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INTRODUCTION

Representative government, as practiced in a democracy, theoretically embraces the philosophy that all people shall be equally represented in the legislature. However, unless there are enforceable constitutional prescriptions, the eventual result in a democratic political system is that not all of the population will have the same representation. Inevitably, the political forces in power will seek to perpetuate their control by arranging electoral district lines in such a way as to minimize the power of the opposition. In the United States, undemocratic concern with voting district boundaries first took the form of the partisan gerrymander which skillfully inflated or deflated party voting strength.[1] The second concern took the form of a silent gerrymander which resulted from a failure to adjust district lines as the population began to move from the farm to the city around the turn of the century. Consequently, the value of a vote in a rural area became greater than the value of an urban vote.

At first the unfairness of partisan gerrymandering created some furor, but gradually this practice was accepted as a "rule of the political game" which could be used by either party whenever it won control of state or local legislative bodies. Likewise, the inequity of the silent gerrymander was regarded initially as being only mildly undemocratic. However, as their populations grew, cities, feeling the financial pinch of citizens' demands, protested against control of the state legislatures by a conservative, rural minority. Appeals to the judiciary were in vain since the Supreme Court avoided becoming embroiled in the controversy of reapportionment by classifying such problems under its self-restraining

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1. This practice was named for one of its early practicioners, Elbridge Gerry. Gerry was a signer of the Declaration of Independence, governor of Massachusetts from 1810 to 1812 and vice-president of the United States from 1813 to 1814.

"political questions doctrine."[2] As urbanization continued to increase at a rapid pace, however, the Court abandoned its position by announcing in *Baker v. Carr*[3] that apportionment questions were justiciable. This change in attitude was probably influenced by a decision two years prior which declared the racial gerrymander unconstitutional.[4] If a state legislature could not manipulate the boundaries of one of its subdivisions for the purpose of excluding Negroes from a population whose government they otherwise would have been able to elect, then it logically followed that under the equal protection clause of the fourteenth amendment a state legislature should not be allowed to discriminate against other classes of people on a geographical basis.

Political Reaction to the Reapportionment Decisions

Justice Frankfurter warned his colleagues in *Baker v. Carr*,[5] while dissenting against the reversal of the self-restraining precedent of *Colegrove v. Green*,[6] that entering the domain of the politicians was an exercise of poor judicial judgment.[7] Yet, it can be doubted whether even the venerable Justice Frankfurter anticipated the constitutional crisis which was nearly precipitated by the assumption of jurisdiction over reapportionment questions. Reaction to the *Baker* decision took an unexpected turn as the opponents sought to invoke the unused application clause of the Constitution's fifth article.[8] A campaign was immediately organized by the Council of State Governments to bring before a national convention three amendments to the Constitution, one of which would have eliminated Supreme Court jurisdiction over state legislative apportionment.[9] Pressured by effective propaganda, a total

2. Colegrove v. Green, 328 U.S. 549 (1946).
3. 369 U.S. 186 (1962).
4. Gomillion v. Lightfoot, 364 U.S. 339 (1960).
5. 369 U.S. 186 (1962).
6. 328 U.S. 549 (1946).
7. Baker v. Carr, 369 U.S. 186, 268 (1962) (dissenting opinion).
8. Article five provides that amendments to the Constitution may be proposed by a two-thirds vote of each house of Congress, or by a national convention which can be assembled when Congress receives applications from two-thirds of the state legislatures. U.S. Const. art. 5.

The history of efforts to propose constitutional amendments by a national convention is described in Martin, *The Application Clause of Article Five*, 85 Pol. Sci. Q. 616 (1970).

9. Another proposition restricted the power of the Supreme Court by requiring a review of its decisions before a "Court of the Union" comprised of the fifty state court chief justices. The third proposal permitted the states to by-pass Congress in the amending process by providing that whenever a textually identical amendment was proposed by two-thirds of the state legislatures, it automatically would be circulated among the states for ratification by a three-fourths majority.

of twenty-nine petitions was presented to Congress in 1963 requesting that a convention be convened to consider one or more of the proposals.

As soon as the motives of the movement to amend the Constitution were better understood, adverse public reaction brought an end to this first effort of the Council of State Governments. However, after the Supreme Court in 1964 formulated its "one man, one vote" principle for congressional districting in *Wesberry v. Sanders*,[10] and for state legislative representation in *Reynolds v. Sims*,[11] the Council renewed its campaign. This time it concentrated only on the issue of reapportionment which had proved in the earlier attempt to be of greater concern to the public than the other two resolutions. The public had received these other proposals unfavorably because they were generally viewed as constituting the same kind of attack upon the constitutional system that the Supreme Court was making in the reapportionment decisions. Twenty-six states quickly gave support to a proposed amendment which would enable voters through a referendum to apply the federal analogy to their legislature by having the representation of one chamber chosen on some basis other than population. While the states were being urged to submit applications, a similar proposal was being promoted in the upper house of Congress by Senator Everett Dirksen.[12] After twice failing by seven votes to secure the necessary two-thirds majority for Senate passage, the forces of Senator Dirksen turned their attention to managing the drive for a national convention which had apparently stalled in 1966 with 28 registered applications. The newly created coalition succeeded in gaining four more petitions in early 1967. When Iowa was persuaded to join the movement in April, 1969, a constitutional crisis seemed imminent since, presumably, the proponents were only one petition short of the requirement for calling a convention.[13] The reapportionment of many state legislatures eventually ended the threat; Kansas rescinded her application in the summer of 1969 and convention supporters were defeated in the legislatures of Delaware and Wisconsin. Nevertheless, the reaction to *Baker* and *Reynolds* has been considered a close call to constitutional disorder because many authorities fear the uncertainty of what might happen if a national convention to propose amendments were summoned.[14]

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10. 376 U.S. 1 (1964).
11. 377 U.S. 533 (1964).
12. S.J. Res. 2 and S.J. Res. 103, 89th Cong., 1st Sess. (1965).
13. The questions surrounding these applications and the calling of a national convention are analyzed in AMERICAN ENTERPRISE INSTITUTE, SPEC. ANALYSIS SERIES No. 5, A CONVENTION TO AMEND THE CONSTITUTION? (1969).
14. *See generally Symposium—The Article V Convention Process*, 66 MICH. L. REV. 837 (1968).

REYNOLDS REVISITED

If a constitutional crisis was averted during the second half of the last decade, it would seem to have been because many state legislators accepted the *Reynolds* formula as being in the best overall interests of democratic government. Also, those responsible for implementing judicially ordered reapportionment obviously construed the *Reynolds* philosophy as permitting some flexibility in the rearrangement of election districts to achieve voting equity. This was a reasonable interpretation since the Supreme Court, in a frequently cited paragraph, did stress the impracticability of stringently applying the "one man, one vote" principle:

> [W]e mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislatures, *as nearly of equal population as is practicable.* We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. *Mathematical exactness* or precision is hardly a workable constitutional requirement.[15]

The connotation of flexibility was further reinforced by the special emphasis given to the "as nearly as practicable" clause when the Court realistically admitted that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."[16]

Concerning state legislative reapportionment, a leading commentator perceived several possible exceptions deriving from *Reynolds*:

> In a left-handed sort of way the Court did speak in one section of the *Reynolds* opinion of several possibly legitimate non-population considerations: "insuring some voice to political subdivisions, as subdivisions"; "according political subdivisions some independent representation in at least one body of the state legislature"; following principles of compactness and contiguity in districting; achiev[ing] "some flexibility by creating multimember or floterial districts"; "effectuat[ing] . . . a rational state policy."[17]

Only for the area of local government, which was not yet included under

15. 377 U.S. 533, 577 (1964) (emphasis added).
16. *Id.* at 578-79.
17. R. DIXON, DEMOCRATIC REPRESENTATION; REAPPORTIONMENT IN LAW AND POLITICS 271 (1968).

the aegis of *Reynolds*, was there a warning against expecting less rigorous standards. Since local governments operate within a limited area and almost without exception use unicameral legislatures "that (1) exercise general governmental functions and (2) are designed to be controlled by the voters of the geographic area . . . ," it was anticipated that the "one man, one vote" rule would be strictly applied to representative bodies at this level in the political system.[18]

In a companion case, *Lucas v. Forty-fourth Colorado General Assembly*,[19] the spirit of the *Reynolds* decision seemingly was echoed, leading one commentator to conclude that "maximum population variances among the [state legislative] districts in the ratio of 1 to 1.7 are at least 'arguably' permissible."[20] This latitude could, of course, conceivably enable state legislatures to preserve the integrity of many traditional subdivisions in making a judicially acceptable reapportionment; but despite the suggestion of flexibility contained in the *Lucas* ruling, a careful reading of *Reynolds* discloses that only a narrow deviation from a zero population variance is constitutionally permissible. In this context the Supreme Court said:

> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible . . . . But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation.[21]

Five years later, the Court's intention to rigorously enforce the qualification placed on flexibility was clearly demonstrated for congressional and state legislative districting in the cases of *Kirkpatrick v. Preiser*[22] and *Wells v. Rockefeller*.[23]

Although more flexibility may have been presumed than was intended in the *Lucas* case, the same attitude that was at least implied in *Lucas* was manifested in the ruling in *Fortson v. Dorsey*,[24] which upheld the

18. Weinstein, *The Effects of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21, 23 (1965).
19. 377 U.S. 713 (1964).
20. Note, *The Case for District Court Management of the Reapportionment Process*, 114 U. PA. L. REV. 504, 513-14 (1966) (footnote omitted). *See* Lucas v. Forty-fourth Colorado Gen. Assembly, 377 U.S. 713, 727 (1964).
21. Reynolds v. Sims, 377 U.S. 533, 579-80 (1964) (footnote omitted).
22. 394 U.S. 526 (1969).
23. 394 U.S. 542 (1969).
24. 379 U.S. 433 (1965).

use of an electoral system that combined a multi-member district with a residence requirement for the election of state legislators. This plan involved the division of Fulton County, Georgia, into seven districts for the purpose of determining residence for the seven state senators who were elected at-large. Since it would be possible for a district to elect more than one senator or since a district might reject its resident candidate who could still be elected by the countywide vote, the multi-member provision was challenged as being in violation of the "one man, one vote" standard. However, the Supreme Court accepted this scheme because it considered the senators to be the representatives of the entire county upon whose vote their election depended. The significance of this decision, however, has been assessed by Professor Dixon as being much less than originally thought because "[i]t was not widely realized that plaintiff's contentions were very narrow and did not reach the crucial issue of unfair impact on political representation needs in the multimember counties, flowing from the winner-take-all aspect of the at-large election system."[25] Even so, the flexibility that was approved in *Fortson* provided a solid precedent for later decisions concerning local government reapportionment.

THE TREND OF LOCAL REAPPORTIONMENT: 1964-1970

Before the Supreme Court extended the *Reynolds* formula to local government, lower courts had generally assumed the applicability of population equality for city and county legislative districting,[26] although in a few instances the "one man, one vote" principle underwent further definition. At one extreme, the Texas Supreme Court decided that factors such as "numbers of qualified voters, land areas, geography, miles of county roads, and taxable values" could be considered along with population in apportioning representation on the county board.[27] On the other hand, in Virginia where a unique county redistricting system has been

25. R. DIXON, *supra* note 17, at 477.

26. A number of state supreme court decisions have required local governments to reapportion. Montgomery County Council v. Garrott, 243 Md. 634, 22 A.2d 164 (1966); Hanlon v. Towey, 274 Minn. 187, 142 N.W.2d 741 (1966); Amentrout v. Schooler, 409 S.W.2d 138 (Mo. 1966); Seaman v. Fedourich, 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965); Bailey v. Jones, 81 S.D. 617, 139 N.W.2d 385 (1966); State *ex rel.* Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N.W.2d 249 (1965). *Contra,* Brouwer v. Bronkema, 377 Mich. 616, 141 N.W.2d 98 (1966); Midland County v. Avery, 397 S.W.2d 919 (Tex. 1965). In addition, a number of lower federal court cases ordered local government reapportionment. *Cf.* Strickland v. Burns, 256 F. Supp. 824 (M.D. Tenn. 1966); Martinolich v. Dean, 256 F. Supp. 612 (S.D. Miss. 1966); Ellis v. Mayor of Baltimore, 234 F. Supp. 945 (D. Md. 1964). For an analysis of these cases and the questions of *Reynolds'* applicability at the local level, see 53 VA. L. REV. 953 (1967).

27. Avery v. Midland County, 406 S.W.2d 442 (Tex. 1966).

used, several judicially appointed citizens commissions believed that the *Reynolds* equation required not only equal population among the supervisorial districts but also a balance between urban and rural populations within each district.[28]

When the Supreme Court had the opportunity to rule on local reapportionment in 1967, the question of inclusion under the *Reynolds* doctrine was left unanswered since the case, which involved representation on a county board of supervisors, was remanded. Unfortunately as far as local government was concerned, a jurisdictional error had been made in using a three-judge district court to review a law that was determined to be of only local, not statewide, application.[29] Although the broader issue was unresolved, two other rulings did develop some guidelines which eventually proved to be important.[30] To begin with, the tenor of the *Fortson v. Dorsey*[31] decision was manifested in the case of *Dusch v. Davis*.[32] Using the same pattern of representation, the city of Virginia Beach elects 11 at-large councilmen, 7 of whom must reside in the city's boroughs and 4 of whom are elected on an areawide basis. Since the population of the boroughs ranged from 733 to 29,048, the "Seven-Four Plan" was challenged as a violation of the "one man, one vote" concept. The Supreme Court, however, found the plan analogous to the scheme approved in *Fortson*. The Court emphasized that, in accordance with the essential constitutional test of the equal protection clause enforced by *Reynolds*, the Virginia Beach election system did not contain an "invidious discrimination."[33] In fact, the need for experimentation was stressed in the Court's conclusion that "[t]he Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megapolis in relation to the city, the suburbia, and the rural countryside."[34]

The emphasis on permitting local governments to devise new forms of representation was also evident in the companion decision of *Sailors v. Board of Education*,[35] in which it was predicted that "[v]iable local

28. For a discussion of the Virginia procedure, see Martin, *County Reapportionment in Virginia*, 55 VA. L. REV. 1167 (1969).

29. Bd. of Supervisors v. Bianchi, 397 U.S. 97 (1967).

30. For a detailed analysis of the local reapportionment cases decided from 1967-70, see Martin, *The Supreme Court and Local Reapportionment: The Third Phase*, 39 GEO. WASH. L. REV. 102 (1970).

31. 379 U.S. 433 (1965). *See* note 24 *supra* and accompanying text.

32. 387 U.S. 112 (1967).

33. *Id.* at 116.

34. *Id.* at 117 (footnote omitted).

35. 387 U.S. 105 (1967).

governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions."[36] Examining one of the typically intricate representational systems used at the local level for special units, the Supreme Court ruled that appointive administrative boards were exempt from the requirement of reapportionment. Concerning what constitutes administrative character, it was merely noted that the county board in the *Sailors* case exercised supplementary power, some of which was subject to review, and that it did not exercise legislative powers "in the classical sense."[37] By inference, the *Sailors* decision seems to indicate that the distinction between administrative and legislative functions can be judicially ascertained by looking at the exercise of fiscal powers. Administrative boards are evidently considered to be those which are dependent upon another governmental body for funding.

Three years later this logic was rejected in *Hadley v. Junior College District*,[38] which involved the federated concept of representation used by a special district government in the metropolitan area of Kansas City, Missouri. Since the representation of individual districts did not correspond precisely with their respective populations, the electoral scheme was held to violate "the constitutional mandate that each person's vote count as much as another's, as far as practicable."[39] In defending its plan of allocating representation, the Junior College District had contended that the equal population standard was not applicable because the elected board of trustees functioned as an administrative, not as a legislative, body. Dismissing this argument as imposing an "unmanageable principle" on the judiciary because governmental activities are seldom subject to such strict categorization, the Supreme Court in effect vitiated the *Sailors* ruling. It was mostly superceded by the general rule that

> whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable,

36. *Id.* at 110-11.
37. *Id.* at 110.
38. 397 U.S. 50 (1970).
39. *Id.* at 57.

> that equal numbers of voters can vote for proportionally equal numbers of officials.[40]

This formulation was essentially a reaffirmation of the decision made two years earlier in *Avery v. Midland County*.[41] That case had clearly extended the "one man, one vote" requirement to local governments exercising general powers, and *Hadley* expanded the application of the *Reynolds* axiom to include local governments established for a special purpose.

In summary, the Supreme Court has gradually ruled on local reapportionment, presumably because of the various and sometimes complex patterns of representation used at the "grass roots" level. Nevertheless, this piecemeal approach has been unnecessarily confusing at times to those persons responsible for designing plans of apportionment. For example, what is left of the *Sailors* decision? If the judiciary cannot distinguish between administrative and legislative duties for the purpose of classifying elections, does the ruling that appointive administrative boards are exempt from the "one man, one vote" principle still apply? On the basis of the *Hadley* case, a reasonable assumption is that *Sailors* no longer constitutes a valid precedent because distinguishing the duties of an appointive body should be no less difficult than for a body selected by election. However, there is one notation in *Hadley* which creates doubt about what is intended. This caveat provides that

> where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not "represent" the same number of people does not deny those people equal protection of the laws.[42]

The difficulty in reconciling the *Sailors* ruling with that of *Hadley* illustrates the problem which has confronted local reapportionment.

On the positive side of the ledger, the uncertainty of how some decisions are to be applied is balanced by the tenor of flexibility evident in all local reapportionment cases decided before 1971. As noted earlier, the *Dusch* and *Sailors* cases both underscored the Supreme Court's willingness to allow experimentation and innovation in designing systems of local representation.[43] There was also a reiteration of this philosophy in both the *Avery* and *Hadley* cases, but the emphasis was

40. *Id.* at 56.
41. 390 U.S. 474, 485-86 (1968).
42. Hadley v. Junior College Dist., 397 U.S. 50, 58 (1970).
43. *See* notes 34-36 *supra* and accompanying text.

not as pronounced. However, the *Hadley* majority tried to delineate a number of perceived exceptions to its general rule and even went so far as to indicate that the stringency of the "as nearly as practicable" standard demanded for congressional and state legislative districting would not be required for local government.[44] The impact of the caveats has not been as satisfactory as anticipated, however, because as Chief Justice Burger pointed out in his dissent to *Hadley*:

> The failure to provide guidelines for determining when the Court's "general rule" is to be applied is exacerbated when the Court implies that the stringent standards of "mathematical exactitude" that are controlling in apportionment of federal congressional districts need not be applied to small specialized districts such as the junior college district in this case . . . . Yet the Court has given almost no indication of which non-population interests may or may not legitimately be considered by a legislature in devising a constitutional apportionment scheme for a local, specialized unit of government.[45]

Although until 1971 there had been deficiencies in the local precedents handed down, the Supreme Court's attitude favoring special status may be the most important factor in the future of local apportionment.

Recent Developments

Is Population Inequality Permissible in Multi-Member Districting?

On June 7, 1971, the most recent rulings concerning local reapportionment were handed down. These decisions concerned three problems: 1) deviation from population equality among election districts, 2) multi-member districting and 3) the requirement of an extraordinary majority in county bond referenda. Coupled with a companion decision affecting congressional districting, these latest cases represent what appears to be a crucial state in the Supreme Court's thinking about the entire matter of reapportionment. In particular, there is a strong manifestation that less stringent requirements will be applied to local government. There is also evidence of this lenient attitude expressed in *Dusch v. Davis*.[46] In fact, that case now has greater meaning. After the lukewarm endorsements of flexibility in *Avery* and *Hadley*, along with their rigorous application of the "one man, one vote" principle, *Dusch* seemed to mean

44. *See* Martin, *supra* note 30, at 114-16.
45. Hadley v. Junior College Dist., 397 U.S. 50, 70-71 (1970) (dissenting opinion).
46. 387 U.S. 112 (1967). *See* notes 31-34 *supra* and accompanying text.

much less than originally thought, especially since the election scheme involved in that case is comparable to the at-large system used by most local governments in the United States.[47]

The recent Supreme Court case of *Abate v. Mundt*,[48] involved challenges to population inequality and multi-member districting in Rockland County, New York, where, for more than a hundred years, the governing board had been composed of the supervisors of the county's five towns.[49] Impressed by the advantages of this local coordination, the Supreme Court stressed several examples such as the interrelationship used for the very important fiscal function. This process permits the towns to prepare their own budgets which are then submitted to the county board. Although the municipalities establish their own real property assessments, the power of equalization is vested in the county board which also levies the taxes. In addition, intergovernmental agreements are used to manage other public services such as snow removal and waste disposal.

While acknowledging the importance of cooperation in the administration of Rockland County's governments, the Supreme Court seemed to accept unhesistatingly the respondent's argument that the "county's rapidly expanding population has amplified the need for town and county coordination in the future."[50] However, it was recognized at the same time that the area's increase in population had affected some towns more than others, with the result that by 1966 there was severe malapportionment of the county legislature. Therefore, in 1966, a federal district court had directed the county board to prepare a new reapportionment plan for submission to the voters.[51] After three different proposals were defeated at the polls, the county supervisors devised a multi-member scheme which, in attempting to provide equitable representation, also retained the essential feature of the traditional system. By continuing the policy of using each town as a county legislative district, town supervisors were encouraged to serve as well on the county governing body.

Since there was a disparity in population among the five towns, the revised apportionment plan was based on the theory of proportional representation. First, using 1969 population figures, the smallest town,

47. According to the amicus curiae brief filed in *Sailors*, only about 25 percent of local governing bodies are elected from districts. *See* Brief for the United States as Amicus Curiae at 110, Sailors v. Bd. of Educ., 397 U.S. 105 (1967).

48. 403 U.S. 182 (1971).

49. This type of representational system is used in a number of New York counties. *See* Abate v. Mundt, 403 U.S. 182, 183 (1971).

50. *Id.*

51. Lodico v. Bd. of Supervisors, 256 F. Supp. 440 (S.D.N.Y. 1966).

Stony Point, was given one supervisor on the county board. Then, its population of 12,114 was divided into that of the four other towns to determine their county representation. As a result of rounding fractional representation to the nearest integer, there was a total deviation from population equality among the districts of 11.9 percent. Clarkstown, with a population of 57,883, received five supervisors under this formula and was over-represented by 4.8 percent; Haverstraw, which was entitled to two supervisors on the basis of its population of 23,676, was over-represented by 2.5 percent. In contrast, Orangetown was under-represented by 7.1 percent because its population of 52,080 warranted four supervisors. The largest town, Ramapo with 73,051 inhabitants and six supervisors, was only 0.2 percent over equality—almost perfect representation. Stony Point was 0.3 percent over-represented.

When Rockland County's multi-member plan of representation was challenged because of its deviations from population equality, New York's highest court upheld the plan's constitutionality.[52] The ground for this decision was the court's interpretation that the *Reynolds* formula did not apply with the same force at all levels of government in the United States. The court's analysis of precedents ascertained three main points: 1) congressional districting demanded almost absolute equality; 2) state legislative districting needed less stringency because the Supreme Court had manifested a "more tolerant attitude toward the practical justification for deviation;" and 3) local districting required voting equity under a "still broader scope" of justifiable variance.[53] On the basis of what had been said in *Avery,* two of the New York justices dissented, holding instead that the "one man, one vote" standard should be similarly applied to all legislative apportionment. Thus, the New York court's ruling again illustrates the difficulty that lower courts have experienced in applying reapportionment guidelines set by the Supreme Court.

In upholding the decision of the New York Court of Appeals, the Supreme Court relied heavily upon a series of previously stated caveats. To obviate any misunderstanding about the applicability of precedents, the Court reiterated in the beginning that "electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections."[54] However, cognizance was again taken of the constitutional impracticability of requiring mathematical precision in every instance.[55] Referring to *Swann v. Adams,*[56]

52. Abate v. Mundt, 25 N.Y.2d 309, 253 N.E.2d 189 (1969).
53. *Id.* at 315, 253 N.E.2d at 192.
54. Abate v. Mundt, 403 U.S. 182, 185 (1971).
55. *See* Reynolds v. Sims, 377 U.S. 533, 577 (1964).

the Court clearly emphasized that "deviations from population equality must be justified by legitimate state considerations."[57] Concerning the implications of prior rulings on state apportionment for the case under consideration, the *Abate* opinion noted that "[b]ecause voting rights require highly sensitive safeguards, this Court has carefully scrutinized state interests offered to justify deviations from population equality."[58] Obviously, the tone of this statement indicates there will not be a relaxation of judicial examination under any circumstance, although the results of *Abate* suggest that a different set of priorities can be applied to the various levels of the political hierarchy.

Shifting the emphasis to local government, the Supreme Court next repeated its earlier statement in the *Sailors* case regarding the need for flexibility in local systems in order to meet societal needs.[59] This caveat was reinforced by reference to the *Reynolds* observation concerning the possible departure from numerical equality in order to preserve the integrity of political subdivisions.[60] Disregarding the connotation of mathematical stringency found in both *Avery* and *Hadley,* the Supreme Court added another dimension to the preceding exceptions to justify population variance for local apportionment. It was concluded that since "local legislative bodies frequently have fewer representatives than do their state and national counterparts and . . . some local legislative districts may have a much smaller population than do congressional and state legislative districts . . . ", the rules governing national and state districting should not always apply to the population deviations built into local apportionment plans.[61]

In an effort to prevent misinterpretation of what was meant, the *Abate* ruling was carefully circumscribed as a special application to a particular situation. Writing for the majority, Justice Marshall clearly indicated that, in pursuance of past decisions, disproportionate representation favoring either geographic areas or political interests would not be condoned. On this score it was pointed out that the Rockland County Plan did not contain any bias or discrimination even though certain groups did at the time have an advantage. However, this was not perceived to be a permanent status because the formula used for assigning representation could shift the advantage to other towns as population

56. 385 U.S. 440, 444 (1966).
57. 403 U.S. at 185.
58. *Id.*
59. Sailors v. Bd. of Educ., 387 U.S. 105, 110-111 (1967). *See* note 36 *supra* and accompanying text.
60. Reynolds v. Sims, 377 U.S. 533, 578 (1964).
61. 403 U.S. at 185.

changes occurred. Likewise, the deviations among the districts could become greater depending upon the pattern of population growth. For this reason, the Supreme Court did not announce an absolute rule. Instead, it reserved for future resolution the question of how much variance is constitutionally permissible.

The crux of the *Abate* decision is that so long as there is no indigenous bias, the "particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality."[62] Applying this principle to the New York county, the Supreme Court primarily based its decision "on the long tradition of overlapping function and dual personnel in Rockland County government and on the fact that the plan . . . does not contain a built in bias tending to favor particular political interests or geographic areas."[63] The Supreme Court was also impressed by the county's attempt to preserve intergovernmental coordination while rectifying to a considerable degree the severe malapportionment which had developed in its old system.

At first glance, the essence of the *Abate* ruling might appear to be a radical departure from the *Reynolds* concept and the beginning of a new trend. Actually, the Supreme Court is following a consistent course. In outlining exceptions to the general rule, one of the possibilties mentioned in *Hadley* was that:

> We [the Court] would be faced with a different question if the deviation from equal apportionment presented in this case resulted from a plan that did not contain a built-in bias in favor of small districts, but rather from the inherent mathematical complications in equally apportioning a small number of trustees among a limited number of component districts.[64]

Thus, the *Abate* decision can be more accurately characterized as an application of the *Hadley* caveat. From the standpoint of local government, the philosophy of the latest case is very encouraging inasmuch as it expands the notion of flexibility endorsed by the Supreme Court in the *Dusch* case. In contrast to their national and state counterparts, local governments are now assured that the Supreme Court, albeit within rather narrowly defined limits, will at least review their assorted apportionment structures with an open mind toward experimentation and innovation which is designed to produce more effective representation.

The impact of *Abate* will be particularly significant in metropolitan

62. *Id.*
63. *Id.* at 187.
64. Hadley v. Junior College Dist., 397 U.S. 50, 57-58 (1970).

areas where either a federated scheme of government has developed or there is a movement toward some form of regional cooperation such as the council of governments used in the San Francisco Bay area.[65] Most of these newer concepts for solving the metropolitan problem involve some application of multi-member districting or proportional representation, the constitutionality of which had been questionable under the *Reynolds* formula. Prior to the *Abate* decision, Professor Dixon warned that "[t]he Supreme Court's increasingly absolutistic and narrowly arithmetic approach to the one man-one vote may pose serious obstacles to regional government on a federated basis . . . ."[66] Dissenting in *Avery*, Justice Harlan opposed extension of the "one man, one vote" theory to local governments because he perceived the ill effects of destroying metropolitan solutions which had to balance urban and rural interests while satisfying those of suburbs.[67] By extrapolation, the *Abate* rule seems to exempt from mathematical exactness any metropolitan or regional government whose plan of representation shows that a "good faith" effort has been made to minimize population variance among election districts. However, the case by case approach being used by the Supreme Court means that undoubtedly the examination of metropolitan or regional governmental arrangements will constitute a future phase in the evolution of guidelines for local apportionment.

On the negative side, the *Abate* case is disappointing because the second question concerning multi-member districts was dismissed. It was alleged that the use of multi-member districts violated the *Reynolds* mandate by favoring less populous districts over more populated ones. However, the Supreme Court merely answered this contention in a footnote which stated that the petitioners "have not shown that these multi-member districts, by themselves, operate to impair the voting strength of particular racial or political elements of the Rockland County voting population . . . ."[68]

Opposing the *Abate* conclusion as a regrettable departure from the "basic constitutional concept of one-man, one-vote," Justices Brennan and Douglas argued that the apportionment plan in Rockland County did not justify any modification of the *Reynolds* theorem which was enforced in previous cases.[69] Neither dissenter, however, believed that

65. For an analysis of this subject prior to the *Abate* decision, see Dixon, *Rebuilding the Urban Political System: Some Heresies Concerning Citizen Participation, Community Action, Metros, and One Man-One Vote*, 58 GEO. L.J. 955, 986 (1970).

66. *Id.* at 985.

67. Avery v. Midland County, 390 U.S. 474, 490-94 (1968) (dissenting opinion).

68. Abate v. Mundt, 403 U.S. 182, 184 n.2 (1971).

69. *Id.* at 187 (dissenting opinion).

the impact of the *Abate* decision would be very great because "[o]bviously no other local apportionment scheme can possibly present the same combination of factors relied on by the Court today."[70] While agreeing with the majority, Justice Harlan also interpreted *Abate,* along with its companion cases of *Whitcomb v. Chavis*[71] and *Gordon v. Lance,*[72] as meaning the Supreme Court was implicitly rejecting majoritarianism as a decisional rule for reapportionment. Although there is a similarity between *Abate* and *Whitcomb* because the issue in both instances centers around the constitutionality of multi-member districts, *Whitcomb,* which concerns congressional districting in Indiana, contains different elements.[73] To begin with, the Indiana election system is based on at-large voting coupled with a residence requirement which contrasts with the district method used in Rockland County; in contradistinction to the New York case, *Whitcomb* involves essentially a charge of racial gerrymandering arising from the use of multi-member districts. This point is especially emphasized by the dissenters in *Whitcomb* who questioned "whether a gerrymander can be 'constitutionally impermissible.' "[74] Despite their differences, the two cases are in agreement on one point since the *Whitcomb* majority also concluded that "experience and insight have not yet demonstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment."[75] It would seem, therefore, that the burden of proof has been placed on the challenger, especially since the *Whitcomb* case was remanded to the district court where it will still be possible to prove discrimination.

Related Question—Exclusion of the Extraordinary Majority

Although its controversy does not concern representation, the third case decided on June 7, 1971, involving local government is equally as important as the *Abate* ruling since it places a limitation on the applicability of the "one man, one vote" standard at the "grass-roots" level. To understand the crux of *Gordon v. Lance,*[76] it must first be explained that many local governments in the United States operate under a stipulation that the incurrence of indebtedness or any form of liability must be

70. *Id.* at 189.
71. 403 U.S. 124 (1971).
72. 403 U.S. 1 (1971).
73. The background of this case is examined in Note, *Chavis v. Whitcomb: Apportionment, Gerrymandering, and Black Voting Rights,* 24 RUTGERS L. REV. 521 (1970).
74. Whitcomb v. Chavis, 403 U.S. 124, 176 (1971) (Douglas, J., concurring in part and dissenting in part). This question had been reserved in *Fortson v. Dorsey,* 379 U.S. 433, 439 (1965) and *Wells v. Rockefeller,* 394 U.S. 542, 544 (1969).
75. *Id.* at 159-60.
76. 401 U.S. 1 (1971).

approved either by a designated segment of the population who are believed to have a greater stake in the outcome, or by an extraordinary majority of the ballots cast in a referendum. Beginning in 1969, the Supreme Court ruled aganst the concept of the restricted electorate in several cases.[77] In *City of Phoenix v. Kolodziejski*,[78] the Court stated that "[p]resumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise."[79] As a result of this attitude, a reasonable anticipation would have been that the requirement of an extraordinary majority would also be declared unconstitutional.

The Supreme Court, however, viewed this matter differently. *Gordon v. Lance*[80] involved West Virginia's constitutional and statutory requirement that all county bond issues and tax increases be approved by 60 percent of the voters who participate in a referendum. The challenge against these provisions originated in Roane County, where, on April 29, 1968, the Board of Education's recommendations for issuance of general obligation bonds and an increase in the tax levy were defeated because they were supported, respectively, by only 51.55 percent and 51.51 percent of the county electoral turnout. Following this setback, proponents of improving the county school system attacked the 60 percent requirement in the state courts as violative of the equal protection clause of the fourteenth amendment because a "no" vote gained value at the expense of a "yes" vote. The West Virginia Supreme Court of Appeals agreed with the plaintiff's contention.[81]

The state supreme court based its decision on two Supreme Court decisions which had overturned policies limiting the right to vote and diluting the weight of a vote. In *Gray v. Sanders*,[82] Georgia's county-unit system of assigning representation was found to be unconstitutional inasmuch as the power of a vote in one county was less than that in other counties. In *Cipriano. v. City of Houma*,[83] the Court ruled that the right to vote in a revenue bond election could not be restricted to property owning taxpayers. According to the Supreme Court, however, the application of the *Gray* and *Cipriano* conclusions to the *Gordon* case was

77. *Cf.* Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).
78. 399 U.S. 204 (1970).
79. *Id.* at 209.
80. 403 U.S. 1 (1971).
81. Lance v. Bd. of Educ., 153 W. Va. 559, 170 S.E.2d 783 (1969).
82. 372 U.S. 368 (1963).
83. 395 U.S. 701 (1969).

inappropriate because those decisions precluded a denial or a dilution of voting power on the basis of geography and property ownership. Neither of these considerations was regarded as being relevant to the interest that the designated groups might have in an election; and to clarify matters further, the Court noted that in both *Gray* and *Cipriano* "the dilution or denial was imposed irrespective of how members of those groups actually voted."[84] The *Gray* ruling was thus restated as constituting a protection against geographic discrimination in voting, whereas the *Cipriano* standard was redefined as being "no more than a reassertion of the principle, consistently recognized, that an individual may not be denied access to the ballot because of some extraneous condition . . . ."[85] It was ascertained that the West Virginia Constitution and statutes did not contain either of the aforementioned discriminations.

The Supreme Court distinguished the *Gordon* case from its previous rulings against restricted electorates on two grounds; first, the 60 percent requirement is imposed upon all bond issues; and secondly, there is "no independently identifiable group or category that favors bonded indebtedness over other forms of financing."[86] On the basis of these factors it was concluded that "no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote."[87] Dismissing the argument that the requirement of an extraordinary majority was unconstitutional because it gave the minority a disproportionate power in governmental decision making, the Supreme Court said that it was not improper to make certain governmental procedures difficult since "there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue."[88] In fact, Chief Justice Burger, speaking for the majority, believed that because the requirement of an extraordinary majority is analogous to certain provisions of the United States Constitution, its validity is derived from national examples such as the two-thirds vote needed in the Senate for impeachment of public officers and for ratification of treaties. The preceding comparison certainly has merit since, in matters considered to be of extreme importance to the public interest, the Constitution does require an extraordinary vote. Perhaps a better illustration is found in article five, which provides

84. Gordon v. Lance, 403 U.S. 1, 4 (1971) (footnote omitted).
85. *Id.* at 5.
86. *Id.*
87. *Id.*
88. *Id.* at 6.

that constitutional amendments must be proposed by a two-thirds majority and ratified by either conventions or legislatures in three-fourths of the states.[89] This formula was definitely designed to protect against hasty, ill-conceived changes in the Constitution. By the same token, the Supreme Court perceived that requirements such as West Virginia's were justifiable because "[i]t must be remembered that in voting to issue bonds voters are committing, in part, the credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand."[90]

In addition to the Constitution's demand for more than a majority vote to approve certain actions, the Supreme Court also interpreted the Bill of Rights as precluding "entire areas of legislation from the concept of majoritarian supremacy."[91] Relying implicitly on the tenth amendment's guarantee of reserved powers, the Court emphasized that the constitutions of many states regulate in some way the governmental power to borrow money or to levy taxes. Whether such restrictions were contained in the state constitution or were embodied in statutes was regarded as inconsequential, and the Court declined to comment on the wisdom of such regulations because of their classification as prerogatives of the states. Regarding state prerogatives, the *Gordon* majority was clearly impressed by *Fortson v. Morris,*[92] a case in which the Georgia procedure for electing its governor by the state legislature whenever no candidate received a majority of the popular vote was declared to be a constitutional exercise of state power.

To obviate further litigation on issues related to the extraordinary majority requirement, the Supreme Court noted that it could not discern a valid distinction between a debt limitation changeable only by constitutional amendment and a restriction against incurring debt unless it is authorized by more than a majority vote of the legislature. In fact, the Court surmised that the legislative vote might be "less burdensome" because 14 states require approval of a constitutional amendment by consecutive sessions of the legislature before submission to the people for final ratification. By extrapolation, the Supreme Court could not see any constitutional difference between the preceding procedures concerning governmental debt and a system which leaves the final decision to popular vote in a referendum. Moreover, the Court concluded that there is no constitutional difference between requiring approval on a given

89. U.S. CONST. art. 5. *See* note 8 *supra.*
90. Gordon v. Lance, 403 U.S. 1, 6 (1971).
91. *Id.*
92. 385 U.S. 231 (1966).

question by more than a majority in a referendum and requiring approval by a majority of all registered voters. Using Roane County, West Virginia, as the example to illustrate this last point, it was calculated that in the 1968 referendum in which 5,600 of Roane County's 8,913 registered voters participated, the requisite approval by an absolute majority would have required an affirmative vote of 79 percent of the ballots cast. Approval by an absolute majority could, therefore, create greater difficulty than the 60 percent qualification. However, the Supreme Court expressed an unwillingness to delve into the arithemetic complexities of extraordinary majoritarianism because the general rule established by *Gordon* is that "so long as such provisions do not discriminate against any identifiable class they do not violate the equal protection clause."[93]

The same concern over possible misreading of its decision which the Court manifested in the *Abate* case was also present in *Gordon*. A concluding footnote made it clear that the *Gordon* ruling applied only to bond referenda as practiced by West Virginia. This statement emphasized that:

> We intimate no view on the constitutionality of a provision requiring unanimity or giving a veto power to a very small group. Nor do we decide whether a State may, consistent with the Constitution, require extraordinary majorities for the election of public officers.[94]

Not even this reservation, however, satisfied Justices Brennan and Marshall, who believed that requiring more than a simple majority violated the "one man, one vote" principle because the weight of a negative vote was greater than that of an affirmative vote.[95]

Conclusion

After seeming to retreat from its previously enunciated policy of allowing some flexibility in designs for local representation, the latest pronouncements indicate that the Supreme Court is returning to the ideas advanced in *Reynolds v. Sims*.[96] Certainly, the *Abate* ruling is consistent with the Supreme Court's delineation in *Reynolds* of permissible variations from population equality among electoral districts.[97] At

93. 403 U.S. 1, 7 (1971).
94. *Id.* at 8 n.6.
95. *Id.* at 8 (dissenting opinion).
96. 377 U.S. 533 (1964). *See* note 15 *supra* and accompanying text.
97. *See* note 21 *supra* and accompanying text.

the same time, there is evidence that the Court will require close adherence to the general rules established for local apportionment while giving this level of government special consideration. It is also abundantly clear, however, that the Supreme Court will not tolerate any invidious discrimination in local arrangements.

The *Gordon* decision obviously recognizes that there are limits to the applicability of the *Reynolds* ideology. Practices which the Supreme Court believes have been formulated to protect the public interest will definitely be held constitutional even though there is a disparity in voting power. However, the concept of a restricted electorate seems to be absolutely unacceptable. Following the *Gordon* case, the Louisiana Supreme Court disregarded an adverse decision by a federal district court[98] and upheld state constitutional and statutory provisions requiring both property ownership and tax payment as a prerequisite for voting in road district bond referenda.[99] The Supreme Court reversed the Louisiana judgment several months later by summary action.[100]

In other recent action, the application of the "one man, one vote" theorem has been urged for the governmentally related function of selecting delegates to the presidential nominating conventions. The latest case considering this question concluded that "population alone cannot be the touchstone of the one man, one vote rule" in determining what size delegation a state political party should have in the national convention.[101] However, the court left open the possibility that population might "be an appropriate factor in party-convention delegate-allocation."[102] Although the Supreme Court declined to review this decision, the issue itself has not been completely resolved.[103] From a practical standpoint, rejecting an extension of the *Reynolds* formula to governmentally related bodies would appear overall to be the best alternative for the Supreme Court because a large number of such bodies exercising legislative powers are used in local government. Among many examples can be listed citizens advisory councils and planning commissions. To cite personal experience, this writer has served on two appointed, *ad hoc* citizens advisory committees for the Town of Blacksburg, Virginia. The committees were constituted to ascertain how much, if any, annexation of county territory should be undertaken, and to determine whether the town should

98. Stewart v. Parish School Bd., 310 F. Supp. 1172 (E.D. La. 1970).
99. Hebert v. Police Jury, 258 La. 41, 245 So. 2d 349 (1971).
100. Vermillion Parish Police Jury v. Hebert, 40 U.S.L.W. 3143 (U.S. Oct. 12, 1971).
101. Georgia v. National Democratic Party, 447 F.2d 1271, 1280 (D.C. Cir. 1971).
102. *Id.*
103. Georgia v. National Democratic Party, 40 U.S.L.W. 3151 (U.S. Oct. 12, 1971).

apply for independent city status.[104] Both matters are extremely important in Virginia's local government, and the committee's recommendations were accepted by the town council in both instances. In neither case was the committee representative of the town's population. If *Reynolds* applies to such functions as party-convention delegate selection, which is performed in many cases by local party committees or conventions, then it could logically be argued that all governmentally related agencies, appointive or elective, must be apportioned equitably. By analogy, even county and municipal charter commissions, which are usually appointed, could be brought under the *Reynolds* mandate. In short, disregarding all arguments pro and con concerning equity or selectivity in choosing membership, the impracticality of applying apportionment standards to all components of local government justifies treating this area differently from congressional and state legislative districting.

As for the future of local reapportionment, two problems appear on the immediate horizon. To begin with, the time has come, as the dissenters in *Whitcomb v. Chavis*[105] argued, for the Court to examine partisan gerrymandering. This devious practice unquestionably blunts the objective of the "one man, one vote" guidelines by minimizing the effect a voter can have on the outcome of an election. In a recent case, a three-judge federal court recognized the probable existence of a partisan gerrymander, but, unfortunately, chose to decide the controversy on other grounds.[106]

The second problem confronting the Supreme Court involves counting population to establish electoral districts. In order to eliminate transients such as college students and servicemen, the city of Los Angeles used only registered voters as the basis for designating its 15 councilmanic districts. Since the largest district had nearly 70 percent more people than the smallest, the California Supreme Court ruled against Los Angeles' method.[107] Applying the decisions reached for congressional districting in *Kirkpatrick v. Preisler*[108] and *Wells v. Rocke-*

104. In Virginia, a town with a minimum population of 5,000 may elect to become a city which is separated from county government. Independent cities are permitted to annex, under certain conditions, surrounding territory which becomes urbanized.

105. 403 U.S. 1 (1971). *See* note 74 *supra* and accompanying text.

106. Avens v. Wright, 320 F. Supp. 677 (W.D. Va. 1971). For a discussion of partisan gerrymandering, see Martin, *supra* note 30, at 120-22.

107. Calderon v. Los Angeles, 4 Cal. 3d 251, 481 P.2d 489, 93 Cal. Rptr. 361 (1971).

108. 394 U.S. 526 (1969).

feller,[109] it can be anticipated that the Supreme Court will likewise take an unfavorable view of the Los Angeles system.

In predicting the future of local reapportionment, a salient factor to keep in mind is the attitude of the latest Supreme Court appointees, Lewis Powell and William Rehnquist. If they join with Chief Justice Burger, Justice Blackmun and Justice Stewart, all staunch opponents of extending the *Reynolds* principle any further, then a reasonable expectation is that at least for local government the judicial policy toward representation is not going to change. However, regardless of what philosophy the new justices hold on the subject, the trend which has survived even the threat of constitutional amendment is not likely to be reversed, since the American public has gained a better understanding of reapportionment and how it insures more equitable representational schemes. According to the Gallup Poll of August 19, 1964, the Supreme Court was backed by 47 percent of the population, with 30 percent opposed and 23 percent having no opinion. By 1969, the Gallup Poll of June 20-23 showed support of 52 percent, with 23 percent opposed and 25 percent expressing no opinion. The Supreme Court's success with reapportionment can thus be measured by the yardstick of public opinion. However, in legal circles it is recognized that the Court has, perhaps, "muddled" its way through the complexities of local apportionment before finally arriving at what seems to be a sound solution for achieving equitable representation.

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109 394 U.S. 542 (1969). For an examination of the implications of the *Kirkpatrick* and *Wells* decisions for local reapportionment, see Martin, *Local Reapportionment,* 47 J. URBAN L. 345, 352-56 (1970).