Fair and Effective Representation: Power to the People

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FAIR AND EFFECTIVE REPRESENTATION:  
POWER TO THE PEOPLE

MAJORITY RULE

His party was the Brotherhood of Brothers,  
and there were more of them than of the others.  
That is, they constituted that minority  
which formed the greater part of the majority.  
Within the party, he was of the faction  
that was supported by the greater fraction.  
And in each group, within each group, he sought  
the group that could command the most support.  
The final group had finally elected  
a triumvirate whom they all respected.  
Now of these three, two had the final word  
because the two could overrule the third.  
One of these two was relatively weak,  
so one alone stood at the final peak.  
He was THE GREATER NUMBER of the pair  
which formed the most part of the three that were  
elected by the most of those whose boast  
it was to represent the most of most of most  
of most of the entire state—  
or of the most of it at any rate.  
He never gave himself a moment’s slumber  
but sought the welfare of the greatest number.  
And all the people, everywhere they went,  
knew to their cost exactly what it meant  
to be dictated to by the majority.  
But that meant nothing—they were the minority.¹

Many factors affect the outcome of an election, but few have a  
greater impact upon the result than the rules of voting and of counting  
the votes.² Because the method of voting and vote tallying is the  
mechanism for recording the voters’ reactions to important political  

¹. PIET HEIN, GROOKS 22 (1966). Published by Doubleday & Co., Inc., copy-  
right 1966, Aspila. Used by permission of the author.  
². For a discussion of the terms “rules of voting” and “counting the votes”, see  
ote note 8 infra.
issues, it is imperative that it be as accurate, as reliable, and as impartial as possible.3

Beginning with the 1962 decision of *Baker v. Carr*,4 the United States Supreme Court has struggled through a judicial review of our elective processes. Acknowledging the importance of an accurate reflection of the electorate in the governing body, the Court, in the landmark case of *Reynolds v. Sims*,5 declared that the basic goal of apportionment must be fair and effective representation.6 This objective was translated into a one person-one vote standard for judging the constitutional validity of election schemes. However, not only does the one person-one vote standard fail to ensure fair and effective representation, but the formula's deceptive simplicity "has kept the Court on a rough road that has run downhill but in the wrong direction . . . [and] has now come to a dead end."7

This note will first review the Supreme Court decisions which develop and apply the one person-one vote standard in the congressional, state legislative, and local governmental reapportionment cases. The discussion will then analyze three specific problems in these decisions: first, the Court's characterization of these cases as civil rights cases; second, the inconsistent application and multiple meanings of the one person-one vote formula; and third, the Court's failure to realize that one person-one vote is little more than an unrealistic cliché. This note will then argue the merits of using fair and effective representation itself as the constitutional standard for reviewing election schemes. After demonstrating the unconstitutionality of bloc voting and plurality voting,8 the two electoral systems used almost exclusively in this coun-

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4. 369 U.S. 186 (1962). *Baker* held that reapportionment suits are not barred by the impediments of standing, federal court jurisdiction, or justiciability. The Court has also indicated that these procedural doctrines will not bar racial or partisan gerrymandering suits. See, e.g., Fortson v. Dorsey, 379 U.S. 433, 439 (1965); Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960). These cases strongly suggest that the direct constitutional attack upon bloc voting and plurality voting advocated in this note could not be dismissed on these procedural grounds. For an in-depth discussion of the justiciability issue, see McKay, Reapportionment and Local Government, 36 GEO. WASH. L. REV. 713, 719-20 (1968); Editorial Note, Political Gerrymandering: The Law and Politics of Partisan Districting, 36 GEO. WASH. L. REV. 144, 150-55 (1967); Note, Wesberry v. Sanders: Deep in the Thicket, 32 GEO. WASH. L. REV. 1076, 1077-91 (1964) [hereinafter cited as *Deep in the Thicket*].
6. Id. at 565-66.
8. Each electoral system is defined by its rules of voting and of vote tallying. In the bloc voting system the voter is instructed to designate as many candidates as there are seats open; each mark is assigned a value of "1." The marks for each candi-
try, the discussion will conclude by suggesting an alternative to these first-past-the-post systems—preferential proportional representation with fractional transfer of surplus votes, a sophisticated electoral system which does ensure fair and effective representation.

**Two Semantic Problems**

Before confronting the Supreme Court's decisions, it is necessary to consider two difficulties in terminology which have complicated resolution of the reapportionment issue. First, many commentators and lower courts, as well as the Supreme Court, have utilized the labels "multi-member districts" and "single-member districts" to refer to bloc voting and plurality electoral systems, respectively. However, the terms are not synonymous. Bloc voting and plurality voting are, respectively, the multi-member and single-member forms of the first-past-the-post class of systems. Technically, a multi-member district is a finite geographical area from which more than one seat is filled in each election; in a single-member district, only one seat is open for election from the area each time.

Secondly, in *Reynolds v. Sims,* the Supreme Court formulated the constitutional "right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the election...." Although the Court has often employed the terminology "equal representation," this is a gross misnomer, there is simply no date are counted, and the candidates accruing the greatest number of votes are declared elected. If there is only one seat open, the system is called plurality voting.

For convenient reference, electoral systems may be grouped into one of three classes, depending upon the system's accuracy in reflecting the composition of the electorate in the governing body. The least accurate class of electoral systems is aptly labelled first-past-the-post and includes both the bloc voting and the plurality voting electoral systems. The most accurate systems are in a class designated as proportional representation (P.R.). Single transferable vote (S.T.V.) and preferential proportional representation with fractional transfer of surplus votes (P.P.R.), the system advocated in this note, are both examples of proportional representation. The third class contains the systems of intermediate accuracy such as cumulative voting and limited voting. For an in-depth, socio-political analysis of these electoral systems (excluding P.P.R., which is of recent origin), see Ross, *supra* note 3.

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9. See note 8 *supra.*

10. To avoid confusion, this note will use "multi-member district" in referring to the improper usage of the term, i.e. meaning bloc voting, and multi-member district, i.e. no quotation marks, in referring to the proper meaning. Similarly, "single-member district" refers to plurality voting and single-member district to the technical definition.

11. See note 8 *supra.*


13. *Id.* at 576 (emphasis added).

such thing. However, a reading of Reynolds and the succeeding reapportionment cases makes it clear that the Court is using "equal representation" interchangeably with fair and effective representation.

The Supreme Court Decisions: Review and Critique

Most frequently labelled "one person-one vote," "one man, one vote," or "equal representation for equal numbers," the standard which the Supreme Court has developed in the reapportionment cases requires that each state make "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." Unfortunately, the articulation and application of this standard have resulted in a series of inconsistent and internally confusing decisions. This section will explore both the Court's interpretation of the one person-one vote standard and its application to the three distinct lines of reapportionment cases—the congressional cases, the state legislative cases, and the local governmental cases.

Congressional Apportionment

The one person-one vote concept on the congressional districting level was derived from article I, section 2 of the federal Constitution. In a 1964 decision, Wesberry v. Sanders, the Supreme Court first interpreted the section's provision that representatives be chosen "by the People of the several States" to mean that one person's vote in a congressional election must be worth as much as another's "as nearly as is practicable." "To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People' . . . ."

In several subsequent decisions, the Court refined the rules of one person-one vote as they applied to congressional elections. In one of these cases, Kirkpatrick v. Preisler, Missouri's reapportionment scheme was invalidated. The largest district was overrepresented by 3.13 percent from the ideal, and the smallest was underrepresented by

15. See Deep in the Thicket, supra note 4, at 1114. In order for everyone to have "equal representation" an electoral system would have to waste no votes at all; i.e. everyone must elect a candidate of his choice.
16. See id.
17. See note 14 supra.
20. Id. at 7-8.
21. Id. at 8.
2.84 percent. Justice Brennan, writing for the majority, declared that the “as nearly as practicable” standard required that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.

The command of Art. 1, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.

Texas’ congressional plan was the most recent victim of the Wesberry and Kirkpatrick rationale. In *White v. Weiser*, a 1973 decision, the Supreme Court invalidated a scheme with a total deviation of 4.13 percent from the mathematical equal population ideal, and a ratio of 1.04 to 1 between the largest and smallest districts.

State Legislative Apportionment

The equal protection clause of the Fourteenth Amendment has been the touchstone in evaluating both state and local governmental districting plans. In the 1964 decision of *Reynolds v. Sims*, the Supreme Court declared:

23. *Id.* at 528. The Court has utilized two types of statistics in measuring the constitutional validity of a districting system. In one type the number of residents in the largest or smallest district is compared to the ideal of exact equality, and the figure is expressed as a percentage deviation. Sometimes the percentages for the largest and the smallest districts are added together to obtain the total deviation. *E.g.*, *White v. Weiser*, 412 U.S. 783, 785 (1973). The second formula utilizes a ratio to express the difference between the populations of the largest and smallest districts. *E.g.*, *Swann v. Adams*, 385 U.S. 440, 442 (1967).

24. 394 U.S. at 530-31 (citation omitted). In *Wells v. Rockefeller*, 394 U.S. 542 (1969), decided on the same day as *Kirkpatrick*, the Court struck down New York’s congressional plan under the authority of *Kirkpatrick*. The scheme divided the state into several large districts, which were then subdivided into districts of equal population.


26. However, the Court’s reliance on the equal protection clause and its corresponding rejection of the due process clause of the Fourteenth Amendment and the guarantee clause of article IV, section 4, have been criticized as “not responsive to large questions concerning the structure of government—which is what reapportionment involves ultimately. . . .” Dixon, *Reapportionment Perspectives: What is Fair Representation?*, 51 A.B.A.J. 319 (1965) [hereinafter cited as Dixon]. Professor Dixon most favors the guarantee clause: “The guarantee of ‘republican form of government’ clause of the Federal Constitution is responsive to the difficult issue of indirect democracy and fair representation with which the Western world has been grappling ever since it abandoned the direct, or referendum, democracy of the ancient Greeks. The due process clause would also be responsive to the complexity of the representation is-
Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment [it must follow] that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race . . . 28

This conclusion was derived from three principles: first, that the right to vote is a basic civil right of man;29 second, that any restrictions upon the right to vote freely for the candidate of one's choice strike at the heart of representative government;30 and third, that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."31

One year later, the Supreme Court was presented with its first opportunity to apply the Reynolds' principles. In Fortson v. Dorsey,32

sue, because of its focus on over-all fairness and reasonableness. Either would be an adequate safeguard for preservation of what Justice Stewart referred to in his Maryland opinion as 'ultimate effective majority rule.' Either would be responsive also to the issue of adequate representation of minority interests and to the correlative issue of gerrymandering to maximize the voting strength of one group of partisans." Id. Professor Dixon has also expressed his feeling that "[e]ven the Supreme Court's selection of the equal protection clause as the instrument for political revolution in apportionment and districting practices would not have been so unsettling to the cause of political realism if the Court had taken the same flexible approach to equal protection when applied to reapportionment as it had taken when applying this clause to almost all issues other than racial equality. . . . In these cases equal protection emerges as an empirical rule of reasonableness, a rule of fairness in the methods used to achieve a legitimate end." Id.

28. Id. at 565-66.
29. Id. at 561.
30. Id. at 555, 562.
31. Id. at 555. The Court concluded that the members of both houses of a state legislature must be elected from equal-population districts. Although they realized that "[m]athematical exactness or precision is hardly a workable constitutional requirement", 377 U.S. at 577, nevertheless, "the overriding objective must be [the] substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." Id. at 579.

Reynolds itself held Alabama's apportionment scheme unconstitutional. In the five companion cases, the Court invalidated the apportionment plans of several other states: WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) (New York); Maryland Comm. v. Tawes, 377 U.S. 656 (1964) (Maryland); Davis v. Mann, 377 U.S. 678 (1964) (Virginia); Roman v. Sinnock, 377 U.S. 695 (1964) (Delaware); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964) (Colorado). In the Lucas case, the apportionment plan had been approved by the state's voters by a margin of 2-1; however, the district population ratios of 1.7 to 1 and 3.6 to 1 for the House and Senate, respectively, did not meet the one person-one vote test of Reynolds.

an attack upon a mixed “multi-member” and “single-member” districting system,\textsuperscript{33} Justice Brennan upheld the mixed scheme and rejected the plaintiffs’ contention that the Constitution permitted only “single-member districts.”\textsuperscript{34} However, in concluding that the “multi-member districts” were not unconstitutional \textit{per se}, the Court refused to recognize the fact that, just as “separate but equal” facilities are inherently unequal,\textsuperscript{35} voters in the “single-member districts” are deprived of their fair and effective representation.\textsuperscript{36}

In \textit{Swann v. Adams}\textsuperscript{37} and \textit{Kilgarlin v. Hill},\textsuperscript{38} two 1967 cases, the Court considered the limit of permissible deviation from absolute equality. \textit{Swann} invalidated Florida’s apportionment plan with ratios of 1.30 to 1 and 1.41 to 1 in the Senate and House respectively; in \textit{Kilgarlin} a ratio of 1.31 to 1 of the largest to the smallest districts in Texas was held to be a violation of one person-one vote. These cases formulated a new rule: to avoid constitutional infirmity, a state must show that its plan suffers only from \textit{de minimus} population var-

33. In a mixed districting system, the geographical electoral unit (city, state, etc.) contains some “multi-member districts” and some “single-member districts”.

34. The Court reserved the question of the constitutionality of “multi-member districts” in circumstances where they were shown to “operate to minimize or cancel out the voting strength of racial or political elements of the voting population.” 379 U.S. at 439. In Burns v. Richardson, 384 U.S. 73 (1966), Justice Brennan spelled out three special situations in which the requisite discrimination might be shown: if the “districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one.” \textit{Id.} at 88.


36. In fact, employing mathematical principles, it has been proven that there is a great difference in the voting power of the residents of different-sized districts, even if the districts are allotted “proportionate” numbers of representatives. This is true because a voter’s ability to affect the outcome of an election does not vary as the simple inverse of the districts’ populations. For example, suppose state X is apportioned into districts A and B. District A contains 400 residents and is given 4 representatives, elected from this “multi-member district”; district B has only 100 persons and is permitted to elect one representative. On the surface, it would seem that the voters in these two districts were given equal representation. However, Professor Banzhaf has shown that, in reality, the voter’s ability to elect his representative is not the inverse of the district’s population, but rather the inverse of the \textit{square root} of the district’s population. In the example above, this would be 4/\sqrt{400}, or 4/20 (or 2/10) and 1/\sqrt{100}, or 1/10, for districts A and B respectively. Thus, the ability of the voters in district A to affect the outcome of the election is twice as great (2/10 compared to 1/10) as in district B. Banzhaf, \textit{One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation}, 36 GEO. WASH. L. REV. 808, 819 (1968); Banzhaf, \textit{Multi-Member Electoral Districts—Do They Violate the “One Man, One Vote” Principle}, 75 YALE L.J. 1309, 1323 (1966).


iances; if greater than *de minimus*, a state must justify any deviation.  

In 1971 the reapportionment litigants renewed their fight against mixed districting schemes. In *Whitcomb v. Chavis*, the Court rejected the two-pronged attack of the black residents of a ghetto in the "multi-member district" of Marion County, Indiana. The petitioners argued, first, that their votes were worth less than the votes of "single-member district" residents, and second, that if their large district was equitably divided, the ghetto residents possessed sufficient strength to elect two representatives and one senator. The Supreme Court decided that overrepresentation had not been proven and that the blacks' failure to elect representatives in proportion to their population "emerges more as a function of losing elections than of built-in bias against poor Negroes."  

The Court's uncertainty as to the best method of handling election cases was apparent in a series of 1973 cases. The retreat from their emphasis on strict equality in state legislative districting was first evident in *Mahan v. Howell*, in which Virginia's apportionment plan, with districts drawn substantially to maintain the existing political boundaries, was upheld. This scheme had created districts with a deviation of 16.4 percent from the ideal but with a ratio of only 1.18 to 1. The issue, said Justice Rehnquist, was whether the equal protection clause permitted only population variances which were unavoidable

41. A major problem in the mixed districting area is the double-headed argument with respect to under- or overrepresentation of voters in "multi-member districts" as compared to "single-member districts." For the argument that the "multi-member district" voters are overrepresented, see note 36 *supra*. The reverse may also be proven mathematically. Suppose districts A and B contain 400 and 100 voters, respectively, and are therefore allotted 4 and 1 representatives, respectively. Whereas a voter in district A is only 1 out of 400 voters, a voter in district B is 1 out of 100 voters. Hence, a district A voter can argue that he has a lesser chance of affecting the outcome of the election.
42. Overrepresentation and underrepresentation describe situations in which districts have, respectively, more or less than the "equal representation" to which they are entitled.
43. 403 U.S. at 153. Justice Harlan, dissenting in *Whitcomb*, pointed out several inconsistencies in the Court's reapportionment decisions, including the statement in *Whitcomb* that the three-judge district court had "misconceived" the equal protection clause. The lower court had struck down the apportionment scheme because, under the circumstances of the case, it minimized or cancelled out the voting strength of a racial element of the voting population—precisely the finding requisite to a declaration of unconstitutionality required by *Fortson v. Dorsey*, 379 U.S. 433 (1965), and *Burns v. Richardson*, 384 U.S. 73 (1966).
44. 410 U.S. 315 (1973).
45. For definition of "ideal", see note 23 *supra*. 
despite a good-faith effort to achieve absolute equality. Justice Rehnquist reasoned that, because Reynolds v. Sims permitted more flexibility in the realm of state legislative districting than in congressional districting, some deviation from equality is permissible if based upon "legitimate considerations incident to the effectuation of a rational state policy." Therefore, he concluded that the proper standard for measuring the validity of a state's justification is "rational consideration," not "governmental necessity."

Connecticut's apportionment plan, which was designed to reflect the actual partisan composition of the state, was sustained in Gaffney v. Cummings. In limiting the scope of the Swann and Kilgarlin rule, Gaffney established the existence of three classes of state legislative apportionment cases: (1) those with enormous variations such as those struck down in Reynolds and Kilgarlin; (2) the Mahan-type cases, in which deviations are sufficiently large to require state justification, but which nonetheless are justifiable and legally sustainable; and (3) those cases with variances so small that no prima facie case is made out at all under the equal protection clause. The total deviation of 9.9 percent from equality, which was sustained in the companion case of White v. Regester, was found to be within this last category; Justice White did "not consider [these] relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation."

Local Governmental Apportionment

The question of whether the one person-one vote formula applied to local governmental units remained unanswered until 1968,
when the plaintiffs in *Avery v. Midland County*55 successfully challenged the election of members of the Midland County Commissioners Court from four districts, one of which contained 95 percent of the county's populace. In *Avery*, Justice White declared that the *Reynolds* principles66 did apply to elections of "units of local government having general governmental powers over the entire geographic area served by the body."67 Two years later, in *Hadley v. Junior College District*,68 the *Avery* doctrine was held to encompass the election of local college trustees: "[A]s a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."59

The outer limit of permissible deviation in local elections was the subject of dispute in *Abate v. Mundt*.60 The suit attacked an appor-

56. For a description of the *Reynolds* test, see note 31 supra & text accompanying notes 28-31 supra.
57. 390 U.S. at 485. *Avery* is an interesting decision for two reasons. First, in four previous cases, the Court had indicated that it wished to wait for an ideal context to finally decide *Reynolds* applicability to local government. *Moody v. Flowers*, 387 U.S. 97 (1967); *Board of Supervisors v. Bianchi*, 387 U.S. 97 (1967); *Sailors v. Board of Educ.*, 387 U.S. 105 (1967); *Dusch v. Davis*, 387 U.S. 112 (1967). *Avery* did not meet any of the criteria of a perfect case. The Commissioners Court dealt almost exclusively with the problems of the rural areas; application of the "equal population" mandate would deny the rural areas virtually all representation. Yet this is exactly what the Court did. "The contrast between the delicate treatment of 1967 and the heavy-handed approach of 1968 was almost breath-taking. It was as though the Court had carefully tiptoed throughout the silent house and then knocked over the lamp while closing the door." *Sentell, Avery v. Midland County: Reapportionment and Local Government Revisited*, 3 GA. L. REV. 110, 120 (1968). Furthermore, the Court rebuked the *Avery* litigants for extensively arguing the legislative versus administrative character of the Commissioners Court. Yet this very point had been a decisive factor in sustaining the constitutionality of an electoral scheme in *Sailors v. Board of Educ.*, 387 U.S. 105 (1967).
59. *Id.* at 56. In *Hadley*, the Court approved the statement in *Sailors v. Board of Educ.*, 387 U.S. 105 (1967), 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. We see nothing in the Constitution to prevent experimentation." 397 U.S. at 59, quoting *Sailors v. Board of Educ.*, 387 U.S. 105, 110 (1967). However, great flexibility is difficult to reconcile with the Court's single-minded emphasis on "equal representation for equal numbers."
60. 403 U.S. 182 (1971). The county legislature was elected proportionately from the county's five constituent towns. As a result of this governmental structure,
tionment plan for electing the eighteen members of a county legislature from five districts, having a total deviation of 11.9 percent from equality. Although the scheme was sustained, Justice Marshall, writing for the Court, emphasized that the decision was based both upon the long tradition of overlapping functions and personnel in the county’s government and upon the absence of a built-in bias tending to favor particular political interests or geographic areas.

The Supreme Court Decisions Analyzed

The preceding discussion illustrates the Court’s confusion in resolving the reapportionment problem. In the congressional districting decisions the Court has staunchly adhered to its preoccupation with strict mathematical equality, while in the state legislative apportionment cases, it apparently permits a greater degree of variation from equal-population districts. Even greater deviations are permitted in local governmental elections, despite the fact that, due to the smaller numbers of voters involved, even a small deviation may have a great effect upon a voter’s ability to affect the election’s outcome.

The following analysis will consider three specific problems encountered in the reapportionment decisions. First, it will consider the significance of the Court’s characterization of these cases as civil rights cases. Second, this discussion will examine the proposition that the Court has created multiple constitutional standards for reviewing reapportionment litigation. Finally, it will consider the problems involved in using a one person-one vote formula as the standard for judging the constitutionality of electoral schemes.

A Personal Right versus Group Interests

The logic of the reapportionment decisions of June, 1964, is simple and straightforward. The Court, pursuing its long and in the main quite proper romance with egalitarianism... defined all of the difficult problems out of existence. In regard to reapportionment, as in regard to race, equal protection is to be a constitutional absolute, in this instance virtually a mathematical absolute. The Court focused on two things, and two things only: one was bare population, with all political allegiances and group interests eliminated; the other was the individual voter, viewed only as a faceless census statistic, and the voter’s supposed right to an abstract mathematically ‘equal’ vote.

In short, the Court does not view these cases as representation cases, or as representative democracy cases at all. It views
them as being simply one more round of civil rights cases—but its supposed 'civil right of voters' is really only a 'civil right of census statistics.'

Because of the mischaracterization of the reapportionment decisions as "right to vote" cases, the Supreme Court, in Reynolds, found that the rights which were being protected were "individual and personal in nature." Thus, it seems that group interests are not relevant factors in designing an apportionment scheme. Paradoxically, however, the Reynolds decision itself relied heavily upon the concept of fair and effective representation, which necessarily incorporates interest-group considerations. Justice Fortas, dissenting in Fortson v. Morris, recognized this inconsistency and the importance of interest groups in our political processes:

It is not merely the casting of the vote or its mechanical counting that is protected by the Constitution. It is the function—the office—the effect given to the vote, that is protected.

A vote is not an object of art. It is the sacred and most important instrument of democracy and of freedom. In simple terms, the vote is meaningless—it no longer serves the purpose of the democratic society—unless it, taken in the aggregate with the votes of other citizens, results in effecting the will of those citizens...

This mischaracterization of the right to vote as a personal civil right was a primary factor leading the Court to resolve the reapportionment problem with the one person-one vote formula. The result has been a preoccupation with numbers, ignoring the most important aspect of the right, the quality of the voter's representation.

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64. See note 89 infra & text accompanying notes 89-92 infra.

65. 377 U.S. at 561.

66. Representation is an interest group concept. It is impossible for elected governmental bodies to consider the wishes and demands of each individual constituent in their decision-making. Rather, it is the voices of interest groups and political parties, "the building blocks of political power", which affect the judgment of the elected officials. See Dixon, Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation, 63 MICH. L. REV. 209, 218 (1964).


68. Id. at 250.

69. For example, the one person-one vote cannot cure the evils of gerrymandering, which has a tremendous impact upon the effectiveness of a vote. In order to deal with gerrymandering, interest-group affiliations must be considered. See notes 97-99 & accompanying text infra.
Different Constitutional Standards?

We may have only one 'one man-one vote' principle, but it may turn out to have more variety than Gertrude Stein's roses.\textsuperscript{70}

Not all legislative classifications are forbidden by the equal protection clause. The Court's approach to equal protection has been dependent upon the importance of the right to equality asserted. If the right is "fundamental," such as race or religion, the classification has been termed "suspect," and the Court's weighing of the interests of the individual and of the government has leaned heavily in favor of maximizing the individual's rights;\textsuperscript{71} less important rights, especially those in the economic realm, are afforded less protection.\textsuperscript{72}

Because the "right to vote" is a basic civil right of man,\textsuperscript{73} any classification of voters which infringes upon this right is suspect and thus subject to strict judicial scrutiny.\textsuperscript{74} The one person-one vote principle—"an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable"\textsuperscript{75}—was the Court's selection of the scale for weighing the interests in the reapportionment cases. However, the "as nearly as practicable" test has not been uniformly applied; rather, its interpretation has depended upon whether the apportionment scheme was aimed at the congressional, state legislative, or local governmental level.

For example, in Kirkpatrick v. Preisler,\textsuperscript{76} a congressional districting case, Justice Brennan rejected "Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered de minimus and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case."\textsuperscript{77} It is difficult to understand how the "as nearly as practicable" approach is any more consistent with fixed standards in the realm of state legislative districting. Yet, in Gaffney v. Cummings,\textsuperscript{78} the Court declared without reservation that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious

\textsuperscript{72} See, e.g., Lindley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).
\textsuperscript{73} Reynolds v. Sims, 377 U.S. 533, 561 (1964).
\textsuperscript{74} Id. at 562.
\textsuperscript{75} Id. at 577.
\textsuperscript{76} 394 U.S. 526 (1969).
\textsuperscript{77} Id. at 530 (emphasis added).
\textsuperscript{78} 412 U.S. 735 (1973).
discrimination under the Fourteenth Amendment so as to require justification by the State."\(^70\) Apparently, as great a variance as 9.9 percent is a minor deviation.\(^80\)

Justice Brennan, concurring in part in *Mahan v. Howell*,\(^81\) expressed his concern with this illogical approach. Prior to *Mahan* the Court had never held that different constitutional standards were applicable to the various reapportionment situations. There are concededly differences, even between congressional and legislative apportionment which the Court had recognized, but this recognition was "hardly tantamount to the establishment of two distinct controlling standards."\(^82\)

While the State may have a broader range of interests to which it can point in attempting to justify a failure to achieve precise equality in the context of legislature apportionment, it by no means follows that the State is subject to a lighter burden of proof or that the controlling constitutional standard is in any sense distinguishable.\(^83\)

The Supreme Court has failed thus far to explain this discrepancy, apparently recognizing the existence of only one constitutional standard which may, however, be tempered by considerations of the relevancy of various state interests to the level of government involved. It has also failed to explain another inconsistency in these cases. In *Reynolds v. Sims*, Justice Warren refused to consider group interests, respect for political boundaries, or history alone as a valid consideration in designing apportionment schemes.\(^84\) Yet, in *Gaffney v. Cummings*,\(^85\) the Court permitted conscious allocation of political power to interest groups (political parties). In *Mahan v. Howell*,\(^86\) the Court sustained Virginia's state legislative apportionment scheme despite the state's justification of respecting political boundaries. Then, in *Abate v. Mundt*,\(^87\) an historical justification was sustained.

Thus, the reapportionment cases have not been reviewed under one constitutional standard. Rather, it seems that the inadequacies of the one person-one vote formula have been compounded by the need to mitigate the rule's rigidity, and the Court has been forced to stretch one person-one vote to the point where it has given rise to several constitutional balancing tests.

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79. *Id.* at 745.
82. *Id.* at 341 (Brennan, J., concurring in part, dissenting in part).
83. *Id.*
87. 403 U.S. 182 (1971).
One Person—One Vote versus Fair and Effective Representation

"Despite all of the cases the Court has decided—involving almost every state—the one man, one vote principle will never be much more than a good slogan." One reason for this is the Court's misconception that the apportionment cases are "right to vote" cases.

In Reynolds the Supreme Court described the right to vote as "a fundamental political right, because preservative of all rights." Although the Court did not cite the origin of a constitutional right to vote, Professor Kauper suggests that its source must be either the "substantive rights" interpretation of the due process clause or the "guarantee of a republican form of government" clause of article IV. Simply assuming the existence of such a right, the Court proceeded to classify the reapportionment cases as "right to vote" cases. However, as both Justice Harlan and Justice Stewart have recognized, no one's right to vote has been denied or restricted, and nobody has been deprived of the right to have his vote counted. Rather, "[the voting cases] are representation cases, i.e., they are cases concerning the most interesting, the most complex, the most baffling aspect of public feeling on innumerable public policy issues through the medium of periodic, partisan selection of district delegates to a multi-membered representative assembly."

The fact that a right to vote is not involved is also evidenced by the Court's emphasis on number of total residents and on census

92. Dixon, supra note 26, at 319.
93. The percentages and ratios considered by the Supreme Court in the reapportionment cases are based on total population as reflected by the last census. Justice White, in Gaffney v. Cummings, 412 U.S. 735 (1973), discussed the difficulty with the Court's emphasis on total population. "[It must be recognized that total population, even if absolutely accurate as to each district when taken, is nevertheless not a talismanic measure of the weight of a person's vote under a later adopted apportionment plan. The United States census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing, often at different rates in either direction, up or down. Substantial differentials in population growth rates are striking and well-known phenomena. So too, if it is the weight of a person's vote that matters, total population—even if stable and accurately taken—may not accurately reflect that body of voters whose votes must be counted and
figures rather than on voting population. Census figures are only rough approximations of the relative numbers of voters in each election; they do not reflect the substantial variation between districts of persons not qualified to vote because of age, nonregistration, or other factors. It is only if the number of valid ballots in every district is identical that the "right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the election" is at all meaningful.

Even if districts having identical numbers of actual voters are created, fair and effective representation may still be an elusive ideal. The one person-one vote concept is completely incapable of deterring either intentional or unintentional gerrymandering. Because group interests, including partisanship, are not evenly distributed throughout a state, a city, or other electoral unit, overrepresentation and underrepresentation of these interests is a necessary consequence of almost any districting arrangement. If a voter lives in a district having many other persons belonging to the same interest group, his vote and his representation will be important; if the voter's interest group has little support in the district, his vote will have an insubstantial impact upon the election's outcome, despite his interest group's overall strength in the electoral unit. In addition, even if interest group affiliations are evenly distributed throughout an electoral unit, the districts can be gerrymandered to control each group's voting power. For example, in a state having a ratio of sixty Democrats to forty Republicans, districts can be drawn so that each has exactly this partisan composition, precluding the election of any Republicans. Hence, contrary to the "basic principle of representative government," the weight of a citizen's vote will usually depend upon where he lives.

weighed for the purposes of reapportionment, because 'census persons' are not voters. The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States." Id. at 746-47.

94. See note 93 supra.
95. See note 124 infra.
97. In other words, the ratio of urban to rural inhabitants, democrats to republicans, and blacks to whites, etc. varies considerably from district to district.
98. In other words, the chance that the interest group composition of any two districts is the same is very remote. It would be a virtual impossibility for the composition of all the districts to be exactly the same. Therefore, overrepresentation and underrepresentation of these interest groups is, for all practical purposes, a mathematical certainty in any districting arrangement.
100. For a further discussion of the effect of residence on voting power, see text accompanying note 117 infra.
Thirdly, "equal representation for equal numbers" may create greater injustices than it discourages. For example, suppose a county containing fewer than 10 percent rural inhabitants has created a governmental body whose function is *almost exclusively* limited to the resolution of rural problems. If the one person-one vote standard were applied, it is doubtful whether the rural residents could obtain *any* representation on the local governmental board. Yet, this is precisely the factual setting of *Avery v. Midland County*, the first decision in which the Supreme Court subjected local government elections to the standard of one person-one vote.

Thus, the Court's one person-one vote formula has generated at least as many problems as it has resolved. A new approach to the reapportionment issue is urgently needed if a citizen's right to fair and effective representation is to receive adequate protection.

A Solution

Many of the reapportionment cases contain language supporting a constitutional right to fair and effective representation, which like the right to vote presumably arises either from the "guarantee" clause of article IV or from the "substantive civil rights" interpretation of the due process clause. *Reynolds* itself recognized that "the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment ..." If this is the ultimate goal, as it should be, then a judicial standard must be designed which will effectuate this ideal. It seems self-evident that the proper standard should be fair and effective representation itself. This test not only ensures that each voter's vote is valued equally, irrespective of his place of residence, but also allows flexibility in factual situations such as that in *Avery*.

Fair and effective representation defies precise definition. Generally, to sustain a "multi-member" electoral scheme under this standard, a court would require that the inherent rules of the system, verified by the results, ensure an accurate reflection of the electorate in the governing body. As to single-office elections, the intrinsic rules of an electoral system must guarantee that the winner is supported by *at least* fifty percent of the voters.

103. See note 90 & accompanying text supra.
104. 377 U.S. at 565-66.
Unconstitutionality of Bloc Voting and Plurality Voting Systems

The Supreme Court has attempted to fit the first-past-the-post systems into a framework of one person-one vote. Their endeavor, however, has not succeeded and for an obvious reason: the two concepts are incompatible. The winner-take-all aspect of these electoral systems advances neither the cause of one person-one vote, nor of fair and effective representation.

Both bloc voting and plurality voting systems are constitutionally suspect when weighed against the goal (or standard) of fair and effective representation. This section will discuss some of the constitutional difficulties with these electoral systems. Although the analysis will concentrate upon the defects of the systems applied on a city level, the arguments are equally valid for other electoral levels.

Bloc Voting System

Bloc voting, the multi-member first-past-the-post system, not only fails to effectuate fair and effective representation, but also results in invidious discrimination, which the equal protection clause prohibits.

As Justice Douglas stated in his dissent in *Wright v. Rockefeller*,106 "[a] well-settled proposition applicable to many rights in the constitutional spectrum is that there may be an abridgement 'even though unintended'. . . . What the State has done is often conclusive irrespective of motive."107 Therefore, regardless of the motivation for utilizing a bloc voting system, if such a system denies substantial interest groups their fair representation, the system is invidiously discriminatory and violative of the equal protection clause.

Bloc voting may perpetuate minority domination of an elective body. When the electorate has aligned itself into several distinct groups, a well-organized group may elect as many as 100 percent of the seats. This result is most apparent when, for example, one group runs many candidates. The group's votes may splinter among the many candidates, permitting a smaller, better-organized group to be grossly overrepresented. Such a result is clearly contrary to the Supreme Court's declaration that "in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators [so as to produce a body] which [is] collectively responsive to the popular will."108

107. Id. at 61-62 (Douglas, J., dissenting).
Bloc voting frequently forces a voter either to vote against a candidate of his choice, or to risk the possibility of defeating his favorite candidate. For example, suppose City X elects the five members of its city council with a bloc voting system. A, a voter, decides that candidate M will best represent his interests on the council. If he votes only for M, he has utilized only one of the five votes to which he is entitled. However, if he does cast votes for other candidates as well, he is helping these others to accrue votes and possibly to defeat his favorite candidate. Such a forced dilemma is clearly contrary to the “right to elect legislators in a free and unimpaired fashion [which] is a bedrock of our political system.”

In Whitcomb v. Chavis, the Supreme Court summarized its position on bloc voting systems. They noted that the cases concerning the constitutional validity of “multi-member districts” have focused not on population-based apportionment but on the quality of representation afforded by the multi-member district as compared with single member districts. The Court’s reluctance to analyze “multi-member districts,” beyond simply comparing them to “single-member districts,” is further evidence of its simplistic approach to reapportionment problems. These systems are clearly suspect under either a fair and effective representation standard, or the Court’s own concept of one person-one vote. Since the inherent rules of bloc voting work to distort representation, it will be a rare occasion, and probably an accident, that a bloc voting election does not violate the Constitution. Furthermore, the voting power of interest groups can also be distorted through gerrymandering or allocation of representatives by a simple ratio when bloc voting is used in a district which is part of a mixed districting arrangement. The Court has not yet confronted these arguments, and a direct attack on bloc voting may force the Court to come to grips with these essential questions.

109. Id. at 562.
111. Id. at 142.
112. Voting power is defined as “the relative ability of each member [of the electorate] to affect the outcome of the group’s decisions through his vote.” Banzhaf, Multi-Member Electoral Districts—Do They Violate the “One Man, One Vote” Principle, 75 Yale L.J. 1309, 1315 (1966).
113. In Whitcomb v. Chavis, 403 U.S. 124 (1971), the Court considered Banzhaf’s mathematical theory that such allocation distorts representation, but erroneously dismissed the argument because it “knowingly avoids and does not take into account any political or other factors which might affect the actual voting power of the residents. . . .” Id. at 145-46. But see Banzhaf, Multi-Member Electoral Districts—Do They Violate the “One Man, One Vote” Principle, 75 Yale L.J. 1309, 1310-11 (1966), for a persuasive rebuttal to the Court's argument.
Plurality Voting—Singly and Districting

Plurality voting may be used in either of two situations: as part of a larger apportionment system, i.e., as a traditional single-member districting system; or alone, in electing a one-seat office, such as in a mayoral race. In both situations, fair and effective representation may be substantially thwarted.

In a two-candidate single-seat election, no problem is presented: one of the candidates must achieve a majority of the votes. However, when more than two candidates vie for the office, the winner frequently accrues only a plurality of the votes. Thus, contrary to the Court's desire for majority rule, this winner-take-all system often operates to distort grossly minority representation and to waste the votes of a majority of the electorate.

The plurality system in a single-office election may also infringe upon a voter's right freely to select a candidate of his choice, a necessary element of a meaningful election in a representative democracy. For example, a voter is often caught in the quandry of deciding whether to vote against a major contender by voting for the other major candidate, or to vote for a wild card candidate whom he feels will more closely represent his views. If he follows the latter course of action, he may assure the election of his least favorite candidate; however, if he selects the former course, he has not voted for the candidate of his choice.

When used as part of a districting system, plurality voting is subject to gerrymandering. Even if the districts are composed of equal populations, there is an infinite number of possible ways to construct the districts, including many which would achieve any desired overrepresentation and underrepresentation. "When such is the case, the surgeon's scalpel replaces the butcher's cleaver, yet with approximately the same results."

Plurality voting in combination with a districting system may tend to encourage the maintenance of ghetto areas. If a voter resides in an area which is also inhabited by others belonging to his interest group, such as a black ghetto, his vote has meaning; he can have his choice reflected in the governing body. On the other hand, if he moves into a predominantly white neighborhood, his vote is transformed into one of the many that are "wasted." The value of his vote therefore varies according to his residence. Such a result was expressly forbidden by the Reynolds' Court when it declared that "the basic principle of rep-

114. See text accompanying note 108 supra.
115. See text accompanying note 109 supra.
representative government remains, and must remain, unchanged—the weight of a citizen’s vote cannot be made to depend on where he lives.”

The Alternative: Fair and Effective Representation Ensured

The proportional representation (P.R.) system of single transferable vote (S.T.V.) was invented and popularized by Thomas Hare in 1857. Many countries utilize P.R. systems and several United States cities have experimented with S.T.V. The S.T.V. system has been justifiably criticized and its constitutionality challenged in several states. The major objections, however, have been overcome in a newly-developed form of P.R., called P.P.R.—preferential proportional representation with fractional transfer of surplus votes.

Mechanics

A P.P.R. election, for all practical purposes, must be computerized. It is a multi-member district system but is easily adopted to a single-office election. Each voter is instructed to mark his ballot preferentially, designating his first preference candidate with a “1,” his second choice with a “2,” etc., until he has no further preferences. The ballots are then fed into a computer, and the outcome is tabulated as follows:

118. See note 8 supra.
119. It had also been “invented” independently two years earlier by Andrae in Denmark. Ross, supra note 3, at 101.
120. For applications of various electoral systems, see Ross, supra note 3, at 234 (Appendix I). See id. at 240 (Appendix II) for examples of elections under P.R. systems.
121. For a discussion and enumeration of the constitutionality suits, see Deep in the Thicket, supra note 4, at 1119 n.272. In People ex rel. Devine v. Elkus, 59 Cal. App. 396, 211 P. 34 (1922), a California court held an S.T.V. system used in Sacramento unconstitutional under the California Constitution, declaring that “[t]he right to vote ‘at all elections’ includes the right to vote for a candidate for every office to be filled and on every proposition submitted.” Id. at 398-99, 211 P. at 35. However, the precedential value of this case is highly questionable. First, the decision is over fifty years old, rendered far before the U.S. Supreme Court's interpretation of the right to vote. Second, the clause in the constitution on which the case relied was deleted in 1972 when article II was extensively rewritten. Article II, § 3 (1972); article II, § 1 (1879). Third, if the right to vote includes the right to fair and effective representation, as the Supreme Court declared in Reynolds v. Sims, 377 U.S. 533, 565 (1964), then the technicality of voting for each seat open should give way to the right to fair and effective representation. The right to vote loses much of its meaning if the right to representation is not protected.
122. See text following note 126 infra.
123. Although a limit on the maximum number of preferences may be established,
1. A quota is determined according to the formula:
\[
\text{the number of valid ballots} \div \text{the number of seats open} + 1
\]
This quota, which is analogous to a majority, both represents the least number of votes needed to be elected and is a number sufficient to preclude the election of too many candidates. For example, if 10,000 ballots are cast and there are four seats open for election, the quota is 2001; if it were 2000, five candidates could possibly be elected.

2. In round one, the first preferences only are tallied for each candidate. If any candidate reaches or exceeds the quota, he is declared elected.

3. If, in the first (or any subsequent round), a candidate is elected, a transfer value for that candidate is figured by the formula:
\[
1 - \frac{\text{the quota}}{\text{the number of votes received}}
\]
The transfer value represents the proportion of each voter's vote which has not helped to elect the candidate. For example, if a candidate accrues 4002 votes, with a quota of 2001 votes, the transfer value is .5; if the candidate accumulates 2002 votes, the transfer value is the decimal equivalent of \(1 - \frac{2001}{2002}\).

4. The unused fraction of a vote calculated above is then transferred to the next valid preference of each of these voters. If any candidate reaches or exceeds the quota at this time, he is elected and the process is repeated. For example, if a voter's first preference is candidate M, who was elected in Round 1 with a transfer value of .5, and his second choice was candidate N who was victorious in Round 2 (or any subsequent round) with a transfer value of .1, then candidate O, the voter's third preference, receives .05 votes, the unused portion of the voter's vote.

the system works most ideally without any limit. The following are suggested rules for dealing with two or more equal preferences or skipped preferences: if a voter designates two or more candidates as the same preference, this preference shall be considered as a skipped preference; if a voter skips a preference—for example, does not designate any candidate as a second preference—the vote is simply transferred to the next preference at present value.

124. Only valid ballots should be tabulated. An example of an invalid ballot in a P.P.R. election is one in which all of the candidates designated are marked as first preferences, since it is not possible to determine the voter's true order of preference; this defect can be cured by simply assigning a fraction of a vote, equal to 1 divided by the number of candidates designated, to each candidate for whom the voter voted.

125. It should be noted that, in P.P.R., "votes" do not mean the same as "ballots." Each voter casts one ballot and is permitted only one vote. However, as shown by subheadings "3." and "4." in the text, although the vote may splinter, it will always cumulatively be worth "1." Therefore, in any given round of the election, since ballots are always counted as whole numbers and votes are often expressed in decimal frac-
5. If, in any round, no candidate reaches or exceeds the quota, the candidate with the least number of votes at that point is deleted, and the "unused" part of each voter's vote (i.e., unused in that it helped elect no candidate) is transferred at its present value to the next preference.

6. This process of election, deletion, and transference is continued until either a sufficient number of candidates has been elected or the number of candidates remaining in contention equals the number of seats unfilled. The latter event occurs because some voters do not select a sufficient number of preferences; thus, their ballot becomes exhausted.\textsuperscript{126}

P.P.R. may be analogized to a shopper's excursion into a supermarket. The shopper wishes to purchase some apples, but the store has run out of this item. His second preference, peaches, is also out of stock. However, strawberries, his third choice, are available—and on sale. Thus, the shopper has enough money remaining to buy the strawberries and also to purchase some blackberries.

An analogous system, the "Alternative Vote System," may be utilized in single-seat elections. As in P.P.R., the voter marks his ballot preferentially. The quota becomes a simple majority: 
\[
\frac{\text{the number of valid ballots cast}}{2} + 1.
\]
If no candidate reaches or exceeds the quota in round 1, the candidate with the least number of votes is deleted, and his votes are transferred. This process is continued until the office has been filled.

P.P.R. ensures accurate reflection of the strength of each interest group in the governing body, regardless of the number of candidates from each interest group seeking election and regardless of how the votes split among the candidates; if one candidate receives a large quotient of votes, the surplus is transferred to other candidates. If the support of an interest group splits widely among its candidates, the votes will eventually concentrate in one or more of its candidates,
depending upon the group's strength in the electorate. Of course, a voter need not vote for candidates representing the same interest group, but may vote according to any criteria he desires. There is no fear that any part of the vote will be wasted,\footnote{127} for if the candidate does not need the vote (either because he is elected or deleted) it will be transferred to the next preference.

There is no doubt that P.P.R. can withstand strict judicial scrutiny, as it guarantees fair and effective representation. Admittedly, however, it is not perfect. Computerization of the voting process frightens some people and may present some technological obstacles. The primary objection to P.P.R., however, is that it is mechanically too complicated for some voters to understand. However, just as an automobile driver need not comprehend the engine's intricacies in order to propel the vehicle, so a voter can confidently vote in a P.P.R. election without comprehending all of the details. Indeed, many "complex" P.R. systems are used in countries with higher illiteracy rates than that in the United States.\footnote{128}

**Conclusion**

Having opened the floodgates of electoral litigation in *Baker v. Carr*,\footnote{129} the Supreme Court has found itself caught in the onrushing waters of a complex struggle for representation. Unfortunately, the Court has resorted to a simplistic, arithmetic approach to resolve the reapportionment conflict and has employed several different constitutional standards to protect one constitutional right.

First-past-the-post electoral systems, including bloc voting and plurality voting, are, at the very least, constitutionally suspect when objectively analyzed; simply comparing these systems to each other, as the Court has done, will neither expose their true nature nor ever resolve the larger representation issues. Having laid the foundation in *Reynolds v. Sims*,\footnote{130} the Court should acknowledge the substantive meaning of the right to fair and effective representation and, using this as its standard, proceed objectively to evaluate bloc voting and plurality voting.

\footnote{127} This is not absolute true. In the final round, the preferences for the last candidate deleted are technically "wasted" since they do not transfer and hence do not help to elect a candidate. But the number of wasted votes in a P.P.R. election will rarely exceed a few percent, which is a vast improvement upon other systems.

\footnote{128} For an excellent analysis of the comparative merits and defects of all three types of electoral systems (not including P.P.R. however), see generally Ross, supra note 3.

\footnote{129} 369 U.S. 186 (1962).

\footnote{130} 377 U.S. 533 (1964).
P.P.R.—preferential proportional representation with fractional transfer of surplus votes—is the most democratic electoral system yet devised, and may be applied to all elections. However, other systems undoubtedly exist, or can be invented, which can meet a fair and effective representation standard. The extraordinary problems foreseen when the Court rendered its decision in *Brown v. Board of Education*\(^{131}\) did not deter the Court there from ruling that segregation in education offended the equal protection clause; it is time for the Supreme Court to provide similar firm guidance in the area of voting and representation.

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