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Fair and Equal Representation*

Bernard Grofman

The four articles in this symposium represent rather diverse approaches to the question of representation. My comments will be primarily directed to the Still and Rogowski articles with only brief remarks about the other two essays.

I. STILL

Still argues that the usual definitions of political equality are “not formulated with sufficient analytical rigor” and that, when the matter is carefully examined, “political equality is not a single concept but a group of distinct (though related) criteria which have not previously been adequately distinguished.” I believe he is correct on both counts, and my comments on his paper will be technical criticisms and emendations which do not affect the basic thrust of his arguments.

I indicate in table 1 election systems which are incompatible with each of Still’s six criteria. In this table it is assumed that voters are a priori indistinguishable, but distinguishable ex post on the basis of which candidates they voted for. Still asserts that “any election system satisfying one criterion will necessarily satisfy the preceding ones, but not necessarily the subsequent one.” Although he recognizes that there are exceptions to this generalization, he dismisses these as unimportant (nn. 16, 17, 25). I disagree that these exceptions are unimportant. First, for districts with unequal numbers of representatives, or for weighted voting schemes, not only does 3 not imply 2, but the two criteria are incompatible.¹ Even for

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1. Numerals in text refer to Still’s criteria. This argument is developed at length in Bernard Grofman and Howard Scarrow, “The Riddle of Apportionment: Equality of What?” *National Civic Review* (1981), in press. In this we also discuss two other criteria closely related to Still’s 3, but with which Still does not deal. Both Rogowski and Still write as if there were one and only one power-index-based notion of equality of representation. Actually, if we neglect the differences between the Banzhaf model and the Shapley-Shubik value as being irrelevant for most purposes, there are three different (but related) criteria by

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TABLE 1
ELECTION METHODS INCOMPATIBLE WITH VARIOUS CRITERIA
OF POLITICAL EQUALITY OFFERED BY STILL

Equality Criteria	Some Election Schemes Ruled out by the Specified Criterion
1. Universal equal suffrage	a) Any rights of suffrage which provide some voters more votes than others (e.g., on the basis of property ownership) b) Any lottery based schemes
2. Equal shares	c) Any district-based schemes, <i>except</i> those in which district representation is directly proportional to district population
3. Equal probability of voter decisiveness.....	d) Any weighted-vote schemes, <i>except</i> those in which legislator weights are directly proportional to the square root of district population e) Any scheme in which the number of representatives differs across districts, <i>except</i> those in which the number of representatives is assigned proportional to the square root of district population
4. Anonymity	f) Any district-based schemes, other than an at-large election
5. Majoritarianism*.....	g) Any decision procedures which require special majorities h) Any proportional representation scheme
6. Proportional group representation.....	i) Any scheme other than proportional representation

* This condition requires that any majority coalition of voters be sufficient to determine all election outcomes. A considerably weaker criterion, but one which I believe to be more attractive, is to require that any majority coalition of voters within a district be able to decide the outcome of the election in that district.

single-member districts, 2 and 3 are compatible only for the special case where voters are homogeneous. (By "homogeneous," we mean that voters are not being distinguished by different propensities to support particular candidates or by different likelihoods that any particular elected representative[s] will look after their interests. Implicit in the usual calculations of Banzhaf or Shapley-Shubik power scores is the assumption of homogeneity.)² For the case where districts have unequal numbers of representatives, 3 is also incompatible with 4 and 5.³ Second, for multimember elections, 6, which the fairness of voting schemes might be judged: (a) equal voter power to affect election outcomes (identical to Still's "equal probability" and Rogowski's "equal representation"); (b) legislator power proportional to population represented; and (c) equal voter power to affect legislative outcomes. Although these three criteria were described by Banzhaf in a series of articles, Banzhaf himself fails to distinguish carefully among them, and New York State courts as well as the U.S. Supreme Court have failed to grasp the differences between them.

2. See Bernard Grofman, "The Banzhaf Index as a Criterion for Fair Apportionment," *American Mathematics Monthly* (1980), in press.

3. See Grofman and Scarrow.

rather than implying 5, is incompatible with it.⁴ Third, for multimember elections, 5 implies 4 only if we interpret majoritarianism to apply to the legislature as a whole, that is, only if we take it to require that any majority coalition can elect all the members of the legislature. In such a case, majoritarianism, like anonymity, requires an at-large election.⁵

Still notes that his own “tentative opinion” is that “meaningful” political equality requires the satisfaction of criteria 1–4. Since 1 and 2 are relatively noncontroversial, this leaves 3 and 4 up for challenge. Personally, I am skeptical of the reasonableness of either.

For multimember elections, 4 would rule out any mechanisms other than at-large elections (for majoritarian decision making), or some form of proportional representation (if we wished also to satisfy criterion 6, proportional group representation). This strikes me as an extremely strong requirement, and, moreover, not so obviously even a desirable one. At-large elections have a number of undesirable properties, for example, they weaken the link between a representative and “his” constituency;⁶ they often fail to represent minority views in the legislature; and they may destroy incentives for (or even the possibility of) genuine political competition.⁷ Similarly, proportional representation has considerable potential drawbacks—in making legislative compromise more difficult and in intensifying and perpetuating divisions in the electorate.

As for Still’s criterion 3, equal probability, where districts have unequal numbers of representatives, this has the undesirable property of requiring that representatives be assigned proportional to the square root of district population. Such an assignment also means that a minority can control a majority of seats in a legislature. Even for single-member districts, the assumption underlying criterion 3—that all combinations of

4. The choice between criterion 5, majoritarianism, and the proportionality principle, criterion 6, seems to be a fundamental one. However, even if proportionality in representation is achieved, this does not guarantee proportionality in outcomes—since permanent coalitions may form. Only some kind of lottery procedure would guarantee each group a decisiveness on outcomes proportional to its members. Such a lottery system is ruled out by Still’s criterion 1, equal suffrage, because, as he defines it, it requires that everyone be allowed to vote.

5. If the majority principle applies only to each district election, the election outcome may not satisfy anonymity. Majoritarianism, when applied to the legislature as a whole, is stronger than anonymity, however, since it rules out various proportional representation schemes which anonymity would permit.

6. It is possible, however, to combine at-large elections with so-called designated representatives or some form of geographic restriction in which particular sets of candidates contest particular seats. Candidates run for specific seats as if each were a single-member election, but the voters as a whole decide each contest.

7. For detailed evaluation of the consequences for racial and linguistic representation of at-large elections and a look at the effects of modified at-large procedures such as designated representatives, see Bernard Grofman, “The Use of Elections Involving Other than Single-Member Districts: Legal and Empirical Issues,” in B. Grofman, A. Lijphart, R. McKay, and H. Scarrow, eds., *Representation and Apportionment Issues in the 1980s*, ed. B. Grofman, A. Lijphart, R. McKay, and H. Scarrow (Lexington, Mass.: Lexington Books, 1981), in press.

voters are equally likely—is not particularly sensible in a context where partisanship, race, or other characteristics impinge on voter choice and are related to voters' expected policy benefits from particular election outcomes.⁸ Moreover, when the homogeneity assumption is dropped, then in general 3 will be incompatible with 2, and I regard 2 as the more compelling.

Because of the difficulties with both 3 and 4 and the fact that they lead us to choose election systems which are unpalatable on other grounds, I would be inclined to be satisfied with criterion 2, equal shares, as the principal constitutional standard for equal representation. However, when voters can be characterized a priori in terms of voting propensities, then, within the equal shares constraint, some districting schemes become more attractive than others in terms of additional criteria (not considered by Still) which focus on outcomes, for example, extent of political competitiveness, absence of partisan/racial bias in the seats-votes ratio, and approximate linearity of the transformation of a party's vote share into seat share; or which focus on criteria for drawing district boundaries.⁹ For example, a bill setting apportionment guidelines for the U.S. House of Representatives, H.R. 1516 (96th Cong., 1st sess., January 25, 1979), which requires (a) single-member districts satisfying equal population guidelines (permitting only a 2 percent discrepancy from strict equality);¹⁰ also requires that (b) "the boundaries of each district shall [consistent with the equal population requirement] coincide with the boundaries of local subdivisions"; and that (c) "each district shall be composed of contiguous territory . . ."; (d) "districts shall be compact in form . . ."; (e) "the boundaries of districts may not be drawn for the purpose of favoring any political party or any specific incumbent or other individual"; and (f) "the

8. Of course, it is no more absurd to treat voters as homogeneous than it is to equate "equal population" districts with "equal representation," as U.S. courts have, in effect, done. The basic problem for the Supreme Court post-*Baker* decisions, according to one constitutional scholar, is that the Court has "centered on something called 'equality'; it has never come to grips with 'representation'" (Robert G. Dixon, Jr., "The Warren Court Crusade for the Holy Grail of 'One Man-One Vote,'" *Supreme Court Review* (1969), pp. 219-70, esp. p. 277). This is a charge with which I concur, at least for those cases decided prior to *Whitcomb* in 1971. The Court's terminology, if not its reasoning, in several of the key apportionment cases is sloppy in claiming "equal representation for equal numbers of people" (*Wesberry v. Sanders* 376 U.S. at 18; *Reynolds v. Sims* 377 U.S. at 559-60) as its goal; and then equating "equal population" with "equal representation." As Dixon (pp. 227-28) quite strongly (and I believe quite accurately) puts it: "There is no such thing as 'equal representation' in a district system of electing legislators. There may be 'equal population' districts, which is an objectively verifiable concept. But with a district basis there can never be 'equal representation' because all districting discriminates by discounting utterly the votes of the minority voters. . . . A goal of 'equal representation' can be approximated only through abolishing single member districts and using proportional representation, such as the party list form used in Europe, or some version of the Hare system. . . . 'Equal representation' is generically a proportional representation concept."

9. Richard Niemi and John Deegan, Jr., "Competition Responsiveness and the Swing Ratio," *American Political Science Review* 72 (1978): 1304-23.

10. Since equal suffrage is constitutionally required and the bill provides for single-member districts, it satisfies Still's criteria 1 through 3. However, it fails to satisfy 4.

boundaries of a district may not be drawn for the purpose of diluting the voting strength of any language minority group or of any racial minority group.”

Language similar to that of items *b-d* above is contained in many state constitutions and municipal charters. Criterion *e* above is intended to prevent so-called bipartisan gerrymandering.¹¹ Criterion *f* is language adapted from recent U.S. Supreme Court opinions and the Voting Rights Act of 1965. For both criterion *e* and criterion *f*, the test is intent rather than outcome.

II. ROGOWSKI

While the Still analysis is analytically very powerful, it fails to come to grips with some of the foremost issues of “fair” representation by focusing exclusively on “equal” representation.¹² When voters are homogeneous we can solve the question of fair representation by solving the question of equal representation. When voters cannot be treated as if they were interchangeable, then the interests of fairness and the interests of equality may diverge.

Rogowski’s analysis provides a useful complement to that of Still, since, although it is considerably less elegant and although much of it may be fitted within the framework offered by Still,¹³ Rogowski does attempt to grapple with questions not discussed by Still. Moreover, as noted above, Still’s listing of criteria to judge equal representation omits several (e.g., requirements for political competition or for electoral responsiveness) with competing normative claims. Also, Rogowski provides a very useful discussion of relevant U.S. Supreme Court cases. However, Rogowski, like Still, fails to distinguish carefully the two cases of homogeneous and nonhomogeneous voters, and fails to distinguish in all cases between the applicability of a criterion to a single election and in applicability to a set of elections—for example, for the members of a multimember legislature.

If we permit voters to be distinguished in terms of a priori characteristics which affect their propensities to vote for particular candidates/slates, then, as Rogowski correctly notes, even equal population single-member districts generally fail to satisfy his “equal representation” criterion (essentially identical to Still’s “equal power” criterion).¹⁴

11. David I. Wells, “Statement on Proposed Legislation Establishing Federal Standard for Congressional Districting,” hearing on Senate Bill S.516 conducted by U.S. Senate, Governmental Affairs Committee, July 10, 1979.

12. It is unfair to charge Still for not doing something he did not intend to do, and this remark should not be taken in any way as censure of Still’s work, which I find admirable in its clarity and elegance. Moreover, in his unpublished doctoral dissertation, “Voter Equality in Electoral Systems” (Yale, 1977), Still does address a number of questions which space limitations made it impossible to deal with in his present paper.

13. Of the six criteria discussed by Still, Rogowski concentrates his attention on two: (1), equal shares, each citizen having the same fractional claim on representation, and (2), equal probability, each citizen having equal probability of casting the decisive vote in an election.

14. Grofman, “The Banzhaf Index as a Criterion for Fair Apportionment.”

Rogowski, in his conclusions, in effect wants to accept the equal share and equal suffrage results of the early reapportionment cases but to reject the bipartisan gerrymandering of *Gaffney* and the racially motivated gerrymandering of *UJO v. Carey*,¹⁵ and to leave open for dispute schemes (e.g., at-large elections) which can be argued to come near to depriving large portions of the electorate of their power to influence outcomes. By and large, I share these views. While virtually everyone will now (post *Baker*) agree with the reasonableness of the equal suffrage and equal shares criteria, any generally acceptable and practically feasible requirements for equality of representation seem next to impossible to specify unless we wish away the problem of voter heterogeneity and we ignore the possibility of fixed coalitional alignments. But voter heterogeneity in particular, is exactly what fair representation must somehow come to grips with.¹⁶

To rely simply on the equal shares criterion is quite tempting but fails to come to grips with a number of troublesome questions—for example, How can we recognize and rule out politically motivated gerrymanders? On the other hand, to reject the equal share criterion as insufficient and to insist on some form of seats-votes proportionality test (if not proportional representation itself) has a number of pitfalls. Indeed, to the extent the court has gone down that road (as in *Gaffney* and *UJO*) the results, as Rogowski indicates, have been quite dismaying. Where does this leave us?

As I see it, if we grant equal suffrage and equal shares, then the key choice lies between the principle of majoritarianism and that of proportionality. If majoritarianism is chosen, then the next crucial choice is, I believe, between a trio of options: fostering politically homogeneous districts, or fostering politically competitive and heterogeneous districts, or reliance on purely formal criteria of districting, such as compactness and contiguity, which may result in either heterogeneous or homogeneous districts.

I think strong arguments can be made for each of the three options. Homogeneous districts assist representatives to have well-defined constituency interests which it is possible for them to ascertain with relatively little effort, and homogeneous constituencies also make it more likely that most voters in the constituency will have a representative responsive to their concerns. Heterogeneous constituencies foster political competitiveness and the virtues of representative democracy discussed in the *Kate* essay (e.g., tolerance). Formal criteria for drawing district boundaries allow us (or so at least we would like to think) largely to rule out intention-

15. *Gaffney v. Cummings* (1973) 412 U.S. 735; *United Jewish Organization of Williamsburg v. Carey* (1976) 430 U.S. 140.

16. In *Iannucci v. Board of Supervisors*, in which the *Banzhaf* index was enshrined as the test for fair representation in weighted voting schemes for New York county government, the New York Court of Appeals did neglect partisan, ethnic, and linguistic realities and calculated power scores based on the assumption that all voter coalitions were equiprobable.

al political gerrymandering. However, none of these solutions is perfect. Homogeneous constituencies may contain “irredentist” elements doomed permanently to lack of representation. Heterogeneous constituencies may generate excessive responsiveness to short-run shifts in electoral strength and excessively hard-fought contests. Formal districting criteria may inadvertently yield gross disparities between a group’s overall vote percentage and the percentage of seats it wins in the legislature or may be biased against one or another political party or racial or linguistic group. Moreover, no districting mechanism can be guaranteed to prevent one-party politics if the minority is greatly outnumbered.

Although I do not claim to have any panacea, I do have a preferred strategy. That strategy is to require equal population, single-member districts, and to place restrictions on intentional political gerrymandering both by prohibiting it explicitly and by introducing formal rules for specifying acceptable district boundaries (as in H.R. 1516). With such a strategy, I believe that many of the most severe problems of unequal representation can be avoided.¹⁷ Moreover, recent development of statistical models to measure the extent of deviation from an expected range of election outcomes based on “unbiased” districting opens the possibility of post hoc testing for deliberate political gerrymandering.¹⁸

III. KATEB

The Kateb article consists of two parts: first, a defense of representative democracy in terms of its contributions to the development of the human spirit; second, a repudiation of the supposed moral superiority of direct over indirect democracy.

Kateb’s defense of representative democracy is in general quite compelling, even though somewhat overstated. He argues that the workings of representative democracy magnify certain sentiments and attitudes and thereby strengthen and enrich them. Those strengthened traits are, he points out, largely desirable, though capable of excess or pathology. Moreover, they affect the individual throughout his life—not just in his dealings with government. Kateb notes that electoral democracy involves “a temporary and conditional grant” of political authority which is “regularly revocable.”¹⁹ As such, he argues that it fosters (1) independence of spirit, that is, autonomy and the disposition to say no; (2) a willingness to claim the status of citizen in all nonpolitical relations which has the effect of democratizing these relations; and (3) a sense of moral indeterminacy (by which Kateb means tolerance in its most positive sense and, in particular, the absence of dogma).

17. Such a strategy would satisfy Still’s criteria 1, 2, and 3.

18. For details see Grofman, “The Use of Elections Involving Other than Single-Member Districts: Legal and Empirical Issues,” and references cited therein.

19. Kateb is especially to be commended for his skillful depiction of the paradoxical dialectic of citizenship—the citizen as both ruler and ruled.

In the second part of his paper, Kateb asks, "Would not a direct democracy—if only it were possible to have one—achieve moral effects superior to a representative one?" and answers that question with a resounding negative.

Here, to make his point, Kateb is guilty of persuasive definition. Direct democracy is equated with community. By assumption, communities must be small, homogeneous, and deindividualizing. Hence, Kateb argues, direct democracy fosters insularity and intolerance, leads to a loss of a sense of delicacy (because of pressure for openness), and discourages independence of spirit (in both its positive and negative sense). "The distilled sense of such a relation to the world is that there is one and only one right way of living, of doing things, of thinking about the world, and that there is one and only one right answer for every problem or question that arises, in private life or public." Moreover, "the life of direct democracy is the life of citizenship, public and continuous and all absorbing, and laid as an obligation on all, not freely chosen by a random few."

Kateb considers the example of Athens; and then dismisses it—citing Sparta as the more relevant example of direct democracy. While I agree that most direct democracies (including the celebrated participatory democracy of the 1960s with which I am familiar from first-hand experience) tend to be intolerant of dissent, require immense time commitments (which few individuals are willing to sustain for long), and are highly susceptible to manipulation by elites,²⁰ this dismal portrait emphasizes all the worst features of direct democracy; while Kateb's portrayal of indirect democracy emphasizes all of its best features and thus stacks the moral deck.

Representative democracy may also breed apathy and a sense of impotence (all politicians are alike). Direct democracy in the form of referendum or initiative procedures or in the (more utopian) form of computerized citizen feedback may avoid many of the excesses of Kateb's small homogeneous communities with their "submerged" and "overpoliticized" citizens.²¹ Thus, while I commend Kateb's new weighing of the balance of moral superiority between direct and indirect democracy as having called attention to characteristically neglected positive features of the first and to neglected negative features of the second, the desirability and long-run consequences for citizen values of particular forms of direct democracy (e.g., California's Proposition 13 fever) is still an open question.

IV. MORONE AND MARMOR

Morone and Marmor offer a useful discussion of differing views of the meaning of "representation" in terms of (1) similarity of representatives

20. See Jane Mansbridge, "Town Meeting Democracy," in *Dilemmas of Democracy*, ed. Peter Collier (New York: Harcourt, Brace, Jovanovich, 1976).

21. See Norman Nie, "Hello Central, Give Me Heaven," *University of Chicago Magazine* 62 (May/June 1970): 2-8; and Stuart Umpelby, "Citizen Feedback: The New Computer Potentials for Strengthening Democracy," *Educom* (Spring 1972), pp. 11-15.

to those they represent in either attitudes or demographic characteristics, (2) mechanisms of choice by which representatives are selected by those they represent; and (3) mechanisms of accountability of representatives to those they represent. They then go on to argue that effective representation of health care interests requires a “quasi-corporatist” form of representation—in which specific interest groups designate their representatives to community boards. For health care they assert that “broad-based” representation is “ill defined at best and undesirable at worst.”

The Morone and Marmor argument for “corporatist” representation—of the interest groups directly affected—is one that will seem strange to most Americans. Space limitations do not permit a discussion of the relative advantages and disadvantages of corporatist versus geographic notions of representation, but I would like to question the claim that interest group organizations, particularly those at the local level, are a desirable basis on which to base representation. That representatives selected on an interest group basis will, as Morone and Marmor argue, be better able to carry on a sustained fight against corporate interests and the professional expertise of bureaucrats is, I think, accurate. However, I doubt, for example, that in general, local chapters of NOW “represent” women in their area, or that American Legion chapters “represent” local veterans, or even that chapters of the Grey Panthers “represent” the local aged. Local-based interest groups can easily become captive to small and unrepresentative oligarchies. Admittedly, the same is true for local politicians, but the desire of politicians for reelection acts as a partial but still quite important corrective.

Morone and Marmor celebrate the National Health Planning Act because it stimulates a broad range of consumer interests and assert that “if the National Health Planning Act accomplishes nothing more than introducing and legitimating potential market balancers on an ongoing basis, it will have achieved considerable success”; but they also point out that the present HSA legislation is badly flawed in (a) not providing specific mechanisms for choice of consumer representatives, (b) leaving HSAs largely powerless, and (c) failing to specify accountability mechanisms of HSA members to their putative constituents. To argue that the Act will help to “organize communities into caring for their health problems” seems to miss the point that the powerlessness of the HSAs may simply reinforce the lesson that health care matters are ones over which citizens can have no effective collective say.

This is not the forum to debate health care issues, but if the problems of the American health care system can largely be traced to factors such as overconstruction of large, high-technology, high-cost (but high-prestige) hospitals and an underuse of less costly outpatient care, it is hard to see why one interested in curing *these* problems should see much to rejoice about in the National Planning Act. In the words of Morone and Marmor, “the act’s program is trivial—more symbols and rhetoric than significant improvements.”