Duquesne Law Review

Volume 16 | Number 2 Article 5

1977

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I. INTRODUCTION

During its 1976-1977 term, the Supreme Court aroused much controversy when, in *United Jewish Organizations, Inc. v. Carey,*[1] it upheld the use of racial criteria in state legislative redistricting by New York. At dispute was the constitutionality of categorizing the electorate so as to give one group of citizens a favorable position at the polls, a dispute collaterally encompassing the "one person, one vote" concept. Objections to the decision have focused not on the intended result of the now constitutional reapportionment plans—guaranteeing representation for blacks in proportion to their percentage of the population in an area—but rather on the manner in which reapportionment was achieved—splitting a religiously homogeneous neighborhood of Hasidic Jews who were thereby deprived of the opportunity to elect one of their sect as a representative.[2] Nevertheless, the opinion sanctioned reapportionment resulting in weighted voting only within the context of a division of the electorate along racial lines.

Shortly after *United Jewish Organizations,* the Supreme Court, in *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*,[3] sustained another New York electoral policy which also had been attacked as a violation of the "one person, one vote" principle. The result, however, went virtually unnoticed, presumably because racial criteria were not the basis of the reapportionment. Yet, *Lockport* also requires a critical analysis inasmuch as it, in contrast to most of the precedents regarding voting equity, approves a dilution of the right to vote.

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1. 430 U.S. 144 (1977).

2. For a discussion of this case, see Martin, *The Quest for Racial Representation in Legislative Apportionment,* 21 How. L.J. 214 (1977).

3. 430 U.S. 259 (1977).

In New York, the general powers of county government have been traditionally exercised areawide by a unicameral legislature which shares local responsibility with the county's constituent cities, towns, and villages.[4] Under the state constitution[5] and the Municipal Home Rule Law,[6] powers can be redistributed between a county and its subdivisions, and a county charter can be amended, repealed, or adopted forming a new county government if *both* a majority of the voting city dwellers and a majority of the voting noncity (town and village) dwellers approve the charter alterations in a referendum. In 1972, Niagara County submitted to the electorate a new charter which would have created the offices of County Executive and County Comptroller. No significant changes were proposed in the county's power to set tax rates, equalize assessments, issue bonds, maintain roads, or administer health and public welfare services. Furthermore, the revision did not reallocate any powers from the cities, towns, or villages to the county government.[7]

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4. The Supreme Court had occasion to examine the unique interdependence of New York's counties, cities, towns, and villages in Abate v. Mundt, 403 U.S. 182 (1971).

5. Article IX, § 1(h)(1) of the New York Constitution provides in pertinent part:

§ 1. Bill of rights for local governments

Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local governments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:

. . . .

(h)(1) Counties, other than those wholly included within a city, shall be empowered . . . to adopt, amend or repeal alternative forms of county government . . . . Any such form of government or any amendment thereof . . . may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other . . . or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment . . . shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit. Where an alternative form of county government or any amendment thereof . . . provides for the transfer of any function or duty to or from any village or the abolition of any office, department, agency or unit of government of a village wholly contained in such county, such form or amendment shall not become effective unless it shall also be approved on the referendum by a majority of the votes cast thereon in all the villages so affected considered as one unit.

N.Y. CONST. art. IX, § 1(h)(1).

6. Section 33(7) of the Municipal Home Rule Law of New York, Power to Adopt, Amend and Repeal County Charters, provides:

7. A charter law

(a) providing a county charter . . .

(b) proposing an amendment or repeal of one or more provisions thereof which would

A majority of the 55,393 ballots cast favored the new Niagara County charter, 28,885 for and 26,508 against. But adoption of the charter required concurrent majorities; while the city voters approved the charter, 18,220 to 14,914, the noncity votors rejected it, 11,594 to 10,665.[8] Since the revised charter was not ratified by a majority of the noncity voters and by a majority of the city voters, it was defeated. Disappointed Niagara County voters challenged the New York constitutional and statutory home rule provisions in federal court as a violation of the equal protection clause of the fourteenth amendment.[9] A second charter, however, was put to a referendum in November 1974, before the case was resolved. Again, the noncity voters blocked the proposed changes although a majority of county voters approved them.[10] Subsequently, the federal district court, ruling on the first referendum, held that the dual majority system was unconstitutional, and ordered implementation of the 1972 charter.[11] On appeal, the Supreme Court remanded "for reconsideration in light of the provisions of the new charter adopted by Niagara County in 1974."[12] Finding "no substantial difference be-

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have the effect of transferring a function or duty of the county, or of a city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit . . . .

N.Y. MUN. HOME RULE LAW § 33(7) (McKinney Supp. 1977-1978).

7. The Supreme Court noted that the towns historically had provided their areas with "major social services that more recently had been transferred to counties." 430 U.S. at 269. The Niagara County charter referendum, while not explicitly transferring power to the counties, was establishing the framework to make the shift feasible. *See* notes 51 & 52 and accompanying text *infra*.

8. *See* 430 U.S. at 262 & n.5.

9. Citizens for Community Action at the Local Level, Inc. v. Ghezzi, 386 F. Supp. 1 (W.D.N.Y. 1974), *vacated*, 423 U.S. 808 (1975), *rev'd on remand sub nom.* Town of Lockport v. Citizens for Community Action at the Local Level, Inc., 430 U.S. 259 (1977). Since the action sought injunctive relief with respect to a state statute and constitution for deprivation of rights secured by the United States Constitution, a special three-judge court was convened. 386 F. Supp. at 4.

10. A total of 36,808 ballots was cast with the city dwellers voting 11,305 to 9,222 in favor of the charter and the noncity voters opposing it by 8,222 to 8,059. Overall in the county, 19,364 voters approved the charter and 17,444 rejected it. 430 U.S. at 263 n.6.

11. 386 F. Supp. at 9.

12. 423 U.S. 808 (1975).

tween the two Charters," the district court declared the 1974 charter had superseded the 1972 charter and was "in full force and effect as the instrument defining the form of local government for Niagara County."[13] The town of Lockport, on behalf of its voters, appealed, asserting that a charter referendum is not subject to the same requirements which apply to the selection of legislative representatives.

II. The Concept of a "One Issue" Election

The lower court recognized that the issue of constitutional protections in a charter referendum presented a question of first impression, but, reasoning by analogy to legislative elections, it held New York's concurrent majority stipulation to be unconstitutional because it violated the "one man, one vote" principle.[14] The Supreme Court did not agree that the "one person, one vote" concept was applicable in a referendum.[15] This principle, the court noted, evolved from the seminal case of *Reynolds v. Sims*[16] which held that any dilution of voting power resulting from the election of representatives among districts of unequal population is constitutionally

13. *See* 430 U.S. at 263-64. While the issue of the constitutionality of the New York laws was being appealed, the appellants, Town of Lockport, *et al.*, instituted state proceedings to challenge the certification and enforcement of the 1974 Charter. The district court enjoined the state proceedings. *Id.* The district court's opinion on remand is unreported. *Id.* at 264 n.9.

14. 386 F. Supp. at 7-9. The defendent's principal argument to support the constitutionality of New York's concurrent majority requirement was based on the Supreme Court's decision in Gordon v. Lance, 403 U.S. 1 (1971). In *Gordon,* the Court upheld a requirement that bonded indebtedness and tax increases be approved by 60% of the popular vote; the rationale was that a state had the right to protect minority interests and those of unborn generations. The defendants asserted that the effect of the New York requirement was similarly to place the responsibility for fundamental changes in government in the hands of a super-majority. The district court distinguished *Gordon:* the New York law did not provide for a simple super-majority because there was no limit to minority domination, and the New York law discriminated against and diluted an identifiable group of voters.

15. 430 U.S. at 266. The Supreme Court primarily addressed the issues raised by the district court's first opinion, although in essence the first and second rulings of the district court were the same.

16. 377 U.S. 533 (1964). Because legislative apportionment involves issues of a political nature, the courts historically had shown great reluctance to entertain challenges to alleged constitutional abuses in apportionment schemes. *See* Martin, *The Supreme Court's Quest for Voter Equality in Bond Referenda,* 28 Baylor L. Rev. 25, 25 (1976) [hereinafter cited as *Voter Equality*]; Note, *Political Representation: The Search for Judicial Standards,* 43 Brooklyn L. Rev. 431, 431-42 (1976). Not until 1962, in Baker v. Carr, 369 U.S. 186 (1962), did the Supreme Court firmly establish the principle that the equal protection clause of the fourteenth amendment permitted judicial review of apportionment.

impermissible since "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state."[17] The *Lockport* Court contended that the purpose underlying this basic tenet, consistently furthered by the *Reynolds* progeny, is simply that "in voting for their legislators, all citizens have *an equal interest* in representative democracy, and that the concept of equal protection therefore requires that their votes be given equal weight."[18] Although this mandate has affected representative elections at every governmental level in the United States,[19] the Supreme Court held that the district court erred in using the same equal protection principles to gauge the fairness of the Niagara County referendum and in failing to recognize distinctive voter interests in such an election.

Manifesting surprise at the lower court's failure to comprehend the "self-evident" difference between a referendum and the selection of legislators at the polls, the *Lockport* opinion focused on the distinction. "In a referendum, the expression of voter will is direct, and there is no need to assure that the voters' views will be adequately represented through their representatives in the legislature."[20] Not only does the personal participation of the voters in the decision-making process distinguish a referendum from a legislative election, but the policy impact of each is also dissimilar. "[I]nstead of sending legislators off to the state capitol to vote on a multitude of issues, the referendum puts one discrete issue to the voters."[21] Since a single question is isolated, it can be judicially "analyzed to determine whether its adoption or rejection will have a disproportionate impact on an identifiable group of voters."[22] If an incommensurate effect on a particular group is found, a court must then address itself to the propriety of a state compensating for the inequity "either by limiting the franchise to those voters specially affected or by giving their votes a special weight."[23] Having considered

17. 377 U.S. at 560-61.

18. 430 U.S. at 265 (emphasis added).

19. In 1968, this principle was applied to all local governments of general powers in Avery v. Midland County, 390 U.S. 474 (1968), and two years later, special districts were brought within the rule in Hadley v. Junior College District, 397 U.S. 50 (1970).

20. 430 U.S. at 266.

21. *Id.*

22. *Id.*

23. *Id.*

these reapportionment practices in the context of elections of special district governmental bodies of limited jurisdiction and bond referenda, the Supreme Court reexamined the precedents in light of the charter referendum controversy.

III. The Restricted Electorate

Although use of the restricted electorate in the United States can be traced to colonial times, the legality of the practice was not reviewed by the Supreme Court until 1965 in *Carrington v. Rash.*[24] The Texas constitution prohibited military personnel stationed in Texas from voting in state elections. The state justified the restriction by asserting an interest in immunizing its elections from the concentrated balloting of military personnel whose collective voice could overwhelm a smaller local civilian community. For example, the state suggested, a local bond issue could fail because servicemen were unwilling to invest in the future of a community from which they might soon depart. While the Court recognized residence as a legitimate means of qualifying the right to vote, it was unimpressed by the Texas argument and held that " '[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[25]

In *Kramer v. Union Free School District,*[26] the Supreme Court considered whether part of the electorate although bona fide residents could be validly "fenced out." A New York voter qualification statute limited individuals eligible to vote in school district elections to (1) the owners or lessees of taxable real property located within the district, (2) spouses of owners or lessees of the requisite property, or (3) parents or guardians of children enrolled for a specific time during the preceding year in a local district school.[27] The Supreme Court struck down the law as a violation of the equal protection clause. The Court was not convinced that, because a school district was financed by revenue from a property tax, an assessment affected property taxpayers more than others, nor that including parents of school children encompassed all persons who

24. 380 U.S. 89 (1965).

25. *Id.* at 94. The petitioner in *Carrington* was a bona fide Texas resident and precluded from voting solely because of his military status.

26. 395 U.S. 621 (1969).

27. *Id.* at 623.

were interested in the educational affairs of their local government. Thus, the New York classification excluded individuals who were "primarily interested" in or "primarily affected" by the issue without furthering a compelling state interest.[28]

Despite its rejection of New York's limiting plan, *Kramer* was not an absolute prohibition on restricting participation; the opinion recognized the possibility that a state articulated goal could be best obtained by restricting the ballot to those people who were "primarily interested." The Court emphasized, however, that in elections of general interest, there must be a compelling state objective to justify restraints other than age, citizenship, and residence on voting eligibility.[29]

To date, *Salyer Land Co. v. Tulare Lake Basin Water Storage District*[30] presents the only example of a compelling state interest that warrants limiting the franchise to a particular group. California's irrigation management system is governed by a board that is not only chosen in an election restricted to landowners, but in an election in which votes are allocated according to land valuation. In a certain district one corporation was entitled to such an overwhelming majority of votes that an election had not been held for over twenty-five years. The Supreme Court did not regard this voting eligibility scheme as violative of the equal protection clause because the voting was restricted to a recognizable group of individuals upon whom the water district's activities would have a disproportionate effect. Funding of the water district projects was by a tax assessment levied in proportion to land ownership. Thus, the holder of the most votes was likewise the largest taxpayer and most affected by the benefits and burdens of the district's projects.[31]

Furthermore, the Court found that even though the district was

28. *Id.* at 630-33. The Court commented that many persons who had a direct and distinct concern in the decisions of a local school board were unconstitutionally "fenced-out," while others who had at most a remote and indirect interest in school district affairs were enfranchised. *Id.* at 632. Thus, the Court did not decide whether a state in fact *could* limit a franchise to those "primarily interested" or "primarily affected."

29. *Id.* The school district asserted that limiting the franchise to those "primarily interested" was necessary because the complexity of the school system made it difficult for the electorate to understand its operation. Parents and those who were supporting the system through property taxes were alleged to have enough interest in the system to acquire the needed information. The Supreme Court did not resolve this issue. *See* note 28 and accompanying text *supra.*

30. 410 U.S. 719 (1973).

31. *Id.* at 734.

vested with typical governmental powers, these powers were related solely to the exercise of the district's primary functions of water storage and distribution, and that the policies and projects of the district had a substantially greater effect upon landowners than upon nonlandowning residents.[32] Having classified the Tulare Water Storage District as a "special-purpose" governmental unit of relatively limited authority and having determined that its activities had a disproportionate effect on an identifiable group of citizens, the *Salyer* opinion concluded that there was no constitutional conflict in denying nonlandowners the right to vote in the water district elections.[33]

Admittedly, *Carrington, Kramer,* and *Salyer* have little direct bearing on the New York referendum procedure. *Salyer* provides a guideline insofar as it approves an electoral arrangement that satisfies the compelling state interest criterion, but its applicability beyond special-purpose units is uncertain.[34] Yet, a reasonable interpretation of the three cases indicates that voter preclusion is prohibited in the absence of a clear demonstration that an election is of sufficient interest to a single group. In light of these precedents, New York's concurrent majority requirement would appear to be supportable only if the state established a substantial reason for protecting one group from domination by another. Yet, the Supreme Court failed to discuss this aspect of the case law in *Lockport.*

IV. Local Bond Referenda

On the same day that the decision in *Kramer v. Union Free*

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32. *Id.* at 728-29 n.8, 730-31.

33. The Supreme Court's assessment was based on the following facts:

> The appellee district in this case, although vested with some typical governmental powers, has relatively limited authority. Its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin. It provides no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body. There are no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundaries, and it does not have a fire department, police, buses, or trains.
>
> Not only does the district not exercise what might be thought of as "normal governmental" authority, but its actions disproportionately affect landowners.

Id. at 728-29 (citations omitted).

34. The implications of the *Salyer* case are discussed in Martin, *The Supreme Court and Local Reapportionment: Voter Inequality in Special-Purpose Units,* 15 Wm. & Mary L. Rev. 601 (1974).

School District was announced, its holding was extended to abolish voter exclusion in referenda for revenue bonds issued by a municipal utility under state authority. In *Cipriano v. City of Houma,*[35] a Louisiana law provided that only property taxpayers had the right to vote in elections called to approve the issuance of revenue bonds. The Court stated that since the operation of the utility system affected everyone living in the city, all voters in the city were substantially affected by the issuance of bonds to finance municipal utilities, not just the forty percent of the registered voters who paid property taxes. The Supreme Court, therefore, held that the restriction against nonproperty owners participating in the revenue bond election was a violation of the equal protection clause.[36]

Cipriano did not obviate the need for future litigation over bond referenda. One year later, *City of Phoenix v. Kolodziejski*[37] considered whether a state could permit only real property owners to vote on the issuance of general obligation bonds which differed from revenue bonds. With the latter, revenue is secured by revenues from the operation of the utility; however, property tax revenues are relied upon for debt service payment of the general obligation bonds, thus imposing a tax burden on real property owners.[38] The Court decided that issuance of either type of bond affected the interests of all voters. The excluded voters, as citizens of the community, should have had a voice in approving or rejecting municipal improvements. Moreover, the Court noted that the excluded residents contributed to the retirement of bonded indebtedness through payment of other local taxes and through payment of increased rents and costs as property owners passed their burden of taxation to the lessee and nonproperty owner.[39] Therefore, a general rule was formulated: "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise."[40] While not pre-

35. 395 U.S. 701 (1969).

36. *Id.* at 705-06.

37. 399 U.S. 204 (1970).

38. "[W]hereas revenue bonds are secured by the revenues from the operation of particular facilities and these revenues may be earned from both property owners and nonproperty owners, general obligation bonds are secured by the general taxing power of the issuing municipality." *Id.* at 208.

39. *Id.* at 210-11.

40. *Id.* at 209.

cisely stated, this rule is based on the "one person, one vote" concept as indicated by requiring voting equality in all governmental referenda.

Following *Phoenix,* the Supreme Court confronted a "dual ballot box" scheme in *Hill v. Stone.*[41] Texas employed this scheme in an attempt to weight property owners' votes more heavily than those of nonproperty owners in municipal elections involving the expenditure of money or the assumption of debt, essentially general obligation bonds. The electorate was divided into two groups: voters who owned taxable property in the district and listed it as such cast their ballots in one box, while the remaining registered voters used a separate box. Since an issue "passed" only if approved by a majority vote of the property owners and by a majority vote of all voters, property owners exercised a veto power over the passage of a bond issue or a related matter. Ostensibly, the demand for concurrent majorities was a constitutionally permissible alternative to the concept of a restricted electorate inasmuch as all voters could participate in the election in the anticipation of having an impact on the outcome. But, applying the general rule enunciated in *Phoenix,* the Court held that the "dual ballot box" policy was nothing more than a clever attempt to deny nonproperty owners an equal vote in elections which are of interest to all municipal citizens.[42] Thus, the scheme restricted the vote without serving a compelling state interest[43] and violated the equal protection clause.[44]

In the bond referenda cases, the Supreme Court has concentrated on voter equality and dismissed considerations of the economic interests of property owners and of the necessity for their protection from excessive taxation through the vote of nonproperty owners.

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41. 421 U.S. 289 (1975).

42. *Id.* at 300.

43. The state sought to justify the rendering requirement on the ground that it afforded some protection to property owners who, it was alleged, would bear the direct burden of retiring the city's bonded indebtedness. The Supreme Court had basically dismissed this argument in *Phoenix. Id.* at 298-99. *See* note 39 and accompanying text *supra.* The state also relied on Rosario v. Rockefeller, 410 U.S. 752 (1973), where the Court upheld a state requirement that a voter register his party preference in advance of a general election to be eligible in the succeeding primary. This requirement was held to further the legitimate and valid state goal of "preservation of the integrity of the electoral process." *Id.* at 761. The *Hill* Court found *Rosario* inapposite since the Texas dual ballot box scheme excluded a portion of the electorate for failing to comply with a state policy wholly independent from the electoral process. *See* 421 U.S. at 300.

44. For a detailed discussion of the Texas "dual election box" case, see *Voter Equality, supra* note 16.

Consequently, the Court has avoided delving into economic subtleties—a necessary analysis if an attempt were made to prorate voting power. This focus on voter equality closely corresponds to the approach in the reapportionment cases—in the reapportionment rulings, the objective has been to equalize numerically the influence of citizens on legislative outcomes, and in the bond referenda cases, the goal has been to equalize the influence of each voter in the result of the election. The goal of equalization is accentuated in the *Phoenix* rule, but in *Lockport,* the Supreme Court failed to note its applicability to the New York controversy over a county charter referendum which unquestionably affected all county citizens in important ways.

V. The "Single-shot" Referendum and Voting Inequity

The Supreme Court concluded that the decisions delimiting use of the restricted electorate in special district elections and in local bond referenda did not resolve the issue of the constitutionality of New York's concurrent majority requirement in a county charter referendum. The sole benefit of the precedents, asserted the Court, lay in their focusing attention on two inquiries, "whether there is a genuine difference in the relevant interests of the groups that the state electoral classification has created; and, if so, whether any resulting enhancement of minority voting strength nonetheless amounts to invidious discrimination in violation of the Equal Protection Clause."[45] By placing these constraints on the scope of its analysis, the Supreme Court rationalized its approval of New York's concurrent majority requirement for local referenda upon the unique governmental system used in the state.

A. *Uniqueness of Governmental Arrangement*

As noted earlier, general purpose local government in New York consists of counties, cities, towns, and villages.[46] The fifty-seven counties outside of New York City are respectively divided into towns, or towns and one or more cities. These subdivisions can autonomously perform functions and provide services within their jurisdiction, or they may cooperate in meeting public commitments

45. 430 U.S. at 268.

46. *See* notes 4-6 and accompanying text *supra.*

with the county, or they may transfer some or all power to the county government. In short, several possible arrangements can be set up to carry out the work of local government under New York law.[47]

Taking a rare stance by recognizing the influence of nonjudicial factors, the Supreme Court analyzed the local government policy of New York:

> Acting within a fairly loose state apportionment of political power, the relative energy and organization of these various subdivisions will often determine which one of them in a given area carries out the major tasks of local government. Since the cities have the greatest autonomy within this scheme, changes serving to strengthen the county structure may have the most immediate impact on the functions of the towns as deliverers of government services.[48]

Considering the range of standard responsibilities that could be altered by a new or an amended charter, for example, sanitation, street maintenance, and waste removal, the Court's assessment of potential changes in local government relationships is certainly reasonable. The control exercised by the cities over many of their functions logically indicates that any reorganization of the existing governmental structure will noticeably affect only the county or the towns since only their powers will be increased or decreased.[49]

The Court, however, was required to demonstrate how the 1974 Charter,[50] which did not explicitly transfer any duties from the towns to the county government, would have a disproportionate effect upon the identifiable electoral interest of the towns. The Court, therefore, noted that the creation of the offices of County Executive and County Comptroller, in effect the establishment of an executive-legislative form of government, "would significantly enhance the county's organizational and service delivery capacity, for the purpose of 'greater efficiency and responsibility in county government.' "[51] The analysis continued:

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47. 430 U.S. at 269.

48. *Id.* at 270.

49. *See* 13 NEW YORK TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, LOCAL GOVERNMENT 20 (1967).

50. *See* notes 11-13 and accompanying text *supra*.

51. 430 U.S. at 270. The Supreme Court's quote was taken from the Niagara County

> Such anticipated organizational changes, no less than explicit transfers of functions, could effectively shift any pre-existing balance of power between town and county governments towards county predominance. In terms of efficient delivery of government services, such a shift might be all to the good, but it may still be viewed as carrying a cost quite different for town voters and their existing town governments from that incurred by city voters and their existing city governments.[52]

In other words, the city voters were categorically equated with the presumed "unaffected" nonproperty owners who were precluded from participating in bond referenda by the City of Houma,[53] the City of Phoenix,[54] and the State of Texas,[55] and with the presumed disinterested or uninvolved citizens who were excluded from the elections of Union School District.[56] At the same time, however, the interests of the noncity voters were defined in such a way that any charter reforms would have a disproportionate effect on them thus making the *Salyer* ruling applicable.[57]

B. *Are the Community Interests Dissimilar?*

If the preceding comparisons are accepted, then the *Lockport* decision cannot be quarrelled with. The crux of the matter, therefore, is whether the city and noncity interests are sufficiently different to justify such classifications under the equal protection clause of the fourteenth amendment. The Supreme Court analogized the city versus noncity voter interests in the county charter referendum to the respective interests of voters in annexation proceedings or in consolidation of school districts. The connection, however, is nebulous—an adequate delineation of the differing city and noncity voter interests in the charter referendum was lacking, whereas in annexation or consolidation questions, substantial voter interests can be clearly identified and labeled for separate polling as to their preference. Nevertheless, the Court contended that reorganizing county

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Charter of 1972 which on judicial order had been superseded by the 1974 Charter. *See* text accompanying note 13 *supra*.

52. 430 U.S. at 270-71.
53. *See* notes 35 & 36 and accompanying text *supra*.
54. *See* notes 37-40 and accompanying text *supra*.
55. *See* notes 41-44 and accompanying text *supra*.
56. *See* notes 26-29 and accompanying text *supra*.
57. *See* notes 30-33 and accompanying text *supra*.

government in New York involves the same kind of separate and opposing interests which are produced by proposals to annex or to consolidate in a governmental system.[58] Writing a unanimously supported opinion,[59] Justice Stewart concluded:

> In each case, separate voter approval requirements are based on the perception that the real and long-term impact of a restructuring of local government is felt quite differently by the different county constituent units that in a sense compete to provide similar governmental services. Voters in these constituent units are directly and differentially affected by the restructuring of county government, which may make the provider of public services more remote and less subject to the voters' individual influence.[60]

Whether different voters' interests were sufficiently discrete to enable a categorization was not determined by the perceptions of voters in a particular county. Rather, the test of constitutionality employed by the Court was whether a state has the authority to distinguish between disparate groups, such as city and noncity citizens, for the purpose of voting on local issues. The Court did not hesitate to approve New York's dual balloting requirement inasmuch as the legislation did "no more than recognize the realities of these substantially differing electoral interests."[61]

To bolster acceptance for its interpretation and to obviate a challenge of inequity, the Court emphasized, in a footnote, that the record did not indicate any preferential treatment had been created by the state. In fact, the Court was favorably impressed by the following statistics:

> In some New York counties, city voters outnumber town voters; in other counties the reverse is true. We are advised that of charters proposed in 14 counties, one failed to obtain majority approval of the city voters; two (including Niagara County) failed to obtain majority approval of noncity voters; eight

58. 430 U.S. at 271-72.

59. Chief Justice Burger may have had some reservations as he filed an unwritten concurring opinion.

60. 430 U.S. at 271-72.

61. *Id.* at 272.

failed to obtain a majority vote in either the towns or the cities; and three were approved by both city and town voters.[62]

While the numbers may be impressive, they hardly furnish a complete justification for demanding concurrent majorities to ratify changes in a local charter.[63] The statistics do not indicate whether charter alterations have a disproportionate effect on an area's population, nor do they demonstrate that there are groups which have sufficiently different interests in the outcome of charter proposals. The *only* plausible basis for upholding the referendum requirement, therefore, is the Supreme Court's preoccupation with the unique pattern of local government in New York; however, the validity of this rationale is questionable in light of the leading precedent examining New York's governmental structure.

C. *The Unusual Precedent*

Abate v. Mundt[64] is in some ways an apposite guideline for determining the propriety or necessity of New York's concurrent majority requirement. In Rockland County, New York, the county's governing board for more than one hundred years had been composed of supervisors chosen from the county's five towns; thus, all county officials were also town officials. Due to the disparity in population among the five towns, a mathematical exactness in the representational system was difficult to attain.[65] On review of a court-ordered apportionment plan for Rockland County,[66] the Supreme Court accepted an 11.9 percent deviation from population equality primarily because of the particular circumstances and needs of the Rockland community.[67] The Supreme Court was impressed with the county-town interrelationship and the resulting coordination among the

62. *Id.* at 272 n.18.

63. *Cf.* Abate v. Mundt, 403 U.S. 182, 186 (1971), where the Court stated: "The mere absence of a built-in bias is not, of course, justification for a departure from population equality."

64. 403 U.S. 182 (1971).

65. While electoral apportionment must be based on the general principle of population equality, "[m]athematical exactness or precision is hardly a workable constitutional requirement." Reynolds v. Sims, 377 U.S. 533, 577 (1964). Nevertheless, deviations must be justified by legitimate state considerations. Abate v. Mundt, 403 U.S. at 185.

66. The county's increased population had produced a severe malapportionment. After the county voters rejected several reapportionment plans, an action was brought to compel reapportionment. 403 U.S. at 183.

67. *Id.* at 184.

towns and county in the all-important fiscal function. The towns were permitted to prepare their own budgets which were then submitted to the county board. Although the municipalities established their own real property assessments, the county board equalized the assessments and levied the taxes. In addition, intergovernmental agreements were used to manage other public services such as snow removal and waste disposal.

Acknowledging the significance of cooperation in the administration of Rockland County's governments, the Court espoused the respondent's argument that the "county's rapidly expanding population [had] amplified the need for town and county coordination in the future."[68] While not mentioned in the *Lockport* case, a similar historic and functional interdependence probably characterizes the Niagara County government. Ostensibly, the goal of the charter referendum was to effect better town and county coordination.[69] Nevertheless, the Supreme Court only referred to *Abate v. Mundt* in a footnote,[70] without attempting to support the concurrent majority requirement as aiding local cooperation in governmental programs. On the other hand, if governmental needs are different in Niagara County, *Abate* can possibly be extended to authorize the Court to consider situational exceptions which might justify the rule of concurrent majorities, but the Court failed to develop even this approach.

D. *The Illusion of Inequality*

The *Lockport* decision did not conclusively prove that the referendum would have an unequal impact upon an identifiable group of voters. To the contrary, it should be apparent that both city and town voters have an equal interest in the structure of their county government. If a difference existed, it surely would be that the city voters had a bigger stake in Niagara County; according to the 1970 census there were 147,026 city residents in contrast to 98,694 town residents. Curiously, this disparity was omitted from the court's evaluation. Even the classification of a referendum as a "single-shot" election which is not subject to the "one person, one vote" principle in the same manner as a legislative election[71] does not

68. *Id.* at 183.
69. *See* notes 4 & 5 and accompanying text *supra.*
70. 430 U.S. at 270 n.15.
71. *See* notes 21-23 and accompanying text *supra.*

explain why the demographic differential was not considered in analyzing the New York charter referendum law. Perhaps, the strained reading of precedents to justify the requirement of concurrent majorities indicates why a comparison of the Niagara County population was neglected in the *Lockport* opinion.

VI. Conclusion

Among the apportionment decisions that were applicable to New York's use of concurrent majorities for finalizing charter actions, *Phoenix v. Kolodziejski* should have provided the benchmark for ascertaining constitutionality. Although the *Phoenix* controversy arose from a bond referendum, the general rule it formulated applies to all governmental decisions made through a referendum. In such elections "when all citizens are affected in important ways . . . the Constitution does not permit weighted voting . . . ."[72] Given the overwhelming number of city versus town voters in Niagara County, the town vote in a charter referendum is worth more, or to put it another way, the franchise is weighted in favor of the townspeople.[73] Of course, authorizing this policy fits in nicely with the political science of John C. Calhoun who advocated a sectional veto over national decision-making.[74] But as long as the "one man, one vote" doctrine of *Reynolds v. Sims* remains viable,[75] the Supreme Court's decision in the *Lockport* case is not consistent constitutional law.

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72. 399 U.S. 204, 209 (1970). *See* notes 37-40 and accompanying text *supra.*

73. *Id.* at 209.

74. *See* J. Calhoun, *A Disquisition on Civil Government,* in The Works of John C. Calhoun 187 (R. Calle ed. 1854).

75. *See* notes 14-19 and accompanying text *supra.*