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Philip L. Martin
Virginia Polytechnic Institute

THE SUPREME COURT AND LOCAL REAPPORTIONMENT—THE FOURTH PHASE

PHILIP L. MARTIN*

In 1962 when the Supreme Court abandoned its precedent of classifying legislative representation as a political question subject to the doctrine of judicial self-restraint, there was no indication as to what governments might be affected.[1] Two years later when the famous "one man, one vote" rule was announced for congressional districts[2] and state legislatures,[3] the question of local governments' inclusion was still unanswered. Localities would have to wait three more years, a period of agonizing confusion and doubt, before the Supreme Court would make its first ruling on the status of local legislative representation. In no respect has the judiciary's uncertainty toward reapportionment been more conspicuous than in the area of local government whose record after June 7, 1971, now consists of four phases, and there are still a number of crucial questions which remain unanswered. Despite considerable progress in achieving numerical equality, the Court's response to the quest for legislative equity has been otherwise disappointing because of its piecemeal formulation of guidelines. As a result the decisions made so far leave unresolved many of the basic conflicts inherent in attaining any degree of the contemporary but highly idealistic concept of participatory democracy. As this paper examines the fourth stage of the reapportionment story, one should, therefore, bear in mind the warning made by Justice Frankfurter in his dissent against entering the "political thicket." He contended that "even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have the accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments."[4] Yet, any criticism of the Supreme Court's standard on reapportionment must realistically consider the fact that it was legislative abnega-

* The author is presently Professor of Political Science at Virginia Polytechnic Institute. He holds a B.S. from Virginia Polytechnic Institute, and an M.A. and a Ph.D. from the University of North Carolina. Prof. Martin has published numerous articles in law journals.

1. Baker v. Carr, 369 U.S. 186 (1962).
2. Wesberry v. Sanders, 376 U.S. 1 (1964).
3. Reynolds v. Sims, 377 U.S. 533 (1964).
4. Baker v. Carr, 369 U.S. 186, 268 (dissenting opinion) (1962).

tion of responsibility which necessitated judicial involvement in what is by nature essentially a political problem. This qualification will, perhaps, excuse some of the judicial shortsightedness evident in the cases to be examined.

The Aftermath of Reynolds

Although the decision of *Reynolds v. Sims* only affected state legislatures, it was generally assumed that the requirement of "one man, one vote" applied as well to the subdivisions of a state.[5] However, since the Supreme Court had not ruled on the subject, some extreme interpretations were made in applying the *Reynolds* principle to local government.[6] For example, the Texas Supreme Court rejected a lower state court's definition of numerical equality and ruled instead that factors such as "numbers of qualified voters, land areas, geography, miles of country roads, and taxable values" could be weighed along with population.[7] At the other end of the continuum judicially appointed citizen commissions construed the *Reynolds* formula to mean that there must not only be numerical equality in population among the supervisorial districts but also a balance between urban and rural populations within each district.[8]

5. Decisions requiring local governments to reapportion were made by state supreme courts in *Montgomery County Council v. Garrott*, 243 Md. 634, 222 A.2d 164 (1966); *Hanlon v. Towey*, 274 Minn. 187, 142 N.W.2d 741 (1966); *Armentrout v. Schooler*, 409 S.W. 2d 138 (Mo. 1966); *Seaman v. Fedourich*, 16 N.Y.2d 94, 209 N.E.2d 778 (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). Opposing conclusions were reached only in the cases of *Brouwer v. Bronkema*, 377 Mich. 616, 141 N.W.2d 98 (1966); and *Midland County v. Avery*, 397 S.W.2d 919 (Tex. 1965). A sampling of lower federal court cases instructing local governments to follow the precedent for states include *Strickland v. Burns*, 265 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 question of *Reynold*'s applicability at the local level, see 53 VA. L. REV. 953 (1967).

6. Whenever jurisdiction over local apportionment was accepted, strict adherence to the principle of "one man, one vote" was required as in the case of a subordinate Michigan court which ruled that, "[a] state may exercise its legislative powers only in a legislative body apportioned on a population basis and if it delegates a part of those powers, it must do so to a legislative body apportioned to the same 'basic constitutional standard'." Brouwer v. Bronkema, No. 1885 (Kent County Mich. Cir. Ct., Sept. 11, 1964). Apparently this was the first local reapportionment case to be decided after the *Reynolds* decision.

7. Avery v. Midland County, 406 S.W.2d 422 (Tex. 1966).

8. Virginia's unique county redistricting procedure, which was eliminated by the adoption of a new state constitution in 1970, is described in Martin, *County Reapportionment in Virginia*, 55 VA. L. REV. 1167 (1969).

The inconsistency of the early lower court decisions regarding local apportionment can be largely attributed to the imprecise meaning given the "one man, one vote" principle in the *Reynolds* case. At that time the Supreme Court was unquestionably thinking in terms other than stringent enforcement of the aforementioned principle as a means of achieving voting equity. On this score it was emphasized that:

> [W]e mean that the Equal Protection Clause requires that a State make an honest and good effort to construct districts in both houses of its legislature, *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. (emphasis added.)[9]

In an effort to underscore the "as nearly as practicable" clause the Court even went so far as to proclaim that following rigorous mathematical formulas might be impracticable because "indiscriminate districting without any regard for political subdivisions or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."[10]

Concerning state legislative reapportionment, one analysis perceived several possible exceptions deriving from *Reynolds v. Sims* because:

> In a left-handed sort of way the Court did speak in one section of the *Reynolds* opinion of several possibly legitimate nonpopulation considerations: 'insuring some voice to political subdivisons, 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.'[11]

Since local legislatures are frequently comprised of several types of representation,[12] a reasonable inference was that local government

9. Reynolds v. Sims, 377 U.S. 533, 577 (1964).

10. *Id.* at 578-79.

11. R.G. DIXON, JR., DEMOCRATIC REPRESENTATION: THE LAW AND POLITICS OF REAPPORTIONMENT 271 (1968).

12. An example would be where the townships contained within a county are each given a member on the county governing board which also has members elected at-large from the entire jurisdiction.

would also be allowed exceptions under the *Reynolds* doctrine. In contrast another commentator warned against expecting "less stringent standards" for local units that: "(1) exercise general governmental functions and (2) are designed to be controlled by the voters of the geographic area."[13] To the contrary, he anticipated that the "one man, one vote" rule would be more rigorously applied to local governments because unicameral legislatures are used in a limited geographical area.[14] Considering the range of conjecture and and the pressure of apprehension and uncertainty under which efforts to achieve greater local democracy labored, the guidance of national judicial judgment was badly needed within a few years after the *Reynolds* pronouncement.

The First Phase

On May 22, 1967, the first cases arising from charges of inequitable representation in local government were unanimously decided by the Supreme Court, but the answer given for the major issue was mostly inconclusive. Because of a jurisdictional error in using a three judge federal court when the challenged law was not of statewide application, two cases, one concerning an Alabama county administrative board and the other a New York county, were remanded.[15] Therefore, it could only be assumed *in arguendo* that the *Reynolds* concept applied to all legislative bodies, but the question of its applicability was partially answered in the remaining two decisions. First, in the case of a Michigan county board, the controversy centered around a state law providing alternative modes of election. Exercising its option, Kent County elects the members of its local school boards, each of which then sends a delegate to a biennial meeting for the purpose of selecting the county board whose duties are primarily administrative. Impressed by the essentially nonlegislative character of the county agency coupled with the fact that its members are not directly elected, the Supreme Court in *Sailors v. Board of Education*[16] ruled out any application of "one man, one vote" for such governing bodies.

13. Weinstein, *The Effects of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 23 (1965).

14. *Id.* at 25.

15. Moody v. Flowers, 387 U.S. 97 (1967).

16. *Id.* at 105.

Beyond a doubt the most important of the four cases concerned the City of Virginia Beach, Virginia, which was created in 1964 as a new entity by the consolidation of an independent city of the same name with the encompassing county.[17] This new government was municipal only in a legal sense because it contained geographically large, sparsely populated rural areas. Consequently, in order to provide representation for the diverse interests of this city, an unusual election scheme combining a residence requirement with an area-wide election was designed whereby a voter casts eleven ballots to choose a councilman from each of seven boroughs along with four at-large members. Since the population of the boroughs ranged from 733 to 29,048, the constitutionality of this plan was subsequently challenged. Relying on its decision in *Fortson v. Dorsey*[18] which reasoned that state senators elected in pursuance of a residence requirement in a multi-district county were as much the delegates of the entire county as the district in which they resided, the Supreme Court held that the seven councilmen elected from the boroughs should be similarly regarded, especially since the "Seven-Four Plan makes no distinction on the basis of race, creed, or economic status or location."[19] According to this opinion, it was assumed that if "*Reynolds v. Sims* controls, the constitutional test under the Equal Protection Clause is whether there is an 'invidious' discrimination" incorporated in election systems.[20] As long as this prerequisite for apportionment was not violated, the Justices in another place indicated a willingness to accept departures from traditional methods by admitting that "[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions."[21] Ostensibly, in an effort to encourage future arrangements such as the Virginia Beach plan, the Court even went so far as to acknowledge the absence of any constitutional prohibition against experimentation. It was therefore concluded that "[t]he Seven-Four Plan seems to reflect a detente between urban and rural communities that may be

17. In Virginia, a town with a minimum population of 5,000 may elect to become a city which functions independently of county government. Consolidations, such as in the case of Virginia Beach, are authorized by special permission of the state legislature.

18. 379 U.S. 433 (1965).

19. Dusch v. Davis, 387 U.S. 112, 115 (1967).

20. *Id.* at 116.

21. Sailors v. Board of Education, 387 U.S. 105, 110-11 (1967).

important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside."[22] Considering the judicial attitude expressed, the immediate reaction to the *Dusch Case* was optimistic as its ruling manifested a flexible interpretation of the *Reynolds* principle particularly when environmental differences needed to be taken into consideration in achieving legislative equity for different demographic groups. However, later decisions have dispelled many hopes in this direction.

The Second Phase

Almost one year later on April 1, 1968, the Supreme Court reversed an order of the Texas Supreme Court[23] by announcing that local government representation must be apportioned according to the mandate of "one man, one vote."[24] In this case the blatant malapportionment could not be defended by even the severest critic of judicial intervention in the area of essentially political questions because the four commissioners were elected from districts which in 1963 were estimated to have populations of 67,906, 852, 823, and 414 with the largest encompassing practically the entire city of Midland. Since the concern in state legislative cases had been eliminating dilution of the vote, it was logical that the pattern of districting in Midland County should be declared unconstitutional as a denial of equal protection of the laws, for it would be both inconsistent and unreasonable to use one application of the Fourteenth Amendment for a state and another for its subdivisions. To provide a constitutional basis for its decision, the majority opinion first emphasized that:

> The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through municipal subdivisions of the state. . . . Although the forms and functions of local government and the relationships among the various units are matters of state concern, it is now beyond question that a State's political subdivisons must comply with the Fourteenth Amendment. The actions of local government are the actions of the State. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of the law.[25]

22. Dusch v. Davis, 387 U.S. 112, 117 (1967).
23. *See* Avery v. Midland County, 406 S.W.2d 422 (Tex. 1966).
24. Avery v. Midland County, 390 U.S. 474 (1968).
25. *Id.* at 479-80.

Second, anticipating a potential argument, it was also asserted that even though the state legislature may be correctly apportioned, elected local governments are not thereby exempted from the Fourteenth Amendment because "[w]hile state legislatures exercise extensive power over their constitutents and over the various units of local government, the States universally leave much policy and decision making to their governmental subdivisions."[26] Since most states require representative government for local units, the Court concluded there is "little difference, in terms of the application of the Equal Protection Clause and of the principles of *Reynolds v. Sims*, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties."[27] Evaluating the powers of Midland County's Commissioner's Court[28] to be similar to those vested in all elective local governing bodies of general purpose, the "one man, one vote" theorem was affirmed for this category of state instrumentalities, but there was evidence of a concern for permitting flexibility in "devising mechanisms of local government suitable for local needs and efficient in solving local problems."[29] The Supreme Court significantly qualified its second ruling by noting that "the Constitution imposes only one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population."[30]

Although the *Avery* case extended the mandate of "one man, one vote" to local governments, the vote on the bench was only five to three.[31] However, the dissenters were not in agreement among themselves. To begin with, Justices Harlan and Stewart restated their opposition to their colleagues' assumption of authority over political prob-

26. *Id.* at 481.

27. *Id.*

28. This governing body consists of commissioners elected from districts and the county judge who is elected at-large. The latter serves as chairman and has only a tie-breaking vote.

29. Avery v. Midland County, 390 U.S. 474, 485 (1967).

30. *Id.* at 485-86. Actually, the impact of this ruling was not too great because as reported in the Amicus Curiae brief filed in *Sailors v. Board of Education* only about 25 per cent of local governing bodies are currently chosen in some manner from districts.

31. Justice Marshall did not participate in this case because he has been involved in the decisions of May 22, 1967, as Solicitor General of the United States.

lems such as reapportionment, but the former admitted losing that battle to the majority in preceding cases. In particular Justice Harlan vigorously opposed applying the theory of "one-man, one-vote" to local governments since their problems were perceived as being too complex for any generalized solution, especially, for example, within a metropolitan area which requires reconciliation not only of rural and urban conflict but also recognition of suburban interests.

A contrasting dissent was registered by Justice Fortas who endorsed the *Reynolds* concept as a guideline for determining representation in state legislatures, but he also challenged its feasibility for districting a state's subdivisions. Using Midland County as an example of the difficulty inherent in categorizing local governments for reapportionment, it was first pointed out that this county government serves basically as an administrative agency of the state, and second, that most of its local functions concern only rural areas since under the Texas Constitution the City of Midland is given substantial home rule over its affairs.[32] To give his argument more force, Justice Fortas also emphasized how the power of the commissioner's court is weakened by the state's assigning certain traditional county responsibilities such as the assessment and collection of taxes to separate officials who are elected at-large. As a result of these facts, the Supreme Court's application of "one man, one vote" to the Texas county was criticized because in this instance a fundamental premise of democracy would be violated in that the urban population could dominate a government in which it has an incommensurate interest. Justice Fortas thus thought a better alternative to the majority's ruling in the case before them would be giving the State of Texas an opportunity to devise a solution in pursuance of the Equal Protection Clause. Of course, these admonitions were intended to apply to all local governments in the United States.

The third dissent concurred with the preceding opinion on every point except its unconditional acceptance of the *Reynolds* ideology. In a stinging rebuke to the Court, Justice Stewart rejected the "one man, one vote" standard on the grounds "that the apportionment of the legislative body of a sovereign State, no less than the apportionment of a county government, is far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic."[33]

32. TEX. CONST. art. XI, § 5.

33. Avery v. Midland County, 390 U.S. 474, 510 (1967).

The Third Phase

Following the second phase the next issue needing resolution was whether a locally elected administrative board or commission of specific authority is subject to the requirement of "one man, one vote". Since this question was not directly before the Court in *Avery*, it was deferred with the cognizance that "[w]ere the Commissioners Court a special purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such bodies may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions."[34] Logically, this statement implied that local governments of special powers will be excluded from the control of *Reynolds* only in the rare circumstance when there is concrete evidence proving an unequal rendering of service, a possibility which appears remote because special districts, are almost without exception, created to serve one purpose within a defined area. However, this interpretation was disregarded by the Missouri Supreme Court in a decision concerning the system of unbalanced representation employed in electing trustees for a public junior college district authorized by the state legislature. Construing the *Sailors v. Board of Education* precedent as including elective as well as appointive boards, it was ruled that the "one man, one vote" standard was inapplicable inasmuch as the governing board exercises essentially administrative, not legislative, power within its jurisdiction.[35] Naturally, this case, involving a solution not yet sanctioned by the highest authority, was appealed to the Supreme Court.

The challenge in the *Hadley* case was directed against the disproportionate voice given to the Kansas City School District which is one of eight such units that voted in a state authorized referendum for consolidation into the Junior College District of Metropolitan Kansas City. Under state law the latter was governed by six elected trustees who were apportioned among the individual districts according to their "school enumeration"; that is, their percentage of population between the ages of six and twenty years. Although the Kansas City District

34. *Id.* at 483-84.

35. Hadley v. Junior College Dist. of Metropolitan Kansas City, 432 S.W.2d 328 (Mo. 1968).

contained approximately 60 percent of the school enumerationof the consolidated Junior College District, it was only given three trustees because the state law provided alternative conditions for selecting a board. First, if no one of the districts had at least one-third of the total school population, all trustees were to be elected at-large. Second, if any district had between one-third and one-half of the total enumeration, it elected two trustees with the remainder being chosen at-large from the other districts. Third, a district containing between one-half and two-thirds of the base enumeration elected three trustees with three being elected at-large. Finally, if the population was more than two-thirds, four trustees were allotted to the district with two being selected at-large.[36]

Recognizing that to a degree Missouri's policy was aimed at equalizing voting power among units of disparate populations,[37] the Supreme Court still found the scheme defective as it "necessarily results in a systematic discrimination against voters in the more populous school districts."[38] Therefore, the conclusion was that "such built-in discrimination against voters in large districts cannot be sustained as a sufficient compliance with the constitutional mandate that each person's vote count as much as another's, as far as practicable."[39]

In addition to the ruling against the challenged plan of apportionment, another important aspect of the *Hadley* decision was the clarification made concerning how the "one man, one vote" principle should be applied. To begin with, the appellees' contention that elections should be categorized according to their significance was quickly dismissed as being contrary to the fundamental right of "each qualified voter to participate on an equal footing in the election process."[40] The Court believed that the decision to make an office elective signifies its importance regardless of what powers are exercised. Similarly, the argument advanced by the appellees for distinguishing between public

36. MO. ANN. STAT. §§ 178.800, 178.820 (1965).

37. Regarding the questionable use of school enumeration instead of actual population as the basis for apportionment, the Supreme Court deferred this matter for later resolution on the grounds that even if school population alone is an acceptable criterion, the Missouri statute still fell short of constitutional requirements.

38. Hadley v. Junior College Dist. of Metropolitan Kansas City, 397 U.S. 50 (1970).

39. *Id.* at 57.

40. *Id.* at 55.

officials according to legislative and administrative duties in order to exempt elections involving the latter category from the authority of *Reynolds* was rejected as imposing an "unmanageable principle" on the judiciary since there can be such a strict division of governmental activities. Thus, the general rule was formulated that:

> [W]henever 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 which will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.[41]

Yet cognizance was taken of the possibility that "there might be some case in which a State elected certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* might not be required."[42] As for the Missouri case, though, the trustees were not conceived to come under that category inasmuch as "[e]ducation has traditionally been a vital governmental function, and these trustees, whose election the State has opened to all qualified voters, are governmental officials in every relevant sense of that term."[43]

Another salient feature of the *Hadley* decision was a very deliberate retreat from the rigidity emphasized in the congressional districting cases[44] of the preceding year.[45] Those rulings seemed to require complete adherence to the concept of "one man, one vote" because the Supreme Court rejected the argument that deviation among district population is unavoidable if there is to be a "legitimate regard for such factors as the representation of distinct interest groups, the integrity of county lines, the compactness of districts, the population trends within

41. *Id.* at 56.
42. *Id.*
43. *Id.*
44. Kirkpatrick v. Preisler, 394 U.S. 526 (1969) and Wells v. Rockefeller, 394 U.S. 542 (1969).
45. The implication of these decisions for local government are discussed in Martin, *Local Reapportionment*, 47 J. OF URBAN L. 352-56 (1970).

the State, the high proportion of military personnel, college students, and other nonvoters in some districts, and the political realities of 'legislative interplay.' "[46] Instead of allowing any flexibility there was insistence upon a state making under the "as nearly as practicable" standard "a good-faith effort to achieve precise mathematical equality."[47] According to this interpretation, "equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elective representatives," and it was further asserted that "toleration of even small deviations detracts from these purposes."[48] In other words, mathematical exactness overrides all factors in redistricting unless the judiciary believes variance is justifiable or unavoidable "despite a good-faith effort to achieve absolute equality."[49] On this score the *Hadley* majority noted that '[w]e 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."[50] And, this opinion reiterated the *Reynolds* statement about mathematical exactness not being required with the stipulation that such a standard would be enforced as long as an electoral system did not discriminate against any of its districts. Writing for the majority, Justice Black again restated the positive attitude expressed in the *Sailors* case for permitting experimentation and innovation in designing election mechanisms.[51] In addition reference also was made to the flexibility endorsed in *Dusch v. Davis*,[52] along with the acceptable practice of appointing officials to administrative boards,[53] and it was even perceived, though without clarification, that "a State may, in certain cases, limit the right to vote to a particular group or class of people."[54]

46. Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969).
47. *Id.* at 530-31.
48. *Id.* at 531.
49. *Id.*
50. Hadley v. Junior College Dist. of Metropolitan Kansas City, 397 U.S. 50, 57-58 (1970).
51. Sailors v. Board of Education, 387 U.S. 105, 110 (1967).
52. *Id.* at 112.
53. *Supra* note 13.
54. Hadley v. Junior College Dist. of Metropolitan Kansas City, 397 U.S. 50, 58-59 (1970).

The immediate conclusion, then, is that the Supreme Court will not demand a stringent application of the *Reynolds* axiom for local government, particularly special districts.[55] However, the inconsistency of national rulings for reapportionment makes one hesitant about making optimistic predictions.

The vote in the *Hadley* case was 5 to 3 with Chief Justice Burger, and Justices Harlan and Stewart disagreeing with the conclusion.[56] Repeating their opposition to judicial involvement in what they still regard to be a political question,the latter two jurists first criticized the extension of the *Reynolds* philosophy to all elected public bodies in the United States. Special governments, they contended, should come under a different rule because, in the words of Justice Harlan:

> [T]he need to preserve flexibility in the design of local governmental units that serve specialized functions, and must meet particular local conditions furnishes a powerful reason to refuse to extend the *Avery* ruling beyond its original limits. If local units having general governmental powers are to be considered, like state legislatures, as having a substantial identity of function that justifies imposing on them a uniformity of elective structure, it is clear that specialized local entities are characterized by precisely the opposite of such identity. From irrigation districts to air pollution control agencies to school districts, such units vary in the magnitude of their impact upon various constituencies and in the manner in which the benefits and burdens of their operation interact with other elements of the local political and economic picture.[57]

The second part of Harlan's and Stewart's dissent concerned the Court's failure to define more clearly what is intended by the "as far as practicable" standard. As a result of this omission Chief Justice Burger in a short concurring dissent said:

> 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 con-

55. For a more detailed analysis of the caveats contained in the *Hadley* decision, see Martin, *The Supreme Court and Local Reapportionment: The Third Phase*, 39 GEO. WASH. L. REV. 102, 115-16 (1970).

56. There was one vacancy on the Supreme Court at the time this case was decided.

57. Hadley v. Junior College dist. of Metropolitan Kansas City, 397 U.S. 50, 60-61 (dissenting opinion) (1970).

> gressional districts need not be applied to smaller specialized districts such as the junior college district in this case. . . . Yet the Court has given almost no indication of which nonpopulation interests may or may not legitimately be considered by a legislature in devising a constitutional apportionment scheme for a local, specialized unit of government.[58]

Although it implicitly approved flexibility, the third phase of local reapportionment was thus disappointingly incomplete because the formulation of general rules leaves other judges mostly in the dark as to the proper application of the high court's intention in specific cases. Obviously, the Supreme Court intended to continue its piecemeal approach to problems of representation.

The Fourth Phase

Part One—Multi-Member Districting and Population Inequality

The latest rulings for local reapportionment concern 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. The first two matters involved Rockland County, New York, which for more than a century had the supervisors of its five towns serve *ex-officio* as the county governing body.[59] This system of representation has served local interests very well by producing close cooperation between county and towns in providing governmental services. For example, a longstanding practice has been for the towns to prepare their own budgets which are then submitted to the county. The county levies the necessary taxes that are based on real property assessments derived by each town, and the county board equalizes the tax rate for the entire area. Other public services for which the county coordinates the efforts of the municipalities are waste disposal and snow removal. Not only are current relationships important to the functioning of government in Rockland County but as the county's population has grown the need for greater cooperation in the future has become more evident. However, the increased population caused severe malapportionment on the county governing body because several

58. *Id.* at 70-71.

59. This arrangement for determining membership on the county legislature is typical in New York.

of the towns expanded more rapidly than the others. Therefore, in 1966 a federal district court ordered the county legislature to submit a reapportionment plan to the county voters.[60] Three different proposals were subsequently rejected at the polls thereby necessitating the preparation of a representational system similar to the old one which encourages the town supervisors to also serve on the county board.

Rockland County found the solution to its problem by first establishing five legislative districts which correspond exactly to the five towns. Then the smallest town, Stony Point with a population in 1969 of 12,114, was assigned one member on the county board. The number of representatives for the other districts was next ascertained by dividing the 1969 population of each town by that of Stony Point. Naturally, these computations resulted in fractional representation which had to be rounded to the nearest integer. Consequently, there was a total deviation from population equality among the districts of 11.9 per cent. Among these units Clarkstown (5 supervisors) with a population of 57,883 was over-represented by 4.8 per cent and Harverstraw (2 supervisors) population 23,676, by 2.5 per cent. On the other side of the ledger Orangetown (4 supervisors) with a population of 52,080 was under-represented by 7.1 per cent and Ramapo (6 supervisors), population 73,051, by 0.2 per cent.

When Rockland County's multi-member plan of representation was challenged because of its deviations from population equality, the New York Court of Appeals in the case of *Abate v. Mundt*[61] upheld the plan's constitutionality, and the national Supreme Court agreed with this decision.[62] Referring to its previously stated qualifications regarding the constitutional impracticability of mathematical precision,[63] the emphasis on protecting the integrity of political subdivisions against the inherent disadvantages of numerical equality,[64] and the need for flexibility in local arrangements to meet societal needs,[65] the Supreme Court found reinforcement for these caveats in another dimension. Along with the preceding exceptions, it was granted that the

60. Lodico v. Board of Supervisors, 256 F. Supp. 440 (S.D.N.Y. 1966).
61. 25 N.Y.2d 309, 253 N.E.2d 189 (1969).
62. Abate v. Mundt, 91 S. Ct. 1904 (1971).
63. *See* Reynolds v. Sims, 377 U.S. 533 (1964).
64. *Id.* at 578-79.
65. *See* Sailors v. Board of Education, 387 U.S. 105 (1967).

population deviations contained in local apportionment structures should not always be governed by the rules applying to national and state legislative districting because "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."[66] Yet, on this score the Supreme Court was unwilling to announce an absolute rule. Instead, emphasis was placed on allowing an exception to mathematical exactness in assigning representation when the scheme does not contain a built-in bias on discrimination and when "particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality."[67]

Writing for the majority Justice Marshall made it clear, however, that the most crucial aspect of the *Abate* rule is not the absence of a built in bias but rather the "particular circumstances and needs of a local community as a whole." Applying this principle to Rockland County, the Supreme Court was especially impressed by "the long history of, and perceived need for, close cooperation between the county and its constituent towns"[68] and by the county's attempt to preserve intergovernmental coordination while remedying to a considerable degree to severe malapportionment which had developed in its old arrangement. As for the second charge that the use of multimember districts violates the *Reynolds* concept by favoring less populous districts over more populated ones, the Supreme Court answered in a footnote that the appellees "have not shown that these multimember districts by themselves, operate to impair the voting strength of particular racial or political elements of the Rockland County voting population."[69]

In a concurring opinion Justice Harlan conceived the result of *Abate v. Mundt* coupled with its companion cases of *Whitcomb v. Chavis*[70] and *Gordon v. Lance*[71] as constituting an implicit rejection of majoritarianism as a decisional rule for reapportionment. Certainly,

66. Abate v. Mundt, 91 S. Ct. 1904, 1907 (1971).
67. *Id.*
68. *Id.*
69. *Id.* at 1906 n.2.
70. 91 S. Ct. 1858 (1971).
71. 91 S. Ct. 1889 (1971).

the *Whitcomb* case, which concerns congressional districting in Indiana,[72] parallels the case of *Abate v. Mundt* because the issue in both instances centers around the constitutionality of multi-member districts in legislative apportionment. Nevertheless, the Indiana controversy can be distinguished from that of Rockland County on two grounds: first the contrast is between an at-large election and the district method used in New York; and second, *Whitcomb v. Chavis* involves essentially a charge of racial gerrymandering arising from the use of multi-member districts. This point is particularly underscored by the dissenters in *Whitcomb* who recognized that "[t]he merits of the case go to the question reserved in *Fortson v. Dorsey*, 379 U.S. 433, 439, and in *Wells v. Rockefeller*, 394 U.S. 542, 544, [as to] whether a gerrymander can be 'constitutionally impermissible'."[73] On the other hand though, there is a strong similarity between the cases under analysis here inasmuch as the *Whitcomb* majority did conclude that "[i]n our view . . . experience and insight have not yet demonstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment."[74] Yet, the case was remanded to the District Court[75] at which point it is still possible for the challenger to prove discrimination.

The two dissenters in *Abate v. Mundt*, Justices Brennan and Douglas, opposed the decision as a regrettable departure from the "basic constitutional concept of one-man, one-vote." In their opinion the governmental arrangement in Rockland County did not justify any modification of the *Reynolds* formula enforced in previous cases. However, the dissenters did not believe the impact of the *Abate* rule 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."[76]

In conclusion the *Abate* case must be analyzed with a cognizance of the Supreme Court's cautious view of the Rockland County plan.

72. For an analysis of the development of this case see Note, *Chavis v. Whitcomb: Apportionment, Gerrymandering, and Black Voting Rights*, 24 RUTGERS L. REV. 521 (1970).

73. Whitcomb v. Chavis, 91 S. Ct. 1858, 1886 (1971) (dissenting opinion).

74. *Id.* at 1877.

75. *Id.* at 1879.

76. Abate v. Mundt, 91 S. Ct. 1904, 1909 (1971) (dissenting opinion).

Justice Marshall emphasized in the summary that nothing said regarding the variables upon which the *Abate* decision was based "should be taken to imply that even these factors could justify substantially greater deviations from population equality."[77] In fact it was indicated that any questions concerning increases in the deviations among the Rockland County districts can be answered in the future.[78] Therefore, the *Abate* ruling must be treated as an exceptional circumstance instead of a reversal in the Supreme Court's application of the "one man, one vote" rule for local apportionment. More properly, this case should be placed in the same category as *Dusch v. Davis*[79] for it represents another example of the flexibility endorsed by the Supreme Court in the Virginia Case.

Part Two—The Extraordinary Majority

Although its question does not effect representation, the decision of *Gordon v. Lance*[80] does involve an application of the "one man, one vote" principle to local government. This case concerned West Virginia's constitutional and statutory requirements that all county bond issues and tax increases be approved by 60 per cent of the county electorate in a referendum. The challenge against this provision arose in Roane County where on April 29, 1968, the Board of Education asked the voters to approve an issuance of general obligations bonds and an increase in the tax levy. Both proposals were defeated since they received respectively only 51.55 per cent and 51.51 per cent of the votes cast. Subsequently, an appeal was made to the West Virginia Supreme Court which decided that the 60 per cent requirement was a violation of the Equal Protection Clause of the Fourteenth Amendment because a "yes" vote is diluted with a concomitant increase in the weight of a "no" vote.

In reaching this conclusion the state supreme court relied upon two precedents pertaining to limitations on the right to vote and to diluting the power of voting. First, in *Gray v. Sanders*[81] the United States Supreme Court had declared Georgia's county-unit system un-

77. *Id.* at 1908.
78. *Id.* at 1907 n.3.
79. 387 U.S. 112 (1967).
80. 91 S. Ct. 1889 (1971).
81. 372 U.S. 368 (1963).

constitutional since a vote in one county carried less value than a vote in other counties. Second, in *Cipriano v. City of Houma*[82] it had been held that the right to vote in a revenue bond election could not be restricted only to property owning taxpayers. In its review of the Roane County controversy the Supreme Court concluded that the West Virginia court had misapplied the aforementioned precedents because they denied or diluted voting power on the basis of geography and property ownership. These factors were not considered as having a valid relation to the interest the affected groups might have in an election, and in both *Gray* and *Cipriano* the Supreme Court discerned that "the dilution or denial was imposed irrespective of how members of those groups voted."[83] In short, the essence of the *Gray* principle was reiterated as a standard protecting the vote against geographic discrimination, while the *Cipriano* ruling was restated 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, such as race."[84] Neither of these defects were found by the Court in the West Virginia Constitution and statutes.

The crux of the *Gordon* decision is that first the 60 per cent requirement is imposed upon all bond issues and that second there is "no independently identifiable group or category that favors bonded indebtedness over other forms of financing."[85] As a result of these factors the Supreme Court concluded: "Consequently no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote."[86] As for the difficulty created by the requirement of an extraordinary majority, the Supreme Court admitted that this procedure gave the minority a disproportionate power in the making of certain governmental decisions, but the Court did not consider this result to be invalid because "there is nothing in the language of the Constitution, our history or our cases that requires that a majority always prevail on every issue."[87] To give currency to this point, reference was made to the decision of *Fortson v. Morris*[88] in which the Supreme Court had not found anything unconstitutional in the Georgia provision whereby if no candidate receives a majority of the popular vote, the governor is elected by the state legislature.

82. 395 U.S. 701 (1969).
83. Gordon v. Lance, 91 S. Ct. 1889, 1891 (1971).
84. *Id.*
85. *Id.* at 1892.
86. *Id.*
87. *Id.*
88. 385 U.S. 231 (1966).

In the Supreme Court's opinion the requirement of an extraordinary majority was legitimized by certain provisions of the United States Constitution. Obviously, the *Gordon* majority was impressed by the argument which had been rejected as inapporpriate and irrelevant by the West Virginia Supreme Court. It was contended before the state court that the demand of an extraordinary majority was constitutional because:

> [T]he Constitution of the United States contains many provisions which are repugnant to the idea of majority rule, including a provision that ratification of treaties requires a concurrence of two-thirds of the senators present and voting, requirements pertaining to amendment of the Constitution, and provisions relating to overriding a veto of a bill by the President.[89]

In addition to the extraordinary vote provisions of the Constitution, Chief Justice Burger, speaking for the majority, also believed that the "Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy."[90] This obvious reference to the Tenth Amendment's reservation of powers to the states was backed up by the point that the constitutions of many states control in some way the governmental power to borrow money or to levy taxes. Such protection, it was indicated, has been deemed necessary to protect future generations from an ill-conceived burden of indebtedness. Whether this protection was included in the state constitution or was embodied in statutes was dismissed by the Court as inconsequential, and it declined to comment on the wisdom of such restrictions because they were regarded as prerogatives of the states.

The appellee's contention that there is a valid distinction between a debt limitation changeable only by constitutional amendment and the restriction against incurring debt unless it is authorized by more than a majority vote of the legislature was rejected as meaningless. In the Court's opinion the legislative method might be the easier of the two since fourteen states require approval of a constitutional amendment by two consecutive sessions of the legislature before submission to the people for final ratification. Furthermore, as far as the Supreme Court was concerned, there is no constitutional difference between the afore-

89. Lance v. Board of Education, 170 S.E.2d 783, 790 (W. Va. 1969).
90. Gordon v. Lance, 91 S. Ct. 1889, 1892 (1971).

mentioned procedures pertaining to governmental debt and one which leaves the final decision up to the people in a referendum; nor is there any constitutional difference between the requirement of approval by more than a majority in a referendum and one which requires approval by a majority of the registered voters. In fact it was ascertained that in Roane County's 1968 referendum in which 5,600 of the 8,913 registered voters participated, the requirement of approval by an absolute majority would have required a "yes" vote on 79 per cent of the ballots cast. Approval by an absolute majority could, thus, be a more stringent qualification than the 60 per cent rule.

Following the pattern of the *Abate* case, the Supreme Court again cautioned in its conclusion against reading more than was intended into its decision. A footnote was added at the end to make it clear that the *Gordon* ruling applied only to bond referenda as practiced by West Virginia. This footnote 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.[91]

Two members of the Court, Justices Brennan and Marshall, disagreed with the *Gordon* decision for the same reasons that West Virginia's Supreme Court had overturned the 60 per cent requirement. They believed that demanding more than a simple majority violated the "one man, one vote" standard because an affirmative vote was diluted whereas the weight of a negative vote was increased.

Conclusion

In his concurring opinion covering all three reapportionment decisions rendered on June 7, 1971, Justice Harlan announced that the Supreme Court was looking for a way out of the "political thicket."[92] To the contrary, it seems that the Court has partially resolved the problem of the "thicket" without changing its basic constitutional philosophy. One obvious result of this latest phase in local reapportionment is that there has not been any relaxation in applying the "one

91. *Id.* at 1893 n.6.

92. Whitcomb v. Chavis, 91 S. Ct. 1858, 1883 (1971) (separate opinion).

man, one vote" concept. The general rules previously enunciated for local government will continue to be enforced in the future, and the retreat from stringency manifested in the *Hadley* case will probably not proceed much further than the lenient attitude expressed in *Abate* toward situational differences. The major tenet in the judicial policy which now seems to be developing for local apportionment is that the Court will accept some deviation from population equality in representational schemes which are designed to produce more effective government as long as there is no invidious discrimination being practiced. Also, the Court will likely continue approving antimajoritarian requirements which have as their purpose protecting against hasty, ill-prepared action. However, these procedures must be of general application and must not contain any type of discrimination. The significance then of the *Abate* and *Gordon* rulings is that the Supreme Court has recognized the difficulty of classifying all of local government and related practices under the *Reynolds* philosophy.

What problems does the future hold for local apportionment? As the dissenters in *Whitcomb* argued, the time has come to ascertain the constitutionality of political gerrymandering.[93] This nefarious practice certainly defeats the intention of the "one man, one vote" principle by reducing the effect a voter can have on the outcome of an election.[94] Another problem with which the Supreme Court will have to grapple concerns the matter of counting population for the purpose of districting. In order to eliminate transients such as college students, servicemen and so forth, the City of Los Angeles used only registered voters as the basis for establishing its fifteen councilmanic districts. As a result the largest district had nearly 70 per cent more people than the smallest. Consequently, the California Supreme Court found Los Angeles' method to be constitutionally faulty.[95] Questions such as the preceding two are examples of the many facets contained in the application of "one man, one vote" to local government. Therefore, it seems reasonable to assume that the Supreme Court's resolution of local apportionment problems has become an annual event.

93. *See* Whitcomb v. Chavis, 91 S. Ct. 1858 (1971) (dissenting opinion).

94. For some examples of political gerrymandering in local government see Martin, *The Supreme Court and Local Reapportionment: The Third Phase*, 39 GEO. WASH. L. REV. 102, 120-22 (1970).

95. Calderon v. City of Los Angeles, 93 Cal. Rptr. 361, 481 P.2d 489 (1971).