THE SUPREME COURT AND VOTING RIGHTS: A MORE COMPLETE EXIT STRATEGY

GRANT M. HAYDEN*

To the great relief of many observers, the Supreme Court has recently become more deferential to state legislatures with respect to their political redistricting plans. The only problem is that the Court appears to be in no mood to revisit some of the cases that got it entangled in the political thicket to begin with—the ones rigorously applying the one person, one vote standard. Indeed, it recently issued a summary affirmance of a lower court decision that tightened up its already exacting standards regarding population equality. As a result, the Court's partial retreat from politics is doing more harm than good, as it is abdicating its responsibility to protect minority voters but leaving certain constitutional rules intact that limit the ability of Congress or the states to do so. For that and other reasons, the Court should make its exit from politics more complete by relaxing its application of the one person, one vote requirement in many situations.

* Professor, Hofstra University School of Law. B.A., M.A., University of Kansas; J.D., Stanford Law School. I would like to thank Joanna Grossman and Bill Marshall for their comments on this piece.

INTRODUCTION

Over forty years ago, the Supreme Court ignored Justice Harlan's warning about entering the political thicket and, in *Baker v. Carr*,[1] found that population disparities between state legislative districts presented a justiciable claim under the Equal Protection Clause. That tentative step into politics was quickly followed with a prescription for remedying the disparities—the one person, one vote standard. Thereafter, state senators and representatives, as well as members of Congress, had to represent equal numbers of people within a state. State governments were remade, and the one person, one vote standard became more popular than any of the Warren Court's other civil rights pronouncements.

But over time, Justice Harlan's warning began to look more prescient. The Supreme Court tried to limit judicial intrusion into political affairs by strictly applying the one person, one vote standard, leaving little room for the exercise of judicial discretion. But strictly applying the standard backfired: if anything, it actually served as a judicial entree into political disputes. The Supreme Court also began to intervene in political disputes completely unrelated to district size. While it started off intervening on behalf of those "discrete and insular" minorities who were otherwise shut out of the political system,[2] it soon expanded the scope of its involvement. By the 1990s, judicial intrusion into politics became a full-fledged invasion in a series of racial redistricting cases, and, of course, culminated in 2000 with *Bush v. Gore*.[3]

While many observers viewed this sort of judicial meddling in political affairs as quite troubling, the Supreme Court never seemed to get the message. But with *Bush v. Gore*, the Court may have reached a tipping point. In the series of redistricting cases afterward, it appears as though the Court is pulling back a bit, if not outright retreating, from second-guessing state legislatures. The only problem is that the Court seems to be in no mood to revisit some of the cases that got it involved in the first place—the ones rigorously applying the one person, one vote standard.

1. 369 U.S. 186 (1962).
2. *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938).
3. 531 U.S. 98 (2000).

Indeed, instead of relaxing its strict application of the standard, the Supreme Court just took a step in the opposite direction. For years, the Court insisted that congressional districts within a state needed to have exactly the same number of people in them, while state legislative districts were allowed to deviate up to ten percent from the ideal district size, even more so if suitably justified. But at the end of June 2004, the Court summarily affirmed a three-judge court's decision that effectively eliminated the ten percent "safe harbor" for state legislative districting, signaling, if anything, a tightening of its already exacting standards.[4] As a result, its partial retreat from politics is doing more harm than good, as the Court is abdicating responsibility to protect minority voters but leaving certain constitutional rules intact that limit the ability of Congress or the states to do so.

The thesis of this Article is that the Supreme Court should relax its application of the one person, one vote requirement in many situations. Part I discusses some of the background for the standard, as well as the justifications offered for it and for its strict application to redistricting plans. Part II traces the recent history of judicial intervention in politics, culminating in *Bush v. Gore*. Part III describes some of the Court's more recent decisions and uses them to argue for a relaxation of the application of the one person, one vote standard.

I. APPLICATION OF THE ONE PERSON, ONE VOTE STANDARD

A. Background of the One Person, One Vote Standard

The story of the one person, one vote standard is a familiar one.[5] In order to preserve and consolidate their political power, state legislators refused to redraw political boundaries in the face of

4. *See* Cox v. Larios, 124 S. Ct. 2806, 2808 (2004). The summary affirmance was accompanied by a concurrence and a dissent. *See id.* at 2806 (Stevens, J., concurring); *id.* at 2809 (Scalia, J., dissenting).

5. *See* GORDON E. BAKER, THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT (1966); ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968); ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION (1965); REPRESENTATION AND MISREPRESENTATION: LEGISLATIVE REAPPORTIONMENT IN THEORY AND PRACTICE (Robert A. Goldwin ed., 1968); Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589, 1596–99 (2004) [hereinafter Hayden, *Minority Representation*]; Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 217–25 (2003) [hereinafter Hayden, *False Promise*].

significant demographic changes over the first half of the twentieth century.[6] By the middle of the century, there were large (and growing) population disparities between statehouse districts and between congressional districts within the same state.[7] As a result, voters in the larger (mostly urban) districts generally found themselves with less political power than their counterparts in smaller (mostly rural) districts.[8] Since state legislators were never in a mood to redistrict themselves or members of their parties out of office, a political solution to the problem was not forthcoming.

After initially balking at the problem,[9] the Supreme Court entered the political thicket with *Baker* by declaring that the malapportioned state legislative districts presented a justiciable claim under the Equal Protection Clause.[10] Soon thereafter, the Court settled on the one person, one vote standard as its baseline of political equality.[11] It then applied that standard to state legislative districts in *Reynolds v. Sims*[12] and to congressional districts in *Wesberry v. Sanders*.[13]

Over the next few decades, the exacting demands of the new standard became apparent. Not content with eliminating the enormous differences in district sizes that existed before *Baker*, the Supreme Court set its sights on districting plans that involved much smaller deviations from its equiproportional ideal. It essentially adopted a "zero tolerance" approach to congressional district size: districts within the same state must be as close to equally sized as practicable.[14] In practice, this led the Court to strike down a New Jersey plan with less than a one percent difference (.6984%, to be exact) in the population of its largest and smallest districts.[15] Lower courts have struck down congressional districting plans with even

6. *See* BAKER, *supra* note 5, at 24–31; MCKAY, *supra* note 5, at 49–53.

7. *See* BAKER, *supra* note 5, at 82 tbl.11 (listing the range of variation for congressional districts in selected states); MCKAY, *supra* note 5, at 46–47 (listing the range of variation for state legislative districts).

8. *See* BAKER, *supra* note 5, at 48–51; MCKAY, *supra* note 5, at 56–57.

9. *See* Colegrove v. Green, 328 U.S. 549, 551 (1946).

10. 369 U.S. 186, 209–10 (1962).

11. *See* Gray v. Sanders, 372 U.S. 368, 381 (1963) ("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.").

12. 377 U.S. 533, 565 (1964).

13. 376 U.S. 1, 7–8 (1964).

14. *See id.*

15. *See* Karcher v. Daggett, 462 U.S. 725, 727–28 (1983); *see also* Kirkpatrick v. Preisler, 394 U.S. 526, 528–29 (1969) (rejecting a Missouri districting plan that involved a 5.97% maximum deviation).

smaller deviations.[16]

For decades, state and local districting plans were given a bit more leeway—with up to ten percent maximum deviations allowed without justification,[17] and slightly greater ones when justified by "neutral" criteria such as a desire to create districts that were compact, contiguous, or respected existing legal boundaries.[18] That changed, however, with the Court's summary affirmance in *Cox v. Larios*.[19] *Larios* involved a one person, one vote challenge to the Georgia state legislative reapportionment plan enacted in the wake of the 2000 Census.[20] The Georgia General Assembly, dominated by Democrats, had adopted a plan designed to protect Democratic incumbents and to protect rural Georgia and inner-city Atlanta against the loss of representation that would accompany their declining populations.[21] Under the plan, "[t]he most underpopulated districts were primarily Democratic-leaning and the most overpopulated districts were primarily Republican-leaning."[22] The plan, however, had a maximum deviation of 9.98%, which was thought to be within the ten percent safe harbor.[23]

After a four-day bench trial, the district court struck down the state districting plan as a violation of the one person, one vote principle.[24] The court found that state plans with less than ten percent

16. *See, e.g.*, Vieth v. Pennsylvania, 195 F. Supp. 2d 672, 675–76 (M.D. Pa. 2002) (striking down a congressional districting plan with an ideal district size of 646,371 or 646,372 because of a nineteen-person deviation between the largest and smallest districts).

17. *See* Brown v. Thomson, 462 U.S. 835, 842 (1983) ("[The Court's] decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations."); *see also* Connor v. Finch, 431 U.S. 407, 418 (1977) (stating that 16.5% and 19.3% deviations "substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments"); Gaffney v. Cummings, 412 U.S. 735, 751 (1973) (stating that a maximum deviation of eight percent did not make a prima facie showing of invidious discrimination); White v. Regester, 412 U.S. 755, 764 (1973) ("[W]e cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9% when compared to the ideal district.").

18. *See* Mahan v. Howell, 410 U.S. 315, 324–25 (1973) (upholding a Virginia state redistricting plan with a maximum deviation of 16.4% on the basis of the state's interest in preserving the integrity of political subdivision boundary lines), *modified*, 411 U.S. 922 (1973).

19. Cox v. Larios, 124 S. Ct. 2806, 2806 (2004).

20. *See* Larios v. Cox, 300 F. Supp. 2d 1320, 1321–22 (N.D. Ga. 2004), *aff'd*, 124 S. Ct. 2806 (2004).

21. *See id.* at 1325.

22. *Id.* at 1326.

23. *See id.* at 1326–27.

24. *See id.* at 1322.

deviation were not immune from constitutional attack; rather, the ten percent threshold merely serves as a way for allocating the burden of proof.[25] Plans under the threshold were only presumptively constitutional.[26] And in this case, the plaintiffs successfully rebutted that presumption by proving that the plan was not "free from 'any taint of arbitrariness or discrimination.' "[27] The plan, according to the court, was not driven by any "traditional redistricting criteria such as compactness, contiguity, and preserving county lines."[28] The attempt to preserve the political power of the declining rural and urban areas at the expense of the growing suburban Atlanta was at odds with much of the Supreme Court's jurisprudence on the subject, and the attempt to protect incumbents was discriminatory for it was only directed at Democratic incumbents.[29] The redistricting plan, then, violated the Equal Protection Clause.

The Supreme Court summarily affirmed the district court opinion.[30] In a concurrence, Justice Stevens noted that "the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength."[31] He was most worried about the manipulation of district size for partisan advantage, which puts the affirmance in tension with *Vieth v. Jubelirer*,[32] decided just a few weeks before.[33] The issue of partisan gerrymandering, and reconciling *Larios* and *Vieth* on that front, is beyond the scope of this Article. Important for my purpose, however, is that the Court reaffirmed its belief in the power of the one person, one vote standard, and actually tightened its application, at a time when it appears to be extracting itself from the political process in other cases.

While an application of the standard allowing ten or fifteen percent deviations might seem reasonable in light of its more ruthless application to congressional districts, such deviations are minuscule when compared to those that prompted the Supreme Court to step into the business of monitoring district size. And assessing this rather precise application of the equiproportional standard means coming to grips with the scope of the historical malapportionment problem.

25. *See id.* at 1340.
26. *See id.*
27. *See id.* at 1341 (quoting Roman v. Sincock, 377 U.S. 695, 710 (1964)).
28. *See id.* at 1341–42.
29. *See id.* at 1338–39.
30. Cox v. Larios, 124 S. Ct. 2806, 2806 (2004).
31. *See id.* at 2808 (Stevens, J., concurring).
32. 541 U.S. 267 (2004).
33. *Cox*, 124 S. Ct. at 2808–09 (Stevens, J., concurring).

The population disparities at issue in cases like *Baker* and *Reynolds* were on the order of nineteen to one and forty-one to one.[34] For example, in the Alabama districts at issue in *Reynolds*, for example, Jefferson County, with a population of 634,864, had the same number of state senators (one) as Lowndes County, with a population of merely 15,417.[35] And the districting plans attacked in *Baker* and *Reynolds* were not outliers—many other states had population disparities that were just as significant.[36] The malapportionment problem, then, did not involve state plans with subtle variations in district size—the variations were enormous and, just as important, unlikely to do anything but grow larger in the future. But did this immense problem really demand such a precise solution?

B. Justifications for the One Person, One Vote Standard

There are several justifications offered for the one person, one vote standard. Some of them, however, have not proven to be well-founded, and the rest do not demand such precise adherence to the standard. I take up some of the most obvious justifications in turn (recognizing, of course, that this somewhat oversimplifies possible overlap and relationships among them).

The first justification for the standard is the historical one. State legislators in charge of redistricting refused to redistrict in the face of tremendous demographic change because it would be against their own political interests (and those of their constituents).[37] As time passed, a smaller and smaller minority of a state's population selected a majority of the state representatives, and thus controlled both the redistricting process (or the lack of it) and other policy decisions that had disproportionate geographic effects. As a result, the needs of those who lived in the more populous districts were overlooked by the state legislatures and Congress. There was a political problem that seemed to be incapable of a political solution.

This historical problem has been described in different ways. At the time, it was described in terms of geographic or racial

34. The districts at issue in *Baker*, for example, gave rise to differences in voting power of nineteen to one, *see* Baker v. Carr, 369 U.S. 186, 245 (1962) (Douglas, J., concurring), and those in *Reynolds* up to forty-one to one, *see* Reynolds v. Sims, 377 U.S. 533, 545 (1964).

35. *See Reynolds*, 377 U.S. at 546.

36. *See* MCKAY, *supra* note 5, at 46–47 (listing the range of variation for state legislative districts). Vermont, actually, took the prize with a disparity of close to one thousand to one. *See* PAUL T. DAVID & RALPH EISENBERG, DEVALUATION OF THE URBAN AND SUBURBAN VOTE 3 (1961).

37. *See* BAKER, *supra* note 5, at 24–31; MCKAY, *supra* note 5, at 49–53.

discrimination (the tyranny of a largely white, rural minority over a more ethnically diverse urban majority), or in broader terms of the failure of majoritarian politics (as increasingly small political minorities came to control the composition of legislative bodies). These are not inconsistent explanations—they merely highlight some of the different ways of viewing the same problem. But they also help show that, from almost any point of view, the historical malapportionment problem did not demand such an exacting solution.

Whether viewed as a problem of discrimination or, more broadly, as an example of political market failure, these large population disparities do not inevitably lead to a solution that imposes strict population equality. When analyzed in terms of geographic discrimination, it was clear that malapportionment allowed those in over-represented rural areas to commandeer a disproportionately large share of public resources.[38] That ended once the large disparities were eliminated.[39] But there is no evidence to suggest that it would have taken strict equality to eliminate the resource allocation issues. And, given the enormous variations that existed prior to *Reynolds* and *Wesberry*, one can imagine that merely trimming down the differences to something like two to one or three to one would have caused a substantial redistribution of public resources.

The same can be said when viewing malapportionment as a form of discrimination on the basis of party membership (against Democrats) or policy preferences (against liberals). The rounds of redistricting in the wake of *Baker*, *Reynolds*, and *Wesberry* were expected to result in substantial gains for Democrats and, more

38. *See* BAKER, *supra* note 5, at 48–51 (describing examples of state inaction on urban problems); ANDREW HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 95–99 (rev. ed. 1964) (discussing the impact of malapportioned seats on Congressional decisions); MCKAY, *supra* note 5, at 56–57 (describing instances where state legislatures in Illinois, New York, and Tennessee acted in ways that disadvantaged those in the states' more populous areas).

39. *See, e.g.*, Stephen Ansolabehere & James M. Snyder, Jr., *Reapportionment and Party Realignment in the American States*, 153 U. PA. L. REV. 433, 434 (2004) (recognizing the variation in policy preferences between urban and suburban voters and the shift in political weight after court-ordered reapportionment); Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 90–94 (1984) (reviewing studies about the impact of state reapportionment on expenditures in suburban and urban areas, minority representation, and party strength); Nathaniel Persily et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1321–42 (2002) (examining the effect of the reapportionment decisions on various aspects of representation).

generally, to produce more liberal policy outcomes on social issues.[40] But while there was some redirection of public resources to newly-empowered urban areas, a seismic shift in favor of more Democratic or liberal policy outcomes did not occur.[41] This was primarily because policy preferences and partisan voting behavior among suburban and urban voters varied in different parts of the country.[42] In the Northeast and Northcentral parts of the country, urban voters were much more Democratic than their rural counterparts, but in the South and West, the rural areas were more Democratic.[43] And while urban voters in the Northeast and Northcentral were generally more liberal on social welfare issues than those in rural areas, there was little difference between those groups in the South and West.[44] Because a commitment to exact equalization across districts did not result in tremendous gains for Democrats or liberals, it is unlikely that a less exacting commitment would have affected the distribution of partisan or policy outcomes any differently.[45] Indeed, it may not have affected them at all, given that describing the malapportionment problem as a form of discrimination against Democratic or liberal policy interests was mistaken from the start.

Describing the malapportionment problem in terms of race discrimination also does not demand a remedy of precise equality. The under-representation of the urban vote can be redescribed as the under-representation of the racial or ethnic minority voters who lived in the cities.[46] But prior to passage of the Voting Rights Act of 1965, minority vote *dilution* was not as much of an issue: minority voters were kept out of the political process more directly—they were prohibited from access to the polls.[47] And while the reapportionment revolution did empower voters on issues of civil rights (for urban voters across the nation did have more liberal attitudes on racial

40. *See* Ansolabehere & Snyder, *supra* note 39, at 434–35.

41. *See id.*

42. *See id.* at 436.

43. *See id.* at 442.

44. *See id.* at 448.

45. And even if it did affect the distribution of partisan power in some slight way, it is unclear how this is different from the role of district shape in reallocating political power.

46. *See* MCKAY, *supra* note 5, at 55–58; Hayden, *Minority Representation*, *supra* note 5, at 1597–98; C. Herman Pritchett, *Representation and the Rule of Equality*, *in* REPRESENTATION AND MISREPRESENTATION: LEGISLATIVE REAPPORTIONMENT IN THEORY AND PRACTICE 1, 3 (Robert A. Goldwin ed., 1968).

47. *See* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 10 (1992); STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969 5 (1976).

politics),[48] there is little evidence that a less exacting remedy would have done the job. In addition, as discussed below, the requirement of precise equality may actually stand in the way of more creative solutions to both urban problems and the continuing problem of minority representation.

So while malapportionment may have been viewed in terms of discrimination on the basis of geography, party, or race, none of those descriptions of the problem demanded a precise solution. To be sure, the enormous variations in district size did work to politically disadvantage certain groups. But there is little evidence that absolute equality was the only answer to these concerns about discrimination.

The historical problem may also be described more broadly as a failure of majoritarian politics. The Supreme Court, and many commentators at the time, often measured malapportionment not in terms of maximum deviation from an ideal district size (looking at the largest and smallest districts), but in terms of the theoretical possibilities of minority control.[49] That is, they looked at district sizes across the state and, assuming those from over-represented districts voted together, described the smallest possible minority of people who controlled a bare majority of representatives in the statehouse. In *Reynolds*, for example, the Court noted that "only 25.1% of the State's total population resided in districts represented by a majority of the members of the Senate, and only 25.7% lived in counties which could elect a majority of the members of the House of Representatives."[50] That such a small minority could theoretically control the state legislature was seen as problematic in itself, regardless of whether particular interest groups were over-represented or under-represented.

But, again, while the gross disparities at issue called for some resolution, they did not call for such an exacting one. It is possible that the type of political logjam that existed as a result of decades-long failure to redraw district lines could have been effectively broken up with a simple pronouncement by the Supreme Court that the constitutional right to vote did not tolerate districts with such large

48. *See* Ansolabehere & Snyder, *supra* note 39, at 448.

49. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 545 (1964) (describing the problem in terms of the possibility of minority control); MCKAY, *supra* note 5, at 46–47 (listing the minimum percentage of the population that can elect a majority of representatives in each of the fifty states' legislative bodies). McKay discusses the common use of this measure of quantitative dilution, known as the Dauer-Kelsay measure of representativeness, and its use by the Supreme Court. *See* MCKAY, *supra* note 5, at 43–45.

50. *Reynolds*, 377 U.S. at 545.

population differences.[51] At the very least, the Court could have announced the one person, one vote standard, but remained more vague on the details—such as who makes up the apportionment base and how closely districts must align with the ideal district size.[52] Indeed, the historical malapportionment problem appears to be one of those circumstances when the Court would have been better off remedying a wrong without devising a standard for what, exactly, is right.[53]

In addition to remedying the historical malapportionment problem, a second justification for the one person, one vote standard, and for such strict adherence to it, is that it is a neutral or objective way of distributing political power.[54] The Supreme Court's initial decision to stay out of the malapportionment problem was driven by a concern about judicial meddling in political affairs.[55] The one person, one vote standard was thought to be neutral in the sense that it appears to favor no particular political interest. The judges applying the standard are thereby prevented from imposing their own substantive political beliefs in enforcing the constitutional standard.

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51. Luis Fuentes-Rohwer points out that the early reapportionment cases provided (correctly, in his view) just such a standard; only later did the Court become more inflexible. *See* Luis Fuentes-Rohwer, Baker*'s Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality,* 80 N.C. L. REV. 1353 (2002); *see also* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 47–72 (2003) (arguing for "unmanageable" standards that would provide state and local governments with more flexibility in redistricting); Richard L. Hasen, *The Benefits of "Judicially* Un*manageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469 (2002) (arguing that the majority and dissenters in *Baker* failed to appreciate the benefits of judicial unmanageablity).

52. In a sense, this is what the Court did in *Baker* by finding malapportionment justiciable but not devising a standard for measuring it. *See* Baker v. Carr, 369 U.S. 186, 237 (1962). Unfortunately, it stepped back into these cases within the next couple of years and started developing and clarifying a standard.

53. *See* Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of* Baker v. Carr, 1995 U. ILL. L. REV. 683, 697 (1995); Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 227–29 (1985).

54. This view was recently reiterated by Justice Stevens in *Vieth v. Jubelirer*, 541 U.S. 267, 339 n.33 (2004) (Stevens, J., dissenting) ("The one-person, one-vote rule obviously constitutes a neutral districting criterion. . . ."); *see also* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1648 (1993) (noting that the Supreme Court in the 1960s considered the one person, one vote standard to be an objective, easily-managed basis for political equality); Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 741 (1998) (describing the one person, one vote standard as the "paradigmatic 'objective' rule" that "seem[s] to avoid the invocation of a contestable political philosophy").

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

Later, when the Court stepped into the political thicket, the apparent objectivity of the standard reassured it that such affairs could be easily managed.[56] After all, it only required application of what Justice Stewart derisively called "sixth-grade arithmetic."[57]

This justification, however, just does not withstand scrutiny. Initially, a decision to weight all votes equally is itself a substantive political judgment. This is generally true because any attempt to assign weight to people's preferences (which one has to do in order to aggregate those preferences) involves making a normative judgment.[58] Or, put in more philosophical terms, there is no objective method of making interpersonal comparisons of utility.[59] And while it is certainly true that assigning the same weight to votes within a particular jurisdiction involves a different normative judgment than assigning different weight to those votes, it is a normative judgment all the same.[60] Of course, a more specific version of this point was recognized early on by Justice Frankfurter when he noted that the *Baker* Court was being asked "to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy . . . ."[61]

But even if the choice of the one person, one vote standard is not neutral or objective, it may well be that requiring strict adherence to it cabins judicial bias. That is, even if the Supreme Court made a substantive political judgment in coming up with the standard, perhaps eliminating any "play" in the application of the standard limits the ability of judges to interject their own political biases in future redistricting cases. The Supreme Court articulated this sort of

56. *See* Reynolds v. Sims, 377 U.S. 533, 620 (1964) (Harlan, J., dissenting) (arguing that courts were incompetent to make such decisions); Hasen, *supra* note 51, at 1475–80 (detailing the judicial search for manageable standards in early reapportionment decisions).

57. Avery v. Midland County, 390 U.S. 474, 510 (1968) (Stewart, J., dissenting) (maintaining that apportionment is "far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic").

58. For an extended version of this argument, see Hayden, *False Promise, supra* note 5, at 244–55.

59. *See* Hayden, *False Promise*, *supra* note 5, at 246–47; *see also* JOHN BROOME, WEIGHING GOODS: EQUALITY, UNCERTAINTY AND TIME 220 (1991); JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE 119–20 (1986); Peter J. Hammond, *Interpersonal Comparisons of Utility: Why and How They Are and Should Be Made*, *in* INTERPERSONAL COMPARISONS OF WELL-BEING 200, 226, 236–37 (Jon Elster & John E. Roemer eds., 1991); Thomas M. Scanlon, *The Moral Basis of Interpersonal Comparisons*, *in* INTERPERSONAL COMPARISONS OF WELL-BEING 17, 17–18, 44 (Jon Elster & John E. Roemer eds., 1991).

60. *See* Hayden, *False Promise*, *supra* note 5, at 259–60.

61. *See* Baker v. Carr, 369 U.S. 186, 300 (Frankfurter, J., dissenting).

justification in *Karcher v. Daggett*,[62] where it explained that "choosing a different standard [other than strict population equality] would import a high degree of arbitrariness into the process of reviewing apportionment plans."[63]

But requiring strict application of the standard does not cabin judicial bias any more than allowing a more relaxed application of the standard. Consider, for example, a rule that no district can have more than double the population of any other district. The rule is more relaxed than the one that currently applies to congressional districts (zero tolerance) and state and local districts. Yet so long as this relaxed rule is strictly applied (if a plan involves no district that is double the size of any other, it is constitutional; if it does include such districts, it is unconstitutional), judges have no opportunity to inject their own bias into this aspect of the decision. In short, one may have a bright line rule regarding a more relaxed application of the one person, one vote standard.

It is clearly the bright line rule, not the actual level of deviation from perfect numerical equality, that limits judicial discretion with respect to the numerical weight assigned to votes. Thus, when it comes to making a judgment on whether a particular districting plan violates the one person, one vote standard, a hard and fast rule allowing little deviation from the standard is no more easily manageable than one allowing significant deviation. Indeed, there are a range of rules that would similarly limit judicial discretion: litigants could be instructed to draw straws, or judges could be instructed to flip a coin.[64] Or, even more radically, courts could decide not to intervene at all—that would truly limit their discretion!

Of course, courts may have other opportunities to impose their own biases on a districting decision. Perhaps allowing the one person, one vote standard to be applied more flexibly would give courts greater opportunity to choose among competing plans, and inject their own political views at that level. That is, even if their judgment about the constitutionality of a plan under the one person, one vote standard is limited, a broader application of the standard would allow courts to choose among a greater variety of districting plans.

While narrowing the range of acceptable deviation from the one person, one vote standard does cut down on the range of apportionment plans that could conceivably be submitted to courts, it

62. 462 U.S. 725 (1983).
63. *Id.* at 732.
64. *See* Hayden, *False Promise*, *supra* note 5, at 227.

still leaves a substantial number to choose from. Even with a rule of strict equality, there are countless ways to carve up a jurisdiction into equally-populous districts.[65] Indeed, this is one of the reasons that the one person, one vote standard has been a failure when it comes to ensuring equality in electoral outcomes.[66] So even with a strict application of one person, one vote requirement, courts have plenty of opportunity to impose their political biases by choosing one gerrymandered plan over another gerrymandered plan.

In fact, it is the current strict application of the one person, one vote standard that may actually prompt greater judicial intervention in redistricting decisions. Given the current standards for congressional districts, every congressional districting plan becomes instantly unconstitutional upon release of the decennial census figures.[67] After a majority of the state legislature passes a new districting plan, a disgruntled minority may (and often does) decide to challenge the new plan in court. Unless the new plan is one with perfectly equal district sizes, the strict application of the one person, one vote rule serves as an entree to the judicial system.[68] As Justice White pointed out in *Karcher*, "[I]nsistence on precise numerical equality only invites those who lost in the political arena to refight their battles in federal court."[69]

Thus, the one person, one vote standard is not objective because it involves an essentially normative judgment. And while strict application of the standard does restrict future courts from imposing their own political views about district size, so would a variety of other bright-line rules, including ones that involve a relaxed application of the standard. Moreover, by triggering more judicial intervention into districting disputes, strict application of the rule gives courts additional opportunities to interpose their own political views on the competing districting plans presented to them in the

65. *See* DIXON, *supra* note 5, at 22 ("A mathematically equal vote which is politically worthless because of gerrymandering or winner-take-all districting is as deceiving as 'emperor's clothes.' "); Issacharoff, *supra* note 54, at 1654 (explaining how advances in compute technology make it easier to gerrymander equipopulous districts); Karlan, *supra* note 54, at 736 (noting that the equipopulous gerrymander is a "staple" of modern reapportionment). *See generally* Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277 (examining the relationship between the requirement of population equity and gerrymandering).

66. *See* Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1705 (1993).

67. *See id.* at 1726.

68. *See id.* at 1726–27.

69. Karcher v. Daggett, 462 U.S. 725, 778 (1983) (White, J., dissenting).

course of that litigation. This second justification for strict application of the one person, one vote standard, then, really does not get us very far, and may actually foster the very problem that it seeks to eliminate.

A third set of justifications for the one person, one vote standard tries to connect it to some fundamental element of democracy. Many have made versions of this argument. For example, the Supreme Court in *Reynolds* explicitly linked the right to have an equally-weighted vote to the right to cast a vote. It noted that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[70] The one person, one vote standard, then, is ultimately about the very right to vote.

While the connection between the right to vote and the right to cast an equally-weighted vote exists at some theoretical level, it is not a persuasive justification for perfect numerical equality. It is true that, at some level, numerically diluting one's vote could be seen as the equivalent of denying one's vote. There is probably little difference between making one's vote worth one-millionth of others' votes and just denying her the right to vote altogether. But this theoretical connection is not a powerful argument for the kind of strict tolerances that we are talking about, in part because other factors (uncompetitive districts, political gerrymanders, racial gerrymanders) have as much or more of an effect on the real worth of an individual's vote.[71]

The one person, one vote standard is also essential to preserving the majoritarian aspects of our democracy.[72] Strictly speaking, almost any deviation from perfect equality may set up a situation where a minority of a state's population elects a majority of its state legislators or congressional representatives.[73] As noted before, the historical problem was described in exactly these terms.[74] But, once again, while there is a link between the two, it is not so pronounced that the smaller deviations are much to worry about.[75] And, in any case, it is

70. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

71. *See* Persily et al., *supra* note 39, at 1313–14.

72. *See* Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103, 1146–48 (2002) (discussing this as one of the core concepts of democratic theory reflected in the reapportionment decisions).

73. *See* Hayden, *False Promise*, *supra* note 5, at 228–29.

74. *See supra* notes 49–50 and accompanying text.

75. Take, for example a hypothetical state with 100,000 people divided into ten districts. If six of the districts have 8,000 people each, and the other four have 13,000, the

not clear that we are committed to principles of absolute majority rule, even within state legislatures and the House of Representatives.[76]

Thus there is clearly a difference between the one person, one vote standard and the amount of deviation from the standard that may be constitutionally tolerated. Arguments typically offered in favor of imposition of the standard do not readily translate into arguments in favor of such strict application of it. Indeed, most of the issues the standard is designed to deal with could have been effectively countered with the adoption of a much more relaxed application. Of course, all of this does not matter unless there is some disadvantage to a strict application of the standard (or, correspondingly, some great benefit to relaxing the standard). So it is to that topic that I now turn.

C. *Criticisms of the One Person, One Vote Standard*

As it turns out, there are some contested issues and some outright obstacles when it comes to applying the one person, one vote standard so strictly. Among the contested issues is the question of what number we use for the apportionment base—who is the "person" in "one person, one vote." The list of candidates is long, and includes total population, voting-age population, voter-eligible population, registered voters, and actual voters.[77] While the Supreme Court has settled on total population as the relevant denominator for

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total deviation from the ideal district size is fifty percent, and forty-eight percent of the state's population can, theoretically, elect a controlling majority in the statehouse. Of course, the relationship between the total deviation and the size of a possible controlling majority not only depends on the total deviation (which only takes account of the largest and smallest district) but the size of the districts in between as well. But the point is that you can have quite significant deviations from the one person, one vote ideal without compromising the principles of majority rule by much.

76. In state legislatures, as already noted, courts routinely allow ten percent deviations, a bit more if suitably justified by other districting criteria. *See* Brown v. Thomson, 462 U.S. 835, 842 (1983); Mahan v. Howell, 410 U.S. 315, 324–25, 329, *modified*, 411 U.S. 922 (1973) (suggesting that a 16.4% maximum deviation "may well approach tolerable limits"). For Congress, the precise tolerances built into a state's congressional districts are swamped by differences between states. After the most recent round of redistricting, this, coupled with the one-representative per state minimum, means that though both Wyoming and Montana have one representative, the congressional district in Wyoming has a population of 495,304, while the one in Montana has a population of 905,316. *See* KAREN M. MILLS, U.S. CENSUS BUREAU, CONGRESSIONAL REAPPORTIONMENT 2 (2001). The average district size, based on Census 2000 apportionment, is 646, 952. *Id.* at 1.

77. *See* Hayden, *False Promise*, *supra* note 5, at 231–32.

congressional apportionment,[78] states are given a fair amount of leeway to choose a different apportionment base for their own redistricting decisions.[79] And moving from one choice to another gives rise to variation in voting power that overwhelm the precise tolerances built into the one person, one vote standard.

Once we have some agreement on whom we are supposed to count, we must count them. Here, too, we have contested issues. States rely on census data for their reapportionment decisions, but those data are plagued by systemic errors. The census overcounts some populations, undercounts others, and the Census Bureau is prohibited from making corrections through statistical techniques like sampling.[80] Even if these issues were eliminated, however, it would not resolve all the problems, for even the perfect census only provides a snapshot of a dynamic demographic process. As we move through a decade, people are born, move, and die, which quickly renders the numbers relied on for redistricting obsolete (or at least less helpful).[81] And while there are bound to be problems in any undertaking of this size, these slippages swamp the precise tolerances built into the one

78. This appears to be mandated by the constitutional requirement that the "whole number of persons in each state" shall be used to apportion representatives. U.S. CONST. amend. XIV, § 2; U.S. CONST. art. I, § 2, cl. 3; *see* Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (holding that Article I, section 8 of the Constitution commands that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's"). *But see* Kirkpatrick v. Preisler, 394 U.S. 526, 534 (1969) (assuming without deciding that congressional apportionment may be based on eligible voter population rather than total population).

79. *See, e.g.*, Burn v. Richardsons, 384 U.S. 73, 91 (1966) ("[T]he Equal Protection Clause does not require the states to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured."). The Court went on to note that in no case had it suggested that "the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." *Id.* at 92.

80. *See* Gaffney v. Cummings, 412 U.S. 735, 745 n.10 (1973) (noting the fact that the 1970 Census undercounted blacks by 7.7% and whites by 1.9%) (citing J.S. Siegel, Address at the Population Association of American Annual Meeting (Apr. 26, 1973)); Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 REV. LITIG. 1, 2–13 (1993). When the Census Bureau announced a plan to use statistical sampling in the 2000 Decennial Census to remedy the growing problem of undercounting some identifiable groups, the plan was challenged and held invalid under the Census Act, 13 U.S.C. § 141 (2000), in *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 320, 343 (1999).

81. *See Gaffney*, 412 U.S. at 746. Sanford Levinson notes that the population numbers used for congressional elections are only good for, at best, one election in the five covered by each new set of census data. *See* Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1278–80 (2002).

person, one vote rules, and make such exacting judgments about district size absurd.[82]

There are also a host of disadvantages that come with requiring state legislatures to draw numerically perfect districts. We have already seen one potential cost of such strict application of the equiproportional standard—it may trigger greater judicial intervention in affairs best left to the political process. This is what the Supreme Court was originally worried about when it reluctantly stepped into the political thicket. And it was a well justified concern, especially given the Supreme Court's later forays into affairs that had traditionally belonged to the legislature. But this is not the only drawback of the equiproportional standard.

Precise adherence to the one person, one vote standard also hinders our ability to solve several different kinds of problems. Many have pointed out the problems faced by local governments that demand innovative solutions on either a sublocal or regional level, some of which are thwarted by application of the one person, one vote standard.[83] Some cities, for example, have established business improvement districts ("BIDs") to coordinate economic development in specific neighborhoods.[84] Although BIDs are sometimes categorized as the kind of special purpose district that are exempt from one person, one vote requirements, they, like many other sublocal entities, are by no means assured of being categorized as such.[85] This may result in the creation of BIDs with appointed, rather than elected, leaders, with a corresponding loss of democratic input, or it may prevent the establishment of the entity altogether.[86] Many other types of sublocal governmental entities are subject to the same restrictions, limiting our ability to deal with urban and suburban problems at the appropriate level.[87]

Metropolitan areas are also limited in their ability to try to solve issues that cross city boundaries.[88] For example, those in the San

82. *See* Hayden, *False Promise*, *supra* note 5, at 233.

83. *See, e.g.*, Joseph Seliga, *Democratic Solutions to Urban Problems*, 25 HAMLINE L. REV. 1, 5–6 (2001) (arguing that "the need to ensure equality of votes consistent with the 'one person, one vote' doctrine hinders the development of democratic governing structures and innovative solutions to urban problems").

84. *See* Richard Briffault, *A Government for Our Time?: Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366 (1999); Seliga, *supra* note 83, at 25–28.

85. *See* Briffault, *supra* note 84, at 431–45; Seliga, *supra* note 83, at 27.

86. *See* Seliga, *supra* note 83, at 27–28.

87. *See id.* at 23–31.

88. *See id.* at 31–39.

Francisco Bay area considered establishing a regional government to solve certain issues—like traffic and other problems that came with population growth—that traversed local boundary lines.[89] But, because the proposed government would have to comply with the one person, one vote rule, smaller cities were unwilling to join the regional entity for fear that the votes of those in their cities would be overwhelmed by the votes of those in more populous cities.[90] As Bruce Cain points out, strict application of the equiproportional standard stood in the way of allowing cities to make the original compromise that induced smaller states to join the large states at the founding of the country.[91] As a result, the Bay area, like many other urban and suburban areas, is left without the type of institutional structures necessary to solve some of its most significant problems.[92]

More recently, it has become apparent that the one person, one vote standard may stand in the way of fulfilling the promise of effective minority participation in the political system. By the 1990s, the solution of choice for the problem of minority vote dilution under both sections 2 and 5 of the Voting Rights Act was the creation of majority-minority districts.[93] The creation of these districts had an immediate, positive effect on the number of black and Hispanic officeholders in Congress and state legislatures.[94] But the use of majority-minority districts was limited, and had at least one serious drawback.

The limitation was that, given the geographic distribution of blacks (especially in the South), there was a fixed number of places to draw such districts.[95] The principal drawback was that such districts seemed to have the unintended side effect of helping the Republican Party (which is not the preferred political party of most minority

89. *See* Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105, 1110 (1999).

90. *See id.*

91. *See id.*

92. *See* Cain, *supra* note 89, at 1110; Seliga, *supra* note 83, at 31–39.

93. *See* Hayden, *Minority Representation*, *supra* note 5, at 1602–04.

94. *See id.* at 1604–05.

95. *See* DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 14–15 (1992); GROFMAN ET AL., *supra* note 47, at 135; CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 200–01 (1993); Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans?: An Analysis of the 1992 Congressional Elections in Eight Southern States*, 57 J. POL. 384, 386 (1995); David Ian Lublin, *Race, Representation, and Redistricting*, *in* CLASSIFYING BY RACE 111, 113 (Paul E. Peterson ed., 1995).

groups covered under the Voting Rights Act).[96] They did so because the minority voters needed to create majority-minority districts had to come from somewhere, and that somewhere was the adjoining districts. For example, removing black voters from adjoining districts effectively "bleached" adjoining districts and made it more likely that, instead of a white Democrat, they would elect a white Republican.[97] The tradeoff occurs, in part, because the one person, one vote standard makes districting a zero-sum game—increasing the percentage of minority voters in one district inevitably reduces the percentage in another.[98] Thus, minority voting rights advocates have to make a choice between increasing the number of minority officeholders and increasing the number of Democrats, between descriptive and substantive representation.[99]

Relaxing the application of the one person, one vote standard would allow for the creation of additional majority-minority districts.[100] And allowing legislatures—or the DOJ or courts—to reduce the population of majority-minority districts would prevent the almost inevitable tradeoff. In other words, minority vote dilution could be remedied (or prevented) by numerically concentrating minority vote power. Placing district population back into play, in this limited way, would help broaden the scope of districting plans available in both section 2 and section 5 contexts.

While requiring districts to contain the same number of people may seem quite rational, strict application of the one person, one vote

96. *See* Hayden, *Minority Representation*, *supra* note 5, at 1607–17. These predictions were made years before the creation of majority-minority districts made them a reality. *See, e.g.*, BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE 168–71 (1984) (noting that Democrats favor overdispersion of minority voters, while Republicans favor overconcentration); Robert S. Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections*, 66 AM. POL. SCI. REV. 1234, 1242–43 (1972) (noting Republicans were "more efficiently distributed geographically," limiting the effectiveness of gerrymandering). Later authors made more pointed predictions about the loss of Democratic majorities in Congress and state legislatures, *see, e.g.*, DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 119 (1997); SWAIN, *supra* note 95, at 205–06; ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 234 (1987), a point that was born out by theoretical studies, *see, e.g.*, Kimball Brace et al., *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?*, 49 J. POL. 170 (1987) (reviewing the racial and partisan consequences of redistricting plans for the South Carolina Senate developed from 1980 Census data).

97. For a survey of the literature documenting and quantifying this phenomenon, see Hayden, *Minority Representation*, *supra* note 5, at 1607–14.

98. *See id.* at 1616.

99. *See id.* at 1613–14.

100. *See id.* at 1627–30.

requirement is not necessary to achieve most of the benefits of the requirement. Its precision gives us a false sense of accuracy given the numerous contested issues in the census process and in determining who counts as a person for purposes of the apportionment base. And, worst of all, strict application of the requirement has some serious disadvantages: it reduces our flexibility to solve some local government issues and prevents us from devising an adequate remedy for racial vote dilution.

II. PLUNGING INTO THE POLITICAL THICKET

With *Baker*, the worry about stepping into the political thicket was multifaceted. There was, of course, the concern that imposing constitutional limits on district size was itself a normative political judgment best left to state legislatures. But there was a second concern as well: that once the judiciary entered the realm of politics, it would be hard to figure out when they should leave. Or, more to the point, it would be difficult to figure out when the courts should step into political disputes, and when they should leave well enough alone.

It was not as though the Supreme Court had never intervened in democratic politics before *Baker*. In a series of cases in the first half of the twentieth century, the Court had taken on the white primary system used to effectively disenfranchise black voters in the South.[101] And the Court had stepped into disputes involving political boundaries as well, as when it struck down an obvious racial gerrymander in *Gomillion v. Lightfoot*.[102] But the circumstances that prompted Supreme Court intervention in those cases seemed limited in that they involved relatively straightforward violations of the Fifteenth Amendment.[103] And these cases did not involve the kind of

101. *See generally* Terry v. Adams, 345 U.S. 461 (1953) (finding a violation of the Fifteenth Amendment when a Texas county political organization excluded black voters from voting in the party's primaries); Smith v. Allwright, 321 U.S. 649 (1944) (holding that the exclusion of black voters from voting in the primary of a Texas Democratic Party whose membership was limited to white citizens violated the Fifteenth Amendment); Nixon v. Condon, 286 U.S. 73 (1932) (holding that the actions of the executive committee of the Democratic Party in Texas constitutes a state action, and therefore that the committee's discrimination against black voters in its primary elections violated the Fourteenth Amendment); Nixon v. Herndon, 273 U.S. 536 (1927) (holding that a Texas statute barring black voters from participation in Democratic Party primary elections violated the Fourteenth Amendment).

102. 364 U.S. 339, 347–48 (1960).

103. This is not to say that the Court stepped in to remedy all straightforward violations of the Fifteenth Amendment—it seemed to be a necessary, though not sufficient, reason for Court intervention. *See, e.g.*, Giles v. Harris, 189 U.S. 475, 476–98

wholesale restructuring of state and federal politics that was triggered by *Baker*, *Reynolds*, and *Wesberry*.

In the wake of those groundbreaking cases, the 1960s and 1970s was a time of great constitutional movement in the voting rights arena. Although the Supreme Court spent some of its time refining the application of the one person, one vote rule, it also stepped into other areas of voting rights. In *Harper v. Virginia Board of Elections*,[104] for example, it prohibited the use of poll taxes in state elections[105] (the Twenty-Fourth Amendment, ratified in 1964, banned them in federal elections).[106] The Court used the Fourteenth and Fifteenth Amendments in a series of cases to analyze district schemes and other devices that hindered minorities from full participation in the political system.[107] In *White v. Regester*,[108] for example, the Court found that use of multimember state legislative districts violated the equal protection rights of black and Hispanic voters by submerging them in a sea of white voters.[109] In the wake of *Baker*, then, the Court appeared to be quite comfortable intervening in state politics on behalf of minority voters.

The Court was also quite active at this time in a series of cases interpreting the Voting Rights Act of 1965. This type of judicial intervention, though, was of a different, less worrisome sort. The Voting Rights Act, after all, was a majoritarian attempt to deal with an issue of minority rights. Had the Supreme Court overstepped its bounds, there was an obvious check—Congress could have amended the Act and corrected the Court's mistake (and had several chances to easily do so as the Voting Rights Act came up for renewal in 1970, 1975, and 1982). These expansive interpretations oftentimes paralleled the broader constitutional protections for minority rights. And, for that reason, perhaps there was less reason to be worried about the Supreme Court's expansions on this front.

But there were other Supreme Court forays into electoral politics

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(1903) (affirming the Court of Appeals' determination that there was no equitable jurisdiction for the plaintiff's claim that he was denied the right to vote because he was black and holding that relief from a political wrong done by the state must be given by the legislative and political departments of the federal government).

104. 383 U.S. 663 (1966).

105. *Id.* at 666.

106. U.S. CONST. amend. XXIV.

107. *See* White v. Regester, 412 U.S. 755, 765–69 (1973); Whitcomb v. Chavis, 403 U.S. 124, 155, 160–61 (1971).

108. 412 U.S. 755 (1973).

109. *See id.* at 765–69.

that were more worrisome. *Kramer v. Union Free School District*,[110] for example, involved a challenge to a statute that limited voting in school-district elections to those who either owned or leased taxable real estate in the district or had children enrolled in the district's schools.[111] The Court struck down the statute because the voting restrictions were not sufficiently narrowly tailored (they excluded some interested people and included some uninterested people).[112] As noted by several commentators, the Court's reasoning involved a bit of sleight-of-hand, as it moved from the state's argument with respect to a voter's objective interest in a school-district election to the plaintiff's subjective interest in such an election.[113] The case is more worrisome, however, because it signaled constitutional intrusion into a state's ability to connect the franchise to interest in the outcome of an election, something that states do all the time with devices like residency requirements. And, while doing so, the Court was not remedying the concerns of any "discrete and insular" minority group that was otherwise kept out of the political process (and, indeed, all voters had indirect say over the passage of the statute itself).

But one of the real signs of change came at the end of this period, in the 1980 case *City of Mobile v. Bolden*.[114] There, the Court held that a party alleging a qualitative vote dilution claim under the Fourteenth or Fifteenth Amendments must prove that the questioned practice was established or maintained with discriminatory intent.[115] Because the attendant claim under the Voting Rights Act was though to be substantively equivalent to the constitutional claims, the statutory cause of action was also held to this intent requirement.[116]

This requirement of proving discriminatory intent brought vote dilution claims to a screeching halt. Congress stepped in and did what it could—which was to amend the Voting Rights Act in a way that decoupled section 2 claims from constitutional claims of vote dilution.[117] Specifically, the section 2 claims did not require proof of discriminatory intent.[118] At that point, section 2 became the weapon

110. 395 U.S. 621 (1969).
111. *Id.* at 622.
112. *See id.* at 632.
113. *See* HASEN, *supra* note 51, at 63–64; Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 354–56 (1993).
114. 446 U.S. 55 (1980).
115. *Id.* at 65–68.
116. *Id.* at 60–62.
117. *See* 42 U.S.C. §§ 1971–1973bb-1 (2000).
118. *See id.* at § 1973(b).

of choice in qualitative vote dilution claims, and the constitutional claims effectively dropped out of the picture.

The rest of the 1980s were relatively quiet on the voting rights front. The Court did interpret the new voting rights amendments, most notably in *Thornbugh v. Gingles*.[119] But there was little movement in the area of constitutional law that either expanded or trenched upon minority voting rights. That changed, however, in the 1990s.

The Supreme Court reentered the arena of voting rights on the constitutional front in the 1990s. It did so, however, not in a way that reinvigorated the constitutional shield that had once helped protect minority voting rights, but instead used the constitution as a sword to eviscerate the statutory protections of minority rights in the Voting Rights Act. More specifically, the principal remedy of cases under both sections 2 and 5 under the Act, majority-minority districts, were suddenly found to be constitutionally suspect.

The Supreme Court fired its opening salvo in *Shaw v. Reno*,[120] where it allowed white voters to challenge the constitutionality of a majority-black congressional district in North Carolina with a "bizarre" shape.[121] Writing for the Court, Justice O'Connor found the proposed district so irrational on its face that it could only be understood as an attempt to segregate voters on the basis of race.[122] In the series of cases that followed, the Court made clear that race could not be the predominant factor in drawing district lines, even when the districting was done pursuant to the Voting Rights Act.[123] As a result, many of the majority-minority districts drawn during the 1990 Census round of redistricting were struck down,[124] and there was an effective limit placed on the ability of state legislatures to fulfill the mandates of the Voting Rights Act.[125]

The Supreme Court, then, had come full circle. To simplify a bit,

119. 478 U.S. 30 (1986).

120. 509 U.S. 630, (1993), *rev'd sub nom.*, Shaw v. Hunt, 517 U.S. 899 (1996).

121. *Id.* at 631.

122. *See id.* at 658.

123. *See, e.g.*, Miller v. Johnson, 515 U.S. 900 (1995) (holding that Georgia's redistricting plan violated the Equal Protection Clause despite the fact that it was an attempt to comply with the Voting Rights Act).

124. For example, nine of the thirteen majority-minority congressional districts created in the South after the 1990 Census were invalidated in the latter half of the decade. *See* Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2214 & n.39 (2003) (listing majority-minority districts struck down by the Supreme Court and district courts).

125. *See* Hayden, *Minority Representation*, *supra* note 5, at 1606.

it spent the 1960s and 1970s using the Constitution in a variety of ways to help minority groups fully participate in the political process. In the 1980s, it backed out of the constitutional cases, but left voting rights advocates with the statutory tools available under the Voting Rights Act. Then, in the 1990s, the Court swept back into the business of voting rights, but did so in a way that limited the statutory remedies available under the Act. But when it came to judicial intervention in politics, these cases paled in comparison to *Bush v. Gore*.[126]

In several respects, *Bush v. Gore* represents the zenith of judicial intervention into the political process. It involved the highest elected office in the country. The Court used the occasion to announce an entirely new application of the Equal Protection Clause to voting rights claims,[127] as well as to expand some fairly traditional legal principles (such as irreparable injury and standing).[128] It did so while signaling that these new principles were not generally applicable, famously noting that "[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[129] And it completely took the state out of the picture at the remedies phase by disallowing it from trying to complete the recount under constitutionally appropriate standards by the December 18 deadline for the meeting of the electoral college.[130]

The fears of entanglement in the political thicket were now fully realized. In the decades after *Baker*, the Supreme Court (and lower courts following its lead) felt more and more at home intervening in what used to be considered non-justiciable political disputes. For awhile, courts seemed to limit themselves to intervening on the side of groups that had been somehow shut out of the political process. But then the Supreme Court seemed willing to expand the scope of its intervention to protect groups that could not be described that way, such as the plaintiff white voters in *Shaw* and the voters subject to slightly different vote counting procedures in *Bush v. Gore*. In a very real sense, the Court's initial, somewhat tentative forays into politics had become routine. Or, in Rick Hasen's words, *Reynolds v. Sims* begat *Bush v. Gore*.[131]

126. 531 U.S. 98 (2000).
127. *See id.* at 104–05.
128. *See* Bush v. Gore, 531 U.S. 1046, 1046 (2000).
129. Bush v. Gore, 531 U.S. 98, 109 (2000).
130. *Id.* at 111.
131. *See* Richard L. Hasen, *A "Tincture of Justice": Judge Posner's Failed*

III. SEARCHING FOR AN EXIT STRATEGY

A. *A Retreat in the Districting Cases?*

After *Bush v. Gore* there has been a pause, a slight hesitation, in the Supreme Court's approach to electoral politics.[132] While the Court continues to be involved in the design and redesign of our political institutions, the cases decided in the last four years appear to mark the beginning of a retrenchment, if not outright retreat, from judicial involvement in political affairs. This retrenchment comes across the spectrum—from redistricting to campaign finance cases—but it has been most pronounced in the racial redistricting cases. And, since the focus of this Article is the constraints of the one person, one vote standard on redistricting, I will focus on those cases.

The most significant racial redistricting cases since *Bush v. Gore* are *Easley v. Cromartie*[133] and *Georgia v. Ashcroft*.[134] Together, they represent a good cross section of the Supreme Court's current thinking on the subject: *Easley* is a constitutional case,[135] and *Georgia v. Ashcroft* is a statutory case.[136] Both come with a dose of judicial hubris not seen in decades. Other redistricting decisions have also signaled an unwillingness to meddle in politics. In *Vieth v. Jubelirer*,[137] for example, the Supreme Court effectively maintained its longstanding hands-off approach to political gerrymandering.[138] But while cases such as *Vieth* are certainly consistent with my thesis, they do not involve an obvious change from past practice.

The small number of cases and great variety of issues involved make it difficult, perhaps even foolish, to draw conclusions about Supreme Court trends. Yet I think one conclusion can be drawn, even if in pencil: the Supreme Court appears to be more and more willing to leave redistricting to Congress and state legislatures. And this has occurred, as we shall see, for better and for worse.

Rehabilitation of Bush v. Gore, 80 TEX. L. REV. 137, 154 (2001) (reviewing RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001)).

132. This may be the result of the Court's having reached "an intellectual dead end in election law." Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum,* 153 U. PA. L. REV. 503, 505 (2004).

133. 532 U.S. 234 (2001).

134. 539 U.S. 461 (2003).

135. *Easley*, 532 U.S. at 327.

136. Georgia v. Ashcroft, 539 U.S. at 462–63.

137. 541 U.S. 267 (2004).

138. *See id.* at 291.

1. *Easley v. Cromartie*

Easley was the Supreme Court's fourth take on the redistricting decisions originally challenged in *Shaw v. Reno*.[139] In *Shaw v. Reno* ("*Shaw I*"), the Court allowed plaintiffs to challenge a majority-black district with a strange shape as a violation of the Equal Protection Clause on the theory that its irregular shape could be explained only on the basis of race.[140] On remand, the three-judge district court found the district to be constitutional under the new standard,[141] but the Court, applying its interim reformulation that race may not be a predominant factor in districting, disagreed and struck the district down as unconstitutional in *Shaw v. Hunt* ("*Shaw II*").[142]

The legislature then redrew the district in 1997, and it too was challenged. The three-judge district court granted summary judgment in favor of the challengers, finding that the legislature had again used criteria that were driven by race.[143] The Supreme Court, in *Hunt v. Cromartie*,[144] disagreed.[145] Though it found evidence that race was a factor in the districting, it also found evidence that the districting may have been drawn to create a safe Democratic seat (a constitutionally permissible objective).[146] Summary judgment, therefore, was inappropriate, and the case proceeded to trial.

After a short trial, the three-judge district court found, again, that the legislature had engaged in an unconstitutional racial gerrymander.[147] Though the court found that the shape of the district was motivated by some permissible criteria, it was also drawn "to collect precincts with high racial identification rather than political identification."[148] That finding, and the fate of the district, was taken up by the Supreme Court in *Easley v. Cromartie*.[149] The way the Court approached the issue, though, bore faint resemblance to its previous examinations of the North Carolina districting plans. Despite the fact that there was plenty of evidence in the record that race played a role in the decision, the Supreme Court found the

139. 509 U.S. 630 (1993), *rev'd sub nom.*, Shaw v. Hunt, 517 U.S. 899 (1996).
140. *Id.*
141. Shaw v. Hunt, 861 F. Supp. 408, 478 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996).
142. 517 U.S. 899, 918 (1996), *rev'd sub nom.*, Hunt v. Cromartie, 526 U.S. 541 (1999).
143. Cromartie v. Hunt, 34 F. Supp. 2d 1029, 1029 (E.D.N.C. 1998), *rev'd*, 526 U.S. 541 (1999).
144. 526 U.S. 541 (1999).
145. *See id.*
146. *Id.* at 549–551.
147. *See* Cromartie v. Hunt, 133 F. Supp. 2d 407, 407 (E.D.N.C. 2000).
148. *Id.* at 420.
149. 532 U.S. 234 (2001).

district court's key finding was mistaken, and thus it had committed clear error.[150]

The opinion and its conclusion were remarkable for several reasons. To begin with, the Court opened its opinion with a collection of citations to some of the most limiting language to be found in the *Shaw* line of cases.[151] We are told that the burden on plaintiffs to prove a racial motivation is a "demanding one."[152] We are then treated to a variety of quotations about how race must be more than "a motivating factor," it must be "the predominant factor," to trigger constitutional suspicion.[153] And, finally, there is another collection of citations to the proper role of the courts, and the "extraordinary caution" they must exercise in adjudicating the districting decisions that are normally in the legislature's sphere of competence.[154] The language is familiar, but the tone is different—one gets the impression that the Court may actually be serious about the limits of its own competence.

The result is different as well. As Karlan pointed out, the Court had never before found a case where racial motivations were "present but not predominant."[155] In all of the previous decisions under the *Shaw/Miller* standard, there was ample evidence of other legitimate considerations driving the districting decisions, making it difficult to conclude that race was the predominant factor; the Court nonetheless struck down those districts.[156] The districting at issue in *Easley* did not appear to be very different from that upheld in previous cases. But the result was completely different, and this is a case where the Court was reversing a district court under a clear error standard.

The import of *Easley* was difficult to assess at the time. Karlan concluded that it appeared that the substantive standard for proving this kind of constitutional violation has been considerably eased.[157] In theory, the test was the same; as applied, there was a world of difference. By setting the trigger for constitutional suspicion at a much higher level, *Easley* invited less frequent judicial intervention in districting decisions. This, as Karlan points out, will largely depend

150. *Id.* at 257–58.

151. *See id.* at 241–42.

152. *Id.* at 241 (quoting Miller v. Johnson, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring)).

153. *Id.* (quoting Hunt v. Cromartie, 526 U.S. 541, 547 (1999)).

154. *Id.* at 242 (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

155. *See* Pamela Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 688 (2002).

156. *See id.*

157. *See id.* at 689.

upon how lower courts read the decision,[158] but it could, theoretically, spell the end of *Shaw*-type claims. That said, Karlan did not see *Easley* as a part of a general retreat from politics.[159]

2. *Georgia v. Ashcroft*

Georgia v. Ashcroft[160] was a not a constitutional case; it was brought under section 5 of the Voting Rights Act. But it, too, demonstrates that the Supreme Court may be backing out of voting rights cases that require it to second-guess state legislators. In *Georgia v. Ashcroft*, however, the Court did so in a way that undermines one of the most significant protections of the Voting Rights Act.

Section 5 requires the Attorney General or the United States District Court in the District of Columbia to approve in advance, or "preclear," any changes in election law in certain jurisdictions.[161] In the preclearance process, the federal government may not approve a change if it will "lead to a retrogression . . . with respect to [minority voters'] effective exercise of the electoral franchise."[162] The benchmark for measuring retrogression in a redistricting plan is the existing plan.[163] The process is designed to preserve minority political strength in jurisdictions with a history of discrimination.

In the wake of the 2000 Census, the Georgia legislature passed a new districting plan for the Georgia State Senate.[164] The baseline for the plan was the 1997 State Senate districting plan, which included eleven districts with a total black population of over fifty percent, ten of which had a black voting-age population of over fifty percent.[165] The 2000 Census showed growth in the black population such that thirteen of the districts now had a black population of over fifty percent, twelve of which had a black voting-age population of over fifty percent.[166]

The Georgia legislature, dominated by Democrats, set about redistricting. Knowing that black voters are reliably Democratic voters,[167] the legislature "unpacked" some of the most heavily black

158. *See id.* at 691.
159. *See id.* at 698.
160. 539 U.S. 461 (2003).
161. 42 U.S.C. § 1973(c) (2000).
162. Beer v. United States, 425 U.S. 130, 141 (1976).
163. *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 334 (2000).
164. *See* Georgia v. Ashcroft, 539 U.S. 461, 469 (2003).
165. *See id.* at 469.
166. *See id.*
167. *See id.*

districts and distributed those voters to other districts.[168] Because black incumbents were crucial to passing the plan, the legislature had to strike a balance between preserving the safety of the black incumbents and spreading black voters around to improve the Democrats' chances in other districts.[169] In the end, the legislature passed a plan that had thirteen districts with a black voting-age population over fifty percent, thirteen districts with a black voting-age population between thirty percent and fifty percent, and four districts with a black voting-age population between twenty-five percent and thirty percent.[170]

The district court refused to approve the redistricting plan because of changes in specific districts.[171] In several districts, the size of the black majority had been reduced in order to shore up Democratic support in other districts.[172] That, according to the district court, constituted impermissible retrogression because it reduced the chance of a black candidate of choice to win election.[173]

The Supreme Court, however, reversed. Important for our purposes, it did so in a way that limited the ability of courts to regulate the political process, even in situations where they were carrying out the will of Congress by enforcing the mandates of the Voting Rights Act. The Court had previously analyzed retrogression in the way that the district court had done: did the submitted change reduce the chance of a black candidate of choice to win an election?[174] Now, however, it explicitly distanced itself from that standard, and instead looked more broadly at whether the new plan preserved the minority voters' "opportunity to participate in the political process."[175]

There are many reasons, detailed elsewhere, why this shift may have gutted one of the most important provisions of the Voting Rights Act.[176] Here, though, I am more interested in the fact that the Court shows extraordinary (even unwarranted) deference to the

168. *See id.* at 469–71.

169. See *id.* at 469–70.

170. *See id.* at 470.

171. *See* Georgia v. Ashcroft, 195 F. Supp. 2d 25, 97 (D.D.C. 2002) (three-judge court), *vacated and remanded*, 539 U.S. 461 (2003).

172. *See id.* at 41.

173. *See id.* at 91.

174. *See* Bush v. Vera, 517 U.S. 952, 983 (1996); Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969).

175. Georgia v. Ashcroft, 539 U.S. at 482.

176. *See* Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 30 (2004).

Georgia legislature in its judgment that the redistricting did not diminish minority political opportunity. While, indeed, it was the district court that was instructed to make the decision under the new standard, the new standard surely allows state legislatures much broader decisionmaking ability when it comes to redistricting subject to section 5 requirements. This will, in the long run, give the state legislatures more, and courts less, discretion in redistricting decisions.

B. A More Complete Retreat: Relaxing Application of One Person, One Vote

After *Bush v. Gore*, the Supreme Court's decisions appear to signal a willingness to allow state legislatures greater discretion in the redistricting process. In some cases, such as in *Easley*, this has been a good thing from the point of view of minority political interests. In other cases, such as *Georgia v. Ashcroft*, it has not, for it flies in the face of an attempt by the majority to transfer some political power to minority interests. Either way, though, it has the makings of a judicial retreat.

I do not mean to argue that the Court has adopted some overarching principle that makes it more reluctant to intrude into political affairs. And I do not even mean to say that the Court is intentionally making this move. Perhaps members of the Court realized, at some level, that *Bush v. Gore* was a fulfillment of Harlan's prophecies about entanglement in the political thicket. Perhaps they were stung by the criticism that followed. And, perhaps, it is just coincidence that the Court seems a bit more reluctant to meddle with the structure of our political institutions.

In any case, the Court's move out of the political sphere has not been a smooth one. Part of the reason for this is that the move has been incomplete—the Court has remained entrenched in some areas of politics while it has moved out of others. Most significantly, it continues to strictly enforce its one person, one vote requirement. This incomplete withdrawal has caused problems, especially for advocates of minority representation.

1. The Problem of Partial Withdrawal

The Supreme Court may be extricating itself from the political thicket. Like many others, I think that this is generally a good thing (indeed, Karlan has written at length suggesting various exit

strategies).[177] But one of the problems with this exit is that it is incomplete. The problem is not limited to the fact that, if judicial meddling in politics is generally a bad idea, then less meddling is always better than more meddling, and a complete withdrawal from politics is more satisfying than a partial one. The problem is also the way in which the Court has backed out—abandoning minority voters on one front (section 5), and hamstringing Congress, the DOJ, and state legislatures in their ability to come up with creative solutions on the other (through application of the one person, one vote standard).

Take, for example, the probable effects of *Georgia v. Ashcroft*. Before the case, minority voting rights advocates were forced to choose between increasing the number of minority representatives and increasing the number of Democrats, between descriptive and substantive representation. The forced choice was the result of many factors, but one of the necessary conditions, as discussed above, was the constitutional constraint that districts must be equipopulous. That constraint, given the demographic dispersal of some minority groups, also limited the number of majority-minority districts. But the DOJ and the courts, in policing jurisdictions subject to section 5 preclearance, were able to ensure the election of a large number of minority-preferred candidates.

After *Georgia v. Ashcroft*, the dilemma remains, but it is more likely that the choice will be made by political parties at the state level instead of by the DOJ or the courts. The problem here is that while the DOJ and the courts, in applying section 5 of the Voting Rights Act, were generally committed to measuring retrogression in terms of the success of minority-preferred candidates, state legislatures are usually driven by more partisan concerns.[178] And, under the new standards of *Georgia v. Ashcroft*, they will be able to get away with it.

Sometimes, as when Republicans control the redistricting, this might manifest itself in a push for safer majority-minority districts (for packing the districts with black voters increases the number of wasted Democratic votes). Other times, as in Georgia, when Democrats are in control, they will be motivated to spread black voters out to reduce the number of wasted Democratic votes. Neither party is particularly concerned about the election of minority-

177. *See* Karlan, *supra* note 155, at 674 (describing numerous exit strategies the Court has used, and could use again).

178. This is not to say that the DOJ under Republican administrations was motivated by minority political success when pushing for more majority-black districts—it was clearly motivated by the resultant boon to Republican candidates in surrounding districts.

preferred candidates (it may be a means to another end, but it is rarely an end itself). And, under the substantive principles enunciated in *Georgia v. Ashcroft*, the state legislature, Republican or Democrat, may now be able to make a showing that minority opportunity has not retrogressed.

That showing would be harder to make if we also relax the one person, one vote standard in the context of minority vote dilution. Republicans would be hard-pressed to argue that they needed to empty surrounding districts of black voters in order to prevent retrogression in a majority-minority district, because they could do the same thing by creating a less populous district and numerically concentrating the black vote. Democrats would not be motivated to spread black voters out when, by manipulating district population, they could preserve majority-minority districts without putting neighboring Democratic districts at risk. Thus, were the Supreme Court to relax application of the one person, one vote standard, the Supreme Court's reinterpretation of section 5 would cause far less damage on the minority voting rights front, in part because the dilemma between descriptive and substantive representation disappears.

Perhaps, though, the problem is the new substantive standard in *Georgia v. Ashcroft* itself. That is, maybe this is all just an argument against the Supreme Court's newest interpretation of section 5, not against strict application of the one person, one vote standard. But even without *Georgia v. Ashcroft*, strict application of the one person, one vote requirements forced minority voting advocates into pursuing a greater number of minority-preferred candidates or a greater number of Democrats. *Georgia v. Ashcroft* just made it more likely that the choice would ultimately be determined by partisan reasons. Thus, the decision highlights the problem and provides an additional reason to back out of such strict application of the standard.

2. Getting Out of Politics for Good

If indeed the Supreme Court is moving away from the political arena, this may be an opportune time for it to relax application of the one person, one vote requirement in situations like those described in Part I.C. It would be part of a more consistent withdrawal from the political arena, and it would prevent the problems that might arise when the Court steps into some areas and not others.

Backing off the strict application of the one person, one vote standard would, of course, eliminate the problems that it has caused. It would, for example, give local governments more flexibility to

design institutions necessary to solve certain sublocal and regional problems. It would allow advocates of minority voting rights the ability to propose additional majority-minority districts without reducing their ability to elect Democrats in other districts. And it would eliminate the ridiculous effort to create very precise district population numbers out of inaccurate and constantly changing census data.

Of course, with major political parties poised to leverage any such change into overwhelming partisan advantage, the Supreme Court probably should not loosen up the one person, one vote standard in all situations. Doing so would likely lead to a version of the legislative lock-up that marked the middle of the last century, although now it would be primarily based on party rather than geography. But the fear of partisan manipulation should not prevent the Court from relaxing application of the standard to allow legislatures to concentrate minority voting strength or to create governmental structures to solve certain local or regional problems. And, going forward, if more states were to adopt non-partisan districting processes, the application of the one person, one vote standard could be relaxed across the board.

This could be done without losing the touted benefits of the standard. The historical malapportionment problem has been solved. Potential discrimination on the basis of geography, race, or politics that may come with unequal district size can be policed without such exacting standards. And judicial discretion can be better cabined by relaxing the application of the standard using bright-line rules. In no case do we need to do away with the one person, one vote standard itself, and preserving the justiciability of the issue of district size (preserving *Baker*, that is) would allow the Supreme Court to step back into the situation and retinker with the application of the standard should any unanticipated problems arise.

CONCLUSION

Forty years after stepping into the political thicket, the Supreme Court may finally be heeding Justice Harlan's advice. Its recent redistricting decisions show what may be the beginning of a judicial retreat from politics. While this is generally a welcome sight, the Supreme Court has left one principle behind—it continues to demand precise application of the one person, one vote standard. Strict application of the standard produces more problems than it resolves, and leaves the federal and state governments without the flexibility they need to solve some of the most enduring problems of urban

government and minority representation. The Supreme Court, then, should make its exit from the political process of redistricting more complete, and relax application of the one person, one vote standard.