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The Reapportionment Cases: A Conservative Defense of Individual Rights

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Leading Articles

THE REAPPORTIONMENT CASES: A CONSERVATIVE DEFENSE OF INDIVIDUAL RIGHTS.

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The latest pronouncement of the Supreme Court in the reapportionment cases will be greeted by legal and political commentators as an example of a further usurpation of states rights by the Supreme Court.[1] They will charge, as Mr. Justice Stewart does in his dissent:[2]

> The Court's draconian pronouncement, which makes unconstitutional the legislatures of most of the 50 states, finds no support in the words of the Constitution, in any prior decision of this Court, or in the 175-year political history of our Federal Union. With all respect, I am convinced these decisions mark a long step backward into the unhappy era when a majority of the members of this Court were thought by many to have convinced themselves and each other that the demands of the Constitution were to be measured not by what it says, but by their own motives of wise political theory. The rule announced today is at odds with long-established principles of constitutional adjudication under the Equal Protection Clause, and it stifles values of local individuality and initiative vital to the character of the Federal Union which it was the genius of our Constitution to create.

It will be shown, however, that (1) the decision was required by the equal protection clause, (2) the decision was foreordained by use of the equal protection clause, (3) the Court was not imposing is own views of political theory when it upheld the civil liberties of individuals and limited the power of political majorities, and (4) the decision will not destroy initiative or local individuality, but will permit a diversified development of new political forms within the constitutional mandate.

After the demise of the Hughes Court, it was generally believed that the basic constitutional function of the Supreme Court was finished. The Supreme Court would, in the view of many observers, limit its functions to arbitrating between governmental bodies and interpreting laws passed by Congress. It was believed that the over-extended defense of contract rights by the previous

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[1] See Ulman, *Revolutions and the Supreme Court,* Wall Street Journal, July 2, 1964, p. 4, col. 4. See also the cartoon by Hesse depicting big city machine knocking out state legislative make-up with comment, "Outa The Way, Hay Seed," U.S. News and World Report, July 6, 1964, p. 31. Report of Congressional efforts to overturn decision by Constitutional Amendment, Wall Street Journal, June 26, 1964, p. 1, col. 5.

[2] WMCA, Inc. v. Lomenzo, 84 Sup. Ct. 1418, 1431 (1964).

members of the Court and the repudiation of many of the earlier decisions had finished the constitutional function of the Court.[3] It was believed that any reforms that would be required would be made by the legislatures, i.e., the majorities. In the words of Learned Hand:[4]

> And so, to sum up, I believe that for by far the greater part of their work it is a condition upon the success of our system that the judges should be independent; and I do not believe that their independence should be impaired because of their constitutional function. But the price of this immunity, I insist, is that they should not have the last word in those basic conflicts of 'right and wrong —between whose endless jar justice resides.' You may ask then what will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

or as Mr. Justice Harlan said:[5]

> The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers. In upholding the claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed exclusively to the political process.
>
> This Court, no less than all other branches of Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system.

These judges would deny the basic function of the Constitution and a Supreme Court. One commentator has stated:[6]

> In one sense, the concept of civil liberties is aristocratic and against democratic rule. . . . Guarding the Bill of Rights even against majorities and even against the people's will, the American Constitution performs an aristocratic and conservative function.

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[3] Corwin, THE TWILIGHT OF THE SUPREME COURT xvii, 178-79 (1934). Also see generally the doctrine of judicial restraint enunciated most forcefully by Justice Frankfurter's dissenting opinion in Baker v. Carr, 369 U. S. 186, 266-330 (1962).

[4] Hand, THE SPIRIT OF LIBERTY 164 (2d ed. 1953).

[5] Wesberry v. Sanders, 84 Sup. Ct. 526, 551 (1964).

[6] Viereck, CONSERVATISM REVISITED 42 (1962).

If the basic unit in the American government is the individual and if the Constitution is to have any meaning, then the Court has the duty of protecting individual rights against state power.[7] This the Court has done for racial minorities, religious minorities, and persons accused of criminal or subversive activity.[8] The Court has been the protector of the best traditions and ideals of America and has changed some Constitutional provisions from pious platitudes to enforceable rights.[9]

The question facing the Court in *Baker v. Carr*[10] was a relatively simple one: may a state deprive a citizen of an effective voice in his government? The Court recently decided in *Gomillion v. Lightfoot*[11] that political boundaries could not be drawn to exclude Negroes. This decision, together with the fact that no political

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[7] "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to; and is probably more strongly impressed on my mind by facts, and reflections suggested by them, than on yours which has contemplated abuses of power issuing from a very different quarter. Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince. . . . What use then may be asked can a bill of rights serve in popular Governments? I answer the two following which, though less essential than in other Governments, sufficiently recommend the precaution: 1. The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion. 2. Altho. it be generally true as above stated that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter source; and on such, a bill of rights will be a good ground for an appeal to the sense of the community." 5 *The Writings of James Madison* 269, 272-73 (Hunt ed. 1904).

[8] This has been the chief business of the Warren Court. Decision day June 22, 1964, includes cases protecting Negro sit-ins, a criminal defendant's right to counsel and a Communist party member's right to travel. For good measure, two free speech cases involving obscenity in books and films are included. 32 U.S.L. Week 4603-04 (U.S. June 22, 1964.)

[9] Compare the enforcement of Negro rights described in MYRDAL, THE AMERICAN DILEMMA (1944) with the enforcement of such rights after Brown v. Board of Ed., 347 U.S. 483 (1954).

[10] 369 U.S. 186 (1962).

[11] 364 U.S. 339 (1960).

solution to the problem was in sight, induced the Court to act.[12] Justices Frankfurter and White warned that no standards could be established, and they advised the Court not to enter the political thicket.[13] Justices Clark and Stewart, however, were willing to enter the political thicket; but they insisted on rational state action.[14] The majority represented by Mr. Justice Brennan did not fully wish to define this right, but, they did choose to use the equal protection clause.[15] Mr. Justice Douglas indicated that invidious discrimination is the test of equal protection. Thus Justice Douglas intimates that the standard is one man, one vote, unless a rational contrary policy may be shown. In this respect, Justice Douglas differs from the other judges. He states the essence of the problem when he says, "the question is, may a State weight the vote of one county or one district more heavily than it does another's."[16] The implication of this statement is that legislators represent people and not other entities; unless a difference in persons may be found, there may be no differences in representation. He points out clearly that sex and race—as bases for discrimination—are inadmissible by constitutional amendment. Whether age, occupation, education, wealth, or any external attribute may be used had not yet been decided. *Baker v. Carr* establishes that a citizen has a basic constitutional right to be represented and that state action in apportioning any legislature must be limited so as not to infringe on this right.

Where people are to be represented, the Supreme Court, in two later cases, set down the principle of one man, one vote. Thus in *Gray v. Sanders,* the Supreme Court held that in an election of officials responsible to a single constituency, the requirement was one man, one vote.[17] No other solution is possible in such a situation without giving one person, as an individual, more weight than another person. Justice Douglas pointed out that the 17th Amendment required Senators to be elected *by the people,* which means

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[12] "A state without the means of some change is without the means of its own conservation. Without such means it might even risk the loss of that part of the Constitution which it wished most religiously to preserve." BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 19-20 (1955).

[13] Baker v. Carr, 369 U.S. 186, 269-70 (1962).

[14] *Id.* at 251, 265 (For concurring opinions).

[15] *Id.* at 237.

[16] *Id.* at 244.

[17] "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." Douglas, J., 372 U.S. 368, 379 (1963).

that no other interest could be considered. Exactly the same position was taken by Mr. Justice Black in the multiple constituency case of *Wesberry v. Sanders*.[18] In that case, the question involved the inequalities of population in congressional districts. Instead of depending on the 14th or 15th Amendment, the Court based its opinion on Art. I, Sec. 2, of the United States Constitution which provides that "The House of Representatives shall be composed of members chosen every second year by the people of the several states." The provision that the election of Representatives be "by the people" was construed in the same manner as "by the people" in the *Gray* case. In both cases, the Court held that people were to be represented, and therefore no differences among the people were to be allowed. This decision requires that the democratic element must have representation in the government. Reading *Wesberry v. Sanders* together with *Gray v. Sanders* we find that whenever people are to be represented, they must be represented equally. In the *Gray* case, the requirement was that the Senators must be elected by the people. Every person must, therefore, be given an equal vote for a Senator.[19]

Thus the stage is set for the question of whether anything other than people may be represented in a legislature. If people were the only entities to be represented, then the Court would be required to answer one man, one vote. An examination of the American scene shows clearly that only people vote. We do not have any corporate elections for public office where shares vote. Even in rural areas, people, not acres, vote. A non-resident owner of substantial property is not allowed to be represented by a vote. Thus, only people vote; and unless some differences can be shown between voters, the only possible answer for the Court is one man, one vote.[20]

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[18] "It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House of equal numbers of people —for us to hold that, within the States, legislatures may draw lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others." Black, J., 84 Sup. Ct. 526, 533 (1964).

[19] *Supra,* note 17.

[20] It is recognized that in some local elections concerning special districts such as neighborhood redevelopment corporations or assessment districts votes may be distributed on the basis of property ownership. In such districts the external cost to be imposed on minority membership groups is directly related to property. Thus if cost to be imposed in an assessment district is based on frontage, it is only fair to let frontage vote. If all government expenditures were made by special districts, then we could adopt Mr. Harold Hunt's proposal of distributing votes

This decision, then, is the draconian pronouncement that would impair individuality and local initiative and is not required by the equal protection clause. Only by a close examination of the function of collective decision making can we determine whether equal representation can be accomplished by one man, one vote, or whether by granting other interests representation would permit greater individual advantages to some individuals than to others. It is clear that equal protection is a doctrine protecting the individual. The Court's decision would be an action in futility if persons having a lesser vote did not receive fewer advantages than persons having a greater vote. Secondly, we must examine whether the granting of one man, one vote, deters the local government from insuring full representation and protection to all persons.

In order to determine whether one vote is of value to the individual, we must analyze the nature of collective action. Basically, collective action is action by more than one person. Persons enter into collective action by agreement. In the non-political field, such agreement requires unanimous consent. A good example of collective action requiring unanimous consent is development covenants running with the land. Each party to the convenant is required to agree to any change of the convenant, and each party owning the land at the time of the contract is required to agree to the terms of the convenant. In a direct government requiring unanimous consent, no external cost could be imposed on any member of society without his consent. If, on the other hand, refusal to consent could be signified by a negative vote, and if some members had no vote, then external costs could be imposed on such members. They would certainly be in a worse position than persons with a vote. If most of our wants are supplied by agreements requiring our consent, than why do we engage in compulsory collective action? Most, if not all, government services could be supplied by non-compulsory methods if someone were willing to pay the cost. Another example may clarify the problem. In building and locating a road, the government decides where to place the road and through a judicial proceeding, purchases the land.[21] A private group could build the

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according to the amount of income tax paid. At least in such a proposal there is a direct relationship between each individual and his right to vote. Zisook v. Maryland—Drexel Neighborhood Redevelopment Corp., 31 Ill. 2d 570, 121 N.E. 2d 804 (1954); Bollens, SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES (1957).

[21] Again it is recognized that most land purchased by a government is purchased voluntarily; however, in such voluntary transactions both parties consider the possible jury verdict based on the highest and best use of the land by private persons. The jury in eminent domain pro-

same road, but it would cost them more. They would have to pay the owners of the right of way an amount equal to the full value to themselves of the road. Contrast the amount they would have to pay with the price the government would pay: the government would pay the owner of the right of way an amount equal to its present use. Thus, on a sale to the government, the owners could not collect more than the present value of the right-of-way, whereas on a sale to private parties, such owners could require payment of an amount equal to the value of the road to the private parties.[22] Thus, we can see that in many instances the cost of coming to agreement is so great that an individual benefits by agreeing to a rule requiring less than unanimous consent, even though such an agreement might result in external cost being imposed upon him without a commensurate benefit.

Once we enter into such a compact, we take a chance that others may take advantage of us. Thus, if we had a three man society with a rule that a majority governs, two of the parties could impose costs on the third without his receiving any benefit. This could be limited if the third party dealt with one of the other two parties to form a new coalition at a lesser price. For example, if all the parties were taxed one dollar, and the money was given to the other two members, they would each gain fifty cents. Our third member, however, could agree with any of the other two members to take only forty-nine cents or a lesser amount from either of the two members. Thus, the coalitions would be unstable. If, on the other hand, our member did not have a vote, he could not engage in the bargaining and would have to allow external costs to be imposed upon him. The question before every voter, then, is how may he prevent external cost, which will not benefit him, from being imposed upon him, or if such costs are to be imposed upon him, what other benefits may he derive from giving his consent? We are all familiar with vote trading and log rolling. In all such

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ceedings is forbidden to consider the value of the land to the government." The special value to the condemner as distinguished from others who may or may not possess the power to condemn has long been excluded as an element from market value." United States v. Cors, 337 U.S. 325, 333 (1949).

[22] Once the location of the road was fixed, any one of the sellers could hold out for an amount equal to the value of the road to the private group. If the seller wanted more than that amount the scheme for the road would be dropped. Once the location of the road is fixed, the seller could hold out for the full value of the road to the private group because the group could not purchase his particular section of a road from anyone else.

occurrences, people trade votes in a matter of lesser concern to themselves in order to get governmental programs in which they are interested. If such activity could be entered into, many programs of limited interest could not become law.[23] Again, since vote trading is used to accomplish such purposes, less than a full vote would limit the benefits an individual would receive. A second detriment would be that less than a full vote might allow external costs to be imposed upon such a person by coalition, whereas a full vote might have prevented passage—or at least minimized the damage. The purpose of this discussion is to show that in the political process, the coins of exchange are votes, and an uneven distribution of such coins is an unequal treatment of people.

The question then arises as to how to protect minorities from coalitions that, by the use of majority votes, could take advantage of such minorities. Some voters have secured protection by having more power placed in their hands. By so doing, the legislatures have not only protected less populated areas from being imposed upon by larger areas, but have allowed power to persons in less populated areas so that they are able to impose costs upon persons living in areas of greater concentration. The belief that the granting of this additional political power was necessary arises from the mistaken belief that granting the power to pass laws is the same as allowing a person a veto. A homely example concerning an assessment district may illustrate this point. Suppose the rule is that 60% of voters in the district must agree before the improvement is made. It cannot be said that 41% have any authority to impose costs on the 59%. The opposite proposition—that the 60% may impose costs on the 40% is, however, valid. Thus the 60% may require the 40% to expend money, notwithstanding the fact that the assessment may, in the opinion of the 40%, not be of benefit to them. The opposite is not true. The 41% cannot impose any cost on the 59%. In the event that the improvement is so valuable to the 59% that they are willing to bear the whole cost—or even more than 60% of the cost—they can purchase the additional votes from the remaining 41%. In such a case, some of the 41% will be approached with the proposition that if they vote for the improvement, the 59% will bear part, or all, of the cost. This same example can illustrate the value of the vote. Suppose under the same circumstances the persons representing the 41% objectors were divided into two groups: the first group having half a vote and

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[23] Examples of such laws are those concerning particular cities and professions. Probably the work of most legislatures is devoted to considering the pleas of special groups.

the other group having one and one-half votes. Suppose the 59% of the voters had agreed that the improvement would be of value to them, while 41% believed that the assessment would be of no value. It is clear that each person having one and one-half votes could command three times the price for his vote than the person having one-half vote. This difference in price is the essence of the reapportionment decisions. The Court has held that the government may not give one person a larger vote—a greater economic good—than it gives to another person. It holds that the Equal Protection Clause—at least for the purposes of the distribution of votes —permits no distinction among people. This notion of one man, one vote, being required by an Equal Protection Clause is not a radical doctrine; it was applied in Nebraska as early as 1916.[24]

Now we turn to the second criticism of the Court's decision. Basically, the criticism is based on the false premise that the Court has been trying to establish democratic majoritarianism as the only form of government. The critics of the Court have complained that there was no purpose in equalizing the vote as long as gerrymander-

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[24] "The principal of our Constitution of absolute equality in governmental matters is recognized in the legislation which requires that the great seal of the state shall contain the words 'Equality before the law.' It must follow that the legislature has no absolute and unlimited power to so distribute the control of county affairs that the voters in one of five districts of the county can control the county affairs. . . . There can be such a number of districts in the county and those districts can be so appointed as to meet every legislative purpose, and at the same time give practically equal representation to all of the people." State v. Moorhead, 99 Neb. 527, 535, 156 N.W. 1067, 1069 (1916). Here the Supreme Court of Nebraska declared a statute unconstitutional that provided for unequal commissioner districts in Douglas County. The law provided for one special district surrounding the county. The purpose of the law was to insure a rural representative on the county board by weighting rural votes more heavily than urban votes. The application by the Nebraska Supreme Court of the equal protection rule to agencies other than the legislature raises the question of the applicability of the rule of one man—one vote to three other agencies of Government. In Nebraska, the Supreme Court and the Board of Regents of the University of Nebraska are districted along the lines of the 1920 Congressional districts. See NEB. CONST. art. V, § 5; art. VII, § 10. These districts have never been reapportioned and now contain substantially unequal populations. The other agency, the Railway Commission, had its districts apportioned by L.B. 406 71st Neb. Leg. Sess. (1963). Whether this apportionment is constitutional may be ascertained by computing the numbers of persons in each district. At least two of these bodies, the Board of Regents and the Railway Commission, have some legislative power. As to the present Legislative apportionment, even if it is found to be invidiously discriminatory, no new apportionment is required for the legislators

ing, the seniority system, or any other limitation of majority rule exists.[25] These critics have missed the point of the Court's protection of individual rights and property. This decision does not prevent the establishment of a system where a majority as large as 90% may be required to impose external costs on individuals. The Court does not prevent a system where representatives are elected at large, by districts, by occupation, or by proportional representation. The Court in fact encourages experimentation with the caveat that each individual qua individual be given an equal voice in the distribution of the public expenditures.[26] Political commentators who argue that the decision will benefit one group or another, or who claim that the Court's decision was for the purpose of helping one kind of policy or another, are beside the mark. It is certainly beyond the powers of the existing tools of social science, or the existing agreement on values, for anyone to claim that one distribution of power will lead to a better government than another. Justices Harlan and Frankfurter are correct in stating that no standards can be constructed that would declare 51% majority rule better than a system that would require a greater consensus. These Justices are incorrect when they state that the Court's present position requires the Court to enter the political thicket. These Justices, and other critics of the Court, are wrong when they fail to realize that the Court's decision is not based on any notions concerning an ideal system of political representation,

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elected to four-year terms. The Court approved a delay of four years 71st Neb. Leg. Sess. (1963). Whether this apportionment is constitu- in Maryland v. Tawes, 84 Sup. Ct. 1442 (1964). The Court, however, does require either a reapportionment every 10 years or a very good explanation. Reynold v. Sims, when it said: "While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect."

[25] Neal, *Baker* v. *Carr; Politics in Search of Law,* 1962 Supreme Court Review, 252 (1962).

[26] "Determining the size of its legislative bodies is of course a matter within the discretion of each individual State. Nothing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums on the size of state legislative bodies." Reynold v. Sims, 84 Sup. Ct. 1362, 1392 n. 63 (1964).

but that it is based upon the realization that each individual has an equal and valuable interest in his right to vote.[27]

If the Court had refused to act, it would have placed its imprimatur of approval on the existing distributions of political power which could not in most instances claim any rational basis.[28] The Court chose not to enter the political thicket by approving the existing distributions of political power or by requiring any particular distribution of political power. Instead it upheld the principle that within any proposed political system, every citizen must be treated equally.

If the dangers to be avoided are democratic majoritarianism and big city machines, then the solution does not lie in denying equal weight to each citizen's vote. The requirement of one man, one vote, does not deter the construction of any desired method of apportionment. Thus De Grazia, in his *Essay on Apportionment and Representative Government* strongly criticizes the Court's interference in the political process. Nevertheless, the complicated scheme he proposes for the representation of all important interests in future state legislatures can be easily accomplished within the standards imposed by one man, one vote.[29]

His proposal assumes a legislature of 100 seats divided as follows: community seats, functional seats, and free seats. The districts of each of the community representatives would be community or governmental regions consisting of not less than 1/40 of the population.

The Court's opinion makes specific reference to the use of local government boundaries and the creation of floterial districts. Thus, in large cities, wards, neighborhoods, or administrative districts could be the basis of community districts, whereas in less populated areas, counties, geographic or economic regions would make up the community districts. If the districts were not on equal population,

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[27] Baker v. Carr, 369 U.S. 186, 269 (1962). Justice Stewart's dissent states: "Even with legislative districts of exactly equal voter population, 26 per cent of the electorate (a bare majority of the voters in a bare majority of the districts) can as a matter of a kind of theoretical mathematics embraced by the Court elect a majority of the legislature under a simple majority electoral system. Thus, the Court's constitutional rule permits minority rule." WMCA, Inc. v. Lomenzo, 84 Sup. Ct. 1418, 1433 n. 12 (1964).

[28] See Justice Harlan's defense of the Tennessee Apportionment in Baker v. Carr, 369 U.S. 186, 340 (1962).

[29] DE GRAZIA, ESSAY ON APPORTIONMENT AND REPRESENTATIVE GOVERNMENT 165-75 (1963).

a few might be given more than one representative, whereas others might be combined in floterial districts.[30] In fact, the Court would allow some variation in the population of such districts in order to permit the participation of local government. Such variations in population would not be invidiously discriminatory, unless the variations were part of a scheme to benefit one particular group of voters.[31] Functional representatives would represent occupational groups. De Grazia would allot 20 seats to this grouping, with one group representing miscellaneous persons. There is no reason for the apportionment of persons in such grouping to be

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[30] "The term 'floterial district' is used to refer to a legislative district which includes within its boundaries several separate districts or political subdivisions which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned." Davis v. Mann, 84 Sup. Ct. 1453, 1458 n. 2 (1964). The Court approves the use of floterial districts in apportionments which provide for representation of local political subdivisions. The Court explains the use of such districts by describing how they are used. "As an example, the City of Lynchburg, with a 1960 population of 54,790, is itself allocated one seat in the Virginia House of Delegates under the 1962 apportionment plan. Amherst County, with a population of only 22,953, is not given any independent representation in the Virginia House. But the City of Lynchburg and Amherst County are combined in a floterial district with a total population of 77,743. Presumably, it was felt that Lynchburg was entitled to some additional representation in the Virginia House, since its population significantly exceeded the ideal House district size of 36,669. However, since Lynchburg's population did not approach twice that figure, it was apparently decided that Lynchburg was not entitled, by itself, to an added seat. Adjacent Amherst County, with a population substantially smaller than the ideal district size, was presumably felt not to be entitled to a separate House seat. The solution was the creation of a floterial district comprised of the two political subdivisions, thereby according Lynchburg additional representation and giving Amerst County a voice in the Virginia House, without having to create separate additional districts for each of the two political subdivisions." Davis v. Mann, 84 Sup. Ct. 1453, 1458 n. 2 (1964).

[31] "A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. . . . In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities gerrymandering. However, permitting deviations

unequal inasmuch as any groups that would be too large could be subdivided or amalgamated as required. For example, day laborers might be represented in a group of building trade workers or in a group of packinghouse workers. Doctors, lawyers, etc. might be entitled to their own representation, or they might be represented in an amalgamated professional group. Again some variation would be allowed under the Supreme Court decision as long as no systematic attempt were made to increase one type of representation at the expense of another.[32] The third group recommended by De Grazia was the free group. This would be divided into equal population districts, but large metropoliton areas would elect their representatives by a system of proportional representation whereas less populated areas would be divided into single member districts.[33]

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from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body." Reynold v. Sims, 84 Sup. Ct. 1362, 1391 (1964).

[32] Davis v. Mann probably explains invidious discrimination better than any of the other Reapportionment cases. In that case the Court disallowed discrimination because of employment. Previously, in the *Reynolds* and *WMCA* cases, the Court has outlawed place of residence as a basis for discrimination. At the same time the Court in the *Reynolds* case approved of some variation in districts if such variations allowed local governmental subdivisions to be represented. Thus, we see that variations are allowable if they are caused not for the purpose of discriminating against any citizen but only because of an attempt to more perfectly represent the citizen. Of course, the Court issues the caveat that such variations in districts to allow for political subdivision representation may not submerge the equal population requirement. Presumably then, fairly large variations in districts could exist if an examination of the apportionment showed no discrimination against any class of voter, such as urban voters, and substantial equality existed among the districts.

The Court also found that districts based on equal population, citizen population, or voting population were permissible and would not constitute invidious discrimination when it said: "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." Reynolds v. Sims, 84 Sup. Ct. 1362, 1391 (1964).

[33] See Neal, note 25 *supra;* "Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts." Reynolds v. Sims, 84 Sup. Ct. 1362, 1389 (1964).

This divergent treatment would be in recognition of the fact that cities are heterogeneous, whereas rural areas are usually homogeneous. Such different treatment would not violate the Equal Protection Clause inasmuch as each voter would still have one vote and would thus protect the legislature from big city control. No one party can control all of the representatives from a district if such representatives are elected by proportional representation.

The problem, then, of curbing democratic excesses or of providing working majorities is not related to the problem of the weight afforded to the individual voter. If a society wishes to enhance majority party representation, it need only increase the size of the districts from which representatives are elected. The extreme limit is an at-large election. In large single district systems majority parties have the advantage of what is known as the cube rule. The effect of this rule is that for every one per cent increase in popular votes over 50%, the majority party receives in seats an amount greater than that percentage in representatives. Thus, if the majority party receives 53% of the vote, it will receive 59.2% of the seats.[34] The effects of this rule have, in fact, doomed third parties in England and in the United States. The cube rule also explains the unusually large majorities garnered by the winning presidential candidate in the electoral college. Thus Hoover received nearly 40% of the popular vote but less than two per cent of the electoral vote. If Congressional seats had been distributed in the same manner as electoral votes in 1936, the Republican Party would have ceased to exist. On the other hand, if Congressional seats would have been distributed by proportional representation, the Republican Party would have had at least 40% of the seats in the House of Representatives.[35] Thus we can see that the movement from unanimity to simple majoritarianism does not depend upon granting some voters more political power than other voters. Instead, it depends upon the construction of the political system.

Systems are available that impose even greater restraints on the majority than multiple representative districts based on pro-

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[34] DE GRAZIA, ESSAY ON APPORTIONMENT AND REPRESENTATIVE GOVERNMENT 127 n.22 (1963). The equation of the Cube Law reads $Y=\frac{3x^3}{3x^2-3x+1.}$

[35] Under such an apportionment the Republicans would have had about seven seats instead of the 89 that they actually received. Under proportion representation they would have had 173 seats. Historical Statistics of the United States, Colonial Times to 1957, at 691.

portional representation. Probably the most restrictive system is that which would require the concurrence of a majority of representatives elected from two separate constituencies.[36] Such constituencies could be created from the same population by dividing the population for one constituency on a random number basis and by dividing the population on an economic basis for the other constituency. Under such a system, assuming one man, one vote, the minimum number of voters required to elect a majority in each house could elect seven-eights of the members in a single house legislature. For example, the minimum number of voters necessary to elect a majority in one house is slightly greater than one-fourth of the voters in a single constituency, but seven-sixteenths of the voters are required to elect the majority in both houses. Seven-sixteenths of the total population could, if properly distributed, elect seven-eighths of a one-house legislature. Thus the existence of a two-constituency system is theoretically equal to a requirement that every bill that passes in a one-house legislature based on equal districts and equal voting rights be passed by a seven-eighths majority.[37]

With all of these tools, it is clear that any legislature may protect any minority within its jurisdiction from being imposed upon by a rapacious majority. One of the functions of requiring consensus is to prevent a majority from taking from a minority without granting equal benefit to such a minority. This improper

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[36] The Court approved of multiple constituency apportionment in its opinion. Reynolds v. Sims, 84 Sup. Ct. 1362, 1389 (1964). See Note 33 *Supra.*

[37] For a mathematical proof of this proposition see BUCHANAN & TULLOCK, THE CALCULUS OF CONSENT at 241-42 (1962), which is as follows: "We have no historical experience with systems which involve representation through two houses that are completely diverse in their constituencies, and therefore we cannot check our conclusions by examining data from the real world. However, it is possible to get the same general result by another line of reasoning, which may serve as a partial check. In representative government the negotiating is done by the representatives. Each representative should vote for any measure or combination of measures which will be approved by a majority of his constituents, and should attempt to arrange bargains satisfactory to such a majority. Given the arrangements of the constituencies with complete diversity, this simple policy on the part of each representative would lead to the same result that we obtained by analyzing the coalition formation in the two-house legislature. This is because the constituents for a single representative in each house include members of all constituencies in the second house, randomly distributed. The end result, in a system in which the representation is like that shown in Figure 21 but in which the square is 199 by 199, would be that in the

action in the case of the three-man society exemplifies the improper action by the majority. A political constitution should protect all citizens from such behavior by a majority. Any further protection is at the expense of other citizens and is constitutionally prohibited.

The Court, therefore, did not establish equalitarian majoritarianism, nor did it stifle individuality and local initiative. The Court did its constitutional, conservative duty of protecting the individual liberties of each citizen and of guaranteeing that each citizen will have the same rights as every other citizen.

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mean case approximately 17,500 out of the 39,601 voters would have to approve a measure before it was passed. Of these about 2,500 would be situated so that their votes would be necessary in both houses, and these voters would tend to be suitably rewarded for their luck.

"Compared with the 10,000 voters necessary to control a one-house representative assembly, 17,500 is a distinct 'improvement'—although it is still less than a majority of the voters. 17,500, in fact, is the number of voters that would be needed to pass a measure through a one-house legislature if a ⅞ legislative majority were required. Requiring a ¾ legislative majority in both houses would mean that a little over 24,000 voters would be necessary to pass a measure, of whom almost 6,000 would be required in both houses. This is more than a majority and better than could be obtained by requiring unanimity in one house. That is to say, the over-all result would reflect a more inclusive 'rule' than would the requirement of legislative unanimity in a one-house legislature, where each representative is elected by a simple majority of constituents." Figures 21 and 22 may be found on pp. 238 and 241 of this book. The book has a very interesting analysis of the value of a vote and compares political activity to market analysis. Anyone interested in the construction of possible methods of representation should read this book.

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