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WHAT HAS THE SUPREME COURT TAUGHT?

A criticism of the United States Supreme Court by way of a critique of Lance v. The Board of Education of Roane County.

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Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.¹

The subway fare in New York City was recently raised to thirty cents. Incensed citizens immediately declared they would go to court and have the increase declared unconstitutional.² “Unconstitutional” and “constitutional rights” have become the watchwords of political protestors and reformers. Moreover, their political forum is often a court of law. Who taught the nation this rhetoric, this mode of action, and this attitude toward law, law reform, and politics? The Supreme Court of the United States. Has the Court deliberately taught this doctrine? No, nor is it apparently even conscious of what it has unwittingly done.

It is important to remember that, the Court is, was intended to be, and ought to be an important, even vital, teacher in our democracy.³ However, this traditional “teaching”⁴ is a conscious attribute of its great power of judicial review — the power to review and override in the name of the Constitution some decisions of those branches of government representing the immediate will of the people. But in a subter more pervasive and ultimately more potent

¹Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
²N.Y. Times, Jan. 6, 1970, at 37, col. 5 (city ed.).
³In Judge Wyzanski’s felicitious phrase the Court is “teacher to citizenry.” Wyzanski, Constitutionalism; Limitation and Affirmation, in GOVERNMENT UNDER LAW 473, 485-486 (A. Sutherland ed. 1956).
⁴For a discussion of the general history, probable “original intent” of the framers, and early practice of this judicial function see, Lerner, The Supreme Court as Republican Schoolmaster, 1967, SUPREME COURT REVIEW 127.
manner, the Court, like the political branches Justice Brandeis was speaking of, teaches by its *example*. This example is the Courts' activity seen as a whole, that is as the publicly-visible pattern of its more salient holdings, rather than as fragmented into individual holdings or their rationale. By this example the Court teaches attitude toward the *idea* of law in a constitutional democracy. By this example it teaches the lower courts their role as decision makers in a democracy. It teaches political leaders their role in constitutional policy making, i.e. in policy touching the heart of what we are as a people. And it teaches all of us whom we must persuade if desired policy is to be realized.

Part I of this article examines in detail one particular result of the Supreme Court's teaching — a recent constitutional decision by the West Virginia Supreme Court of Appeals. In Part II** of this article, a more general examination of the Court's recent activity, is undertaken in order to develop the thesis suggested by the critique of the West Virginia case that the tone set by the example of the Court of the recent past is inimical to both the vital function of the Court as a guardian-teacher of fundamental American ideals and to the political health of a democracy.

**Lance v. Board of Education of Roane County**

In 1966, the people of West Virginia were asked (by referendum) to amend the state constitution in order to allow local taxing units to lift the constitutional maximum limits on *ad valorem* property taxes by simple majority vote of its electors instead of by a 60% majority vote. Similarly, West Virginians were asked to amend the constitution in order to allow local units to incur bonded indebtedness redeemable from property taxes by simple majority instead of by a three-fifths majority. Both amendments were offered to facilitate taxing to support public schools. This was to most a laudable purpose and to many these were wise amendments. Some,

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**Part II will appear in the spring edition of the Law Review.**


"6 W. VA. CONST. art. X., §§ 1 and 10.

7 W. VA. CONST. art., § §§ 8 and 10.

8 Judge Haymond in dissent in Lance v. Board of Education, 170 S.E.2d 783, 796 (W. Va. 1969) stated: "I favor all possible and proper aid to education and, if I had been eligible to vote in Roane County, I would have voted to authorize the issuance of the bonds . . . ."

170 S.E.2d (W. Va. 1969)."
however, have criticized property taxes as an unfair and even as a regressive form of raising revenues. The people of West Virginia chose not to adopt the amendments by a majority of 6341.

In 1969, the Supreme Court of Appeals of West Virginia at the behest of several litigants ordered such 60% majority limitations out of the constitution, in effect amending the constitution to allow what the people had recently said they would not allow.

AND HOW SHOULD THEY PRESUME?

How could a court of law, a judicial tribunal, presume to rewrite, contrary to the polity's recently manifested will, the law as to how and when certain nondiscriminatory taxes which the people must pay, will be levied? The court "presumed" because it felt authorized, even compelled, by certain recent United States Supreme Court decisions that held that suits to compel states to reapportion their legislatures on a basis more compatible with equal representation of population were fit for federal courts to decide. Since the West Virginia court decided on the merits that this suit was analogous to the reapportionment cases and therefore controlled by them, it gave cavalier treatment to the threshold question of justiciability. Thus the Supreme Court had taught them to presume. But even assuming that Baker v. Carr and progeny are analogous to Lance on the merits, certain palpable surface differences might have alerted the court to examine more carefully the much criticized Baker mutation of the political question doctrine that had before Baker prevented federal courts from hearing such suits.

In the first place, Lance was not a federal case, and although the Supreme Court has generally admonished state courts to lend a

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14By "surface differences" is meant differences that are plain on the face of the case without probing extensively into the merits. The phrase is not synonymous with superficial differences. Rather, surface differences are those that are plain, palpable, salient - those that a layman would immediately see but that a lawyer schooled in the subtle art of analogical thinking might pass over as merely superficial.
hand in the surprisingly successful experiment of reapportionment, it did not thereby convert a principle of federal court jurisdiction, or the proper exercise thereof, into one controlling state court jurisdiction. That question is one solely for the state court to decide. The declination of jurisdiction would not have prevented federal court adjudication but it might have put the case in a different posture when and if it ultimately reached the Supreme Court.

Second, and more to the merits of the justiciability or "political question" issue, is the distinct difference between Baker and Lance. In Baker v. Carr the constitutional challenge was to the very integrity of the political process. Tennessee had not reapportioned in 60 years despite the command of the Tennessee constitution, nor did it appear likely that legislators would destroy their own seats to effect this reform. Rural areas dominated the legislature of Tenn-

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17 If the West Virginia Court of Appeals had refused to find the suit judicially cognizable in the West Virginia courts, an appeal could have been had to the U.S. Supreme Court under 28 U.S.C. § 1257 (2) (1948). But since such decision would manifestly rest on a non-federal ground, the Supreme Court under its rule in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875) would not decide the federal claim unless it found the asserted state ground of decision "inadequate." See Henry v. Mississippi, 379 U.S. 443 (1965). Among the several tests for this, the one most likely applicable to the Lance case would be whether the decision was consistent with prior state decisions or simply a means of avoiding giving remedy to asserted federal rights. Woods v. Nierstheimer, 328 U.S. 211 (1946); Hartford Life Ins. Co. v. Johnson, 249 U.S. 490 (1919). If it found such ground inadequate, the Court would probably proceed to decide the asserted federal claim, including its justiciability. (But a finding of inadequacy would in this context be tantamount to a finding of federal court justiciability.) Whether the Court could then remove to the state court to enforce a decree which the state court had declared it was without authority under state law to enforce is doubtful. It could probably do so only on the ground that the state court denial of a remedy was itself a violation of due process. Brinkerhoff-Faris Trust and Sav. Co. v. Hill, 281 U.S. 673 (1930).

On the other hand, if the U.S. Supreme Court now decides that the claim in Lance is not justiciable under federal doctrine, it will either deny certiorari or having granted certiorari dismiss the writ as improvidently granted. In either event, the decision in Lance will stand. See Doremus v. Board of Education, 342 U.S. 429 (1952). However, another possibility is available to the Court. Since it declared in Baker v. Carr, 369 U.S. 186 (1962), that nonjusticiability as a political question was not a jurisdictional question (as standing had been in Doremus), it might proceed to the merits of the state court decision, which was based squarely on federal law, despite reservations as to its justiciability as a matter of original federal court cognizance. It could thus correct the erroneous reading of the "one man, one vote" rule.

The procedural problems raised by the West Virginia court's rush to judgment are only suggested here. A full treatment is outside the scope of this article. See Note, The Untenable Non-Federal Ground in the Supreme Court, 74 Harv. L. Rev. 1375 (1961).
essee despite the large numerical superiority of the urban areas. This was part of a nationwide problem—an old problem that the political process itself showed no signs of abating. It was of such fundamental concern that the Solicitor General of the United States entered the case as amicus curiae on behalf of plaintiffs and it was his argument that dominated the Court's opinion.

In brief, *Baker v. Carr* was an effort to break a logjam in the fundamental political process that time and the nature of the problem had shown could not be broken by the political process itself. The dynamite of judicial review could, by ignoring in this instance the damper of its well considered political question doctrine, make the political process more responsible and responsive. In fact, early, too sanguine, commentators suggested that the one blast of *Baker v. Carr* would itself sufficiently weaken the jam so that the pressure of the river of public opinion would clear it away. It took more judicial dynamite than *Baker*. But the political process has now been reinvigorated and renovated. Now, ironically, *Baker* should become, not an excuse for intervention, but rather a reason for a greater deference to such newly-responsive political process, giving greater plausibility to the political question excuse for refusing jurisdiction.

In *Lance*, on the other hand, none of these demands for court intervention were present. The political process was quite healthy. The constitution could be amended by a bare majority. A constitu-

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19*Id.* at 248 n.4. For an early apportionment case see State *ex rel.* Attorney General v. Cunningham, 81 Wis. 440, 51 N.W. 724 (1892). In *Reynolds* v. *Sims*, 377 U.S. 533 (1964) the Court cites authority to the effect that proper apportionment was a major concern as early as the Constitution itself. *Id.* at 564 n.41 and at 573 n.58.
21See Katzenbach, Some Reflections on Baker v. Carr, 15 VAND. L. REV. 829 (1962) where at 832, the then Deputy Attorney General of the United States characterized the Court's decision as a "call for action" to the states to put their own houses in order. A. Bickel, *The Least Dangerous Branch* 196 (1962) states: The decision in *Baker v. Carr* may thus be read as holding no more than that, Tennessee having last been malapportioned sixty years ago, the situation there is the result, not of a deliberate if imperfect present judgment of the political institutions, but merely of inertia and oligarchic entrenchment. . . . [T]he principled goal of equal protection had enough vitality to enable the court to prod the Tennessee political institutions into action. . . . The judgement in *Baker v. Carr* is likely to generate effective pressure for legislative action. . . . Once a new apportionment statute had been passed, curing the situation in some degree, there will be little more that the judicial process can or should do. . . .
tional amendment had recently been offered to the voters and rejected. There was absolutely no logjam in the political process except perhaps in the way the constitutional amendments were proposed or in what some may have thought was the obstinacy of the voters. Surely no court can enjoin the amendment-proposers to be good tacticians or the voters to be wiser. The West Virginia legislature was reapportioned in 1964 — with the help of the West Virginia Supreme Court — to reflect the population of West Virginia as accurately as is possible, consistent with not destroying county units and not opening the way to wholesale gerrymandering. This probably was in response to Baker v. Carr, which may be partial vindication of those generally too sanguine views that “one blast” would do it.

Admittedly the United States Supreme Court has obfuscated this clear difference which is apparent when viewing Baker and Lance in isolation. Between Baker and Lance are many decisions, which plunge inexorably forward seeking manageable standards of apportionment with hardly a look back to Baker v. Carr. Even in Avery v. Midland County, where the Court took a long leap forward (or backward) by extending Reynolds v. Sims to local government units, the majority of five made only oblique reference to Baker v. Carr and then not to its justiciability holding.

And this singularly unprophetic advice is given by Bickel at 195: “Urban voters will be snatching defeat from the jaws of victory if they now concentrate all their energies on law suits and focus their hopes of ultimate success on the judiciary.” See also McCloskey, The Reapportionment Case, 76 HARV. L. REV. 54 (1962) and Edwards, Theoretical and Comparative Aspects of Reapportionment and Redistricting: With Reference to Baker v. Carr, 15 VAND. L. REV. 1265 (1962).


In Reynolds v. Sims, 377 U.S. 553, 553 (1964), the Court did note that, “No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available.” This is also noted in Reynolds v. Sims, supra at 570. But see Lucas v. Colorado General Assembly, 377 U.S. 713 (1964).


The Chief Justice and Justices White, Black, Douglas and Brennan; Justices Harlan, Stewart and Fortas dissented, Justice Marshall not participating.

Only Justice Harlan in a dissenting opinion concurred in by Justice Stewart, saw the justiciability issue as raised again. He stated:

At the present juncture I content myself with stating two propositions which, in my view, stand strongly against what is done today. The first is that the "practical necessities" which have been thought by some to justify the profound break with history that was made in 1962 by this Court's decision in Baker v. Carr . . ., are not present here. . . .

But Harlan did not press the issue further in his opinion. However the majority did make the following assertion which was no doubt partially in response to Harlan's above quoted objection;

That the state legislature may itself be properly apportioned does not exempt subdivisions from the Fourteenth Amendment. While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decisionmaking to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government — for decisionmaking at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local home rule which are immune from legislative interference.  

This statement certainly indicates that the Court felt that the political process could not be responsive to the problem of local malapportionment because of incrusted constitutional limitations on the power of legislatures to act with regard to local government. Thus, a close reading of the cases following Baker and examination of their underlying facts may have alerted the West Virginia court to the continuing plausibility of reading Baker as a "practical necessities" exception to a still vigorous political question doctrine. At least for purposes of determining whether to adopt and adapt the

\[^{30}\text{Id. at 488.}\]

\[^{31}\text{Id. at 481.}\]
federal remedial procedure as the state's own, a fresh look at the problem was indicated.

Perhaps, too, the West Virginia Supreme Court of Appeals should have taken Justice Frankfurter's sage advice given in dissent in Baker to avoid the "danger of conceptions of 'justiciability' derived from talk and not from the effective decision in a case." For the Court in Baker strained to announce in "neutral principles" a rule arrived at for "prudential" reasons. Such "strain" produced all the "talk" which obscured the basically prudential reasons for judicial intervention — the practical necessity of breaking the logjam.

In no federal case had it been held that the unfairness of the size of the majority required for an election was a judicially cognizable issue. All of the decisions following Baker involved holding an apportionment scheme unfair in some context. Desire to appear "neutral" and "principled" may well have swept the Court along on any reapportionment case, brushing aside Harlan's suggestion in Avery that the Court now acknowledge the prudential nature of the Baker decision. But in Lance, even assuming that the principle of "one man, one vote" applied, the strikingly different context of its application to voting on laws as opposed to voting for officials should have given the West Virginia court an excuse for an "out" on principled grounds from the Supreme Court's prudential ruling in Baker.

Assuming again that the "one man, one vote" standard can be logically extended to Lance, another surface difference between Baker and Lance is in the nature of the basis for standing in the two cases. In Baker, the plaintiffs were objectively identifiable as members of a class whose rights plaintiffs sought to vindicate. Then insofar as they were members of such prejudiced class, they were individually prejudiced — i.e. showed "disadvantage to themselves as individuals." As a general rule in equal protection cases one must be a member of the class discriminated against in order to have standing to sue. And if all the cases prior to and cited in

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24See Bickel, supra, note 21, at 182-183.
Baker to support standing in an equal protection context are examined, one finds that the plaintiffs were all members of objectively identifiable classes. Where an individual is allowed to sue as a "citizen or taxpayer," rights other than equal protection rights were claimed violated.

Since Lance was an equal protection case, standing could not be maintained merely as "taxpayers, citizens, and qualified electors" but paradoxically that was the plaintiffs' only plausible basis. For in Lance there was no objectively identifiable class that the plaintiffs were members of. The plaintiffs could not be identified by where they lived, by their race, or even by their political party (as in

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*Baker v. Carr, 369 U.S. 186, 207 n.28 (1962)* lists some of the cases. Matthews v. Handley, 361 U.S. 127 (1959), which is cited in the footnote, affirmed on motion an order by a three judge district court dismissing a citizens' suit in a reapportionment case, but the plea for relief was the injunction of a gross income tax on the basis that the tax was passed by a malapportioned legislature. Neither the district court nor the Supreme Court mentions standing. It was dismissed as a nonjusticiable political question. However, the nature of the case does suggest that plaintiffs sought standing merely as taxpayers and citizens since they were seeking to enjoin tax collection. Which constitutional right was claimed violated is not made clear. It was most likely due process on the theory that the legislature, having disobeyed the positive command to reapportion contained in the constitution that created it, was no longer a lawful body and its acts were simply of no effect. Thus, even if standing was sub silentio recognized in taxpayers, it was in due process taxpayer's suit and not an equal protection suit. Matthews v. Handley, 179 F. Supp. 471 (N.D. Ind. 1959).

For example Wood v. Broom, 287 U.S. 1 (1932) interpreted the Reapportionment Act of 1911 at the behest of a citizen, elector, and qualified candidate. (Cardozo, Brandeis, Stone and Roberts, J.J. concurred on basis of want of equity.) See also Flast v. Cohen, 392 U.S. 83 (1968) (citizen and taxpayer allowed standing in Establishment Clause suit) and compare with Frothingham v. Mellon, 262 U.S. 447 (1923). Smiley v. Holm, 285 U.S. 355 (1932) reversing 184 Minn. 228, 238 N.W. 494 (1931) [cited in Baker v. Carr, 369 U.S. 186, 205 n.26 (1962)] was a case involving the meaning of the word "Legislature" in art. I, § 4 of the Constitution of the United States. The Supreme Court of Minnesota had said that it meant the body of men called the legislature. Thus a governor's veto could not override that body's power as granted in art. I, § 4. The United States Supreme Court said it meant the sum total of those people who have the legislative power of the state — which would include the governor's veto. The suit was brought by a "citizen, taxpayer, and elector." His standing was assumed (without consideration) by the Minnesota court. Thus had the Supreme Court reviewed standing as an independent federal issue as in Doremus v. Board of Education, 342 U.S. 429 (1952) and found it wanting, it would have allowed to stand an erroneous interpretation of specific language of the constitution (at odds with another state's interpretation) which could have only one of two meanings. Its duty to make clear once and for all the correct interpretation of a precise word affecting federal elections was manifest. The decision was unanimous and did not even mention standing.

the Progressive Party Case), the latter being somewhat more difficult to identify objectively than any other group so far recognized. The plaintiffs did claim in their brief to have been "active in support of the efforts of the Board to provide additional local revenues to meet the requirements of the county educational system, contributing their time, efforts and resources." This has some of the attributes of a political party. However, plaintiffs did not rely on this for standing, nor did the court find this to be the group they could be identified with, nor would it have been sufficient if they had. For such a loose-knit, informal collection of workers for a common single political purpose had none of those attributes which make a political party an objectively identifiable class. In MacDougall v. Green the organization membership and voter registration lists gave some means of identifying the individuals composing the class other than such individuals' absolutely unverifiable say-so as to their votes or their political convictions.

The class, membership in which plaintiffs did rely for standing, cannot be identified objectively, because the only evidence of membership in it is their word as to a vote secretly cast and now beyond identification with the voter casting it. In order to get an objectively identifiable class an unveiling of the secret vote would be necessary — a calling forth of all to cast their vote publicly — an overturning of a most sacred and personal right. If this is thought to be mere captiousness, ask yourself if the intervenors and true adversaries (for the nominal defendants — the school board — had proposed the very tax levies defeated) were not forced to cast their votes publicly in order to intervene and claim what they felt was justice.

40MacDougall v. Green, 335 U. S. 281 (1948); again if a finding of standing there was, it was sub silentio. See also Moore v. Ogilvie, 394 U.S. 814 (1969); Williams v. Rhodes, 393 U.S. 23 (1968).
42Ibid. at 2. Appellants do claim to be "citizens, taxpayers, and qualified" voters of Roane County. But at 14, appellants asserted "Every one of the Supreme Court cases cited above has affirmatively sustained the right of appellants to sue for themselves and on behalf of all others voting with the majority at the April 29, 1968, elections."
44395 U.S. 281 (1948).
46The intervenors claimed standing merely as "qualified voters and taxpayers of Roane County, West Virginia, whose personal and property interests are directly affected by this proceeding." Brief in Support of Motion for Leave...
Moreover, if in order to get an identifiable group, the votes must be cast publicly — must both the vote on the tax bond levy and on the 1967 constitutional amendment to eliminate the 60% requirement be so cast? And is it not pure conjecture to say that no one of the 52% majority for the tax levy did not also vote to retain the 60% requirement? In other words, some probably voted for passage of the tax levy who did not wish the levy passed unless at least 60% approved. And that was the condition of the balloting when they cast their votes. The court's decision not only changed the outcome, it changed retroactively what the people voted for.

Moreover, the Lance decision is awash with the implication that nominal defendants cannot supply that "concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional question." This is another aspect of the standing requirement — to avoid "friendly, nonadversary proceedings" and here the defen-

to Intervene and for Rehearing at 1, Lance v. Board of Education, 170 S.E. 2d 783 (W. Va. 1969). But as a practical matter have they not made manifest, by going to the trouble of intervening, how they in fact voted? Assuming they are hardy men willing to so cast their apparent vote publicly, the point is they had an absolute right conferred by the secret ballot to keep that political choice private. That right they were effectively forced to abandon in order to protect that vote by intervening.

Moreover, as to the intervenor's standing, plaintiff asserted, Plaintiffs' Memorandum of Authorities In Opposition to Motion to Intervene and for Rehearing, Lance v. Board of Education, supra:

It is difficult to determine just what interest the movants have in these proceedings. They do not allege that they voted in the elections in question or how they voted, nor do they allege any other interest which would give them a right to intervene. This case involves only the voting rights of the individuals who voted at the election; and the interest of the movants as taxpayers and citizens are insufficient to give them the right to intervene.

It is clear from this that plaintiffs did predicate their standing on being members of the "class" of majority voters for the tax levy, although they stated in their Brief that they were "citizens, taxpayers and qualified voters of Roane County." See notes 41 and 52 supra. It is also clear that at least plaintiffs' idea was that the intervenors must reveal their vote in order to have standing to intervene.

dants' obvious interest in getting more money to build schools makes them highly suspect as real opponents, to say the least.49

Even in reapportionment cases, the official defendants have in a number of cases declined to defend, or have even joined in plaintiff’s prayer for invalidation.50 In some, but not all of such cases, the defense has been assumed by intervenors.51 But the intervenors did not have to reveal a vote secretly cast or make public a political position privately held in order to intervene.

Finally, it should be added that no court has heretofore even discussed the idea that a class must be “objectively ascertainable” but then no such “class” as here represented has ever sought equal protection vindication.

The whole point is that these palpable differences in the nature of the political question involved and the standing alleged as between Lance and Baker should have alerted the court to make careful inquiry of these matters before extending the equity jurisdiction of the West Virginia court.52 Why they did not was caused, I believe, by the example set by the U.S. Supreme Court — its loose language, its effort to find a principled basis for an essentially prudential decision and the natural confusion engendered by its wrench-

49On the subject of collusive suits see United States v. Johnson, 319 U.S. 302 (1943). In Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1850), Chief Justice Taney explained the difference between amicable suits and ones lacking true controversy:

"[In some cases] for the purposes of obtaining a decision of the controversy, without incurring needless expense and trouble, [the parties] agree to conduct the suit in an amicable manner. . . . But there must be an actual controversy, and adverse interests. The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between parties. The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.

50Neal, supra, note 20 at 208 n.71.
51The West Virginia Supreme Court of Appeals cited only Nuckols v. Athey, 149 W.Va. 40, 138 S.E. 2d 44 (1964), as authority for the extension of a declaratory judgment remedy to the Lance case. Lance v. Board of Education, 170 S.E. 2d 783 (W. Va. 1969). The Nuckols case was a typical declaratory judgment suit without political question or standing problems. The rest of the authority was borrowed from federal law. But, as pointed out above, this federal law has now become state law and the fact can be decisive in the disposition of the case made by the United States Supreme Court.
ing the judiciary out of its traditional passive role and thrusting it into the "political thicket" without holdings that limit this new activist role.

The reapportionment cases are really only a part of the pattern. But before discussing that pattern, it is necessary to discuss "one man, one vote", which was jerked from its original context in reapportionment and election-of-officials cases to do service in Lance. This standard, it should first be pointed out, evolved out of cases following Baker in which the Court tried frantically to fulfill the bland assurance of Baker that the subject matter of reapportionment was amenable to "judicially discoverable and manageable standards" of resolution. Finally, they reached a standard so simple that one dissenting member of the Court has characterized it as a resolution "in terms of sixth grade arithmetic."54

AND WHAT DID THEY ASSUME?

Weighting Votes and Majority Rule

In Lance v. Board of Education of Roane County, the West Virginia Supreme Court of Appeals assumed two things about the "one man, one vote" rule as enunciated in Reynolds v. Sims.55 First, it assumed that the rule could be applied out of the context of legislative reapportionment and out of the context of state elections — relying respectively on Gray v. Sanders56 and Avery v. Midland County.57 Second, it assumed that the peoples' having adopted the measure by statewide referendum was no defense to a deviation from the "one man, one vote" principle.58

From this they deduced that the right was a personal voting right that obtained in a county election despite the approval in 1966 by a majority of the people of the state of the "violation" of the "right". And none of this is inconsistent with the "one man, one vote" rule of Reynolds and progeny. But the Court had to make a further step. It seemed simple. Since the Supreme Court had said as a corollary to the "one man, one vote" rule that votes cannot be

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"weighted" differently, the West Virginia court deduced that any referendum election that required anything other than simple majority for passage of the proposed measure was a weighting of votes and thus unconstitutional. The reasoning goes like this: When there is a requirement of 60% majority for passage, that means that 60 "for" votes exactly balance 40 "against" votes. Now assuming an ordinary balance (like one for weighing physical objects) simple arithmetic tells one that if the scale is in balance when 60 things are one one side and 40 on the other then each of the "things" on the 60 side must "weigh" (assuming all "things" on one side are equal) two-thirds as much as each "thing" on the other side. Or put variously the ratio of the weight of each unit on the 60 side to each unit on the 40 side is as 1 to 1 1/2. If the 60 side is labeled "for" and the 40 side labeled "against", with Lance claiming he cast one of the votes "for", then since it weighed only two-thirds what an "against" vote weighed, his personal right to an equally weighted vote was violated. And if further assurance is needed did not the United States Supreme Court use the very word "weight" five times in its opinion in Gray v. Sanders and many times since?

Logical? Simple? Obvious? Of course, overwhelmingly so — a child could see it. But wait, is there not still a lingering doubt? Could it be that voting for officials is different from voting for tax laws? Not necessarily, as will be pointed out below. But an assumption was made in the reasoning posited above, and that assumption is the very conclusion reached. That assumption was that "one man, one vote" demands simple majority rule. By using the analogy of the "balance", where one extra increment of weight on either side tips the scale, one has assumed the simple majority principle where one extra vote on either side tips the election. But that is the very question asked — a classic example of petitio principii.

Was the United States Supreme Court also guilty of such logical fallacy? No. But what they did by not stating this premise and by using the word "weight" was apparently very misleading. For "weight" necessarily implies a scales and when the weighing is of one thing against another, it necessarily implies a balance. But in

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\(^{39}\text{E.g., Reynolds v. Sims, 377 U.S. 533, 563 (1964).}\)
\(^{40}\text{372 U.S. 368, 374 (once), 379 (twice), 380 (twice) (1963). Justice Harlan in dissent uses "weighted" three times and "diluting" twice to characterize the majority rule.}\)
the Supreme Court cases the premise of majority rule was a "given" in each case. That is, in electing a primary candidate in Gray, simple majority rule was the test set up by Georgia. In the legislative reapportionment cases the ultimate thing "elected" is the legislation, i.e., the laws passed by the legislature, state or local. (This will be explained below as another necessary underlying premise of the reapportionment cases. This also makes for some confusion since it is unstated; but, the Court's reticence in this regard can be explained). And in the overwhelming number of cases this legislation is created by a simple majority of the legislative body. Thus in all cases decided up to now by the Supreme Court, simple majority was assumed as a premise, not because simple majority must be taken, a priori, as the only just principle, but rather it was assumed because it was factually true. When the rule was formulated in terms of weight, simple majority was a necessary premise, but that did not necessarily make it the only true principle; it was simply a given fact. The complete formulation of the rule in Gray v. Sanders is: Given simple majority rule, all votes must be weighted equally.

Moreover, it is safe to say that as a matter of fact simple majority is generally considered the fairest way to decide issues in a democratic society. One class of issues can be decided only by simple majority to be consistent with the ideal of fairness fundamental to a "scheme of ordered liberty". However, another class of issues can be decided by either simple majority or by a super majority and remain consistent with the ideal of fundamental fairness. The real question in Lance was determining which kind of issue was before the voters and further, if it was of the latter class, the question was: Was the 60% requirement under all the particular circumstances consistent with that fundamental fairness which is due process?

The first class of issues, that which can be decided only by simple majority, is one in which the choice is between two (or more) alternatives, one of which must be taken, as there will be nothing to fall back on if the choice is not made. The typical example is the election of people to office. Assume, as is typical, that A holds the office at election time but his term automatically expires by law on January 1. A and B are both candidates for the office commencing January 1. If neither is elected then the office is left vacant. Assuming that such vacancy could not be tolerated (e.g., the office
of president, governor, senator, congressman, mayor, etc.), then a choice must be made. Then given the assumption that one man is as good as another in legal contemplation — certainly a fundamental American ideal — the only fair way to determine as between A and B is by counting the individual choices and giving office to the one who is chosen by the most people — a simple majority. In the case of more than two candidates a simple plurality will often be tolerated because of the need to fill the office.

Moreover, some lawmakers is of this variety. Take for example, a tax levy or appropriation, which furnishes the sole support of a vital governmental function, such as public schools, but which automatically expires as of a certain date. The voters are given a choice of one of two new tax levies to begin at the expiration of the old. No taxes would mean no revenue and no revenue would be the end of the vital governmental function, which termination is intolerable. If the choices are labeled A and B, then, since one must prevail, the rejection of A is automatically the choice of B, and B is not simply “not A.” The latter fact is most significant. For “not A” is here simply no tax at all and that, as said, is intolerable.

If tax “A” could not become law unless 60% of the people approved of it that would mean tax “B” would become law if preferred by only 41% of the people. It needs no elaboration to conclude that almost anyone would see that as fundamentally unfair. It is certainly inconsistent with the ideal of government by the will of the people, assuming all men are equal in legal contemplation.

The fundamental indicia of the first class of issues, then, are that (1) a choice must be made (2) between two or more new courses of action (or people). But negatively, there must be a situation in which there is no existing practice to carry on if a choice is not made.

This brings us to the second class of issues. It is typical of most legislative situations. In the usual situation a law is either (1) a revision, amendment or supplantation of an old law or (2) an entirely new course of action. In the former, if the proposed change fails, the old law still exists and there is no intolerable unlawed-

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"Of course, depending on the office, a vacancy is more or less tolerable for a short period of time, e.g., a vacant senate seat will not prevent the Senate from functioning, whereas a presidential vacancy is, for any length of time, absolutely intolerable as manifested by the elaborate line of automatic succession."
gap. In the latter, of course, we can carry on as before. In short, this second class of issues exists in any situation in which a choice is not imperative, i.e., in which an existing practice will continue if no choice is made. This kind of choice can be characterized symbolically as the choice between "A" and "not A", where "not A" is equivalent to existing practice. If "A" is chosen in this situation, existing practice is changed. This change means that: (1) the will of the people (the lawmaker) of an antecedent time is overridden and (2) expectations built up under existing practice are lost. These two factors make for a "presumption in favor of existing practice." Note that neither of these factors was present in the first class of "imperative choice" issues.

The justification for this presumption, if not obvious, is made clear by two common sense questions. Since the existing practice is some former lawmaker's choice or series of choices and we have gotten along (even if we've only muddled through), and since such former lawmaker may even have been almost as wise and reasonable as we are, had we not better think twice before we change? Second, if the predictability of the legal consequences of voluntary acts is of the essence of law, then, in so far as new law upsets reasonable prophecies based on existing practice (law), is it not to that extent counter to the very idea of law? The most egregious form of this upsetting of expectations is the ex post facto law. Retroactive legislation of all sorts has been subjected to due process scrutiny and often struck down. The judicial rule of stare decisis is also predicated in part on not upsetting expectations.

Moreover, the whole idea of constitutional limitations and a primary consideration in the governmental structure set up in constitutions are to force change in existing practice to be deliberate

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\(^a\)Alexander Bickel's phrase, but in slightly different context. Bickel, supra, note 21 at 48.

\(^b\)See generally Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960).

\(^c\)Of course, the chief rationale for the doctrine is that courts make no law, they only interpret it. This involves first discovering, then announcing, the controlling principles. But after the rule has been once announced, if no "lawmaker" intervenes to change it, it is not changed and cannot be changed because courts are without such power. But courts could (and sometimes do) declare that the earlier announcement was wrong (compare Plessy v. Ferguson, 163 U.S. 537 (1896) with Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)) and would be more inclined to do this but for expectancies built up and fear of loss of faith in the finality and principled nature of judicial decision making.
and slow.\textsuperscript{65} The more fundamental the existing practice, the more difficult it is to change - to the point where some rules are felt by many to be so rooted in reason, tradition, or their idea of the nature of governmental or societal relationships, as to be absolutely immutable.\textsuperscript{66} Thus, constitutional limitations or their counterparts, constitutional rights, being thought generally to embody fundamental norms, are made most difficult to change.\textsuperscript{67} But ordinary legislation is also made more difficult to create than by simple majority passage. Executive veto is almost universal practice. The very idea of bicameralism was predicted on slowing down the impetuousness of change by a simple majority of a single popular chamber. Of course, one of the primary methods of protecting the presumption in favor of existing practice is in requiring super-majorities or in allowing minority veto, which is the same thing.

If the super-majority requirement is thought of as a minority veto, the contrast between the second (non-imperative) kind of choice and the first (imperative) kind becomes obvious. A veto can only be negation of a single alternative. It cannot be a choice between two alternatives, for a veto is a choice between accepting and rejecting a single alternative. Confusion may be caused by thinking

\textsuperscript{65}James Madison, in defending the Senate's structure and role established by the Constitution, stated:

[A]nd as the facility and excess of lawmaking seem to be the diseases to which our governments are most liable [the Senate's role as an additional impediment against improper acts of legislation] . . . may be more convenient in practice than it appears to many in contemplation. The necessity of a senate is not less indicated by the propensity of all single impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.

\textit{The Federalist} No. 63, at 402-403 (Modern Library ed. 1937) (J. Madison).

\textsuperscript{66}See, e.g., \textit{The Federalist} No. 78 (A. Hamilton).

\textsuperscript{67}See e.g., U. S. CONST. art. V.

Alexander Hamilton in defending the presidential veto stated:

It may perhaps be said that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconsistency and mutability in the laws, which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of lawmakers, and to keep things in the same state in which they happen to be at any given period, as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by preventing a few good laws will be amply compensated by the advantage of preventing a number of bad ones.

that "rejecting" is a second alternative, and in a way it is. But that second alternative is existing practice.

A final illustration from another context, to sum up this discussion of "classes of issues" will also take us back to the "one man, one vote" rule. Five people (of equal status) start on an auto trip from Pittsburgh to New York, tacitly agreed upon (from previous trips) route "A". On the trip several decisions might have to be made. If route "A" is for some reason closed and two alternative routes are open to continue the journey, then a simple majority must control. If route "A" is open, but one person proposes a new route and two others say they too would like the new route, while two want no change, the minority travelers might protest that the new route was contrary to the wishes of the group as expressed just three hours before. They might also ask whether they were to be subjected to the mercurial whims of a mere majority? In addition, one dissenter complains he had relied on using route "A" as it was shorter and he needed to be in New York by a certain time. The more explicit he can show the original agreement to have been (including any agreement as to how a change would be made) or the greater his reliance on the original route, the more cogent is his contention that the will of the two who desire no change should prevail over the three who do. The decision would turn on many factors (it would be a political type decision) but one could not seriously contend that fundamental fairness required simple majority rule. If someone proposed during the trip that they go to Baltimore instead of New York, a minority veto (even a single man veto) would be plainly justified.

On the other hand, a wholly different order of question is involved if one of our five travelers was given two votes in whatever decision was to be made. Such might be justified on the grounds that he owned the car, was the driver, etc. Or someone else might not be given any vote (because he was too young, didn't help buy gasoline, etc.). This type of question can be put under the rubric of relative participative power and it is this order of question that was resolved by the "one man, one vote" rule of Reynolds v. Sims.68

Before turning to a closer analysis of the apportionment cases, a further word is in order on the type of issue that was before the voters in Roane County on April 29, 1968, and which became the

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subject of the lawsuit in Lance v. Board of Education. Sections 4 and 8 of Article X of the Constitution of West Virginia place limitations on debt acquisition and on the level of property taxes of local governmental units which are absolute in terms but subject to temporary suspension (if acquired for school building purposes), but only if three-fifths of the qualified voters (each having one vote, of course) approve of such ad hoc suspension of the constitutional limitation. Clearly, the constitutional limitation was the existing practice and the vote was for a change from that practice. In this situation, the condition for such change was expressedly agreed on beforehand. The electors voted either for or against such change - i.e., voted either for “A” or for “not A”. It is analogous to our five travelers having agreed on route “A” to New York but having also agreed before they started that any deviation to route “B” must be acceded to by four of the five travelers.

The Lance election was of the change-in-existing-practice type of issue. Moreover, it involved a change in an existing practice thought so fundamental as to be enshrined in the state constitution. Under those circumstances a three-fifths majority requirement was clearly compatible with the concept of fairness thought fundamental to a scheme of ordered liberty.

This somewhat overstates the case for the fairness of the three-fifths majority rule in the circumstances of the Lance case. The overstatement is caused by purposely oversimplifying the models used above for analysis. What has been left out is the fact of modern

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That is, in a dynamic, as opposed to a static society, there is a constant need for new legislation, and the need is, of course, a function of the degree of change. The more rapid and marked is the change, the greater is the felt need for legislation (i.e., public problem-solving) to the point that in many instances and to a greater or lesser degree, an intolerable unlawed-gap is felt to exist. Since this felt intolerability of existing practice is different with each problem demanding legislative solution, the degree of felt fairness or unfairness of a minority veto on legislative change likewise varies with each problem. The precise instances when any minority veto will be fair and the size of the minority (e.g., 33%, 40%, 45%) that ideally should be allowed to block a majority are almost impossible to predict. For example, the increasing use of automobiles has created increasing demands for pollution control and new highways; increasing urbanization has increased demands for slum eradication; inflation, demands for fiscal control and higher taxes to meet increased costs; affluence, demands for financial security, leisure time, better schools; etc. But the demand varies with each problem and so does the solution.

Thus, the deliberate use of minority veto is limited almost exclusively to special situations like constitutional change, overriding executive veto, expulsion of legislative members, etc. See, e.g., U.S. Const. art. V, art. I, § 7; art. I, § 5.
society's dynamic growth and change. Such change, of course, creates many new problems—problems with which existing practice is simply unable to cope. The greater the problem, the more imperative will be the felt need for solution. The point may be reached where doing nothing about the problem is intolerable. Of course, when that point is reached, the issue becomes similar to the imperative choice type of issue even though the choice remains between "A" and "not A". "Not A", or existing practice, is felt to be intolerable by many in the community. Of course, if it is absolutely intolerable in the sense used above, where, for instance, there would be no president if a new one is not chosen, then presumably the entire community would vote "A" and a percentage vote problem is obviated. In fact, if there is a broad consensus that solutions and the choice would become one between alternative solutions rather than between solution and no solution. A pure form of the imperative kind of issue would then arise, i.e., a choice between "A" and "B". Thus, legislative issues usually hover between pure imperative and pure non-imperative type issues depending on the consensus about the intolerableness of no solution to a problem. Of course, to those individuals to whom "no solution" seems absolutely intolerable anything but simple majority vote seems fundamentally unfair. But again if "no solution" is really intolerable in the pure-imperative sense then the question of majorities will not arise—simple majority rule will always be assumed as it always has been in imperative choice situations. The assumption is so fundamental one does not even recognize it.

The degree of unfairness of a super-majority requirement is a direct function of the degree of intolerability of "no solution" to problems constantly arising in a changing society. Super-majority requirements are thus not a very workable or satisfactory way of checking too rapid change in existing practice. Probably because of this, the universal general rule is simple majority in all but a few kinds of legislative situations. Checking, as mentioned above, is left to bicameralism, to executive veto, and to constitutionalizing fundamentals. But primarily existing practice is protected by the fairness inherent in the presumption in its favor which most lawmakers feel and are to that degree restrained.

In Lance, the plaintiffs and maybe even the court felt the rundown condition of the school system was intolerable and demanded solution. Thus, to them at least, the three-fifths majority require-
ment seemed fundamentally unfair. To all people with strong convictions about the imperativeness of sound education, the power of a minority to veto reform must seem like an issue of constitutional dimensions. This is especially true in light of prevailing attitudes toward constitutional rights, as taught by the Supreme Court. (This "teaching" by the Court will be discussed in Part II.) For the reasons stated above, the three-fifths rule was not fundamentally unfair in the constitutional sense. Only one's convictions about education make it seem so. Apparently such conviction was not shared by even a simply majority of the people of the state.

But had the court explored the problem of when a minority veto is and is not fundamentally fair, they would have been dealing with whatever constitutional problem was raised by the complaint. Analysis in terms of the "one man, one vote" rule was like using the rules of arithmetic to teach spelling.

Unfortunately, however, the West Virginia Supreme Court of Appeals did rely on the "one person, one vote" rule first announced in *Gray v. Sanders* and further enunciated in *Reynolds v. Sims* in deciding the Lance case. The West Virginia court relied on the following statement in *Gray* to bridge the gap between electing a governor or legislature and voting in a referendum.

The only weighting of votes sanctioned by the Constitution concern matters of representation, such as the allocation of Senators irrespective of population and the use of electoral college in the choice of a president.

Rather than helping the West Virginia court reach its result, this passage should have alerted the court to the fact that the Supreme Court does not think of super-majority requirements sanctioned by the Constitution.

Furthermore, the West Virginia court placed special reliance on the following language in *Reynolds v. Sims*:

And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as wholly prohibiting the exercise of the franchise.

Although this idea of "dilution of weight" was explained above as only a way of talking about the "one man, one vote" rule in a

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73 77 U.S. 533 (1964).
74 *U.S. CONST.* art. I §§ 3, 5 and 7; art II, § 2; art. V.
context of simple majority, a somewhat fuller statement of the
purport of the "one man, one vote" rule may make clear why it is
inapposite to the super-majority situation.

The "One Man, One Vote" Rule

A plethora of articles has been written explaining, expanding
and criticizing the reapportionment cases.\footnote{E.g., Auerbach, The Reapportionment Cases: One Person, One Vote—One Vote, One Value, 1964, SUPREME COURT REVIEW 1; Edwards, supra note 21; Reapportionment Symposium (Dixon, Kauper, McKay) 63 MICH. L. REV. 209 (1954); Sickels, Dragons, Bacon Strips and Dumbbells—Who's Afraid of Reapportionment, 75 YALE L. J. 1300 (1966); Schwartzberg, Reapportionment Gerrymanders, and the Nation of "Compactness," 50 MINN. L. REV. 433 (1966).} It will be sufficient
here to set forth in rather stark terms what the "one man, one vote"
rule means, based on the facts, holdings and talk of the cases. No
criticism of the rule is here attempted.

The "one man, one vote" rule is deceptively simple, not be-
cause it does not mean exactly what common sense tells us it means,
but rather because it does. But if it does, why all the fuss, since
everyone in an equalitarian democracy like ours agrees that no-
body should get more or less vote than anyone else, and in direct
elections this is the rule that universally obtains.\footnote{In some recent cases the Supreme Court has struck down the denial of the right of a citizen to participate in local elections. Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) (school board election) and Cipriano v. City of Houma, 395 U.S. 701 (1969) (election for issuance of revenue bonds by municipal utility). These are, of course, pure voting rights cases in the sense of Carrington v. Rash, 380 U.S. 89 (1965); and see cases collected in Reynolds v. Sims, 377 U.S. 553, 554-55 (1964). That is, the right of certain citizens to participate in an election was absolutely denied. The absolute denial of the right to participate in the election, i.e., to vote, has been, as far as my research discloses, the only way the right to vote has been abridged in any direct election. I know of no instances where in a direct election some voters are given two or three votes or only a half a vote. Only in cases like Lance where simple majority rule is assumed to be the only fair method of determining the outcome of any election does the weighting of votes appear to obtain in a direct election. Even there, however, it was the choice made that was weighted, and not the right to choose. Everyone in Roane County had exactly the same right to choose, i.e., to participate in the election. Some confusion is apparently engendered by the dual meaning of the word "vote." It means in common usage both the "right to choose" and the "choice made." In voting rights and reapportionment cases, the right to vote has meant only the "right to choose." If one's vote is not counted or is counted less than others, on whichever side it is cast, then the "right to choose" is violated. But some confusion may be caused by the fact that the incident of such violation comes after the choice has been made. See United States v. Mosley, 238 U.S. 383 (1915) (conspiracy by election officials not to count the votes of certain precincts). See also Reynolds v. Sims, 377 U.S. 553, 555 (1964). The "vote" as the "choice made" was entirely irrelevant in those cases.} It is only in in-
direct elections that the rule has not universally obtained and in fact was, until Baker v. Carr, flagrantly violated by most states.

An indirect election is one in which the thing immediately voted on is not the thing ultimately voted for. The most familiar example is the balloting for President of the United States. The thing ultimately voted for is the President. The thing immediately voted on is the way one's state's electoral votes will be cast. Originally, this latter fact was more clearly recognized because one voted for a slate of electors who had some discretion in casting their votes for the presidency. The gradual process of democratization (and the party system) has made the electors, de facto, pure reflectors. They are now in practice exactly like the de jure pure reflectors in the county unit vote system involved in Gray. In the latter case, one voted for the way one's county's allotment of votes would be cast in the ultimate election of a gubernatorial nominee. Since the county votes are pure reflectors, a voter feels he is voting for the ultimate thing when actually he is voting for the way the county unit vote will be cast. The same is true of presidential elections. Thus any distortion between the immediate vote and the thing ultimately elected is quite palpable in these simple indirect elections.

In indirect elections of the pure reflector variety there are two kinds of distortion. First, since the "reflector votes" are voted for by groups of people, any inequality in the ratios of reflectors to numbers of people in the groups electing such reflectors will distort the result from what it would have been in a direct election. For example, if group A of fifty people gets one vote, group B of two hundred get two votes, and group C of three hundred people gets

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78 At this point, a brief lexicon of the terms used here to describe the phenomenon of indirect election is in order: A reflector is the medium through which the original vote is translated into the final result (a mirror, not a thinker); a pure reflector is one which is both "mere" and "simple"; a mere reflector is one which only reflects and has no capacity to exercise intervening judgment and should be contrasted with; a trustee reflector which has capacity to exercise its own judgment in reflecting the voter's will; a simple reflector is one which reflects only the vote as originally cast (really a reflector vote) and should be contrasted with; a complex reflector which reflects the will of the voters over a period of time and through a complex of means (a reflector voter); a simple indirect election is one in which the reflector is "pure"; a complex indirect election is one in which the reflector is either "complex" or "trustee" or both; a pure trustee is not a reflector but rather a legislative agent free to exercise his own will as to what is best for the entire polity he legislates for.
two votes in the common election of the governor, then obviously votes reflecting two-hundred and fifty people can elect the governor despite the casting of the votes reflecting three hundred voters for the other candidate. This is the distortion of unequal apportionment.

Second, since the "reflector votes" are usually allotted according to the total number of people (or voters) in a unit, one "reflector vote" in effect represents (reflects) both those for and against the way such vote will ultimately be cast. Taking for example the same groups as above: in groups A, 26 vote for the X candidate reflector vote and 24 for the Y candidate reflector vote; in group B, 101 vote for Z, 99 for Y; in group C, zero vote for X and 300 for Y. Thus three unit votes will be cast for X and two for Y, but only 127 people voted for X and while 423 voted for Y. This is the distortion for unit voting.

Since the votes ultimately cast are pure reflections of the original voters and these voters are felt to be the ones actually electing the ultimate thing, the distortion is palpable and the unfairness of the system is patent. Thus we have the Gray decision and the present movement for direct election of the President.

Now, the indirect election involved in legislative apportionment cases is both more difficult to see and inherently less distorting. Thus these cases are much more controversial. The reason the election of legislative representatives is actually an indirect election is that what one is ultimately voting for is, to put it baldly, the legislation that will come out of the legislature and neither the individual legislator voted nor the body of legislators! The reason such an indirect election is less distorting than the pure reflector unit system is that representatives, not being simple reflectors or mere reflectors, in exercising their legislative judgement on any particular legislation before them can consider the interests of all those whom they represent — those who voted against as well as for them. Moreover, since the basis of allocating representation is population, not voters, they represent those who did not or could not vote. The unit rule distortion is thus mitigated.

— See Burns v. Richardson, 384 U.S. 73, 90-95 (1966).
— In cases in which equal apportionment has been ordered, Justice Stewart in dissent has urged that the continuing presence of unit rule distortion makes unrealistic, and ultimately futile and meaningless, the whole effort to reapportion on a strict mathematical basis. Lucas v. Colorado General Assem-
However, because representatives have increasingly come to be thought of essentially as reflectors of the will of their constituents, the proposition is true that the thing ultimately voted for in a representative election is legislation. Although essentially reflectors, legislative representatives are not pure reflectors for two reasons: (1) they cannot be simple reflectors; and, (2) they are not supposed to be mere reflectors. First, they cannot be simple reflectors (in the Gray sense) because the specific legislation the legislators will ultimately vote on is not usually before the voters. Second, they are not supposed to be mere reflectors, because no legislator is compelled to vote only the way the people whom he represents want him to vote - even if he could know how “they” want him to vote. Besides the fact that, once elected, a representative looks as much to the next election as the last, he is also expected to be a trustee as well as

bly, 377 U.S. 713, 744, 750 (Stewart, J., dissenting). See also Neal, supra note 20 at 217. But what is assumed explicitly by Justice Stewart and implicitly by Dean Neal is that “[l]egislators] represent people, or, more accurately, a majority of the voters in their districts... Lucas v. Colorado General Assembly, supra at 750. As is pointed out below, the proposition that the representative represents only those who voted for him simply cannot be true. In a way, this is seeing representative elections as an indirect election of the legislature, and not of its legislation. (Neal’s words “[allow] one-fourth of the total voting population, ... to control the legislature.” Neal, supra at 217 (emphasis added). Viewed that way, proportional representation would be the better system for assuring an accurate translation of popular elections into representative bodies. But viewing the matter as if the legislature is being indirectly elected (i.e., the body of legislators being viewed as a monolith) is erroneous for such view is inconsistent with the idea of a representative as a delegate of all the people in his district; moreover, “to control the legislature” in the Neal sense could only mean “to control who the individual members will be” whereas the important control is over their activity while assembled. The latter control is much more complex than control over their mere election. Commentators like Professor Auerbach counter the Stewart criticism by asserting (1) the unit rule distortion is not as an empirical reality very great, (2) eliminating half the evil is better than eliminating none, and (3) proportional representation has its own attendant evils. Auerbach, supra note 76 at 31-35.

That is not the reply to Stewart that evolves out of the analysis made by this article, which is that legislation, not legislatures, are elected indirectly, and law-making is an on-going, complex process allowing all members of the constituent districts to have a voice in the individual legislative vote of their representative. It is true, however, that through this analysis one sees that unit rule distortion is only mitigated, not eliminated, because the initial vote to elect a representative still is a strong control (one among others) of the elected representative’s future legislative votes. But proportional representation, with its many parties and coalition governments, has long been rejected in Anglo-American political theory, and any unit rule distortion caused by constituent districts is outweighed by the evils of the alternative.
a delegate (mere reflector) - i.e., to exercise his own judgment as to the interests of all his constituents as well as reflect their judgment or carry out their mandate.\(^8\)

Thus the ultimate vote for legislation, which is the aim of the preliminary vote for a representative, is a dynamic, complex process of reflection which begins with the actual election of a representative. This election is at least partly based on current issues - i.e., on the candidate's declaration as to how he will vote on prospective legislative issues. Once the representative is in the legislature then he is controlled through his constituent's various manifestations of their desires with reelection as their lever for compliance. Moreover, he continually uses his individual judgment as to their interest for which judgment he was in part elected, but again with reelection as the ultimate sanction on such judgment. In short, when one votes on a representative one votes for that man whom he feels—all things considered—will most probably vote for those laws which he would himself vote for, given the representative's special knowledge and expertise.

The foregoing can be labeled the 'essentially reflective' theory of representative democracy, more commonly, though somewhat misleadingly, called the delegate theory. Note that the trustee aspect of the representative's role described above was limited to the representative's judging his own constituents' best interests. He was to be, if you'll excuse the surface anomaly, a trustee-reflector.

There has long been a debate over whether representatives are essentially trustees - entrusted with the power to exercise their own judgment as to what is best for the whole polity, or essentially delegates (to use the phrase more familiar than "reflector"), authorized to exercise their own judgment only to determine what the most likely judgment of their constituents would be on any issue.\(^2\) One elects a trustee because one trusts his judgment, a delegate because he can be trusted to vote his constituent's judgment. Representatives are thought to be both but with emphasis shifting from one theory to the other over time.\(^3\)

Now, when the emphasis shifts to representatives-as-pure-delegates there is a concomitant shift to thinking of legislatures merely

\(^{8}\)See Auerbach, supra note 76 at 56-57, and authorities therein cited.  
\(^{2}\)See Edwards, supra note 21 at 1272-73 and empirical studies therein cited.  
\(^{3}\)Id.
as organs for expressing the will of the people - to the extreme point of thinking that there is an identity between legislative will and popular will. Theoretically when that point is reached, a *perfect indirect election* situation obtains. *Perfect indirect elections* are ones in which the intermediate vote is reflective only (though through dynamic complex reflection) - and they demand "one man, one vote" as the only fair rule of apportionment.

On the other hand, the emphasis on representatives-as-trustees produces a concomitant emphasis on legislatures as bodies of aristocrats governing the polity with their collective and deliberative wisdom. The will of the legislature is a thing apart from the will of the people (but not, of course, necessarily or even usually opposed to such will). In the representative as *pure* trustee theory, the indirect election concept does not obtain, and therefore the "one man, one vote" *formulation* of the pure population basis for apportionment simply makes no sense.

Population is not, however, irrelevant as a criterion for apportionment but great precision in equality is unnecessary and too simplistic. It is unnecessary since the elected trustee is not going to reflect his constituents' will, he is going to join with others to govern the whole polity. The election is merely a method of selecting the best man of the polity by districts instead of at large. Such precision is too simplistic because county (or any political subunit) integrity should be maintained and a broad geographical distribution of trustees aimed for in order that there be representative trustees in all parts of the polity to keep the deliberative body informed of the broad range of problems. It is assumed that the deliberative body of trustees will use such informing voice only to determine what is best for the whole polity and the informing trustee will not necessarily vote his district's interest, but vote the broader interest of all the people. Population is not entirely irrelevant since the more populous areas are both more likely to have more people of trustee quality (just statistically and to have more problems since people are the source of some governmental problems) about which the deliberative body needs an informing voice. But the essential point remains that in the representative-as-pure-trustee scheme, population is not paramount.

It was a position between these two polar theories of representative government that the Supreme Court was forced to choose when in *Baker v. Carr* it decided to settle the dispute over legislative
apportionment. This was what Mr. Justice Frankfurter, with his usual perspicacity, predicted in his dissent in *Baker v. Carr.* Whether the court knew it would need to make such choice one cannot determine. In fact, whether or not the justices now know they have much such choice is not determinable from their opinions.

What can be determined is this: many (in fact most) state apportionment schemes had through neglect or abusive use of entrenched power, ignored population in apportionment to an unconscionable extent even under a pure trustee theory of representation. However, if any argument could be made that the states' unequal apportionment reflected rational policy (the Court in *Reynolds* said it reflected "no policy") the argument had to be that the apportionment was predicated on an extreme form of representation as pure trusteeship. At the same time the representatives neither acted like pure trustees nor were expected to. In fact, if anything our democracy had moved radically in the other direction.

Enter the Supreme Court, determined to break the unconscionable legislative impasse. Being a court and federal, it had to find a justiciably manageable standard (i.e., a simple one) for determining which legislative apportionments were so unconscionable as to be unconstitutional. Moreover, it had to find a rule having generality and neutrality. Being a constitutional rule, it had to embody an ideal of almost immutable fundamentalness. Thus with the imperatives of simplicity, generality, neutrality and fundamentalness, the court moved inexorably from *Baker* to "one man, one vote" as that standard. Passing through *Gray v. Sanders* made it easier since that case involved a purely reflective or simple indirect election. But at the same time the court chose, consciously or not, a position on the extreme delegate or reflective end of the spectrum of theories of representative government. As was pointed out, at least this theory is more compatible with notions of what our democracy has become than the trustee theory viz.: the remarkable extent to which the Court has gotten compliance with decrees

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*869 U.S. 186, 300 (1962).*
*This is more fully discussed in Part II of this article.*
*The imperatives of judicial constitutional decision-making are discussed in Part II under the rubric of the "legitimate rule of judicial review in a democracy."*
which were essentially unenforceable without willing (if verbally grudging) cooperation from the state legislatures.87

Why has the Court not expressly stated that it has chosen a standard for resolution of apportionment cases which necessarily implies viewing the whole representative process as an indirect election of legislation by the people? The answer is fairly plain: (1) If "one man, one vote" implies "indirect election" and "indirect election" implies a distinct theory of representative government then the choice of "one man, one vote" implies the choice of a distinct theory of representative government. The latter choice is obviously a Guarantee Clause decision and the Court has persisted in maintaining that such decisions are beyond its competency. (2) Because of initial standing and justiciability problems the court adopted the rhetoric of "equal protection" and "voting" cases. The Court may have become so involved with such rhetoric that it was simply blinded to the implications of its decisions.

In Reynolds v. Sims, the opinion of the Court comes closest to explicitly asserting that the thing ultimately voted for in electing representatives is legislation, with these words:

But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.88

Another place the Court refers to "an individual citizen's ability to exercise an effective voice in the only instrument of state government directly representative of the people . . . ."88 It also quotes Jefferson as saying "a government is republican in proportion as every member composing it has equal voice in the direction of its concern. . . ."90

But aside from these references most of the opinion "talks" as if the "one man, one vote" rule applied only to the immediate election of the individual representatives, and as such demands equal population districts.91 This is patently absurd. Manifestly in

87McCloskey, supra note 21 at 56-57. Professor McCloskey refers to the court's apparently having hit upon "a latent consensus" of the public.
89Id. at 576 (emphasis added).
90Id. at 573 n.53 (emphasis added).
91Id. at 555, 559, 560, 562, 568, 565, 566.
voting for the district representative all "one man, one vote" demands is that each eligible voter get one vote. That standard is and has been universally obeyed in such elections from time immemorial. The only way a "one man, one vote" rule makes sense as a demand for equal population districts is if the election is viewed as an indirect election for legislation. The "one man, one vote" rule when translated into its reapportionment form reads: each citizen is, through the representative process, to have an equal right to participate with each other citizen in the formation of those laws which he must obey.

In a direct election like that involved in *Lance v. Board of Education* substitute "eligible voter" for "citizen" and strike out "through the representative process". It is manifest that in the election in *Lance* the rule was obeyed. Every eligible voter of Roane County had the exact same right to participate in the voting on the tax levy as every other eligible voter. Each took one vote into the voting booth. Each had his counted as one. Only if one assumes simple-majority as the only permissible margin for decision do the votes appear to be counted differently. But, of course the thing assumed is the whole issue to be decided.

Perhaps the West Virginia Supreme Court of Appeals should have discovered on their own that they were blazing an entirely new trail through the "political thicket" - Judge Haymond's dissent certainly reveals that he was aware of this. Moreover, the court had to know that the respondent, Board of Education, and its attorney did not have sufficient adversity of interest, to motivate the laborious effort of fully and persuasively articulating the opposition case. But something more than mere inadvertence or negligence must explain why four careful and responsible judges could have been as wrong as they were in *Lance v. Board of Education*. That something more is the example set by the United States Supreme Court. The example of taking cases that are not "cases" in the traditional sense; of taking cases for reasons that on their facts must appear to the uninitiated at least to be merely the assumption that every wrong must have a remedy whether judicially appropriate or not; for declaring rights that in the stark form

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*I use "wrong" not because the decision was unwise (though I think it was) or generally untenable (though I think it was that, too) but because the court relied on cases that logically did not support its position.*
of a holding must appear to be mere judicial fiat no matter what gloss of history, precedent or fundamental morality is put on it by lengthy opinion unread by a few and even that usually neutralized by dissent; and by not limiting such holdings with other holdings but allowing loose, confusing and sometimes contradictory language to draw the new line. This "bad example" is not large by actual number of incidences but rather appears large because the Court's example is so visible that every tendency is magnified by discussion, by speculation and by reformer's hope. Such reformer's hope would be better used if turned to persuasion in the political arena - to that arduous, painstaking process of articulating, explaining, reasoning and ultimately convincing the People. Of course this still goes on, but to some extent is dampened by the hope (largely false in the long run) of judicial intervention and court solution.

To enlarge and explain this hypothesis, I will in Part II set forth my view (largely borrowed from others) of the legitimate role of judicial review in a democracy; cite specific examples of the court's deviation from such role; explain, with examples, how this has had a deleterious effect on our democracy; and finally, to make some modest proposals for change.