The "One Person, One Vote" Doctrine - A Dead End Street?

Henri J. Charmasson
Western State College of Law

Follow this and additional works at: http://lawscl.org/wslawreview
Part of the Law Commons

Recommended Citation
Available at: http://lawscl.org/wslawreview/vol1/iss1/2

This Article is brought to you for free and open access by Library and Archive of Western State College of Law (LAWS). It has been accepted for inclusion in Western State Law Review by an authorized editor of Library and Archive of Western State College of Law (LAWS). For more information, please contact admin@lawscl.org.
THE "ONE PERSON, ONE VOTE" DOCTRINE
—A DEAD-END STREET?

by Henri J. Charmasson

"The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the fifteenth, seventeenth and nineteenth amendments can mean only one thing—one person, one vote."

This excerpt from Justice Douglas' opinion in Gray v. Sanders,1 coined the name of one of the most far-reaching doctrines formulated by the Supreme Court over the last decade: "one person, one vote."

In Reynolds v. Sims,2 Chief Justice Warren restated the rule as follows: "The fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence."

Few political entities have been exempted from the application of this rule. It has been extended to the election of persons exercising general governmental power, as minor as school board district officers.3

However, the Burger court, with President Nixon's appointees, is heralding a retreat from the rigid application of the "one man, one vote" rule in three recent decisions—Gordon v. Lance,4 Abate v. Mundt,5 and Whitcomb v. Chavis.6

Is the retreat warranted?

THE COURT IN THE THICKET

Although the Supreme Court's contribution to the enfranchisement of every qualified member of the society is almost a century old,7 the Court has been more reluctant to guarantee the worthiness of every

7. See ex parte Yarbrough, 110 U.S. 651 (1884).
ballot. For a long time it refused to review cases of unfair apportion-
ment of electoral districts on the ground that such a political issue was
nonjusticiable.

In 1945, the issue of reapportionment of the Illinois congressional
districts was found to be of "a peculiar political nature and therefore
not meet for judicial determination."8

However, in Gomillon v. Lightfoot,9 the Court relied exclusively
on the Equal Protection Clause of the fourteenth amendment to re-
verse the district court's dismissal of a complaint that the Alabama stat-
ute redefining the city boundaries of Tuskegee was a device to remove
from the city "all save only four of its four hundred negro voters while
not removing a single white vote." The Justices found no barrier to
trial in "political question" arguments drawn from Colegrove v. Green.10

Two years later in Baker v. Carr,11 the Court disposed of the
issue of justiciability of "political questions." It held that where an
issue of consistency of a state action with the Federal Constitution ex-
ists—as where invidious discrimination results from the drawing up of
electoral districts in violation of the Equal Protection Clause—the
courts should not hesitate to scrutinize the state action despite charges
of infringement upon the domain of the state. According to Justice
Brennan's majority opinion, nonjusticiable "political questions" are re-
stricted to problems of "relationship between the judiciary and the co-
ordinate branches of the federal government, and not the federal ju-
diciary's relationship to the States."12

The opinion is based on a survey of various precedents in which
the "political question" has been in issue. The Court also ruled that
the defendant State could not challenge its jurisdiction by having re-
course to the guaranty clause which reserves to Congress and the Execu-

8. Colegrove v. Green, 328 U.S. 549 (1946). Justice Frankfurter reviewing this
decision in his dissenting opinion of Baker v. Carr wrote: "Both (majority) opinions
demonstrate a predominant concern, first, with avoiding federal judicial involvement
in matters traditionally left to legislative policy making; second with respect to the
difficulty—in view of the nature of the problems of apportionment and its history in
this country—of drawing on or devising judicial standards for judgment, as opposed
to legislative determinations, of the part that more numerical equality among voters
should play as a criterion for the allocation of political power; and third, with prob-
lems of finding appropriate modes of relief." See also Hartsfield v. Sloan, 357
U.S. 961 (1958); Radford v. Gary, 352 U.S. 991 (1957); Tedesco v. Board of Super-
visors, 339 U.S. 940 (1950); Colegrove v. Barret, 339 U.S. 804 (1949); South v.
12. Id. at 210.
tive the responsibility of preserving in each state a republican form of government. The equal protection clause furnished sufficient jurisdictional ground for the Court's intervention, notwithstanding the political issue. Finally, the Court found that the plaintiffs as individual voters, had enough standing to maintain the action since they were "asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that government be administered according to law."

In *Baker v. Carr*, the Court did not intend to hand down any guideline for the "allocation of political power within the State." In his concurring opinion Justice Stewart stated: "The Court most assuredly does not decide the question may a state weigh the vote of one county or one district more heavily than it weighs the vote in another?" Yet in his dissent Justice Frankfurter warned: "In effect, today's decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty states. If state courts should for one reason or another find themselves unable to discharge this task, the duty of doing so is put on the federal courts or on the Court."

As foreseen, the Supreme Court was soon led to invalidate the Georgia county unit system in primary elections for statewide officers in *Gray v. Sanders*. Soon after, *Wesberry v. Sanders*, struck down the Georgia congressional district statute without resorting to fourteenth amendment claims. The Court construed Article I & II of the Constitution, that representatives be chosen "by the People of the several States," as a requirement that one man's vote be worth as much as any other's in congressional elections. In *Reynolds v. Sims* which held that the legislature of Alabama had been unconstitutionally apportioned, Chief Justice Warren declared: "The equal protection clause guarantees the opportunity for equal participation by all voters in the

13. Id. at 208.
14. Id. at 226.
15. Id. at 263.
16. Id. at 269. Between March, 1962, and June 1964, almost sixty apportionment cases in thirty states had been adjudicated or were awaiting appeal.
17. Justice Douglas delivering the opinion of the Court held that "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have "an equal vote." 372 U.S. at 379. Justice Stewart, concurring stated: "within a given constituency, there can be room for but a single constitutional rule—one voter, one vote." 372 U.S. at 382.
election of state legislators. Diluting the weight of votes because of
place of residence impairs basic constitutional rights under the four-
teenth amendment just as much invidious discrimination based upon
factors such as race, or economic status." One year after this ruling,
apportionment methods were found unconstitutional in fifteen states.20

Between Gomillon v. Lightfoot and Reynolds v. Sims, the weight
of the Warren Court's reapportionment rulings shifted from the protec-
tion of the constitutional right of representation towards the compulsory
reshaping of the states' electoral systems along the Court's unique and
rigid guideline: strict numerical equality of representation among the
citizens of all constituencies.

Can the Court's rationale in disposing of the "political question"
in Baker v. Carr support the holdings of subsequent apportionment
cases? The Burger Court is not certain, and the spectre of nonjusticia-
bility seems to have returned to haunt a majority of today's justices.

The justiciability of the apportionment cases hinges upon the three
criteria defined by Justice Frankfurter in Baker v. Carr.21  (1) The
courts should decline to review political matters traditionally left to the
legislatures.22 However, the Supreme Court sometimes has felt obliged
to remedy repeated congressional inaction.23 The final decision as to
the timeliness and necessity of its intervention remains largely discre-
tionaire, and is not necessarily related to the political orientation of its
Justices.24 (2) Justiciability is denied on issues which require a court's
definition of the weight to be assigned to factors contributing to the al-
location of political power within a polity. Yet in the series of appor-
tionment cases initiated by Baker v. Carr, the Supreme Court, assuming
its duty of constitutional interpretation of the fourteenth amendment
decreed that mathematical equality of representation and majority rule
were the only constitutional bases of political power in America—a
decision which reflected the political philosophy of the controlling ma-
ajority in the Warren Court.  (3) There must be an effective judicial

20. For a chronological account of the major reapportionment cases see McClain,
21. See note 8 supra.
22. Congress' traditional role in the regulation of election is demonstrated by
the Act of June 25, 1842, ch. 47, 5 Stat. 491, requiring elections of Representatives
by separate districts, and forbidding state at-large elections which tended to give too
much weight to party affiliation.
23. President Truman's message of Jan. 9, 1951, 97 Cong. Rec. 114 (1951) was
an unsuccessful appeal for legislative action in the area of reapportionment.
24. Some politically conservative justices have been judicial activists; some liberal
justices favored noninterference; the Warren Court became both liberal and activist.
remedy. The majority opinions of *Baker v. Carr* and the following apportionment cases do not adequately explore this aspect of justicia-
bility; this may be the seamy side of the “one person, one vote” doc-
trine, the side which is the most vulnerable to attack.

**POLITICS AND THE COURT**

Behind the various methods of selecting government officials lies
the fundamental issue: what form of government is being established?\(^{25}\) The guaranty clause of the Constitution is satisfied if the state govern-
ment is republican in form, i.e., some form of representative govern-
ment. The spectrum of republican governments is wide enough to en-
compass the Helvetic Confederation and the U.S.S.R. with their widely divergent politics. One of the major distinguishing characteristics of
a particular form of republic is the method followed in the selection
of leaders and legislators. Voting laws are to a republic what the laws
of succession are to a monarchy: the fundamental laws of the system.

On one side of the dispute over the nature of American institutions
are advocates of a system which Justice Harlan called “pure majori-
tarian democracy.”\(^{26}\) Their philosophy can be traced to Locke and Rousseau.\(^{27}\) It calls for a form of self government in which each in-
dividual takes an equal participation in running the public res.

According to this school of thought, every decision of the sov-
ereign body must be discussed among the citizens, and be the fruit of
the general concensus expressed by the majority.\(^{28}\) Since all members
of a republic the size of the United States cannot be expected to gather
and agree day after day on the acts of communal administration, this
shall be left to a selected few. But the selection of the representatives
of the mass must follow a strict mathematical scheme to avoid giving
some individuals more decision power than others. Absolute equality
of voting power among citizens is imperative considering the omnipo-

\(^{25}\) "(Baker and its progeny) are no right to vote cases, even though voting is
involved. They are representation cases, i.e., they are cases concerning the most in-
teresting, the most complex, the most baffling aspect of any democratic political sys-
tem." Dixon, Reapportionment Perspectives: What is Fair Representation? 51


\(^{27}\) John Locke (1632-1704), English philosopher and father of revolutionary liberal-
ism. Jean-Jacques Rousseau (1712-1778), French philosopher whose brand of
"direct democracy" is explained in The Social Contract.

\(^{28}\) "Rousseau deserves to be honored as the father of untrammeled political democ-
acy. But the concept of the general will is also fundamentally, and in practice
ruthlessly opposed to that faith in the potential of the individual on which the govern-
ment of the United States is founded." F. MORLEY, FREEDOM AND FEDERALISM 25
(1959).
tence of the unique governing body, which acts according to the will of the majority, restrained only by the constitutional safeguards.  

Opposing the majoritarian democracy concept, stands the organic principle of representative government. Under the latter, a single and all powerful government is replaced by a complex pyramid of organized social entities, each sharing governmental responsibilities. The citizens are not single and equal components of the policy but members of various bodies through which they govern themselves. These various bodies are made up of societies, groups, and associations based on geographic, economic, professional, educational or political communities of interests.

Some entities, such as a town or village, exist naturally; others such as a labor union or a state, are created to achieve a common purpose. Each entity is given only the amount of sovereignty necessary to accomplish its task. More complex and more encompassing social functions are delegated to organizations situated at higher levels of the social structure. The basic law of the system requires that every task be accomplished at the lowest possible levels and as close as possible to the individual citizens.

The bulk of decision making is concentrated at the bottom of the pyramid. Higher levels exist to support and complement the powers and activities of the lower strata of government, never to supplant them. The principle of subsidiarity limits the powers of upper governmental bodies to satisfying the needs and deficiencies of the lower organizations. By contrast, administrative intermediaries in the

29. "When a number of men have ... consented to make one community or government ... the majority have the right to act and conclude the rest." J. Locke, Essay Concerning the True Original Extent and End of Civil Government, in Collections on Democracy 95 (W.S. Carpenter ed. 1936).

30. Electoral districts which are created for the unique purpose of electing representatives from a homogenous section of the general population cannot be regarded as legitimate political bodies if they do not correspond to natural entities or group of people with distinct common interests (the entire farming population of a valley, or the Italian speaking section of an eastern industrial city). Similarly, certain counties which have no independent self governing function nor geographic, historical, ethnic or social significance, but are mere administrative agencies of the state are not among the organic entities described here.

31. "Local assemblies of citizens constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty." 1 Alexis de Tocqueville, Democracy in America 45 (H. Reeve transl. undated).

32. From the latin subsidium: support, help.

33. The rule is not absolute and the flexibility of the system may permit, for example, the levies of all the income taxes by the central government, and subsequent distribution of revenues to the local bodies, in order to avoid duplication of taxing agencies, if such arrangement works to the financial benefit of the lower organizations. The distribution of monies by the central government is not a grant but a return to the lower organizations of what was theirs from the start.
purely majoritarian system of government are organized along a hierarchic line. Authority flows from the top to the individual at the base through governmentally controlled agencies. Under the majoritarian democratic regime, each individual stands alone, face to face with the single governmental power. His ballot is the only means of control and participation in the administrative process. Only apportionment techniques that guarantee equal weight for every citizen's vote may be sanctioned.\textsuperscript{34}

Under the decentralized organic form of power structure, various governmental entities carrying the bulk of the administrative process are within the immediate control of the individual. He can exert his influence through direct involvement and participation in the administration, or by personal contacts with the officials. More flexibility may be allowed in the electoral methods. Some intermediate governmental bodies have only restricted powers over the general population. Their election through an electoral college of specially qualified citizens may be found both expedient and equitable. The upper strata of government may be subject to such controls and reviews by the lower administrative bodies that direct control through general election is not necessary. Indirect balloting and long terms of office may be tolerated. Factors other than population can play a legitimate role in politics.

Pure majoritarian democracy is a relatively modern concept born in the minds of European philosophers of the seventeenth and eighteenth centuries. Attempts to implement it on a large scale have degenerated into authoritarian regimes.\textsuperscript{35}

The organic form government appears more open to individual initiative, and more compatible with the natural law. It has been practiced under various forms. Federalism, as it was defined by the framers of our Constitution, is an excellent application of the principle of subsidiarity.\textsuperscript{36} The enumerated powers conceded by the states to

\textsuperscript{34} In France, during the Revolution the project Thouret attempted to subdivide the country into exact squares for administrative and electoral purposes. The dividing lines cut across towns and villages and the whole project had to be abandoned as impractical.

\textsuperscript{35} "The republican government in France was lost without a struggle, because the party of "un et indivisible" had prevailed: no provincial organizations existed to which the people might rally under authority of the laws." Letter from Thomas Jefferson to De Tracy, 1811, in \textit{Jefferson: Letters on Democracy} (1939).

\textsuperscript{36} "Among people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly on the general, and partly on the municipal legislature. In the former case all local authorities are subordinate to the supreme, and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal
the national government were jealously restricted to (1) those powers which could not practically be exercised by the states themselves, or (2) those which, although they could have been retained by the states, were believed to be more efficiently applied by a central government.

Colonial history supports the theory that the early states were conceived by necessity; not as sovereign entities for their own sake, but as practical means of self administration. They were limited in power, as well as purpose, by strong individualism. Cities, townships, and counties were proud and jealous of their initiative and independence. The American Revolution—unlike the French, which abolished all intermediary political entities—was fought to preserve the liberties exercised through local governmental organizations.

The political structure of the United States after the adoption of the Constitution was essentially that of an organic type of republican institution. Alexis de Tocqueville, in his penetrating analysis of American politics, wrote: "In the United States the county and the township are always based upon the same principle, namely, that every one is the best judge of what concerns himself alone, and the most proper person to supply his private wants. The township and the county are therefore bound to take care of their special interests: the State governs, but it does not interfere with their administration." "We the People" in the preamble of the Constitution represented an organized body capable of self administration with or without a national government, not an amorphous mass of individuals who surrendered their initiative and intrusted their political welfare to an omnipotent central power.

Is this picture true today? Remove the federal institutions and the country would plunge into chaos. Powers and responsibilities of the Federal Government have grown enormously as the nation changed

authorities form distinct and independent portions of the supremacy, no more subject within respective spheres, to the general authority, than the general authority is subject to them within its own sphere." 39 James Madison, The Federalist (Jan. 18, 1788).

37. See note 35 supra.
38. Democracy in America, supra note 31, at 65.
39. During the Virginia's Convention of June 1788, answering Patrick Henry's objection to the use of "We the People" instead of "We the States", Madison stated that the People who were mentioned in the preamble were not the people as composing one great body but the people composing thirteen sovereignties.
40. "When all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the center of all power, it will render powerless the check provided of one government or another and will become as venal and oppressive as the government from which we separated." Letter from Thomas Jefferson to C. Hammond, 1821, in Jefferson: Letters on Democracy (1939).
from agrarian to industrial society. Since the days of Chief Justice Marshall—the first interventionist—the Court has not ceased to expand control of the central government under the interstate commerce clause to meet the demands of a modern economy. But the apportionment cases mark the entry of the Court into a purely political area. The liberal or conservative penchants of its Justices have thus become decisive factors in the settlement of these cases.

Liberal judges may view federalism as a concept rooted in an agrarian era, ill adapted to the needs of contemporary America. They may advocate national government hegemony and more uniformity in local administrative bodies. They may see a better answer to the problems of our modern society in a form of government close to the pure majoritarian democracy concept. Their opinions rest on the belief that the federalist system and the Constitution were a temporary compromise between a confederation of sovereign states and an egalitarian democracy based on individual citizens acting together as a single community of interests.

According to this theory, the framers of the Constitution were partisans of a democracy derived from the ideas of Locke and Rousseau. Realizing that the citizens of the newly freed Colonies were not yet ready to accept such radical principles of political philosophy the framers used federalism as a first step towards a more unified democratic system. Believing that the seeds of the future system are imbeded in the words and silences of the Constitution, a liberal judge sees the Supreme Court as a midwife bringing to life the majoritarian democracy under the call of circumstances.

A conservative judge, on the other hand, recognizing some universal value in the principle of federalism, will not attempt to enforce a judicial solution without first considering its potentially harmful effect on the operation of lower political entities.

The Warren Court showed little concern for the possible effect of

---

41. As to the economic importance and vitality of local government bodies in contemporary America see Campbell, MOST DYNAMIC SECTOR, 53 NAT'L CIVIC REV. 74.
42. As used here the liberal may be given to a judge who refuses to be fettered by claims of universality and immutability of certain principles. He is willing to interpret the law in accordance with the needs of the moment. The conservative judge on the contrary is more concerned with upholding the universal values embodied in the Constitution. Those values, he believes, are based on the unchanging characters of human nature and on principles applicable to all ages. He is less inclined to bend the law in order to avoid hardship caused by an unfortunate set of circumstances.
43. "The prevailing apprehension among thinking men is that the Convention, for fear of shocking the popular opinion will not go far enough." Letter from Alexander Hamilton to George Washington (undated), in C. Rossiter, ALEXANDER HAMILTON AND THE CONSTITUTION 45 (1964).
the "one person, one vote" doctrine on the operation of local and state
governments. Justice Warren himself overlooked the historical auton-
omy of local governments when in Reynolds v. Sims,44 he stated: "Political
subdivision of States—counties, cities or whatever—never were and never
have been considered as sovereign entities. Rather, they have been tra-
ditionally regarded as subordinate governmental instrumentalities
created by the State to assist in carrying out state governmental
functions."45 By imposing a uniform and single base of political
power, and discounting original contributions of municipal and other
local institutions to the democratic process of government, the
Court may have discouraged healthy experimentations in the use
of other electoral methods to resolve social problems at the local level.

Liberals see the best guarantee of individual freedom in the fed-
eral government's application of the Bill of Rights and the civil rights
amendment to all levels of governmental activities. To a conserva-
tive or constructionist judge,46 the best guarantee of civil liberty is the
conservation of state and local home-rule with limited federal interference.

The two theories are oftentimes difficult to reconcile in the course
of constitutional interpretation. The Warren Court's apportionment
decisions reflect the recent predominance of the liberal view in that
forum. The Burger Court, in its early apportionment cases has shown
restraint in forcing the "one person, one vote" doctrine upon local in-
stitutions. The current predominance of conservative justices presages
a significant shift in future "political" cases.

THE "ONE PERSON, ONE VOTE"
RULE AS A JUDICIAL REMEDY

Is the "one person, one vote" doctrine a practical means of
achieving political equality?

Measured in terms of the number of districts which have been
reapportioned since the decision of Baker v. Carr, the results seem
spectacular.47 But has equality of voting power been achieved? Dis-
crepancies between census figures, which serve as the mathematical
bases for reapportionment, the number of eligible voters, and those

44. 377 U.S. at 575.
45. Compare above.
46. The two terms may be synonymous since the Constitution is an inherently
conservative document. The American Revolution was not truly a revolution, but a
War of Independence, or in the words of Edmund Burke, the British statesman, a
revolution "not made, but prevented".
47. See Reapportionment; Success Story of the Warren Court, 67 MICH. L. REV. 223 (1968).
who actually cast their ballots, render this equality illusory. Results are further distorted by changes in population between census years, and unbalance in partisan registration which affects the nominations through intra party primaries.

Actual equality of representation becomes frustrated even more by the divergences of interest between the citizens grouped in the same electoral district and practices of seniority within legislative bodies. Size of the constituency also has direct bearing upon the power and effectiveness of representation of minorities. The practice of drawing up electoral districts to achieve population parity rather than using natural and organic political subdivisions opens the door to gerrymandering.\(^{48}\) Political give-and-take in redistricting is often more determinative of the outcome of the election than parity of population.

If equality is the goal, the "one person, one vote" doctrine goes only half way.\(^{49}\) Equality of voting power and of representation could only be attained by using very complicated apportioning, vote counting methods and computerized weighing. Various formulae have been proposed; none are sophisticated enough to take into account all known factors which may affect these rather hazy aspects of political equality.\(^{50}\)

“One person, one vote” is not the talismanic formula which will bring about political equality in voting power and representation. This form of equality itself is not easily defined. However the original purpose of the doctrine was to remedy invidious discrimination practiced against minorities. As Justice Douglas remarked in his concurring opinion of *Baker v. Carr*: “The traditional test under the equal protection clause has been whether a State has made an invidious discrimination as it does when it selects a particular race or nationality for oppressive treatment . . . Universal equality is not the test; there is room

\(^{48}\) "Indiscriminate districting, without any regard for political subdivisions or natural or historical boundary lines, may be little than an open invitation to partisan gerrymandering." *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964).

\(^{49}\) The House of Representatives is probably the most unbalanced legislative body in the whole nation, the Senate excepted. When all the current reapportionments based on the new figures from the 1970 census, and those ordered by the courts under the "one man, one vote" doctrine are completed, the lone representatives of the States of Alaska and North Dakota will represent 302,173 and 617,761 people respectively, a difference of more than 100%. Among multimember States the representative of the ideal South Dakota district would speak for 33,129 constituents, his colleague from Utah for 529,637, a 59% variation.

\(^{50}\) See Banzhaf, Weighted Voting Doesn't Work; A Mathematical Analysis, 19 RUTGER L. REV. 317 (1965). See also, Justice Harlan's mention of "astronomical differences in voting power which can result from minor variations of political characteristics." *Whitcomb v. Chavis*, 403 U.S. 124, 169 (1971).
for weighting . . . the prohibition of equal protection clause goes no further than the invidious discrimination.51

As a result of Baker v. Carr some progress has been made in protecting rights of minorities in areas where blatant racial discrimination virtually eliminated those minorities from participating in politics. But under the “one person, one vote” formula, potential progress in the struggle for civil rights of minorities is necessarily limited. The plight of certain minorities deserves more attention than a guarantee of exact proportional representation in governmental bodies. The strict mathematical character of the rule will leave them too often an impotent minority. While the doctrine may have been useful in correcting gross abuses, it is no final answer to the country’s crises. “One person, one vote” may in fact stand in the way of other more realistic solutions.

To give proper attention to the pressing needs of minorities, a government might be well advised to grant them political powers and influence beyond the degree which can be expected under a proportional method of representation. Such special recognition can more readily be accomplished within an organically constituted political structure.

Two steps are required: (1) the minorities must be organized from within; (2) they must be institutionalized through political recognition as legitimate intermediary administrative bodies. While no legal barrier exists to the first step, the second requires that existing political entities be free of the shackles of the “one person, one vote” rule, in order to grant the organized minorities political recognition on the basis of their special needs and interests beyond the measure of voting power which they can muster.52

Consider this hypothetical example:

The State of Cornucopia has a population of approximately one hundred thousand migrant make farm workers. Every year these individuals and their families travel the length of the State, harvesting agricultural products which represent the major export of the State. They live in trailer-homes or in cabanas made available to them on the properties of large farming corporations.

51. 369 U.S. at 244-45.
52. The procedure would be in direct contradiction to Chief Justice Warren’s holdings in Reynolds v. Sims: “Neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population based representation. Citizens, not history or economic interests cast votes.” 377 U.S. at 580. “Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.” 377 U.S. at 566.
By reason of their living habits and lack of permanent domicile, they hold no voter registration. They have no legislative representation.

They are now organized into the Cornucopia Migrant Workers Union, (C.M.W.U.) under the leadership of Julie Pepon. They have thus acquired enough bargaining power to exact from the Cornucopia Farmers Association, which represents most of their employers, salaries commensurate with the national average income. In search of a remedy for some of their particular social problems—such as lack of access to educational facilities, and poor health care—Pepon and the C.M.W.U. are attempting to obtain political representation in the State Assembly.

Under the strictly proportional representation system, assuming that all residency requirements for registration are waived by special order of the courts, it would be impossible for the widely dispersed migrant workers to control the election of a single legislator, in spite of the fact that their total voting strength, of one hundred and twenty thousand eligible voters, correspond to almost half the average voting population of the State Assembly district.

If the State were to escape the mathematical constraint imposed by the various apportionment cases, the following equitable solution would be available: Cornucopia, through its legislature, taking special notice of the existence of the farm workers community and of their right to political representation, could create a special electoral district within the frame of the C.M.W.U., and grant political recognition to this legitimate and natural sector of the State population.

The above example illustrates the obstacle that "one person, one vote" might impose upon legitimate attempts to solve minorities problems. The solution proposed was generous enough to please both liberals (who should not hesitate to abandon abstract principle which stand in the way of an immediate solution), and conservative (who will recognize in the political recognition of a natural community a legitimate application of local rule).

The "one person, one vote" rule puts every citizen, every group on the same footing in the race for political services. In some cases it will work against disadvantaged members of minorities who might better be given special political privileges in order that they may compete with as equal a chance of success as the rest of the population.

53. Other examples of political and administrative institutionalization may be found in the admission of a new state to the Union, the granting of a city or county chart and the recognition of a labor union as the sole bargaining agent for a professional group.

54. For other examples of non invidious methods of apportionment based on factors other than population see: Nonpopulation Factors, 38 N.D. LAW 499; De Grazia, Essay on Apportionment and Representative Government 165 (1963).
What is suggested here requires more than a loosening of the "one person, one vote" rule. The type of solution proposed could not be imagined under a centralized form of government, but only within government entities where factors other than mere numerical consideration serve as a basis for allocation of political representation.

Reapportionment according to the "one person, one vote" guideline is insufficient to achieve equality of voting power and representation. The rigidity of the rule may interfere with the operation of local governments. As a remedy against racial discrimination the rule is limited and may in the long run become obtrusive.

The propriety of the "one person, one vote" remedy falls short of supporting the justiciability of the reapportionment issue beyond the mere correction of invidious discrimination.

In Baker v. Carr, Justice Douglas suggested that in order to correct invidious discrimination the Court "need not undertake a complete reapportionment. It might possibly achieve the goal of substantial equality merely by directing respondent to eliminate the egregious injustices."^55

Stripped of the egalitarian element, Baker v. Carr and its progeny could be reduced to the following rule expressed by Justice Harlan: "All that is prohibited is invidious discrimination bearing no rational relation to any permissible policy of the State. And in deciding whether such discrimination has been practiced by a State, it must be born in mind that a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. It is not inequality alone that calls for a holding of unconstitutionality; only if the inequality is based on an impermissible standard may this Court condemn it."^56

THE RETREAT

Even before the three recent cases^57 which may herald a retreat from the "one person, one vote" doctrine, a 1965 case and two 1967 decisions pointed to limitations in the application of the rule. In Fortson v. Dorsey,^58 the Court reversed a district court decision that Georgia senatorial apportionment discriminated against the population

---

55. 369 U.S. at 250 n.5.
56. 369 U.S. at 334-35.
of multi-district counties, in that county-wide voting might thrust upon the voters of a particular district a candidate whom they had not chosen. The Court noted that the elected senators must serve the interests of the whole county population, and the courts should not intervene as long as the senatorial districts are substantially equal in population, and the particular apportionment scheme does not cancel out or minimize the voting strength of racial or political elements of the voting population.

In *Sailors v. Board of Education*, the Supreme Court upheld a procedure for choosing school board members that left the selection to the school boards of component districts, even though they had equal voting and served unequal populations. The Court reached its decision by relying on the appointive character of the selection scheme.

In *Dusch v. Davis*, the Court relied on *Fortson v. Dorsey* in upholding the electoral system for the legislative body of Virginia Beach, which provided for election-at-large of candidates required to be residents of particular districts. The wide variation was thought not to be fatal since the candidates were city's, not district's, councilmen. The principal and adequate reason for the residency requirement was to assure that the city council would have some members with some general knowledge of rural problems. The electoral scheme indicated a desire to provide for intelligent expression of views on subjects relating to agriculture; a great economic factor in the welfare of the entire population.

The Supreme Court in these cases recognized that, at the local level, there might be other factors than population which should be allowed to influence the selection of government officials, such as special knowledge or status of a candidate. Faced with the problem of equality of representation in multi-member districts and other types of elections-at-large, it deemed it impossible to define practical guidelines, and satisfied itself with the fiction that district candidates, elected at-large are all representatives of the whole electoral body. In *Sailors v. Board of Education* the Court further accepted the fact that once an official or representative is elected, he does not necessarily act as an agent for his constituents according to the pure democracy concept;

59. The seven most populous counties were divided into two to seven districts; while two to eight of the least populous counties were grouped in a single district.
60. 387 U.S. 103 (1967).
62. The city limits of Virginia Beach include several peripheral rural communities.
but instead may govern by the virtue and authority of his office and according to his own judgment.\textsuperscript{63}

With this groundwork, the Burger Court in \textit{Gordon v. Lance}\textsuperscript{64} found that West Virginia's constitutional and statutory provision, forbidding political subdivisions to incur bonded indebtedness without approval of sixty per cent of the voters, does not discriminate against any identifiable class. Therefore it does not violate the equal protection clause. The Court stated that the requirement does not single out any discreet and insular minority for special treatment, and that "there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevails on every issue. Moreover, the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy."\textsuperscript{65}

In \textit{Abate v. Mundt},\textsuperscript{66} the Court sustained an unusual reapportionment plan for the New York Rockland County's legislature even though it produced a deviation from population equality of almost twelve per cent—a greater percentage than had been tolerated in any other case.\textsuperscript{67} Justice Marshall's majority opinion found adequate justification for the deviation, first in the fact that local government bodies have fewer representatives than their state and national counterparts so that slightly greater percentage deviation may be tolerated. Furthermore, no built-in bias tending to favor particular area groups was found. The plan was based on a long history of, and perceived need for, close cooperation between the county and the constituent towns.\textsuperscript{68} With \textit{Whitcomb v. Chavis},\textsuperscript{69} the whole issue of multimember districts was brought once again before the Court who refused to declare them "inherently invidious and violative of the fourteenth amendment."\textsuperscript{70} The plaintiff first charged that "any multi-member

\begin{itemize}
\item \textsuperscript{63} "Equal protection of the laws may be achieved and perhaps can only be achieved by a system which takes into account a complex of values and factors, and not merely the arithmetic simplicity of one equals one. \textit{Dusch} and \textit{Sailors} were wisely and prudently decided. They reflect a reasoned, conservative, empirical approach to the intricate problem of applying constitutional principles to the complexities of local government." Justice Fortas dissenting in \textit{Avery v. Midland County}, 390 U.S. 474, 496 (1967).
\item \textsuperscript{64} 403 U.S. 1 (1971).
\item \textsuperscript{65} Id. at 6.
\item \textsuperscript{66} 403 U.S. 182 (1971).
\item \textsuperscript{67} In \textit{Kirkpatrick v. Preisler}, 394 U.S. 526 (1969), the Court rejected a Missouri plan for congressional reapportionment which varied from absolute population equality by 2.83\% below to 3.13\% above it.
\item \textsuperscript{68} The plan provided for a county legislature of eighteen members chosen from five districts corresponding to the county's five constituent towns.
\item \textsuperscript{69} 403 U.S. 124 (1971).
\item \textsuperscript{70} Id. at 160.
\end{itemize}
district bestows on its voters several unconstitutional advantages over voters in single-member districts or smaller multi-member districts. The other allegation was that the (multi-member) district, on the record of the case, illegally minimizes and cancels out the voting power of a cognizable racial minority. Plaintiff, in support of the first charge, demonstrated mathematically that voters of multi-member districts are overrepresented.

The Court, however, noted that the demonstration did not take into account other factors such as party affiliation, race, or previous voting characteristics which might affect the actual voting power of the residents, and concluded that "the real life impact of multi-member districts on individual voting power has not been sufficiently demonstrated to warrant departure from prior cases." As to the second allegation, the trial court had "identified an area of the city as a ghetto inhabited by poor Negroes, and thought this group unconstitutionally underrepresented because the proportion of legislators with residence in the ghetto, was less than the ghetto's proportion of the population, and less than would likely have been elected had the county consisted of single-member districts." The Court reiterated: it had "insisted that the challenger carry the burden of proving that multi-member districts unconstitutionally operated to dilute or cancel the voting strength of racial or political elements," and found that in this case the underrepresentation was due to the fact that the ghetto along with all other democrats had suffered the disaster of losing too many elections.

"Are poor Negroes of the ghetto any more underrepresented than poor whites who also voted Democratic?" asked Justice White. He concluded: "It is expressive of the more general proposition that any group of distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represent a majority living in an area sufficiently compact to constitute a single-member district. . . . Indeed it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangements such as proportional representation or cumulative voting aimed at pro-

71. Id. at 144.
72. Id. at 146.
73. Id. at 144.
74. Id. at 146.
75. Id. at 153.
viding representation for minority parties or interests. At the very least, affirmance to the District Court would spawn endless litigations concerning the multi-member system now widely employed in the country.

The rejection of "majoritarian supremacy" in *Gordon v. Lance* and the recognition in *Abate v. Mundt*, or the various factors including history, which contribute to the allocation of political power, contrast sharply with some Warren Court's opinions. The *Whitcomb v. Chavis* decision underlines the impossibility of reducing the measurement of voting power to simplistic mathematical formulae. The Court mentioned the desirability of organic representation of minorities in governments but refused to lend its judicial power to the implementation of this political scheme. Having apparently abandoned the chimera of equality in voting power, the Burger Court restricts the scope to the application of the Equal Protection Clause in the matter of reapportionment to ferreting-out of invidious discrimination.

Justice Harlan's separate opinion is indicative of the new mood: "Earlier in this term I remarked on the evident malaise among the members of the Court with prior decisions in the field of voter qualifications and reapportionment. Today's opinions confirm that diagnosis. . . . That line of cases (which began with *Gray v. Sanders* and ended with *Hadley v. Junior College District*) can best be understood, I think, as reflections of deep personal commitments by some members of the Court to the principles of pure majoritarian democracy. It is a philosophy which ignores or overcomes the fact that the scheme of the Constitution is not of majoritarian democracy, but of federal republics, with equality of representation a value subordinate to many others, as both the body of the Constitution and the Fourteen Amendment itself show on their face."

**CONCLUSION**

The "one person, one vote" doctrine represents the Warren Court attempt to extend the scope of the Equal Protection Clause beyond the prevention of invidious discrimination, and to prescribe proportional representation as the only constitutional basis for the allocation of political powers at all levels of government. The extension of its preroga-

---

77. 403 U.S. at 156.
78. See notes 3 & 52 supra.
79. 403 U.S. at 163-67.
tive of constitutional interpretation led the Supreme Court to judicate issues which lay outside its traditional norms of justiciability. This "adventure in judicial experimentation", as Justice Harlan called it,\textsuperscript{80} is consistent with the general concentration of political power in the central government, and reflects the personal political inclinations of certain justices towards a system of pure majoritarian democracy. The rule found some limitations at the level of local governments, which because of their pragmatic or empiric approach to the balance of political powers, cannot be forced into the straitjacket of egalitarian rules.\textsuperscript{81}

The New Court has already demonstrated its intention to limit interference with the electoral process of States and local governments to the prevention of proven and unjustifiable cases of group discrimination. Should the Court continue this trend, it will retreat into its constitutional role of issuing principled rulings, as professor Herbert Wechsler suggested it should,\textsuperscript{82} rather than attempting to solve current political problems by ad hoc decisions, a task for which Congress is better qualified by mandate and by nature.

\textsuperscript{81} "The Constitution does not require that a uniform strait jacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." Justice White in \textit{Avery v. Midland County}, 390 U.S. 474, 485 (1967).