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Robert W. Bennett[a1]

SHOULD PARENTS BE GIVEN EXTRA VOTES ON ACCOUNT OF THEIR CHILDREN?: TOWARD A CONVERSATIONAL UNDERSTANDING OF AMERICAN DEMOCRACY

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I. Introduction

Approximately one quarter of the American citizens who are resident in the United States--some sixty-two million people--are children under eighteen years of age[1] who are not allowed to vote for any public officials.[2] ***504** Independent voting is precluded for the first few years of life by basic mental and physical limitations. As children age and acquire both the physical capacity to cast a ballot and the ability to understand the idea and the mechanics of what is involved in voting, the continuing disenfranchisement is justified by the fact that children are not, in general, reflective enough to appreciate what is at stake. We will have occasion to discuss the "interest" that adult voters pursue at the polls, whether they do or should consider only their own welfare conceived in a self-absorbed way, or instead factor in the interests of others or of some broader public.[3] But whatever conception of interest adults pursue when they cast their votes, we may doubt that even older children are up to the task. In particular, there seems ample reason to question whether children in general have learned the lesson of discounting the short term by the long, no matter the notion of interest in play.

To be sure, the same might be said of many adults. There is no perfect, or even reasonably obvious, standard age to separate the population with the judgment necessary to vote from those without such judgment. But deciding fitness to vote on a case-by-case basis in order to separate mature adults from the immature is fraught with both cost and the danger that those making the case-by-case decisions cannot be trusted to stick to judgments of capacity. In addition, no matter what admittedly arbitrary age is chosen within some plausible range, we can be reasonably confident that a good deal more of the desirable perspective will be found on the adult side of the dividing line. In any event, adults have all been children once. And an age-based restriction in the range to which contemporary democracies like the United States have gravitated automatically comes to an end in a relatively short timeframe. For both these reasons, we need not worry quite as much as we might with categories of adults that the societal decision to attach the franchise to a standard age of majority reflects genuine judgment about capacity, as opposed to the interest of those doing the excluding.

At the same time, it seems likely that the failure to enfranchise children has substantial effects on public policy outcomes. This is no doubt a good thing, to the extent that children might exert influence through immature or unreflective votes. But if there were a mechanism by which the interests of children could be taken into account through more reflective voting--and the votes of others thereby given less proportionate say--then political effects might well follow that could not so easily be dismissed. Public expenditures on schools and playgrounds, on early-intervention public health measures, or on the preservation of endangered species and virgin forests might be higher, for instance, ***505** whereas expenditures on benefits for the elderly, or on research to prevent diseases that typically strike later in life, might be lower.[4]

But there is such a mechanism. It is widely assumed that voters who are **parents** cast the single **votes** they now receive in part at least in pursuit of the interests of their children.[5] Why then should those **parents** not be **given** **extra** **votes** on account of their children? There are no doubt substantial arguments that **extra** **votes** for **parents** would be unconstitutional, but the most obvious of those arguments seem a good deal less than decisive.[6] And enacting a constitutional amendment is always possible. That is the way in which the **vote** was extended to the emancipated slaves, to women, and to eighteen-year-olds.[7] In any event, this "utopian"[8] idea of **extra** **votes** for ***506** **parents** has recently surfaced in the literature concerning law and democracy,[9] and I propose here to take it seriously.

My purpose is neither to endorse nor to reject the idea of **giving** **extra** **votes** to **parents** on account of their children. Rather, I will explore both the normative appeal of the notion and the reasons--here entering the realm of positive theory--that this idea has generated virtually no support and precious little attention from those who think about American democracy. The question of the political status of children was squarely raised by the Supreme Court's initial reapportionment cases almost thirty-five years ago. But it remained in the shadows until the recent phase of litigation about racial districting.[10] Even now, despite the very substantial appeal of the idea--to which we will turn in Part III--the possibility that **parents** be **given** **extra** **votes** remains largely unattended, and, once attended, is easily dismissed as "utopian" or even "bizarre."[11] Asking why all this is so proves to be instructive about the law of apportionment in particular and, more generally, about the nature of our democratic order.

I. Children and the Problem of the Apportionment Base

At first blush, it would seem more than puzzling--"astounding" might be a better word--that the electoral status of children has not received more attention. For the Supreme Court's reapportionment jurisprudence put the ***507** problem in plain sight. The seminal decisions, Baker v. Carr,[12] Wesberry v. Sanders,[13] and Reynolds v. Sims,[14] came in quick succession in the early 1960s. Baker held that legislative apportionment issues were justiciable, Wesberry that the Constitution requires that intrastate districting for the House of Representatives be according to population, and Reynolds that population-based apportionment[15] was similarly required for both houses of state legislatures.[16] The Court found different textual homes for the congressional and state legislative requirements, the former in Article I's provision that "[t]he House of Representatives shall be composed of members chosen . . . by the people of the several States," and the latter in the Equal Protection Clause of the Fourteenth Amendment. We will have occasion to look more closely at the Court's different approaches in the two contexts,[17] but the congressional and state legislative imperatives clearly fed on each other from the outset.[18] In both contexts the requirement was encapsulated in the slogan "one person, one **vote**."[19]

From the start there was ambiguity about the apportionment status of children and other parts of the population without the **vote**. For while the slogan tells us each voter's share of the **vote** in an appropriately apportioned district, it does not tell us what it means to equalize those single shares across districts.[20] It does not tell us who counts as part of the "population" that must be divided equally among those districts. Is only the **voting** population to be included in this apportionment base,[21] or is one category or ***508** another of the population that is not eligible to **vote** still going to be included? Among residents of any **given** state,[22] these nonvoters would include not only children, but also felons,[23] legal aliens,[24] and illegal ones. In various states, the population ineligible to **vote** might also include categories of ex-felons[25] and the mentally incompetent.[26]

***509** The Court's initial apportionment decisions largely sloughed over this question of the apportionment base. In Wesberry, for instance, the Court said that "as nearly as is practicable one man's **vote** in a congressional election is to be worth as much as another's."[27] In isolation--and leaving aside some difficulties in the notion of "worth" to which we will return[28]-- this statement suggests that those not eligible to **vote**-- children, aliens, and the like--were not to be included in the apportionment base. But the Court also spoke of "the fundamental goal" of "equal representation for equal numbers of people . . . ."[29] And in Wesberry

and Reynolds, the Court used, inter alia, the words "voters," "citizens," "persons," and "inhabitants" essentially interchangeably to refer to the relevant population.[30]

This was not an ambiguity about an incidental matter. Despite the slogan, the apportionment decisions were not about the assignment of a single **vote** to each voter. In the typical American, geographically defined, single-member, first-past-the-post electoral districting system, each voter had one **vote** before as well as after the Court interceded. It was distribution of some population that was at issue in these cases, and it was widely varying populations among districts that caused the Court such concern.[31] In toto the population ineligible to **vote** is quite substantial in relation to the eligible ***510** population. For obvious reasons, the number of aliens illegally residing in the United States is hard to pin down, though a conservative estimate put the number at five million in 1996.[32] An official 1990 estimate put the entire alien population of the United States at more than ten million.[33] The ineligible population of felons still serving sentences is probably less than one million, but one commentator estimated the total of the disenfranchised felons and ex-felons at about four million in 1991.[34] The number disenfranchised for mental incompetence is also difficult to estimate, though it is not likely very large. But when all these are combined with the population of resident citizen children, the population left in apportionment-base limbo by Wesberry and Reynolds could easily exceed thirty percent of the total.[35]

Nor has the Court treated the population distribution question loosely in other respects. For congressional apportionment, it has held that the state must "make a good-faith effort to achieve precise mathematical equality."[36] State consideration of other "legitimate" concerns is not precluded, but "absolute population equality" remains the "paramount objective."[37] For state and local apportionment, the Court has provided considerably more leeway in deference to state interests in respecting internal political boundaries and the commonality of electoral concerns that may be associated with those boundaries.[38] But even in that context, the Court scrutinizes deviation from equality to make sure that it is based on "rational" state concerns.[39] **Given** ***511** this general stance, the almost studied avoidance by the Court of questions concerning the inclusion and exclusion of large groups in the apportionment base is truly stunning, all the more so because Justice Harlan's dissent in Wesberry --the very first case reaching the substance of apportionment --called specific attention to this apportionment-base problem.[40]

For any group of nonvoters that is dispersed among states and among districts within states in proportion to its representation in the population as a whole, the decision to include or exclude need not affect the drawing of district lines.[41] In fact, however, the "proportion of the census population [[ineligible] . . . to **vote** . . . varies substantially among the States and among localities within the States."[42] Among states, for instance, the percentage of children runs from 23-1/3% in Massachusetts to almost thirty-four percent in Utah.[43] Of the estimated five million illegal immigrants residing in the United States in 1996, eighty-three percent live in just seven states (California, Texas, New York, Florida, Illinois, New Jersey, and Arizona). These seven states contained approximately forty-one percent of the national population.[44] For legally resident aliens, there are likely similar disproportions.

The disparities among state legislative districts or within localities that employ electoral districting are surely even greater. Ineligible incarcerated felons, for instance, are typically counted for apportionment purposes in the prisons where they are incarcerated. The population of ineligible ex-felons is more broadly dispersed; assuming that the racial and ethnic composition of this population roughly reflects that of felons currently in prison, however, the population of ex-felons is still likely to be found in disproportionate numbers in certain minority communities. Legal and illegal aliens are disproportionately found in proximity to citizens with similar national and ***512** ethnic origins. And citizen children are much more heavily concentrated in some legislative districts than in others.[45]

Given this pattern of disproportionate distribution of those ineligible to **vote**, the decision of whether to include them in the apportionment base becomes very important--in the drawing of district lines, and in the consequent alignment of political wherewithal. To illustrate this with a hypothetical example that will occasionally be useful as we proceed, assume that there are

two equally populated electoral districts within a state--district A and district B--each with fifty thousand people and each entitled to one representative because the allocation is based on total district population. District A, however, has twenty thousand eligible voters and thirty thousand ineligibles, while district B has forty thousand voters and ten thousand ineligibles. The franchise is then distributed between the voters of A and B unequally. Each of A's voters has twice the ability of B's voters to influence electoral outcomes.[46] In a two-way race, for instance, a voter in A need attract only ten thousand additional **votes** for his choice to prevail, while a voter in B requires twenty thousand.

Two years after first insisting on "equality" in apportionment, the Court explicitly treated the apportionment-base question[47] and remained firmly indecisive. In Burns v. Richardson,[48] Hawaii had apportioned its state legislature using the population of registered voters as its base. To a claim that total population was the only appropriate basis for apportionment, the Court said:

> Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary ***513** 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. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.[49]

The problem of racial discrimination in districting has **given** the apportionment-base question some incremental visibility. The use of race in the drawing of district lines is not a new phenomenon in American democracy, but it has taken on new salience since the 1982 amendment of the **Voting** Rights Act providing that neither race nor color may be used to deprive persons of equal "opportunity . . . to participate in the political process and to elect representatives of their choice."[50] Under this provision, members of a racial minority may assert that district lines have been illegally drawn to their electoral disadvantage. One factor the courts consider in evaluating such a claim is whether the number of districts where the minority in question is electorally dominant is proportionate to its representation in the population more generally.[51] Some minority populations will have disproportionately large numbers of children, or live in proximity to substantial numbers of noncitizens of the same race or ethnicity. The Courts have generally been clear that electoral dominance is a matter of effective ability to elect a candidate, which means that it is judged by counts of **voting** population.[52] But the other side of the judgment of "proportionality" has been more troublesome. Is the "fair" number of electoral districts to be proportionate to **voting** population or to total population?[53]

***514** The difference can be crucial to legislative control in jurisdictions where **voting** is racially polarized. Suppose, for instance, that district A, from our hypothetical example, is inhabited solely by members of a complaining minority, while district B consists solely of members of the majority. The minority then has one half of the population of the two districts combined (50,000 out of 100,000), but only one third of the combined count of eligible voters (20,000 out of 60,000). If the same proportions hold in the rest of the jurisdiction, a court's determination of which proportion to use in judging "fairness" to the minority could make the difference between political powerhouse and isolated opposition.[54] The apportionment-base question has drawn substantial attention in racial-districting decisions,[55] and that, in turn, has drawn the attention of commentators.[56] This seems as likely an explanation as any of why the question of the political status of children seems recently to have poked its head out into the light of day.[57]

The apportionment-base question might have been solved by following the lead of the constitutional text. Section 2 of the Fourteenth Amendment provides that the House of Representatives is to be apportioned among the various states "according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."[58] This provision is a post-Emancipation adaptation of the approach to state representation in the House of Representatives found in Article I, Section 2, where "respective numbers" was clearly understood to refer to total population,[59] except as explicitly qualified--by, in addition to the exclusion of Indians "not taxed," the notorious inclusion of slaves at three fifths of a person each. In

the Fourteenth Amendment version the words "inhabitants" and "citizens" elsewhere appear, reinforcing the conclusion that "persons" refers to all of them. And the consistent practice throughout our constitutional ***515** history has been to use total population (save, of course, for the explicit qualifications) as calculated by the decennial census for the purpose of congressional apportionment among states.[60]

Still, this interstate apportionment might be viewed as an integral, but not necessarily "principled," part of the bargain necessary to secure agreement at the Constitutional Convention.[61] That is certainly the reading typically **given** to the three-fifths provision for the slave population.[62] After excising that provision, the Fourteenth Amendment then simply carried over the underlying formulation. In this view, the provision for apportionment of the House among the states would not be taken to be especially relevant to the intrastate questions raised by Wesberry and Reynolds.[63] The constitutional formulation for House apportionment among the states will continue to hover over our inquiry, but we will mostly pursue the logic of apportionment assuming, as has the Court, that the interstate question and the intrastate ones are distinct.[64]

In most contexts, children will represent by far the largest group of residents without the **vote**, and, as we have seen, they are distributed among and within states quite unevenly. Children are thus the group for which the decision to include or exclude has the most pervasive effect on districting. The passage quoted from Burns does not explicitly mention children, but children were not included in Hawaii's apportionment base, and the decision thus likely meant that they need not be. Still, as mentioned, the usual practice in intrastate apportionment is to use total population. Whatever the reason for this practice,[65] the result is that children are usually included in the apportionment base. This means that "**extra**" **votes** are typically cast (or at least **extra** "**voting** power" is exercised) on account of children--as well as on account of others included in the apportionment base but not entitled to **vote**. If the entire ineligible population in our hypothetical districts A ***516** and B consisted of children, for instance, the enhanced **voting** power of the voters in A would be attributable to the higher proportion of children in district A (sixty percent) as opposed to district B (twenty percent).

A number of intriguing questions are suggested by this excursion into the problem of the base in the law of apportionment. Why is it that only two years after insisting on equality in apportionment in the name of the Constitution, the Court found no constitutional significance in this apportionment base question? Can it really be that equally populated districts are important in constitutional terms, but that the inclusion or exclusion from the count of population groups that may approach, or conceivably even exceed, half the total in some districts is of no constitutional moment?[66] If total population need not be used, are the differences among nonvoting groups irrelevant, so that it matters not which are included? In particular, would the exclusion of citizen children be of no more significance than the exclusion of illegal aliens, or of legal ones? If children (and others) are to be included in the base, are they to be ignored in the intradistrict assignment of **voting** power? If one group or another of nonvoters is included in the apportionment base because its members are treated for electoral purposes as individuals with interests entitled to political regard, are the voters of the district generally the appropriate group to represent those interests, or would some more limited group be the appropriate repository of that "**extra**" **voting** power attributable to nonvoters? Or, perchance, has the Court's numerical approach to apportionment, and its justificatory rhetoric, led us astray, beguiled by the allure of a democracy that is unattainably remote from the one we have?

To grapple with these questions, we should initially look behind the reapportionment decisions in order to get a handle on the normative underpinnings of apportionment, and, more generally, on representative democracy in the United States. It should not be surprising to find that the normative ground shifted between the time that Article I grappled with apportionment in the 1780s and the time that the Supreme Court did so almost two hundred years later. A great deal about American democracy changed on the ground over that span. Not all change on the ground brings change in normative thinking, but neither are the two isolated phenomena. Rather, norms for living and the facts of life almost inevitably influence each other on an ongoing basis. After attempting in Part III to bring into focus the normative picture contemplated by ***517** the apportionment jurisprudence--and its implications for the electoral status of children and other nonvoters--we will be in a position in Part IV to ask explicitly why the children question remains obscure still in thinking about American democracy.

III. Apportionment, the Franchise, and Strains of Normativity in American Democracy

A. Introduction

Historians and political theorists have identified two competing visions of the way in which participants in American democracy might approach the public decisions they are called upon to make.[67] These could be **given** different labels, but "republican" and "liberal" should do.[68] Each is said on occasion to characterize the way the system actually works--at least sometimes or to some degree--but they operate most obviously as normative visions, as opposed to positive or descriptive ones. The line between normative and descriptive accounts is, however, not nearly so bright as is sometimes supposed, and it is easy to become ensnared in the relationship between the two. An introductory word about that relationship is in order.

A normative account provides a model or standard against which something about the real world may be judged better or worse. Its purpose may be justification of what is, but often the purpose will be to bring about improvement. For this latter purpose, however, an ideal that is too far removed from the reality it is to instruct will seem ill-suited to the job.[69] For this reason, normative theories conceived with betterment in mind will usually have substantial points of connection with the portion of the reality that is thought to require improvement. If the instruction takes hold and the reality moves closer to the normative ideal, the points of connection may increase. If the instruction does not take hold, or does not seem likely to, then the normative theorist may make further concessions to reality by introducing ***518** additional points of connection in the hope of increasing the chances of bringing reality around.

An account that starts out as descriptive is similarly susceptible to seduction by normative visions. We are dealing here with theories of a very complex social system--democracy in the United States--of which any complete description is out of the question. Selectivity is essential, and that has two important, and related, consequences. The first is that there must be some basis for selection. That basis may be hard to discern. It may involve a degree of chance selection. And it may well remain unstated, or even unappreciated. But even if unappreciated, the inspiration for selection will often be some normative stance. When asked to describe American democracy, for instance, the respondent's selection of what to say will likely reflect his favorable or unfavorable, even if inchoate, judgment about the system. A fan might say something like "self-government through the rule of the majority" or "a system for maximizing individual prerogative within an ordered society," while a detractor might reply "an excuse for the use of state force to squelch a dissenting minority" or "a system tending to assure that people of only modest ability rise to positions of authority." The second consequence of selectivity is that some degree of inaccuracy will remain in the most sophisticated accounts. There will thus always be material with which to contest the descriptive accuracy of some depiction of complex social phenomena. The inclination to contest, and its terms, will again often reflect the contestant's normative stance or presuppositions.

With such constant interaction, normative and positive theorizing can easily become intermingled in the imagination. I will hope to minimize any confusion by calling attention to intermingling that may invite it. But I do not pretend that the normative accounts discussed in this Part, or the positive one presented in Part IV, are hermetically sealed from infestation from the other realm. Thus, the republican and liberal visions that I present initially are pure ideal types. In pure form, neither one counsels **extra votes** for **parents** on account of their children, but an accommodation of the two just might. In working toward that accommodation, I will repeatedly check the one vision or the other against parts of American political reality. That should not be taken to show, however, that the accommodation at the end is descriptively accurate. To the contrary, we know that **parents** are not **given extra votes**. That and a great deal else about the reality of American democracy remains distant from the republican and liberal visions of that democracy--and also from this Part's melding of the two. Part IV grapples with that reality, presenting a positive account of American democracy that attempts to explain the inattention to the **extra-votes** possibility. It purports to explain a great deal else besides, despite the fact that, like all descriptive accounts of complex phenomena, it is incomplete and thus inevitably subject to contest that may be normative in inspiration.

***519 B. The Republican and Liberal Visions**

In the pure form with which I start, both the republican and liberal visions contemplate a small community where individuals entitled to engage in "self-government" do so in person, and in meetings convened for that purpose. For our discussion, the principal fault line between the two is in the spirit with which democratic participants approach public decisionmaking in these public gatherings.

The republican vision is a communitarian one in which political participants deliberate through reason and decide selflessly about the interest of the entire community. This is in contrast to the personal aims that even republicans may pursue in their private lives. What is required for participation in the decisionmaking process is wisdom and the ability to put one's own interests to the side when engaging matters of the public good. A good republican arrives at the interest of the whole not by trading or counting, but by reasoning. If the final decision is taken by **vote**, that is almost incidental, for the process of reasoning should allow the best answer to emerge, perhaps even to the point of consensus. To be sure, additional information may aid the process, and that may counsel broad participation. But wisdom and a capacity for selflessness are essential in the decisionmakers. That truth may counsel somehow restricting participation, for not all members of the broader community might be expected to have the required wisdom or capacity for self-denial.

There is a certain republican ambiguity about the reach of societal concern. The community about which republicans deliberate might be thought to have an integrity of its own, so that its interest is not reducible to some combination of the interests of its constituent members. In that case, there would be no pressing need to say just who is and who is not a member. It might seem, however, that a community as a whole could have no interest that was not somehow a function of the individual interests of its constituent members, in which case the importance of membership would loom large.

There may be important advantages to the republican in leaving that ambiguity unresolved. For it allows him to sidestep what may be difficult questions of membership, and also the real possibility that if the interests are those of individuals, conflict among those interests may be all too apparent. These will prove to be vexing problems, but however they may be resolved, it is important to note that there is no required coincidence for the republican between those who decide and those whose interests may matter. The good republican is one who is able to subjugate his private interests as he reasons through to decision about the interest--or interests--of the whole.

The liberal approach to governance is, in contrast, an individualistic one, where citizens pursue the same ends in public deliberations as they pursue in private affairs. Even for the liberal there must be a difference in the form of decisionmaking in the public and private realms--multilateral **voting** in public, as opposed to bilateral bargaining or unilateral action in ***520** private. There may also be an associated difference in the tone and procedure of decisionmaking, for nothing will ever get done in a public gathering of more than a very few people without formal and informal norms of decisionmaking, such as a degree of civility and deference, as well as rules of order enforced by a presiding officer. The liberal engaged in governance faces a "collective action" problem, how to assure that the collectivity can take action that will redound to the benefit of most or even all members, when each might make himself better off by withholding his cooperation. These all pose variants on the liberal's problem of how to attract the trust of others if each is to assume that others are, like himself, only interested in their own welfare.

However these problems are solved, in the liberal vision the end of government is a summation of the private interests of those who take part in decisionmaking. Because individuals do not come to public decisionmaking with any spirit of self-sacrifice, the only acceptable rule for weighting interests is that of equal regard for each. For the liberal, the summing of equally weighted private interests, effected through a **vote** in which each counts for one, is all that might be meant by the interest of the community as a whole. In contrast to the republican, the definition of who gets to **vote** is fundamental for the liberal, because it is only through the **vote** that one's interests can be made to count.

C. The Move to Representative Government

The move to representative government introduces complications for each vision, for decisionmaking now has two phases and many slippery questions of the relationship between them. To simplify matters, I am going to assume that the legislative decisionmakers are chosen in popular elections, in American-style, single-member (two in the case of the United States Senate), geographically defined districts.[70]

***521** For the republican, selfless decisionmaking is surely required at the legislative level, but is it also required of members of the electorate in the selection of the legislature? The stakes in answering that question are high, for the viability of the republican ideal may be in play. If there is electoral selflessness, then it is easy to imagine that the representatives chosen will be selfless as well, so that they can concentrate on the public good. The mechanics of the system will then seem relatively unimportant. The drawing of district lines, for instance, becomes important--if at all--only because representatives of different areas may bring different bases of information to the legislative process. Beyond information, what is required is wisdom and self-denial, and those traits are not geographically defined.

But the move to representative government must raise doubts about whether selflessness can be sustained at the electoral level, when the function of electors is so centered on the choosing of others to make the decisions that will ultimately matter. And if the republican comes to doubt electoral selflessness, can doubts about the public spiritedness of representatives be far behind? For how is it that the representatives chosen will bring to their task a public-spiritedness that those who put them in office do not necessarily share? Concerns like this may lead the republican to worry a great deal about the details of the electoral system. Restriction of eligibility to **vote** in the search for a self-denying subset of the citizenry is an obvious possibility. Indirect election of representatives and bicameralism may seem attractive. The details of districting may seem important. While geographical districting might have some informational purpose, it simultaneously suggests the variability of interests that the republican wants to deny or suppress. If districting is taken as a **given**, however, it might seem that larger districts with many competing interests would make it more likely that representatives chosen could play the district interests off against each other and thus achieve breathing room for public-interest decisionmaking.[71]

The move to representative government might seem also to jeopardize the mechanisms of liberal decisionmaking. How can the liberal achieve effective representation of the interests of citizen voters, who are mostly not present when the decisions are made? This is a problem not only of the absent citizens, but of the present ones. If individuals engaged in liberal self-government are assumed to pursue self-interest, the liberal might worry that representatives would pursue their own interests and not those of their constituents. This difficulty is real, and we will return to it,[72] but initially, at least, popular election might be seen as a mechanism by which the electorate as a whole could produce a smaller version of itself in the legislature.[73] The decisions of the legislative assembly might then be thought to replicate those that would have been produced by an assembly of the whole. And if perchance the legislature was unfaithful to such a charge, it could be turned out of office by self-interested voters the next time around.

D. American Embrace of the Liberal Vision

While both liberal and republican visions played prominent, and intermingled, roles in American political imagination from the start, by most accounts ***522** the republican vision was especially influential in our constitutional beginnings.[74] For the most part, it was only free, white, propertied adult males who were allowed to **vote**, for it was only they who were thought capable of approaching decisionmaking in good republican fashion.[75] Government was representative in form, to be sure, but there was revolutionary fervor with attendant sense of community, and the population of the country was minuscule compared to the modern day. At the time of the revolution, the entire population of the country approximated that of my hometown of Chicago today.[76] Philadelphia was the largest city, reaching a population of about forty thousand by the time it played host to the Constitutional Convention. Virginia was the most populous state, with a total free population of under 300,000 people according to Thomas Jefferson's 1782 estimate. Of that 300,000, fewer than sixty thousand were males twenty-one years or older,[77] and fewer still met the property qualifications for **voting**. In such a setting, it may well have been possible to imagine

that the processes of government, even if representative in form, involved the great bulk of the **voting** population in an ongoing and active way and in a spirit of self-sacrifice.[78]

But the tensions in a representative republicanism are not easy to contain or hide. Indeed, they had been on display front and center in the disputes between England and the colonies. For the colonists, with their battle cry of "no taxation without representation," were objecting not simply to an inability to explain why taxation was unfair. The representation they craved entailed not only a chance to be heard, but to **vote**. Their lament assumes that there are particular interests, not just that of the whole; that the particular interests of some will often clash with those of others; and that the particular interests of some cannot simply be entrusted to the republicanism of some of those others.

The great English statesman Edmund Burke appreciated the tension. In republican fashion, Burke believed that there is in "one interest, . . . the general good,"[79] but he simultaneously sympathized with the colonists' complaint that they were unrepresented. Burke tried to hold the package together, as republicans had before him, with the notion of "virtual" representation:

> ***523** If a part of the kingdom is being well governed, its interest secured, then it is represented whether or not it has the franchise; if it is not represented actually, then it can be said to be represented virtually. Virtual representation is that in which there is a communion of interests and a sympathy in feelings and desires between those who act in the name of any description of people, and the people in whose name they act, though the trustees are not actually chosen by them.[80] But what would explain why virtual representation would suffice for some Englishmen, but not for the colonists? Burke's answer was that virtual representation had to be based in real attachments, which were absent in the case of the colonists.[81] But that simply served to highlight that distributed representation served some purpose. The purpose might be informational, but it became hard to deny that separate interests were at work, interests that would often conflict, thereby calling into question the reality of a unitary common good. And once representation was in order, who other than those whose interests were at stake was to say that some interests could be represented virtually while others required actual representation? **Given** the American experience, the possibility of virtual representation, which had initially been advanced in aid of the republican project, may well have helped expose its frailty.

We can catch glimpses of both republican and liberal visions, and of some of the tensions between them, in early American thinking about politics and governance. In debates about the length of legislative terms, for instance, shorter terms found their defense in a liberal desire to bind representatives to constituents through the electoral mechanism, while longer terms were embraced by republican sentiment as fostering dispassionate and unpressured deliberation about the public interest.[82] In parallel fashion, direct election of members of the House of Representatives "by the people" would provide liberal responsiveness, while the Senate, originally to be chosen by the state legislatures, would foster republican deliberativeness.[83]

***524** In his classic study of early American political ideology, Gordon Wood captures the confused intermingling of liberal and republican themes in debates about legislative apportionment and extension of the franchise, the matters that, in contemporary guise, form the centerpiece of our inquiry:

> [I]f men were compelled to think about it[,] some sort of conception of virtual representation was a necessary concomitant of their republican ideology and their Whig belief in the homogeneity of the people's interest. Yet [,] ironically[,] those who were most radically Whiggish, most devotedly republican, were at the same time most committed to the characteristics of the concept of actual representation--equal electoral districts, the particularity of consent through broadened suffrage, residence requirements for both the elected and the electors, the strict accountability of representatives to the local electorate, indeed, the closest possible ties between members and their particular constituents--characteristics that ran directly counter to the central premises of virtual representation

> and all that they implied about the nature of the body politic.[84] American electoral politics has undergone great change since those beginnings. The increase in population and the growth and diversification of the economy have been of profound significance. No longer is it possible in most governmental contexts in the United States to think of the entire population, or even of some large subset of it, as reasoning together toward solutions to the community's problems. Our government is representative, in form and in fact. There have been other changes of surpassing importance. Slavery has, of course, been eliminated, and over time the franchise has been gradually, but vastly, extended to the great bulk of the adult citizenry. The United States Senate, originally to be selected by state legislatures, is now chosen by that expanded electorate.[85] So, effectively, is the President.[86] Because these two in combination choose the members of the federal judiciary,[87] even the holders of that "nonpolitical" office are more closely tied to a broadly based popular election process than was the case in the original scheme of things.

***525** The extension of the franchise is usually and rightly depicted as affirming the competence and dignity of all individuals in our democratic polity.[88] While efforts are made to reconcile the changes with a republican vision, they are, as Wood suggests, much more comfortably assimilated to a liberal vision instead. When virtually all adults take part in decisionmaking, it is difficult to maintain that participation in decisions is confined to those truly capable of self-denial. Nor is it credible that a mass of decisionmakers produces decisions that are fundamentally self-denying. To put the point somewhat differently, when virtually all adults count, and count for a large sweep of decisions affecting people who are mostly strangers, decisionmaking at the electoral level must increasingly seem to be a matter not of selflessly reasoning together, but of doing the counting.

Even if a republican throws in the towel on any claim of a self-denying electorate, he might cling to the hope that the representatives chosen would be capable of public-spirited deliberation. James Madison had held that a representative legislature might "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country."[89] But this suggests weak ties between legislators and constituents, while the move toward ever greater sweep for popular elections insinuates a strengthening of those ties.

So, at least, the apportionment decisions seem to assume. According to the Court in Reynolds, "[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies," which is to be achieved "through the medium of elected representatives."[90] It might be possible to put a republican gloss on such language. Representatives still might view their task not as responsiveness to constituents but rather as refining and enlarging "the public views." But the service of republican reasoning at the legislative level is a most unlikely prop for assigning constitutional importance to equal distribution of the franchise. The Court's reasoning in Reynolds conjures up an image of the popular **vote** as a mechanism by which representatives are tamed by members of the electorate, and in equal measure.[91] Taming representatives in the interests of their ***526** constituents, rather than freeing them from those constituents, is to bend representative government to a liberal rather than a republican form.[92]

This is not to say that by the time of the reapportionment decisions, republican themes had been banished from American political discourse. For one thing, we can cling to ideals no matter how much they have been outrun by what happens on the ground. There is in fact a lively contemporary literature explicitly trumpeting republican themes.[93] But even more importantly, only the republican vision leaves room for the possibility that is hard to shake that part of the population is not permitted to **vote** but is, nonetheless, entitled to political regard.

It may be that the question of political regard, and its relationship to the **vote**, was camouflaged a bit in the move to representative government on a large scale, for that move raised something of a question for eligible voters and ineligibles alike about how their interests would be protected.[94] There may be further protective coloration in the fact that there is room in the liberal vision for the interests of those without the **vote**. We are social beings, who define ourselves and our interests in significant part in terms of

relationships with others. To the extent that the liberal recognizes this root fact of social existence, he will appreciate that interests of those not charged with decisionmaking may enter into the most self-regarding contribution to the liberal calculus. With this in mind, it may begin to seem that the line between the liberal and the republican visions is not as stark as initially it seemed. We saw earlier that the republican may sense that it is not simply some disembodied "public interest" that is caught up in the public decisions that are to be made, but rather the real, and varying, interests of discrete individuals.[95] In that case, republican self-denial would be an ability to subjugate one's own private interest not so much to a community interest but to the private interests of others. It might then be hard to tell a good republican from a good liberal--that is, to distinguish a decisionmaker who is subjugating his own interests to those of others from one who has incorporated the interests of others into his own.

Still, this provides no final escape from a liberal dilemma about entitlement to regard of those without the **vote**. Liberal consideration of others resides in the discretion of the liberal voter. It thus does not answer the possibility of entitlement of nonvoters to political regard. Nor does it explain the disenfranchisement. For the liberal, each person gets to decide what are in his own interests, so that some cannot effectively **vote** for others. And finally, the possibility that a voter may cast his one **vote** partly out ***527** of concern for another does not respond to the liberal vision's requirement of accounts for political regard that count each entitled person as one.

The republican vision can be put to service in filling those spaces. In addition to its flexible definition of entitlement to political regard, republican themes can explain disenfranchisement, for republicanism ties the **vote** to a capacity for wisdom and subordination of one's own interests, capacity that need not be coincident with entitlement to regard. Through the device of virtual representation, republicanism might come to the liberal's aid in his accounting dilemma. Of course, using republican filler for liberal spaces does not necessarily make for a pretty whole. But the two visions have coexisted and mingled from the start in the American political imagination. There would thus be nothing all that new if the liberal view borrowed support from its rivalrous but constant companion.

E. Entitlement to Regard: Children and Others Ineligible to Vote

We know that there is a substantial part of the resident population in the United States that is ineligible to **vote**. But is that population entitled to political regard? If there is no population at once ineligible to **vote** yet entitled to regard, then the disenfranchisement creates no particular problem from the liberal perspective.[96] Once representatives are assumed to be tamed by the **vote**, mechanisms seem to be in place with which to fulfill the liberal ideal for the **voting** population. But in the liberal spirit of the apportionment decisions this would require that districting be based on **voting** population, and, as we have seen, the prevailing practice is to use total population.

Reasoning backwards from the prevailing apportionment practice, perhaps the entire population is entitled to political regard. As we have seen, the **extra voting** power of the eligible population of District A need not be seen as "**extra**" at all, but, rather, cast on account of an ineligible population that is entitled to regard in the processes of government.[97] The pure liberal ***528** vision will not admit of such a possibility, of course, but perhaps it might be made more palatable even within a basically liberal framework if some republican explanation could be provided for the disenfranchisement of those who are nonetheless entitled to regard.

There is a third possibility. Even if apportionment is based on total population, only a part of the ineligible population (or, at the extreme, even none of it) might be entitled to political regard. Counting population for apportionment purposes is precarious business for a whole host of reasons. **Given** the mobility, fertility, and mortality of the population, any count, no matter how precise, is out of date even before it is publicly available; and it rapidly deteriorates from there.[98] **Given** that basic fact of apportionment life, even the most committed liberal theorist might find it hard to get excited about counting inaccuracies produced by slippage between the apportionment base and entitlement to regard. This is especially so because the most dependable counting is done for the national census, which comes only once a decade and is focused on counts of total resident population because of its constitutional attachment to interstate apportionment of the House of Representatives. If

some more limited base were thought ideally appropriate for intrastate apportionment purposes, further imprecision could often be expected from an effort to quantify that base.[99] In the face of these problems, the liberal theorist might become resigned to basing apportionment on total population, despite the fact that some or all of the total was not thought entitled to political regard.

Even more likely is that the issue of entitlement to regard is not joined. The Supreme Court made that possibility especially inviting by its casual treatment of the apportionment base in Burns v. Richardson. Many important decisions affecting portions of the population that Burns leaves with ambiguous apportionment status--aliens and children most obviously--are made on the federal level. Under Burns, the liberal accounts could become quite confused if the national representatives of some states were to extend regard to those populations, while the representatives of other states did not. There is no obvious route out of this liberal dilemma. It might then seem the path of least resistance for the liberal simply to ignore the problem, taking some comfort perhaps from republican strains that muffle the importance of entitlement to regard.[100]

***529** Despite the uncertainties, it does seem possible to do a bit of parsing of contemporary assumptions about entitlement to regard for elements of the ineligible population. A large part of that population consists of citizens, and that status is strongly suggestive of entitlement.[101] Cutting across the citizenship/noncitizenship divide, in liberal terms disenfranchisement denies entitlement, while inclusion in the apportionment base affirms it. In the face of such contradictory signals, the strength of any conviction we can muster about entitlement to political regard might be influenced by any help republican notions of capacity can provide in justification of the disenfranchisement. In what follows, I will suggest how these and assorted other considerations might be thought to bear on the regard question for categories of those ineligible to **vote**. But the treatment I **give** here is only summary, for my eye is on the children question, and the other categories of ineligibles become relevant mostly for the shades of contrast they provide.

Noncitizens who have entered or remain in the country illegally do not present a particularly appealing claim of entitlement to regard. They share our humanity with us, of course, and the Constitution does extend important rights to illegal resident aliens.[102] But in liberal terms, receipt of a measure of regard in fact need not imply entitlement to it.[103] By definition, illegally resident aliens are not "legitimate" members of the community, and for that reason any claim to regard borders on the oxymoronic.[104] The frequent inclusion of this population in the apportionment base, moreover, is readily understandable if legally resident aliens are entitled to regard. For the legally resident aliens are the more numerous, and disaggregating the two presents serious difficulties in practical terms.[105]

Noncitizens who reside legally in the country present a much more appealing claim to regard. They are not citizens, of course, but their attachment to the community is entirely legitimate, and often quite productive.[106] Indeed, in some instances their initial immigration will have been ***530** courted.[107] Many members of this population are serving a probationary period awaiting citizenship.[108] Short of the franchise, this population is accorded a high degree of attention and respect in political and legal processes.[109] And it is possible to come up with a republican rationale for the disenfranchisement. Noncitizens might be viewed as insufficiently committed to the societal enterprise or insufficiently imbued with the ability to appreciate societal needs, quite apart from claims they might have to regard.[110]

The pieces of the puzzle of entitlement to regard are hard to fit together for the population of (citizen) felons still serving sentences. As citizens, of course, they would seem to have a claim of entitlement to regard, and that impression is reinforced by their inclusion in the apportionment base. This is especially so because exclusion would likely be manageable, **given** the relative ease of counting and the defined geography in which this population is typically found. Still, there are some suggestions in the literature that those convicted of serious crimes have forfeited their claims to regard.[111] Perhaps more plausible is that felony convictions raise doubt not about entitlement to political regard but about republican capacity in this group to bring a degree of self-denial to the decisionmaking process.[112]

Even more difficult to understand in terms of entitlement to regard is the practice of some states in disenfranchising ex-felons. As a practical matter, exclusion of ex-felons from the apportionment base would be virtually impossible, so that nothing much about entitlement can be inferred from their inclusion. Still, it is hard to credit the suggestion that after readmission to most of the standard perquisites of membership in the community save the **vote**, ex-felons have no claim to political regard. Again, the most plausible explanation for the disenfranchisement might be doubt about ***531** capacity,[113] though that explanation too seems strained for persons who have been readmitted to society in other respects.[114]

We have also thus far neglected the liberal--and constitutional-- anomalies of United States citizens in American territories abroad and in the District of Columbia.[115] By virtue of the Twenty-third Amendment, citizens in the District now participate in the presidential selection, albeit with some important matters left not to the District government but to Congress.[116] And they, along with citizens in the overseas territories, may elect local officials with a degree of real authority.[117] While, with minor exceptions, each of these groups has a nonvoting presence in the House of Representatives, they have no full **voting** representation there and are not deemed relevant to the national apportionment process.[118] In the Senate, of course, they do not even have a presence. Putting aside the admittedly large complication of presidential involvement in national policy making, such treatment would seem to imply in liberal terms that these populations are not in national matters entitled to political regard.

At least for the adult citizen population of the District of Columbia, this is still difficult to swallow in liberal terms. In the first decade after formation of the District, its residents continued to **vote** in Maryland or Virginia, the two states that had ceded the territory for formation of the District. This practice apparently ended with the assumption of full control by the federal government in 1800. At that time, the District had less than 15,000 residents, far fewer than the 50,000 minimum set by the Northwest Ordinance for consideration of a territory for statehood.[119] The national legislative scheme already in place made no allowance for the District, and its relatively small permanent population no doubt made the electoral status ***532** of its inhabitants easy to ignore. In addition, there may have been some republican sentiment at work that entrusted the interests of citizens in the District to the selfless deliberation of representatives from the States.[120] But this is a story of historical accident rather than of no entitlement to regard. District residents are physically in our midst and to all appearances share fully in our collective ups and downs. In such a setting, their continued disenfranchisement is most easily understood as the product of partisan political standoff. Inclusion in the presidential selection process might then be taken as a sign of liberal sensitivity to the point.

American citizens in overseas territories are differently situated. No doubt historical accident also plays a role in their national disenfranchisement, but their geographical isolation sets them apart from citizens in the District. That isolation may raise doubts about whether they possess the information base requisite for republican capacity in public deliberation. But it may also raise questions about their claim to regard, despite the formalities of citizenship. The importance of geography in defining the community presupposed by a liberal calculus has no doubt been diluted in the modern day. The projection of armed force and of cultural influence around the globe means that members of one community can be absorbed through force or agreement into another remote from it. Thus, Hawaii and Alaska are now member states of the United States, and Puerto Rico may one day follow suit. But geographical isolation surely makes the sense of common cause, and hence of claim to regard, more difficult to sustain.[121]

Be all this as it may, for two categories of those ineligible to **vote** the claim to entitlement to regard is very strong. These are resident citizen children and those citizens disenfranchised solely on account of mental incompetence. For in areas that use total population as the apportionment base, the only ambiguous indication about regard for these groups is their disenfranchisement, and in each case the disenfranchisement is readily understandable in terms of capacity. Indeed, even the committed liberal theorist might welcome republican capacity cover for extending entitlement to regard for these two categories of the disenfranchised. For in the case of children and the mentally incompetent, the liberal assumption that only the individual is in touch with his own interests meets its most severe challenges.[122] For children at least--far the larger and more visible

of these two groups--the contemporary rhetoric of law and politics in the United States seems resounding in its insistence on entitlement to political regard.[123]

*533 F. Providing the Regard: Adult Ineligibles

While inclusion in the apportionment base might be thought necessary to make liberal accounts balance, it is not sufficient. As we have seen, inclusion of a group of ineligible voters in the base results in **votes** effectively being cast on account of that group.[124] But without the **vote**, the ineligible population is still deprived of the liberal mechanism by which its interests are made to count. What is required, once the disenfranchisement is taken as **given**, is something like the virtual representation that republicans suggested when they sensed the heat of the liberal challenge. For if a group of voters that achieves "**extra**" **voting** power because of the inclusion of ineligibles feels a "communion of interests and . . . sympathy in feelings and desires" with that ineligible population, and if that group of voters deploys its **extra voting** power accordingly, the representatives selected might similarly reflect that sympathy and thus be thought to be the mechanism for bringing the liberal accounts into balance. But such virtual representation is more easily achieved for some ineligible groups than for others.

We might, for instance, doubt that much communion and sympathy is felt by voters for any ineligible imprisoned population thought to be entitled to regard. This is especially so in practice, because the **extra voting** power is typically assigned to the voters in whose district a prison is located rather than to any population more likely to have ties to the prisoners of family or friendship.

For any population of noncitizens, the possibility of the required feelings of connectedness are more promising, but still highly uncertain. For purposes of illustration, assume that the entire ineligible population of our hypothetical districts A and B, consists of noncitizens entitled to regard. If the eligible and ineligible populations are both largely immigrant, with a common language and similar patterns for their countries of origin, that might plausibly supply a degree of the desired attachment, so that the **voting** population of the districts could represent "virtually" the interests of the ineligible population.[125] Decisions under the **Voting** Rights Act, and the law and politics of racially cognizant districting more generally, may assure a ***534** degree of commonality of interest within districts for the citizen and noncitizen elements in certain racial groups.[126] And **given** residential patterns, the happenstance of the drawing of district lines may provide a degree of the desired connection within districts for other immigrant groups as well.

Still, for noncitizens there will likely often be a large-scale mismatch between the provision of the "**extra**" **voting** power and the degree of attachment that might justify it in virtual representation terms. There is nothing in the law of apportionment or of racial districting that requires attachments within districts.[127] Indeed, if too much of a particular racial minority is "packed" into a **given** district, the courts will lend a sympathetic ear to a **Voting** Rights Act challenge on the ground that such packing dilutes the political force of that minority in the polity as a whole.[128] We thus cannot say much about the real extent of attachment in our illustrative districts without closer inquiry into the demographics of the districts. In fact, it is entirely plausible to imagine that virtually all of the thirty thousand nonvoters in our hypothetical district A would be Hispanics awaiting citizenship but that only ten thousand of the twenty thousand voters in the district would be Hispanic. In that case, half of the **extra voting** power on account of the ineligible population of the district would be provided to the ten thousand voters with no special attachment to the nonvoters. And even this way of discussing the problem considerably oversimplifies it, for there is enormous diversity--and no doubt occasionally tension--among groups within the Hispanic population. At the extreme, if a population of recent immigrants still ineligible to **vote** is included in a district where the eligible population has no particular attachments to it--to say nothing of the possibility of open hostility--the "**extra**" **votes** for the eligible population find scant justification in some "virtual representation" that they provide.

For any noncitizens entitled to political regard, however, it might be that the liberal theorist searching for a vehicle of virtual representation can do no better--once disenfranchisement is taken as a **given**. A "political thicket"[129] would await both

legislatures and courts if they announced a principle that districting with an apportionment base that included noncitizens was required to assure some high degree of commonality of countries of origin or other salient indicia of common interests between eligible and ineligible populations. Short of such an initiative, there may be no alternative to providing any **extra** **voting** power on account of noncitizens to the eligible-- even if sometimes not particularly sympathetic--**voting** population in a district as a whole.

***535** The prospects for virtual representation that might be thought effective are even more bleak for disenfranchised ex-felons and the mentally disabled. Whether institutionalized or not, there seems no reason to think that the districts in which the mentally disabled are found will be disproportionately populated with voters who feel some special sympathy with them. And the same is likely true of ex-felons. One might search for some more defined population that could wield surrogate **voting** power on account of these categories of ineligibles. Close relatives or friends are possibilities. For the mentally disabled, legal guardians come to mind. But there may be no appropriate persons available. Even legal guardians for the mentally disabled may identify with their charges in only a limited way. In any event, the allocation of the **extra** **voting** power, and verification of its proper assignment, would often present severe administrative problems--to say nothing of resentment of the "paternalism" involved. Under the circumstances, for the liberal in search of a vehicle of virtual representation, there may again be no practical alternative--once disenfranchisement is taken as **given**-- to placing faith in whatever representation is provided by the district population at large.

Again, a somewhat different perspective is necessary for the electorate of the District of Columbia. Because the District is afforded no **voting** representation in the national legislature at all, the only virtual representation that might be thought to be available to the District population in the Congress would be that provided by the voters and representatives from the rest of the country. Any such wholesale use of the notion might actually be closer to the original republican ideal for legislators[130] than the more modern adaptations that I have suggested. **Given** the importance that the District has for the country as a whole--and its visibility to the Congress-- such virtual representation may even have a measure of contemporary descriptive plausibility. It could probably be found, for instance, with less strain than could virtual representation of a population of legally resident aliens in a district with few voters who share ethnicity with the aliens. In any event, once the disenfranchisement is taken as **given**, it is again hard to see how we could, as a practical matter, do better.

For any population in overseas territories, or living in foreign countries, and entitled to regard but not the **vote**,[131] virtual representation in national affairs would also have to be provided through the Congress as a whole. In those cases, however, while we can still probably do no better, any suggestion of real connectedness that might make the representation effective seems quite strained.

***536 G. Providing the Regard: Children and the Extra-Votes Possibility**

The problems in providing virtual representation for adult ineligibles are substantial, but for the most part those problems melt away for resident citizen children, for whom **parents** are the obvious repository for the **extra** **voting** power. In the case of the mentally disabled, we might wonder whether legal guardians would be appropriate surrogate voters. The overwhelming proportion of children, however, are in the care of one or both **parents**. Those **parents** regularly make decisions for their children, and that power is grounded in longstanding tradition founded on powerful psychological attachments.[132] There is no apparent reason why surrogate **voting** might be thought less justified on account of those attachments than the myriad decisions that **parents** already make for children. In virtual representation terms, the present practice of reposing the **extra** power in the district **voting** population as a whole is perhaps more promising for children than it is for any of the other groups of ineligibles, simply because there is an effective guarantee that some of that **extra** **voting** power will be exercised by **parents**. But that is only to emphasize that in terms of liberal accounting, concentrating the power in the **parents** would be preferable to the present dispersion among **parents** and nonparents alike in the district **voting** population.[133]

Nor do there appear to be inordinate practical problems in assigning the **votes** to **parents**. Registration of children and identification of their **parents** (or legal-**parent** substitutes) is routinely done for school and other matters at the present time.

Half-votes could solve the problem of two parents with an odd number of children. For separated parents, there is the possibility that one parent (or even both) would vote in a jurisdiction where the child did not live and hence was not a part of the apportionment base. But that problem would likely pale into insignificance compared to the present disjunction between apportionment-base site and voting jurisdiction that we tolerate for college students and government employees.[134]

A series of "political" problems seems more serious--even apart from resistance to providing some voters with "more" votes than others. There are citizen children of noncitizen parents--indeed, even of illegal alien parents. ***537** [135] Any suggestion that votes might be cast by that alien population would surely be controversial. Perhaps even more troubling would be assignment of the extra votes to public officials in the case of "wards of the state," children in the custody of public institutions.[136] Still, to the liberal imagination these problems should seem trivial in the face of the potential for substantially more sensitive "liberal" voting for a full quarter of the nation's population.

Introduction of the extra-votes proposal might highlight the contrast with the situation of adult ineligibles. Once the problem of children had been satisfactorily resolved in these adjusted liberal terms, questions of entitlement to regard for adult ineligibles, and related questions of the apportionment base, might be harder to ignore. The District of Columbia disenfran-chisement is an issue already squarely on the national agenda.[137] For any other disenfranchised adult group deemed entitled to regard, the diffusion of extra voting power among the district population as a whole might seem hollow, given the directed representation that children had achieved. To the committed liberal theorist, however, bringing such neglected issues to the fore should simply add to the attraction of the extra-votes idea.

H. Conclusion

Here, then, is the normative appeal of extra votes for parents on account of their children. It would provide meaningful representation for a population whose entitlement to regard seems broadly taken for granted. The proposal is grounded in the liberal vision and its basic belief that politics is about adding up private interests, though it is republican in its faith that at least part of the accounting can be accomplished by the representation of the interest of one by another. And it might even induce us to face more forthrightly other shortcomings in our attempts to implement the liberal vision. In the liberal terms that dominate apportionment jurisprudence, and a great deal else that is said about contemporary American democracy, extra votes for parents on account of children at least merits serious consideration, if not immediate adoption. But it has not caught on, and is still hardly noticed. I now turn to the question of why that is so.

*538 IV. Children and Apportionment in Conversational Perspective

A. Introduction

The normative terms introduced in Part III do not necessarily resolve the question that frames the background for our inquiry. We might find it inappropriate to give parents extra votes on account of their children, because we would rather live with unfairness to children than let go of the liberal assumption that no person can make electoral decisions for another. Or perhaps we believe that children are less than full members of the community and, as such, less than fully entitled to have their interests count. A third possibility is that we do not want to forsake a rather pure republican ideal in politics, in which legislators do not represent constituencies so much as deliberate about the interests of the public as a whole--children included. Or, finally, we might reject the idea on practical grounds, or grounds of expediency. Even if our vision is a basically liberal one in which children's interests should count, and even if we appreciate that the best way to make children count is to give extra votes to their parents, we might hold back because it would be complicated to proceed. We would have to allocate votes between two parents, making provision for half votes and for the possibility of a single voter dividing his multiple votes among candidates. We would have to deal with politically charged possibilities, such as voting by noncitizen parents for their citizen children or voting by state officials for wards of the state. We might even find ourselves urged to more forthrightly face the electoral status of citizens in the District of Columbia, of the imprisoned population, of ex-felons, or even of legally resident aliens.

The discussion in Part III nonetheless leaves us with a real puzzle, for it makes clear that none of these objections is terribly powerful once the issue is joined in the liberal terms that dominate much contemporary discourse about American democracy. In a liberal representative democracy there is powerful appeal to the suggestion of **extra votes** for **parents**. Yet the idea has hardly surfaced, and on most of the rare occasions when it has, it seems to be easily dismissed as "utopian," or even "bizarre." How could it be that a suggestion with such normative appeal--and one with great potential to change the pattern of public policy decisions--is ignored, or, worse, unnoticed?

A large part of the answer, I believe, is that the idea is utopian, in the sense that there is a very great distance between the reality of American democracy and any description that might be coaxed out of the normative terms that counsel **extra votes** for **parents**. In Part III we saw that however close American democracy and our ways of thinking about it may once have been to a republican ideal, over the years a substantial distance has emerged. In a number of respects, the direction of movement has been toward the liberal vision. But that does not mean that American reality is now fashioned in a liberal image. Inattention to the **extra-votes** possibility ***539** helps us see that American democracy remains remote not only from the republican ideal but from the liberal one as well. Nor is it plausibly thought of as approximating the republican adaptation of the liberal ideal that we fashioned in justification of the **extra-votes** notion. **Parents** are not **given** those **extra votes**. Rather, American democracy produces substantial and broad-based satisfaction through mechanisms not captured in liberal or republican terms. This satisfaction produces a substantial degree of stability, and that stability provides little room--or occasion--for the **extra-votes** idea to catch on.[138]

This is not to deny that a normative vision--like that behind the **extra-votes** idea--may grab our collective attention, producing pangs of conscience that cause a degree of disruption until we pay them heed. That is certainly a plausible account of Emancipation and the long struggle to secure **voting** rights of the former slaves and their descendants.[139] It is also a plausible way to view the suffragette movement that resulted in the extension of the **vote** to women.[140] Something like those examples may yet happen with the normativity that undergirds the **extra-votes** idea. There are at least hints that the idea is in the air today in a way that it was not just five years ago. But it is still hardly a puff of wind, let alone a moral thunderstorm. I do not pretend to profound insight into what **gives** some normative visions their social energy, but thus far the normative case for **extra votes** for **parents** has left the stable reality of American democracy quite undisturbed. In this Part, I sketch a way of viewing that reality that can at least help us understand the quiet.

I call this positive account "democracy as meaningful conversation," and I have elsewhere discussed it at some length.[141] Here I will summarize its major elements, including a few refinements, and then concentrate on ***540** how the electoral and apportionment phenomena we have been scrutinizing might be appreciated in conversational terms. It is important, however, to recur to the earlier discussion of positive theories of complex social phenomena.[142] Democracy as meaningful conversation is in no sense a comprehensive account of American democracy, whatever that might mean. Nor is it subject to the kind of rigorous proof that the natural scientist might demand. For large-scale social phenomena like American democracy, "[p]roblem complexity denies the possibility of proof."[143] Instead, we are in search of "informed argument"[144] that can provide a "base for thinking" and thus help us "organize our thoughts."[145] It is in these terms that I think a conversational account of American democracy succeeds. For it brings together disparate aspects of American democracy, from its foundational elements through to a host of more incidental but telling phenomena. Indeed, one of the most compelling arguments to be made for the "accuracy" of the conversational account is its ability to explain some sounds of silence in the functioning of American democracy--like the silence about the electoral status of children.[146]

Nor is the conversational account pure description unaffected by normativity. For I was drawn to it as a way to explain the degree of fidelity that American democracy commands. I do not deny that such fidelity could be misplaced, but my personal stance toward American democracy is largely one of appreciation and admiration. Democracy as meaningful conversation is thus for me a vehicle for helping to understand what makes an essentially good system hold. As such, the conversational account may

raise stability-based alerts (positive as well as negative) about one or another proposed change. But the conversational account is decidedly not a normative theory offered either to improve the system or to understand what it is that is good in the system at present. It in no way denies the possibility of improvement in nonconversational ways. For stability produced by conversation or other means will be normatively unattractive if what is stable is infirm.[147]

I proceed in Subpart B with a discussion of the gap between liberal vision and American reality suggested but largely unattended to in the discussion in Part III. I have treated this subject before as well,[148] but Parts II and III have laid the groundwork for a supplemental treatment here. Subpart C provides the sketch of the conversational account, and in Subpart D I return ***541** to the electoral and apportionment phenomena with which we have been grappling, this time to grapple in conversational terms.

B. The Gap Between Liberal Vision and American Reality

1. Introduction. The most obvious way in which American reality diverges from the liberal ideal is the utter implausibility of the assumption of an equal weighting of interests for those entitled to regard. The failing is not just the slippage one might expect in combining a multitude of interests through complex and fallible social mechanisms. Nor is it some simple function of the hard reality that resources, and attendant ability to work within the political system, are not evenly distributed among those entitled to **vote**. Those problems paint in part of the picture, and the failure sensibly to account for children in a liberal calculus is also a part. But some of the gap precedes all of this; it resides in an ambiguity in what equal weighting of interests might mean. Even if we are able to force our way through that ambiguity, a gap is produced by elements quite consciously built into the constitutional system in the United States. Indeed, among the major formal institutions of American government on a national level, not a one of them is well-suited--even in isolation--to effectuating a liberal summation of individual interests. In combination, they produce a picture that is fanciful to describe in liberal terms. Some of the holes might be filled in by republican touch-up via virtual representation, but not, I fear, enough to produce even an approximation of a liberal pattern for the whole.

2. Fundamental Ambiguity. A fundamental ambiguity in what the equal weighting of interests contemplated by liberalism might mean shows up even in our pure setting of direct liberal democracy. (To make the possibility somewhat real, we might imagine a contemporary condominium association large enough to have a complex "public" agenda but small enough that its members grapple with that agenda in person.) Typically when we talk of majority rule, at least in the context of direct democracy, we mean that a majority of those entitled to **vote** decides on issues one at a time as they occur. We mean that in part because there seems to be normative purchase in such an understanding. An adulteration of the democratic ideal is often thought to be involved if some members of a **voting** body allow a **vote** on one issue to be affected by sentiments on other issues.[149]

But issues do not come prepackaged. If there are three unpaved roads in a jurisdiction, for instance, liberal voters may decide very differently if the question of paving those roads is joined one road at a time, on the one hand, or combined in comprehensive paving legislation, on the other. This problem is related to a broader normative question of whether democratic decisionmaking really should take on issues one at a time, however they are ***542** defined. For treating issues discretely counts positions on issues but does not weigh the depth of feeling on those issues.[150] Some persons may care deeply about an issue while others may be close to indifferent, even as they lean one way or the other. It is not at all clear that a **vote** in which each counts for one treats "equally" the interests of people so differently disposed on the subject of the **vote**.

A requirement of unanimity for decision rather than a majority would assure that no person loses from the eventual **vote**.[151] A decision rule of unanimity raises the possibility that great gains would be neglected on account of trivial losses to some minority, however, unless there were a mechanism of side payments by which those inclined to say "no" on the substance of a **vote** could be induced to consent. In the political arena, the compensation could come in the form of **votes** on other issues, and this suggests that the unanimity and the net societal gain might appropriately come not on discrete issues, but on the entire public policy agenda. Positions on separate items on that expansive agenda could be traded to the end of maximizing satisfaction over the entire electorate, with each voter's "satisfaction" **given** equal treatment.[152]

I will call these two notions of what equally weighted votes might mean a "pure" model and an "intensity" model. The normative clash between the two is likely replicated on a descriptive plane. On the one hand, the temptation to trade seems built into the human DNA. But that temptation will meet a variety of obstacles in a democratic arena. In the real world, voting on the entire agenda of some voting body will often be impossible. An "entire" public agenda must at least be limited to some timeframe, but for an ongoing body any such limit may be objectionable to a voter with just a bit longer time horizon. And unanimity as the decisional rule is impractical once a voting body of some size and an agenda of appreciable scope is in prospect. In addition, vote trading is not likely to be all that effective as a mechanism for weighing interests. Money is the universal solvent in the private market that allows us to measure the value of one item against another, and also to keep track of inflow and outflow. Vote trading, in contrast, has all the inefficiencies of bartering, and then some. Unlike freewheeling bartering, in the legislative arena the only things that can be traded without running afoul of bribery laws are those that have made their way onto the public agenda. Even trades of votes on agenda items would not be legally enforceable, no doubt in part because of the strains of normative disapproval. These problems suggest that even descriptively ***543** democratic voting in direct democratic settings likely migrates between action on discrete issues and action that takes account of varying packages of issues. The pattern of "democratic" results could not then be expected to reflect with any consistency either a pure or an intensity model of equal weighting.

3. Simple Representative Government in Single-Member Districts. Legislative bodies are similarly limited in any attempt to capture the interests of their members in pursuit of a public policy agenda.[153] But the point of representative government for the liberal is to aggregate the interests not of the members of the legislature, but of those members' constituents. The liberal effectiveness of representative government thus depends in addition on the extent to which legislators might be thought to be faithful conduits for the interests of their constituents. We passed over this difficulty in our earlier discussion of the liberal ideal, relying on an assumption that the popular vote is an effective mechanism for bending representatives to the voters' will.[154] That genuinely competitive elections deter officials to a degree from pursuing purely personal aggrandizement in office is not to be doubted, but there is every reason to doubt that popular election causes representatives somehow to embody within their own legislative behavior a summation of equally weighted constituent interests. This is no doubt in part because we retain a republican model of legislating, but it is also because the conduit cannot be made to work.

The normative ambiguity about what equal weighting should mean is in no way dissipated by the introduction of representative government.[155] Nor is the descriptive complication. The legislator must represent a package of public-policy positions, and the voter must take that package as a whole.[156] If the voter is assumed to use his vote as a self-interested liberal, his choice of candidates will necessarily reflect some weighting of the relative importance to the voter of the various issues in the package. To enhance ***544** his chances for election (and reelection) the candidate would like to understand voter sentiment weighted just as the voter would weight it. But the signal the voter gives is simplistic in the extreme--candidate A or candidate B. For the candidate this does not even disaggregate constituent sentiments among issues, let alone convey information about intensity on discrete issues.

In addition, a candidate need not be concerned about any voter sentiment not necessary for election (or reelection). This would cause serious problems for any intensity-weighted descriptive model of representative democracy, but it also complicates a pure model. For a representative legislature can be composed of people who in the aggregate commanded a minority of the popular vote. This may not happen very often,[157] but it is entirely possible in a winner-take-all system, where elections in one district may be close and that in another not so close.[158] In any event, there is no basis whatsoever for assuming that a legislature elected from single-member districts will be a microcosm of the society as a whole.

There is the possibility of communication between elections as a mechanism for conveying detail and weights with regard to particular issues. Much ink has been spilled exploring the democratic role of organized "interest groups" or "special interests" in the production of public policy. Such groups are more likely to be formed, and their agendas more likely to be vigorously pursued through the use of lobbying, if the individuals behind them have intense interests in those agendas. And since the

lobbyists for such groups can be heard between election seasons, interest groups might be thought to be a mechanism for informing legislators of the intensity of their constituents' sentiments on particular issues.

No doubt interest groups have some such effect, but they too are likely to operate in the most crude fashion as conveyors of the intensities of constituent sentiments, for at least two reasons. First, interest group lobbying will at best "weigh" only the interests of individuals that are individually large enough to justify the expenditure of resources on the group.[159] As interest-group theorists are at pains to stress, the combined interest of those with such an incentive can easily be less than the aggregate of opposed, but dispersed, interests. More generally, the incentive to organize politically ***545** depends heavily on the distribution of interests, not just on their magnitude over the entire population. Second, lobbying through organized groups must be a very imprecise way to convey the intensity of sentiments even of the group's members. Lobbyists can be more or less effective advocates. If their constituencies are at all sizable, they will likely have little sense of the range of intensities among them. Indeed, it may be doubted whether lobbyists for organized groups have much incentive to convey any complexity about intensity that they may come to appreciate.

All this suggests that the actual pattern of public-policy outputs to be expected from simple representative democracy will be an unstable and unpredictable amalgam of three forces: a pure model of actual or likely voter preferences, an intensity model of such preferences, and legislator pursuit of personal public-policy inclinations. That may well make simple representative democracy normatively preferable to lots of competitors, but it provides little justification for any claim of fulfillment of a liberal ideal.

4. American Complexity. Even if we were to convince ourselves that simple representative democracy produced results that approximate one or another conception of the liberal ideal of equal weighting of interests, those who designed the American system of government introduced great complexity that surely causes its decisions to produce further distortions. Bicameralism means that public-policy measures must clear two legislative hurdles rather than one.[160] The Continental Congress had been unicameral. Nonetheless, it was essentially taken for granted by the delegates to the Constitutional Convention that the national legislature should have two houses,[161] and at least part of the idea was to provide a calm "second look" before action became final.[162] But the second look in congressional bicameralism is quite different from a revisiting by the same body or even by one that could be assumed to be roughly equivalent to the one that looked initially.[163] Rather, the two houses of the American Congress are very differently constituted from one another, and the result surely is that the most considered judgment of one house is more than occasionally frustrated (or compromised) for want of bringing the other house around.

Neither of the two houses of our bicameral national legislature, moreover, is individually crafted in a liberal image (as imagined in the reapportionment ***546** cases). This is most obvious with regard to the Senate, the apportionment of which by states leaves it worlds removed from the one person, one **vote** prescription. Less noticed is that the House of Representatives is not all that close to a liberal ideal either. The constitutional requirement that each state have at least one representative-- and that congressional districts not cross state lines[164]--means that the number of constituents varies quite significantly from one House member to another. Thus, Montana's delegation to the House was reduced from two to one by virtue of the 1990 census. The Supreme Court upheld that action despite the fact that Montana's single district would have a census population of 803,655, while the average district population in the country as a whole would be 572,466.[165] That is a divergence of over forty percent, far higher than the Court has tolerated in the intrastate congressional apportionment context.[166] More generally, with House districts confined within state borders, it is to be expected that some districts in less populous states will diverge quite substantially from the norm.[167]

The other branches of the national government do not fare particularly better in liberal terms. It is by now a commonplace (though not a terribly ***547** instructive one)[168] that the federal courts are a "counter-majoritarian" branch of government. And while the President (and Vice President) are elected in a single, nationwide, popular election, the **votes** are not counted one at a time. It is state **votes** that are counted, and the weight of each state's say in the so-called "electoral college" is proportionate not to population, but to the combination of Senate and House delegations--a rather different matter, as we have seen.[169] Again, it

is not often that the Presidential winner has a smaller popular **vote** total than an opponent, though that can happen, and has.[170] More importantly perhaps, states get to decide important matters about how their electoral **votes** are distributed. Most states award their **votes** as a unit, and that greatly increases the importance of the popular **vote** in states with large electoral-college weighting.[171] Candidates for President undoubtedly respond to that incentive in their campaigning, in the substantive stances they take and in the appearances they make.[172]

Further complexity is introduced by the fact that the three branches of the national government divide power and are, of course, superimposed on a variety of state governments as well as local units subordinate to the states. Power over particular subjects is often shared among these different levels. This further bedevils any attempt to trace some liberal weighting of interests through the system as a whole.

Many of the formal mechanisms of American politics that frustrate a liberal summation of interests were consciously inserted with something of a republican vision in mind. For instance, the relatively long terms of office for Senators, and even for members of the House, were, as we have seen,[173] provided in part so that the legislators could enjoy a degree of insulation from constituent pressures, the better to deliberate about the public good. We have seen that bicameralism might be depicted in similar terms, and it is even possible to put something of a republican "public interest" gloss on such things as the presidential veto and judicial review. It does seem likely that "public interest" deliberation, in which legislators and other officials feel free to pursue their own best judgments about public policy largely free from constituent pressure, is a real part of the decisionmaking design in American government.[174]

***548** At the same time, there can be little doubt that organized interest groups effectively wield great political power.[175] From one perspective, the power of interest groups is indicative of responsive government --" responsive" in the sense of government that turns constituent interest into public policy not particularly as a result of reasoning about it, but simply because it is what at least some constituents want. The result is not likely liberal responsiveness, because there is no reason to think that it is responsiveness that is distributed in even approximately equal measure across the electorate--in either of the two senses we distinguished earlier.[176] Precisely because it is responsiveness, however, it is not republican, for the republican legislator may listen attentively but decides on his own.

5. Pluralist Integration. The foregoing litany of ambiguities, qualifications and compromises of the liberal ideal is well-known to students of democratic decisionmaking and of American government.[177] Despite this familiarity, there persists a widespread belief that the liberal ideal is to a great extent fulfilled in the operation of American democracy. The most sophisticated version of this belief is associated with the "pluralist" strain in American political science. The word "pluralism" is often used to characterize a system in which organized interest groups are dominant and legislative outcomes are simply "'[t]he balance of ... group pressure." '[178] But there is a more optimistic note associated with pluralism, in which, in the complexity of interest group battles, each person is likely sometimes to win and sometimes to lose, with the results more or less canceling each other out. The final accounting then supposedly approximates a liberal ideal (though whether it is the pure or intensity version of this ideal is typically left unsaid). The idea is captured in the words that Robert Dahl puts in the mouth of "Pluralist" in one of the dialogues he created for his 1989 book, Democracy and Its Critics:

> [I]n a democratic order on a large scale of a country, associational pluralism, combined with a good deal of decentralization of decisions to local governments, would help to ensure that the interests of citizens in the different publics would be **given** more or less equal consideration. In that sense, the public good would be achieved in a pluralist democracy.[179] ***549** One commentator who expressed such an optimistic pluralism was Alexander Bickel. In the same work where he coined the phrase "counter-majoritarian difficulty" to raise a warning sign about policymaking by the courts, Bickel displayed an appreciation of the fact that the rest of the system might not be all that majoritarian either. He acknowledged "the . . . important complicating factor" of the disproportionate political power of interest groups. But Bickel was consoled, because, the Supreme Court apart, it was all likely to

> work its way out to a liberal bottom line. The legislature and the executive represent different constituencies, he explained, and this "tends to cure inequities of over- and underrepresentation." Groups can in the final analysis be effective politically only by "combining in some fashion . . . [and] constituting a majority."[180]

While there does not seem to be any decisive basis on which to defeat the optimistic pluralist conclusion, neither is there much reason for crediting it. For it is hard to fathom the mechanism by which some coherent liberal bottom line is reached. It is possible that the evidence is indirect, an inference drawn from the stability in the system. If the liberal vision is a broadly attractive one, and if the system is perceived as yielding liberal results, then widespread satisfaction and stability might be thought to follow. But there is no apparent accounting system even for knowing a liberal bottom line when we reach it, so it is quite unclear how the perception would even get started. It seems plausible enough to expect instability in an open democratic society like the United States if there is widespread and deeply held dissatisfaction with governmental decisions extending over a substantial period of time. The stability we observe suggests that there is no such extent or level of dissatisfaction. It may also suggest that some rough compromise of satisfactions in our polar liberal senses is sufficient to keep dissatisfaction under control, even if there is also a good measure of inequality and legislator discretion along the way. In the end, that may be what grounds the pluralist faith.[181] But this is a far cry from any suggestion that some coherent conception of liberal results can be inferred from stability in the system. Most likely, pluralists have succumbed to the temptation noted earlier to allow liberal normative predispositions (however ill-defined) to ***550** migrate to descriptive accounts of a system they know they like.[182] In any event, there is a more plausible account of the stability in the system than an insistence that it is liberal results that bring about that stability.

C. A Positive Theory of American Democracy

1. Summary of the Theory. The very complexity of American democracy that helps confound a liberal account of its operation also suggests an alternative. American democracy in all its complexity can be understood as a mechanism of involvement of the citizenry with a diverse menu of public conversation about public policy. Bicameralism, federalism, and separation of powers divide up issues and constituencies in a large variety of ways and provide multiple focal points for communication between candidates and officials, on the one hand, and their constituents (and the groups they form), on the other. That communication in turn helps stimulate a secondary conversation about public affairs among and between diverse media of communication and segments of the populace. A highly speech-protective interpretation of the First Amendment allows this conversation to flower in a multitude of ways. To a great extent the resulting public conversation is designed to draw the population into concern with, and a sense of engagement by, public matters, and there seems good reason to believe that in substantial measure it succeeds. The conversational involvement is then an important stabilizing force in the system.

The American complexity provides a dazzling variety of public conversational subjects, from the weightiest matter of economic theory, through the peccadilloes of one public servant or another, to the choice of playground equipment for the local park. We can distinguish two different reasons why conversation on such topics might be involving, though I do not think the line between the two is sharp. First, conversation might be valued as providing information of instrumental value. In the public context the conversation might, for instance, be relevant in obtaining some public benefit. But it could also help in consideration of some particular public policy in which one has an interest--acquiring swings rather than a new slide for that park, for instance--or for deciding which candidate to **vote** for in an election. While an individual might realistically hope to affect the swings decision--perhaps by making his views known to the local school officials--for matters of public policy that affect large numbers of people, any individual's involvement in public conversation is quite unlikely to be effective in achieving a desired end. Conversational involvement might nonetheless be instrumentally involving because the individual will take some concrete action--like casting a **vote** for a candidate--even if (or as) he appreciates that he has no real power over the result.

***551** The second way in which the most ordinary of conversation can be involving, largely apart from its instrumental possibilities, is as part of a developed or developing relationship between people. So it is with public conversation. The

American system of single-member geographically defined districting helps establish primary relations between representatives (or candidates) and constituents, as well as "secondary" attachments by members of the public with media commentators on public affairs, both of which can then provide the basis for conversational involvement of a relational sort.[183] These two types of involvement are not fully distinct, because they likely feed on each other, just as instrumental and relational conversational involvement do in everyday life. Thus, while the two may at times compete, as we shall see,[184] more typically they will go hand in hand. Both are a function of the embeddedness of the conversation in a shared societal enterprise where decisions of real-world importance are to be made. For most members of the electorate, participation in the public conversation will be passive most of the time. There are simply too many members of the public to imagine that it could be otherwise. But **given** this constraint, the conversational possibilities are adaptable to varying tastes, interests, talents, schedules, and, indeed, inclinations toward active or passive participation.

There is, of course, public conversation in nondemocratic countries, but its subject matter is typically limited and its content repetitive. Conversation that breaks out of those constraints will likely be limited in its circulation. Wide-ranging and varied public conversation seems to be a peculiarly democratic phenomena and, perhaps, an especially American one. Competitive elections are the crucial stimulus for this conversation. While the liberal account has elections directing a process of producing governmental decisions, this conversational account instead depicts elections as providing an incentive structure for involving conversation. For it is those elections that **give** candidates and officials the incentive to reach diverse constituencies and to do so in a way that stimulates a sense that the conversation is directed to them because their attention to it matters. That primary conversation between candidates and constituents is then important in stimulating the secondary conversation. Precious little public conversation is in fact tailored to identified individuals. But where competitive elections prevail, both candidates and media do have real incentives to match audiences with information and messages of interest. The adaptability and directedness of the public conversation is in marked contrast to the blunt instrument that the **vote** represents as a supposed means to fine-tune liberal results.

***552** The popular involvement in public conversation that I have in mind need not be particularly inspired or enlightening.[185] All that is required for the stabilizing effect I posit is that members of the electorate get caught up in it in a way that produces a sense of genuine involvement in the public processes of the land. So conceived, the conversation is not nearly as attractive a phenomenon as what contemporary republican theorists have in mind when they speak of popular involvement in a "deliberative democracy,"[186] but then theirs is a normative account, while democracy as meaningful conversation purports to take the conversation as it finds it in the real world.

In that real world, to be sure, the conversational possibilities are not unlimited. A candidate for public office may have to choose, for instance, between emphasizing park or peccadillo. In addition, one form of conversational involvement may compete with another. If district lines are drawn to maximize political competitiveness, for instance, that should in turn maximize the incentives of candidates to employ a diverse menu of conversational topics to be directed toward the entire **voting** population of the district. The incentive extends to reaching the marginal voter in ways short of alienating larger numbers of voters than will be attracted. Noncompetitive districts, on the other hand, where relative political homogeneity reigns, may dampen that incentive while simultaneously fostering the conversational engagement that comes from a relationship born of felt political kinship between representative and constituents.[187]

This is not to say that competitive elections must necessarily crowd out relational conversational involvement. Just as we may disagree with those with whom we have quite intense private relationships, so a voter may feel relationally involved with a representative with whom he disagrees on a range of issues. But whether competing or not, primary conversational involvement of either the instrumental or relational variety is largely independent of the numerical division of the population among districts. To be sure, extremes of malapportionment may make it abundantly clear to voters in a disfavored district that neither they nor their representatives really matter in a range of public policy discussions.[188] If such a state of affairs persists, the sense of involvement on the part of the disfavored portion of the populace may wither. Short of such extremes, however, the interactions ***553** in which a voter finds conversational engagement are focused at the electoral level and for that reason can remain

robust in the face of a good measure of interdistrict malapportionment--as the example of the United States Senate dramatically demonstrates. To all appearances, elections for the Senate foster a high level of popular engagement even in those populous states which are substantially disfavored by the Senate apportionment by States.

The descriptive force of the conversational account is not attributable to any "original intention" to design American institutions to maximize or foster public conversation. The accuracy of the conversational account is instead a product of the operation of something akin to evolutionary selection. The great architectural decisions about the structure of American government were likely fed by normative visions like the liberal and republican ones we examined in Part III, and by the need to compromise among such visions and among various interests in play at the times those decisions were taken. Once set on their way, however, institutions change their form for various reasons that may have had little to do with their origins. Political parties, for instance, are now central actors in American public life, though our formal constitutional scheme contemplates no role for them whatsoever. The changes that survive within the structure will be those that foster survival of the whole, or at least do not seriously or repeatedly jeopardize that survival. Political systems can, of course, survive a measure of instability, but probably not instability that comes without surcease. If democratic conversation promotes political stability, conversation-promoting mechanisms can for that reason be expected to endure over time, whether or not there was any original intention to foster that conversation.

The role of competitive elections as stimulus to conversation can be appreciated by considering the proposal occasionally advanced in pursuit of the liberal vision, that the legislature be chosen not by election but by lot, or by some other random procedure.[189] If large enough, the resulting legislature might approximate that microcosm of the "electorate" as a whole that some liberal theorists imagined.[190] While a random selection procedure might be thought to produce results in the liberal image, it would simultaneously alter the conversational characteristics of American government, most likely in very dramatic ways. Unless, perchance, the randomly chosen legislator remained in office for a long time (which itself might defeat much of the liberal purpose), little relational involvement of the electorate could be expected. More likely, members of the citizenry would remain essentially ignorant of the identities of those deciding on their behalf. In addition, random selection would eliminate competitive elections and hence the incentive that candidates now have to reach out conversationally to the electorate. Lobbying might continue, in which various interests tried to ***554** convince the legislators who happen to have been chosen about what those legislators should think. But the great bulk of the populace would likely be left out in the conversational cold. No longer would members of the electorate believe that public conversation was directed to them because their attention to it mattered.

A conversational perspective brings a good measure of coherence to a large number of features of American democracy, formal and informal. The theory can help make sense not only of American governmental complexity and of the central role of the First Amendment in American jurisprudence, but of the American tradition and practice of loose political party discipline, of the pervasive suspicion of special-interest groups, and of why it is that people bother to **vote** at all.[191] I will turn shortly to conversational analyses of the apportionment and enfranchisement phenomena on which we have been focusing. First, however, let me call attention to two peculiarly American political institutions where a conversational account fleshes out a picture that, without such an account, is rather mystifying. These are the United States Senate, which shares legislative power with the much more fairly apportioned House of Representatives, and the United States Supreme Court, which exercises a good measure of policymaking authority despite the fact that its members are appointed rather than elected and effectively serve for as long as they like.

A conversational theory explains why the United States Senate apparently enjoys broad popular support, despite its gross violation of the liberal apportionment ideal. From the beginning, the Senate has exercised legislative power essentially as a coequal partner with the House. In this respect the American Senate is unusual, if not unique, among "upper" chambers of national bicameral legislatures. But the method by which Senators are chosen has changed in ways that have important conversational implications. They were originally selected by the state legislatures.[192] For a variety of reasons, this proved unsatisfactory, and over a protracted period of time the states introduced elements of popular involvement in senatorial selection.[193] This practice eventuated in the Seventeenth Amendment, under which Senators are now, like members of the

House of Representatives, elected "by the people." Part of the idea of the original selection plan was to create a distance between Senators and the populations of their respective states, all in the service of republican deliberation.[194] Both because of the extreme disproportions of populations among the states and because of the inevitable slippage in projecting electoral sentiment through representative government,[195] the introduction of popular election did not come close to ***555** making the Senate into a liberal organ of government. Yet, despite the fact that the Senate might now seem to reside in an ideological no man's land of American politics, to all appearances it is a thriving institution.

The principal reason for the Senate's success as an institution is that it is an especially suitable vehicle for stimulating public conversation--of both a relational and an instrumental sort. The apportionment scheme for the Senate provides incentives for an ample menu of instrumental conversation. While not all states have highly competitive political divisions, the stability of district lines for the Senate (i.e., state lines)[196] establishes a framework in which competition is importantly free from the threat that incumbents will move the lines around for their own benefit. Even more clearly, the Senate has a distinct advantage over the House when it comes to conversational involvement of a relational sort. The stability of the district lines and the six-year terms of office for the Senate must make it easier for constituents to keep track of their Senators' identities and of what they say. The result seems likely to be the easier development of a sense of relationship with Senators than with members of the House, despite the fact that because they typically serve larger populations, it is harder to produce Senators with broad-based ideological attachment to the great bulk of their constituents.[197]

Like the Senate, the United States Supreme Court is an "illiberal" governmental institution that exercises a large measure of policymaking authority. But unlike the Senate, the Supreme Court's exercise of policymaking prerogative is recurrently criticized in American political discourse. The criticism most typically employs Alexander Bickel's warning of a "counter-majoritarian difficulty" posed by the Court,[198] but that way of putting ***556** it is decidedly unhelpful in understanding any contrast with the Senate, for neither is very close to a "majoritarian" institution. A conversational perspective brings the contrast into focus. Unlike the Senate, the Court has little incentive to foster any popular sense of involvement in its decisionmaking processes. The Court's traditions, indeed, run in just the opposite direction. As a court, it stands prepared to listen attentively to the litigants before it, while the views of more broadly based segments of the population that may be affected by its decisions are assumed to be irrelevant. The Court does, of course, hear from nonlitigants through amicus briefs, but these are difficult and expensive to produce and have never been thought to be central to the Court's decisionmaking processes. To be sure, there are those who believe that the Court listens more than it admits, but it certainly does little to make the population directly aware of any listening it does.

There are, of course, salient differences between the Senate and the Supreme Court other than their conversational inclinations. Even since the advent of popular election of its members, the Senate serves to keep national and state concerns in touch with each other, while the Supreme Court is a more purely national institution. Therein may lie part of the explanation for the lack of controversy that surrounds the "counter-majoritarian" Senate. But the conversational contrast of the Court and the modern Senate could hardly be more stark. This has led me to suggest that the democratic "difficulty" with the Court is more aptly termed "counter-conversational" than "counter-majoritarian."[199] Labels aside, the greater controversy that surrounds Court policymaking fits comfortably into a conversational account of American democracy.

A conversational theory does not by any means capture the full complexity of the American political system.[200] But it does bring a degree of order to American reality, and it certainly acts as an effective antidote to the descriptive accuracy sometimes claimed or suggested for liberal accounts. In what follows, I would like to **give** a sense of the coherence a conversational account can provide--as well as of its limitations--by concentrating on the phenomena that have shaped our inquiry, the law and practice of electoral apportionment and the distribution of the franchise.

2. The Apportionment Base. Along with the franchise, the inclusion and exclusion of large parts of the population in the apportionment base seems crucial for the liberal project, for together they define who counts in the liberal calculus, whom it is

the society must heed equally. In these terms, however, the Court's casual approach to the base in Burns v. ***557** Richardson,[201] seems incoherent, at least for decisionmaking on a national basis. Under Burns, some states could, for instance, "count" the interests of children, while other states choose not to count them. But the impact of national policy cannot typically be disaggregated by states, so each type of delegation would be left to wonder what to make of the costs or benefits that fulfilling its representational responsibilities will produce for other states. The very best that might be hoped for, in liberal terms, would be a confused compromise between incommensurable calculations.

Through a conversational lens, however, Burns v. Richardson makes perfect sense (though that does not allow it to rest any more easily in the liberal company of Wesberry and Reynolds). For conversational purposes, the important thing about the apportionment base is not its composition, but its contribution to a political system that stimulates involving conversation. The usual practice of dividing up the entire population is satisfactory, but so would be the exclusion from the base of one or another group of ineligible voters. It is their enfranchisement or disenfranchisement that has the immediate conversational implications, not their inclusion or exclusion in the apportionment count. Indeed, one or another group of eligible voters might be excluded from the apportionment base with no necessary conversational consequences. Something like this already effectively happens when certain eligible voters--like college students--are counted for census purposes (and hence apportionment purposes) not where they **vote**, but instead on the college campuses where they live. There actually may be untoward conversational consequences of that practice, because candidates may not know how to reach out to those voters. There would be no such problem with exclusion from the apportionment base of eligible voters who live and **vote** in a single location so that candidates know where to direct their conversation.

3. Equinumerosity. A conversational perspective might also help us understand why the Court imposed so much less rigorous an interpretation of the equality norm in the context of state and local legislative bodies than it did in the congressional context. According to the Court, the difference is that states have an interest in following internal political lines when they draw up districts for state legislative purposes, because local units of government often have special interests and special perspectives that can usefully be brought to bear in state legislatures.[202] This is an explanation that is suggestive of conversational sensitivity in the state apportionment process. Districting along lines of common interests may not maximize electoral competitiveness and, for that reason, it may dampen the incentives of some candidates to reach out to marginal voters. But such districting does help foster conversation in two different ways. It allows the representative to focus his conversational energy on informational areas known to concern large ***558** numbers of constituents. It also facilitates the sense of relationship between constituents and representatives that comes from making common cause.

To a substantial degree, however, the same could be said of the national legislative process, where geographically clumped interests, like those of cities and agricultural areas and of racial and ethnic groups, may be under consideration. To be sure, congressional districts are likely to be more populous than state legislative districts and hence, other things being equal, harder to apportion along lines of common interest. But this suggests that the conversational difference between congressional and state contexts is more a matter of degree than kind.[203] There are, moreover, considerations the Court ignored that suggest reversing its order of stringency for the equality norm. The constitutional language on which the Court relied for the congressional requirement is less directed to any norm of equality.[204] And very substantial deviation from the one person, one **vote** standard is virtually inevitable in the congressional context, where the constitutional requirement that each state have a minimum of one representative makes it overwhelmingly likely that some districts will have populations approaching fifty percent greater than others.[205] There is no such impediment to essentially perfect realization of the equality norm in the state context.

The net result is that while the Court's rationale for its different treatment of congressional and state legislative apportionment has some plausibility, it is far from decisive. An alternative explanation for the difference in treatment is that after its initial rush of enthusiasm, the Court began to appreciate the very real difficulties in the one person, one **vote** solution-- difficulties understandable in part at least in conversational terms. The formal differences between the two contexts may then have provided a convenient hook on which the Court could hang a growing ambivalence.

None of this is to say that a return to English-style "rotten boroughs" would not have untoward conversational implications. It was apparent when Baker v. Carr[206] was before the Court that a large part of the apportionment problem was the self-interest of legislators in maintaining the status quo. As Justice Clark put it in concurring that the malapportionment of the Tennessee legislature was justiciable:

> I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But . . . . [t]he ***559** majority of the voters have been caught up in a legislative strait jacket . . . . This is because the legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the **votes** of their incumbents a reapportionment of any kind is prevented.[207] This "legislative strait jacket," or, as it was called in Reynolds, "rural strangle hold,"[208] had important conversational implications. Voters in districts made politically impotent at the state level by gerrymandering may have felt relational ties to their representatives. But the state political marginalization of such constituents would have caused even relationally charged conversation to ring hollow, because it made clear that the representatives of those marginalized constituencies were not genuine players in large parts of the public debate. Moreover, the marginalization **gave** every sign of being chronic. The result could be popular cynicism and detachment, rather than a sense of involvement.[209] The net effect of the Court's intervention may then have been to unsettle a conversationally stifling environment.

Any such reading of the Court's effort must be qualified in two important respects. First, after the dust had settled, even when the equinumerosity requirement is most stringently applied, it leaves plenty of room for partisan gerrymandering and incumbent protection.[210] Indeed, the Court's apportionment jurisprudence may help camouflage the continuing prevalence of incumbent self-dealing.[211] Second, it is important to emphasize that we are bumping up against competition among types of conversational involvement. To the extent that incumbent protection is unsettled, politics may become more competitive, and that, in turn, may lead candidates to reach out conversationally to marginal voters. At the same time, stable district lines and even incumbent protection may foster relational involvement, for voters will find it easier to keep track of their representatives if they know their districts, and if the same people remain in office for extended periods of time.[212] The Court's one person, one **vote** solution provides no way to square this circle, though neither would Justice Clark's solution, which was to allow apportionment flexibility as long as it was ***560** grounded in rational state concerns.[213] Conversational tradeoff is required. That may be what the Court provided in the state legislative context. In the congressional context, however, the Court displayed little sensitivity to the subtler conversational implications of its efforts. For these reasons, a conversational account of the Court's use of the equinumerosity requirement has some, but certainly not overwhelming, appeal.

4. The Pattern of Adult Eligibility to **Vote**. With very minor exceptions,[214] the distribution of the franchise has moved in one direction over the course of American history. The **vote** has been extended to additional categories of adults, and the enfranchisement line between children and adults has been edged younger to expand the electorate. This has occurred despite the fact that such expansion rubs a bit against the republican grain, and that it dilutes the decisionmaking power of the preexisting electorate in any liberal calculus that one might have supposed was at work.

A conversational account of American democracy comfortably accommodates the extension of the franchise in this way. When formerly marginalized groups are brought into the electorate, that provides incentives for their involvement in public conversation. Such conversational involvement helps defuse the possibility of alienation, and hence destabilizing behavior, in those newly eligible groups.

The process may be troubled, even in conversational terms. Inclusion in the franchise of racial minorities or of newly naturalized immigrant groups may arouse opposition, even resulting in alienation among the opposed. The opposition may be fed by a fear of disempowerment. Whatever political power accrues to the new groups may be seen as coming at the expense of the old.

At the extreme, a perception of lost political power can cause disengagement from politics and from its conversation. But the American experience has by and large been that the expanded electorate eventually gains reconciliation. The conversational explanation for the reconciliation is simply that it becomes clear that additional groups can be included conversationally, without concomitant or even serious diminution of the conversational involvement of preexisting groups.

***561** I do not want to exaggerate the point. To the extent that politics is a matter of dividing up a limited pie of public resources, new groups compete with old ones and public conversation will not completely obscure that fact. But not all conversational topics are directed to the eventual expenditure of strictly limited resources. New groups may be interested--or may be induced to be interested--in topics that are relatively costless and of little interest to others. And the large variety of officeholders in American democracy provides the opportunity for relational involvement that can simultaneously bring a measure of satisfaction to old and new members of the electorate alike. But most fundamentally, the conversational account rests on a perception that political satisfaction derives fully as much from involvement as it does from results.

The reasons for the continuing adult disenfranchisement surely vary among the excluded groups, and in some cases they remain obscure.[215] And while disenfranchisement cannot find any fundamental explanation in conversational terms, the remaining disenfranchisement is relatively insignificant. In addition, the marginal conversational dampening produced by the disenfranchisement is likely attenuated to one degree or another for several of the disenfranchised groups. In this sense, the pattern of enfranchisement as a whole can be seen as the product in significant measure of conversational dynamics.

Residents of the District of Columbia, for instance, do **vote** in both presidential and local elections, and for that reason are the objects of conversational attention by officials and candidates. In addition, they live in the midst of a public conversational storm about national matters. In some cases, they may find very substantial interest in elements of the nationally focused public conversation because of their professional concerns. They do attain a measure of national conversational engagement through their nonvoting representative in the House.

Citizens resident in overseas American territories, in contrast, are **given** no formal **vote** in presidential elections. Because of their distance from the bulk of the population and territory of the country, however, their capacity for destabilizing conduct is probably limited and easily ignored. In addition, there may be a question of the incentive of this population to engage in destabilizing conduct, since citizens in the overseas territories may already obtain many benefits of citizenship without some of its burdens.[216]

Among other groups, imprisoned felons are capable of destabilizing conduct, but it might be doubted that their disenfranchisement contributes in any significant way to the disenchantment many of them undoubtedly feel. And a substantial portion of legally resident aliens consists of persons serving a probationary period awaiting citizenship, which will, of course, ***562** bring eligibility to **vote**. For that group, officeholders and candidates have a degree of incentive to direct conversation their way on account of future possibilities. Even for the resident alien population with neither intention nor prospect of obtaining citizenship, there may be conversational incentive on the part of representatives to the extent that such persons are seen as having influence with persons who do **vote**.

At least apart from the anomalous case of the District of Columbia (and perhaps that of citizens in the overseas territories), the most questionable disenfranchisement in conversational terms is that of ex-felons. Though geographically dispersed and not easily organized or galvanized, this is a fairly sizable group[217] that, when neglected, may have real potential for acting in destabilizing ways. **Giving** it a conversational stake would thus seem particularly likely to pay stabilizing dividends. Some such reasoning may lie behind the gradual erosion in the inclination of states to continue restrictions on **voting** for those who have completed serving sentences for serious crimes.[218]

5. The Disenfranchisement of Children and Inattention to the **Extra**-**Votes** Idea. A conversational perspective comfortably accommodates the disenfranchisement of children, and it also provides a context in which the idea of **extra** **votes** for their

parents does not excite attention. With the line of causation between voter inputs and public-policy outputs largely beyond comprehension, the satisfaction of voters is produced by conversational involvement. To produce levels of dissatisfaction that might lead to destabilizing behavior, there must be an excluded group that feels the pain of conversational exclusion. Even without **extra votes**, **parents** are not excluded, and the typical disinterest of children means that for the most part they feel no such pain.

The one **vote** that adult **parents** each receive as citizens provides officials and candidates--as well as media of communication--with incentive to talk to them. **Extra votes** would do no obvious harm in this respect, but neither would they likely heighten the candidate incentive, at least as long as **parents** of underage children represent a substantial portion of the electorate. Indeed, because they are interested in the welfare of their children in addition to themselves, **parents** might already be thought to have more incentive to **vote** than others. If candidates respond to such a perception, that only heightens their interest in communicating with **parents**, even with no **extra votes** in the picture.[219]

***563** A conversational reckoning of the disenfranchisement of children is more complicated. Very young children are uninterested in receiving communication about matters of public policy. They are preoccupied with more immediate gratifications. As children mature and crave communication about matters in the public realm, they are likely to find it available and adaptable to their interests and needs, even as they remain without the **vote**. For the **vote** is in prospect for older children, and they are (sometimes, at least) in communication with enfranchised **parents**. Candidates thus have a measure of incentive to communicate with older children even before they become eligible to **vote**. In addition, children seem likely to be drawn to public conversation initially as a part of learning about public affairs, a first step on the road to a sense of fuller involvement. For these initial purposes, children may find a good measure of satisfaction from the public conversation about them, even if it is not particularly targeted their way. But none of this is to deny that older children are both capable of destabilizing behavior and may feel conversationally neglected. Indeed, some such perception may have contributed to the Twenty-Sixth Amendment's extension of the right to **vote** to eighteen-year-olds.[220]

6. Assessing Accuracy. Earlier I criticized the pluralist tradition for advancing an improbable descriptive account of American political decisionmaking.[221] In light of that criticism, it is fair to ask whether the conversational account fares any better. In neither case is anything approaching rigorous proof available, not only because controlled experimentation cannot be conducted, but also because neither purports to provide an exhaustive account. In each case, some piece of the puzzle that does not fit well within the theory could be explained away as finding its explanation elsewhere. At least in the case of democracy as meaningful conversation, these problems are compounded by the fact that the conversational engagement on which the descriptive account turns takes a variety of forms which may compete with each other. When one form of conversational involvement seems to come up short as explanation, another can be brought in to do service.[222]

Despite these admitted problems in establishing any ultimate "truth" for the conversational depiction, the contrast with pluralism provides a solid foundation for preferring the conversational account and indeed for according it a measure of respect for its accuracy. Pluralism is a victim of its own bravado. ***564** It purports to characterize connections that not only cannot be measured, but the mechanisms for effectuation of which are quite mysterious. By what means would American complexity lead one distortion of the liberal ideal to offset another? In the absence of any plausible answer to that question, the pluralist account must rest on little more than faith. I have suggested that that faith is likely grounded at the intersection of an apparently successful American system and normative approval of the liberal ideal.[223]

The conversational account can be related more easily to phenomena with which we are familiar. We all have experience with public conversation, the ways and the extent to which it commands our attention. Moreover, we have even greater experience with private conversation that can be related to the sorts of public conversational involvement that I posit. All of this provides an anchor for assessing a conversational account of engagement in politics. Precisely because much more is going on in American democracy than conversational involvement, our conversational experience cannot decisively validate

the conversational account. But that experience does allow us to perform reality checks on conversational claims such as those concerning the conversational implications of the **extra**-**votes** possibility.

The ultimate test of a descriptive theory of large-scale social systems is whether the theory helps us "organize our thoughts"[224] about that system in coherent and, ultimately, in useful ways. Democracy as meaningful conversation has done just that for me, helping me bring first a handful, and then a larger group, of phenomena of American democracy into some semblance of order, where before there was mostly confusion. Some of those new phenomena have been the persistence of obviously inapt ways of describing real problems, like the fixation of constitutional commentators on the "counter-majoritarianism" of the Courts. Others have been sounds of silence, like the silence about the apportionment of the United States Senate and the political invisibility of children. In this sense, the conversational account has not only helped me unify "apparently diverse phenomena" but has helped me see things that were hidden without it.[225] It will be a fair test of the "accuracy" of the conversational account whether it can do some of the same for others.

V. Conclusion

In the early part of the nineteenth century, astronomers assumed that there were seven planets in our solar system. The eighth, which we now call Neptune, was discovered initially not because it was observed directly, but because it caused Uranus, then assumed to be the outermost planet, to move in ways that were aberrant by the light of the prevailing Newtonian ***565** conception of the mechanisms of planetary movement.[226] In similar fashion, the common liberal conceptualization of the operation of American democracy can help us see things that are necessary to make that conceptualization work. In particular, the liberal conceptualization suggests that something is amiss in the political treatment of children. It suggests that **extra** **votes** for **parents** on account of their children could help put American democracy into a semblance of liberal order.

But something is still amiss. Neptune turned out to be there, but **extra** **votes** are not. The Newtonian conception held, but the liberal one cannot. And the reason is fairly apparent. The liberal conception of American democracy is essentially a normative conception that has been put to descriptive service. Descriptive accounts of large-scale social phenomena are never perfect, and that has helped disguise the deficiencies in the liberal account. But the **extra**-**votes** possibility is too central to the liberal account to have its mysterious nonappearance dismissed as just a small blur in an otherwise clear picture. Widespread indifference and inattention to the **extra**-**votes** idea helps point us to other problems with the liberal account, and cumulatively they make clear that a different conceptualization is needed.

Democracy as meaningful conversation provides an alternative account of American democracy, in which the system is held together by involving essentially the entire adult population in that system. The liberal account also entails popular involvement, but liberal involvement takes the form of the production of results in which each contributor counts for one. The conversational model is less ambitious. It suggests no definable relationship between widespread involvement and the outputs of the system. It posits the involvement as itself the stabilizing force in the system. And it posits that the mechanism of involvement is conversation about matters in the public realm.

By the conversational account, the **extra**-**votes** idea has not caught on because it would serve no particular purpose in bringing stability to American democracy. The one **vote** that **parents** now receive is sufficient to provide an incentive structure in which they can be caught up in public conversation. But unlike planetary movements, American democracy can be unsettled by normativity that will not be denied. In its normative guise, the liberal vision may thus yet inject life into the **extra**-**votes** idea. Our Neptune may yet appear. Until it does, however, we do well to notice its absence, and see what we might make of it.

Footnotes

a1 Professor of Law, Northwestern University School of Law. I received helpful comments on earlier drafts of this Article from Bob Burns, Gary Lawson, Jane Rutherford, Henry Smith, Mel Durchslag, Daphne Barak-Erez, and Barry Friedman. In addition to similar

comments, I am especially grateful to Judson Miner for patiently helping me work my way through some of the intricacies of apportionment law and practice. I am also grateful to Daniel Polsby for finding the relevant Calvin and Hobbes piece. Finally, I must express special thanks to Ricardo Delfin of the Northwestern Law School class of 2000 for his splendid research assistance.

1 No official count of this population is made. I have extrapolated from 1996 mid-census Census Bureau figures, which show approximately 26% of the entire resident population of 265,000,000--including noncitizens--as under the age of 18, as well as a noncitizen adult population of 13,000,000. See U.S. Bureau of the Census, Statistical Abstract of the United States: 1997, at tbl.14 (117th ed. 1997) [hereinafter Statistical Abstract]; U.S. Bureau of the Census, Percent of Population **Voting** By Citizenship Status and Selected Demographic Characteristics: November 1994, at tbl.3, <http:// www.census.gov/population/socdemo/**voting**/profile/ptable3.txt> (visited on Sept. 3, 1999) (reporting that as of September 1996, the U.S. adult noncitizen population was 13,007,000). In any event, if the number of resident citizen children ineligible to **vote** were added to the total eligible population, the children would represent a very substantial fraction of the whole.

2 The Twenty-Sixth Amendment of the United States Constitution now forbids withholding the **vote** "on account of age" from those 18 and older. U.S. Const. amend. XXVI. Presumably states remain free to lower the age of suffrage below 18, but as of 1988 at least, no state had done so. See Thompson v. Oklahoma, 487 U.S. 815, 839-40 (1988). The state determinations then govern for state and many local elections, and for federal elections as well. See U.S. Const. art. I, § 2; U.S. Const. art. II, § 1, cl. 2; U.S. Const. amend. XVII. There may be elections for some local bodies (like school boards or park districts) where children are allowed to **vote**, but I have not encountered references to any. Children do, of course, **vote** for student councils and the like, or for captains of their school teams, and if the definition of "public official" were extended to such offices, the statement in the text would require qualification.

3 See infra text accompanying notes 70-97.

4 I do not mean to endorse one set of decisions or the other. I only want to suggest that distribution of the **vote** will likely influence public policy choices when the numbers are as large as they are with children. For a discussion of a variety of possibilities regarding public expenditures, see Paul E. Peterson, An Immodest Proposal: Let's **Give** Children the **Vote**, 121 Daedalus 170 (1992). Peterson's discussion is remarkable both for ignoring the differences between young children and older ones, and for ignoring the possibility of affording the **vote** to **parents** on behalf of their children.

5 See, e.g., Barnett v. Daley, 32 F.3d 1196, 1200 (7th Cir. 1994) (Posner, C.J.); Richard A. Posner, Aging and Old Age 151 (1995); Dennis L. Murphy, The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation, 41 Case W. Res. L. Rev. 969, 991 (1991); Peter H. Schuck, Against (and for) Madison: An Essay in Praise of Factions, 15 Yale L. & Pol. Rev. 553, 575 (1997). See also infra notes 79-83 and accompanying text (discussing the concept of virtual representation). But cf. Vita Wallace, **Give** Children the **Vote**, The Nation, Oct. 14, 1991, at 439 (arguing for the enfranchisement of children and dismissing the objection "that children would **vote** the way their **parents** tell them to, which would, in effect, **give** **parents** more **votes**").

6 Assuming that one or more states adopted the **extra-votes** idea, the argument for unconstitutionality would build on existing reapportionment jurisprudence. Gray v. Sanders, 372 U.S. 368 (1963) was the case in which the Supreme Court first used the slogan "one person, one **vote**" that was to encapsulate the conception of political equality embodied in the reapportionment decisions. Id. at 381. Gray involved a challenge to the Georgia "county unit" system for tabulating **votes**, by which **votes** in some counties were weighted more heavily than those in others. Id. In its decision, the Court said that "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal **vote** ...." Id. at 379. Later, in Reynolds v. Sims, 377 U.S. 533 (1964), where the court held that both houses of state legislatures must be apportioned by population, the Court found "[i]t ... extraordinary to suggest that a State could be constitutionally permitted to ... [provide] that certain of the State's voters could **vote** two, five, or 10 times for their legislative representatives, while voters living elsewhere could **vote** only once." Id. at 562. See also Gray, 372 U.S. at 381-82 (Stewart, J., concurring) ("Within a **given** constituency, there can be room for but a single constitutional rule--one voter, one **vote**."). Taking off from this language, the challenge to allowing **parents** to **vote** on account of their children would assert that **voting** is a quintessentially personal activity, so that it is one thing to extend the **vote** to additional classes of people but quite another to allow surrogates in the casting of **votes**. The argument falters, however, if **voting** is not so quintessentially personal, and if the **extra** **votes** are seen as cast for the children rather than for the **parents**. Part III explores the normative framework through which the question of just how "personal" the **vote** need be would likely be joined. See infra Part III.

7 U.S. Const. amends. XV, XIX, XXVI. See also U.S. Const. amend. XXIV (abolishing the poll tax).

8 Posner, supra note 5, at 289.

9 See Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998) (Posner, C.J.) ("It is not as if the proposal were to **give** **extra** **votes** to families with more than the average number of children, a bizarre suggestion in our political culture but one that could be defended with reference to the concept of virtual representation."); Sylvia Ann Hewlett & Cornel West, The War Against **Parents**: What We Can Do For America's Beleaguered Moms and Dads 240-41 (1998) ("Serious consideration should be **given** to the suggestion that **parents** be **given** the right to **vote** on behalf of their children."); Posner, supra note 5, at 289; Robert W. **Bennett**, Democracy As Meaningful Conversation, 14 Const. Comm. 481, 499-500 n.46, 514 (1998); Jane Rutherford, One Child, One **Vote**: Proxies for **Parents**, 82 Minn. L. Rev. 1463 (1998). Professor Jost Pietzcker of the law department of Germany's Bonn University called my attention to the fact that the idea has periodically garnered support in Germany over the years. See Hans Hattenhauer, Uber den Minderjahrigenwahlrecht, 51 Juristen Zeitung 9, 9-16 (1996).

10 This phase can be traced to Shaw v. Reno, 509 U.S. 630 (1993), which came in the wake of House apportionment activity prompted by the 1990 U.S. Census, the first census after the 1982 amendments to the **Voting** Rights Act of 1965. 42 U.S.C. § 1973 (1994). There had, of course, been earlier cases dealing with claims of racially based districting. See, e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960). **Voting** Rights Act litigation before the 1990 U.S. Census and even the 1982 amendments had drawn attention to the disparities among districts between the **voting** population and the total population. See, e.g., United Jewish Orgs. v. Carey, 430 U.S. 144, 164 (1977); Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984). In this most recent phase, courts and litigants have had to juggle an encouragement of majority-minority districting in response to the **Voting** Rights Act and a wariness of such districting in response to constitutional concerns. See, e.g., Bush v. Vera, 517 U.S. 952 (1996). The juggling required is so delicate that details--like the electoral status of children--are becoming ever harder to miss.

11 Both these characterizations are by Chief Judge Posner. See Posner, supra note 5, at 289; Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998).

12 369 U.S. 186 (1962).

13 376 U.S. 1 (1964).

14 377 U.S. 533 (1964).

15 I will use the words "apportionment" and "districting" interchangeably to mean the allocation of population in the designation of electoral districts, though they might well be **given** different meanings, the first the allocation of representatives among the states according to population, and the second the intrastate drawing of district lines. See Michael R. Lavin, Understanding the Census 393 (1996).

16 All states except for Nebraska have bicameral legislatures. The equinumerosity requirement has been extended to local legislatures, as well as many quasi-legislative bodies, most of which are unicameral. See, e.g., Abate v. Mundt, 403 U.S. 182 (1971); Board of Estimate v. Morris, 489 U.S. 688 (1989).

17 See infra text accompanying notes 36-40, 202-06.

18 Both Wesberry, 376 U.S. at 18, and Reynolds, 377 U.S. at 578, picked up on the "one person, one **vote**" language in Gray v. Sanders, 372 U.S. 368, 381 (1963). Wesberry said that "as nearly as practicable one man's **vote** is ... to be worth as much as another's." 376 U.S. at 7. Reynolds repeated the phrase "as nearly as practicable." 377 U.S. at 577. See Karcher v. Daggett, 462 U.S. 725, 782 n.14 (1983) (White, J., dissenting). Reynolds did note that there might be appropriate "distinctions ... between congressional and state legislative representation," but a reading of Reynolds at the time would not, I think, have suggested the rather different paths the Court would travel in the two contexts. See Reynolds, 377 U.S. at 533.

19 Wesberry, 376 U.S. at 18; Reynolds, 377 U.S. at 558 (quoting Gray, 372 U.S. at 381).

20 See Paul Brest & Sanford Levinson, Processes of Constitutional Decision Making: Cases and Materials 1087 (1992); see also John E. Nowak & Ronald D. Rotunda, Constitutional Law 914-15 (5th ed. 1995).

21 There is also ambiguity about what might be meant by the "**voting** population." In practice the reference is usually to those eligible to **vote**-- whether registered or not--but it might instead refer to those registered to **vote**, or perhaps even to those who actually did

vote in some recent election. In any event, I do not intend to probe this particular ambiguity any further. See Gaffney v. Cummings, 412 U.S. 735, 746-48 (1973); Burns v. Richardson, 384 U.S. 73, 92-93 (1966).

22 Another problem I intend to leave to one side is why eligibility to vote is usually defined by residence in a particular geographical location. See Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978); Judith N. Shklar, American Citizenship: The Quest for Inclusion 15 (1991) (discussing early practice in some states of tying eligibility to property without a residence requirement). But see Saphos v. Town of Savannah Beach, 207 F. Supp. 688 (S.D. Ga. 1962) (citing Dunn v. Blumstein, 405 U.S. 330 (1972) ("The requirement of residence then raises the problem of a mandatory period of physical presence before voting 'residence' is established."). Suffice it to say that while nonresidents may be importantly affected by legislative decisions, in the United States these problems of geographical externality have been dealt with to a degree by successively more (geographically) encompassing governmental units, with the more encompassing units able to override the decisions of the less encompassing ones. See Mark V. Tushnet, Red, White, and Blue, A Critical Analysis of Constitutional Law 70-107 (1988).
In addition, there are cases where "residence" for purposes of eligibility to vote is not coincident with the place where a person is counted for purposes of the census, and hence usually for apportionment purposes. The census, for instance, will count college students, most government employees, and the legally incarcerated population that is eligible to vote where it finds them when the census count is taken, while they typically remain eligible to vote in the places they call home. United States citizens residing abroad (other than those who never resided in the United States) are statutorily entitled to vote in federal elections in the states of their most recent domicile. Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff-1 to 1973ff-6 (1994). While these phenomena further distort apportionment counts, they are probably a product of practical considerations rather than of any deep-seeded ambivalence about electoral status. See infra text accompanying notes 98-101. A related problem to which I will turn below, see infra text accompanying notes 130, 215-16, is that of citizens residing in the District of Columbia, as well as overseas territories of the United States, who receive at most nonvoting representation in the House of Representatives, and none in the Senate.

23 I will use the term "felons" as a catch-all for this group, but the definition of disqualifying convictions in fact varies from state to state. See generally, Kathleen M. Olivares et al., The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later, 60 Fed. Probation 10 (1996); Note, The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box," 102 Harv. L. Rev. 1300 n.1 (1989) [hereinafter Harvard Note].

24 I mean to limit the category of "legal aliens" to those residing indefinitely in the United States. It thus does not typically include students, tourists, or diplomats. See T. Alexander Aleinikoff, Citizens, Aliens, Membership and the Constitution, 7 Const. Comm. 9, 10 n.3 (1990). In Skafte v. Rorex, 430 U.S. 961 (1977), the Supreme Court dismissed an appeal from a Colorado decision that there was no denial of equal protection in exclusion of legally resident aliens from the franchise.

25 Many states do not extend electoral disqualification of convicted criminals after sentences have been served. See Olivares et al ., supra note 23, at 11. In states that do prolong disqualification, the definition of disqualifying crimes, the possibilities of reinstatement, and the mechanisms of enforcement vary widely. Id. See also Harvard Note, supra note 23, at 1300; Note, Disenfranchisement of Ex-Felons: A Reassessment, 25 Stan. L. Rev. 845 (1973) [hereinafter Stanford Note].

26 Here too there is great variation among the states. See Note, Mental Disability and the Right to Vote, 88 Yale L.J. 1644 (1979).

27 Wesberry v. Sanders, 376 U.S. 1, 8 (1964).

28 See infra text accompanying notes 149-52.

29 Wesberry, 376 U.S. at 18.

30 See, e.g., id. at 7 ("voters"), 8 ("inhabitants"), 9 ("population"), 11 ("people" and "constituents" (favorably quoting James Wilson)), 13 ("inhabitants"), 14 ("voters" and "inhabitants"), 17 ("citizens" (favorably quoting James Wilson)). See also Reynolds v. Sims, 377 U.S. 533, 557 ("voters"), 558 ("all who participate in the election," "voter," and "person" (favorably quoting Gray v. Sanders, 372 U.S. 368, 379-81 (1963)), 565 ("citizen" and "people"), 567 ("citizen" and "voter"), 577 ("population"), 579 ("population" and "citizen"), 580 ("citizens") (1964). Without displaying any sensitivity to the importance that different definitions of the base might have, the Court in Reynolds said: "[w]e realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." Reynolds, 377 U.S. at 577. And note the shifts within a single paragraph of Justice Black's majority opinion in Wesberry:
It would defeat the principle solemnly embodied in the Great Compromise-- equal representation in the House for equal numbers of people--for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give

some voters a greater voice in choosing a Congressman than others. The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter.
376 U.S. at 14. See also Garza v. County of Los Angeles, 918 F.2d 763, 779-81 (9th Cir. 1990). The Court is occasionally joined in this casual treatment of the difference among people, citizens, voters, and the like, by the most sophisticated of commentators:
Apportionment assigns voters to electoral districts .... [A] citizen placed in one district is simultaneously excluded from all other districts. Moreover, the Constitution's one-person one-**vote** requirement means that including a particular voter within a district demands excluding some other voter in order to equalize the number of persons in each district.
Samuel Issacharoff & Pamela S. Karlan, Standing and Misunderstanding in **Voting** Rights Law, 111 Harv. L. Rev. 2276, 2279 (1998).

31 See Reynolds, 377 U.S. at 545-551; Wesberry, 376 U.S. at 2, 7-8; Baker v. Carr, 369 U.S. 186, 192, 253-58 (1962) (Clark, J., concurring).

32 Immigration & Naturalization Serv., Statistical Yearbook of the Immigration & Naturalization Serv., 1996-97 (1997).

33 U.S. Bureau of the Census, U.S. Dep't of Commerce, 1990 Census of the Population: Persons of Hispanic Origin in the U. S. 3-4 (1993). See supra note 1 (providing an even softer estimate that put the alien population at 13,000,000 in 1996).

34 Andrew L. Shapiro, Note, Challenging Criminal Disenfranchisement Under the **Voting** Rights Act: A New Strategy, 103 Yale L.J. 537, 540 n.17 (1993).

35 There are also approximately 4,500,000 United States citizens in the District of Columbia and overseas American territories, of whom perhaps 3,000,000 are potentially eligible voters. See Lavin, supra note 16, at 367. Unlike those made ineligible in various states, these citizens in United States territories may elect some officials, while they have no **voting** representation in the Congress. I discuss some of the problems created by their partial ineligibility below. See infra notes 115-21, 130-31 and accompanying text. There is also a population of perhaps 6,000,000 American citizens residing more or less permanently in foreign countries who are not typically counted for apportionment purposes but may **vote** in the states of most recent residence. See Jamin B. Raskin, Is this America? The District of Columbia and the Right to **Vote**, 34 Harv. C.R.-C. L. L. Rev. 39 (1999).

36 Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969) (emphasis added).

37 Karcher v. Daggett, 462 U.S. 725, 732 (1983); Chapman v. Meier, 420 U.S. 1, 23 (1975) ("[In] congressional districting ... population equality appears now to be the preeminent, if not the sole, criterion on which to adjudge constitutionality."). The evidence in the racial districting case of Bush v. Vera, 517 U.S. 952 (1996), apparently showed that "[e]very one of Texas' 30 congressional districts contains precisely 566,217 persons." 517 U.S. at 1013 n.10 (Stevens, J., dissenting).

38 See Mahan v. Howell, 410 U.S. 315 (1973); Abate v. Mundt, 403 U.S. 182 (1971).

39 See Connor v. Finch, 431 U.S. 407 (1977); Gaffney v. Cummings, 412 U.S. 735, 742 (1973). But cf. Brown v. Thomson, 462 U.S. 835 (1983) (upholding apportionment of state House of Representatives with a maximum deviation of 89% because of constitutional and historical guarantees that each county would have at least one seat). This use of "rationality" is a reversal of the usual approach. In apportionment law, the Court provides the norm of equality and the state must provide "rational" justification for deviation from that norm. More typically the state can choose any norm, subject to the requirement that the choice be "rational." Cf. Robert W. **Bennett**, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 Cal. L. Rev. 1049 (1979).

40 Wesberry v. Sanders, 376 U.S. 1, 21 n.4 (1964) (Harlan, J., dissenting). Justice Brennan's opinion in Baker discusses the use by Tennessee of various apportionment bases. Baker v. Carr, 369 U.S. 186, 189-90 n.4 (1962). The studied avoidance is perhaps most apparent in Gaffney, where the Court discusses the dramatic effect that the inclusion of nonvoters in the apportionment base can have in congressional apportionment but then proceeds to other matters without pausing for reflection. 412 U.S. at 746-48.

41 See Garza v. County of Los Angeles, 918 F.2d 763, 781 (9th Cir. 1990) ("Absent significant demographic variations in the proportion of **voting** age citizens to total population, apportionment by population will assure equality of **voting** strength and vice versa."). I say "need not" rather than "will not" because it is conceivable--barely--that the inclusion decision would have some symbolic significance that would then feed back to the politics of districting.

42 Gaffney, 412 U.S. at 746-47.

43 Compiled from U.S. Bureau of the Census, supra note 1.

44 Compiled from U.S. Immigration & Naturalization Service, Statistical Yearbook of the Immigration & Naturalization Service, 1996-98 (1997).

45 See Garza, 918 F.2d at 774 ("Basing districts on voters rather than total population results in serious population inequalities across districts."); Karcher v. Daggett, 462 U.S. 725, 771-72 (1983) (White, J., dissenting); Gaffney, 412 U.S. at747. The Census Bureau does not compile data on the citizen population in congressional districts, but one authority proposes the data on foreign-born residents--which is available--as suggestive. This varies from under 2% to over 50%. See Thomas Alexander Aleinikoff, The Census and Undocumented Aliens: A Constitutional Account, 33 Mich. L. Quad. nn. 26, 30 (1989). In 1992, Takoma Park, Maryland extended the right to **vote** in local elections to legal resident aliens after discovering that some of its "wards had far more eligible voters than others because some contained a large alien population." Jamin B. Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage, 141 U. Pa. L. Rev. 1391, 1463 (1993).

46 Formal ability at least. In reality, the "ability ... to influence electoral outcomes," even by **voting**, depends on a great deal besides the number of other voters in the district. See infra text accompanying notes 210-11. But whether or not the decision makes a difference to a voter as an individual, it may well make a difference to him as a member of some group of voters in its collective effort to have its electoral way.

47 In WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964), a companion case to Reynolds v. Sims, 377 U.S. 533 (1964), the Court reviewed apportionment of the New York legislature that was based on population counts of United States citizens, excluding aliens. While finding unconstitutional malapportionment, the Court raised no explicit question about this aspect of New York's approach, though through its choice of words ("undervaluation of the weight of the **votes** of certain of a State's citizens"), it suggested that the citizen base was permissible. WMCA, Inc., 377 U.S. at 653 .

48 384 U.S. 73 (1966).

49 Id. at 92; see Gaffney, 412 U.S. at 746-47. In Burns, the Court insisted that Reynolds and its companion cases had "carefully left open the question of what population was being referred to." Burns v. Richardson, 384 U.S. 73, 91 (1966). There is no reason to think that the Court views the congressional apportionment problem any differently in this respect under the Article I language that is said to govern in that context.

50 42 U.S.C. § 1973(b) (1994).

51 See Johnson v. De Grandy, 512 U.S. 997 (1994). A failure of proportionality is not dispositive of illegal "dilution" of minority **voting** power. For if the minority members are geographically dispersed, they can make no claim that a minority district should have been formed with torturous district lines. The **Voting** Rights Act explicitly provides that it does not "establish a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1994). Indeed, any such racial gerrymandering becomes constitutionally suspect. See Bush v. Vera, 517 U.S. 952 (1996).

52 See Johnson, 512 U.S. at 1013; City of Rome v. United States, 446 U.S. 156, 186 n.22 (1980); Connor v. Finch, 431 U.S. 407, 427 n.2 (1977); Beer v. United States, 425 U.S. 130, 141 (1976). But see Daly v. Hunt, 93 F.3d 1212, 1227 (4th Cir. 1996) (no reason to believe that **voting** age population is significantly better than total population).

53 Or perhaps to **voting** age population, citizen and noncitizen alike. In Johnson, the Court upheld districting that provided minority districts proportionate to "**voting**-age numbers." 512 U.S. at 1014. But it sidestepped an opportunity definitively to decide "which characteristics of minority populations (e.g., age, citizenship) ought to be the touchstone for proving a dilution claim and devising a sound remedy." Id. at 1008; see also id. at 1017 n.14, 1021 n.18. In Shaw v. Reno, while allowing a constitutional claim of racial gerrymandering to proceed, the Court raised no question about the state's use of **voting** age population in its initial judgment of proportionality. 509 U.S. 630, 634 (1993). See infra notes 96-123 and accompanying text (discussion of differentiating among those groups ineligible to **vote** on the basis of "entitlement to political regard").

54 Cf. Johnson, 512 U.S. at 1021 n.18.

55 See, e.g., Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990); Barnett v. City of Chicago, 141 F.3d 699 (7th Cir. 1998).

56 See, e.g., Aide Cristina Cabeza, Total Population: A Constitutional Basis for Apportionment Reaffirmed in Garza v. Los Angeles County, 13 Chicano-Latino L. Rev. 74 (1993); M. Elaine Hammond, Comment, Toward A More Colorblind Society?: Congressional Redistricting After Shaw v. Hunt and Bush v. Vera, 75 N.C. L. Rev. 2151 (1997).

57 See Barnett v. Daley, 32 F.3d 1196, 1198 (7th Cir. 1994).

58 U.S. Const. amend XIV, §2. The phrase "Indians not taxed" apparently never had any very precise meaning and was long interpreted to mean simply all those Native Americans who did not live in white communities. See Hyman Alterman, Counting People: The Census in History 293 (1969). In any event, all Native Americans are now counted, so that this part of the apportionment formula is irrelevant. See L. Scott Gould, The Consent Paradigm: Tribal Sovereignty at the Millennium, 96 Colum. L. Rev. 809, 902 n.69 (1996); Indian Citizenship Act of 1924, 8 U.S.C. §1401(b) (1994).

59 See The Federalist No. 54 (James Madison). But see infra note 60 discussing the conflict surrounding illegal aliens.

60 See generally Alterman, supra note 58. There is a lively contemporary dispute about whether illegal aliens--a category that was essentially unknown at the time of the Constitution--are to be counted in the decennial census and then in interstate apportionment of the House. For opposed views on this question, see Murphy, supra note 5; Aleinikoff, supra note 45.

61 See Garza v. County of Los Angeles, 918 F.2d 763, 784 n.10 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part); cf. Wesberry v. Sanders, 376 U.S. 1, 26-27 (1964) (Harlan, J., dissenting). Compare Reynolds v. Sims, 377 U.S. 533, 574-75 (1964) (discussing apportionment of the United States Senate).

62 See Frank H. Easterbrook, Abstraction and Authority, 59 U. Chi. L. Rev. 349, 366 (1992); Raymond T. Diamond, No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution, 42 Vand. L. Rev. 93, 108 n.94 (1989).

63 See United States Dep't of Commerce v. Montana, 503 U.S. 442 (1992).

64 Congress has authority to preempt the states with regard to the "manner" of holding elections for Senators and Representatives. U.S. Const., art. I, § 4, cl. 1. In exercise of this power Congress now requires that elections for the House be held in single-member districts. 2 U.S.C.A. § 2c (1997). The result is that intrastate House apportionment is required in all states entitled to more than the constitutional minimum of one House member.

65 See infra notes 97-100 and accompanying text.

66 In an insightful dissent in the racial **voting** rights decision in Garza, Judge Kozinski concludes that Burns can best be understood as requiring that apportionment be based on **voting** rather than total population. 918 F.2d at 778. He continues:
The only other way to explain the result in Burns is to assume that there is no principle at all at play here, that one person one **vote** is really nothing more than a judicial squinting of the eye, a rough-and-ready determination whether the apportionment scheme complies with some standard of proportionality the reviewing court happens to find acceptable.
Id. at 784. I offer a different sort of explanation, see infra Part IV.C.2, but Judge Kozinski well sensed the internal tension in the Supreme Court's approach to apportionment.

67 See generally Robert A. Dahl, Democracy and Its Critics 24-30 (1989); Dennis C. Mueller, Constitutional Democracy 47-48 (1996); Gordon S. Wood, The Creation of the American Republic 46-90, 1776-87 (1969); Frank I. Michelman, Conceptions of Democracy in American Constitutional Argument: **Voting** Rights, 41 Fla. L. Rev. 443 (1989).

68 Each of these terms is used in common and scholarly parlance with quite different shades--or even colors--of meaning. In the case of "liberal," the problem is especially acute, since it can include either deep skepticism of, or essential trust in, the possibility of constructive government action. For those familiar with recent writing on the "republican" revival, the meanings I **give** to the terms may be fit for quarreling but should not seem awkward. See, e.g., Michelman, supra note 67; Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988). Still, there is the possibility of confusion. After agonizing a bit, I stuck with these terms because they do capture the distinction I want to highlight, and because I could not do better. I would only ask the reader not to read more into the terms than the constrained meanings I assign them.

69 See Dahl, supra note 68, at 284 ("Ideals ... should ... be relevant to human possibilities.").

70 The Senate was, of course, originally chosen by the state legislatures. See U.S. Const., art. I, § 3, cl. 1. The Seventeenth Amendment now requires popular election.

71 This is, of course, an extension of one of Madison's argument for an extended republic. See The Federalist No. 10. For additional possibilities for republican tinkering with the details of the electoral system, see infra notes 82-83 and accompanying text.

72 See infra text following note 159 and accompanying notes 206-11.

73 Probably the most prominent early American exponent of such a view was John Adams. In a letter to John Penn, for instance, Adams said that a legislature "should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them." Letter From John Adams to John Penn, quoted in Hannah Fenichel Pitkin, The Concept of Representation 60 (1967).

74 See generally Wood, supra note 67, at 53-65; Dahl, supra note 67, at 24-28.

75 John Adams held, for instance, that propertyless males, like wives and children have no "judgment of their own [for] they talk and **vote** as they are directed by some man of property ." Letter From John Adams to James Sullivan, quoted in Robert J. Steinfeld, Property and Suffrage in the Early American Republic, 41 Stan. L. Rev. 335, 341 (1989). Adams is just one example of important early figures who sounded liberal notes along with republican ones. See supra note 73.

76 Alterman, supra note 58, at 168.

77 Id. at 169, 178.

78 See Wood, supra note 68, at 102; Frank I. Michelman, Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 54 (1986); cf. Dahl, supra note 67, at 289.

79 Edmund Burke, Speech to the Electors at Bristol (Oct. 13, 1774), quoted in Wood, supra note 67, at 175.

80 Letter From Edmund Burke to Sir Hercules Langriche, in Burke's Politics: Selected Writings and Speeches on Reform, Revolution and War 494 (Ross J.S. Hoffman & Paul Levack eds., 1949).

81 See Pitkin, supra note 73, at 173.

82 Compare Dissent of the Minority of the Pennsylvania Convention, in I The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification 526, 548-49 (Bernard Bailyn ed., 1993) [hereinafter The Debate] (desirability of a "short period" of legislative service) and "Cato" V, Can An American Be a Tyrant? On the Great Powers of the Presidency, the Vagueness of the Constitution, and the Dangers of Congress, in The Debate at 399, 401 ("safe democratic principles of annual [elections]") with "Americanus" V, On Montesquieu, A System Monger Without Philosophic Precision and More on the Erors of "Cat," in The Debate, supra at 487, 490 (longer terms afford "the members more time to acquire a knowledge of public affairs competent to the station they fill") and "A Citizen of America," An Examination into the Leading Principles of the Federal Constitution, in The Debate, supra, at 129, 140 (longer terms of senators will allow them "gradually [to] lose their partiality, [and] generalize their views, and consider themselves as acting for the whole").

83 Compare The Federalist No. 52 (James Madison) (House to have "an immediate dependence on, and an intimate sympathy with, the people") with The Federalist No. 63 (James Madison) (a "well-constructed Senate ... may be sometimes necessary as a defense to the people against their own temporary errors and delusions"). The Constitution also provides that members of the House of Representatives must be twenty-five years of age (and seven years United States citizens), while Senators are required to be thirty (and citizens for nine years). U.S. Const., art. I, § 1, cl. 2; § 3, cl. 3. These differences too might be thought to relate to the different conceptions of their roles.

84 Wood, supra note 67, at 188.

85 See U.S. Const., amend. XVII.

86 The President is chosen by what has come to be called the "electoral college," consisting of electors from each state appointed "in such manner as the legislature thereof may direct." U.S. Const., art. II, § 1, cl. 2. Over time, all the states have come to use popular election as the manner of "appointment." See Lawrence D. Longley & Neal R. Peirce, The Electoral College Primer 24 (1996).

87 U.S. Const., art. II, § 2, cl. 2.

88 See, e.g., Shklar, supra note 22, at 2.

89 The Federalist No. 10 (James Madison).

90 Reynolds v. Sims, 377 U.S. 533, 565 (1964).

91 See Michelman, supra note 67, at 472. Actually Professor Michelman strives mightily in that article to find republican themes in a second generation of Supreme Court apportionment decisions, where the Court grappled with questions of the franchise in selection of representatives for local governmental units that deal with a limited range of subjects. Id. at 458-85. But even in that relatively congenial context, republican themes are not easy to find in what the Court had to say. In the end, Michelman concedes that "[i]t is a hypothesis I offer rather than a claim." Id. at 486 (italics in original). Cf. Gerald L. Neuman, "We Are the People": Alien Suffrage in German and American Perspective, 13 Mich. J. Int'l L. 259, 321-22 (1992).

92 See Lawrence D. Brown, Jr., Black on Representation: A Question, in Representation: Nomos X 144, 148, (J. Roland Pennock & John W. Chapman eds., 1968).

93 See, e.g., Michael J. Sandel, Democracy's Discontent: America in Search of a Public Policy (1996); Michelman, supra note 68; Sunstein, supra note 68.

94 See supra Part III.C.

95 See supra Part III.B.

96 Cf. Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998) ("[t]he dignity and very concept of citizenship are diluted if noncitizens are allowed to **vote** either directly or by the conferral of additional **voting** power on citizens believed to have a community of interest with the noncitizens").

97 The majority opinion in Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), seems to reach this conclusion. Garza involved a **Voting** Rights Act discrimination claim in districting for the Los Angeles Board of Supervisors, brought on behalf of an Hispanic minority. Id. at 765. The claim turned on whether the Hispanic population was sufficiently large to support a district of its own. Id at 770. The court held that the Hispanic proportion of the total population was the basis on which to evaluate that question. See id. at 774. In doing so, the court made clear that total population was also the preferred apportionment base for two reasons. First, if **voting** population were used, then people in more populous districts "will suffer diminishing access to government," including the "right to petition their government for services and to influence how their tax dollars are spent." Garza, 918 F.2d at 775. And second, "[a]dherence to a population standard ... is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government." Id. (citing Colderon v. City of Los Angeles, 481 P.2d 489, 493 (1971)). The first of these points may represent solicitude for the **voting** population of the district, on the assumption that even an ineligible population assumed to have no entitlement to regard would in fact impose burdens on legislators, thereby diminishing the ability of those legislators to serve voters. In the liberal spirit of the apportionment decisions, that part of the problem would seem better dealt with by enhancing the staffs of overburdened legislators, rather than the **voting** power of their "real" constituents. The court's second point, however, assumes that those ineligible to **vote** are nonetheless entitled to a "voice in government."

98 See Gaffney v. Cummings, 412 U.S. 735, 746 (1973) ("The United States census is more of an event than a process."). Nor is the census count very precise from the start. See Marie Cocco, Now that I'm in GOP-Land, I'm Sure to Count, Newsday, Sept. 3, 1998, at A55.

99 Unless perhaps the base were registered voters, for which fairly precise numbers should be available.

100 See supra Part III.B.

101 "[The] citizenry is the country and the country is its citizenry." Afroyim v. Rusk, 387 U.S. 253, 268 (1967). See also Minor v. Happersett, 88 U.S. (21 Wall.) 162, 165-66 (1874).

102 See, e.g., Plyler v. Doe, 457 U.S. 202 (1982); Aleinikoff, supra note 25, at 18.

103 See supra text accompanying notes 94-95.

104 See Murphy, supra note 5. One commentator has suggested that illegal resident aliens be allowed to **vote**. See Kevin R. Johnson, Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement, 1993 BYU L. Rev. 1139, 1220-23.

105 See Federation for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 573-74, 572 n.12 (D.D.C. 1980); Murphy, supra note 6, at 993-95.

106 Among the reasons offered in Garza for the conclusion that the entire population of a district is entitled to political regard is that the entire population has "a right ... to influence how their tax dollars are spent." 918 F.2d 763, 775 (9th Cir. 1990). But see Steven A. Camarota, Does Immigration Harm the Poor? 133 Pub. Interest 23 (1998). As the passage from Garza suggests, productivity does not necessarily distinguish legal from illegal aliens, though any contribution of the latter must presumably be diminished at least by immigration enforcement costs they impose.

107 See Jeri Clausing, Bill to Increase Work Visas for Foreigners Gets New Lease on Life, N.Y. Times, Oct. 14, 1998, at C3; John H. Cushman, Jr., An Agreement to Increase Visas, N.Y. Times, Sept. 24, 1998, at A25; Michael D. Patrick, Reduction in Recruitment, N.Y. L. J., May 14, 1998, at 3.

108 See 8 U.S.C. § 1427(a)(1) (1994) (five-year residence required for application for citizenship).

109 See, e.g., Sugarman v. Dougall, 413 U.S. 634 (1973); Aleinikoff, supra note 24, at 18; Carl E. Goldfarb, Allocating the Local Apportionment Pie: What Portion for Resident Aliens?, 104 Yale L.J. 1441, 1451 (1991) (assuming that resident aliens are entitled to "have their needs and interests taken into account."); Neuman, supra note 91, at 322 n.376 ("Resident aliens have ... routinely been afforded the opportunity to participate in administrative rulemaking procedures, both at the agency [level and in subsequent judicial review].").

110 See Michelman, supra note 67, at 461. There was a time in our history when legal aliens were afforded the **vote** in a significant number of American jurisdictions. See Minor v. Happersett, 88 U.S. (21 Wall.) 162, 177 (1874). See generally Neuman, supra note 91, at 292-300; Raskin, supra note 45, at 1397-1417. In a limited number of local jurisdictions, they are accorded the **vote** still, including, for instance, in elections for local school "councils" in Chicago. See 105 Ill. Comp. Stat. 5/34-2.1 (West 1998). Pleas are often heard that their franchise rights be broadened again. See Raskin, supra 45.

111 See Harvard Note, supra note 23, at 1311-12.

112 See id. at 1307-08.

113 See Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978).

114 See Stanford Note, supra note 25; Harvard Note, supra note 23. Justice Marshall's dissent in Richardson v. Ramirez, see 418 U.S. 24, 56, 79-86 (1974), provides a critical examination of the typical justifications offered for the disenfranchisement of ex-felons. In terms of electoral outcomes, the questions raised by disenfranchisement and apportionment treatment of felons and ex-felons are far from academic, since the numbers involved are significant, and members of racial minorities are disproportionately represented in both populations. See Alice E. Harvey, Comment, Ex-Felon Disenfranchisement and its Influence on the Black **Vote**: The Need for a Second Look, 142 U. Pa. L. Rev. 1145, 1153 (1994); Shapiro, supra note 34.

115 Residents of American Samoa are not citizens but rather "American nationals" who owe "permanent allegiance to the United States." 8 U.S.C. § 1101(a)(21), (22) (1994). See GAO Report, U.S. Insular Areas: Application of the U.S. Constitution, OGC-98-5, at 8-9 (1997).

116 U.S. Const., amend. XXIII, § 1.

117 See GAO Report, supra note 115 (for discussion of the overseas territories generally).

118 In addition to the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and American Samoa have **voting** representation in House committees, but not in the actions of the body itself. See 2 U.S.C.A. § 25(a) (West 1997) (District of Columbia); 48 U.S.C.A. §§ 891, 1711, 1731 (West 1987) (Puerto Rico, Guam, the Virgin Islands, and American Samoa). The Northern Mariana Islands has a "representative to the United States" who is not at this point afforded any formal status by the House. See GAO Report, supra note 115, at 15. See also 48 U.S.C.A. § 1801 (West Supp. 1999).

119 See Raskin, supra note 45, at 78.

120 Cf. Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820).

121 See generally Raskin, supra note 45, at 46.

122 See generally Pitkin, supra note 73, at 162.

123 Cf. Barnett v. Daley, 32 F.3d 1196, 1200 (7th Cir. 1994). I see little basis for quarreling with this proposition, for there are many signs of societal concern for children. For instance, one of the most popular versions of Indiana license plates proclaims "kids first." See also Goldfarb, supra note 109, at 1452 (arguing that "[i]ncluding children in the local apportionment base ... is not only desirable but is also probably required constitutionally"); but cf. Rutherford, supra note 9, at 1494. Still, there is a certain awkwardness in much of the evidence that could be adduced, because a great part of the solicitousness of children takes the form of subordination to their **parents**, or, when that mechanism is thought likely to fail, to the state. As just one example of the resulting tension (as well as the basic supposition that children are entitled to regard), here is Justice Powell struggling with a question of the legal prerogatives of adolescent girls in making the abortion decision:
Properly understood ... the tradition of **parental** authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the **parental** role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.
Bellotti v. Baird, 443 U.S. 622, 638-39 (1979).

124 See supra text following note 65.

125 See Barnett v. City of Chicago, 141 F.3d 699, 704 (1998) ("[I]f it is assumed that citizen and noncitizen Latinos have a strong community of interest, then **giving** citizen Latinos **extra voting** power based on the number of noncitizen Latinos **gives** the latter a kind of representation in the political process.").

126 See, e.g., id.

127 See, e.g., Abrams v. Johnson, 521 U.S. 74 (1997).

128 See, e.g., Shaw v. Reno, 509 U.S. 630, 647 (1993).

129 This was Justice Frankfurter's phrase in Colegrove v. Green, 328 U.S. 549, 556 (1946), to characterize the difficult problems the Court would encounter if it engaged questions of intrastate congressional apportionment, as, of course, it eventually did in Wesberry v. Sanders, 376 U.S. 1 (1964).

130 See supra notes 70-71 and accompanying text.

131 For the electoral and apportionment status of American citizens residing permanently in foreign countries, see supra note 22 .

132 See Nancy Goldhill, Ties That Bind: The Impact of Psychological and Legal Debates on the Child Welfare System, 22 N.Y.U. Rev. L. & Soc. Change 295, 300-01 (1996). I dealt with some of these issues in Robert W. **Bennett**, Allocation of Child Medical Care Decisionmaking Authority: A Suggested Interest Analysis, 62 Va. L. Rev. 285, 307-17 (1976).

133 Thus I am puzzled by Chief Judge Posner's choice of words in discussing "virtual representation" of children in Barnett v. City of Chicago, 141 F.3d 699 (7th Cir. 1998). After characterizing the **extra-votes** possibility as "a bizarre suggestion in our political culture," he says that **giving extra votes** to a racial or ethnic group "which happens to have a higher than average number of children .... is not a ridiculous idea." Id. at 704.

134 See supra note 22 . I would not think it necessary for "liberal" sensibilities to allow **parents** to split their **votes** among candidates, but even that should be manageable if it were thought desirable.

135 See U.S. Const., amend. XIV, § 1 ("All persons born ... in the United States and subject to the jurisdiction thereof, are citizens of the United States.").

136 See, e.g., 20 Ill. Comp. Stat. 505/5 (West 1998). There would be a similar problem with assigning **votes** to state officials on behalf of incompetents who are wards of the state. See 405 Ill. Comp. Stat. 5/2 (West 1998).

137 See, e.g., Roger K. Lewis, A Marriage Between D.C. and Maryland Could Be the Start of a Beautiful Relationship, Wash. Post, Sept. 19, 1998, at G8.

138 The stability I have in mind is itself a complex phenomenon. For change is always with us, and indeed stabilizing forces can also be engines of democratic change. Political instability is disorderly political change, as well as its precursors, like threats to produce disorderly political change, violence directed to such change, or even manifest signs of deep dissatisfaction that find no ready avenues toward orderly change. Cf. Mueller, supra note 67, at 201. The American Civil War was a major instance of instability. It radically changed the nature of American democracy, and it was accompanied by both violence and repeated instances of unaccustomed ways of proceeding. The 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, in contrast, produced little actual change in American democracy, though it may have been intended to produce change and might have succeeded had conditions been different. As the violent examples above (and lots of others that might come to mind) suggest, the United States is not without signs of instability, but in comparative terms American democracy must be deemed quite stable. It is the longest lived among major contemporary democracies. This is all the more remarkable, **given** the fact that the United States is populated by an extraordinary variety of racial, religious, and ethnic groups, which heterogeneity is typically thought to make instability more likely. See id. at 263.

139 See Herman Belz, Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era 108-140 (1978).

140 An interesting account can be found in Christine Stansell, The Road from Seneca Falls, New Republic, Aug. 10, 1998, at 26.

141 See generally **Bennett**, supra note 9.

142 See supra Part III.A.

143 Charles E. Lindblom & David K. Cohen, Usable Knowledge 81 (1979).

144 Id.

145 Ronald H. Coase, How Should Economists Choose?, in Essays on Economics and Economists 15, 16-17 (1991).

146 Cf. John Rawls, A Theory of Justice 579 (1971) ("[J]ustification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.").

147 I am in debt to my colleague Mayer Freed for insisting that I be clear about this point.

148 See **Bennett**, supra note 9, at 493-500.

149 See infra note 155 .

150 See generally Robert A. Dahl, A Preface to Democratic Theory 90-123 (1956); James M. Buchanan & Gordon Tullock, The Calculus of Consent 85-96 (1962).

151 See generally Buchanan & Tullock, supra note 150, at 85-96; Mueller, supra note 67, at 153.

152 I leave aside the even more intractable problem of whether the totality of each person's interest in the public policy agenda measured subjectively is what is to be accorded equal weight, or whether "equality" requires adjustment for some "objective" measure of what each individual has at stake.

153 Because it is American democracy we are investigating, I will confine the discussion here to the typical American setting of single-member, geographically defined districts. I will further assume that the representative system has been massaged by the Supreme Court's equinumerosity requirement. Finally, just to simplify matters, I will assume that selection of representatives is a choice between only two candidates. If anything, this should make it more plausible that some form of the equality ideal is within reach.

154 See supra note 73 and accompanying text.

155 The normative appeal of taking issues one at a time is reflected in a variety of rules and practices in the legislative context. These include the fractionation of legislative consideration of issues through the use of committees, limitations of legislation to single subjects, item vetoes for executives, and even the modern movement in favor of term limits for legislators. Some of these are discussed in William N. Eskridge, Jr. & Phillip P. Frickey, Cases and Materials on Legislation 250-61 (2d ed. 1995). Both indicative of and tending to enforce the norm is that any deals struck would not be legally enforceable.

156 This should be qualified in that voters can influence their representatives between elections. See infra text following note 158. That does not, however, greatly disturb the basic reality that voters take their candidates' positions on an all or nothing basis.

157 Indeed, the usual tendency is for districting to lead to overrepresentation of the majority party. See Robert G. Dixon, Jr., Representation Values and Reapportionment Practice: The Eschatology of "One-Man, One-**Vote**," in Nomos X 167, 170, 175, 195 (1968); Daniel D. Polsby, & Robert D. Popper, Ugly: An Inquiry Into the Problem of Racial Gerrymandering Under the **Voting** Rights Act, 92 Mich. L. Rev. 652, 669 (1993).

158 Dixon, supra note 157, at 180. See also Bush v. Vera, 517 U.S. 952, 1003-06 (1996) (Stevens, J., dissenting).

159 I say "at best" in part because even those with interests sufficiently large to justify group activity have an incentive to "free ride" on the activity of others with similar or greater interest. To the extent that such free riding takes place, the interest group will be ineffective at capturing and conveying the interests of the riders.

160 They must clear three hurdles if we count the executive wielding the veto as a "legislative" hurdle.

161 The Virginia Plan, which became something of an initial agenda for the Constitutional Convention, provided that "the National Legislature ought to consist of two branches." 1 The Records of the Federal Convention of 1787, at 20 (Max Farrand ed., 1966).

162 James Madison, who believed that "the facility and excess of law-making seem to be the diseases to which our governments are most liable," argued in Federalist 62 that bicameralism would double "the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient." The Federalist No. 62 (James Madison).

163 As Madison well understood. See id.

164 The Constitution provides that "[r]epresentatives shall be apportioned among the several states." U.S. Const. amend. XIV, § 2 (emphasis added). While this is not entirely explicit, the practice has been, and the intention surely was, as stated in the text.

165 United States Dep't of Commerce v. Montana, 503 U.S. 442, 445 (1992).

166 In Karcher v. Daggett, 462 U.S. 725 (1983), the Court found unconstitutional malapportionment of New Jersey congressional districts where "the population of the largest district [was] less than one percent greater than the population of the smallest district," i.e., 527,472 to 523,798. 462 U.S. at 727-28. The Court was thus a little fast and loose when it said in Wesberry v. Sanders, "one principle was uppermost in the minds of many delegates [to the Constitutional Convention]: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress." 376 U.S. 1, 10 (1964). Even as to interstate districting, and putting aside the realities of "voice" discussed in the text, see supra notes 158-59 and accompanying text, the delegates did not succeed in effectuating such a "principle." In Montana, the Court did say that "it is by no means clear that the facts here establish a violation of the Wesberry one person, one **vote** standard." Montana, 503 U.S. at 443. But that was true only in the sense that the constitutional House apportionment in which each state is entitled to a minimum of one representative but no district may overlap state boundaries makes the goal of "precise mathematical equality," Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969), "illusory for the Nation as a whole." Montana, 503 U.S. at 463.

167 It is entirely possible--and indeed routinely happens even since the reapportionment decisions--that states entitled to multi-member House delegations will have district populations that diverge quite substantially from the national average. In 1990, for instance, by my calculation 15 states (Maine, Rhode Island, North Dakota, South Dakota, Nebraska, Kansas, Delaware, Kentucky, Mississippi, Oklahoma, Montana, Idaho, Wyoming, Colorado, and New Mexico) with a total of 44 representatives, had average district populations that were more than 40,000 people more or fewer than the 572,466 people representing 1/435 of the national apportionment population. See U.S. Bureau of the Census, supra note 1; Lavin, supra note 15, at 367. The Court thus moved too fast in Reynolds v. Sims, when

it proceeded from the correct observation that "only four States have less than 1/435 of the country's total population, under the 1960 census," to the conclusion that "only four seats ... are distributed on a basis other than strict population." 377 U.S. 533, 572 (1964).

168 See generally **Bennett**, supra note 9.

169 See supra note 164 and accompanying text. .

170 Specifically in the elections of 1824, 1876, and 1888. See Longley & Peirce, supra note 86, at 32-34.

171 See id. at 127-53.

172 I have in mind not only formal candidates in the midst of campaigns, but aspirants to the office at any time. There are, of course, other pressures, like the early scheduling of the New Hampshire primary, but the electoral college rules and procedures surely loom large over contests for the American presidency.

173 See supra note 82.

174 See Daniel A. Farber & Philip P. Frickey, Law and Public Choice 21 (1991) (discussing work of Richard Fenno).

175 Even though skeptical of the more extreme claims made about interest group influence, Farber and Frickey would probably not quarrel with this assertion. Id. at 12-21.

176 See supra Part IV.B.2.

177 The text only scratches the surface of the subject, however, for the ability of American democracy to respond in equal measure to the policy preferences or interests of those taken to be entitled to regard is hemmed in by a host of additional constraints. See **Bennett**, supra note 9, at 499-500 n.46.

178 See Farber & Frickey, supra note 174, at 13 (quoting Arthur F. Bentley, The Process of Government 258-59 (1908)).

179 Dahl, supra note 67, at 295.

180 Alexander Bickel, The Least Dangerous Branch 18 (1962). Another commentator in the pluralist tradition, in expressing his skepticism about the usefulness of the Supreme Court's one person, one **vote** apportionment standard, put it this way: "in the complex politics of group bargaining and shifting temporary majorities that we actually have in the United States, inequalities in **voting** strength may contribute in [sic] the over-all equality of all participants in the political process as a whole." Martin Shapiro, Law and Politics in the Supreme Court 249 (1964).

181 This time speaking in his own voice, Robert Dahl says that the institutions of democracy "make it unlikely ... that a government will long pursue policies that deeply offend a majority of citizens." Dahl, supra note 67, at 223. See also Ian Shapiro, Three Fallacies Concerning Majorities, Minorities, and Democratic Politics, in Nomos XXXII 79, 108 (John W. Chapman & Alan Wertheimer eds., 1990) ("[P]luralism was thought to distribute political satisfaction ... widely ... [so that no] particular group will lose so often as to have no commitment to the system and nothing to lose but its proverbial chains.").

182 See supra note 69 and accompanying text; Schuck, supra note 5, at 564.

183 Cf. Chapman v. Meier, 420 U.S. 1, 15-16 (1974) ("[W]hen candidates are elected at large, residents of particular areas within the district may feel that they have no representative specially responsible to them.").

184 See infra notes 187-88 accompanying text.

185 This is so even apart from the concentration on personality and peccadillo of public officials. In a recent congressional race in Kentucky, for instance, stock car racing was reported to demand a lot of the attention of the candidates and the electorate. See B. Drummond Ayers, Jr., A Fast-Track Battle of a Different Kind, N.Y. Times, July 20, 1998, at A20.

186 See generally Cass R. Sunstein, The Partial Constitution (1993).

187 Cf., e.g., David R. Mayhew, Congressional Representation: Theory and Practice in Drawing the Districts, in Reapportionment in the 1970s, at 249, 257 (Nelson W. Polsby ed., 1971) (asking "[w]hat is wrong ... with having at least some congressmen ... who apparently 'speak for' overwhelming majorities of their constituents?").

188 I return to this possibility in an attempt to integrate the Supreme Court's apportionment jurisprudence into a conversational picture of American democracy. See infra text accompanying notes 206-09.

189 See Mueller, supra note 67, at 316; Akhil Reed Amar, Choosing Representatives by Lottery **Voting**, 93 Yale L.J. 1283 (1984). Hannah Pitkin discusses this idea in Pitkin, supra note 73, at 73-75.

190 See infra note 73 and accompanying text .

191 See **Bennett**, supra note 9, at 511-30.

192 U.S. Const., art. I, § 3, cl. 1.

193 See George H. Haynes, 1 The Senate of the United States 96-117 (1938).

194 See supra note 83 and accompanying text.

195 See supra notes 153-59 and accompanying text.

196 House districts in those states entitled to only a single representative for a protracted period enjoy a similar advantage. Without elaborating on the reasons, Justice Harlan noted the importance of stable district lines in his Reynolds v. Sims dissent. See 377 U.S. 533, 565 (1964) (Harlan, J. dissenting).

197 Bill Marshall has pressed me on the question of whether the United States would be more stable if there were no House of Representatives, or perhaps if the allocation of **voting** power among the states in the House approximated that of the Senate, with permanent--and hence stable--district lines within states. I cannot do justice to the question here, but I would think of the bicameralism and the malapportionment questions as quite distinct. The Senate without a House of Representatives would raise a danger that substantial segments of the population, particularly in populous states, would come to feel that nobody was talking their language. Neglected segments might get little useful information from their Senators and, partly in consequence, resist being drawn into a conversational relationship. See supra text accompanying note 188. Bicameralism, with the two chambers chosen in quite different ways, is no guarantee against such alienation, but it does enrich the conversational mix. At the present time, for instance, the smaller size of House districts may stimulate more conversation with pressing informational content about things of local importance. That may in turn make it easier for constituents to develop a sense of relationship, even with Senators with whom they often disagree. The hypothesized bicameral realignment would likely retain much of this conversational potential.

198 Bickel, supra note 180, at 16. Bickel explained that,
[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it .... [This] is the reason the charge can be made that judicial review is undemocratic.
Id. at 16-17.

199 See **Bennett**, supra note 9, at 518 n.87.

200 See id. at 530-32.

201 384 U.S. 73 (1966); see supra notes 47-49 and accompanying text.

202 See supra text accompanying note 38.

203 See Karcher v. Daggett, 462 U.S. 725, 780-82 (1983) (White, J., dissenting).

204 In Wesberry v. Sanders, the Court relied on Article I's requirement that the House of Representatives be selected "by the people of the several states." 376 U.S. 1 (1964). This could well have been taken simply as language that contrasted with the original provision for selection of Senators "by the legislature[s from each state]" and carried no special implications for apportionment. Reynolds v.

Sims, in contrast, rested on the Fourteenth Amendment's Equal Protection Clause. 377 U.S. 533 (1964). See supra notes 13-18 and accompanying text.

205 See Federation for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 577 (D.D.C. 1980); supra notes 164-67 and accompanying text.

206 369 U.S. 186 (1962).

207 369 U.S. at 258-59 (Clark, J., concurring).

208 377 U.S. 533, 543 (1964).

209 Cf. Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990).

210 See Polsby & Popper, supra note 157.

211 See Karcher v. Daggett, 462 U.S. 725, 777 (1983) (referring to the "patina of respectability for the equipopulous gerrymander") (White, J., dissenting).

212 A similar point could be made about a conversational tradeoff between homogenous and heterogeneous districts. The former may foster some sorts of conversational involvement by allowing the great bulk of a district's population to identify with the representatives. But the latter will be associated with a more competitive political environment and hence a greater incentive on the part of candidates to communicate with even marginal voters.

213 See Baker v. Carr, 369 U.S. 186, 258 (1962). Neither really does much to impede a high degree of self-protective manipulation by incumbents. See also Polsby & Popper, supra note 157, at 669; Karcher v. Daggett, 462 U.S. at 740; Bush v. Vera, 517 U.S. 952, 964 (1996).

214 During the nineteenth century, a number of states excluded paupers from the franchise. See Samuel Issacharoff et al., The Law of Democracy 31 (1998). And more recently, the number of states permanently disenfranchising some ex-felons appears to have increased slightly between 1986 and 1996 (from eleven to fourteen). See Kathleen M. Olivares et al., The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later, 60-SEP Fed. Probation 10, 11 (1996). One 1989 count came up with fifteen states that permanently disenfranchise some ex-felons. See Harvard Note, supra note 23. There may well have been other perturbations over the years within states, either in their formal requirements, or in the vigor of their enforcement efforts in protecting **voting** rights for certain groups.

215 See supra notes 101-23 and accompanying text.

216 See Amber L. Cottle, Comment, Silent Citizens: United States Territorial Residents and the Right to **Vote** in Presidential Elections, 1995 U. Chi. Legal F. 315, 327-28 (1995).

217 See supra text accompanying note 34.

218 See Richardson v. Ramirez, 418 U.S. 24, 83-85 (1974) (Marshall, J., dissenting).

219 Even without the added **votes** under discussion, there is a "paradox" of **voting** by **parents** (as well as by any other voters), **given** the extreme unlikelihood of any single voter determining the outcome of an election in a district of any appreciable size. On the paradox of **voting**, see generally Dennis C. Mueller, Public Choice 120-24 (1979). In a large district the chances would not become significant even with two or three **votes**. **Parents** and others do, of course, exhibit such "paradoxical" behavior, but the reasons that impel them to do so--a sense of "civic duty" or of participation with others in the enterprise of governance--seem likely to be independent of the number of **votes** they might cast, at least in the range we are considering. See **Bennett**, supra note 9, at 522-23.

220 Some support for the Amendment came from people who hoped it would help "defuse youthful alienation and unrest." See American Bar Assoc., Juvenile Justice Standards Project, Standards Relating to Rights of Minors, § 1.1, Commentary, at 17 (1977).

221 See supra notes 181-82 and accompanying text.

222 See supra note 187 and accompanying text.

223 See supra text accompanying note 182.

224 Coase, supra note 145, at 16-17.

225 See John Ferejohn & Debra Satz, Unification, Universalism, and Rational Choice Theory, in The Rational Choice Controversy 71, 72 (Jeffrey Friedman ed., 1996).

226 The story is engagingly told in Ivars Peterson, Newton's Clock: Chaos in the Solar System 99-119 (1993)

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