NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 8
Issue 2 *VOLUME VIII Spring 1991 Part Two*

Article 8

1991

# ONE PERSON, ONE VOTE: IS IT TIME FOR A NEW CONSTITUTIONAL PRINCIPLE?

Alexander D. Rosati

# ONE PERSON, ONE VOTE: IS IT TIME FOR A NEW CONSTITUTIONAL PRINCIPLE?

## I. INTRODUCTION

In the recent decision of *Board of Estimate of City of New York v. Morris*,[1] the United States Supreme Court invalidated the city charter of New York, ruling that it was unconstitutional under the fourteenth amendment's equal protection clause.[2] The Board of Estimate, a legislative body, violated the "one person, one vote" rule created by the landmark decision of *Reynolds v. Sims*.[3] The rule, extrapolated from the equal protection clause, mandates that all elected bodies exercising legislative powers must be apportioned on the basis of population.[4] The Board of Estimate, which gave one vote to Brooklyn, the city's most populous borough, and one to Staten Island, the least populous, failed to pass constitutional muster under this simplistic test.[5] In light of past cases, the Court's decision was not found as surprising.[6]

The *Board of Estimate* ruling brings into focus the basic flaws of the "one person, one vote" rule in its expansion of the equal protection clause's meaning and in its application when compared to the traditional three tier analysis of equal protection cases.[7] This Note will give a brief history of the rule in case law, culminating in the *Board of Estimate*

---

1. 489 U.S. 688 (1989). The case was originally brought before the United States District Court for the Eastern District of New York in 1982 by Beverly Morris, Joy Clarke Holmes and Joanne Oplustil, three registered voters of the borough of Brooklyn. *See* Morris v. Board of Estimate, 551 F. Supp. 652 (E.D.N.Y. 1982).

2. *Board of Estimate*, 489 U.S. at 690.

3. 377 U.S. 533 (1964).

4. *Id.* at 568; *see also* Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 734-37 (1964).

5. *See Board of Estimate*, 489 U.S. at 690 n.2, 692.

6. *See generally* Fox, *High Court Voids Board of Estimate Composition*, N.Y.L.J., Mar. 23, 1989, at 1, col. 3.

7. For a recent statement of the Court's three tier analysis of equal protection cases, see Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439-42 (1988) (under the first tier of analysis, applicable to most classifications, legislation is presumed valid if the classification is rationally related to a legitimate government interest; under the second tier analysis, applicable to gender based classifications, legislation will be upheld if it is substantially related to a sufficiently important governmental interest; and under the third tier of analysis, applicable to race classifications, legislation is subject to strict scrutiny and will be sustained only if it is suitably tailored to serve a compelling state interest).

decision. The interpretive problems of the rule will then be discussed and possible solutions given. Special regard will be given to the way in which the "one vote" rule infringes upon the rights of minorities, upon basic ideas of democracy and upon the dying concept of federalism.

## II. ORIGINS OF THE RULE

Originally, the Supreme Court had a "hands off" attitude towards apportionment controversies, viewing them as non-justiciable issues.[8] Apportionment controversies were considered political problems best left to the legislative branch.[9] When faced with such a controversy in *Colegrove v. Green*,[10] the Court stated that "this [apportionment] controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally remained aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people."[11]

Despite such strong statements about the idea of intrusion into the area of everyday politics and political questions, less than twenty years after *Colegrove* the Court reversed its policy in *Baker v. Carr*.[12] The *Baker* case involved a claim that the Tennessee General Assembly, which had not been reapportioned since 1901, violated appellants' right to equal protection of law.[13] Subsequent shifts in population left some areas with

---

8. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 553 (1946).

9. *Id.* at 554. The Court in *Colegrove* held that questions of apportionment in congressional districts were expressly left to Congress to decide. *Id.* "[D]ue regard for the Constitution as a viable system precludes judicial correction. . . . Article I, sec. 4 of the Constitution provides that 'The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .'" *Id.* (quoting U.S. CONST. art. I, § 4, cl. 1).

10. 328 U.S. 549 (1946).

11. *Id.* at 553-54. The Court reasoned that to decide that an apportionment scheme was invalid would be an invasion of the arena of politics from which the courts were supposed to be insulated. *Id.* at 552-53. The Court further noted that to hold on such an issue would be a violation of the separation of powers doctrine. *Id.* at 556. "To sustain this action would cut very deep into the very being of Congress." *Id.*

12. 369 U.S. 186 (1962), *rev'g* 179 F. Supp. 824 (M.D. Tenn. 1959).

13. *Id.* at 187-88. Petitioners contended "that the 1901 statute, even as of the time of its passage, 'made no apportionment of Representatives and Senators in accordance with the constitutional formula . . . , but instead arbitrarily and capriciously apportioned representatives . . . without reference . . . to any logical or reasonable formula whatever.'" *Id.* at 192.

many more people but only the same amount of representatives in the legislature.[14] The lower courts dismissed for lack of subject matter jurisdiction citing the *Colegrove* case.[15] The Supreme Court, in a dramatic turnabout, signalled its decision to enter the area of politics stating that "this challenge to an apportionment presents no nonjusticiable 'political question.'"[16]

The Court went on to give approval to the equal protection theory that the appellants had brought. "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, . . . [that] a discrimination reflects *no* policy, but simply arbitrary and capricious action."[17] The Court further concluded that "the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision."[18] Because the Court's decision remanded the case to the lower courts for trial, there was no reason to reach the merits of appellant's claim.[19] The Court's decision on such an issue would have to wait.

The landmark decision in *Reynolds v. Sims*,[20] which came two years after *Baker*, contains the definitive statement of the Court concerning apportionment and the fourteenth amendment. In this case, the Court revealed the extent of its expansion of the equal protection clause and outlined the method of judicial scrutiny that would

---

14. *Id.* at 192-93.

> Between 1901 and 1961, Tennessee has experienced substantial growth and redistribution of her population. In 1901 the population was 2,020,616, of whom 487,380 were eligible to vote. The 1960 Federal Census reports the State's population at 3,567,089, of whom 2,092,891 are eligible to vote. The relative standings of the counties in terms of qualified voters have changed significantly.

*Id.* at 192 (citations omitted).

15. Baker v. Carr, 179 F. Supp. 824, 826 (M.D. Tenn. 1959).

16. *Baker*, 369 U.S. at 209. The Court further stated that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." *Id.*

17. *Id.* at 226 (emphasis in original).

18. *Id.* at 237.

19. *Id.*

20. 377 U.S. 533 (1964).

subsequently govern such questions up to the present day.[21]

The *Reynolds* case involved a claim by Alabama voters, which alleged underrepresentation of certain counties in the state legislature.[22] The Alabama State Legislature had not been re-apportioned since a 1900 census.[23] The appellants claimed that population growth within their counties devalued their voting power in relation to other counties whose population had not grown; all the counties still maintained the same voting power.[24] The appellants claimed that this devaluation of their voting power represented discrimination in violation of their right to equal protection under the fourteenth amendment.[25] The Court agreed with the appellants, finding that the lack of population-reflective apportionment between the counties in the Alabama Legislature represented invidious discrimination in violation of the Constitution.[26] Examining the equal protection claim, the Court stated:

> [A]s a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. [An] individual's right to vote . . . is unconstitutionally impaired when its weight is . . . diluted when compared with votes of citizens living in other parts of the State.[27]

Taking hold of the equal protection clause, the Court expanded its meaning from one of protection from arbitrary discrimination to one which includes a constitutional imperative of population-based

---

21. *Id.* at 568. The decision in *Reynolds* states that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.*

22. *Id.* at 536-40. According to the 1901 apportionment plan each of the state's 67 counties and senatorial districts were entitled to at least one representative and one senator respectively. *Id.*

23. *Id.* at 540.

24. *Id.*

25. *Id.* "The complaint asserted that plaintiffs had no other adequate remedy, and that they had exhausted all forms of relief other than that available through the federal courts. They alleged that the Alabama Legislature had established a pattern of prolonged inaction from 1911 to the present which 'clearly demonstrates that no reapportionment . . . shall be effected . . . .'" *Id.*

26. *Id.* at 568-69.

27. *Id.* at 568.

representation in legislative bodies.[28] This represented a great leap of interpretation by the Court. The Court took a tool for the protection of persons from discrimination, whether arbitrary or based on race or national origin,[29] and manipulated it to protect political views on pro-majoritarian democratic theory.[30] The Court stated that the "Equal Protection Clause demands no less than substantially equal . . . representation for all citizens, of all places as well as of all races."[31] However, the rule is still majoritarian in that it does not proscribe apportionment that reflects arbitrary or racist discrimination, but that apportionment be predicated solely on the basis of population.[32]

In implementing this new constitutional principle, the Court went on to set guidelines or methods of examination for determining when this principle has been abrogated.[33] "Population is, of necessity, the starting point . . . and the controlling criterion for judgment in legislative apportionment controversies."[34] The Court was also quick to point out that "people, not land or trees or pastures, vote."[35] Population was made the controlling factor in deciding when the equal protection clause has been violated in apportionment controversies. It is at this point that the Court faced the obvious problems with making the population the controlling factor. "[I]t is a practical impossibility to arrange legislative districts so that each one has an identical number of residents. . . . Mathematical exactness or precision is hardly a workable constitutional

---

28. The equal protection clause has traditionally been interpreted by the Court as protecting persons from actions by the government that are discriminatory where the discrimination "[r]eflects *no* policy, but simply arbitrary and capricious action." Baker v. Carr, 369 U.S. 186, 226 (1962) (emphasis in original).

29. *See supra* note 7 for discussion of equal protection analysis.

30. *Reynolds*, 377 U.S. at 576.

31. *Id.* at 568.

32. *See supra* note 21.

33. *Id.* at 568-69. The Court employed a "population variance ratio test" which compared the populations and representation that each area had to determine what percentage of the population had what percentage of the votes in the legislature. *Id.* at 545-51. Under this test, it was found that only 25.1% of the population of the state lived in areas that elected a majority of the seats in the state legislature. *Id.*

34. *Id.* at 567. The Court was, in effect, advocating the use of a mathematical population-based representation theory. *Id.* at 567-68.

35. *Id.* at 580.

requirement."[36]

Despite their own statements acknowledging the weakness of making population and mathematics the controlling factors for this new rule, the majority in *Reynolds* went on to discourage the use of a great deal of other types of interests. "[N]either history alone, nor economic or other sorts of group interests, are permissible factors . . . ."[37] While the Court recognized that preserving political subdivisions is a permissible state interest, population is given precedence over it, with any substantial deviation from population interests rendering the apportionment unconstitutional.[38]

## III. EXPANSION OF THE RULE

The most substantial effect of *Reynolds* is that it announced an expansion of a principle that the Constitution mandated population-based representation, discouraging the representation of other important interests.[39] The Court was clearly invading areas of political discretion, most notably, that of federalism. The Court's intrusion into the area of states' rights and political decisions is clearly exhibited by the decision in *Lucas v. Forty-Fourth General Assembly*.[40] In *Lucas*, the Court struck down a representation scheme of the Colorado state legislature which had been approved by state referendum.[41] The Colorado scheme was not purely population based.[42] The Colorado plan provided for two houses, one which was population-based and one which had representatives of the

---

36. *Id.* at 577. "By holding that . . . both houses of a state legislature must be apportioned on a population basis, we mean . . . that a State [must] make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Id.*

37. *Id.* at 579-80 (footnote omitted). The Court dismissed geographical considerations as unimportant in light of the advancements in the areas of transportation and communications. *Id.* However, the Court offered little justification for dismissing these interests beyond that reasoning and failed to address the question of why historical and economic interests were unimportant.

38. *See generally id.* at 581.

39. *See generally* Note, *Reapportionment: A Call for a Consistent Quantitative Standard*, 70 IOWA L. REV. 663 (1985) [hereinafter Note, *Call for Consistent Quantitative Standard*].

40. 377 U.S. 713 (1963) (the *Lucas* decision was handed down simultaneously with the *Reynolds* decision).

41. *Id.* at 737-39.

42. *Id.* at 717-18.

same number for given areas of unequal population, similar to the United States Senate.[43] Striking down this scheme, the Court, in effect, denied the majority of the State of Colorado the representational system that they considered the best reflection of their interests.[44] A clearer example of judicial invasion into a state's discretion, and into the rights of the people to establish the form of government best suited to their needs, can hardly be imagined.[45]

Despite the Court's recognition of the danger of establishing a rule of mathematical exactness this is exactly the type of rule that the *Reynolds* case has inspired.[46] The "nearly as practicable test" became the standard rule of such controversies and was strictly construed in subsequent cases.[47] "*De minimus* deviations are unavoidable," the Court stated in *Swann v. Adams*.[48] However, in the same case the Court required that "variations from a pure population standard . . . be justified . . . ."[49] The Court in *Swann* then went on to examine the percentage of deviations, applying a mathematical examination for apportionment, while at the same time maintaining that such "'exactness . . . is not required.'"[50]

Later cases further increased the stringent nature of the rule. In the case of *Kirkpatrick v. Preisler*,[51] the Court held that any deviation from population based representation by a legislature must be justified "no

---

43. *Id.* at 718. Under the Colorado plan the seats in the state Senate were apportioned on the basis of geographical considerations and a number of other factors, one of which was a population-based factor. *Id.* However, a ratio system did not allow districts of very large population a significantly larger number of senators. *Id.* at 717-18 n.4.

44. *Id.* at 717. In the 1962 Colorado general elections, the voters of that state, in a referendum vote, adopted the non-population plan by an almost 2-1 margin and defeated a proposal to change the apportionment as well. *Id.*

45. *See* Swann v. Adams, 385 U.S. 440, 441-43 (1966) (Florida State Legislature required to reapportion three times).

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

47. *See, e.g., Swann*, 385 U.S. at 444; *see also* Note, *Call for Consistent Quantitative Standard, supra* note 39, at 668-70.

48. *Swann*, 385 U.S. at 444.

49. *Id.*

50. *Id.* at 443 (quoting the district court opinion, Swann v. Adams, 258 F. Supp. 819, 826-27 (1965)). The Court examined the statistics and concluded that there was a "deviation of more than 10% in districts which elect 29 of the 117 representatives; 24.35% of the State's population lives in these districts." *Id.*

51. 394 U.S. 526 (1969).

matter how small."[52] "The Court expressly rejected several of the state's proffered reasons for the population deviations, including state's interests in (1) preserving areas with distinct 'interest orientations'; (2) accommodating 'partisan politics,' including the inhibition of partisan gerrymandering; (3) avoiding the fragmentation of political subdivisions; and (4) creating 'compact' districts." [53]

Despite the sweeping scope of the justifications that were disallowed under *Kirkpatrick*, the Court, in the subsequent case of *Mahan v. Howell*,[54] ruled that preserving political subdivisions was a permissible justification for deviation from pure population based representation.[55] In addition, the Court explicitly acknowledged that it was applying a "mathematical standard" in the case at bar and in previous cases in order to determine when deviations were acceptable.[56]

## IV. ADOPTION OF DIFFERENT LEVELS OF EXAMINATION: FEDERAL V. STATE

The decisions of the Court began to split along the lines of federal apportionment controversies and state controversies. Congressional cases had to comply with the strict *Kirkpatrick* rule, while "minor deviations from mathematical equality among state legislative districts . . . ," were held as insufficient "to require justification by the State."[57] In a congressional apportionment case decided in this same period, the Court invalidated a districting scheme that had a representational percentage difference between districts of only 4.13%.[58] The rule remains strict in congressional cases.[59] The evolution of the "one person, one vote" rule with regard to apportionment controversies within states, however, has

---

52. *Id.* at 531.

53. Note, *Call for Consistent Quantitative Standard, supra* note 39, at 670 (quoting *Kirkpatrick*, 394 U.S. at 533-36).

54. 410 U.S. 315 (1973).

55. *Id.* at 328.

56. *Id.*

57. Gaffney v. Cummings, 412 U.S. 735, 745 (1972); *see also* Note, *Call for Consistent Quantitative Standard, supra* note 39, at 672.

58. White v. Weiser, 412 U.S. 783, 784-85 (1972).

59. *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 727 (1982) (deviation of representation of less than 1% between congressional districts held invalid under "one person, one vote" rule).

continued to evolve.[60]

In *Brown v. Thompson*,[61] the Court once again addressed the question of the claimed dilution from an apportionment controversy in a state legislature.[62] This case involved the Wyoming State Legislature which had a maximum deviation in representation between districts of 89%.[63] The Court held that the deviation, which was justified on the basis of preserving political subdivisions, was constitutional.[64] In so doing, the Court ignored the method of examination that it had laid down for itself in *Mahan* and *Kirkpatrick*. The Court left behind its test that any deviation from population based apportionment should be "based on legitimate considerations incident to the effectuation of a rational state policy"[65] and whether "the population disparities . . . that have resulted from . . . this plan [or interest] exceed constitutional limits."[66]

The application of the rule in previous cases of state apportionment schemes had allowed a deviation from population based representation where the state had a permissible purpose.[67] The question the Court asked now was whether the deviation itself exceeded any constitutional limits.[68] To decide when the so called "limits" had been exceeded, the Court applied a "mathematical standard."[69] In *Brown*, on the other hand, the Court expressly eschewed the mathematical standard.[70] "The issue therefore is not whether a 16% average deviation and an 89% maximum deviation, considering the state apportionment plan as a whole, are constitutionally permissible. Rather, the issue is whether

---

60. *See, e.g.*, Brown v. Thompson, 462 U.S. 835 (1983) (upholding Wyoming policy of using counties as representative districts and ensuring each county has one representative); Avery v. Midland County, 390 U.S. 474 (1968) (fourteenth amendment forbids election of local government officials from districts of substantially unequal population).

61. 462 U.S. 835 (1983).

62. *Id.* at 838-40.

63. *Id.* at 846. The Court stated that the issue was "whether Wyoming's policy of preserving county boundaries justifies the . . . deviations from population equality . . . ." *Id.*

64. *Id.* at 846-48.

65. Mahan v. Howell, 410 U.S. 315, 325 (1973) (quoting Reynolds v. Sims, 377 U.S. 533, 579 (1964)).

66. *Id.* at 328.

67. Brown v. Thompson, 462 U.S. 835, 846-48 (1983).

68. *Mahan*, 410 U.S. at 328.

69. *Id.*

70. *See generally Brown*, 462 U.S. at 846.

Wyoming's policy of preserving county boundaries justifies the . . . deviations from population equality . . . ."[71]

At the same time that the Court was applying this new examination, which did not rely on previous cases, the majority opinion stated that it was, in fact, applying the "constitutional limit" mathematical examination as set down in *Swann* and *Mahan*.[72] While Justice Powell, who wrote the majority opinion in *Brown*, claimed to be adopting a traditional test, he was, in fact, embarking on an entirely new theory of judicial examination.[73]

## V. FURTHER EXPANSION OF THE RULE TO STATE SUBDIVISIONS

While the "one person, one vote" rule was developing with regard to the state legislature, the Supreme Court also began to lengthen the reach of the rule to legislative bodies within political subdivisions of states.[74] The foremost case in this area is *Avery v. Midland County*.[75] The *Avery* case involved a claim by residents of Midland County, Texas, who alleged that the apportionment of the county government was unconstitutional in that it denied them equal protection of the law under the fourteenth amendment.[76] The Midland County government, called the Commissioners Court, consisted of one judge, elected by the county at large, and four commissioners, elected by their districts.[77] Although each district had one vote, a great disparity existed in population among the districts.[78]

In *Avery*, the Court held that the Midland County government

---

71. *Id.* at 846.

72. *Id.* at 843. The Court in *Brown* even goes so far as quoting the *Mahan* decision, stating that "[t]he ultimate inquiry, therefore, is whether the legislature's plan 'may reasonably be said to advance [a] rational state policy' and, if so, 'whether the population disparities among the district that have resulted from the pursuit of this plan exceed constitutional limits." *Id.* (quoting *Mahan*, 410 U.S. at 328).

73. *Brown*, 462 U.S. at 842-48.

74. *See* Avery v. Midland County, 390 U.S. 474 (1968).

75. *Id.*

76. *Id.* at 475-76.

77. *Id.* at 476.

78. *Id.* One district had a population of 67,906 while the other three had populations of 852, 414, and 828 respectively; each had only one representative in the local government. *Id.* "This vast imbalance resulted from placing in a single district virtually the entire city of Midland, Midland County's only urban center, in which 95% of the county's population resides." *Id.*

violated the "one person, one vote" rule, stating that "local government . . . must insure that those qualified to vote have the right to an equally effective voice in the election process."[79] Once again the Court imposed the strict population-based representation rule, this time on the local government level.[80] The majority went on to state "that the Constitution permits no substantial variation from equal population in . . . local government . . . ."[81]

While imposing this strict rule, the Court simultaneously recognized the danger of the precedent of its decision interfering with the fragile and unique local governments in all fifty states.[82]

> This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems.[83]

In this language, it appears as if the Court was willing to tolerate apportionment in local governments that was not population based. The *Avery* decision recognizes the compelling needs and problems of local government and the difficulties that they would face if limited by the "straightjacket" of the "one person, one vote" rule.[84] This, however, was merely dicta, while the holding of the case left a more accurate statement of the decision's effect. *Avery* was the Court's declaration of "open season" on all units of legislative government, no matter how small. The decision was, in the words of Justice Harlan, "unjustifiable and ill-advised."[85]

In addition to showing the Court's willingness to apply the "one

---

79. *Id.* at 480.

80. *Id.* at 478-79.

81. *Id.* at 484-85.

82. *Id.* at 485.

83. *Id.*

84. *Id.*

85. *Id.* at 487 (Harlan, J., dissenting). Justice Harlan called the majority decision an "adventure in the realm of political science." *Id.* Justice Harlan pointed to "the ease with which the Court has proceeded to fasten upon the entire country at its lowest political levels the strong arm of the federal judiciary." *Id.* at 490.

person, one vote" rule to even the lowest levels of state governments, the *Avery* case signalled, once again, the foray of the Court into the areas of states' rights and democratic discretion, since local governments are a product of state legislatures.[86] The Court is again denying the majority of a state the type of local government it feels would be most effective.[87] Essentially the Court was intruding into the "realm of political science,"[88] straying far from its function as ultimate interpreter of the Constitution.[89] Justice Harlan touched upon this intrusion but did not explore it deeply enough.[90] He stated that "this decision . . . wholly disregards statutory limitations upon the . . . jurisdiction of this Court in state cases . . . ."[91]

## VI. APPLICATION OF THE RULE TO THE REPRESENTATION OF RACIAL MINORITIES

By the time the *Brown* case was decided in 1983, the Court hardly realized that it had several types of examinations which depended upon the type of legislative body involved.[92] If the body were the House of Representatives, the strict *Kirkpatrick* test applied.[93] If the body were a state legislature, then a more relaxed *Brown* rule was applied.[94] If the legislative body were a local one then the Court, based on its dictum from the *Avery* case, would presumably be even more willing to tolerate an apportionment that took into account other values besides population.[95] In addition to these different levels of examination in traditional

---

86. *Id.* at 480 (majority opinion).

87. *Id.* at 476. "The Commissioner's Court is assigned by the Texas Constitution" and as such is a statement of the majority of the legislature and state of Texas. *Id.*

88. *Id.* at 487 (Harlan, J., dissenting).

89. *See* Marbury v. Madison, 1 Cranch 137 (1803). Justice Marshall stated that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177.

90. *See Avery*, 390 U.S. at 488-90 (Harlan, J., dissenting).

91. *Id.* at 486.

92. *See, e.g.*, Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Mahan v. Howell, 410 U.S. 315 (1973).

93. *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 730-31 (1983). The Court in *Karcher* stated that "Article I, § 2, establishes a 'high standard . . . for the apportionment of congressional districts . . . .'" *Id.* (citing Wesberry v. Sanders, 376 U.S. 1, 18 (1964); *Kirkpatrick*, 394 U.S. at 530-31).

94. See Mahan v. Howell, 410 U.S. 315, 326 (1973).

95. *Avery*, 390 U.S. at 484-85.

apportionment controversies, the Court also applied a very different standard of examination to another line of cases: the racial apportionment and gerrymandering controversies.[96]

Race discrimination voting controversies actually began with the *Reynolds v. Sims* case.[97] In *Reynolds*, the 1964 Alabama legislature was being controlled by the white majority who were denying blacks the power to vote by means such as literacy tests and poll taxes.[98] The passage of the Voting Rights Act of 1965[99] helped to correct the situation. However, when *Reynolds* was decided, the Supreme Court was not primarily concerned with how the Alabama Legislature had denied blacks the vote and equal representation.[100] Rather, the Court was more concerned with the fact that regions with larger populations had the same vote in the legislature as those less populated.[101]

The "one person, one vote" rule, as it developed from *Reynolds*, was clearly not concerned with the representation of minorities.[102] The Court in *Reynolds* stated that "[t]he Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races."[103] However, the rule it expounded in that case is purely pro-majoritarian in its theory.[104] Because the rule of population-based representation is purely pro-majority, it is also by

---

96. For a discussion of racial discrimination in apportionment cases, see Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1 (1982) [hereinafter Blacksher & Menefee].

97. 377 U.S. 533 (1964).

98. *See* Blacksher & Menefee, supra note 96, at 1 n.1.

99. 42 U.S.C. § 1971 (1981).

100. Reynolds v. Sims, 377 U.S. 533, 560-61 (1964). The Court stated that the equal protection clause establishes that representation must be the same regardless of sex, race, economic status or place of residence within a state, yet only addressed the apportionment problems and not race discrimination. *Id.*

101. *Id.* at 569.

102. *See, e.g.*, Mahan v. Howell, 410 U.S. 315, 318-30 (1973).

103. *Reynolds*, 377 U.S. at 568.

104. *Id.* The rule ensures a one-to-one relationship between the population and the amount of seats in the legislature, thus assuring the majority of the population a control over the vote while disregarding the needs of minorities, political or otherwise. *Id.*; *see also* Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 166-67 (1984) [hereinafter Low-Beer].

inference anti-minority.[105] Thus, the rule weakens the position of minorities within the legislative system.[106] "The standards of proof adopted by the Supreme Court have, in effect, elevated the right of population equality created in *Reynolds* to a position of constitutional primacy."[107] For the Court "majority rule was the paramount law of the land."[108] Under "one person, one vote," minority rights are clearly a casualty.

A more recent example of the Supreme Court's method of examination for claims of racism in voting rights controversies is the case of *City of Mobile, Alabama v. Bolden*.[109] This case involved a class action by black voters in the city of Mobile who alleged a dilution of their voting rights under the fourteenth and fifteenth amendments and under the enforcement provisions of the Voting Rights Act of 1965.[110] The voters claimed that the system of electing members to the City Council with at-large elections prevented blacks, who made up a 35% minority, from electing members to the council; a fact proven by the dearth of any blacks on that governmental body.[111] The city of Mobile appealed from adverse judgments in the lower courts which found discrimination to be present.[112] The Supreme Court reversed, holding that the appellees had not met their burden of proving that the apportionment plan was "'conceived or operated as [a] purposeful devic[e] to further racial . . .

---

105. *See id.* at 163-75. The author points out that "[t]wo fundamental values underlie the Supreme Court's debate about constitutional rights in voting: majority rule and minority representation. The debate has taken the traditional system of winner-take-all . . . as a given." *Id.* at 163.

106. Blacksher & Menefee, *supra* note 96, at 1-14; *see also* Low-Beer, *supra* note 104, at 164-65.

107. Blacksher & Menefee, *supra* note 96, at 4. The authors point out that the Court's creation of a constitutional imperative of pure majoritarian representation by using the fourteenth and fifteenth amendments is almost hypocritical in light of the fact that those amendments were created in order to safeguard the rights of racial minorities. *Id.* The Court's rulings have "created an intolerable inversion of historical and constitutional priorities." *Id.*

108. *Id.* at 13.

109. 446 U.S. 55 (1980).

110. 42 U.S.C. § 1973 (1982).

111. *City of Mobile*, 446 U.S. at 71. Furthermore, the Supreme Court stated that the trial court had not only found that no black had ever been elected to the City Commission, but that city officials were not as responsive to the needs and interests of blacks in the community. *Id.*

112. *Id.* at 59.

discrimination.'"[113]

Whereas with traditional apportionment controversies, the underrepresented voters needed to show that there was a significant difference in the percentage of the vote between districts,[114] racial minorities could not rely on such statistical evidence alone.[115] The Court stepped back to more relaxed levels of examination under the equal protection clause.[116] Citing *Washington v. Davis*,[117] the Court stressed that showing a discriminatory effect, such as blacks not being elected to any district posts, was not sufficient to support a finding of discriminatory purpose.[118] For cases of voting infringement, the Court required a showing of a racially discriminatory purpose.[119] The Court acknowledged that the equal protection clause gives everyone the "[r]ight to participate in elections on an equal basis with other qualified voters."[120] Yet there was an unwillingness on the majority's part to assume the infringement of that right without a showing of racist intention by the government.[121] The foremost reason for this high standard of proof, the most strict of the apportionment examinations, is the Court's underlying policy for the "one person, one vote" rule. That policy is to protect majority interests at all costs to the exclusion of minority interests.[122] The *Mobile* decision reiterates this underlying policy, stating that the "right to equal participation in the electoral process does not protect any 'political group,' however defined, from electoral defeat."[123]

## VII. THE MODERN STATEMENT OF THE RULE

---

113. *Id.* at 66 (quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971)).

114. *See, e.g.*, Avery v. Midland County, 390 U.S. 474, 485-86 (1968).

115. *City of Mobile*, 446 U.S. at 66. In order for an apportionment scheme with a racially discriminatory effect to be struck down, a showing of racist purpose or intent by the legislature is necessary. *Id.*

116. *See generally id.* at 66-68.

117. 426 U.S. 229 (1976).

118. *City of Mobile*, 446 U.S. at 70-71.

119. *Id.*

120. *Id.* at 77 (citing Dunn v. Blumstein, 405 U.S. 330, 336 (1972); *Reynolds*, 377 U.S. at 576)).

121. *Id.* at 70-71.

122. Reynolds v. Sims, 377 U.S. 533, 568 (1964).

123. *City of Mobile*, 466 U.S. at 77.

Leaving behind the different branches of analysis, one arrives at the modern day restatement of the "one person, one vote" rule in current case law. The *Board of Estimate* case is the most up to date statement of the "one person, one vote" rule.[124]

The case was brought before the United States District Court for the Eastern District of New York in 1982.[125] The case involved a an equal protection claim by voters in Brooklyn, the most populous borough of New York City, against the Board of Estimate. The Board has eight members, three elected city-wide; a Mayor, a City Comptroller, and a president of the City Council. All have the right to sit on the Board by virtue of their election to the city governmental offices that they hold.[126] The other members of the Board are the presidents of each borough;[127] one from Staten Island, one from Brooklyn, one from Queens, one from the Bronx and one from Manhattan.[128] The district court found the Board constitutional.[129] The district court held that the Board did not fall under the "one person, one vote" rule because it was not an elected legislative body.[130] The court based its holding on the fact that the Board does not have elected seats. Rather, the officials who sit on the Board are elected to represent in their districts independently and participate in the assigned activities of the Board as part of the duties of their respective offices.[131] "Membership . . . in . . . the Board is simply a part of the prescribed duties of the respective offices to which

---

124. Morris v. Board of Estimate, 551 F. Supp. 652, 656-57 (E.D.N.Y. 1982), *rev'd*, Board of Estimate of the City of New York v. Morris, 489 U.S. 688 (1989).

125. *Morris*, 551 F. Supp. at 652.

126. *Id.* at 653.

127. New York City traditionally has been composed of five boroughs. Originally these boroughs were either cities, as in the case of Brooklyn, or counties, such as Staten Island (formerly known as Richmond County). In 1864 these areas were joined, and along with Manhattan, became the greater city of New York. *See* W. SAYRE & H. KAUFMAN, GOVERNING NEW YORK CITY 11-15 (1960).

128. When the case was decided, the borough of Staten Island had a population of 352,121; Brooklyn had 2,230,936; Queens had 1,891,325; the Bronx had 1,169,115; and Manhattan had 1,427,533. Morris v. Board of Estimate, 831 F.2d 384, 387 (2d Cir. 1987).

129. *Morris*, 551 F. Supp. at 657.

130. *Id.* The district court stated that "the Board performs a wide variety of executive and administrative functions . . . . None of these, however, is legislative in nature except for the Board's limited role in the annual budget process, which cannot be decisive without the concurrent support of the city council." *Id.*

131. *Id.* at 656.

the designated officials were already elected."[132]

The district court further found that the executive and administrative functions of the Board were not legislative in nature except for the Board's limited role in the annual budget process.[133]

> [T]he Board performs a wide variety of executive and administrative functions in respect of the use of property of, or for the City; the authorization and/or approval of public improvements; the disposal of City property; City planning and zoning; contracts and franchises; budgetary and financial matters; and a miscellany of minor matters.[134]

Because the district court found that the Board is not a legislative body, either in form or function, the *Reynolds* rule was not applied.[135] The court, therefore, granted the city's motion for summary judgment.[136]

On appeal, the Second Circuit reversed and remanded.[137] The court of appeals found that the members of the Board are duly elected and do, in fact, perform legislative functions.[138] The circuit court remanded for fact finding on the issue of the proportionality of the representation in the Board's membership.[139] Interestingly, the court hinted that the lower court may still find any malapportionment to be justifiable by a sufficient "interest" on the part of the government, listing, among those interests the interest of "blending majority control with minority representation . . . ."[140]

In the first proceedings upon remand, the district court applied the apportionment test of *Abate v. Mundt*[141] as stated in *Flateau v.*

---

132. *Id.* The district court considered the board members to be appointed rather than elected. *Id.* (citing Sailors v. Board of Educ., 387 U.S. 105 (1967)).

133. *Id.* at 657.

134. *Id.* The district court further stated that "if there were no Board, these functions would very likely have to be performed by the same elected officials who constitute the Board, and who indeed now make its decisions." *Id.*

135. *Id.*

136. *Id.*

137. Morris v. Board of Estimate, 707 F.2d 687, 691 (2d Cir. 1983).

138. *Id.* at 689-90.

139. *Id.* at 690.

140. *Id.* at 691.

141. 403 U.S. 186 (1971).

*Anderson*.[142] The test utilizes a formula which determines the percentage of deviation between the districts involved.[143] "The maximum percentage deviation is determined by adding the percentage deviation above the population mean of the district with the greatest number of voters to the percentage deviation below the population mean of the district with the fewest number of voters."[144] To utilize this test a population mean is determined between the districts and then each district's voting power is compared to the mean to see if it is more or less representational.[145] The lowest negative number is then added to the highest to determine the maximum percentage deviation between both the most overrepresented district and the most underrepresented district.[146]

The district court, applying this *Abate* test, but without factoring the presence of the three at-large members, found that the maximum deviation, between Brooklyn and Staten Island, was 132.9%.[147] This meant that Staten Island had 75.2% more vote than it should were the Board merely population reflective and Brooklyn had -57.7% the vote than it would. The court then ordered further proceedings to determine whether the deviation was justified.[148]

In the subsequent proceedings, the city offered its justification for the disparity.[149] The city's justifications rested on several general

---

142. 537 F. Supp. 257, 261 n.7 (S.D.N.Y. 1982).

143. *Abate*, 403 U.S. at 182.

144. *Id.*

145. *Id.*

146. *Id.* (an interesting, almost algebraic, mathematical formula, considering the Court's warning about the utility of such numerically exacting tests).

147. Morris v. Board of Estimate, 592 F. Supp. 1462, 1475 (1984).

148. *Id.*

149. *See* Morris v. Board of Estimate, 647 F. Supp. 1463, 1467-68 (E.D.N.Y. 1986). These reasons included:

> 1. Absence of any demonstrable injury to the populations of the more heavily populated boroughs . . . , particularly in light of the presence on the Board of three members - the Mayor, the Comptroller, and the City Council President . . . [the at-large members].
>
> 2. Uniqueness of the Board as a form of local government . . . .
>
> 3. Meaningful representation of the citizens of the lesser populated boroughs . . . in Board affairs.
>
> 4. Preservation of the boroughs as . .

grounds. First was the fact that the Board worked, and because of that, it was a necessary part of the government of the city.[150] Thus, the underproportioned boroughs had not suffered any injury.[151] Second was the need to represent the boroughs' interests in city government.[152] Third was the uniqueness of the Board as a "creative solution" to the problems of local government.[153]

The court dismissed these reasons as invalid,[154] finding that harm exists wherever there is malapportionment.[155] The mere presence of disparity is thus taken by the court to be "harm."[156] Given that the city of New York has grown and prospered during the years since the formation of the greater city, the court's finding of "harm" is purely

---

> . entities . . . .
>
> 5. Use of natural and historical borough boundaries to define representational entities in local government. . . .
>
> 9. The long standing dual role of borough representatives as both Borough Presidents and . . . member[s] of the Board.
>
> . . . .
>
> 11. Ability to balance differing interests and needs . . . .
>
> 13. Correlation between functions of the Board and the impact of those functions upon the boroughs . . . .
>
> 14. Necessity and effectiveness of borough representation in local government . . . .

*Id.*

150. *Id.* at 1469-71.

151. *Id.* The city also attempted to show that the presence of the at-large members of the Board - the Mayor, the City Council President, and the city Comptroller, adequately represented the whole population of the city and that this negated any numerical underrepresentation. *Id.* at 1468-69.

152. *Id.* at 1473-74.

153. *Id.* at 1469-70.

154. *Id.* at 1468-71.

155. *Id.* at 1468-69. "All citizens are effected when an apportionment plan provides disproportionate voting strength . . . ." *Id.* at 1468 (quoting Chapman v. Meier, 420 U.S. 1 (1975)).

156. *Id.* at 1468-69.

analytical.[157] The concept of uniqueness was dismissed as "unavailing" because the unique nature "serves no pragmatic purpose."[158] The idea of the need for borough representation was also dismissed because it was considered, in essence, contrary to the ideal of "one person, one vote."[159] The court stated that the right to vote was "a citizen's right - not a borough's . . . ."[160]

Among the justifications that the court considered valid were the historical and natural boundaries, the preservation of political subdivisions, the effectiveness of the government, and the meaningful representation of smaller boroughs in affairs.[161] Although the court agreed that these reasons were valid, it found that the city had failed to show that an alternative, population-representational form of government could not achieve these interests.[162] The court thus held that the reasons offered by the city did not justify the deviation from population reflective apportionment and the Board, along with §§ 61 and 62 of the New York City Charter creating it, were held to be unconstitutional.[163] On a subsequent appeal, the circuit court affirmed[164] finding that the *Abate* test had been correctly applied and that the failure to include the presence of at large members in the test was correct.[165] The city was then given six months to effect a change in its government.[166] The city appealed the decision to the United States Supreme Court.[167] The Supreme Court granted *certiorari* and in its decision on March 22, 1989, affirmed the

---

157. *Id.* The district court examined harm as defined by the Supreme Court in previous cases and not with respect to the case before it. *Id. See, e.g.*, Chapman v. Meier, 420 U.S. 1, 24 (1975); Reynolds v. Sims, 377 U.S. 533, 563 (1963); Andrews v. Koch, 528 F. Supp. 246, 251 (E.D.N.Y. 1981), *aff'd*, 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom.*, Giacobbe v. Andrews, 459 U.S. 801 (1982).

158. *Id.* at 1470.

159. *Id.* at 1470-71. The Court stated that "[t]he one borough, one vote proposition clashes with the one person, one vote rule. The Constitution does not mandate identical votes for boroughs with widely disparate populations." *Id.* at 1470.

160. *Id.*

161. *Id.* at 1472-74.

162. *Id.* at 1475.

163. *Id.* at 1479. "[The city] must also demonstrate that no alternative plan would satisfactorily embrace the legislative considerations and diminish deviation." *Id.* at 1475.

164. Morris v. Board of Estimate, 831 F.2d. 384, 393 (2d Cir. 1987).

165. *Id.* at 391.

166. *Id.* at 393.

167. Board of Estimate of City of New York v. Morris, 489 U.S. 688 (1989).

circuit court decision, with Justice White writing for the majority.[168] The Court held that the "one person, one vote" rule was properly applied to this form of municipal government.[169] "No distinction between authority exercised by state assemblies, and the . . . powers delegated by these assemblies to local, elected officials, suffices to insulate the latter from the standard of . . . voter equality."[170] The Court also rejected the city's claim that the "Board of Estimate is a unique body wielding non-legislative powers . . . ."[171]

Turning to the *Abate* test, the Court did not agree with the Second Circuit that the rule was properly applied with the exclusion of the "at-large" members.[172] The Court noted that when factoring these members into the equation the disparity in percentage between Brooklyn and Staten Island was 78%.[173] Justice White noted that no previous case before the Court had "indicated that a deviation of some 78% could ever be justified."[174] As a basis for this conclusion Justice White cited the *Brown v. Thompson* case,[175] which is somewhat perplexing, as that case found that a deviation of 89% was, in fact, acceptable.[176]

In regard to the other justifications offered by the city, Justice White deferred to the lower court's findings that these claims were not sufficient.[177] The final opinion strongly strengthens the Court's reliance on the rule of "one person one vote."[178] This is most accurately reflected in Justice White's statement that "[t]he personal right to vote is a value in itself, and a citizen is, without . . . mathematically calculating his power to determine the outcome of an election, shortchanged if he

---

168. *Id.* at 690-703.

169. *Id.* at 692-94.

170. *Id.* at 693.

171. *Id.* at 692.

172. *Id.* at 701. "We do not agree with the Court of Appeals' approach. . . . Here the voters in each borough vote for the at-large members as well . . . and they are also represented by these members." *Id.*

173. *Id.* The appellees indicated that with the at large members figured into the "equation" the difference in over-all representation was 78%. The city agreed with this figure in oral argument. *Id.* at 701 n.9.

174. *Id.* at 702 (citing Brown v. Thompson, 462 U.S. 835, 846-47 (1983); Connor v. Finch, 431 U.S. 407, 410-20 (1977); Chapman v. Meier, 420 U.S. 1, 21-26 (1975); Mahan v. Howell, 410 U.S. 315, 329 (1973)).

175. *Id.*

176. *Brown*, 462 U.S. at 846-48.

177. *Board of Estimate*, 489 U.S. at 702-03.

178. *Id.* at 693-94.

may vote for only one representative when citizens in a neighboring district, of equal population, vote for two . . . ."[179] This statement demonstrates the Court's almost hypocritical view that mathematical methods of examination should be avoided, while simultaneously applying a mathematical test.[180]

In the final analysis, the *Board of Estimate* opinion, as the statement of the modern "one person, one vote" rule, signaled the triumph of numbers. The Court placed the mathematical exactness of the *Abate* test above the need for legislative bodies that reflect the will of the people.[181] The decision of the Court in this case will have grave affects on the many different systems of municipal governments throughout the country.[182] Indeed, the Court has come a far way from the "hands off" policy of the 1940's and proceeded headlong down a rocky path into the dangers of the "political thicket."[183]

## VIII. ANALYTICAL PROBLEMS WITH THE RULE

The most significant problem with the "one person, one vote" rule is the interpretive leap that the Court made when it found a constitutionally protected right to population-reflective legislatures;[184] a rule which has been expanded not just to all state legislatures, but to every level of local government as well. Originally, the post-Civil War amendments were a reaction to that war and the problems that started it: "[t]he problems of slavery and emancipation."[185] These amendments were traditionally interpreted by the Supreme Court as limited in scope in

---

179. *Id.* at 698.

180. The Court stressed that a mathematical test would be insufficient to demonstrate how the Board works in real life; yet it still applied the *Abate* mathematical examination. *Id.* at 699-701.

181. *Id.*

182. One estimate puts the number of local governmental units at approximately 83,200. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1990 271 (110th ed. 1990). All such units will have to reexamine the way that they are apportioned and many more will be brought into court under the *Avery* and *Board of Estimate* decisions. *Id.*; Board of Estimate of City of New York v. Morris, 489 U.S. 688 (1989).

183. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946).

184. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568 (1964).

185. G. GUNTHER, CONSTITUTIONAL LAW 408 (11th ed. 1985) (the thirteenth, fourteenth, and fifteenth amendments of the Constitution).

their restriction of the power of states in only a few limited areas.[186]

The *Slaughter House Cases*[187] serve as a useful example of the limited power and intent of the fourteenth and the other post-war amendments. In that case Justice Miller, writing for the majority, stated that the purpose of the equal protection clause was merely to invalidate

> laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class . . . . We doubt very much whether any action of a State not directed by way of discrimination against negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.[188]

Justice Miller's statement proved to be incorrect. The equal protection clause has, indeed, evolved from that limited meaning to include discrimination of all types, including discrimination based on all types of race, national origin and gender.[189] The line of equal protection cases has carved out an area of protection for traditionally discriminated classes by recognizing that there was a basic principle underlying the fourteenth amendment when the electorate voted upon it. This principle was the idea that government should govern impartially, and not on the basis of race or other arbitrary interests.[190] Few people would argue that the acknowledgment of an underlying constitutional principle that government must not act on the basis of race, creed or color, or that no law may be passed by the state due to prejudice, is not a venerable idea. It is also arguable that the framers and ratifiers of the Constitution may have had this in mind when the amendment was passed,

---

186. *Id.* at 408-09. "[T]he Court's first interpretation of the Amendments . . . rejected the effort to give the Amendments a content going beyond the problems which prompted them." *Id.* at 408.

187. 83 U.S. 36 (16 Wall.) (1872).

188. *Id.* at 81.

189. *See, e.g.*, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439-42 (1985) (providing a general statement of the modern equal protection doctrine); *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (upholding a claim that the all-female requirement of the state run nursing school violated claimant's fourteenth amendment rights).

190. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

although in a limited and narrowly defined way.[191]

The expansion of the protection of the equal treatment principle to preclude actions of the state based on any type of prejudice is understandable when one acknowledges that the constitutional principles and interpretations of today's electorate should be taken into account when the Supreme Court interprets the Constitution.[192] Most modern scholars recognize that merely relying on the original intent of the framers and ratifiers of the Constitution is, at best, a limited mode of interpretation.[193]

Even if relying upon the constitutional values of the framers and ratifiers, the Court was truly making an interpretive leap in *Reynolds* by recognizing the pro-majoritarian rule of "one person, one vote."[194] "The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races."[195] When examining the traditional interpretation of the equal protection clause, it is difficult to percieve this guarantee. Examining this difficulty from an originalist viewpoint, the Court failed to acknowledge that in order to secure full and effective representation the Constitution has traditionally recognized that a balance must be struck between the rights of minorities, geographic, racial or otherwise, and the need to protect those rights from the tyranny of the majority.[196] This fear of

---

191. *See Slaughter House Cases*, 83 U.S. at 81. Even Justice Miller, who penned the majority opinion in the *Slaughter House Cases*, acknowledged that the post-Civil War amendments were passed in order to ensure the freedom of blacks but that it might not be specifically limited to this idea. *Id.* ("We do not say that no one else but the negroe can share in this protection.")

192. *See, e.g.*, Chang, *Conflict, Coherence, and Constitutional Intent*, 72 IOWA L. REV. 753, 827 (1987) [hereinafter Chang]. "Thus, the equal protection clause, as originally understood, prohibited only particular forms of discrimination against blacks . . . . Despite this original conception . . . modern Supreme Court doctrine suggests that *any* governmental action undertaken because of racial prejudice . . . is constitutionally prohibited." *Id.* (emphasis in original). The Supreme Court has augmented the views of the framers and ratifiers with the "constitutional values of 'the people' today." *Id.* at 828.

193. *Id.* at 796. "Thus, if courts took seriously the notion that they are permitted to make constitutional decisions *only* on the basis of value determinations the framers and ratifiers did make, or could have made, then constitutional provisions would be progressively less relevant . . . ." *Id.* (emphasis in original).

194. *See supra* notes 28-30 and accompanying text.

195. Reynolds v. Sims, 377 U.S. 533, 568 (1964).

196. THE FEDERALIST No. 51, at 323 (J. Madison) (C. Rossitor, New American Library ed. 1961).

pure majority rule is one that James Madison had, and is a central theme of the Federalist Papers.[197]

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure.[198]

The new government of the proposed Constitution was thought to balance these two competing interests.[199] One way in which the right of the majority was balanced with the interests of the minority was within Congress.[200] The new Congress had two houses, the House of Representatives, which was population based, and the Senate, to which two senators form each state were allotted, regardless of population.[201] The Senate was thought to be a protection of one state's views in light of the national electorate.[202] By giving the two houses equal power in passing laws, the Constitution also puts a check on purely population based, or majority rule, by allowing the non-population-based body of the Senate to thwart, in some degree, the will of the House of Representatives.[203]

It is clear from Madison that in order to insure "effective" and constitutional representation, legislatures should not be apportioned merely on the basis of population.[204] The electoral college is another

---

197. *Id.*

198. *Id.*

199. *Id.* at 324.

200. THE FEDERALIST No. 62, at 378 (J. Madison) (C. Rossiter, New American Library ed. 1961). "No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States." *Id.*

201. U.S. CONST. art. I, §§ 2-3.

202. THE FEDERALIST No. 39, at 243-44 (J. Madison) (C. Rossiter, New American Library ed. 1961).

203. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President . . . .")

204. THE FEDERALIST No. 39, *supra* note 202, at 243-44 (J. Madison). Madison, in stating that the adoption of the Constitution would be a "federal" act accomplished only with the unanimous assent of all the States and not from a "decision of a *majority* of the people of the Union, nor from that of a *majority* of the States . . . ," pointed out that no rule that would allow a majority to dictate to a minority would be allowed in the

manifestation of this idea in the federal system.[205] As evidenced by the views of the framers and by the structure of the federal system itself, it is erroneous to conclude that the Constitution embraces the idea that pure majoritarian rule is the essence of American democracy.[206] A situation in which a minority's rights are overshadowed and forced to submit to the tyranny of a majority is exactly the situation that the framers and ratifiers foresaw and feared.[207]

The Supreme Court makes it difficult to address the issue of majority rule versus minority rights in its analysis of apportionment controversies because it fails to state its principle clearly.[208] The Court seems almost to be hiding the true pro-majoritarian view that it is espousing. The Court, in *Reynolds*, simply states that "every citizen has an inalienable right to full and effective participation in the political process . . . ."[209] The closest any of the opinions come to a statement of the Court's underlying principles is in the *Board of Estimate* decision.[210] This statement, however, is hidden in the Second Circuit

---

adoption process. *Id.* (emphasis in original).

205. *See* U.S. CONST. art. II, § 1. Under the electoral college process each state appoints a number of electors equal to the number of representatives of that state in the House of Representatives and the Senate. *Id.* During a presidential election a candidate who wins a state by popular vote also wins that state's electors. *Id.* The candidate possessing the greatest number of electors then wins the election. *Id.* The electoral college procedure was put in place in order to protect the integrity of the presidency by constructing a baffle to those who were unqualified but were popular. THE FEDERALIST No. 68, at 414 (Hamilton) (C. Rossiter, New American Library ed. 1961). Hamilton warned that "[t]alents for intrigue, and the little arts of popularity, may alone suffice to elevate a man . . . ." *Id.*

206. It is also helpful to note that the framers and ratifiers of the Constitution provided for the settlement of apportionment controversies within the Constitution itself, leaving the power to resolve such disputes in the legislative branch. Colegrove v. Green, 328 U.S. 549, 554 (1946). Article I of the Constitution provides, in pertinent part, that "[t]he Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, . . . ." U.S. CONST. art. I, § 4, cl. 1.

207. THE FEDERALIST No. 51, *supra* note 196, at 323-24 (J. Madison).

208. The first mention of the pro-majoritarian principle behind the rule is in Board of Estimate v. Morris, 489 U.S. 688, 698-703 (1989). *See infra* notes 210-11 and accompanying text.

209. Reynolds v. Sims, 377 U.S. 533, 565 (1964).

210. *Board of Estimate*, 489 U.S. at 698-703.

opinion later embraced by the Supreme Court when it affirmed.[211] "[T]he fact that a minority may be overshadowed by its more populous neighbors . . . is one characteristic of a representative democracy."[212]

From a modern viewpoint, ascertaining the constitutional values or principles of today's electorate, the "one person, one vote" rule fails to protect those values adequately. The principle that the fourteenth amendment prohibits all governmental actions whose impetus may be racial prejudice is not an originalist view, it is a contemporary constitutional value.[213] Yet the Supreme Court has acknowledged this widely accepted interpretation of the Constitution.[214] A rule of representation based purely on population erodes the need to police governmental action because of racial prejudice in the sphere of apportionment controversies.[215] Under a pro-majoritarian rule such as the "one person, one vote" rule, minority rights are a casualty; a system that vindicates the rule of the majority above all cannot adequately protect the minority.[216] Thus, adopting the constitutional principle that the Constitution protects minorities from discrimination in all governmental actions exposes the weakness and inadequacy of the "one person, one vote" rule in protecting this principle.

In addition to the problems with the "one person, one vote" line of cases that fail to recognize not only the true constitutional ideal of effective representation and to define its own ideal of majoritarian rule, the rule has other interpretive problems. The rule is weak, in an analytical sense, because it fails to take into account a great deal of interests that are, in most people's views, as important as the need to reflect the will of the majority. Justice Harlan's dissent in *Reynolds* is an accurate statement of the different interests, all important in their own

---

211. Morris v. Board of Estimate, 707 F.2d 687, 691 (2d Cir. 1983); *see also* Morris v. Board of Estimate, 647 F. Supp. 1463, 1474 (E.D.N.Y. 1986).

212. *Morris*, 647 F. Supp. at 1474.

213. *See* Chang, *supra* note 192, at 827.

214. See, e.g., Palmore v. Sidoti, 466 U.S. 429, 429 (1984); Loving v. Virginia, 388 U.S. 1, 10 (1967).

215. *See* City of Mobile v. Bolden, 446 U.S. 55, 67 (1980). Where the Court raised the standard required to show unconstitutional racial discrimination in apportionment controversies, a showing of specific racist purpose or intent by the legislature was required in order to find the apportionment unconstitutional. *Id.* This is in sharp contrast to usual apportionment controversies involving representation between regions in which a mere showing of unproportionality was sufficient; *see also* Low-Beer, *supra* note 104, at 172-75.

216. *See*, Low-Beer, *supra* note 104, at 172-74.

right, that the Court has failed to take into account.[217]

> [T]he Court declares it unconstitutional for a State to give effective consideration to . . . (1) history; (2) 'economic or other sorts of group interests'; (3) area; (4) geographical considerations; (5) a desire 'to insure effective representation for sparsely settled areas'; (6) 'availability of access of citizens to their representatives'; (7) theories of bicameralism . . . ; (8) occupation; (9) 'an attempt to balance urban and rural power.' (10) the preference of . . . the State . . . . I know of no principle of logic . . . still less any constitutional principle, which establishes all or any of these exclusions.[218]

Justice Harlan correctly points out the need and importance of these interests in bringing about "effective" representation. Apart from these interests, the rights of racial minorities must also be considered.[219] The Court, however, makes it quite clear in *City of Mobile* that an apportionment which has the effect of denying a racial minority representation, is not the concern of the rule. Instead, the primary concern is that population be correctly and mathematically reflected.[220] The Court fails to recognize the fact that the problems of government and of insuring fair representation in government are too manifold to address with a simple numbers rule.[221] The opinions espousing the "one person, one vote" rule address the dangers of a purely numbers-based rule but fail to follow through on the need to avoid these dangers.[222] "Mathematical . . . exactness is hardly a workable constitutional requirement."[223] In the *Board of Estimate* decision, however, the Court begins its examination by "calculating the deviation among districts," in order to determine if "'the vote of any citizen is approximately equal in weight to that of any

---

217. Reynolds v. Sims, 377 U.S. 533, 622-23 (1964) (Harlan, J., dissenting) (quoting extensively from the majority opinion).

218. *Id.* (footnotes omitted).

219. *See* City of Mobile v. Bolden, 446 U.S. 55 (1980).

220. *Id.* at 66.

221. *Id.*

222. *Reynolds*, 377 U.S. at 576-77.

223. *Id.*

other citizen.'"[224]

The rule is further weakened by the undue invasion into states' rights and the concept of federalism.[225] Harlan, in his *Reynolds* dissent, faced this issue when he listed "the preference of a majority of voters in the state" as one of the concerns to which the "one person, one vote" rule failed to give any consideration.[226] The rule invades a traditional area of state's discretion, an invasion that is most evident in the *Lucas* decision.[227] The Court in *Lucas* denied a majority of voters in Wyoming the form of government that they chose to be the most suited to their needs; the apportionment scheme in *Lucas* had actually been approved by statewide referendum.[228] The Court claimed to be protecting the representation of the majority and ideals of democracy but it effectively overturned the majority of Wyoming voters.

## IX. SOLUTIONS

In order to solve these problems with analysis and interpretation the Court must first more adequately define the constitutional right that it is protecting. Next, a better and more flexible rule of examination should be developed to insure the protection of the many interests that Justice Harlan suggests in his *Reynolds* dissent.[229] The traditional concept of the protection of minorities, the widely accepted idea of a constitutional prohibition of state action motivated by prejudice, the protection of less populated areas from the tyranny of neighboring, more populated areas, and historical geographic concerns are all interests that should be protected by the court.[230] The present rule lacks the necessary definition and flexibility to insure the best possible government for the people.

Clearly the present rule is not sufficiently responsive to the needs of local government. If it is possible for the court to step into the local government, as in the *Board of Estimate* case, and strike down an entire

---

224. Board of Estimate v. Morris, 489 U.S. 688, 701 (1989) (quoting Reynolds v. Sims, 377 U.S. 533, 579 (1964)).

225. *See* Avery v. Midland County, 390 U.S. 474, 487 (1968) (Harlan, J., dissenting).

226. *See* Reynolds v. Sims, 377 U.S. 533, 622-23 (1964) (Harlan, J., dissenting).

227. Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964).

228. *Id.* at 737-39.

229. *Reynolds*, 377 U.S. at 622-23 (Harlan, J., dissenting).

230. *Id.*

system that had worked well and had not caused any actual harm to those who claimed to be underrepresented,[231] then it is obvious that the rule is inadequate.[232] However, constitutional protections of some kind are required in this area because the danger of an individual's voting power being decreased is a real one. Many of the cases that came before the Court involved genuine controversies in which a large electorate was denied the vote by a minority for arbitrary or illegal purposes.[233] Any solution to the "one person, one vote" rule would have to be able to prevent this type of legislative excess.[234]

The solution which takes into account these differing needs and interests equitably cannot be a "hard and fast rule," nor can it be a mathematical one, for such solutions are too arbitrary.[235] Any new rule must be a powerful tool, powerful enough to solve real apportionment controversies, but also be flexible so as not to upset the delicate balances struck by local electorates.

A balancing test is one solution that has been offered.[236] This balancing solution would weigh the need for substantial equality among

---

231. Morris v. Board of Estimate, 647 F. Supp. 1463, 1468-69 (E.D.N.Y. 1986). It is also best to note that Staten Island, the borough that was allegedly so powerfully overrepresented under the Board of Estimate System, is the least populated of the five boroughs of New York City and is regarded by many as "the forgotten borough" or as "New York City's stepchild." Wolff, *Little Island with Power Feels Weaker*, N.Y. Times, Mar. 24, 1989, at B2, col. 1. Staten Island is the only borough that has no free access to other boroughs, there is no subway system, the city plans to build a city jail when the Island already contains a federal prison, and many areas of the island lack sewers and water service, as well as other basic services. *Id.* The many years of overrepresentation on the Board certainly did not elevate Staten Island to any level of ascendancy within New York.

Now that the Board of Estimate has been abolished, Staten Island has lost any ability to prevent the more powerful boroughs from using the city government to diminish valuable services on the Island. As this article goes to press, the city has begun to cut back the ferry service, which is the Island's most viable public transportation link to the rest of the city. Hoey, *Ferry Riders Caught in Squeeze Demand Restoration of Service*, Staten Island Advance, July 2, 1991, at 1, col. 2. Since they lack any mechanism within the new city government to prevent such unfair action by City Hall, Staten Islanders can only anticipate more of the same in the near future.

232. *Morris*, 647 F. Supp. at 1468-69.

233. *See, e.g., Reynolds*, 377 U.S. at 545-50.

234. *Id.*

235. *Id.* at 577. "[G]overnment would not work if it were not allowed a little play in its joints." *Id.* at 577 n.1 (quoting Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931)).

236. *See* Note, *Call for Consistent Quantitative Standard*, supra note 39, at 690-91.

voters with the competing need for flexibility in order to protect other valuable interests.[237] This test would allow the states' interests to be balanced against the need to represent on a purely population-reflective basis. The problem with this rule is that the Court has already made forays into this area and seems unwilling to allow any interest to be sufficient to overcome the need of population-reflective representation.[238]

Another solution is to give a clearer, less arbitrary, less mathematic definition of the constitutional principle that is being vindicated and to combine this new principle with a balancing test. Instead of interpreting the Constitution as mandating that all voters must be represented equally, the principle should be that the Constitution requires that all persons have the same right to equally *effective* representation. By interpreting the Constitution as ensuring *effective* and not just population-based representation, the Court would have a more flexible principle to work with. The Court's analysis would also be closer to the constitutional views of the framers and ratifiers and the constitutional views of today's electorate.[239] This "effective representation" principle would free the court from the mathematical and arbitrary trap that it has set for itself and would allow for the concerns of an apportionment plan that balances geographical interests, historical interests, theories of bicameralism and protection of minorities.[240] At the very least, a rule that is flexible enough to allow the balancing of these competing interests would prevent the Court from ignoring them as it did in the *Board of Estimate* decision.[241]

The best method of review for this new principle would be a more traditional analysis under the equal protection clause.[242] A strict scrutiny test could thus be applied to a claim of a denial of the right to effective representation. A *prima facie* case would be made of this denial by a showing of lack of representation in numbers, or a lack of members

---

237. *Id.* at 691.

238. *See* Morris v. Board of Estimate, 647 F. Supp. 1463, 1467-68 (E.D.N.Y. 1968). The city offered seventeen justifications for its deviation from population; the court found only four to be invalid and yet still held that the remaining thirteen were not sufficient justification. *Id.* at 1478.

239. *See supra* notes 191-205 and accompanying text.

240. *Reynolds*, 377 U.S. at 622-23 (Harlan, J., dissenting).

241. *See generally* Board of Estimate v. Morris, 489 U.S. 688 (1989).

242. *See, e.g.*, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439-42 (1985).

of the group bringing the case serving in the legislative body. The burden would then shift to the state to show that it is providing effective representation. Effective representation could be proven with a showing of an overriding state interest such as a need to adequately represent a minority group, or the preservation of political subdivisions.[243] The state would be required to show that its apportionment plan was necessary for the purpose of achieving these ends. By placing the burden on the state once a prima facie case is made, this new test would adequately protect persons from having their right to effective representation denied for arbitrary or insufficient reasons. The fact that the test would be a balancing one weighing competing concerns would also force the Court to acknowledge the important concerns that have traditionally been ignored.[244] Setting up a balancing test which takes into account important competing interests would also more adequately protect minorities from a tyranny of the majority, as foreseen by the framers and ratifiers of the Constitution,[245] and would also acknowledge the constitutional principles of the modern day in protecting the civil rights of racial and other minorities.

## X. CONCLUSION

Although no method of examination is beyond criticism, the *Board of Estimate* decision reveals the weaknesses of the "one person, one vote" rule. The modern rule is clearly too large of an intrusion by the judiciary into the affairs of the legislative and executive branches, and a step into the complex "political thicket" of apportionment controversies. A new rule, vindicating the principle of a constitutionally protected right of equally effective representation, would allow states and legislatures more leeway in apportionment and in securing interests other than merely the interests of the majority, such as affirmative-action representation plans.

This new rule would also more adequately protect racial minorities and other traditional sufferers of prejudice, a need that has been recognized by this court in other areas.[246] Further, a new rule would

---

243. *Reynolds*, 377 U.S. at 622-23 (Harlan, J., dissenting).

244. *Id.*

245. *See supra* notes 197-207 and accompanying text.

246. *See* Chang, *supra* note 192, at 827 (citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984); Loving v. Virginia, 388 U.S. 1, 10 (1967)).

prevent one largely populated area from exploiting and despoiling less populated areas for its own purposes. Although it is true that members of legislatures do not represent trees or land, nor do they represent numbers alone. It is this fact of which the "one person, one vote" rule is ignorant and it is this fact that requires a new rule to be created by the Court.

*Alexander D. Rosati*