THE NEW SUPREME COURT: PROSPECTS AND PROBLEMS

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"The judiciary," said Hamilton in the 78th Federalist, "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."¹

It did not turn out quite the way Hamilton imagined. The Court has proved itself capable of taking a few active resolutions. Never for long has it been that remote, unintrusive, seldom noticed institution envisioned in the 78th Federalist. But while the Court has been much in the minds of its countrymen, and not always favorably, while it has seemed to many Americans to be a deviant, an inconsistent institution in a political democracy, and also otherwise an irritant—just the same, while we have talked about it endlessly, we have never known what, if anything, to do about it. We have, indeed, seldom wished to do anything about it, coming to the brink only once or twice, notably in the Court-packing fight of 1937. Like Easterners transplanted to southern California, who find themselves missing the four seasons, rain, snow, sleet and all, our people would no doubt discover that they missed the Court if they ever did figure out something to do about it. It may be, as Felix Frankfurter once remarked, at a time when he was being highly critical of the Court


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of the 1920's and 30's, that if the Supreme Court "did not exist, we should have to create it."\(^2\)

The nature of the Court's impact on the society, the process that produces the impact, and the justification for it—all are ill-understood by all concerned—lay observers and professional, indeed at times by the Court itself.

In one aspect, the Court does play a clear, readily recognizable role. This is a symbolic role, important in itself, and essential to the performance of any other function. It is this role that for many observers was put in question by the affair that resulted in the resignation of Justice Fortas, and by the charges of ethically dubious behavior that were leveled against Judge Clement Haynsworth, and that caused his nomination to fail. Again, this role of the Court was put in question also by the rather well-substantiated—as I thought them—accusations of racism that were made against ex-Judge (and in a way, ex-Senator) Harrold Carswell, and that defeated his nomination, in turn. A story Chief Justice Taft used to enjoy telling illustrates the symbolic role I have in mind.

For many decades, until it moved into its present quarters in 1935, the Court sat in a beautiful room in the Capitol, where Senators throw luncheon parties these days. The room is still known as the Supreme Court Room, but its uses, one may think, have degenerated. It is on the east side of the main corridor of the Capitol, and there used to be a robing room on the west side. Sessions of court would start at noon sharp—they don't any longer; another tradition broken!—and just before noon, attendants would come out, separate the ever-present crowd of tourists, and rope off a passage-way across the corridor, through which the robed Justices then marched in a line to the courtroom, the Chief Justice at their head. Taft would tell of the bystander who was overheard to remark, in utmost seriousness and sheer awe: "Christ, what dignity!"

Before it is anything else, before, indeed, it can even try to be anything else, the Court is and must be the symbol of dignified detachment, of a disinterestedness remote from the everyday hurly-burly of the political, or any other, market place.

But the Court is, of course, also an instrument of policy, a branch of government. It is in this latter role—made possible by the first, and in tension with it—that the Court is mysterious, ill-understood.

We speak easily of a Warren Court and a Burger Court, and

thus indulge what the late Thomas Reed Powell called an unwarranted animism. At least, such terms mislead in that they suggest sharp breaks, which do often occur when other institutions of government change hands. But sharp breaks occur very rarely indeed, if ever—the very special circumstances of the period 1937 to 1941 may be the exception that proves the rule—very rarely, if ever, in the Supreme Court. The reasons are at least two. First, personnel changes are very slow. Second, the institution has a life-force of its own that can exert dominion over, and bend the preconceptions of, the strongest of new men.

Yet there are eras in the history of the Supreme Court, and such an era very probably ended with the departure of Chief Justice Warren. What is to come next is a function of new men—two already—and of events.

We know something about the kind of new men we will get. The President has said that he intends to put some “strict constructionists” on the Court. The variety of often contradictory meanings poured into that phrase over the course of our constitutional history is of no moment. What the President means by it is plain enough; it is one thing that he has, in the phrase he is so fond of using, made very clear. He intends to pick men who, he hopes, will be—literally—conservative in the use of judicial power; who will, by and large, let the society be, and leave the initiative for reform and change to the President, to Congress, and to state and local governmental bodies. Like some, though of course by no means all, professional observers of the Court, the President would like to see a less intrusive Court than we have experienced in recent years.

Nevertheless, of the two elements of change, men and events, the new men, the new “strict constructionists” whom Mr. Nixon will perhaps have the opportunity to give us, may be harder to predict than the events. No doubt, forward reforming movement will be slowed, particularly in the area of criminal procedure, and there will be changes of tone, nuance, perhaps of emphasis, throughout. The Court Mr. Nixon will have reconstructed will very likely consolidate, modify, and moderate some of the reforms of the past decade and a half. But only the most daring would venture to guess just exactly what the new men will do with these old problems.

Events, paradoxically enough, may be somewhat easier to foretell. They are quite likely to alter the nature of at least two major categories of problems the Court has dealt with, and, albeit cautiously and ever fallibly, one may venture perhaps to predict that new circumstances will exact new responses from the Justices.

I would like to direct attention, in some detail, to developments
in the public schools, with which the Court has been continuously concerned, of course, since *Brown v. Board of Education*, the school desegregation decision; and more briefly, to the problem of apportionment, the one man, one vote problem.

Some familiar but often misunderstood history may show us where we are in the constitutional law of public schools, and how we got here. *Brown v. Board of Education* dealt with legally enforced segregation, and declared it unconstitutional. I am not now talking about various strands in the philosophy that underlay the decision in *Brown*, or about inferences that may be drawn from the opinion. I am talking about the factual situation that was before the Justices, and I am stating what I understand them to have decided. Most lower appellate courts have understood the *Brown* case as I do, and none has explicitly read it otherwise.

In administering the disestablishment of legally segregated, dual school systems against strong resistance over the years, the lower federal courts, the Department of Health, Education, and Welfare acting under Title VI of the Civil Rights Act of 1964, and the Supreme Court itself have laid down a number of rules, which may be thought of as rules of administration, or of implementation. Thus the Supreme Court made it clear that freedom-of-choice plans superimposed on an essentially dual system, and producing no more than a minor black presence in previously all-white schools, will not do. Nor will residential zoning, to the extent that it uses schools originally located so as to implement a policy of segregation, particularly if they are substandard schools; or if pupils are allowed to transfer out of schools into which they have been zoned, but in which they are in a racial minority; or if a school board otherwise fails to satisfy a judge or the Department of Health, Education, and Welfare of its good faith. Finally, faculties and all other activities must be desegregated.

These rules of administration were essential to the maintenance of the integrity and credibility of law. They required the manifestation in practice of the principle of *Brown v. Board of Education*, which in turn was crucial to a believable—meaning an honest and effective—legal order. We would have mocked the principle of *Brown* if we had allowed the South to wipe some laws formally off its books, and then to continue with segregation as usual, through inertia, custom, and the application of private force. And so we have quite properly, indeed necessarily, implemented *Brown* by demanding the palpable, visible disestablishment of the prior system.

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of legally enforced segregation, and the substitution for it, in a phrase—but it is only a phrase—of a unitary system.

Some lower federal courts, and in some instances the Department of Health, Education, and Welfare, have gone farther. They have taken literally Justice Brennan’s dictum in the Green case of 1968\(^5\) that there should be no white schools or Negro schools, "but just schools,"\(^6\) and have directed the achievement of a racial balance in each school of a system, corresponding more or less to the proportion of the black to the white race in the system's total school population. But such racial-balance decisions are conditioned by the particular circumstances and the history of litigation of particular school districts. The Supreme Court itself, as Chief Justice Burger pointed out in his brief concurrence in the Memphis case,\(^7\) in which the Court denied certiorari last March, has not decided whether "any particular racial balance must be achieved in the schools."\(^8\) Nor, as the Chief Justice went on to say, has the Court told us "to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court."\(^9\) And the Chief Justice added: "Other related issues may emerge."\(^10\)

Underlying all these questions is the fundamental one whether "the ends sought by prior holdings of the Court,"\(^11\) the ends sought by the constitution, remain the disestablishment, root and branch, palpably and visibly, of prior systems of legally enforced segregation, or whether the end we must now seek is the dispersal of pupils of different races throughout each school system, and the achievement of a racial balance in each school? That is the open question. That is the turning point we have now reached.

I don’t mean to suggest that this is the only problem that’s left and that needs attention, or that the Supreme Court will solve it for us this winter or spring. Disestablishment is not complete. And where complete, it remains to be policed, even as the covert enforcement of racial separation in some Northern and Western school districts remains to be policed. But the overriding question has now become that of the ends to be sought, in the South and throughout the country—not for the millennium, to be sure, but in the foreseeable future.

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\(^6\) Id. at 442.
\(^8\) Id. at 237.
\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
The question does not arise abstractly, and it can't be solved under laboratory conditions. If our policy is to be racial dispersal and the achievement of racial balance in the public schools, it will have to be enforced under social and economic conditions prevailing in the United States today, and within the established legal order in the United States today. Moreover, for the Supreme Court, as indeed for Congress or the President, the question is posed as one of national policy. It is thus a different question than may be presented in communities across the country, which may adopt a policy of their own without needing to worry about its applicability elsewhere, in variable circumstances. One may decide against racial dispersal as a national policy, and yet hope devoutly that it will take place in many communities, and work hard toward that end. But one must take very serious pause before settling on a national policy that one intends to apply and enforce in some communities, but not necessarily in other ones.

I think I appreciate the idealism that moves proponents of a policy of racial balance. And I think I appreciate the force of arguments made in support of such a policy, although I do not find them ultimately persuasive.

The distinction, which in the main the cases have so far drawn, between legally enforced segregation (de jure), which must be disestablished, and separation without legal compulsion (de facto), which is allowed to persist—this distinction strikes many people as thin, legalistic, not altogether ingenuous. But such distinctions are entirely characteristic of our law, indeed of any legal system. They are far more prevalent than rules, as Justice Holmes once said, of "simple universality." "I do not think we need trouble ourselves," Justice Holmes wrote, in a different context, of course, "with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized."\(^\text{12}\)

The law in most of its concerns finds stopping points, at which effective returns diminish, or at which one value clashes with another. That is when it draws lines and emphasizes differences of degree, which may seem arbitrary or appear disingenuous if seen in isolation at the point of contact, but which are ineluctable, as much a necessary part of a legal order as the great principles at whose peripheries they occur.

De facto separation of the races in the schools generally reflects, through a neighborhood school policy, residential separation. The arguments are made, first, that the residential separation is

itself a function of law, and, second, that even if it isn't, to reflect it in a compulsory school assignment policy is to enforce segregation by law at one remove.

Quite possibly, as Professor Edward C. Banfield has pointed out in his recent book, The Unheavenly City, we overestimate the degree to which legal coercion or inducement, and indeed private racial prejudice, have been decisive factors in producing residential separation. There is prejudice, of course, and the law has catered to it. But the composition of urban neighborhoods may be a consequence, more importantly, of relatively impersonal social and economic forces that operate in the growth and development of metropolitan areas. In any event, if residential separation is forced or induced in significant measure by law, then it is the root problem to which the law should address itself. It would follow that residential separation should be declared unconstitutional or otherwise unlawful.

An occasional lower federal court has tackled residential separation, but are we prepared to adopt forced residential racial dispersal as a national policy? I suggest that we are not—not only, and not even chiefly, because of the material and social costs that would be involved, but because we are far from sure upon reflection that it would be the right policy. In 1968, Senator Robert Kennedy urged a Senate subcommittee to invest by far the major portion of federal funds for low-cost housing in the slums themselves, thus accepting continued racial separation for the time being, rather than outside the slums, in an effort to create integrated housing. Senator Kennedy said:

To seek a rebuilding of our urban slums is not to turn our backs on the goal of integration. It is only to say that open occupancy laws alone will not suffice and that sensitivity must be shown to the aspirations of Negroes and other non-whites who would build their own communities and occupy decent housing in neighborhoods where they now live. And, in the long run, this willingness to come to grips with blight of our center city will lead us toward an open society. For it is comparability of housing and full employment that are the keys to free movement and to the establishment of a society in which each man has a real opportunity to choose whom he will call neighbor. Others have come to similar conclusions. Piven and Cloward have written:

The Achilles heel of housing programs has been precisely our insistence that better housing for the black poor be achieved by residential desegregation. This ideal glosses over the importance of the ethnic community as a staging area for groups to build the communal solidarity and power necessary to compel eventual access to the mainstream of urban life.\textsuperscript{15}

I shall point out further on that considerations very much like these are relevant to the public schools. But even if they are not, yet if we conclude that residential separation is permissible, then why may the schools not reflect it, as they reflect socioeconomic, ethnic and other living patterns? The answer that is made constitutes perhaps the single most important argument for racial dispersal in the schools. It is that separation of the races in the schools works a particular and a terrible injury to black children. It results in an unequal education for them. This proposition, adopted in perhaps a somewhat different sense by the Supreme Court in \textit{Brown v. Board of Education}, in the context of legally enforced segregation, is extended to de facto separation on the basis of the Coleman Report.\textsuperscript{10}

Now, the Coleman Report compared the education actually given in this country several years ago to black children and white, middle-class and lower-class children, in integrated and in separated situations. Dr. Coleman and his colleagues sought to ascertain what made a difference, and their Report is a triumph of social science, no doubt. But the Report assessed, it could assess, of course, only those differentiating factors which were then in being. It did not compare what we might do with what we have been doing. It compared only the things we have been doing, with each other, in the places we have been doing them.

The Coleman Report found that the socioeconomic composition of the classroom made a difference to the quality of education. It found also that the racial composition of the classroom made some smaller, less easily discernible difference. But there has been a question ever since whether the racial factor was properly isolated, or whether the figures purporting to deal with race simply repeated the findings on the effect of socioeconomic class. Assuming that racial composition of the classroom did make a difference, hard as it was to measure it, the conclusion to be drawn from Dr. Coleman's data would then be that if a minority of black children, in a

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\item \textsuperscript{16} J. Coleman, \textit{Equality of Educational Opportunity} (1966).
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percentage that had best not exceed thirty or so, are put in the same learning situation with a majority of whites, their learning improves.

It would follow that as the percentage of blacks rises toward a majority, nobody's learning improves, and ultimately there is a loss for some—that is, a loss in terms of what the middle-class parent wants the school to give his child. Moreover, Dr. Coleman did not find that other factors, such as per pupil expenditures, made no difference at all to the education of deprived children, particularly in the South, or that teacher quality made no difference at all. He found merely that a child's socioeconomic background, and that of his classmates, made the greater difference. And he found that among negative factors deriving from family background that the school, if possible, must counteract, the one that seemed to relate most strongly to achievement was the child's lack of a sense of control of the environment.

Slender and not really conclusive as the findings of the Coleman Report may be, one could understand basing a policy of racial balance on them, even a rather major policy, involving large expenditures, not only of material resources, but of political and other energies, if there were nothing else in play, if there were no competing values also legitimately entitled to consideration, and if, as a practical matter, probable results promised adequately to reward the effort.

Well, as to probable results, it is apparent that whites, and particularly the middle class, among whom the dispersal of other groups would be required to take place under a policy of racial balance aimed at achieving the full benefits indicated in the Coleman Report—whites and particularly the middle class tend to leave schools, or if not schools, classrooms, in which their children do not form the dominant majority. This is the phenomenon of resegregation, which has been evident throughout the country, particularly in urban areas.

It is all too facile, and not a little self-righteous, to ascribe resegregation purely to racism. After all, there is reason to believe that when the middle class becomes a minority in a classroom, the educational process, as conceived from its point of view, suffers. Whatever the motives behind it, however, resegregation is not an instance of unlawful resistance to the law of the land, or of resistance that could readily be made unlawful. Taking refuge in thinly disguised so-called private schools, which are in truth publicly supported, has been declared unlawful. But the right as such to withdraw from the public schools and attend a parochial or other
genuine private school is itself constitutionally protected.\textsuperscript{17} And the right to change residence is surely unquestionable.

Let us be clear. Resegregation need not occur everywhere. If the numbers are right and other conditions are favorable, stable situations of racial balance can be brought about, and we may assume that they are beneficial. The difficulty comes in medium and large cities. Even there, the possibility of some success is enhanced if we are willing to enlarge the geographic area over which the attempt to achieve racial balance is made. The middle class can be pursued. But not into private schools, unless we quite alter their position in the legal order; and otherwise also at high cost, by no means only in financial terms. If the costs and the problematic prospects of success deter us from enforcing racial balance in most medium and large cities, does it not have to follow that where stable situations of racial balance are achievable at moderate cost, they must be achieved locally, as a matter of local option? For any effort to achieve racial balance by compulsion of national law would result in unequal application of that law, and that is not an easily justified or sustained state of affairs.

Still, despite the relatively inconclusive body of evidence on which we would be proceeding, and despite what is surely, at the least, the undesirability of enforcing national law unequally, we might be tempted to push on if there were not yet other values on which the effort would impinge. Whites are not alone, it turns out, in often rejecting schools in which they are not the dominant majority. Recognizing, as other groups have before them, that their needs and aspirations may for the time being be particular to themselves, resenting as invidious the theory that they necessarily benefit educationally from being in a white-majority school, and wishing to try on for size the privilege of controlling their own schools which other groups have exercised in our society, a growing number of blacks resist being sent to schools in which they will form a minority, and which they do not control. They insist that only schools which they control can breed in their children that sense of control of environment which Dr. Coleman found to be so important, and they suggest that they may be able to try things the effectiveness of which Dr. Coleman did not measure, because nobody had tried them.\textsuperscript{18}

The point then is that racial dispersal in the public schools in present conditions in the United States cannot be regarded as simply a desirable goal not seriously in competition with other

\textsuperscript{17} Pierce v. Society of Sisters, 268 U.S. 510 (1925).
legitimate goals, or with other values embodied in our legal order. The costs of the disestablishment of legally enforced segregation, properly speaking, were measured entirely in money, convenience, and offense to the prejudices of people who insisted on treating other people invidiously. That is not the case with racial dispersal. It competes with other legitimate values and goals—educational quality, as the middle class perceives it, when certain percentages are reached; the right to move or to use private schools, which can defeat the attempt to achieve racial balance; the desire of blacks as a group to define educational quality in their own terms, for their own purposes; the preferences of blacks and whites for schools close to the community, as compared with distant ones, which necessitate lengthy transportation, and are inevitably too remote for the effective exercise of parental influence. The question is whether under these circumstances the objective of racial dispersal ought to have the highest priority in the allocation of our human, political, and material resources in the field of primary education.

A very near analogy may be found in the field of higher education. *Brown v. Board of Education* is of course applicable, has indeed been applicable all along without the qualification of the deliberate-speed formula. Yet its implementation has not progressed beyond a requirement of freedom of choice. That may quite possibly be wrong, and ought, I am inclined to think, be remedied. Something more ought to be shown by white state universities in the South than that they no longer exclude Negroes. But one scarcely hears proposals for the enforcement of racial balance and the concomitant closing of black institutions. Judge Frank Johnson of the United States District Court in Alabama, whose credentials in racial cases are beyond question, held just a couple of years ago, not only that no racial dispersal was required in a state's institutions of higher learning, but that the scope of the affirmative duty to disestablish prior segregation should not be "extended as far in higher education as it has been in the elementary and secondary public school area." The Supreme Court last year affirmed this decision. The reason for this policy is that we perceive values—the blacks perceive important values—in institutions which blacks control and which meet particular needs of their community. Hence, we are content to draw a distinction between the disestablishment of legally enforced segregation, on the one hand, on which we in-

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20 *Id.* at 787.
sist, and, on the other hand, the enforcement of racial balance, which we do not undertake.\textsuperscript{22}

We cannot, said the Court in \textit{Brown v. Board of Education} in 1954, "turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when \textit{Plessy v. Ferguson} [the separate-but-equal decision] was written. We must consider public education in light of its full development and its present place in American life throughout the nation."\textsuperscript{23} That development, we now know, was not full and not final at the time of the \textit{Brown} case, and that place is changing. So the Burger Court may find itself unable to turn the clock back to 1954, when \textit{Brown v. Board of Education} was written, as it deals with problems that will not answer to the solutions of 1954.

Nor may the Burger Court be able to turn the clock back to the early 1960's, when the one man, one vote rule was enunciated.

Passing the decade and a half of his tenure in review after he had announced his retirement, Chief Justice Warren reflected that the most important achievement of the Court he had headed was the apportionment revolution. That is saying quite a bit, having regard to all else the Warren Court did. And it is a curious judgment.

There has been an apportionment revolution, in the sense that virtually all state legislatures have reapportioned themselves, and most have redistricted their state Congressional delegations. But Chief Justice Warren could not have meant that there has also been a consequent revolution in the nation's politics. Despite the most preposterously sanguine expectations with which the effort to engage the Federal judiciary in the apportionment of legislatures has been invested ever since the 1940's, success has made little difference in the output of the political process, which is what was hoped for. Malapportionment, its foes had persuaded each other, was the source of most of our domestic ills. In it were the roots of the urban crisis and of the obsolescence of federalism. It was the essential reason why "wealth accumulates, and men decay." There are, it has turned out, other roots, less easily reached; other reasons, less easily understood. And if reapportionment has resulted in a redistribution of political power among various groups, the beneficiaries either don't know it yet, or don't know how to use their newly acquired power, or are not the ones who were expected to get it.


\textsuperscript{23} 347 U.S. at 492-93.

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In any event, even if it were true that the apportionment revolution has enabled certain groups, previously out of power, to get what they want out of the political process, that could scarcely have been Chief Justice Warren's reference when he spoke of the Court's most important achievement, as he saw it. The output of the political process—who gets what—is no business of the Court, and the Chief Justice would not have had, or avowed, any such concern. Most assuredly, he meant rather that the Court's apportionment decisions confirmed a fundamental principle of political organization, which is valid regardless of the results it produces; he meant that the Court has secured a salutory observance of the principle of majoritarianism. That is what Chief Justice Warren was celebrating, for as Walter Lippmann wrote of earlier populists, the Chief Justice "is hypnotized by the belief that the great thing is to express the will of the people, first because expression is the highest interest of man, and second because the will is instinctively good."24

Actually Chief Justice Warren is quite wrong. His Court's apportionment decisions have given us no new birth of majoritarianism, any more than they changed the substantive course of American politics. But the crucial point against them is that a rigorous majoritarianism is not what our institutions rest on, nor is it what the country needs.

The American government—as Chief Justice Warren might have been expected to remember; nothing is stranger than a populist judge!—includes a Supreme Court, which wields political power, and is not only not majoritarian, it is not elected. Our government includes a Senate, which because its members are elected at large in each state has often been in recent years more responsive to liberal and reforming trends than the House, but in which each state, regardless of population, has an equal vote that not even a duly enacted and ratified constitutional amendment can, without its own consent, deprive it of. Our government includes a House of Representatives in which each state has at least one vote, even though the whole state may be—and some are—considerably smaller in population than the average congressional district. And aside from the fact that very few of our institutions of government, and none of our national ones, are out-and-out majoritarian, we don't choose to do everything by simple majority votes.

One may view all these institutions and devices as outrageously undemocratic, hardly less undemocratic than a malapportioned legislature, and be prepared to sweep them all away also, including conceivably the Supreme Court itself, the next time the majori-

24 W. Lippmann, Public Opinion 312 (1922).
tarian broom cleans out the stables. In truth these institutions and devices tell us that throughout our history we have perceived other values in government than mere responsiveness to simple majorities of the moment, which are in any event not easy to find and are as often imaginary as real; and we have defined democracy as the rather complex sum of these values, not just as uncompromising majoritarianism. We have, since Madison, realized that people tend to act politically not so much as individuals as in groups; that they have opinions, preferences, and interests which vary in intensity, thus calling for varying degrees of respect and forbearance on the part of others, even if those others constitute a majority; that majorities sometimes act rashly and even mindlessly, and may need to be given pause; that, in short, influence and even power should be distributed more widely than they would be in rigid adherence to the majoritarian principle, so that government may rest on widespread consent rather than teetering on the knife-edge of a momentary majority. For we have wanted government to be stable and peaceable, and to have the most limited need to resort to coercion.

What we have evolved, therefore, is not majority rule, but a pluralist system, in Professor Robert Dahl's phrase, of minorities rule. We have striven, perhaps it may be said, not for a majoritarian, but for a participatory democracy, in which access to the process of government is continuously available to all groups. The sensible question to ask about any multi-member institution of government, therefore, is not whether it is purely majoritarian, but whether it tends to enhance minorities rule; whether it tends to include or exclude various groups from influence, and whether if it assigns somewhat disproportionate influence to some groups, they are the ones which are relatively short-changed elsewhere, so that the total effect is the achievement of a balance of influence.

From the beginning, the Warren Court's apportionment decisions have consistently asked the wrong questions about American political institutions. Not unnaturally, they have, therefore, also come up with the wrong answers. But the right questions cannot be avoided forever. And the wrong answers are coming under challenge in the field of local government, again in connection with the schools, among other institutions.

The one man, one vote rule necessarily deprives discrete groupings and interests, regional, racial, and other, of direct representation. It makes impossible in state and local government the application in any degree of the method of federalism. At a time when division among groups and interests is as marked and deeply felt as ever; when unity is something to be striven for, to be painstakingly constructed and perhaps attained, not to be taken for
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granted; when the call for functional decentralization in government is insistent; at a time, in sum, when the participatory aspect of our democracy needs the greatest emphasis and when, therefore, the device of federalism should be available for the freest and most imaginative use, the Court has virtually outlawed it.

It seems to be generally conceded that the structure of urban government is obsolete. The cities serve many more people, groups, and interests than, given the present limits of their jurisdiction, they govern and can tax. Jurisdictional lines ought to be redrawn, therefore, as occasionally they have been in the past. This is conventional wisdom, but it seems nonetheless to be right. Yet if the jurisdiction of central urban government is to be expanded, so as to encompass outlying suburban areas, the one person, one vote rule is going to be an insurmountable obstacle; an obstacle, in other words, that must be removed. For metropolitan government organized on the one person, one vote principle will necessarily mean either that the central city, increasingly black and poor, governs the suburban middle class, whose interests are distinct and in many respects adverse; or that the suburban middle class, combined with its remnants in the central city, governs the black and the poor, whose interests are distinct and in many respects adverse. Neither result is possible politically, neither result is right. The solution cannot be populist. It must be federal.

The federal solution is equally called for in the governance of public schools. For a variety of reasons, there has been in recent years a trend toward the consolidation of previously separate school districts. When the units that are merged are pretty much alike in resources and in ethnic, racial, and social composition of the student body, there won't be much of a problem. Where the units are not alike, however, their interests tend to diverge, and consolidation under a central authority on a one person, one vote basis will be resisted, and is not right. Enlargement of administrative jurisdiction in one fashion or another offers the only possibility in metropolitan areas of achieving any approach to racial balance in the schools. For this and perhaps some additional purposes, it means consolidation of units, typically of a central city school district with its suburban neighbors. The interests of urban and suburban districts do not altogether coincide. Such districts differ in the nature of student populations and in resources; that is the whole point of the drive to integrate them. The federal method of consolidation is the fairest and most efficient, and may be the only possible one.

There is a counter-trend in the governance of public schools, toward decentralization. The aim is to permit cohesive communities to control their own schools through locally elected boards. Schools
may appropriately be viewed as in large measure extensions of coherent groups of families, but the education by any group of its children nevertheless has externalities which affect larger communities. The retention of some supervisory authority in a central board of education will, therefore, not likely be avoided. But if the central board is constituted on a one person, one vote basis and elected at large, or if it must be elected from equal districts that are not coterminous with the local school communities (which are in turn very probably not going to be of equal size), then the authority of the central board may negate a good part of what decentralization seeks to attain. Hence the federal solution is again appropriate.

These problems, which arise at the local government level, are not to be taken as proving merely that the one person, one vote rule should not have been extended to local government. Rather they are, at the moment, the most salient illustrations of the inanities and deficiencies of the rule.

The most valuable function that the Supreme Court performs in our society is to draw attention to major issues, to put them forcefully on the agenda. The Brown case performed that function, and so did the earliest of the reapportionment cases. But having highlighted a major issue, the Court often attempts to make the society live up to its own resolution of it. That is something else again. It seldom works over the long run, as the ramifications of the issue become apparent.

Professor Paul Freund, the wittiest and most elegant of professional observers of the Court, and one of my predecessors in this lectureship, has likened some manifestations of the judicial process to the boy who said that he knew how to spell the word banana; he just didn’t know when to stop. The inability to find the stopping place was characteristic of the Warren Court, perhaps it is always characteristic of the institution. But events have a way of indicating stopping points, and the Burger Court may perforce allow free play to the political process on the problems that I have discussed. Yet ultimately the Supreme Court may again seize the initiative on yet other problems. The cycle has most often resumed in the past, and perhaps it always shall. The word banana, anyway, is likely always to be spelled in the same tricky, seductive fashion.