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Ashira Ostrow
Hofstra University, ashira.ostrow@hofstra.edu

The Next Reapportionment Revolution

ASHIRA PELMAN OSTROW*

In the 1960s, the Supreme Court famously imposed the one-person, one-vote requirement on federal, state, and local legislatures. The doctrine rapidly resolved the problem of malapportioned districts. Within just a few years, legislatures across the nation were reapportioned to equalize the population between districts. Sadly, however, the national commitment to equal-population districts has led directly to the current crisis of political gerrymandering. The boundaries of equal-population districts must be redrawn every ten years to maintain population equality. Even with rigid adherence to population requirements, district boundaries are easily manipulated to secure incumbent seats and advance partisan interests. Redistricting is rightly condemned for allowing politicians to pick their voters, instead of the other way around. Rather than reform the redistricting process, this Article proposes eliminating it by using weighted voting to comply with the one-person, one-vote requirement. To that end, this Article identifies several innovative countywide apportionment plans that use political units as electoral districts and allocate legislative votes to each district in proportion to its population. Weighted voting eliminates the need for strict population equality and enables the formation of fixed districts that reflect multiple dimensions of political representation. The Supreme Court's notably flexible approach to the one-person, one-vote requirement at the local level grants local governments substantial discretion to experiment with local political institutions and electoral arrangements. Policy innovations that succeed in one locality can spread to others and stimulate change at the state and national level. This Article seeks to stimulate change at the state and national level by drawing attention to local weighted-voting apportionment plans.

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* Professor of Law, Maurice A. Deane School of Law at Hofstra University. Thank you to Richard Briffault, Bruce Cain, Robin Charlow, Josh Douglas, David Gartner, Joel Goldstein, Grant Hayden, Eric Lane, David Rubenstein, Erin Ryan, Richard Schragger, Ken Stahl, Greg Stein, and Nicholas Stephanopoulos for helpful discussions and comments on earlier drafts.

In the 1960s, the Supreme Court entered the political thicket of legislative apportionment to confront the problem of malapportioned districts.[1] In *Reynolds v. Sims*,[2] the Court required state legislatures to be apportioned according to population, so that each voter had a numerically equally weighted vote.[3] The one-person, one-vote requirement famously triggered a reapportionment revolution.[4] Within just a few years, legislatures across the nation were reapportioned to equalize the population between districts.[5] Sadly, however, the national commitment to equal-population districting has led directly to the current crisis of political gerrymandering.[6] The boundaries of single-member, equal-population districts must be redrawn after each decennial census to maintain population equality.[7] Even with rigid adherence to population requirements, district boundaries are drawn to secure incumbent seats and advance partisan interests. Redistricting is rightly condemned for allowing politicians to choose their voters, rather than the other way around.[8]

Rather than reform the redistricting process, this Article proposes eliminating it by using weighted voting to comply with the one-person, one-vote requirement. Weighted voting alters the politics of legislative apportionment, avoiding endless battles over district lines by simply adjusting the number of votes allocated to each

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1. *See* Baker v. Carr, 369 U.S. 186, 199–200 (1962).

2. 377 U.S. 533 (1964).

3. *Id.* at 565.

4. *See* GORDON E. BAKER, THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT (1966) (coining the phrase to describe the rapid reapportionment of legislative bodies to equalize the population of each district in response to the one-person, one-vote requirement).

5. Ashira Pelman Ostrow, *One Person, One Weighted Vote*, 68 FLA. L. REV. 1839, 1842–43 (2016) (explaining that following the reapportionment cases equal-population districts became the norm).

6. *Id.* at 1854–56.

7. For an overview of the redistricting process, see generally NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010 (2009).

8. Ostrow, *supra* note 5, at 1854–56.

district.[9] This Article examines the evolution of countywide weighted-voting plans, demonstrating that local legislatures use weighted voting to maintain fixed electoral districts that prevent malapportionment and gerrymandering. Weighted voting can be used to preserve representation for whole political units, such as towns, on a county board. It can also be incorporated into multimember districts or equal-population districts to equalize the numeric weight of each vote across unequal-population districts. Weighted voting eliminates the need for strict population equality, dramatically increasing the options for legislative apportionment and enabling the formation of electoral districts that achieve multiple districting objectives.[10]

In 1968, in *Avery v. Midland County*, the Supreme Court extended the one-person, one-vote requirement to local legislatures.[11] Despite early apprehension over its impact on local governance, the extension of the one-person, one-vote doctrine has done little to constrain local experimentation with government formation and electoral processes.[12] Instead, the Court has gone out of its way to acknowledge "the immense pressures facing units of local government, and of the greatly varying problems with which they must deal,"[13] and to limit its own application of the one-person, one-vote requirement to enable local governments to respond to local circumstances.[14]

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9. *Id.* at 1840; *see also* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1836–37 (2012) (noting that "redistricting is bedeviled by the sore loser problem: because new district lines can determine the electoral fates of candidates, political parties, and interest groups, it is usually worth their time and effort to overturn a plan that they do not like for the uncertain prospect of something better").

10. This Article thus follows the recent "institutional turn in election law scholarship," proposing a nonjudicial strategy for preventing gerrymandering. *See generally* Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 86, 90–100 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) (describing proposals that avoid judicial review and "harness politics to fix politics"); Cain, *supra* note 9, at 1810–11 (providing an overview of proposals designed to lessen court involvement by improving the political process); Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 699 (2006) (arguing that "[t]he need for political answers in redistricting ought to guide reform toward new institutional approaches").

11. 390 U.S. 474, 485 (1968).

12. Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 339–40 (1993) (noting concern that "rigid application of federal constitutional principles could deprive states and localities of the flexibility essential to make local governments responsive to the tremendous diversity of local conditions" but finding that states "retain considerable control over the organization and structure of local governments"); Kenneth A. Stahl, *Local Government, "One Person, One Vote," and the Jewish Question*, 49 HARV. C.R.-C.L. L. REV. 1, 5–6 (2014) (analyzing extension of one person, one vote to local elections).

13. *Avery*, 390 U.S. at 485.

14. *See, e.g.*, Sailors v. Bd. of Educ., 387 U.S. 105, 110–11 (1967) ("Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions."); Abate v. Mundt, 403 U.S. 182, 185 (1971) (quoting *Sailors*, 387 U.S. at 110–11); Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo., 397 U.S. 50, 59 (1970) (quoting *Sailors*, 387 U.S. at 110–11);

Thus, while the one-person, one-vote requirement virtually eliminated variation in Congress and at the state level,[15] local governments have continued to experiment with legislative apportionment and voting rights.[16] In particular, some local legislatures use weighted voting to comply with the one-person, one-vote requirement while preserving representation for fixed political subdivisions.[17] Some rural counties use a "one town, one representative" system under which each town elects one representative regardless of the town's population.[18] Thus, a supervisor whose town contains ten percent of the total county population casts ten percent of the votes on the county board. The federal courts have upheld this format, explaining that this "method of local governance preserves not only traditional boundaries and local allegiances, but assures that no voter is effectively disenfranchised by reason of place of residence."[19]

Nonetheless, in counties with district that vary substantially in population, the "one-town, one-representative" model can lead to constitutionally significant inequality in legislative representation, or what I have previously described as functional

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accord Greenwald v. Bd. of Supervisors, 567 F. Supp. 200, 210 (S.D.N.Y. 1983) ("The flexibility which is to be afforded municipal government schemes has been repeatedly stressed . . . .").

15. Ostrow, *supra* note 5, at 1845; *see also* James A. Gardner, *How To Do Things with Boundaries: Redistricting and the Construction of Politics*, 11 ELECTION L.J. 399, 402 (2012); Jeffrey C. O'Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. ST. L. REV. 327, 332 (2006); Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1406 (2012).

16. *See* Ashira Pelman Ostrow, *Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change*, 102 COLUM. L. REV. 1954, 1965 (2002) (distinguishing local elections from state and national elections); *see also* Steve Bickerstaff, *Making Local Redistricting Less Political: Independent Redistricting Commissions for U.S. Cities*, 13 ELECTION L.J. 419, 421 (2014) (noting variations in municipal structure); Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 3 (2006) (emphasizing the "capacity of local governments to restructure basic features of their political organization, and their interest in doing so"); Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1045–69 (2017) (noting local expansions of the right to vote); Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-CL. L. REV. 333, 339–43 (1998) (noting use of alternative voting systems at the local level); O'Neill, *supra* note 15, at 333 ("Local elections may be any combination of single-member and multi-member districts.").

17. Ostrow, *supra* note 5, at 1850–51 (describing emergence of weighted voting in New York); *see also* R. Alta Charo, *Designing Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate*, 53 FORDHAM L. REV. 735, 784 (1985) (describing use of weighted voting to preserve town-based representation on county board); Bernard Grofman & Howard Scarrow, *Weighted Voting in New York*, 6 LEGIS. STUD. Q. 287, 288–89 (1981) (identifying unique circumstances that led to weighted voting in New York).

18. *See* Ostrow, *supra* note 5, at 1850–51.

19. Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 886 F. Supp. 242, 244 (N.D.N.Y. 1995), *aff'd*, 80 F.3d 42, 49 (2d Cir. 1996).

vote dilution.[20] Consider a county in which the smallest town contains five percent of the population and the largest town contains forty percent of the population. If each town elects a single representative, residents of both towns will be underrepresented in different ways. Residents of the smaller town will be underrepresented because a legislator with fewer votes will have less political power and less opportunity to influence legislative outcomes.[21] Residents of the larger town will also be underrepresented, first, because they have fewer actual representatives in the legislative body to advocate on their behalf and, second, because a representative serving a larger constituency will have less time to devote to each individual resident.[22]

Counties using weighted voting address this concern in a variety of ways. Some combine weighted voting with roughly equal-population districts, subdividing densely populated cities into districts each of which elects its own representative.[23] Others combine weighted voting with multimember districts, increasing the number of representatives each district elects in proportion to the district's population.[24] Still others have replaced their weighted-voting systems with equal-population districts when extreme inequalities in legislative representation could not be reduced.[25] Remarkably, in just the few years following the 2010 census, one county adopted weighted voting for the first time;[26] a second county voted to replace its weighted-voting system with a county legislature;[27] and several other counties modified their plans, tinkering with the size of the legislative body or the allocation of weighted votes.[28]

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20. Ostrow, *supra* note 5, at 1862–64.

21. *Id.*

22. *Id.*

23. *See, e.g.*, CORTLAND CTY. PLANNING DEP'T, LEGISLATIVE AND ELECTION DISTRICTS (2013); *see also* Slater v. Bd. of Supervisors of Cortland, 330 N.Y.S.2d 947, 948–50 (N.Y. Sup. Ct. 1972), *aff'd*, 346 N.Y.S.2d 185 (N.Y. App. Div. 1973) (upholding Cortland County's apportionment plan); *infra* Part III.B.

24. *See e.g.*, SCHENECTADY CTY., N.Y., CHARTER art. II § 2.04(F) (2015); Michael Lamendola, *Schenectady County Legislature Pushes for Weighted Voting*, DAILY GAZETTE (Apr. 12, 2011), https://dailygazette.com/article/2011/04/12/0412_weighted [https://perma.cc/AD2M-5ARB]; *infra* Part III.B.1.

25. *See* Jackson v. Nassau Cty. Bd. of Supervisors, 818 F. Supp. 509, 531–34 (E.D.N.Y. 1993).

26. *See* SCHENECTADY CTY., N.Y. CHARTER art. II, § 2.04 (2015) (amending county charter to incorporate weighted voting).

27. *See* MONTGOMERY CTY., N.Y. CHARTER art. 2, § 2.01 (2012) ("The County legislature shall consist of nine (9) members elected from single-member districts."); *see also* Notice of Adoption, Montgomery Cty., N.Y., *in* LOCAL LAW FILING OF LOCAL LAW NO. 2 OF 2012, at 34 (2012), https://www.co.montgomery.ny.us/sites/public/government/locallaws/LocalLawScans/023.pdf (explaining charter amendment that "change[d] county government by abolishing the Board of Supervisors and replacing it with a nine member Legislature . . . elected from nine equally sized districts," that "eliminate the need for weighted voting and comply with the principle of 'one man one vote'").

28. CORTLAND COUNTY, N.Y., RULES OF ORDER art. XI (2014); *Legislative and Election Districts*, CORTLAND COUNTY (on file with the *Indiana Law Journal*) (maintaining

Although the Court has held that partisan gerrymandering can violate the Constitution, it has yet to develop a manageable standard for determining when that occurs.[29] While the Court continues its search, this Article proposes an alternative apportionment strategy that prevents gerrymandering and furthers numerous districting priorities that would otherwise conflict. As this Article explains, weighted-voting districts accomplish the seemingly impossible. They preserve political subdivisions, prevent gerrymandering, provide equal functional representation, increase minority representation, and satisfy the quantitative one-person, one-vote requirement.

Part I demonstrates that weighted voting is uniquely able to satisfy the quantitative one-person, one-vote requirement. Weighted-voting plans grant each district a percentage of the total number of votes that corresponds precisely with its percentage of the total population. As a result, there is zero percent deviation from population equality. Regardless of each district's shape or population, weighted voting equalizes the numeric weight of each vote, thus satisfying the quantitative one-person, one-vote requirement.

Part II considers the extension of the one-person, one-vote doctrine to local elections. This Part notes that Court has tailored its application of the one-person, one-vote requirement to accommodate a wide range of local political conditions, exempting many political units from the one-person, one-vote requirement, and granting local legislatures substantial discretion to craft districts that reflect local political preferences. This Part argues that the Court's notably flexible approach facilitates local political experimentation and innovation that could, in turn, serve as a model for broader state and national reforms.

Part III critically examines the evolution of weighted-voting plans. First, this Part analyzes the "one town, one representative" model in which each town is represented by a single legislator. Next, this Part identifies hybrid-weighted-voting plans that

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weighted-voting system but reducing the size of its legislature); MADISON CTY. BD. OF SUPERVISORS, ORGANIZATION & BOARD MEETING AGENDA FOR JANUARY 8, 2013 (2013) (on file with the *Indiana Law Journal*) (passing resolution maintaining weighted-voting system); Lohr McKinstry, *Slight Power Shift*, PRESS REPUBLICAN (Apr. 13, 2012), http://www.pressrepublican.com/news/local_news/slight-power-shift/article_16140991-dc49-5e84-aaa6-cfbda4470f50.html [https://perma.cc/AF6K-NYJU] (noting that Essex County adjusted the allocation of votes on its Board in accordance with the Banzhaf Index of voting power); Stephen Williams, *Saratoga County Board Votes Against Expanding Its Ranks*, DAILY GAZETTE (Aug. 17, 2011), https://dailygazette.com/article/2011/08/17/0817_board [https://perma.cc/7M5T-4FKB]; JAMES R. RUHL, SARATOGA COUNTY GOVERNMENT FUNDAMENTALS 2 (Jan. 20, 2009) (on file with the *Indiana Law Journal*) (noting that Saratoga County increased the number of residents each legislator represents to avoid increasing the size of its Board).

29. Gill v. Whitford, 138 S. Ct. 1916, 1920 (2018) ("Over the past five decades this Court has repeatedly been asked to decide what judicially enforceable limits, if any, the Constitution sets on partisan gerrymandering. Previous attempts at an answer have left few clear landmarks for addressing the question and have generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury."); *see also* League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006); Vieth v. Jubelirer, 541 U.S. 267 (2004); Davis v. Bandemer, 478 U.S. 109 (1986); Gaffney v. Cummings, 412 U.S. 735 (1973).

equalize multiple dimensions of legislative representation by combining weighted-voting with multimember or equal-population plans. Finally, this Part examines weighted-voting plans that equalize voting power, or the mathematic probability of determining the outcome of a vote, rather than the numeric weight of each vote.[30]

Part IV argues that hybrid weighted-voting plans maximize the advantages of each apportionment system and should serve as a model for broader state and national reform. Equal-population and multimember districts provide equal functional representation because each legislator represents roughly the same number of people and casts roughly the same number of votes. Weighted voting prevents racial and partisan gerrymandering, satisfying the one-person, one-vote requirement by allocating votes to each district in proportion to its population, rather than by redrawing the boundaries of each district.

I. WEIGHTED VOTING AND THE ONE-PERSON, ONE-VOTE REQUIREMENT

The Court often refers to the "one person, one vote requirement" as the "equal-population requirement."[31] This nomenclature is misleading. The one-person, one-vote doctrine requires mathematically equally weighted votes.[32] It does not require equal-population districts.[33] In *Reynolds v. Sims*,[34] the Court held that a plan in which disparately sized districts each had a *single* vote in the legislative body violated the Equal Protection Clause of the Fourteenth Amendment.[35] The Court noted that a state could preserve representation for political subdivisions that vary in size by increasing the legislative representation of more populous districts.[36]

Multimember districts and weighted-voting districts are designed to preserve representation for political subdivisions that vary in size by allocating legislative votes to each district in proportion to the district's population.[37] Multimember districts increase the number of representatives each district elects; weighted-voting districts increase the number of votes each representative casts.[38] To illustrate, assume that

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30. *See infra* Part III.C; *see also* John F. Banzhaf III, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 RUTGERS L. REV. 317 (1965) (developing voting power model); Joseph Fishkin, *Weightless Votes*, 121 YALE L.J. 1888, 1893 (2012) (explaining that one way to conceptualize the "weight" of a vote is as "the probability that I might cast the decisive vote").

31. *See, e.g.*, Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016) ("*Wesberry* and *Reynolds* together instructed that jurisdictions must design both congressional and state-legislative districts with *equal populations* . . . ." (emphasis added)); Cox v. Larios, 542 U.S. 947, 949 (2004) (mem.) (referring to one person, one vote as "the equal-population principle"); NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 7, at 22–45 (discussing the "constitutional requirement of equal population among state legislative and congressional districts").

32. Ostrow, *supra* note 5, at 1846–47.

33. *Id.*

34. 377 U.S. 533 (1964).

35. *Id.* at 568.

36. *Id.* at 549.

37. Ostrow, *supra* note 5, at 1846–47.

38. *Id.* at 1847.

an equal-population district contains 1000 people. Its residents would elect one representative who would cast one vote. Residents of a multimember district with 2000 residents would elect two representatives, each of whom would cast a single vote. Residents of a weighted-voting district with 2000 people would elect one representative who would cast two votes. In each district, the mathematic ratio of people to legislative votes is 1000 to 1. Although the populations vary, the votes are numerically equal.[39]

Both multimember and weighted-voting plans use proportional representation to equalize the weight of each vote. Because weighted voting varies the number of votes, rather than the number of members, it is a far more precise mathematic tool. A district with 6.6% of the population can be granted precisely 6.6% of the votes. It cannot be granted 6.6 members. In a multimember system, the number of members must be rounded up to 7. The rounding process can produce deviations from population equality that exceed the constitutionally permissible threshold.

This Part demonstrates that weighted voting is uniquely able to satisfy the quantitative one-person, one-vote requirement.[40] Subpart A briefly reviews the problem of malapportioned districts that gave rise to the quantitative one-person, one-vote doctrine. Subpart B notes that the Court regularly permits state and local apportionment plans to deviate from population equality to preserve the integrity of political subdivisions. Thus, the Court (1) presumes that state and local apportionment plans that deviate by less than ten percent comply with the one-person, one-vote requirement and (2) permits state and local legislatures to use proportional representation to preserve representation for political subdivisions.

Subpart C compares the mathematics of weighted-voting to multimember districting, noting that multimember systems frequently generate impermissibly high deviations from population equality or require the formation of unreasonably large legislatures. Subpart D considers the implications of weighted voting on other dimensions of legislative representation. In particular, this Subpart notes that varying the number of votes each legislator casts, and correspondingly, the number of people each legislator represents, creates inequality in functional representation and legislator power, and increases the risk of minority vote dilution.

A. The Problem of Malapportioned Districts

In its one-person, one-vote cases, the U.S. Supreme Court confronted the problem of malapportioned districts.[41] During the first half of the 1900s, the nation's population began to shift from rural to urban areas. State legislatures charged with redis-

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39. *Id.*

40. *See id.* at 1846–47.

41. *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1124–26 (2016) (reviewing history of the one-person, one-vote doctrine); *see also* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 7, at 105–06; Grant M. Hayden, *The Supreme Court and Voting Rights: A More Complete Exit Strategy*, 83 N.C. L. REV. 949, 950 (2005) (providing an overview of one person, one vote).

tricting state and congressional legislative districts refused to adjust district boundaries to account for these demographic changes.[42] Many states used legislative maps drawn to equalize population as it existed at the turn of the century.[43] Others allocated a single representative to each county, regardless of its population.[44] In Alabama, for example, an urban county with over 600,000 residents and a rural county with only 15,000 residents each elected one representative to the state senate.[45] Throughout the country, urban voters, who were disproportionately members of minority groups, had their votes numerically diluted.[46]

For decades, the Supreme Court refused to intervene, holding that electoral districting was a nonjusticiable political question.[47] "The remedy for unfairness in districting," the Court maintained, "is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[48] Yet, the political process provided no obvious solution. Rural legislators had no incentive to adopt new maps that might diminish their power. Thus, in 1962, in *Baker v. Carr*,[49] the Court entered the political thicket of legislative districting. In *Baker,* the Court overturned its earlier precedent and found that the Tennessee legislature's failure to redistrict gave rise to a justiciable issue under the Fourteenth Amendment.[50] One year later, in *Gray v. Sanders,* the Court declared that "[t]he conception of political equality . . . can mean only one thing—one person, one vote."[51]

The Court developed the details of the one-person, one-vote standard in the cases that followed. First, in *Wesberry v. Sanders*,[52] the Court invalidated Georgia's congressional district map, under which one congressional district was "two to three times" larger than the others.[53] The Court interpreted Article I, Section 2 of the Constitution, which commands that representatives be chosen "by the people of the several States," to mean that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[54] Later that same Term, in *Reynolds v. Sims*,[55] the Court held that the Equal Protection Clause requires that state

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42. *See* Hayden, *supra* note 41, at 955 n.36 (citing PAUL T. DAVID & RALPH EISENBERG, DEVALUATION OF THE URBAN AND SUBURBAN VOTE 3 (1961)); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 543 (2004).

43. *Evenwel*, 136 S. Ct. at 1123.

44. *See id.*

45. Reynolds v. Sims, 377 U.S. 533, 546 (1964) (discussing population disparities).

46. *See* Hayden, *supra* note 41, at 955 n.36.

47. Colegrove v. Green, 328 U.S. 549, 552, 556 (1946) (warning that courts are "not to enter this political thicket").

48. *Id.* at 556.

49. 369 U.S. 186 (1962).

50. *Id.* at 237 ("We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision.").

51. 372 U.S. 368, 381 (1963).

52. 376 U.S. 1, 17 (1964).

53. *Id.* at 7, 18.

54. *Id.* at 7–8 (quoting U.S. CONST. art. I, § 2).

55. 377 U.S. 533 (1964).

legislative seats be apportioned on a population basis so that each person has an equally weighted vote.[56] Finally, in *Avery v. Midland County*, the Supreme Court extended the holding in *Reynolds* to local legislatures, requiring cities, towns and counties to be apportioned on a population basis.[57] Thus, by the end of the decade, legislatures at every level of government—federal, state, and local—were subject to the one-person, one-vote requirement.

B. Equally Weighted Votes

1. The Maximum Deviation from Population Equality

Courts typically determine whether an apportionment plan satisfies the constitutional one-person, one-vote requirement by calculating the plan's "maximum deviation from population equality."[58] The maximum deviation is the total range between the most over- and underrepresented districts. If the largest district is two percent larger than the ideal, and the smallest district is one percent smaller than the ideal, then the overall range, or maximum population deviation, is three percent.[59] The one-person, one-vote requirement is satisfied so long as a plan's maximum population deviation falls within a constitutionally acceptable range.

Over time, the Court has developed different numeric requirements for congressional districts versus state and local legislative districts.[60] At the national level, the Court insists that congressional districts be precisely equal.[61] The Court has rejected the suggestion that there is a point at which population differences between congressional districts are *de minimus*.[62] Where congressional districts vary from precise mathematic equality, the state must either show that the variances are unavoidable or specifically justify the variances.[63] In *Karcher v. Daggett*, for example, the Court

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56. *Id.* at 568.

57. 390 U.S. 474, 481 (1968) (requiring county to allocate seats on a population basis).

58. Evenwel v. Abbott, 136 S. Ct. 1120, 1124 n.2, 1149 (2016) ("Maximum population deviation is the sum of the percentage deviations from perfect population equality of the most- and least-populated districts."). Courts refer to this range in a variety of ways. *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 99 (1997) ("overall population deviation"); Bd. of Estimate of N.Y. v. Morris, 489 U.S. 688, 700 (1989) ("maximum percentage deviation"); Connor v. Finch, 431 U.S. 407, 416 (1977) ("maximum deviation"); Chapman v. Meier, 420 U.S. 1, 23 (1975) ("deviation," "variation," and "total population variance").

59. *See also Evenwel*, 136 S. Ct. at 1124 n.2 ("[I]f the largest district is 4.5% overpopulated, and the smallest district is 2.3% underpopulated, the map's maximum population deviation is 6.8%.").

60. *See id.* at 1149; *see also* Mahan v. Howell, 410 U.S. 315, 322 (1973) (noting that, while "population alone has been the sole criterion of constitutionality in congressional redistricting . . . broader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting").

61. *See, e.g.*, White v. Weiser, 412 U.S. 783, 795–97 (1973) (invalidating districts that were not as mathematically equal as possible).

62. Kirkpatrick v. Preisler, 394 U.S. 526, 531–32 (1969) (rejecting suggestion of *de minimis* population differences among congressional districts).

63. *Id.* at 531.

rejected New Jersey's congressional reapportionment plan that deviated by less than one percent from population equality because the plan's opponents were able to demonstrate that an alternative plan would have produced a slightly lower deviation.[64]

In state and local apportionment plans, however, the Court has adopted a more flexible approach, establishing a presumption of constitutionality for plans that deviate by less than ten percent from population equality.[65] The Court permits state and local districts to deviate from the ideal size to "accommodate traditional districting objectives," such as "preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness."[66] The Court has embraced an even more flexible approach in its review of local districting plans, cautioning that "[a]n unrealistic overemphasis on raw population figures" may cause courts to overlook other factors more critical to an "acceptable representation and apportionment arrangement."[67]

2. Proportional Representation in State and Local Legislatures

Under federal law, congressional representatives must be elected from single-member, equal-population districts.[68] In contrast, state and local representatives can be elected from multimember districts that vary in size. In *Fortson v. Dorsey*,[69] for example, the Court upheld a state redistricting plan that consisted of a mixture of multimember and single-member districts. The *Fortson* Court expressly rejected the claim that the Equal Protection Clause requires equal-population districts.[70] Although the districts varied in size, the Court determined that the plan provided each person with an equally weighted vote.[71] There is "clearly no mathematical disparity"

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64. 462 U.S. 725, 742–44 (1983).

65. *Evenwel,* 136 S. Ct. at 1124 ("Where the maximum population deviation between the largest and smallest district is less than 10%, the Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule."); *see also* Voinovich v. Quilter, 507 U.S. 146, 161 (1993) (noting a ten percent threshold); Brown v. Thomson, 462 U.S. 835, 842 (1983) ("[A]n apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.").

66. *Evenwel*, 136 S. Ct. at 1124; *see also* Mahan v. Howell, 410 U.S. 315, 329 (1973) (approving a state-legislative map with maximum population deviation of sixteen percent to accommodate the State's interest in "maintaining the integrity of political subdivision lines," but cautioning that this deviation "may well approach tolerable limits"); Reynolds v. Sims, 377 U.S. 533, 579 (1964) (permitting variation "based on legitimate considerations incident to the effectuation of a rational state policy").

67. Gaffney v. Cummings, 412 U.S. 735, 749 (1973); *see also* Abate v. Mundt, 403 U.S. 182, 184–86 (1971) (stating that "slightly greater percentage deviations may be tolerable" at the local level because local legislative bodies have fewer representatives and smaller districts).

68. *See* 2 U.S.C. § 2a(a), (c) (2012) (requiring single-member, equal-population districts for congressional representatives).

69. 379 U.S. 433 (1965).

70. *Id.* at 438–39.

71. *Id.*

in the weight of each vote, the Court explained, because each district elects a number of representatives in proportion to its population.[72] As a result, the plan satisfied the one-person, one-vote requirement.[73]

In 1971, in *Whitcomb v. Chavis*, the Supreme Court again held that multimember districts could be used to satisfy the quantitative one-person, one-vote requirement.[74] The plaintiffs in *Whitcomb* argued that multimember districts do not provide each person with an equal vote because a voter in a multimember district has statistically "more chances to determine election outcomes than does the voter in the single-member district."[75] The Supreme Court rejected this statistical argument and held that multimember districts satisfy the quantitative one-person, one-vote requirement.[76]

Although the Supreme Court has not directly addressed the constitutionality of weighted voting, the lower federal courts have held that weighted voting can be used to satisfy the quantitative one-person, one-vote requirement.[77] In *Roxbury Taxpayers Alliance v. Delaware County Board of Supervisors*,[78] the Second Circuit rejected the claim that the one-person, one-vote doctrine requires equal-population districts and held that weighted voting satisfies the requirement so long as votes are allocated in proportion to population.[79] The federal courts have also required counties to adopt weighted-voting schemes to remedy malapportioned districts. In 2001, for example, the U.S. District Court for the Western District of New York ordered Erie County to maintain its existing districts and use weighted voting to comply with the one-person, one-vote requirement.[80]

In addition, the Supreme Court has indirectly held that weighted voting does not violate the federal Equal Protection Clause. In 1973, in *Franklin v. Krause*,[81] the New York Court of Appeals upheld Nassau County's weighted-voting scheme against an Equal Protection challenge.[82] The *Franklin* court emphasized the Supreme Court's tolerance for flexible local governance structures and the value of preserving representation for political subunits—towns and cities—on the County Board.[83] The

72. *Id.* at 437.

73. *Id.* at 438–39; *see also* Kilgarlin v. Hill, 386 U.S. 120 (1967); Burns v. Richardson, 384 U.S. 73 (1966).

74. 403 U.S. 124, 145 (1971).

75. *Id.* at 147, 168–69.

76. *Id.* at 145–47.

77. *See, e.g.*, Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 80 F.3d 42, 49 (2d Cir. 1996); Reform of Schoharie Cty. v. Schoharie Cty. Bd. of Supervisors, 975 F. Supp. 191, 194–95 (N.D.N.Y. 1997), *aff'd*, 152 F.3d 920 (2d Cir. 1998).

78. 80 F.3d 42 (2d Cir. 1996).

79. *Roxbury Taxpayers All.*, 80 F.3d at 48.

80. Korman v. Giambra, No. 01-CV-0369E(SR), 2001 WL 967552, at *1 (W.D.N.Y. Aug. 8, 2001); *see also* Abate v. Rockland Cty. Legislature, 964 F. Supp. 817, 830 (S.D.N.Y. 1997) (requiring county to comply with one-person, one-vote by redistricting or by using weighted voting).

81. 298 N.E.2d 68 (N.Y. Ct. App. 1973).

82. *Id.* at 73.

83. *See id.* at 70, 72 (noting that preserving town boundaries facilitates local taxing and the delivery of local services and that merging these units into equal-population districts

Supreme Court declined review of this decision for want of a federal question.[84] This dismissal has been treated as a decision on the merits. That is to say that by deciding that weighted voting did not raise a federal question, the Supreme Court also decided that weighted voting does not violate the federal Equal Protection Clause.[85]

C. Weighted Voting as a Mathematical Tool

Although both multimember and weighted-voting districts are designed to preserve representation for political units, multimember systems frequently produce unconstitutional deviations or require the formation of unreasonably large legislatures.[86] Indeed, from a mathematic perspective, multimember systems are quite clunky. To allocate a whole number of representatives to each district in a multimember system, the number must be rounded up or down. In *Abate v. Mundt*, the Supreme Court explained that "this need to round off 'fractional representatives' produces some variations among districts in terms of population per legislator."[87] In a county districting plan where the smallest district has 100 residents, for example, a town with 151 residents would be allocated two representatives, while a town with 149 residents would have only one.[88] Although the population of these two towns is nearly identical, the first receives twice as much legislative representation as the second.[89]

In addition, multimember districts may cause the legislature to become unreasonably large. If a district with 100 residents elects one representative, then a district with 1000 residents would have ten representatives, and a district with 2000 residents would have twenty.[90] Under a multimember districting plan considered by New York in the 1960s, the state assembly would have contained nearly 400 members.[91] A hypothetical regional government for Boston would have contained over 4000.[92] There is an inherent tension between keeping the legislature small and keeping the deviation within constitutional limits.

Weighted voting eliminates both concerns. First, weighted-voting plans constrain the overall size of the legislature by limiting the number of representatives each

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"would be to sacrifice practicality for an abstraction").

84. Franklin v. Krause, 415 U.S. 904 (1974).

85. Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 886 F. Supp. 242, 247–48 (N.D.N.Y. 1995) (noting that "[t]his type of dismissal is deemed to reach the merits of the case, and creates binding precedent").

86. Ostrow, *supra* note 5, at 1846–47.

87. 403 U.S. 182, 184 (1971).

88. *Id.*

89. Abate v. Rockland Cty. Legislature, 964 F. Supp. 817, 820 (S.D.N.Y. 1997) (noting that "the voters of the second town would elect half as many county legislators as the nearly identical number of voters of the third town while simultaneously having one-third less voting power than the voters in the first town").

90. *Id.*

91. *See* Banzhaf, *supra* note 30, at 322 n.21.

92. Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1801 (2002).

district elects.[93] In addition, because votes are allocated in proportion to population, weighted-voting plans generally do not deviate from population equality. In a weighted-voting plan, the deviation is calculated by comparing the "percent of total population represented by a given local official to the percent of weighted votes allocated to that official."[94] If one town contains fifteen percent of the county population and is allocated fifteen percent of the total number of votes, there is zero percent deviation from population equality. Similarly, a town containing 15.8% of the population can be allocated precisely 15.8% of the total number of votes, again producing zero percent deviation. Weighted voting consistently eliminates the deviation from population equality by granting each district a percentage of the votes that corresponds precisely to its percentage of the population.

D. Weighted Voting and Political Representation

Weighted voting equalizes the mathematic weight of each vote by increasing the number of votes each district receives in proportion to its population. Although this is a distinct advantage for equalizing the numeric weight of each vote, it generates distinct inequality in other dimensions of legislative representation.[95] In particular, this Section notes that weighted voting generates inequality in functional representation and legislator power, and increases the risk of minority vote dilution.

1. Functional Representation

Weighted voting systems do not provide each person with equal functional representation.[96] Weighted voting compensates for population disparities between districts by increasing the number of votes each legislator casts. Yet, this adjustment accounts for only one dimension of legislative representation. Indeed, legislators do more than simply vote. They engage in policy making, serve on legislative committees, participate in floor debates and provide a range of constituent services. In contrast to the number of votes, the functional dimensions of legislative representation cannot be weighted. Thus, "[a] single legislator with a double vote cannot perform double the legislative functions, serve on double the number of committees, or maintain double the contact with her constituents."[97] Limiting each district to a single

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93. *See, e.g.*, Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 80 F.3d 42, 49 (2d Cir. 1996) (noting that "the Board's small size allows for the efficient conduct of county business and a greater degree of flexibility than would a Board of substantially greater size").

94. *Roxbury Taxpayers All.*, 80 F.3d at 49 (citing League of Women Voters v. Nassau Cty. Bd. of Supervisors, 737 F.2d 155, 170 (2d Cir. 1984)); Ostrow, *supra* note 5, at 1848.

95. Ostrow, *supra* note 5, 1865.

96. *Id.* at 1862–64.

97. *Id.*; *see also* Briffault, *supra* note 12, at 408 ("A legislator from a large district may be given proportionately more votes than a legislator from a small district, but she cannot engage in proportionately more activities, devote herself to the negotiation of proportionately more bills, or be in proportionately more places at the same time."); Frug, *supra* note 92, at 1803 ("[T]he presence of people in the room—and not just their voting power—has an effect

physical representative can produce constitutionally significant inequality in legislative representation.[98]

2. Voting Power

Critics of weighted voting, notably Professor John Banzhaf, have argued that weighted voting does not equalize each legislator's voting power, or the mathematic probability determining legislative outcomes.[99] Banzhaf demonstrated that weighted voting tends to over-represent more populous districts by granting their legislators voting power in excess of their population.[100] So, for example, a legislator with sixty percent of the total number of votes will have 100% of the *voting power*. Although the legislator represents only sixty percent of the total number of people, he or she will have the power to determine the outcome of every decision that comes before the legislative body.[101] The representatives of the remaining forty percent of the population have no power. Banzhaf argued that votes should be allocated so that each legislator has the power to determine the outcome of as many legislative matters as they would have been able to determine in a legislature composed of equal-population districts.[102] The Supreme Court, however, has rejected this argument,[103] interpreting the Equal Protection Clause to require equally *weighted*, not equally *powerful*, votes.[104]

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on the outcome. . . . Adding more people from the more populous towns would change the dynamic of the discussion.").

98. *See infra* Part III.A.

99. Ostrow, *supra* note 5, at 1868–70.

100. Banzhaf, *supra* note 30, at 318 (arguing that "weighted voting does not allocate voting power among legislators in proportion to the population each represents because *voting power is not proportional to the number of votes a legislator may cast*" (emphasis in original)); *see also* John F. Banzhaf III, *Multimember Electoral Districts—Do They Violate the "One Man, One Vote" Principle?*, 75 YALE L.J. 1309, 1310 (1966) (providing a mathematical method for measuring voting power disparities in multimember districts); John F. Banzhaf III, *One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation*, 36 GEO. WASH. L. REV. 808, 809 (1968) (arguing that disparities in legislative voting power impact legislative representation).

101. Iannucci v. Bd. of Supervisors of Wash. Cty., 229 N.E.2d 195, 199 (N.Y. 1967) (recognizing that a representative of sixty percent of the votes possesses 100% of the power).

102. Ostrow, *supra* note 5, at 1868–70 (describing Banzhaf's argument and Banzhaf-based weighted-voting plans); *see also* DAN. S. FELSENTHAL & MOSHE MACHOVER, THE MEASUREMENT OF VOTING POWER: THEORY AND PRACTICE, PROBLEMS, AND PARADOXES 82–83, 142, 160 (1998) (explaining Banzhaf's formula and noting its use in the U.S. Electoral College and the European Union).

103. Bd. of Estimate of N.Y. v. Morris, 489 U.S. 688, 698 (1989) (criticizing Banzhaf's voting power formula as merely a "theoretical explanation of each board member's power to affect the outcome of board actions" and rejecting it as a measure of the plan's deviation from population); Whitcomb v. Chavis, 403 U.S. 124, 147, 168–69 (rejecting mathematical theory).

104. Fishkin, *supra* note 30, at 1893–99 (explaining voting power theory and noting that the Supreme Court has rejected this approach); Jurij Toplak, *Equal Voting Weight of All: Finally "One Person, One Vote" from Hawaii to Maine?*, 81 TEMP. L. REV. 123, 153 (2008) (arguing that the Court's decisions reflect its commitment to protecting an equally weighted

3. Minority Representation

Weighted voting systems have the potential to suppress electoral minorities.[105] In a weighted voting system, each representative is elected at-large, from the district as a whole. When representatives are elected at-large, the majority has the capacity to elect all of the districts representatives.[106] Indeed, the Court's primary concern with regard to multimember districting is not numeric vote dilution, but rather qualitative vote dilution resulting from the discriminatory impact on racial minorities.[107] The Supreme Court, thus, prefers equal-population districts in court-ordered legislative reapportionment plans "unless the court can articulate a singular combination of unique factors that justifies a different result."[108]

Weighted voting magnifies the risk of minority vote dilution in two ways. First, in a multimember district it is possible, particularly using cumulative voting or other alternative voting mechanisms, for a minority group to win one or two seats.[109] In contrast, where the district elects a single representative, the majority will always win. Moreover, in multimember districts, the individual representatives may disagree with each other and cast conflicting votes.[110] In a weighted-voting district, however, the single representative casts all her votes in a bloc, completely suppressing racial and political minorities within the weighted-voting district.

At-large systems will be struck down under Section 2 of the Voting Rights Act if the court determines that it has a discriminatory impact on a geographically concentrated racial minority group.[111] Still, at-large elections are quite common in local

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vote, not an equally powerful one).

105. Ostrow, *supra* note 5, at 1872–73.

106. Thornburg v. Gingles, 478 U.S. 30, 47–48 (1986) ("The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.").

107. Whitcomb v. Chavis, 403 U.S. 124, 145 (1971) (commenting that multimember districts are typically challenged because of their discriminatory impact, rather than because they fail to equalize the mathematic weight of each vote); Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 731 n.21 (1964) (approving the use of multimember systems to preserve representation for counties on the state legislature, but recognizing that "certain aspects of electing legislators at large from a county as a whole" might make it undesirable); *see also* Ostrow, *supra* note 5, at 1862 (distinguishing between qualitative and quantitative vote dilution claims).

108. Connor v. Finch, 431 U.S. 407, 415 (1977); *see also* Connor v. Johnson, 402 U.S. 690, 692 (1971) (noting the Court's preference for single-member districts).

109. Ostrow, *supra* note 5, at 1875.

110. *Id.*; *see also* Frug, *supra* note 92, at 1803 (noting that "electing multiple representatives would allow cities to have legislators who disagree with each other").

111. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (amended 1982). Under the *Thornburg v. Gingles* test, a minority group that contends an apportionment plan violates its constitutional rights must demonstrate as follows: (1) it is sufficiently large and geographically compact to constitute a majority in a single-member legislative district, (2) it is politically cohesive, and (3) the majority votes sufficiently as a bloc to enable the majority to usually defeat the preferred candidate of the minority. 478 U.S. at 35.

elections. According to the National League of Cities, nearly two-thirds of all municipalities use at-large elections in some way.[112] In New York, at-large elections are used to elect all board members in towns, villages, and school districts, and in about a quarter of the cities.[113] Particularly at the local level, the potential for weighted voting to result in minority vote dilution does not preclude its use.

II. FEDERAL VOTING RIGHTS AND LOCAL POLITICAL INNOVATION

Local governments have long been at the forefront of political innovation, experimenting with political institutions in ways that are inconceivable (and often unconstitutional) at the state or federal level.[114] Local governments have devised a baffling array of limited purpose districts and funding mechanisms to enable the provision of specialized public services to discrete subsets of the local population.[115] They have sought to increase their own democratic accountability and responsiveness by introducing alternative voting systems, direct democracy, term limits, campaign finance reform, and ethics codes to municipal governance.[116]

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112. *Municipal Elections*, NAT'L LEAGUE OF CITIES, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/municipal-elections [https://perma.cc/6B45-9VVD]; *see also* Paul H. Edelman, *Making Votes Count in Local Elections: A Mathematical Appraisal of at-Large Representation*, 4 ELECTION L.J. 258, 260 (2005); Kenneth A. Stahl, *The Artifice of Local Growth Politics: At-Large Elections, Ballot-Box Zoning, and Judicial Review*, 94 MARQ. L. REV. 1, 9 (2010).

113. Gerald Benjamin, *At-Large Elections in N.Y.S. Cities, Towns, Villages, and School Districts and the Challenge of Growing Population Diversity*, 5 ALB. GOV'T L. REV. 733, 736–41 (2012). Professor Benjamin's study found that at-large districting in local elections in New York has not reduced representation for African Americans. The study found that regardless of the districting system used, African American representatives have been elected in numbers proportionate to the size of the local African American population. *Id.* at 734–35. Benjamin notes that the same cannot be said for Hispanic populations and more recently immigrated groups. *Id.* at 735.

114. Briffault, *supra* note 12, at 348–49 (noting that "local governments do not abide by the tripartite separation of powers characteristic of the federal and state governments"); Douglas, *supra* note 16, at 31–32 (comparing municipalities to "'test tubes of democracy' that can try out novel democratic rules, such as broadening the right to vote, on a smaller scale"); *cf.* Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 638 (2017) (analyzing the potential costs and benefits of sub-federal policy experimentation).

115. Ashira Pelman Ostrow, *Emerging Counties? Prospects for Regional Governance in the Wake of Municipal Dissolution*, 122 YALE L.J.F. 187, 191–92 (2013), http://yalelawjournal.org/forum/emerging-counties-prospects-for-regional-governance-in-the-wake-of-municipal-dissolution [https://perma.cc/UZZ3-AY49] (describing growth of special-purpose districts); *see also* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 13–16 (8th ed. 2016) (describing growth and function of special-purpose districts).

116. Briffault, *supra* note 16, at 2–4 (reviewing local political innovations that enhance democratic accountability).

In contrast to the state or federal governments, local governments are easily accessible and highly responsive to local preferences and conditions.[117] They continually adapt, in both substance and form, to meet the evolving needs of democratic governance. Like federalism more generally, local political innovation promotes participatory democracy, increases local tailoring and government responsiveness to citizen concerns, fosters a sense of community, and enables low-risk experimentation within the federal system.[118] Moreover, local experiments can trigger action at higher levels of government.[119] In a common pattern of innovation, "a policy first embraced by a city proves itself manageable and popular at the local level before percolating 'out' to other cities and 'up' to the state level."[120] Thus, policy innovations that succeed at the local level frequently serve as a model for state and national reform.

In *Avery v. Midland County*, the Supreme Court extended the one-person, one-vote requirement to local legislatures.[121] In so doing, the Court recognized that some political subdivisions are more than mere creatures of the state. As the Court noted, general-purpose municipal governments, such as towns, cities, and counties, function as independent democratic governments, regulating autonomously in a wide variety of areas.[122] The Equal Protection Clause, thus, requires them to meet the same standard of democratic accountability as their state and federal counterparts.[123] Equally critically, however, the *Avery* Court recognized that many local political institutions are not equivalent to independent governments, and that in any event, local governments must have the flexibility to adapt to local conditions.[124] The Court, thus, emphasized that the doctrine is not intended to act as a "roadblock[] in the path of innovation, experiment, and development among units of local government."[125]

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117. Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1443 (2012).

118. *Id.* at 1442 (summarizing the values of experimentation, tailoring, and political participation in local government); *see also* Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1315 (1994) (recognizing the virtues of federalism in local governments).

119. BRUCE KATZ & JENNIFER BRADLEY, THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMY 9–13 (2013) (describing local policy innovations that triggered state reform); Paul Diller, *Intrastate Preemption*, 87 BOS. U. L. REV. 1113, 1113 (2007) ("City policy experimentation is a catalyst for change at the state and national levels"); Douglas, *supra* note 16, at 12, 37 (arguing that local voting rules "can serve as catalysts for broad-reaching reforms").

120. Diller, *supra* note 119, at 1118–19.

121. 390 U.S. 474 (1968).

122. *Id.* at 478.

123. *Id.*

124. In the words of the Court: "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions." Sailors v. Bd. of Educ., 387 U.S. 105, 110–11 (1967); *see also* Abate v. Mundt, 403 U.S. 182, 185 (1971); Hadley v. Junior Coll. Dist. of Metro. Kan. City, 397 U.S. 50, 59 (1969); Briffault, *supra* note 16, at 16–17 (noting that local governments adapt their governance structures in response to local conditions).

125. *Avery*, 390 U.S. at 485.

This Part evaluates the application of the one-person, one-vote requirement to local political institutions and argues that the Supreme Court's flexible approach facilitates local policy innovation that can, in turn, stimulate state and national reform. Section A reviews the extension of the one-person, one-vote requirement to general-purpose municipal legislatures. Section B emphasizes the Court's tolerance for local political experimentation and tailoring, noting first, that the Court entirely exempts many local electoral arrangements from the one-person, one-vote requirement, and second, that the Court has generally upheld innovative apportionment plans designed by the local government to accommodate local demographics and political preferences.

A. Local Legislatures

The federal courts have traditionally treated local governments as administrative agents of the state, subject to plenary state control over their formation and power.[126] As Justice Brennan once remarked, "Ours is a 'dual system of government,' which has no place for sovereign cities."[127] In the seminal case of *Hunter v. City of Pittsburgh*, the Supreme Court sustained a state law that permitted consolidation of two cities without the consent of the smaller of the two.[128] Voters in the smaller city strenuously objected to the consolidation and argued that the state should require that a majority of each city approve the consolidation. The Supreme Court famously rejected this argument, characterizing local governments as "convenient agencies" created by the state to exercise power on behalf of the state.[129] Under *Hunter*, the state has "absolute discretion" over the "number, nature and duration of the powers conferred upon [them] and the territory over which they shall be exercised."[130]

The Court reiterated this conception of local governments as agents of the state in *Reynolds v. Sims*.[131] Alabama's state senate was composed of one representative from each county within the state.[132] Alabama defended its "one county, one vote" apportionment plan by arguing that it was modeled on the United States Senate, in which each state is represented equally.[133] The Court, however, rejected the analogy to Congress. In contrast to the sovereign states, the Court maintained, political subdivisions are not entitled to independent representation on the legislative body.[134] In the words of the Court: "Political subdivisions of States—counties, cities, or whatever— . . . have been traditionally regarded as subordinate governmental instrumen-

126. Ostrow, *supra* note 5, at 1857.

127. Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 53 (1982) (citation omitted) (emphasis omitted).

128. 207 U.S. 161, 178 (1907) (finding that the state may modify or withdraw any powers necessary to expanding or uniting municipalities).

129. *Id.*

130. *Id.*

131. 337 U.S. 533, 575 (1964).

132. *Id.* at 543–44.

133. *Id.* at 571–73.

134. *Id.* at 568.

talities created by the State to assist in the carrying out of state governmental functions."[135] *Reynolds* thus required that both houses of Alabama's bicameral state legislature be apportioned on a population basis.[136]

If, as *Hunter* and *Reynolds* suggest, local governments are simply administrative agents of the state, their governing bodies are not democratic "legislatures" and should not be bound by the one-person, one-vote requirement.[137] In *Avery v. Midland County*,[138] however, the Court embraced a more nuanced view of local governments recognizing that, in practice, local governments exercise autonomous authority in a variety of policy areas.[139] In *Avery*, the Court considered the composition of the Commissioners Court of Midland County, Texas, which had been districted to enable a tiny rural minority to elect a majority of its members.[140] The Court noted that the government at issue performed a number of functions that generally affected the residents of the county, including the imposition of countywide property taxes and the administration of welfare services.[141] Because Midland County functioned independently, the Court held its legislature to the same standards of democratic participation and accountability as state and federal legislatures.[142] Thus, each county resident was entitled to an equally weighted vote.

B. Local Experimentation with Democratic Governance

In *Avery v. Midland County*, the Supreme Court extended the one-person, one-vote requirement to local legislatures. From the outset, however, the Court recognized that a single federal standard could not apply uniformly to the diverse and constantly evolving range of local political arrangements.[143] The Court has, thus, tailored its application of the one-person, one-vote requirement to accommodate a wide range of local political conditions, exempting many political units from the one-person, one-vote requirement, and granting local legislatures substantial discretion to craft districts that reflect local political preferences.

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135. *Id.* at 575.

136. *Id.* at 568.

137. Ostrow, *supra* note 5, at 1857; *see also* Briffault, *supra* note 12, at 347 (arguing that under *Hunter* "a state ought to be able to design local governments along the lines it deems appropriate to effectuate its purposes").

138. 390 U.S. 474 (1968).

139. *Id.* at 481 (noting that "the States universally leave much policy and decisionmaking to their governmental subdivisions").

140. *Avery*, 390 U.S. at 476 (noting that the districts contained, "respectively, 67,906; 852; 414; and 828 [people]" and that "[t]his vast imbalance resulted from placing in a single district virtually the entire city of Midland, Midland County's only urban center, in which 95% of the county's population resides").

141. *Id.* at 484.

142. *Id.* at 481.

143. *Id.* 483–85.

1. Special-Purpose Districts and Non-Legislative Bodies

Although *Avery* extended the one-person, one-vote standard to general-purpose municipal legislatures, it was careful to note that standard might not apply to "a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents."[144] The Court has since exempted a variety of special districts and non-legislative bodies from the one-person, one-vote requirement. In *Salyer Land Company v. Tulare Lake Basin Water Storage District*,[145] for example, the Court determined that water districts fell within the "special-purpose district" exception to one person, one vote.[146] The *Salyer* Court determined that the water storage district had "relatively limited authority" and its actions "disproportionately affect[ed] landowners."[147] As a result, the Court held that the vote could be limited to landowners. In *Ball v. James*,[148] the Court went further, upholding a "one-acre, one-vote" plan that not only limited the right to vote to landowners, but also distributed votes to each landowner in proportion to the number of acres he or she owned.[149] Courts have upheld similar property-based apportionment systems for Business Improvement Districts that are created primarily to maximize the value of real property within the district.[150]

In addition, to special-purpose districts, the one-person, one-vote requirement does not apply to the election of local officials to non-legislative bodies, including regional and municipal advisory boards,[151] local delegations to the state

144. *Id.* at 483–85; *see also* Hadley v. Junior Coll. Dist. of Metro. Kan. City, 397 U.S. 50, 53, 56 (1970) (recognizing that some local functionaries that are "so far removed from normal governmental activities and so disproportionately affect different groups" that they need not comply).

145. 410 U.S. 719 (1973).

146. *Id.* at 720, 728 (finding one person, one vote does not apply in water district); Ball v. James, 451 U.S. 355, 371 (1981) (same).

147. *Sayler*, 410 U.S. at 728–29.

148. 451 U.S. 355 (1981).

149. *Id.* at 367–68; Briffault, *supra* note 12, at 360 (describing extension of special-purpose district exception to water districts with more limited authority); Stahl, *supra* note 112, at 31 (describing application of doctrine to special-purpose districts).

150. Kessler v. Grand Cent. Dist. Mgmt. Ass'n, 960 F. Supp. 760 (S.D.N.Y. 1997); *see also* Burris v. Sewer Improvement Dist. No. 147, 743 F. Supp. 655, 658 (E.D. Ark. 1990) (upholding property-based apportionment plan for sewer district), *rev'd on other grounds sub nom*, Burris v. City of Little Rock, 941 F.2d 717 (11th Cir. 1991); Stahl, *supra* note 112, at 30–31 (application of one person, one vote to business improvement districts).

151. *See* Educ./Instruccion, Inc. v. Moore, 503 F.2d 1187, 1189 (2d Cir. 1974) (concluding that a regional council is not subject to one person, one vote because the "powers and functions of the councils are essentially to acquire information, to advise, to comment and to propose," none of which constituted governmental functions); Polk Cty. Bd. of Supervisors v. Polk Commonwealth Charter Comm'n, 522 N.W.2d 783, 788–90 (Iowa 1994) (concluding that the Mayors' Commission, which studies and formulates resolutions that are proposed to the Commonwealth Council, is not subject to the requirement of one person, one vote).

legislature,[152] and representatives to a state constitutional convention.[153] Similarly, the one-person, one-vote requirement does not apply if political officials are *appointed*, rather than elected.[154]

2. Flexibility in Legislative Design

The Supreme Court has adopted a notably flexible approach to reviewing local legislative plans. The Court has generally cautioned against a rigid focus on population equality noting that "[a]n unrealistic overemphasis on raw population figures" may cause courts to overlook other factors more critical to an "acceptable representation and apportionment arrangement."[155] The Court has also held that "slightly greater percentage deviations may be tolerable" at the local level because local legislative bodies have fewer representatives and smaller districts than their state and federal counterparts.[156] As the Second Circuit observed, the Supreme Court's review of local apportionment plans is "noteworthy for the nonpromulgation of strict mathematical tests," so that at the local level the theme "has been flexibility."[157]

In the 1971 case of *Abate v. Mundt*, for example, the Supreme Court upheld a multimember apportionment plan for Rockland County, New York, that was designed to preserve representation for towns on a county legislature.[158] Under Rockland County's plan, the smallest town was allocated one representative, a town that was 4.3 times as large was allocated four representatives, and a town that was 4.8 times as large was allocated five representatives.[159] As a result of the rounding process, the plan deviated from population equality by 11.9%.[160] The Court upheld the plan, despite the deviation, explaining that local needs "may sometimes justify

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152. DeJulio v. Georgia, 290 F.3d 1291, 1292 (11th Cir. 2002) (holding that one person, one vote does not apply to local delegations because they do not "engage in governmental functions"); Ala. Legislative Black Caucus v. Alabama, 988 F. Supp. 2d 1285, 1309–12 (M.D. Ala. 2013), *appeal dismissed*, 134 S. Ct. 694 (2013) (holding that the one-person, one-vote requirement does not apply to local delegations); McMillan v. Love, 842 A.2d 790, 799–01 (Md. 2004) (finding county delegation is not subject to the one-person, one-vote requirement because the delegation only refers and recommends legislation to the Maryland General Assembly).

153. Driskell v. Edwards, 413 F. Supp. 974, 977–78 (W.D. La. 1976) (concluding that "the principles of one-man, one-vote had no application to the selection of delegates to the Louisiana Constitutional Convention").

154. Sailors v. Bd. of Educ., 387 U.S. 105, 109 (1967) (noting one-person, one-vote does not apply when officials are appointed).

155. Gaffney v. Cummings, 412 U.S. 735, 749 (1973).

156. Abate v. Mundt, 403 U.S. 182, 185 (1971); *see also* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 7, at 146 ("The sheer number and variety of 'players,' i.e., office holders, special interest groups and interested parties, generally is smaller in local redistricting than at the higher levels.").

157. League of Women Voters v. Nassau Cty. Bd. of Supervisors, 737 F.2d 155 (2d Cir. 1984).

158. *Abate*, 403 U.S. at 184–86.

159. *Id.* at 184 n.1.

160. *Id.*

departures from strict equality."[161] In particular, the Court explained that preserving representation for towns on the county legislature was a legitimate districting priority because it would facilitate local governance and service delivery.[162]

The *Abate* Court recognized that multimember districting plans could produce large deviations from population equality, but mindful of the "experimental" nature of Rockland County's plan, refused to invalidate the plan on that basis.[163] Instead, the Court facilitated the County's experimental use of multimember districts to preserve towns as the basic unit of representation on the county legislature.

Similarly, in *Dusch v. Davis*, the Supreme Court upheld an innovative apportionment plan designed to meet the needs of a city containing rural and urban districts that varied dramatically in size.[164] The City of Virginia Beach contained seven boroughs that ranged in population from 1000 to 30,000. Three boroughs were urban, three were rural, and one, the Borough of Virginia Beach, was centered around tourism. Under Virginia Beach's "Seven-Four Plan," four council members were elected at large, without regard to residence, and seven were elected at large, with one residing in each of the city's seven boroughs.[165]

Although the districts varied dramatically in size, the Court determined that the plan satisfied the one-person, one-vote requirement. The Court explained, the plan "uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.'"[166] The residency requirement assured "that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area."[167] In addition, the Court suggested that the plan could serve as a model to balance competing interests in other similarly situated cities, noting that: "The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside."[168]

The Supreme Court has also upheld local efforts to expand the relevant political community by extending the franchise to include nonresident property owners.[169] In

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161. *Id.* at 185.

162. *Id.*; *see also* Schneider v. Rockefeller, 293 N.E.2d 67, 71 n.3 (N.Y. 1972) (noting that flexibility may be "desirable to facilitate intergovernmental co-operation").

163. *Abate*, 403 U.S. at 186 n.3 ("[W]e express no opinion on the contention that, in future years, the Rockland County plan may produce substantially greater deviations than presently exist. Such questions can be answered if and when they arise.").

164. 387 U.S. 112, 117 (1967); *see also* Dallas Cty. v. Reese, 421 U.S. 477, 477 (1975) (upholding county legislative system that provides for countywide balloting for each of the four commission members, but requires that a member be elected from each of four residency districts); Carlson v. San Juan Cty., 333 P.3d 511 (Wash. Ct. App. 2014) (finding county residency requirement did not violate Equal Protection Clause).

165. *Dusch*, 387 U.S. at 115.

166. *Id.*

167. *Id.* at 116.

168. *Id.* at 117.

169. *See* Ashira Pelman Ostrow, *Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change*, 102 COLUM. L. REV. 1954, 1965 (2002) (describing expansion of franchise in local elections to nonresident property owners).

Spahos v. Mayor of Savannah Beach, one of the earliest cases dealing with nonresident enfranchisement, the Supreme Court upheld a voting scheme for a seaside resort town that extended the franchise to nonresidents who owned property in the town.[170] The Supreme Court rejected the claim that expanding the franchise to include nonresidents unconstitutionally dilutes the vote of permanent residents. The Court determined that it was rational to include nonresident property owners, many of whom were summer residents, in the community's political process.[171] Thus, despite the extension of the one-person, one-vote requirement to local legislatures, "local governments still have the flexibility to organize themselves in ways that meet the needs of the local communities"[172] and the potential to stimulate state and national reform.

III. LOCAL INNOVATIONS IN LEGISLATIVE APPORTIONMENT

For the past several decades, New York's counties have experimented with weighted voting, developing innovative apportionment plans that use weighed voting to preserve representation for political subdivisions on the county legislature. Traditionally, counties in New York were governed by a Board of Supervisors made up of the elected supervisor of each town within the county.[173] In the aftermath of the one-person, one-vote cases, several counties preserved their Boards of Supervisors by allocating votes to each town supervisor in proportion to the town's population. The Second Circuit has upheld this model, noting its value in preserving "traditional boundaries and local allegiances."[174] Still, allocating one representative to districts that vary substantially in population could produce significant inequality in legislative representation.

As this Part explains, counties have responded to this demographic challenge in different ways, with different results. Some counties equalize legislative representation by incorporating weighted-voting into multimember or equal-population plans. Weighted-equal-population plans use roughly equal-population districts, each of which elects its own representative to the legislature. Weighted-multimember plans increase the number of representatives each district elects in proportion to its popu-

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170. 207 F. Supp. 688, 692 (S.D. Ga. 1962), *aff'd*, 371 U.S. 206, 206 (1962). Though this case was decided in 1962, before the major one-person, one-vote cases, courts have continued to rely on its holding to permit the enfranchisement of nonresident property owners in a variety of local elections. *See, e.g.*, May v. Town of Mountain Vill., 132 F.3d 576, 580–81 (10th Cir. 1997); Collins v. Town of Goshen, 635 F.2d 954, 958 (2d Cir. 1980); Brown v. Bd of Comm'rs, 722 F. Supp. 380, 398 (E.D. Tenn. 1989.)

171. *Spahos*, 207 F. Supp. at 692; *see also* Diebler v. City of Rehoboth Beach, 790 F.2d 328, 339 (3d Cir. 1986) (Sloviter, J., concurring) (describing "[t]he city's commendable effort to enfranchise nonresidents and to insure nonresidents' participation in the leadership of the City").

172. Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 886 F. Supp. 242, 251 (N.D.N.Y. 1995), *aff'd*, 80 F.3d 42, 46 (2d Cir. 1996)).

173. Ostrow, *supra* note 5, at 1850–51.

174. Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 80 F.3d 42, 49 (2d Cir. 1996).

lation. Hybrid-weighted-voting plans do not produce significant inequality in legislative representation because each legislator represents roughly the same number of people and casts roughly the same number of votes. In 2017, a federal district court approved of a countywide hybrid-weighted-voting plan, finding that the plan satisfied the quantitative one-person, one-vote requirement and provided each citizen with fair and effective legislative representation.[175]

Other counties were less concerned with disparities in legislative representation, and more concerned with disparities in voting power. These counties sought to equalize each legislator's voting power by apportioning votes so that each legislator would be able to determine the outcome of as many legislative decisions as he or she would be able to determine if the votes were not weighted.[176] Though the New York courts initially required counties to use the voting power model,[177] the federal courts have since rejected this approach,[178] leaving the status of voting power plans unsettled.

A. One Town, One Representative

In a pair of cases decided in the late 1990s, the Second Circuit upheld two traditional countywide weighted-voting plans, under which towns with varying populations were each represented by a single representative on the board. In 1996, in *Roxbury Taxpayers Alliance v. Delaware County Board of Supervisors*,[179] the Second Circuit upheld Delaware County's "one town, one representative" weighted-voting plan against an Equal Protection challenge.[180] At the time of the case, Delaware County was made up of nineteen towns that ranged in population from 550 to 6600.[181] Each town was represented by its elected Town Supervisor, whose vote

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175. Westcott v. Warren Cty. Bd. of Supervisors, No. 1:16-CV-1088 (GTS/CFH), 2017 WL 1532588, at *12–13 (N.D.N.Y. Apr. 27, 2017).

176. *Roxbury Taxpayers All.*, 886 F. Supp. at 248 n.10 ("In the simple arithmetic model, the number of actual votes are distributed in proportion to the percentage of the total district population in each unit. In a Banzhaf-based model, the weighted votes are apportioned to each representative based on the theoretical voting power each representative should possess.").

177. Iannucci v. Bd. of Supervisors of Wash. Cty., 229 N.E.2d 195, 199 (N.Y. 1967).

178. Jackson v. Nassau Cty. Bd. of Supervisors, 818 F. Supp. 509, 532–34 (E.D.N.Y. 1993) (rejecting voting power model); *see also* Bd. of Estimate of N.Y. v. Morris, 489 U.S. 688, 698 (1989) (criticizing Banzhaf's formula as merely a "theoretical explanation of each board member's power to affect the outcome of board actions" and rejecting it as a measure of plan's deviation from population); Whitcomb v. Chavis, 403 U.S. 124, 147, 168–69 (1971) (rejecting Professor Banzhaf's mathematical theory).

179. 80 F.3d 42 (2d Cir. 1996).

180. *Id.* at 49; *see also* Reform of Schoharie Cty. v. Schoharie Cty. Bd. of Supervisors, 975 F. Supp. 191, 194–95 (N.D.N.Y. 1997) (upholding a substantially identical weighted-voting scheme in Schoharie County).

181. 80 F.3d 42, 44. For updated statistics, see *Quick Facts: Delaware County, New York*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/delawarecountynewyork [https://perma.cc/9ESL-TEGU]; *Quick Facts: Schoharie County, New York*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/schohariecountynewyork [https://perma.cc/YXG9-XW86].

was weighted in proportion to the town's population.[182] The smallest town contained one percent of the total county population and was allocated one percent of the total number of votes on the board. The largest town contained fourteen percent of the total county population and was allocated fourteen percent of the total number of votes on the board.[183]

The court calculated the plan's maximum deviation from population equality using a weighted-vote formula that compared the percent of population an official represents to the percent of votes allocated to that official.[184] Because votes on the board were allocated in proportion to the population of each district, the plan deviated by less than one percent from population equality. The court thus concluded that Delaware County's plan complied with the quantitative one-person, one-vote, requirement.[185]

In addition, the Second Circuit expressly rejected the claim that the Equal Protection Clause requires the use of equal-population districts.[186] Though the population of each town varied, the Second Circuit found there was nothing in the record to indicate that the plan did not provide "fair and effective" representation.[187] To the contrary, the court explained that the county's "one town, one representative" structure "assures that the interests of every town, no matter how small, are considered by the Board, and that no town suffers from permanent lack of representation on account of its size."[188]

In *Reform of Schoharie County v. Schoharie County Board of Supervisors*,[189] which followed only two years later, the court went further, expressly rejecting the claim that Schoharie's "one town, one representative" plan violates the Equal Protection rights of residents of larger districts, who receive less functional representation than residents of smaller districts.[190] Although the towns in Schoharie County varied in size,[191] the court determined that there was no qualitative difference in the

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182. Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 80 F.3d 42, 49 (2d. Cir. 1996) (noting that the plan "allocates votes among Board members based strictly on the population represented by each Supervisor").

183. *Id.* at 45.

184. *Id.* at 49 (citing League of Women Voters v. Nassau Cty. Bd. of Supervisors, 737 F.2d 155, 170 (2d Cir. 1984)) (comparing the "percent of total population represented by a given local official to the percent of weighted votes allocated to that official").

185. *Id*.

186. *Id.* at 45 (arguing that the Equal Protection Clause required equal-population districts and that "the County's desire to preserve the integrity of town boundaries could not override that constitutional requirement").

187. *Id.* at 46 (quoting Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 886 F. Supp. 242, 252 (N.D.N.Y. 1995), *aff'd*, 80 F.3d 42 (2d Cir. 1996)).

188. *Id.* at 49.

189. 975 F. Supp. 191, 193 (N.D.N.Y. 1997), *aff'd*, No. 97-9297, 1998 WL 425911 (2d. Cir. Apr. 22, 1998).

190. *Id.*

191. The towns varied in size from 332 to 7270 residents. This number includes students from S.U.N.Y. Cobleskill. *Id.* at 192. The court later states that the population of the largest town is 5670, which presumably does not include those S.U.N.Y. students. *Id.* at 193 n.1.

voters' access to their elected representative, or in any of the other non-voting functions, such as participation in committees, legislative debate, or discussion with other supervisors.[192] On appeal, the Second Circuit affirmed the district court's decision that local supervisors are likely to be able to provide "fair and effective representation" despite the fact that the towns differ in size.[193]

Similarly, in its seminal case upholding weighted voting, the New York Court of Appeals rejected the claim that inequality in legislative representation violates the Equal Protection Clause.[194] In *Iannucci v. Board of Supervisors of Washington County*, New York's highest court recognized that weighted voting discriminates against residents of smaller districts because "representatives who cast the larger aggregates of votes can be expected to have greater influence with their colleagues"[195] and "necessarily have greater influence over the passage of legislation."[196] The court held, however, that there is "nothing unconstitutional in a disparity of influence" among the representatives.[197]

The U.S. Supreme Court's recent decision in *Evenwel v. Abbott*[198] lends additional support to the claim that Equal Protection does not require that each legislator represent an equal number of people.[199] In *Evenwel,* the Court expressly noted that "constituents have no constitutional right to equal access to their elected representatives."[200] The Court explained that it was reasonable to create districts that equalize the total number of people (as opposed to total number of eligible voters) because such districts promote "equitable and effective representation," "[b]y ensuring that each representative is subject to requests and suggestions from the same number of constituents."[201] Yet, the Court did not require that districts contain an equal number of people. Under *Evenwel*, equalizing the number of constituents each legislator represents is a reasonable state policy, not a federal constitutional mandate.

B. Hybrid Weighted-Voting Plans

In *Reform of Schoharie County v. Schoharie County Board of Supervisors*, the district court upheld the county's one-town, one-representative plan, but emphasized

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192. Although the court noted that the argument might be more persuasive in a densely populated county. *Id.* at 196.

193. Reform of Schoharie Cty. v. Del. Cty. Bd. of Supervisors, No. 97-9297, 1998 WL 425911, at *1 (2d. Cir. Apr. 22, 1998) ("We affirm substantially for the reasons stated in [the district court opinion]. The arguments made by appellant in the present case are not substantially different from those made, and rejected, in the similar suit brought with regard to the board of supervisors of Schoharie's neighboring county, Delaware County.").

194. Iannucci v. Bd. of Supervisors of Wash. Cty., 229 N.E.2d 195, 197–200 (N.Y. 1967).

195. *Id.*

196. Iannucci v. Bd. of Supervisors of Wash. Cty., 279 N.Y.S.2d 458, 459 (App. Div.), *aff'd*, 229 N.E.2d 195 (N.Y. 1967).

197. *Iannucci*, 229 N.E.2d at 199.

198. 136 S. Ct. 1120, 1132 (2016).

199. Ostrow, *supra* note 5, at 1865–66.

200. *Id.* at 1132 n.14.

201. Evenwel v. Abbott, 136 S. Ct. 1120, 1132 (2016).

the uniformly rural character of the county.[202] The district court noted that weighted voting at higher levels of government, or in more densely populated counties, could "lead to serious non-voting-related constitutional problems."[203] Some counties mitigate these problems by combining weighted-voting with multimember or equal-population districts. These plans equalize legislative representation because each legislator represents roughly the same number of people and casts roughly the same number of votes.

1. Weighted-Multimember Districts

Some counties use weighted voting to preserve multimember districts that would otherwise generate impermissibly high deviations from population equality or require the formation of an unreasonably large legislative body. Rockland County, for example, used weighted voting to reduce the deviation produced by its multimember apportionment plan.[204] Rockland County used its five existing towns as electoral districts.[205] Under the plan, each town was allocated a number of representatives in proportion to the town's population.[206] At the time of its formation, the plan deviated from population equality by 11.9%.[207] In its 1971 decision in *Abate v. Mundt* the Supreme Court found that the deviation was justified by the county's desire to preserve representation for its towns.[208] Although the Court recognized that in future years, the county's multimember districting plan "may produce substantially greater deviations than presently exist," it determined that "such questions can be answered if and when they arise."[209]

By 1998, however, the deviation caused by Rockland County's multimember plan had increased to 19.8%.[210] The court determined that the increased deviation could no longer be justified and ordered Rockland County to reapportion its legislature to comply with the quantitative one-person, one-vote requirement. To reduce the deviation below the presumptively constitutional ten percent threshold, the County would have had to increase the size of its legislature to forty-two members, an increase that would have defeated the county's goal of maintaining an efficient legislative body.[211]

Instead, Rockland County preserved representation for its towns by incorporating weighted voting into its multimember apportionment plan. Under the county's hybrid weighted-multimember plan, each town was allocated a total number of votes in pro-

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202. 975 F. Supp. 191, 193 (N.D.N.Y. 1997), *aff'd*, 152 F.3d 920 (2d Cir. 1998).
203. *Id.* at 194–95.
204. ROCKLAND CTY. CODE § 101-8 (1997).
205. Abate v. Mundt, 403 U.S. 182 (1971).
206. *Id.* at 184–86.
207. *Id.*
208. *Id.*; *see also* Schneider v. Rockefeller, 31 N.Y.S.2d 420, 429 n.3 (1972) (noting that flexibility may be "desirable to facilitate intergovernmental co-operation").
209. *Abate*, 403 U.S. at 186 n.3.
210. Abate v. Rockland Cty. Legislature, 964 F. Supp. 817, 830 (S.D.N.Y. 1997).
211. *Id.*

portion to its population. The town's votes were then divided among the town's representatives.[212] So, for example, if the largest town contained twenty percent of the total population, it would be allocated twenty percent of the total number of votes. Those votes would then be divided among the town's representatives who are elected at large from the town as a whole.

Rockland County's hybrid weighted-voting reflected its desire to use its towns as multimember districts and its need to reduce the plan's total deviation from population equality. Although Rockland County later replaced its hybrid-weighted-multimember system with a county legislature composed of equal-population districts, its innovative apportionment plan continues to serve as a model for reapportionment reform.[213] In 2010, for example, Schenectady County adopted this model to preserve its multimember apportionment plan. Schenectady County is governed by a county legislature made up of four multimember districts whose boundaries correspond to existing city and town boundaries.[214] The city of Schenectady is divided into two districts and each of the other districts contains two whole towns.[215] The number of members each district elected was adjusted after each census to reflect changes in the population.[216]

At the time of its adoption, the county legislature contained fourteen members.[217] After several decades of minor fluctuation, the 2010 census revealed significant demographic shifts.[218] To comply with the one-person, one-vote requirement, the county would have had to add nine more members to the board.[219] Voters objected to an expansion of this size. In the words of one voter:

> [A] Legislature of 24 members would work, provided we raise enough in additional county taxes to pay for nine new legislators and their desks and crowd all of this into the legislative chamber. But would even the League of Women Voters claim that this is a reasonable solution? I doubt it.[220]

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212. ROCKLAND CTY. CODE § 101-8 (1997).

213. Memorandum from Christopher H. Gardner, County Attorney, Schenectady, on Results of the 2010 Census and the Requirements of Section 2.04 of the Charter of Schenectady County, and the Requirements of the Federal and State Court Decisions Requiring One Person/One Vote to the Schenectady County Legislature (Apr. 8, 2011) (on file with the *Indiana Law Journal*) [hereinafter Memorandum from Christopher H. Gardner]; *see also* Lamendola, *supra* note 24.

214. Memorandum from Christopher H. Gardner, *supra* note 213, at 3.

215. *Id.* at 2.

216. *Id.*

217. *Id.*

218. *Id.* at 1 (noting that for the first time since 1970, Schenectady County's population increased rather than decreased).

219. *Id.* at 3. The County Charter limited the population deviation above or below the average population per legislator to 7.5%. SCHENECTADY CTY., N.Y., CHARTER § 2.04(f) (2001), *amended by* SCHENECTADY CTY., N.Y., CHARTER § 2.04 (2011).

220. Edwin D. Reilly Jr., Opinion, *Weighted Voting Is Probably Least Bad Solution*, DAILY GAZETTE (May 22, 2011), https://dailygazette.com/article/2011/05/22/0522_reilly [https://

At the same time, the county wanted to maintain its fixed electoral districts, first to preserve the integrity of its political subdivisions,[221] and second, to avoid the "potential mischief of single member districts which could encourage gerrymandering."[222]

Rather than dramatically expand the size of its legislature, or even more dramatically, replace its multimember districts with equal-population districts, the county used weighted voting to reduce the plan's deviation from population equality.[223] Under the County's hybrid multimember-weighted voting plan, each district received a total number of votes in proportion to its population. The votes were divided among the district's representatives who were elected at large. Weighted voting enabled the county to achieve multiple goals, including: (i) maintaining its fixed multimember districts, which preserved representation for its political subdivisions and prevented gerrymandering, and (ii) reducing its deviation from population equality without expanding the size of its legislature.

2. Weighted-Equal-Population Districts

Cortland County uses weighted voting to preserve single-member districts that correspond to fixed political subdivisions and contain roughly the same number of people, but would not otherwise satisfy the quantitative one-person, one-vote requirement. At the time of its formation, Cortland County's legislature was composed of nineteen single-member districts that corresponded to fixed political subdivisions and ranged in population from 2100 to 2700 residents.[224] These roughly-equal-population districts were formed by subdividing the city of Cortland and three more populous suburban towns into legislative districts, and by grouping together rural towns with smaller populations.[225] If each single-member district was granted a single vote, the plan would deviate from population equality by more than twenty-five percent.[226] Instead, the County used weighted voting to eliminate the deviation and equalize the numeric weight of each vote.

The County's hybrid-weighted-equal-population plan allocated legislative votes to each district in proportion to its population. The smallest district contained 4.5% of the population and was granted 4.5% of the votes.[227] The largest district contained

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perma.cc/D66F-M2P9].

221. *Id.*

222. Memorandum from Christopher H. Gardner, *supra* note 213, at 3–4 (noting that maintaining the connection between districts and political subdivisions "(i) [P]reserves the natural and historical political units in the county, (ii) recognized that citizens identify with the cities and towns through schools, PTA and other civic organizations, and (iii) further recognizes that such an identification of the votes with political units would be lost if a system of equal population districts splits some communities and artificially created others.").

223. *Id.*

224. Slater v. Bd. of Supervisors of Cortland, 330 N.Y.S.2d 947, 948–50 (Sup. Ct. 1972), *aff'd*, 346 N.Y.S.2d 185 (App. Div. 1973).

225. *Id.*

226. *Slater*, 346 N.Y.S.2d at 186.

227. *Id.*

twenty-five percent of the population and was granted twenty-five percent of the votes.[228] Because each district received a percentage of the total number of votes that corresponded to its percentage of the total county population, there was no deviation from population equality. In addition, because each legislator represented roughly the same number of people, there was no significant deviation in functional representation. There is also less of a risk that a geographically concentrated minority group will be submerged within a larger weighted-voting district.

Cortland County's weighted-equal-population plan combines the advantages of equal-population districting with weighted voting. As the New York court observed in upholding the constitutionality of Cortland's plan:

> It unites the smaller towns possessing similarity of interests into legislative districts; it divides the two larger towns into legislative districts. The city's boundary is not pierced. It creates legislative districts much closer in population than if weighted voting were used on the basis of existing towns and city wards in which populations vary from 493 to 7469.[229]

Voters in Cortland continue to approve of this approach. Following the 2010 census, Cortland County considered several possible redistricting plans, one of which would have eliminated weighted voting.[230] In 2012, the voters passed a referendum to maintain their weighted-equal-population system.[231]

3. Multidimensional Districts

Warren County uses weighted voting together with multimember and single-member districts to preserve the integrity of political subdivision boundaries. Warren County's weighted-apportionment plan vividly illustrates the versatility of weighted voting as a means of complying with the quantitative one-person, one-vote requirement. Warren County is comprised of eleven towns and one city that vary widely in population.[232] The largest town contains forty-two percent of the county population, while the smallest, contains only one percent of the county population.[233] If each district elected one representative, whose vote was weighted in proportion to the district's population, there would be significant inequality in legislative representation. The legislator with forty-two percent of the total number of votes would dominate

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228. *Id.*

229. *Slater*, 330 N.Y.S.2d at 950.

230. Catherine Wilde, *Smaller Legislature on Tuesday's Ballot*, CORTLAND STANDARD (Nov. 1, 2012), http://www.cortlandstandard.net/articles/11012012n.html [https://perma.cc/PEB2-9D26].

231. *See* CORTLAND CTY., N.Y., RULES OF ORDER art. XI (2014); *Legislative and Election Districts*, CORTLAND COUNTY, http://www.cortland-co.org/election/LEGISLATIVE%20DISTRICTS%2022%20X%2036.pdf.

232. Westcott v. Warren Cty. Bd. of Supervisors, No. 1:16-CV-1088 (GTS/CFH), 2017 WL 1532588, at *7 (N.D.N.Y. Apr. 27, 2017).

233. *Id.* at *5–7 (describing the county's weighted-voting plan).

the legislative agenda, but have little contact with individual voters and less time to serve on committees and perform non-voting functions. The legislator with only one percent of the vote would have significant contact with individual voters, but powerless to determine the outcome of any legislative matters.

To prevent those problems, Warren County equalizes legislative representation in two ways. First, the largest town is a *multimember* district which elects five representatives to the county board.[234] The town is allocated forty-two percent of the total number of votes, which are divided among the town's five representatives. Each representative, therefore, represents approximately eight percent of the population and casts eight percent of the votes.[235] Second, the next largest municipality, the city of Glens Falls, contains 22.5% of the county population.[236] The city is subdivided into five wards, each containing approximately 4.5% of the population. Each district elects a single representative who casts 4.5% of the votes on the board.[237] The balance of the towns range from 1.1-6.2% of the population. Each town elects one representative whose vote is weighted in proportion to the town's population. [238]

In *Westcott v. Warren County Board of Supervisors*, the district court upheld Warren County's hybrid weighted-voting plan, finding that it satisfied the quantitative one-person, one-vote requirement and provided each citizen with fair and effective representation.[239] Warren County's plan equalizes the numeric weight of each person's vote by allocating legislative votes to each district in proportion to its population. It equalizes other dimensions of legislative representation by assuring that each legislator represents roughly the same percentage of the population. It also maintains fixed electoral districts that preserve representation for political subdivisions and prevent gerrymandering. Warren County's apportionment plan demonstrates that weighted voting can be used to create a legislature that reflects a more nuanced balance of political values than a legislature composed of single-member, equal-population districts.

C. Voting Power Plans

Warren County's hybrid weighted-voting plan combines weighted voting with multimember and single-member districts to equalize the number of constituents

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234. *Id.*
235. *Id.*
236. *Id.* at 1.
237. *Id.*
238. *Id.*
239. Westcott v. Warren Cty. Bd. of Supervisors, No. 1:16-CV-1088 (GTS/CFH), 2017 WL 1532588, at *12–13 (N.D.N.Y. Apr. 27, 2017); *see also* Don Lehman, *Lawsuit May Renew Debate over Board of Supervisors or Legislature in Warren County*, POST STAR (Apr. 24, 2016), http://poststar.com/news/local/lawsuit-may-renew-debate-over-board-of-supervisors-or-legislature/article_1e589aca-47c3-5fa0-8075-9f83a01caf34.html [https://perma.cc/C5QN-8GLB]; Don Lehman, *Official Outlines County Board Format Options*, POST STAR (Mar. 23, 2016), http://poststar.com/news/local/official-outlines-county-board-format-options/article_6df49540-c4fa-51d9-a33b-dd6cd68018bc.html [https://perma.cc/ZM6W-FUCB].

each legislator represents and the number of votes each legislator casts. Other counties have addressed a similar demographic challenge in a very different way, with very different results. Nassau County, for example, used a voting-power plan to preserve representation for the Town of Hempstead, which contained more than half of the total county population.[240] In 1993, however, a federal district court rejected Nassau's voting power model and ordered it to reapportion its legislature to equalize the numeric weight of each person's vote. The County responded by replacing its Board of Supervisors with a county legislature composed of equal-population districts.[241]

Today, Nassau County's equal-population apportionment plan suffers from the same crisis in partisan gerrymandering as equal-population apportionment plans throughout the country. Indeed in 2014, a non-partisan coalition of voting rights groups organized a "'Gerrymandering Grand Prix,' a guided caravan tour of the zany borders of gerrymandered Nassau County Legislature districts."[242] The director observed that, "gerrymandering hurts our democracy by dividing communities, entrenching incumbents, and discouraging political competition and participation."[243] Perhaps this result could have been avoided if Nassau County modified, rather than replaced, its weighted-voting plan.

1. Equally-Powerful Votes

Nassau County's weighted-voting plan long preceded the one-person, one-vote requirement. Like other New York counties, Nassau's Board of Supervisors was initially composed of the elected Supervisor of each of its component towns.[244] In 1917, however, the county adopted a weighted-voting plan to increase representation for its largest town, the Town of Hempstead.[245] Under Nassau County's weighted-voting plan, two cities and two towns each had one member on the Board of Supervisors, while Hempstead had two members.[246] The total number of votes on the Board were allocated to each district in proportion to its population.[247] To prevent

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240. *See* Jack B. Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21, 44–45 (1965).

241. *See infra* notes 260–261.

242. *Gerrymandering Grand Prix*, NASSAU COUNTY UNITED REDISTRICTING COALITION http://www.nassauunitedredistricting.org/gerrymandering-grand-prix-2 [https://perma.cc/RNW6-GAHY]; *see also Nassau County Gerrymandering Grand Prix: Redistricting Reformers Rally To Oppose Partisan Gerrymandering*, READMEDIA (Mar. 23, 2014, 1:15 PM), http://readme.readmedia.com/NASSAU-COUNTY-GERRYMANDERING-GRAND-PRIX/8359227 [https://perma.cc/JB32-SCQX].

243. *Id.*

244. Bernard Grofman & Howard Scarrow, Iannucci *and Its Aftermath: The Application of the Banzhaf Index to Weighted Voting in the State of New York*, *in* GAME THEORY AND THE U.S. COURTS 170, 178–79 (S. J. Brams et al. eds., 1979).

245. Grofman & Scarrow, *supra* note 17, at 288–89; Weinstein, *supra* note 240, at 44.

246. Grofman & Scarrow, *supra* note 17, at 288–89; Weinstein, *supra* note 240, at 44.

247. Weinstein, *supra* note 240, at 44.

the Town of Hempstead from dominating the Board, the County adopted a supermajority requirement. Hempstead was granted fourteen out of twenty-five votes, but a majority was defined as fifteen (rather than thirteen) out of twenty-five votes.[248]

By 1968, when the Supreme Court extended the one-person, one-vote requirement to general purpose municipal governments, Hempstead contained fifty-seven percent of the county population, but was allocated only 49.6% of the vote.[249] The New York Court of Appeals determined that this allocation violated the one-person, one-vote requirement and ordered the county to reapportion its legislature on a population basis.[250]

Nassau County could not simply weigh the votes of each district in proportion to its population, because doing so would give the Town of Hempstead nearly sixty percent of the total number of votes on the Board. The New York Court of Appeals had already held that such an apportionment plan would not be valid. In *Iannucci v. Board of Supervisors of Washington County*, the court observed that:

> [A] particular weighted voting plan would be invalid if 60% of the population were represented by a single legislator who was entitled to cast 60% of the votes. Although his vote would apparently be weighted only in proportion to the population he represented, he would actually possess 100% of the voting power whenever a simple majority was all that was necessary to enact legislation.[251]

The court held that weighted voting could be used to satisfy the one-person, one-vote requirement so long as votes were distributed so that each "legislator's voting power, measured by the mathematical possibility of his casting a decisive vote," approximates the power he would have in a legislature composed of equal-population districts.[252]

Nassau County, thus, complied with the one-person, one-vote requirement using a voting-power plan that allocated votes in proportion to each legislator's voting power, rather than in proportion to each district's population.[253] Under Nassau County's plan, Hempstead was allocated enough votes to enable it to determine the outcome of sixty percent of the Board's decisions.[254] This formula resulted in Hempstead being allocated slightly less than a majority of the total number of votes.[255] Over the next several decades, both the New York Court of Appeals and the Second Circuit approved of Nassau County's weighted-voting plan.[256] In *Franklin v.*

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248. *See* Grofman & Scarrow, *supra* note 17, at 296.

249. Weinstein, *supra* note 240, at 44–45.

250. Franklin v. Mandeville, 256 N.E.2d 534, 535 (N.Y. 1970).

251. 229 N.E.2d 195, 199 (N.Y. 1967) (accepting Banzhaf's voting power argument).

252. *Id.*; *see also* Grofman & Scarrow, *supra* note 17, at 287–92 (describing *Iannucci* as a "remarkable decision, standing as one of the most conspicuous examples ever recorded of a judicial decision based squarely on the findings of scholarly research").

253. *See* Weinstein, *supra* note 240, at 44–45.

254. *Id.*

255. *Id.*

256. *See* League of Women Voters of Nassau Cty. v. Nassau Cty. Bd. of Supervisors, 737

Kraus, for example, the New York Court of Appeals noted that Nassau County's plan "comports with the standards set forth in *Iannucci v. Board of Supervisors of Washington County* as closely as is possible, given the unique situation created by Hempstead's size with the disparities in population among the other [districts]."[257]

In its 1989 decision striking down the one-borough, one-vote structure of New York City's Board of Estimate, however, the Supreme Court rejected the voting power formula as a means of calculating a plan's deviation from population equality.[258] Although the case did not involve weighted voting, the decision called the constitutionality of Nassau County's voting plan into question. If a voting power formula could not be used to calculate the deviation from population equality, could it be used to allocate votes within a weighted-voting plan?

In *Jackson v. Nassau County Board of Supervisors*, the federal district court said no.[259] Echoing the Supreme Court's language, the *Jackson* court criticized the voting power model both for the "mathematical quagmire such a system engenders," and, more importantly, because "the methodology fails to take into account other critical factors related to the actual daily operations of a governing body."[260]

The demographics of Nassau County thus created a structural problem. Population-based weighted voting would grant the Town of Hempstead more than a majority of votes on the Board. Yet, the voting power formula could no longer be used to adjust the allocation of votes on the Board. The *Jackson* court concluded that Nassau County's weighted voting system was fundamentally flawed and ordered the county to adopt a reapportionment plan that complied with the one-person, one-vote requirement. The County eventually replaced its weighted voting system with a county legislature composed of equal-population districts.[261]

F.2d 155, 156 (2d Cir. 1984); Franklin v. Krause, 298 N.E.2d 68, 72 (N.Y. 1973).

257. *Krause*, 298 N.E.2d at 72 (citations omitted); Franklin v. Krause, 415 U.S. 904 (1974) (declining review for want of a federal question).

258. Bd. of Estimate of N.Y. v. Morris, 489 U.S. 688, 698 (1989) (criticizing Banzhaf's formula as merely a "theoretical explanation of each board member's power to affect the outcome of board actions" and rejecting it as a measure of the plan's deviation from population).

259. Jackson v. Nassau Cty. Bd. of Supervisors, 818 F. Supp. 509, 535 (E.D.N.Y. 1993) ("[T]he Court finds that weighted voting as it is presently utilized by the Nassau County Board of Supervisors is unconstitutional, in that it violates the one person, one vote principle encompassed by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.").

260. *Id.* at 532.

261. *Id.* To help formulate the remedial plan, the County Executive appointed a seventeen-member Commission on Government Revision. The Commission proposed, and the board of supervisors eventually adopted, an apportionment plan composed of nineteen single-member legislative districts, two of which were minority districts. *See* Jackson v. Nassau Cty. Bd. of Supervisors, 157 F.R.D. 612, 614 (E.D.N.Y. 1994); *see also* John T. McQuiston, *Plan To Revamp Nassau Legislature To Create 2 Minority Districts*, N.Y. TIMES (Mar. 28, 1994), http://www.nytimes.com/1994/03/28/nyregion/plan-to-revamp-nassau-legislature-to-create-2-minority-districts.html [https://perma.cc/5STC-XFM8] ("The creation of two minority-dominated districts is at the heart of a plan for a new 19-member Nassau County Legislature that is meant to assure fair representation for Long Island's growing number of minority residents.").

2. Did the Experiment End Too Soon?

Although the federal courts reject voting power plans, they have continued to uphold population-based weighted-voting plans that equalize the numeric weight of each vote by allocating votes to each district in proportion to the district's population.[262] Thus, Nassau County's experiment with weighted voting leaves at least two questions unanswered.

First, what is the legal status of New York's remaining weighted-voting power plans? The New York Court of Appeals decision requiring counties to adopt voting power plans has not been overturned.[263] As a result, counties in New York continue to use these systems. Following the 2010 census, for example, Essex County adjusted its allocation of votes using the voting power formula.[264] In some cases, the distinction may not matter. In practice, the voting power formula often produces an allocation of votes that mirrors the allocation that would be produced if votes were distributed in proportion to population, making it possible to comply with both the federal and state standard.[265] Nonetheless, the system is difficult to understand and expensive to implement. It is, at best, not necessary, and more likely, not valid.

Second, could Nassau County have preserved its board of supervisors without the voting power formula by using a hybrid weighted system? Specifically, could Nassau have either subdivided the Town of Hempstead into roughly equal-population districts, each of which would elect its own representative to the board (as is done in Cortland County), or treated the Town of Hempstead as a multimember district, increasing its representatives in proportion to its population and splitting the total number of weighted votes between them (as is done in Schenectady County), or created its own mix of apportionment systems (as is done in Warren County)?

Had Nassau County continued to experiment with weighted voting, it could have developed a plan that preserved representation for its political units and satisfied the one-person, one-vote requirement. Instead, like most equal-population apportionment plans, Nassau County's gerrymandered districts reflect little more than the political self-interest of the politicians who draw them.

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262. Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 80 F.3d 42, 48 (2d Cir. 1996) (upholding plan under which each supervisor is allocated a number of votes in proportion to the population of his or her town); Reform of Schoharie Cty. v. Schoharie Cty. Bd. of Supervisors, 975 F. Supp. 191, 193 (N.D.N.Y. 1997), *aff'd*, 152 F.3d 920 (2d Cir. 1998).

263. Iannucci v. Bd. of Supervisors of Wash. Cty., 229 N.E.2d 195, 199 (N.Y. 1967).

264. Lohr McKinstry, *Slight Power Shift*, PRESS REPUBLICAN (Apr. 13, 2012), http://www.pressrepublican.com/news/local_news/slight-power-shift/article_16140991-dc49-5e84-aaa6-cfbda4470f50.html [https://perma.cc/TC69-PWME] (noting that, in Essex County, the Town of Ticonderoga has 13.39% of the county population and 13.44% of the *voting power*, not 13.44% of the actual number of votes).

265. *Reform of Schoharie Cty.*, 975 F. Supp. at 193 n.1 (noting only "minor differences between the votes allotted by the Banzhaf method . . . and those which would be allotted by strictly arithmetical computation"); Grofman & Scarrow, *supra* note 17, at 298 (noting that except in rare cases with extreme population deviations between districts, the allocation of votes based upon the Banzhaf-based model deviates only slightly from the strict arithmetic model).

IV. USING WEIGHTED VOTING TO END PARTISAN GERRYMANDERING

In the United States, state legislatures are primarily responsible for redrawing the boundaries of state legislative and congressional electoral districts after each decennial census.[266] Self-interested districting is an entirely predictable byproduct of this process. When legislators are empowered to draw their own districts, they will inevitably use that power to secure their own reelection and maximize their party's representation in the legislature.[267] In the decades before the reapportionment revolution, self-interested districting manifested through inaction. State legislatures refused to adjust electoral district bounds in response to widespread demographic shifts from rural to urban areas.[268] The Supreme Court eventually intervened with its one-person, one-vote doctrine, requiring that legislatures be apportioned on a population basis so that every person has an equally weighted vote.[269]

Though the one-person, one-vote doctrine resolved the problem of malapportioned districts, it did not constrain self-interested districting.[270] The equal-population standard is just that: a requirement that each district contain the same number of people. It says nothing about who those people are or how the district lines will be determined. As the Supreme Court soon recognized, computerized districting and mapping technology "make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has."[271]

Moreover, the normative commitment to equal-population districts means that state legislatures are affirmatively required to adjust district boundaries after each decennial census to account for demographic shifts. The redistricting process provides politicians with a regularly scheduled opportunity to manipulate district boundaries to secure their own reelection and maximize their party's representation in the

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266. MICHAEL P. MCDONALD, REDISTRICTING AND COMPETITIVE DISTRICTS, IN THE MARKETPLACE OF DEMOCRACY 222, 228 tbl.10-1 (Michael P. McDonald & John Samples eds., 2006) (summarizing state districting processes); ALL ABOUT REDISTRICTING (July 30, 2017), http://redistricting.lls.edu/states.php [https://perma.cc/D293-6DZU] (discussing the redistricting processes of various states).

267. Kang, *supra* note 10, at 683 ("Self-dealing incumbents can and do substitute their political interests as the overriding priority for redistricting in place of any broader sense of the public good."); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 681 (2013) (arguing that politicians create districts that serve their self-interest).

268. *See supra* notes 41–42.

269. *See supra* notes 49–57.

270. Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 759 (2004) ("While the doctrine has substantially equalized the populations of legislative districts throughout the country, it does not directly prohibit redistricting authorities from gerrymandering district lines in a way that unfairly favors one political party and disfavors another.").

271. Karcher v. Daggett, 462 U.S. 725, 733 (1983); *see also* Gaffney v. Cummings, 412 U.S. 735, 748–49 (1973); Michael Kent Curtis, *Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 324 (2003) ("New computer technology has moved the gerrymander from an art to a science, making it far easier to create districts of equal population with any desired political configuration."); Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609, 1669 (2017) ("[S]ophisticated computer algorithms allow for the creation of voting districts with equal population and just about any political configuration.").

legislature.[272] Thus, in the decades since the reapportionment revolution, self-interested districting manifests through aggressive and often creative manipulation of district lines to entrench incumbents and weaken political opponents by "packing" them into supermajority districts or "cracking" them between several districts.[273]

In the aftermath of the reapportionment cases, several states considered adopting statewide weighted-voting plans to comply with the quantitative one-person, one-vote requirement without redistricting.[274] Proponents argued that weighted voting would enable states to continue to use counties as the basic unit of representation on the state legislature and prevent gerrymandering.[275] Critics objected that weighted voting generates unacceptable inequality in legislative representation.[276] Representatives with more votes are simultaneously more powerful on the legislative body and less accessible to their constituents. Courts sided with critics, rejecting statewide weighted-voting plans for failing to equalize legislative representation.[277]

Local legislatures, however, have continued to experiment with weighted-voting, incorporating it into their apportionment plans to preserve fixed electoral districts that correspond to political subdivisions. The evolution of weighted-voting plans is a credit to local political innovation and participatory democracy. The Supreme Court has long recognized that "[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions."[278] The Court's notably flexible

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272. Cox, *supra* note 270, at 759–60, 760 n.46 (citing arguments that equal-population districting facilitates gerrymandering); Issacharoff & Karlan, *supra* note 42, at 570–77 (arguing that redistricting enables gerrymandering); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 441–42 (2015) (noting that districting "presents politicians with the valuable opportunity to choose their voters"); Laura Royden & Michael Li, *Extreme Maps*, BRENNAN CTR. FOR JUST. 1 (2017), https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf [https://perma.cc/L345-93FG] (noting that redistricting "provides an enormous opportunity for politicians" to manipulate the map "to create a more favorable set of districts for themselves and for their party").

273. Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 557–64 (2011) (describing packing and cracking); Rave, *supra* note 267, at 681 (describing techniques for gerrymandering); Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609, 1670 (2017) (redistricting permits the party in power to "'pack' like-minded voters into districts to ensure that a particular party wins, and 'crack' the voting strength of the opposing party's constituents across districts to ensure that it loses").

274. Ostrow, *supra* note 5, at 1842–43.

275. *Id.*

276. *Id.*

277. *See, e.g.*, Burns v. Gill, 316 F. Supp. 1285 (D. Haw. 1970); Bannister v. Davis, 263 F. Supp. 202, 209 (E.D. La. 1966); WMCA v. Lomenzo, 238 F. Supp. 916 (S.D.N.Y. 1965); League of Neb. Municipalities v. Marsh, 209 F. Supp. 189, 195 (D. Neb. 1962); Jackman v. Bodine, 43 N.J. 491 (1964); Brown v. State Election Bd., 369 P.2d 140, 149 (Okla. 1962).

278. Sailors v. Bd. of Educ., 387 U.S. 105, 110–11 (1967); *see also* Abate v. Mundt, 403 U.S. 182, 185 (1971) (quoting *Sailors*); Hadley v. Junior Coll. Dist. of Metro. Kan. City, 397 U.S. 50, 59 (1970) (quoting *Sailors*).

approach to the one-person, one-vote requirement at the local level, enables local governments to serve as laboratories of democracy and experiment with various forms of political representation and voting rights. The opportunities for innovative governance increase exponentially at the local level, not only because there are far more local governments than there are states, but also because policy experiments that could never gain traction at the state level, can frequently find support in a smaller arena. In many cases, innovative policies that begin at the local level stimulate change at the state and national level.

This Article seeks to stimulate such change by drawing attention to the evolution of hybrid weighted-voting apportionment plans. As New York counties have discovered, combining weighted-voting with equal-population or multimember apportionment plans enables them to harmonize districting priorities that would otherwise conflict. Cortland County, for example, uses weighted-voting to eliminate the deviation produced by its roughly-equal-population districts.[279] Schenectady County recently incorporated weighted-voting into its multimember apportionment plan to reduce the plan's deviation.[280] Warren County uses weighted-voting in both ways.[281]

Hybrid-weighted-voting plans maintain fixed electoral districts that preserve representation for political subdivisions and prevent gerrymandering. These plans satisfy the quantitative one-person, one-vote requirement by granting each district a percentage of the total number of votes that is equal it its percentage of the total county population. In addition, hybrid weighted-voting plans equalize legislative representation by increasing the number of representatives from more populous areas.[282] In a hybrid apportionment plan, each legislator represents roughly the same number of people and casts roughly the same number of votes. Each legislator can perform all his or her non-voting functions, such as serving on committees and providing constituent services. Each has an equal seat at the table and an opportunity to represent their constituents on all legislative matters. Legislator power is not artificially enhanced by the number of residents in each district.

Moreover, combining weighted-voting with equal-population districts also reduces the risk of racial vote dilution. Weighted-voting systems have the potential to suppress racial minorities because each representative is elected at large.[283] Thus, a geographically concentrated minority group, that would constitute a majority of an equal-population district, may constitute only a minority of a larger, more populous, weighted-voting or multimember district. As a result, the minority group may be unable to elect any representatives.

The traditional remedy where at-large elections cause minority vote dilution has been to divide the jurisdiction into equal-population districts, each of which would elect just one representative.[284] Yet, equal-population districting has proved vulner-

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279. *See supra* Part III.B.1.

280. *See supra* Part III.B.2.

281. *See supra* Part III.B.3.

282. *See supra* Part III.B.

283. Ostrow, *supra* note 5, at 1872–73.

284. Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 339 (1998); *see also*

able to gerrymandering. Incorporating weighted-voting into equal-population apportionment plans remedies both concerns: fixed district boundaries eliminate the risk that boundaries will be gerrymandered to reduce representation for racial minority groups, and rough population equality reduces the risk that racial minorities will be submerged within a larger district.

CONCLUSION

This Article highlights local innovations in weighted voting apportionment to provide a model for broader state and national reform. In particular, this Article demonstrates that equal-population apportionment plans maximize the advantages of each apportionment system: (i) weighted-voting equalizes the numeric weight of each vote, enabling legislatures to satisfy the quantitative one-person, one-vote doctrine while maintaining fixed electoral districts that preserve representation for political subdivisions and prevent gerrymandering, (ii) rough population equality mitigates inequalities in legislative representation by assuring that each legislator represents roughly the same number of people and casts roughly the same number of votes, (iii) rough population equality also reduces the risk of that racial minorities will be submerged within a larger district.

Thornburg v. Gingles, 478 U.S. 30, 34–42 (1986) (affirming lower court ruling providing for single-member district remedy in Voting Rights Act challenge to North Carolina multimember state legislative districts).