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Overview: Electoral Reform

Introduction:
The Judicial Regulation of Political Processes—
In Praise of Multiple Criteria

Paul S. Edwards† and Nelson W. Polsby‡

State legislatures have started to convert 1990 census data into new districts and the political maneuvering has begun.¹ Accusations about partisan or racially motivated gerrymandering have begun to fill the op-ed pages.² Meanwhile, in the popular press there is hand-wringing about the expense and waste of campaigning for elective office, the lack of responsiveness of legislatures, and the corrupting influence of special interests in politics.³ Like most controversial social issues of our day, many of these concerns about regulating the electoral process will end up in court.⁴

The articles in this issue of the Yale Law & Policy Review raise questions about partisan gerrymandering, minority vote dilution, campaign finance, and voter mobilization. Together they propose a sizeable agenda directed at the further regulation of American political processes. Scholars and policy makers will be interested in subjects covered by these articles because of the impact electoral and political reforms could have on how well Americans are represented in government.

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⁴ Indeed, the court battles have already started. For example, when the Illinois state legislature failed to redraw congressional districts, the project went straight to the federal courts. See Elizabeth Brackett, Redrawing the Lines, Report for MacNeil-Lehrer News Hour (July 22, 1991); see also Robert Kagan, Adversarial Legalism and American Government, 10 J. POL’Y ANALYSIS & MGMT. 369, 369-75, 379-406 (1991) (exploring why so many social issues in the United States end up in adversary proceedings).
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We, however, are primarily interested in how courts will receive these articles. In fact, many of these articles address themselves to courts by proposing reform of the U.S. electoral system through the application by judges of what are hoped to be judicially manageable standards. We, too, focus on the judiciary because courts, for better or worse, will establish many of the policies in this area.

Part I of this brief overview and introduction considers the decline of the political question doctrine as it relates to this cluster of issues, and recommends judicial decisionmaking guided by multiple criteria as contrasted with reliance on any single, "judicially manageable," standard. Part II argues that multiple criteria are needed for court decisions about electoral politics because of a lack of consensus about political representation, and because any single criterion fails adequately to consider trade-offs that exist among relevant desiderata. We illustrate this point by discussing the competing criteria surrounding the issues of (1) money and politics, (2) minority representation, and (3) vote dilution and gerrymandering. All three subjects are discussed at length by other articles in this issue. Finally, we conclude in part III that the use of multiple criteria may help courts deal with "political questions" more competently to the extent that courts believe they should deal with such questions at all.

I. THE DECLINE OF THE POLITICAL QUESTION DOCTRINE AND THE RISE OF JUDICIALLY MANAGEABLE STANDARDS

When litigation is the method of reform, it is traditional to defer to those ingenious recommendations which offer judges a single, clear criterion to identify evils and devise remedies. Our tentative conclusion is that in some cases multiple criteria, which may not be quite so clear, are better.\(^5\) The advantages of multiple criteria over a single criterion are most apparent when the problems in need of remedy involve social and political circumstances that are important to the life of the community, but which nest in ways that are not fully understood, or when solutions promise to cause a cascade of consequences that cannot be easily foreseen.

Judicial intervention into political processes was once well understood to carry such risks. Judges honored the political question doctrine by refusing

\(^5\) Our term "multiple criteria" (as contrasted with single criterion) merely suggests that judges need to recognize and account for the trade-offs between competing criteria (none of which is obviously inappropriate) in deciding how to resolve disputes about the regulation of representative government. As we discuss in detail infra, adherence to financial equality among candidates fails to accommodate concerns for competitive elections, adherence to exact equality between district populations may fail to accommodate concerns for professional leadership in the legislature, etc. Given such trade-offs, multiple criteria, rather than one single criterion, have to be considered as a way of structuring judicial decisionmaking in regulating politics.
jurisdiction over certain cases. Often these cases highlighted the unaccountability of appointed judges to democratic processes, and the difficulty of finding satisfactory and clear legal standards to apply to political behavior.6

Recently, fights over the justiciability of political questions surrounding elections have been resolved largely in favor of judicial action.7 Since regulation of the political process is a relatively new line of work for judges, they, and authors such as those represented in this issue, are still at the stage of trying to fashion clear, "judicially manageable" tools that will separate permissible from impermissible behavior and point toward appropriate remedies. By advocating attention to multiple grounds of permissibility, we necessarily differ with some of the articles that follow. In our opinion, the very clarity with which the authors construct problems and solutions ignores too many probable pitfalls and introduces too much toxic material into the political system in the guise of remedies.

We know that laws governing the composition of districts, the finance of campaigns, or the registration of voters undoubtedly affect who runs for public office and who wins. There is, however, no single plausible explanation for how these laws affect those processes, or how they should. For instance, given the need to mobilize voters, and the fact that the individuals least likely to vote are those lowest on the socio-economic scale,8 can we say unequivocally that the expenditure of money in democratic politics operates against the principle of equality?9 Given the dangers of stalemate ever-present in proportional representation systems, can we confidently dismiss single-member districts and plurality (i.e., first-past-the-post) voting systems as undemocratic?10 Careful exploration of issues of this sort has yielded many surprises.

This may not bring much solace to judges who are today faced with the task of choosing from among contested districting plans, or ruling on the constitutionality of legislation meant to curb some forms of campaign expendi-

9. Expenditures of large amounts of money may be needed to mobilize voters from lower socio-economic echelons; the resulting mobilization may strengthen those individuals politically. One could argue that in such a case it is the expenditure of money in campaigns which creates more equality. See Nelson W. Polsby, Moving Toward Equality in Campaign Finance?, in POWER, INEQUALITY, AND DEMOCRATIC POLITICS 263 (Ian Shapiro & Grant Reeher eds., 1988) (advantages of money in elections may reach point of diminishing returns).
10. When proportional representation systems fail to produce decisive majorities, i.e., when there is stalemate, the strategic behavior of minority parties in the formation of legislative coalitions can give them power wildly disproportionate to their size. Cf. DOUGLAS RAE, POLITICAL CONSEQUENCES OF ELECTORAL LAWS 170-76 (1967) (discussing structural instability of legislative coalitions in proportionally represented multiparty legislatures without decisive majorities).
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ture—and who need to do so before the next round of elections. Multiple criteria may require more of judges than the application of bright lines and clear standards. But, multiple criteria need not dissuade judges from seeking to correct wrongs.

As Martin Shapiro has said, courts often find themselves “in a position to identify a wrong without being able to define the right. Finding themselves in this position, they are ethically entitled to, and in fact do, intervene against the wrong.” Thus, when a court knows that special interests are purchasing votes in this legislature, that malapportionment allows consistent minority control of that state assembly, that racial or ethnic minorities are systematically excluded from representation on this county’s board of supervisors, then straightforward remedial action can be contemplated. We suggest that if courts address the particular problem at hand by borrowing from a range of criteria, they are less likely to introduce anomalies and difficulties into contexts not contemplated by the facts before them.

II. WHY MULTIPLE CRITERIA

The desire that judges proceed cautiously when they decide questions related to political processes like elections does not require resorting to an unprincipled majoritarianism. But it does require the recognition that some issues are intractable to solutions that invoke just one sovereign principle because (1) there is no agreement on what the proper guiding principles should be, or (2) the principles most obviously applicable can be counted among many relevant considerations.

Our advocacy of multiple criteria stems from these same concerns. First, there is no theoretical consensus regarding electoral structures from which to derive a single principle or criterion for regulating elections. Second, even if we posit a principle or criterion, there may be many means to the stipulated end, as well as many other highly relevant factors worthy of consideration.

What follows then is not a shopping list of criteria from which to choose. Rather, we try to highlight some of the problems we perceive in single-criterion solutions in the areas of campaign finance, minority representation, and vote dilution. We discuss the “one person, one vote” doctrine extensively

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12. See, e.g., BICKEL, supra note 6 at 28, 65-72, 244-72 (discussing tension between fundamental principles and the “practice of democracy” in constitutional adjudication); HARRY WELLINGTON, INTERPRETING THE CONSTITUTION 140-58 (1990) (examining use of public values in constitutional adjudication and how constitutional adjudication shapes public values); Louis Jaffe, Standing to Secure Judicial Review: Public Actions, 74 HARV. L. REV. 1265, 1303 (1961).
13. BICKEL, supra note 6, at 185.
in order to illustrate what a jurisprudence of political regulation might offer if it made more extensive use of multiple criteria.

A. No Theoretical Consensus on Politics

Thinking about regulation inspires us to think about the economy, with its generally accepted criterion of efficiency, or, as economists would have it, Pareto efficiency. Behind this particular view of efficiency lies an elaborate and carefully articulated theory which describes how competitive markets with full information tend to move.\(^4\) However, the theory also informs us that markets can fail to move toward Pareto efficiency when there is less than full information, when competition is otherwise hindered, or when individuals do not recognize the full benefits or harms of their transactions.\(^5\) For such instances the theory suggests that regulation of pure market forces might be desirable.\(^6\) But even with a basic theoretical consensus, the practice of regulating the economy has been fraught with debate and contention.

Can we transplant this powerful intellectual machinery to the realm of political regulation? Assume that we could agree that what we wanted to maximize in democratic politics was equal representation of citizens. A theory of representation would help us better to understand what moved us toward or away from optimal representation, both in elections and in legislatures. The theory might indicate failures which could be corrected through regulation of one type or another. But no such generally accepted theory exists. Debates over representation have raged as long as representational structures have existed, and we do not foresee their resolution in the near future.\(^7\) A defensible regulatory regime should take account of the lack of common ground on such fundamental theoretical issues.

B. More Than One Story

Several of the articles which follow use rhetorically powerful complaints about some illness of American democracy as a backdrop for the application of a preferred remedy. Some articles argue that the courts, armed with proper premises, will see past the self-interest and confusion which keep legislatures from making the "right" decisions in the first place. But there is more than


\(^{15}\) See, e.g., PINDYCK & RUBINFELD, supra note 14 at 586-88, 591-621; COOTER & ULEN, supra note 14 at 45-49.

\(^{16}\) See, e.g., PINDYCK & RUBINFELD, supra note 14 at 622-30.

\(^{17}\) Some of the varieties of thought concerning representation can be seen in NOMOS X: REPRESENTATION (J. Rowland Pennock & John W. Chapman eds., 1968) and HANNA PITKIN, THE CONCEPT OF REPRESENTATION (1967).
one way to construct and remedy many of the problems complained of, as at least two of the articles herein recognize. Kenneth Gross focuses attention on enforcement, arguing that any changes in the substance of campaign finance laws will be ineffectual unless the Federal Election Commission enforcement process is improved. Stephen Gottlieb demonstrates that any attempt to regulate politics calls forth competing theories of democracy, equality, and legitimacy. Hence Gottlieb cautions us that electoral reforms, particularly those which purport to increase purity in the campaign process, will not necessarily give us better government or more democracy.

1. Money and politics. David Cole’s article, First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance, assumes that money does not mix with democratic politics and that it should be more tightly regulated. Hence, the article largely agrees with the Supreme Court’s recent decision in Austin v. Michigan Chamber of Commerce to uphold Michigan’s ban on independent expenditures by corporations. In Cole’s view, the case “reflect[s] the Court’s first serious acknowledgement” of the “structural threat of a monopolized marketplace of ideas.” Although Cole thinks that Austin did not reach far enough to curb the influence of wealth in politics, he argues that this does not necessarily mean that the initial impulse to respond to the distorting effects of wealth is wrong. It only reveals how difficult it is in a capitalist society to offset the distorting effects of unequal private resources on public debate. Moreover, . . . the problem of wealth distorting speech is so widespread and deeply ingrained that attempts to respond to it will inevitably run up against competing constitutional interests. But the difficulty of the task does not mean it should be abandoned . . . .

So Cole urges upon the courts a single criterion of equalization, a doctrine of judicial antitrust in the marketplace of ideas.

How much money in the political system is “too much”? Cole argues, along with the Austin Court, that politics needs protection from the corrosive and distorting effects of money. That view presumes the existence of some

20. Id.
21. Id.
24. Id. at 269-70.
25. Id. at 264-71; Austin, 110 S.Ct. at 1401. Far more money is spent each year to influence and inform arguably less important decisions than candidate selection. All campaigning for presidential candidates in the 1988 elections cost nearly $394 million. NELSON W. POLSBY & AARON WILDAVSKY, PRESIDENTIAL ELECTIONS 361-62 n.24 (8th ed. 1991). By contrast, the costs for advertising breakfast cereal in America in 1988 totalled nearly $835 million. Ad $ Summary (BAR/LNA Multi-Media Service) 12 (Leading National Advertisers Jan.-Dec. 1988).
baseline, some ideal form, which is being distorted. But what is the baseline? What is the ideal? Is it a politics greatly influenced by people having non-monetary resources, such as mobilized retirees and students? These presumably would be among the most politically influential groups if the money of working individuals is replaced by a non-monetized politics of pure participation. 26

A clear and precise criterion of "equalization" poses problems because many attributes and advantages are differentially distributed, and it may be that money actually operates to balance them. 27 The most important of these is incumbency, which by its nature tends to give advantage only to one contestant at a time. Writers with strong regulatory impulses seize upon money as the thing to regulate because it is easy to see when money is distributed unequally among candidates. 28 It is harder, however, to see when the candidate with less money actually has enough, or when the excess amount of money in the hands of the richer candidate produces diminishing returns. 29 This illustrates how relying on one clear, enforceable criterion of equalization can inadvertently exacerbate other prevailing inequalities.

Another justification of campaign finance regulation stems from the concern that expenditures of money on political activity might involve corruption of the political process in the form of bribery. Although the Supreme Court has recognized a compelling state interest in curbing corruption or the appearance of corruption through campaign finance regulation, that interest must always

26. When the case of Buckley v. Valeo was before the federal appellate court the plaintiffs argued (we think correctly) that

[iit is . . . too crabbed a notion of the political process to restrain people from demonstrating the intensity of their conviction on particular issues. Indeed, it is hard to see how a democratic nation can have a stable government if it does not permit intensity of feeling as well as numbers of adherents to be reflected in the political process . . . Campaign contributions represent a means by which intensity can be shown. . . .

Brief of the Plaintiffs at 105, Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975) aff'd in part and rev'd in part, 424 U.S. 1 (1976) quoted in J. Skelly Wright, Politics and the Constitution: Is Money Speech?, 85 YALE L.J. 1013-14 (1976). See also ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 90-123 (1956) (discussing need to account for intensity of preference in democracy). So long as money is (1) unequally distributed in the underlying population, and (2) the only way to demonstrate intensity of interest in politics, monetary differences invite regulation to increase equality of influence on decisions by voters. Nobody questions that most U.S. electorates meet the first criterion; the second criterion is another matter. As one of us argues elsewhere, once multiple forms of influence are recognized, restrictions on one form of influence merely increases the strength of the others. Polsby, supra note 9.

27. Polsby, supra note 9.


29. See, e.g., Polsby, supra note 9, at 270 (suggesting that 1972 Nixon presidential campaign reached point of diminishing returns); See generally GARY C. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS (1980) (elections respond to money in the hands of challengers, but not incumbents).
be balanced against the rights of free speech implicated by such regulation.\textsuperscript{30} It is important to note, however, that of late no corruption by means of campaign finance has been proved to exist.\textsuperscript{31}

So far, the growing empirical literature on how money influences legislative politics indicates that the link between finance and policy is weak at best,\textsuperscript{32} and just as likely as not runs opposite to the direction commonly supposed; a legislator receives contributions because he or she already supports a particular policy, not vice versa.\textsuperscript{33} Thus, concerns about the effects of contributions on legislative outcomes may not justify elaborate and onerous regulations on campaign finance. Perhaps deregulation, with effective disclosure, would be better.

2. \textit{Minority representation}. The Voting Rights Act of 1965, as amended,\textsuperscript{34} asks courts to play a large role in increasing minority representation.\textsuperscript{35} Nonetheless, more than one story can be told about increasing minority influence in legislative bodies. A current litigation strategy attempts to concentrate minority voters into a single district so that they are assured of getting at least one representative.\textsuperscript{36} But one representative in a legislative body may not be enough to influence policy.\textsuperscript{37} Measured by the policy outcomes for the minor-

\begin{thebibliography}{37}
\bibitem{32} The "appearance" of corruption, frequently cited as something equally debilitating to the political system as corruption itself, deserves separate consideration—indeed more consideration than we can accord it here. It is commonly invoked in the passive voice, as though it would be of no moment to whom a given set of circumstances appeared to be corrupt, or on what grounds. Given other presumptions of Anglo-American jurisprudence, such as the presumption of innocence under a variety of circumstances, the construction of public policy and of a regime of judicially managed regulation of the political process on the basis of something as vague and easily manipulable by anybody with access to a soap box or an editorial page as an "appearance" of corruption seems highly questionable. Yet it is rarely questioned.
\bibitem{33} See, e.g., \textit{Frank Sorauf, Money in American Elections} 312 & n.26 (1988). After reviewing the literature on the consequences of campaign financing, Sorauf concludes that "there are simply no data in the systematic studies that would support the popular assertions about the "buying" of the Congress or about any other massive influence of money on the legislative process." \textit{Id}. at 312.
\bibitem{34} \textit{42} U.S.C. \textsection 1973 (1988).
\bibitem{35} \textit{Id.} \textit{See also} Abigail M. Thernstrom, \textit{Whose Votes Count? Affirmative Action in Minority Voting Rights} 192-93 (1987) (indicating that litigation under revised \textsection 2 of Voting Rights Act has been voluminous and successful for minority plaintiffs); Barbara Y. Phillips, \textit{How to Use Section 5 of the Voting Rights Act} (3d. ed. 1983) (discussing administrative and judicial preclearance, and litigation strategies under §§ 2 and 5 of Voting Rights Act).
\bibitem{36} \textit{See, e.g.}, Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), \textit{cert. denied}, 111 S. Ct. 681 (1991) (upholding lower court redistricting plan creating a Hispanic majority in one supervisorial district).
\bibitem{37} \textit{See, e.g.}, Rufus P. Browning, \textit{et al.}, \textit{Protest Is Not Enough: The Struggle of Blacks and Hispanics for Equality in Urban Politics} 24-45 (1984) (arguing that political incorporation and policy responsiveness are more important measures of political equality than the simple fact of representation).
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ity population, it may be better to have minorities influence electoral outcomes in several districts, rather than determine the outcome in only one. 38

Another proposal for assuring minority representation is a system of proportional representation (PR). 39 Most versions of PR offer this clear criterion for representation: they allow groups to elect candidates in proportion to their population in the electorate. But a judicial requirement for nationwide PR would set off an enormous constitutional change. 40 Moreover, in legislative decisions governed by majority rule PR would not assure any influence for those minorities whom it is intended to benefit. Indeed, in the legislature PR might greatly empower quite different minorities than those it intends to protect. Policy outcomes under PR depend upon how governing coalitions are formed.

Edward Still’s article, Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections, 41 addresses the problem of minority vote dilution in at-large judicial elections, an issue recently decided by the U.S. Supreme Court. 42 Still argues that cumulative and limited voting might remedy minority vote dilution in at-large electoral districts. 43 These remedies would create proportional voting in at-large judicial elections. 44 Although Still may correctly characterize the nature of district court judicial elections as significantly different from that of legislative elections, proportional representation as a remedy for violations of section 2 of the Voting Rights Act constitutes a very long reach for our political system.

3. Vote dilution and gerrymandering. The reapportionment cases of the early 1960s called attention to a problem of representative democracy in states where a minority of voters controlled state legislatures. Two avenues were open to the courts to overcome this deficiency. The first was to invoke the Guaranty Clause of the Constitution. 45 The other was to rely on the Equal Protection Clause, 46 the rationale the Supreme Court pursued.

The language of the Equal Protection Clause offers a single criterion: equality, a logical extension of which was the principle of “one person, one

38. THERNSTROM, supra note 35, at 243-44 (multiethnic election districts can create strong political incentives to include minorities in political process and reduce causes of interethnic conflict).
40. See Shapiro, supra note 11, at 254-56 (describing judicial imposition of proportional representation as “nuclear disaster scenario” resulting in “the most major and fundamental amendment to the Constitution since the Fourteenth Amendment.”).
44. Id.
45. U.S. CONST. art. IV, § 4, cl. 1. (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”).
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vote.”47 “One person, one vote” was meant to promote majority control in the states. But, as soon as it was announced, it was used to thwart an overwhelming majority in the State of Colorado which, through ballot initiative, chose to apportion one state house by population and the other by county.48 To the majority of voters in Colorado, who wanted their state legislature to reflect the unique political geography of a state with one major metropolitan area and small populations scattered across the plains and cloistered in mountain valleys, the Supreme Court now had only one response: “one person, one vote.”49

What might have happened if the Court had chosen the Guaranty Clause, which declares that states must provide their citizens “a republican form of government”?50 By recognizing that minority regimes in contravention of their

47. Reynolds v. Sims, 377 U.S. 533, 568-76 (1964). Although the Court has pursued this single criterion quite an extraordinary distance, it still has yet fully to resolve some important issues governing its application. For example, does “one person, one vote” mean apportionment by population or the right to an equally weighted vote? See Garza v. County of Los Angeles, 918 F.2d 763, 779-88 (9th Cir. 1990), (Kozinski, J., concurring and dissenting in part) (apportionment by population and apportionment by number of voters “are based on radically different premises and serve materially different purposes.”), cert. denied, 111 S. Ct. 681 (1991); see also BRUCE CAIN, THE REAPPORTIONMENT PUZZLE 57-59 (1984) (discussing differences in weight of vote in equally populous districts with differing numbers of voters). Where there are disparities in the underlying population and number of voters, the two standards are in conflict. This issue clearly affects the appropriate remedy for instances of minority vote dilution. Those interested in electing a minority candidate through the creation of a minority district need to calculate carefully the number of minority voters, not merely the minority population, in order to assure that minority strength is sufficient to elect minority candidates. See William A. V. Clark and Peter A. Morrison, DEMOGRAPHIC PARADOXES IN THE LOS ANGELES VOTING RIGHTS CASE, 15 EVALUATION REV. (forthcoming 1991) (manuscript at 4, on file with authors).


49. Colorado’s geography makes representation very difficult. Jim Johnson, a Republican representative from Colorado’s fourth congressional district in the 1970s once noted that he really served four different districts. In describing the disparities, Johnson observed, “‘The far east is mostly concerned with agriculture, the foothills of the mountains on the east are suburban; the mountain area on the continental divide is mostly tourist, a resort area and small mountain towns that are ranching-oriented and the far west is agriculture and mineral development’” RICHARD F. FENNO, JR., WATCHING POLITICIANS: ESSAYS ON PARTICIPANT OBSERVATION 103 (1990) (quoting Jim Johnson). As Richard Fenne notes,

[i]he nature of these interests put [Johnson] in the middle of some of the toughest issues of the 1970s—energy, environment, natural resources. . . .

. . . To complaining cattlemen on the western slope, he said that the dairymen on the eastern slope were worse off. To people in favor of the West Divide Reclamation Project, he said that the people who worried about flooding beautiful country had a point. He told people on the western slope that the Denver Water Board had reasonable people on it; and on the eastern slope he told people it was unfair for them to keep water from the western slope farmers who needed it when Denver had no need for it now. He regularly told one group that another group in the district had a different viewpoint—trying always to engender that essential tolerance, constituent to constituent as well as constituent to congressman.

Id. at 103, 109.

50. U.S. Const. art. IV, § 4, cl. 1. We do not offer this radical proposal naively. The Court has held that the Guaranty Clause is usually nonjusticiable. Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (holding guaranty clause gave Congress, not the Court, sole authority to decide what was lawful authority in Rhode Island during Dorr Rebellion); Taylor & Marshall v. Beckham (No. 1), 178 U.S. 548 (1900) (holding nonjusticiable claim that state’s resolution of contested election deprived voters of republican form of
own constitutions\(^5\) did not provide a republican form of government, the Court could have started moving incrementally towards a Guaranty Clause jurisprudence in the way it gropes its way toward the statement of most doctrines: case by case. The Guaranty Clause could have allowed judges to take into account not just the size of a population, but also the extent of its distribution into discrete communities. Indeed, there are many other factors related to republican government that courts could consider in apportionment. These factors include adherence to state constitutional provisions, the appropriateness of a legislative decision to protect incumbents in order to preserve the state's political power at the national level, the need to create more competitive elections in order to increase legislative "responsiveness," and the need for flexibility when creating new or specialized governmental institutions. Consideration of such factors is difficult and perhaps impossible if courts are required to attend only to "one person, one vote."

For example, consider the desire to protect state interests in a federal system. State \(A\), being quite homogeneous and politically stable, sends the same representatives to Congress year after year. These representatives acquire

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\(^5\) It is rarely noted that failure to comply with state constitutional provisions was a central issue in the litigation leading to Baker v. Carr, 369 U.S. 186 (1961) (voter challenge to Tennessee's legislative districting justiciable under equal protection clause). The malapportionment of Tennessee's legislative districts in 1961 was largely due to the failure to reapportion those districts since 1901, despite the fact that the Tennessee constitution specifically provided for decennial reapportionment. See id. at 188-91. Although we suggest that the Guaranty Clause may allow federal courts to consider the issue of compliance with state constitutional provisions, state supreme courts should continue to be the final arbiters of their own constitutions.
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seniority and enjoy a great advantage in dealing with less senior representatives from other states. This creates an incentive for the legislature of State B, a more heterogeneous state, to draw its district lines so as to protect as many of its incumbent members of Congress as possible, in the hope of improving its competitive standing in Washington. In this manner, reducing competition for House seats may increase political competition nationally, and may actually benefit a larger population.

Examples of incumbent protection by state legislatures are, of course, legion. The Texas legislature protected House Speaker Sam Rayburn for many years. Rayburn’s district at the time of his death was the second smallest in population in the nation (the smallest being the district covering Michigan’s upper peninsula) and adjacent to one of the largest districts, covering Dallas. It is not obvious that the people of Dallas were ill-served by this arrangement even though it ostensibly diluted their political influence.

Or consider the need for flexibility and inducement when creating innovative governmental institutions. Many people in the San Francisco Bay Area, where we live, are worried about the deteriorating standard of living. One proposal that addresses this issue seeks to establish a regional government that can deal with issues such as transportation, the environment, and growth. Although its powers would in some respects be limited, this government, which would exercise important governmental functions, would likely only be considered politically legitimate if it were elected. But small outlying cities, which might consider themselves disproportionately affected by the decisions of such a government, have no incentive to opt into such a system if it is assured that they will always be outvoted on issues that concern them. As was clear in the classic debate in the federal convention of 1787 leading to the Connecticut Compromise, those favoring some centralized control need to be able to provide assurances or incentives to small communities before they will enter the system. Thus, any effective coordination may be possible only if there is some type of representation by town. A Bay Area regional government based on representation by towns or counties might arguably guarantee to its citizens a republican form of government, and thereby pass constitutional muster according to an approach in which more than one criterion of acceptability is consulted. But, under the monotonic doctrine of “one person, one vote,” such a governmental instrument could not meet constitutional standards. Is it better for such a device never to be created?

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52. BAY VISION 2020 COMMISSION: THE COMMISSION REPORT (1991) (proposing a regional commission for the San Francisco Bay Area to coordinate regulation of air quality, transportation, and housing).

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Our brother Polsby and Popper's elegant article, *The Third Criterion*,\(^5^4\) offers the judiciary a single criterion to remedy one of the major complaints lodged against partisan gerrymandering, the highly suspect lack of compactness of districts. They advise using the compactness standard merely as a rebuttable presumption, thus avoiding the dangers of single-mindedly pursuing a single criterion such as has notoriously occurred in the case of the "one person, one vote" doctrine. The use of this presumption would theoretically allow politicians to justify districting in terms of criteria such as existing political boundaries, geographically bounded communities, and the goals of the Voting Rights Act, but not self-preservation. We wonder, however, if judges will employ the criterion in the suggested way, or if the legal availability of a simple measure of compactness will override all other considerations in determining the acceptability of the shapes of districts. The history of the closely related criterion of equal population can give no comfort. It seems to us only a matter of time before the single criterion of compactness produces its judicial equivalent of *Karcher v. Daggett*.\(^5^5\) It is very easy to overstate the need for judicial supervision of the inherently political business of redistricting. The most recent empirical evidence suggests that the cumulative effect of partisan gerrymandering seems to wash out nationally,\(^5^6\) and partisan gerrymanders have proved to be far from lasting.\(^5^7\) Thus what Polsby and Popper have given us may be more solution than the problem requires.

Additionally, compactness as a desideratum for legislative districts is becoming positively unfashionable in the face of demands for minority-dominated seats and perfect equality of district sizes. *Congressional Quarterly* reports on an official, computer-drawn congressional redistricting in North Carolina "that looks like a Rorschach test, with boundaries that loop and snake and twist through the state, splitting counties, cities, towns and even fourteen precincts; two new districts intersect at a geometric point—known as the 'double crossover.'"\(^5^8\) The real story in North Carolina is not the grotesqueness of the shapes of districts—although virtually all of the twelve districts are in fact grotesquely shaped. What these shapes attest to is not merely lack of compactness but, more significantly, the disregard of all bases for the construc-

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55. 462 U.S. 725 (1983). *Karcher* invalidated a New Jersey congressional districting plan where the deviations between districts was less than one percent, which was less than the margin of error in the census data used, because the state had failed to make a "good faith effort to achieve precise mathematical equality" in population among its congressional districts. *Id.* at 744. In other words, the Court wanted the districts to be drawn more precisely than the available data would allow.
Introduction

tion of political community other than race and incumbency. The presump-
tion that geographic proximity leads to interests in common may in fact be
totally wrong. Or it may not be. Confiding the drawing of lines to the legisla-
ture instead of a computer, as the North Carolina constitution provides,
leaves decisions about how to construct the political communities to which
North Carolina’s representatives in Congress are individually responsible in
the hands of persons who are capable of invoking diverse criteria, not merely
the one or two (equal population, safe-minority districts) that have been
selected for emphasis by courts. The legislature, however, added only one
criterion to the computer program: incumbent protection. Contiguity and com-
pactness, having no current judicial advocates, went by the boards.

Will the discovery of Polsby and Popper that compactness can be judicially
managed cause judges to insist on compactness? Will this cause legislatures
to abandon incumbent protection? No doubt some observers will welcome this
added constraint upon elected politicians. One wonders how state constitutions
could have been so badly written as to neglect to provide directly for judicial
supervision of reapportionment.

III. CAN MULTIPLE CRITERIA SALVAGE
THE DOCTRINE OF THE POLITICAL QUESTION?

The rationale for the sort of judicial behavior variously called “judicial
restraint,” or “modesty,” to which we generally subscribe, is that unelected
officials ought, in a democracy, to defer in their judgments to elected officials
on matters in which political judgments may constitutionally vary. The doctrine
of the political question was developed in part as a way of identifying those
empirical instances in which judicial deference was regarded as particularly
appropriate. As the number of such instances has diminished, it becomes
necessary in effect to rewrite the code of judicial behavior so as to minimize
the ill effects from the standpoint of democratic theory.

One signpost that has been relied upon in the course of increased judicial
involvement is strict adherence to one judicially manageable principle at a
time. This has created problems. If judges are going to participate more
vigorously in the dispensation and alteration of political benefits and penalties,
they had better do so with their wits about them, and not delude themselves
into thinking that close adherence to one glorious principle at a time will avoid
the most trouble.

59. Id. at 1916-17.
60. See N.C. CONST., art. II, § 5; cf. N.C. GEN. STAT. § 163-201 (Supp. 1990) (act of General
Assembly specifying congressional districts following the 1980 census).
Life is filled with circumstances in which responsible decision makers must attend to more than one value to arrive at outcomes. Courts must do the same, especially when they enter the political arena. Thus:

(1) Limiting expenditures of money may actually work against the goal of "leveling the playing field" as between incumbents and challengers in contests for elective office. The unrestrained use of money may actually be the best way for non-incumbents to get into the game.

(2) Increasing the influence of historically disadvantaged demographic minorities may require the establishment of a protected, minority-dominated district, or it may require distributing minority votes into several districts.

(3) The requirement of equally populated congressional districts may be so easy to manage judicially as to inspire courts to micro-manage along this particular line. Requiring a republican form of government, by contrast, might have prevented the court from doing more than it needed to do in order to persuade a state to follow its own constitution.

In all these instances, we think the simple answer was not necessarily the right answer, and that courts might have done less inadvertent harm while coming roughly to the same conclusions by attending to multiple criteria in their decisionmaking. Vigorous judicial intervention into the political process requires a philosophy of jurisprudence that is broadly attentive to the consequences of what judges do.

If courts are going to decide political questions it is better that they make explicit trade-offs among considerations such as these than that they proceed as though no such trade-offs are entailed in the choices they make. This, at any rate, is the basis for our belief that they must attend to a suitable range of criteria in their decisionmaking, and hesitate to follow the single-valued courses of action so frequently pressed upon them.

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61. Stephen Gottlieb's article reminds us that election reform is one of those areas. Gottlieb, supra note 19.

62. Polsby, supra note 9; see also supra text accompanying notes 25-33.

63. THERNSTROM, supra note 35; see also supra text accompanying notes 34-44.

64. See supra text accompanying notes 45-57.