Black Mirror:
The Twin Abstractions of the American Dollar and the American Vote

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> "You have to choose [as a voter] between trusting to the natural stability of gold and the natural stability of the honesty and intelligence of members of the Government. And, with due respect for these gentlemen, I advise you, as long as the Capitalist system lasts, to vote for gold."
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> - George Bernard Shaw[1]

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities."
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> - Justice Earl Warren[2]

Introduction

Perhaps never in U.S. history has the connection between money and democracy been so bare.[3] Perhaps never has the value of a vote been so discussed in popular culture.[4] The mechanisms of the uniquely glitchy American form of democracy are critiqued but not corrected; the vocabulary is debated but not defined. American capitalism and American democracy are systems that rely heavily on a definition of

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[1] GEORGE BERNARD SHAW, THE INTELLIGENT WOMAN'S GUIDE TO SOCIALISM, CAPITALISM, SOVIETISM AND FASCISM 263 (Transaction Publishers, 2d ed. 2005) (1928).

[2] *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

[3] The 2016 presidential candidacies of Bernie Sanders and Donald Trump provide wildly contrasting examples. *See* GETTING BIG MONEY OUT OF POLITICS AND RESTORING DEMOCRACY, https://berniesanders.com/issues/money-in-politics/ (last visited Jan. 12, 2017); Nathaniel Popper et al., *Goldman Sachs to Extend Its Reach in Trump Administration*, N.Y. TIMES, (Dec. 9, 2016), http://www.nytimes.com/2016/12/09/business/dealbook/goldman-sachs-no-2-seen-as-a-top-economic-adviser-to-trump.html.

[4] *See, e.g.*, Jeffrey Toobin, *The Real Voting Scandal of 2016,* THE NEW YORKER, (Dec. 12, 2016), http://www.newyorker.com/magazine/2016/12/12/the-real-voting-scandal-of-2016; K.K. Rebecca Lai & Jasmine C. Lee, *Why 10% of Florida Adults Can't Vote: How Felony Convictions Affect Access to the Ballot*, N.Y. TIMES, (Oct. 6, 2016), http://www.nytimes.com/interactive/2016/10/06/us/unequal-effect-of-laws-that-block-felons-from-voting.html.

representation as value itself. Voting and "gold"—or at least, currency—both rely on an abstraction valued as concrete reality. Our system of currency relies on our belief that money—paper and coins—represents a concrete, determined value. Similarly, our system of elections relies on our belief that votes have a fixed value. Both systems of currency and representative democracy rely on a truism: that the unit of exchange (money or votes) may be exchanged for its representative value. Dollars may always be exchanged for items deemed to have the same value as the dollars and, until fairly recently, could have also been exchanged for value itself—for gold. Votes are more abstract. Theoretically, votes are a unit that may be exchanged for political power—for representation itself. In both systems it is the *belief* in the exchange value of the form that renders it valuable. There is no longer any gold defining the value of a dollar and there is no clear definition of what it means, in fact, to be represented. Thus, in capitalism as in representative democracy, representations exist *as value*, without any fixed antecedent.

In *The Will to Power*, Friedrich Nietzsche examined the mechanisms of representation. He analyzed the relationship of a thing-itself, a discrete entity, to the way it is conceived and represented (in language, imagination, or otherwise):

> The concept of substance is a consequence of the concept of the subject: not the reverse! . . . The subject: this is the term for our belief in a unity underlying all the different impulses of the highest feeling of reality: we understand this belief as the *effect* of one cause—we believe so firmly in our belief that for its sake we imagine "truth," "reality," "substantiality" in general.— "The subject" is the fiction that many similar states in us are the effect of one substratum: but it is we who first created the "similarity" of these states . . . .[5]

Inevitably, Nietzsche observed, we conflate representation with the thing-being-represented and ultimately we replace the thing with its representation; the representation usurps the reality of the thing-itself. The "substance" that theoretically provided meaning or value to the representation vanishes, and we are left with a mere shadow, yet a shadow that we value as if it had substance.

This process of representation—whereby the representation itself supplants the represented—can be seen in both the mechanics of our economy and our political economy. Specifically, the significant shift the American economy underwent over the decade from 1970 to 1980 highlights the level of abstraction required for a capitalist economy to function. Critical in this move was the understanding that value can be purely abstract, that a representation (dollars) can exist fully free of its concrete substantive unity (gold). At the very same time, the Supreme Court was implementing a similar shift in understanding the connection between democratic representation and the "value" of a vote. Just as the federal government consciously changed the representational structure of the economy in order to end "stagflation" and keep the

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[5] FRIEDRICH NIETZSCHE, THE WILL TO POWER 268–69 (W. Kaufman ed., Vintage Books 1967) (1887).

economy expanding,[6] so too did the Supreme Court redefine the standards of representation in an attempt to counteract structural impediments to political power in the 1970s.[7]

In this paper, I will first examine the economic moves that took place in the 1970s—specifically, the removal of the gold standard—within a critical framework provided by Nietzsche. The paper then will attempt to connect the abstraction of value in the 1970s economy to the abstraction of value in the 1970s political structure. The very same abstraction, the removal of the concrete from the representation of value at the expense of the concrete itself, that can be found in the mechanisms of the American and international economy in the 1970s can also be seen in the line of Supreme Court cases dealing with apportionment and the establishment of the one person, one vote principal. Essentially, this paper will attempt a thought experiment: Is the one person, one vote principal the "gold standard" of representative democracy?

I. The Gold Standard and Real Abstraction in the 1970s Economy

The gold standard is one of the hallmarks of modern capitalism. Although some form of representation has formed the basis for value (sometimes in the form of coin, sometimes paper) since as early as the 17th century,[8] this paper will focus on the modern and contemporary concepts of the gold standard for two reasons. The first is that the modern gold standard reveals the extent to which the world economy is based on imaginary and reinforced credibility.[9] Just as Nietzsche noted that our "concept of substance is a consequence of the concept of the subject: not the reverse,"[10] the value of the dollar relies on our *concept* of its value, not on any true substantive reality (such as gold). Much like the one person, one vote standard in voting, the switch from a commitment to gold to a commitment to the value of the dollar as a representation alone was believed to be credible due to both a lack of information about the mechanics of the system and a lack of political power representing those who were most affected.[11] Interestingly, the moments at which the gold standard required the highest level of abstraction in order to maintain its supremacy were paradoxically marked by rhetoric of certainty and concreteness.[12] Such uncertainty veiled in concrete language will also be seen in the line of voting rights cases.

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[6] Roger Lowenstein, *The Nixon Shock*, BLOOMBERG BUSINESSWEEK, (Aug. 4, 2011), http://www.businessweek.com/magazine/the-nixon-shock-08042011.html.

[7] Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 175, 182–183 (2012).

[8] *See, e.g.*, CHRISTINE DESAN, MAKING MONEY: COIN, BANK, CURRENCY, AND THE COMING OF CAPITALISM (2015).

[9] *See, e.g.*, BARRY J. EICHENGREEN, GOLDEN FETTERS: THE GOLD STANDARD AND THE GREAT DEPRESSION, 1919–1939 (1992); Bill Maurer, *The Anthropology of Money*, 35 ANN. REV. ANTHROPOLOGY 15 (2006).

[10] NIETZSCHE, *supra* note 5.

[11] EICHENGREEN, *supra* note 9, at 5–6.

[12] *See, e.g.*, Lowenstein, *supra* note 6.

The second important historical reason which provides a basis for focusing on the modern gold standard is a coincidence (yet perhaps no coincidence at all) of chronology. The year 1971 was a crucial year for the gold standard. The "Nixon Shock," as it would come to be called—President Nixon's attempt to stabilize the international economy by removing the gold from the standard—occurred in 1971.[13] The year 1971 was also a historic year for voting rights. The voting age was lowered to 18,[14] and it was the year in which the Supreme Court decided *Whitcomb v. Chavis*.[15] The historical moment of 1971, therefore, allows voting and value (thus representation) to be analyzed together; the American consciousness in 1971 was managing levels of abstraction that directly affected our fundamental concepts of money as well as voting—the two pillars of American society.

The modern history of the gold standard, specifically its role in the global economy after World War II through the present, relies on Nietzschean levels of abstraction *qua* reality. In 1944, in order to stabilize the international economy after the war, the United States established the Bretton Woods system, which fixed currency rates to the U.S. dollar.[16] The dollar was, at that time, still fully redeemable for gold at a fixed price.[17] Thus, post-World War II, the U.S. dollar essentially became the world's gold standard.[18] The Bretton Woods system worked for a few decades, but by the 1970s the system was collapsing—in no small part due to the unsustainability of the U.S. providing the gold standard for the globe.[19] Therefore, in 1971, President Nixon and his Treasury Secretary John Connally broke up the Bretton Woods system, crucially ending the convertibility of the dollar into gold.[20] In the wake of this bold move, the meaning, and representational properties, of the dollar shifted. Currency as a representation of "real" value no longer existed; values could thus be redetermined, and reimagined, as there was no longer any concrete value for money.

Taking the dollar off the gold standard meant that the representational property of the dollar was, following 1971, theoretical—completely in the imagination of the government or the individual. Moreover, although this economic move was undertaken because the dollar was essentially self-destructing and the American economy was the weakest it had been since the Great Depression,[21] Connally and Nixon packaged the move to the American public not "as America abandoning its commitment to the gold standard, but as America taking charge. [They] turned the dollar's collapse, which could have appeared shameful, into a moment of hubris."[22]

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[13] *Id.*
[14] U.S. CONST. amend. XXVI.
[15] *Whitcomb v. Chavis*, 403 U.S. 124 (1971).
[16] EICHENGREEN, *supra* note 9.
[17] *Id.* at 5–6.
[18] *Id.*
[19] *Id.*
[20] Lowenstein, *supra* note 6.
[21] *Id.*
[22] Lewis E. Lehrman, *The Nixon Shock Heard 'Round the World*, WALL ST. J. (Aug. 15, 2011), http://online.wsj.com/news/articles/SB10001424053111904007304576494073418802358.

For example, it was necessary to freeze wages and prices temporarily to prevent a run on the dollar and fight the desperate crisis of inflation. In his address to the nation, Nixon characterized this freeze with a vocabulary of strength, power and exceptionalism:

> Let me emphasize two characteristics of this action: First, it is temporary. To put the strong, vigorous American economy into a permanent straitjacket would lock in unfairness; it would stifle the expansion of our free enterprise system. And second, while the wage-price freeze will be backed by Government sanctions, if necessary, it will not be accompanied by the establishment of a huge price control bureaucracy. I am relying on the voluntary cooperation of all Americans—each one of you: workers, employers, consumers—to make this freeze work. Working together, we will break the back of inflation, and we will do it without the mandatory wage and price controls that crush economic and personal freedom.[23]

Thus, in Nietzschean terms, the concept of the subject (strong American capitalism) supplanted the concept of the substance (weak American international economics). The removal of gold from the dollar meant, in representational terms, that the literal value of money was gone. The value existed, from 1971 on, only in the belief in the value of the dollar, only in what we believe it represents (yet we know full well it does not truly represent anything except itself and our belief). Even now, the fall of the Bretton Woods system continues to make financial professionals "acutely aware of money's fictional qualities, its imaginative economies, and its ability to literalize its metaphorical possibilities."[24]

A similar cycle can be seen in the voting rights arena. Perhaps nowhere is this more apparent than in the Supreme Court's one person, one vote jurisprudence. The Court's failure to define adequately the value of a vote relies on an abstracted sense of the individual, and creates the vote as an empty representation—a currency with no gold standard, with an exchange value based only on belief.

II. The Value of a Vote: Apportionment and Representational Abstraction

In the 1960s, in the wake of desegregation and the rise of the civil rights movement, the Supreme Court held that the Equal Protection Clause required that every individual's vote be equally valued.[25] The line of cases that led to the adoption of the one person, one vote standard for evaluating legislative apportionments under the Equal Protection Clause marks the origins of the Supreme Court's replacement of the "substance" of voting with an abstract concept of representation. Just as Nixon restructured the concept of monetary representation in an attempt to end a recession,

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[23] President Richard Nixon, Address to the Nation Outlining a New Economic Policy: "The Challenge of Peace" (August 15, 1971) (transcript available at http://www.presidency.ucsb.edu/ws/index.php?pid=3115 - axzz1UZnES7PMon).

[24] Maurer, *supra* note 9, at 26.

[25] *See, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

so too did the Supreme Court restructure the concept of political representation in an attempt to end structural political racism. The establishment of the one person, one vote standard is thus conceptually and temporally related to the Nixon Shock.

The first move by the Supreme Court towards redefining representation, towards relying on a Nietzschean fictional subject to give value to a vote, can be seen in *Baker v. Carr*.[26] Prior to *Baker*, most famously in *Colegrove v. Green*, the Court had declined to decide on malrepresentation, holding that such issues were nonjusticiable.[27] In *Baker*, the Court decided to enter the "political thicket"[28] by moving away from the guarantee-clause form of analysis it had been employing in previous apportionment cases.[29] As will be seen, this move necessarily required a level of abstraction not yet attempted by the Court in the realm of voting rights.

In *Baker*, plaintiffs alleged that, due to population growth and migration, certain counties in Tennessee were no longer fairly apportioned. In Tennessee, the standard for allocating representation among counties was the total number of qualified voters residing in each county. The apportionment scheme had not been revised since 1901 and thus plaintiffs argued that, since the population at the time of *Baker* was greatly different from the population at the time of apportionment, they were being denied equal protection of the laws due to the "debasement of their votes."[30] The Court in *Baker* rejected *Colgrove*'s notion that apportionment issues are inherently "political" and that "[c]ourts ought not enter this political thicket,"[31] and instead held that the "political question" had theretofore been too broadly defined.

The thicket becomes readily apparent in Justice Brennan's majority opinion in *Baker*. His explanation of why this particular issue is, actually, justiciable, is notably thick and abstract. Before *Baker*, apportionment challenges were based on a right to a republican form of government, and therefore were nonjusticiable and purely "political" questions.[32] Justice Brennan, by contrast, held in *Baker* that a claim of vote dilution due to malapportioned districts is not necessarily foreclosed by the Court's prior labeling of such claims as a purely political question. He explained:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political

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[26] *Baker v. Carr*, 369 U.S. 186 (1962).

[27] *See Colegrove v. Green*, 328 U.S. 549, 555 (1946) (holding that controversies arising from malapportioned districts involve questions inherently political in nature and thus the political process should resolve these problems). Article IV, § 4 of the Constitution, or the 'Guarantee Clause,' guarantees that the federal government shall ensure that every state has a republican form of government. In *Colegrove*, the Court interpreted the Guarantee Clause to mean that issues pertaining to whether or not a vote is overvalued or undervalued are issues relating to whether a state truly has a republican (i.e., democratic) government in place. According to Article IV, § 4, these issues fall to Congress and not to the Judiciary to monitor and mediate.

[28] *Id.*

[29] *See, id.*

[30] *Baker*, 369 U.S. at 188.

[31] *Colegrove*, 328 U.S. at 556.

[32] *Id.* ("Violation of the great guaranty of a republican form of government . . . cannot be challenged in the courts.").

> department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[33]

Justice Brennan's framing of the political question issue is notable for its language of certainty and concreteness that, upon closer examination, is revealed to be, in actuality, highly abstract. Only one of his methods for determining a political question is concrete or tangible; the "textually demonstrable constitutional commitment of the issue to a coordinate political department" could theoretically be used as an actual litmus test for determining when an issue is "political" and thus nonjusticiable. However, the remaining four are arguably impossible to demonstrate concretely. He describes a "lack of . . . standards," two "impossibilities," and a "potentiality."[34] How would one go about proving a "lack," or an "impossibility," or that there exists a "potentiality of embarrassment?" Justice Brennan decides the issue of the political question, essentially, by reframing the issue in abstract terms so as to open the door for the exercise of judicial discretion. And yet, at the same time as Justice Brennan is creating an abstraction, a test with no substance, he is declaring that, in fact, the *Baker* decision creates a concrete standard by which to judge future cases against the "political question" issue. The concrete reality that remains, therefore, is only belief in the "unity underlying all the different impulses of the highest feeling of reality."[35]

Justice Frankfurter, joined by Justice Harlan, filed a pointed dissent in *Baker* which highlighted such abstraction and also highlighted the majority's marked failure to markedly address the key issue—the value of a vote. Justice Frankfurter spoke to the inherent abstraction of what it means to vote. He reasoned:

> Applicants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful—in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of "debasement" or "dilution" is circular talk. *One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth.*[36]

The dissent argues that the majority opinion has neglected to provide a concrete reality for the only representation of importance; until there is a true definition of the value of a vote, there can be no talk of abstraction. Until the Court determines what a vote is meant to represent, and thus how a representative is meant to be substantively

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[33] *Baker*, 369 U.S. at 217.
[34] *Id.*
[35] NIETZSCHE, *supra* note 5.
[36] *Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting) (emphasis added).

and equally elected, there can be no talk of unfair vote dilution. Frankfurter's dissent can be seen as worrying about the Nietzschean model of representation—worrying that we should "believe so firmly in our belief that for its sake we imagine 'truth,' 'reality,' 'substantiality' in general."[37] Just as Nixon's Secretary of State announced the abandonment of the gold standard as a triumph of the dollar when, in reality, the dollar was threatened and weak,[38] so too can the Court be seen announcing as concrete a rule that is, upon close examination, highly abstract. "As a rule," Karl Marx wrote, "the most general abstractions arise only in the midst of the richest possible concrete development, where one thing appears as common to many, to all. Then it ceases to be thinkable in a particular form alone."[39] The Court's creation of the deceptively concrete one person, one vote standard enables the right to vote to appear as common to every citizen, as substantively equal, yet at the same time divests a vote from any particularity or substance of value.

III. One Person, One Vote: Reapportionment and Real Abstraction

Perhaps nowhere is the tendency to veil abstraction with concrete language more apparent than in the one person, one vote standard. Two years after *Baker*, in *Reynolds v. Sims*,[40] the Court again explicitly created a standard that is expressed in concrete terms that seem real and substantive, but is in reality an abstract vessel for the exercise of judicial discretion. In *Reynolds*, the plaintiffs made allegations similar to those made by the plaintiffs in *Baker*; the apportionment scheme in Alabama was based on population, and since the districts had not been reapportioned since 1901, there were grave disparities between representation and population in some counties due to shifts in population density.[41] Thus, the *Reynolds* plaintiffs argued that the individual votes of the citizens from more populous areas were valued lower than the individual votes from districts with lower populations; in essence, certain votes "purchased" less representation than others. Depending on where you lived, on the population of your voting district, your vote would "buy" less representation than the vote of someone who lived somewhere else. The Supreme Court held that in order for the promise of equal protection to be fulfilled, legislative districts must be equal in population.[42] Every person's vote must be valued the same—it must be able to be exchanged for the same amount of representation in government. Thus, the Court firmly established what would become known as the "one person, one vote" standard. In *Reynolds*, the Court framed the issue in individual-rights based terms, and in so doing formed the basis for the many ways in which individual identity would be supplanted by group identity in future voting rights cases.

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[37] NIETZSCHE, *supra* note 5, at 256.
[38] Lehrman, *supra* note 22.
[39] KARL MARX, GRUNDRISSE 104 (Martin Nicolaus trans., Penguin Books 1973) (1939).
[40] *Reynolds v. Sims*, 377 U.S. 533 (1964).
[41] *Id.* at 545.
[42] *Id.* at 535–36.

Close examination of the Court's decision in *Reynolds* is instructive. The first level on which the Court began to abstract the individual was by defining the individual right being violated by malapportioned districting as "personal." The Court stated:

> The right to vote is personal. . . . Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. . . . As long as ours is the representative form of government *elected directly by and directly representative of the people*, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. . . . The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[43]

The vote dilution issue would seem to demand an analysis of how an individual vote should be valued; how can the Court determine if a vote has been diluted if it does not articulate a baseline value for a non-diluted vote? Indeed, this analytical chasm in the majority opinion was highlighted in Justice Frankfurter's dissent in *Baker*, in which he observed that "one cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth."[44] The *Reynolds* Court skirted this question entirely, declaring simply that dilution occurs when an individual is deprived of the equal representation that is fundamental to democratic government without ever defining a standard of vote value.[45]

The Court accomplishes this jurisprudential sleight of hand by using confident, declarative language that veils the inherent abstraction in their decision. The *Reynolds* Court holds that the right to vote is personal, that legislators directly represent "the people," and that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities."[46] Moreover, the Court speaks of "the right to vote," and "the right of suffrage," without ever firmly defining these rights.[47] Yet, at the same time, these undefined rights are hailed as the "bedrock of our political system," "the essence of a democratic society."[48] The Court can be seen maintaining the sense that voting is based on a value system, that a vote can be exchanged for something substantive. And yet, when the Court's language is parsed, it becomes clear that a vote only represents representation itself. This is a highly abstract concept, yet it is cloaked in simple, easy-to-understand language. The Supreme Court is engaging in the same sort of doublespeak that Nixon's Treasury Secretary employed to sell the "Nixon Shock" to the American people. Just as Nixon presented the fall of the dollar in a language of American exceptionalism and ultimate strength, so too does the Court present a system based on imagination as if it was substantiality itself.

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[43] *Id.* (emphasis added).
[44] *Baker*, 369 U.S. at 300.
[45] *Reynolds*, 377 U.S. at 555.
[46] *Id.* at 562.
[47] *Id.* at 536.
[48] *Id.*

The dissent filed by Justice Harlan in *Reynolds* notes this seemingly obvious paradox. He argues that the Court has engaged in highly abstract reasoning, and its explanation or justification is circular and ultimately empty.

> Although the Court—necessarily, as I believe—provides only generalities in elaboration of its main thesis, its opinion nevertheless fully demonstrates how far removed these problems are from fields of judicial competence. . . . I know of no principle of logic or practical or theoretical politics, still less any constitutional principle, which establishes all or any of these exclusions. Certain it is that the Court's opinion does not establish them.[49]

Justice Harlan here speaks to the very lack of clarity he and Justice Frankfurter highlighted in their dissent to *Baker*. The Court established a precedent of abstraction in *Baker* and, from *Reynolds* on, the vote dilution cases are tinged with such lofty, abstract language. The Court calls such rules "objective," yet they are unquestionably abstract. The apportionment cases demonstrate the Court's tendency toward "objective" rules that "avoid the invocation of a contestable political philosophy."[50] Much as Nixon made certain to characterize the move away from the gold standard as strong and fixed, when in reality it was born of weakness and abstraction, so too does the Court find itself creating a myopic representation.

Without the sense of a concrete value behind the representation, we cannot trust that we are truly being represented when we vote. One person, one vote attempts to make a vote represent something concrete and the Supreme Court's establishment of the one person, one vote principle was equally an affirmative act meant to restructure a marketplace, as was the Nixon Shock.[51] Both moves were intended to preserve our belief in the supremacy of a particular system, even as the very system may be collapsing in on itself. Both such moves toward abstraction, although stemming from a sense of weakness in the respective systems, were presented as a triumph of legitimacy. Just as Nixon's Secretary of the Treasury presented their economic plan, not as the collapse of the dollar but rather as America's triumph,[52] so too was one person, one vote accepted as a miracle of American equality. "Unlike school desegregation, the police practices revolution, or the ban on school prayer, one person, one vote has occasioned no backlash and seems wildly popular across the political system."[53] Furthermore, neither Nixon's abstraction nor the Supreme Court's addressed the respective problem each was designed to solve. As the next section explores, minorities, racial minorities in particular, are still no better represented. Thus, although we may, as Americans, have a sense of how our economy is based in abstraction and that this abstraction has a relationship to economic inequality, culturally we do not yet

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[49] *Id.* (Harlan, J., dissenting).
[50] Pamela S. Karlan, *The Fire Next Time: Reapportionment after the 2000 Census*, 50 STAN. L. REV. 731 (1998).
[51] *Id.* (arguing that the Supreme Court restructured the "marketplace" of voting to protect minority interests).
[52] Lowenstein, *supra* note 6.
[53] Ross, *supra* note 7, at 230.

embrace the fact that our democratic process is similarly abstract, and similarly responsible for structural (thus economic, thus political, thus social) inequality.

IV. Equal Protection and the Abstraction of the Individual

The lack of definition of "vote," as seen first in *Baker* and then in *Reynolds*, thus demonstrates the ways in which the jurisprudence of equality as it relates to voting rights is founded on abstraction. American democracy depends on "we, the people"[54] and yet also insists on the right of the individual.[55] Thus, we abstract to allow individuals to be identified through groups, and yet reject such a characterization at every turn. One person, one vote requires the creation of a definable, recognizable, political group so that the group can then be represented. However, despite the development of the one person, one vote standard, it became clear that each person's vote was not, actually, equally valued. At the federal level, the Electoral College defines the value of each person's vote differently depending on the ratio of population to Electoral College votes. At the state and local level, gerrymandering and redistricting have ensured that votes buy more or less representation depending on where someone lives. Such a myopic jurisprudence depends, in no small part, on not only the abstraction of what a "vote" means, but also on what it means to be represented. Karl Marx noted an early progenitor of the one person, one vote rule in Enlightenment Europe, writing, "The state abolishes, after its fashion, the distinctions established by *birth, social rank, education, occupation*, when it decrees that birth, social rank, education, occupation are *non-political* distinctions; when it proclaims, without regard to these distinctions, that every member of society is an *equal* partner in popular sovereignty."[56] This is the latent oxymoron of equal protection jurisprudence; the Court wishes to treat citizens as individuals, but it also deeply desires to eradicate past discrimination. In order to do this, the Court necessarily must abstract the individual.

The one person, one vote standard ensures that "only individuals" are represented in the political sphere. It is a means through which the state can value its citizens as "precisely equal, identical individuals, "abstracted" from their particular cultural and territorial associations."[57] However, the notion that a vote can adequately represent an individual (or indeed, that there even is such a thing as an individual to be represented) is an abstraction itself. Like the Nietzschean fiction of the subject as real, here, the *creation* of the abstraction of individualism or identity is, in fact, the substance of identity. Thus, the concept of the individual must also be abstracted. Indeed, the "chiasmal" equipopulation requirement of the one person, one vote standard rendered

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[54] U.S. CONST. PREAMBLE.

[55] *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 730 (2007) ("[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995))).

[56] KARL MARX, *On the Jewish Question*, *in* THE MARX-ENGELS READER 26, 33 (R. C. Tucker ed., 2d ed. 1978) (1843).

[57] *Id.*

it a uniquely specific rule that may have led to an increase in inequality.[58] Such a balance can be seen in the later voting rights cases.

In *Whitcomb v. Chavis*,[59] for example, the Court allows that there is a definable group, and yet cannot decide how to define the group. Certain definitions are not allowed, due to the abstract ways in which the Court has defined individual rights in the past. In *Whitcomb*, poor black residents of Marion County, Indiana claimed that the districting scheme in place diluted their voting power.[60] They based their case on the political and social context in which the scheme operated—such as evidence that state legislators disproportionally lived in other parts of the county and were generally unresponsive to their interests—and argued that they were being deprived of effective representation in the political process.[61] Although the Court allows that the group may be defined geographically, the fact that the area is known as (and referred to in the decision as) "the ghetto" carries no weight. Moreover, the Court permits defining a group along racial lines, but not along party lines, stating:

> Absent evidence or findings we are not sure, but it seems reasonable to infer that had the Democrats won all of the elections or even most of them, the ghetto would have had no justifiable complaints about representation. . . . The voting power of ghetto residents may have been "cancelled out" as the District Court held, but this seems a mere euphemism for political defeat at the polls. On the record before us plaintiffs' position comes to this: that although they have equal opportunity to participate in and influence the selection of candidates and legislators, and although the ghetto votes predominantly Democratic and that party slates candidates satisfactory to the ghetto, invidious discrimination nevertheless results when the ghetto, along with all other Democrats, suffers the disaster of losing too many elections.[62]

Thus, the Court, using one person, one vote, is able to define groups of people ("Democrats," "the ghetto") through various means (political affiliation, race, economic or social status, geography, etc.) while at the same time claiming that they are yet dealing with the *individual* right to vote. Again, Justice Harlan dissents and points to high abstraction employed by the Court, calling such results "wondrous."[63] Justice Harlan, similar to his protest in *Baker*, again reminds the Court that until concrete definitions of value are determined, the Court will continue to reach results unsubstantiated by reality, results that create a representation with only the belief in its value for value or meaning. The other dissenting Justices provide a more detailed explanation of the abstraction, rooting it in the washing out of identity. Justice Douglas, joined by Justices Brennan and Marshall, writes:

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[58] *See* Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201 (1996).
[59] *Whitcomb v. Chavis*, 403 U.S. 124 (1971).
[60] *Id.* at 129.
[61] *Id.*
[62] *Id.* at 152 (Harlan, J. dissenting).
[63] *Id.* at 166.

> Our cases since *Baker v. Carr* have never intimated that "one man, one vote" meant "one white man, one vote." Since "race" may not be gerrymandered, I think the Court emphasizes the irrelevant when it says that the effect on "the actual voting power" of the blacks should first be known. They may be all Democratic or all Republican; but once their identity is purposely washed out of the system, the system, as I see it, has a constitutional defect. It is asking the impossible for us to demand that the blacks first show that the effect of the scheme was to discourage or prevent poor blacks from voting or joining such party as they chose.[64]

The Court creates arbitrary schemes of value; its preference for so-called "objective" rules privileges certain groups over others.[65]

The Court in *White v. Register*[66] similarly abstracted the individual to find against racial discrimination when drawing districting lines, thus cementing the logical abstraction it began in *Whitcomb*. In *White*, the Court held that the apportionment scheme in two counties in Texas "invidiously discriminated against cognizable racial or ethnic groups."[67] The Court has placed itself in a jurisprudential contradiction. In order to find districting an unconstitutional violation of the right to vote (which they decline to concretely define) they rely on a notion of group representation. Such groups can only be "racial or ethnic" and, moreover, they find the right of the individual in the right to have his or her group adequately represented. Although the Court is engaging in highly abstract reasoning, they nonetheless employ language of concreteness and certainty to describe their holding.

Remarkably, the Court has never analyzed vote dilution cases through a racial bias lens. Despite the fact that many of these cases involve poor minority groups claiming that their constitutional rights have been violated, the Court has never subjected any voting scheme to strict scrutiny.[68] Despite the fact that strict scrutiny analysis is usually initiated when a particular definable group is deprived of the effective opportunity to influence the political process, no court has ever used strict scrutiny to analyze a voting rights case.

The Court therefore, in its enforcement of representative equality (one person, one vote) is enforcing a substantive model of democratic representation.[69] The Court has made a value judgment; the Court has deemed the proper aggregation of votes in our representative government is by population:

> It is a value judgment that rejects other bases of aggregation such as by geography, which was utilized in the organization of the U.S. Senate and served as a model for many states prior to the Court striking them down. Similarly, the adoption of majority rule and effective representation for minorities was a value judgment that subordinated a prior form of representative government that had provided a minority veto to protect against majority tyranny. . . . Judicial enforcement of the representative equality

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[64] *Id.* at 180.
[65] Karlan, *supra* note 50, at 745.
[66] *White v. Register*, 412 U.S. 755 (1973).
[67] *Id.* at 755.
[68] Ross, *supra* note 7.
[69] *Id.* at 229.

> principle therefore enforces important substantive value judgments and does not fit neatly within either form of representation-reinforcing judicial review.[70]

Just as Nixon (or rather, his economic advisors) made a value judgment that in time proved to be disastrous,[71] a value judgment which our economy may still be feeling the effects of today,[72] so too did the Court make a value judgment in the apportionment cases. They "voted for gold" with one person, one vote. They attempted to create a concrete standard that could give value to voting.

V. (in)Conclusion: The Gold Standard of Judicial Discretion

We are comfortable with the level of abstraction that capitalism requires of us. It is part of our collective consciousness that one dollar represents no substantive value. The stock market is proof that we are more or less fully aware of our economy's abstraction of value, and our reliance on money as a representation of this abstraction. We understand that economic inequality exists partly because of this abstraction; the rising and falling of the stock market, inflation, arbitrary and conflicting values attached to certain objects—we understand that this all is, in a very real sense, made up. It is not so clear that social inequality is likewise a consequence of the abstraction required by our political system of representation. We do not necessarily understand our right to vote, the ballot, or representative government as similarly abstract and imaginary—that the law's purported neutrality veils the ways in which the Court reifies the existing class structure.[73]

There are several moments at which the Court can be seen vainly (or "messianically"[74] perhaps) trying to perfect the political process, to create a concrete or neutral standard that in reality acts to reinforce the status quo. The "intent" standard for racial discrimination is one such instance. In *Washington v. Davis*,[75] plaintiffs sued the Washington, D.C. Police Department claiming that the Department used discriminatory hiring procedures. Specifically at issue was a test on which hiring decisions were based.[76] The Court held that, despite the fact that African American applicants disproportionately failed the test, the Department did not intend for the test to be discriminatory on the basis of race, and therefore did not violate plaintiffs' 14th Amendment rights.[77] In so holding, the Court established the "discriminatory intent" standard; from *Davis* on, equal protection challengers had to show that a law or practice was motivated by an intent to discriminate. Mere discriminatory effect was not enough. In *Davis*, the Court shifted the evidentiary framework towards the intent of the

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[70] *Id.* at 230.
[71] *See, e.g.*, Lehrman, *supra* note 22.
[72] Maurer, *supra* note 9, at 21.
[73] Kenneth A. Stahl, *Local Government, "One Person, One Vote," and the Jewish Question*, 49 HARV. C.R.-C.L. L. REV. 1, 18–20 (2014).
[74] Karlan, *supra* note 50, at 763.
[75] *Washington v. Davis*, 426 U.S. 229 (1976).
[76] *Id.* at 235.
[77] *Id.* at 248.

perpetrator (a highly abstract concept) away from the discriminatory impact of the action (a concrete, arguably factual consideration). However, the effect of such a shift was not just that the outcome of equality-based challenges drastically become essentially predetermined, but also that the Court found itself performing remarkable logical abstractions. The Court had to ignore virtually factual, incontrovertible assertions of historical bias or present-day discriminatory effect in order to reach their preferred result.[78] Most notably, in *Feeney*, a group of women were denied jobs because the state of Massachusetts had instituted a regime by which veterans were granted preferential treatment in hiring decisions. In order to uphold the status quo (a world in which the group "veteran" is justifiably and constitutionally preferred over the group "women") it was necessary for the Court to find that it was irrelevant that women had historically been excluded from military service. If fewer women are veterans it seems to follow that women would be disadvantaged by a regime that provides preferential treatment to veterans—a group which is mostly comprised of men. Indeed, Justice Stewart noted that veterans' services "operated overwhelmingly to the advantage of males."[79] Despite finding all this, the Court did not hold that such discriminatory practices violated the constitutional rights of women.[80]

The Voting Rights Act of 1965 and its preclearance standard was another moment at which the Court can be seen attempting to establish a "unity underlying all the impulses of the highest feeling of reality."[81] The preclearance standard is the colloquial term used to describe the section of the Voting Rights Act that reads: "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[82] By establishing the preclearance standard[83] the Court could have been trying to place some substantiality behind the representation of voting equality that, after *Baker* and *Reynolds*, could perhaps have been seen as heading down the wrong path. Although the Voting Rights Act did manage to move many states towards more substantial voting equality, it nonetheless codified the abstraction of the individual. By firmly stating that race alone is an unequal means of vote dilution,[84] the Voting Rights Act wrote into law the very political abstraction Marx wrote of in his essay *On the Jewish Question*. The state necessarily reduces "all things in society to a single measurement: their market exchange value."[85] The Voting Rights Act can essentially be seen as reducing the value of all citizens' votes to a single measurement:

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[78] *See, e.g.*, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (upholding a discriminatory housing ordinance based on a failure to prove discriminatory purpose); *Pers. Adm'r v. Feeney*, 442 U.S. 265 (1979) (holding that historical discrimination against women was irrelevant when contrasted with the governmental desire to protect veterans).
[79] *Feeney*, 442 U.S. at 259.
[80] *Id.*
[81] NIETZSCHE, *supra* note 5.
[82] 42 U.S.C. § 1973b(b).
[83] *Id.*; *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).
[84] *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).
[85] MARX, *supra* note 56, at 23.

their race. Indeed, the recent Supreme Court decision to remove the preclearance standard from the Voting Rights Act, in *Shelby County v. Holder*,[86] fits in neatly with the voting jurisprudence established in *Baker* and *Reynolds*; when population and history are the standards against which equality of vote-value is measured, the decision in *Shelby*, which arguably opens the door for rampant racially-motivated vote dilution laws, is a natural conclusion. Yet, at the same time, although it makes logical, jurisprudential sense, it does not fit into the Court's standard of attempting to redefine the value of a vote so as to benefit racial minorities. Thus, as the many redistricting cases and the various other discrimination cases have shown, from *Baker* through today, there is no overarching, universally applicable rule that can ensure political and racial fairness.[87]

Districting and apportionment exist to group voters to elect representatives.[88] However, the Court has established that representatives represent individuals, not groups—saying famously in *Baker* that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities."[89] The Court, therefore, establishes a precedent that demands the government treat citizens as individuals by necessarily treating them as identifiable groups.[90] Thus, "The citizen is conceived as an abstraction, an individual formally identical to every other citizen and released from the particular associations of the private sphere."[91] The one person, one vote standard established in *Reynolds* is the creation of an abstraction regarding the representation of persons, to the detriment of the thing-being-represented—in this case, the people.

Society, as it increases to abstract the individual away from concrete identities, also becomes increasingly reliant on money as value. Money levels "particular distinctions as surely as did the abstraction of citizenship . . . by reducing all things in society to a single measurement: their market exchange value."[92] The one person, one vote standard, the Court's concrete abstraction of the individual, creates, as Marx would say, a double existence for citizens:

> When the political state has attained to its full development, man leads . . . a double existence—celestial and terrestrial. He lives in the *political community*, where he acts simply as a *private individual*, treats other men as means, degrades himself to the role of a mere means, and becomes the plaything of alien powers. In the state . . . man is the imaginary member of an imaginary sovereignty, divested of his real individual life, and infused with an unreal universality.[93]

The Court attempts to allow citizens to retain both their individuality and their universality in the apportionment cases. This is the problem with the one person, one

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[86] *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).
[87] Karlan, *supra* note 50, at 763.
[88] *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588 (1993).
[89] *Baker*, 369 U.S., at 562.
[90] *See, e.g.*, Karlan, *supra*, note 50, at 1207.
[91] Stahl, *supra* note 73, at 22.
[92] *Id.* at 25.
[93] MARX *supra* note 56, at 34.

vote standard. It requires abstracting the individual to appropriate, acceptable, groups. The standard infuses the doctrine with an "unreal universality," and as a result the "coin" of one person, one vote is rendered almost void. As Nietzsche wrote near the end of his life, "truths are illusions about which one has forgotten that is what they are: metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins."[94] Money and political representation are both purely and only this sort of truth. They are both representations that represent only our concept of what they are meant to represent. Money, post-Bretton Woods, post-Nixon Shock, can "never represent or stand for anything else 'truly,' that is, fully and finally. . . . [T]he issue is no longer one of representation's arbitrariness, but rather its ultimate failure. In other words, money is always representationally flawed."[95] Similarly, *representation itself* is representationally flawed. Politicians, supposed representations of the people, necessarily cannot represent the people, because not only do we disagree on how to define "the people," but also because the system exists to create representations for representation's sake. A vote truly has become a worn out metaphor, a representation exchangeable only for an abstract concept of representation itself.

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[94] FRIEDRICH NIETZSCHE, *On Truth and Lies in a Nonmoral Sense*, in THE NIETZSCHE READER 114-124 (K.A. Pearson & D. Large, Eds. 2006) (1873).

[95] Robert Foster, *In God We Trust? The Legitimacy of Melanesian Currencies*, *in* MONEY AND MODERNITY: STATE AND LOCAL CURRENCIES IN MELANESIA 214, 230–31 (D. Akin & J. Robbins eds., 1999).