ONE PERSON, ONE WEIGHTED VOTE

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Abstract

This Article argues that weighted voting should be used to comply with the constitutional one-person, one-vote requirement while preserving representation for political units on the legislative body. First, this Article demonstrates that weighted voting satisfies the quantitative one-person, one-vote requirement by equalizing the mathematic weight of each vote. Second, this Article demonstrates that weighted voting has the potential to remedy several negative consequences of equal-population districts. Specifically, this Article argues that by preserving local political boundaries, weighted voting eliminates the decennial redistricting process that gives rise to claims of partisan gerrymandering, enables local governments to function both as administrative arms of the state and as independent political communities and provides a format for regional governance. Third, this Article recognizes that while weighted-voting equalizes the mathematic weight of each vote, it does not equalize all aspects of legislative representation. In particular, this Article explains that weighted-voting generates inequality in the functional representation each voter receives, inflates the political power and voting power of legislators from more populous districts, and increases the risk of minority vote dilution. Though the Supreme Court has never addressed the constitutionality of weighted voting, this Article argues that weighted voting does not violate the Equal Protection Clause. Instead, this Article maintains that the Equal Protection Clause does not require equal functional representation or legislator power, and that the Supreme Court permits the use of at-large voting systems that have a similar capacity to dilute minority voice. Thus, this Article concludes that while it is important to recognize the tradeoffs inherent in weighted-voting apportionment plans, these tradeoffs do not preclude their use.

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INTRODUCTION

Every ten years, jurisdictions throughout the country comply with the constitutional one-person, one-vote mandate by redrawing their legislative maps to equalize the population of each district.[1] In the quest for population equality, local governments are broken into abstract electoral districts, destabilizing political communities and affording politicians nearly limitless discretion to gerrymander electoral boundaries

1. Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016) (noting that the one-person, one-vote doctrine requires states to "regularly reapportion districts to prevent malapportionment"). For an overview of the redistricting process, see NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010 (2009).

for their own personal and political ends. While other jurisdictions engage in contentious political and legal battles over district lines,[2] Delaware County, in upstate New York, simply adjusts the number of votes allocated to each member of its Board of Supervisors.[3] That is because Delaware County is among a handful of counties that uses a unique system of weighted voting.[4] Under this system, each town elects a representative whose vote is weighted in proportion to that town's share of the county population.[5] Thus, a representative whose town contains ten percent of the total county population is allocated ten percent of the votes in the county legislature.

This Article argues that weighted voting should be used to preserve representation for political subdivisions and prevent gerrymandering. Though the concept is not new, weighted voting has been surprisingly underexplored and, as this Article argues, underutilized.[6] In its one-person, one-vote cases, the U. S. Supreme Court insisted that each vote be weighted equally with all other votes cast in the same election.[7] It did

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2. For an overview of litigation following each decennial census, see Justin Levitt, *Litigation in the 2010 Cycle*, ALL ABOUT REDISTRICTING, http://redistricting.lls.edu/cases.php (last visited June 18, 2016).

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

4. *See* Gerald Benjamin, *At-Large Elections in N.Y.S. Cities, Towns, Villages, and School Districts and the Challenge of Growing Population Diversity*, 5 ALB. GOV'T L. REV. 733, 742 & n.49 (2012) (listing counties that use weighted voting); N.Y. STATE ASS'N CTYS., COUNTY GOVERNMENT ORGANIZATION IN NEW YORK STATE 14 (2015) (providing overview of county structure).

5. *See Roxbury Taxpayers All.*, 80 F.3d at 49.

6. The only recent works of scholarship addressing weighted voting as a means of complying with the one-person, one-vote requirement are Keith R. Wesolowski, Note, *Remedy Gone Awry: Weighing in on Weighted Voting*, 44 WM. & MARY L. REV. 1883, 1884 (2003) (case study on a New York court ordering a county to adopt a weighted-voting scheme) and Jurij Toplak, *Equal Voting Weight of All: Finally "One Person, One Vote" from Hawaii to Maine?*, 81 TEMP. L. REV. 123, 145–46 (2008) (arguing for weighted voting in Congress). For earlier commentary, see Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 401 (1993) (considering a weighted-voting alternative for regional governance); Richard David Emery, *Weighted Voting*, 6 TOURO L. REV. 159, 160–61 (1989) (arguing that weighted voting is unconstitutional); Bernard Grofman & Howard Scarrow, *Weighted Voting in New York*, 6 LEGIS. STUD. Q. 287, 287 (1981) (describing flaws in weighted voting); Ronald E. Johnson, *An Analysis of Weighted Voting as Used in Reapportionment of County Governments in New York State*, 34 ALB. L. REV. 1, 44–45 (1969) (scrutinizing the computer-testing technique for the validation of weighted-voting plans in New York). Several international bodies, including the European Union, the World Bank and the International Monetary Fund, use weighted-voting systems. William N. Gianaris, *Weighted Voting in the International Monetary Fund and the World Bank*, 14 FORDHAM INT'L L.J. 910, 910 (1991); Eric A. Posner & Alan O. Sykes, *Voting Rules in International Organizations*, 15 CHI. J. INT'L L. 195, 197 (2014); LÁSZLÓ Á. KÓCZY, THE EFFECT OF BREXIT ON VOTING IN THE COUNCIL OF THE EUROPEAN UNION (2016), http://www.academia.edu/26845750/.

7. *See* Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (requiring equally weighted votes in

not insist that state and local districts be equally sized.[8] Instead, in *Reynolds v. Sims*,[9] the Court held that a plan in which representatives of disparately sized districts each had a *single* vote in the legislative body violated the Equal Protection Clause of the Fourteenth Amendment.[10] The problem was not that the districts themselves were unequal but rather that they received unequal representation.[11] Thus, the *Reynolds* Court itself maintained that a state might be able to compensate for population disparities by increasing the legislative representation of more populous districts.[12]

Weighted voting satisfies the one-person, one-vote requirement by increasing the number of legislative votes each representative casts in proportion to the district's population.[13] To illustrate, assume an average-sized district has 1,000 residents. Each district would elect a single representative with one vote in the legislature. Residents of a weighted district with 2,000 residents would elect a single representative who would cast two votes. In each district, the ratio of residents to legislative votes is 1,000 to 1. Although the populations vary, the numeric weight of each vote is exactly the same. This avoids the *Reynolds* problem in which disparately sized districts are granted the same legislative representation.

Weighted voting, thus, enables legislatures to use political subdivisions that vary in size as electoral districts. Following *Reynolds v. Sims*, several states considered adopting weighted-voting apportionment plans to equalize representation for their existing districts.[14] Proponents

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congressional districts); Reynolds v. Sims, 377 U.S. 533, 565 (1964) (requiring equally weighted votes in state legislative districts); Avery v. Midland Cty., 390 U.S. 474, 480–81 (1968) (requiring equally weighted votes in general purpose municipal legislatures).

8. Fortson v. Dorsey, 379 U.S. 433, 438–39 (1965) (holding that state plan that mixed single-member and multimember districts that varied in size did not deny residents an equally weighted vote); Mahan v. Howell, 410 U.S. 315, 327–28 (1973) (finding that multimember apportionment plan satisfied the one-person, one-vote requirement even though the districts varied in population size); Whitcomb v. Chavis, 403 U.S. 124, 147 (1971) (stating that unequal multimember districts satisfy the one-person, one-vote requirement).

9. 377 U.S. 533 (1964).

10. *Id.* at 565–66.

11. *Id.* at 567.

12. *Id.* at 549, 577 (noting that in state legislatures "[o]ne body could be composed of single-member districts while the other could have at least some multimember districts"); *see also Fortson*, 379 U.S. at 436 (noting that *Reynolds* "rejected the notion that equal protection necessarily requires the formation of single-member districts").

13. Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 80 F.3d 42, 49 (2d Cir. 1996); R. Alta Charo, *Designing Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate*, 53 FORDHAM L. REV. 735, 777 (1985).

14. John F. Banzhaf III, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 RUTGERS L. REV. 317, 317 (1965) ("[W]eighted voting has been widely suggested as an alternative to actual reapportionment.").

argued that weighted voting would prevent gerrymandering and enable states to continue to use counties as the unit of representation in the state legislature.[15] Critics countered that weighted voting generates inequality in critical dimensions of legislative representation.[16] Courts, for the most part, sided with critics and rejected state-wide weighted-voting plans for failing to equalize the non-voting aspects of legislative representation.[17]

Thus, most jurisdictions elect representatives from single-member, equal-population districts.[18] The Supreme Court has expressed a strong preference for this mode of apportionment.[19] Federal law requires equal-population districts for congressional seats,[20] and the vast majority of states use equal-population districts for their state legislatures.[21] Over the past decades, however, it has become increasingly obvious that equal-population districting imposes its own costs on voter equality.[22] Equal-population districts inevitably disrupt the integrity of local government boundaries. The decennial redistricting process exacerbates this effect, inhibiting the formation of political communities and enabling gerrymandering.

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15. *Id.* at 323; Robert Imrie, *The Impact of the Weighted Vote on Representation in Municipal Governing Bodies of New York State*, 219 ANNALS N.Y. ACAD. SCI. 192, 199 (1973) (advocating the use of weighted voting as a temporary solution).

16. Banzhaf, *supra* note 14, at 318 (arguing that weighted voting overrepresents residents of more populous districts); Jack B. Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21, 45–46 (1965) (arguing that weighted voting does not provide equal legislative representation).

17. *See infra* notes 152–60.

18. James A. Gardner, *What Is "Fair" Partisan Representation, and How Can It Be Constitutionalized? The Case for A Return to Fixed Election Districts*, 90 MARQ. L. REV. 555, 562 (2007) (noting our country's "commitment on both the federal and state levels to the use of single-member, territorial election districts"); Jeffrey C. O'Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. ST. L. REV. 327, 332 ("Single-member districts are the norm in the United States and engender the two-party system.").

19. *See* Chapman v. Meier, 420 U.S. 1, 19 (1975); Connor v. Johnson, 402 U.S. 690, 692 (1971).

20. 2 U.S.C. § 2a(a), (c) (2012) (requiring single-member equal population districts for congressional representatives).

21. *See* O'Neill, *supra* note 18, at 332; Gardner, *supra* note 18, at 562; Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1406 (2012).

22. Micah Altman & Michael P. McDonald, *Redistricting Principles for the Twenty-First Century*, 62 CASE W. RES. L. REV. 1179, 1185 (2012) (describing oddly shaped equal-population districts drawn to favor a political party, incumbent, or minority group); Pamela S. Karlan, *Maps and Misreading: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 176 (1989) (noting that the equal-population requirement does not prevent legislators from gerrymandering district boundaries to dilute the voting power of minority groups); Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-CL. L. REV. 333, 339 (1998) ("Single-member districting . . . provides members of governing bodies substantial discretion to 'gerrymander' in such a way as to determine the outcome of elections.").

This Article argues that weighted voting should be used to mitigate these costs. The Article proceeds as follows. Part I argues that weighted-voting systems satisfy the constitutional one-person, one-vote requirement by allocating legislative votes in proportion to the population of each district. Moreover, this Part argues the Supreme Court's default preference for single-member, equal-population districting can be overcome by a desire to preserve the boundaries of political subdivisions.

Part II considers the advantages of weighted voting. Specifically, Part II argues that by preserving local political boundaries, weighted voting eliminates the decennial redistricting process that gives rise to claims of partisan gerrymandering, enables local governments to function both as administrative arms of the state and as independent political communities, and provides a format for regional governance.

Part III recognizes that weighted-voting does not equalize all aspects of legislative representation. In particular, weighted-voting systems generate inequality in the functional representation each voter receives, inflate the political power and voting power of legislators from more populous districts, and increase the risk of minority vote dilution. Though these inequalities are critically important from a policy perspective, this Part argues that they do not render weighted voting unconstitutional per se.

Part IV proposes combining weighted-voting with equal-population districts to form districts that correspond to political subdivisions, yet contain roughly the same number of people. Combining weighted voting with equal-population districts maximizes the advantages of each apportionment format. First, using existing political subdivisions as electoral districts prevents gerrymandering, strengthens the role of local governments and removes an obstacle to regional governance. Second, equalizing the population of each district equalizes functional representation and legislator power, and prevents minority vote dilution. Finally, allocating votes to each district in proportion to its population equalizes the mathematical weight of each vote and satisfies the quantitative one-person, one-vote requirement. Hybrid weighted-voting plans, thus, harmonize multiple districting goals that would otherwise conflict.

I. THE CONSTITUTIONALITY OF WEIGHTED VOTING

Historically, electoral districts corresponded to fixed political units, such as counties or cities.[23] Until the 1960s, the most common mode of apportionment was to create districts comprised of one or more whole

23. James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237, 1244–45 (2002); Stephanopoulos, *supra* note 21, at 1406.

counties and vary the number of representatives elected from each district in rough proportion to their respective populations.[24] In its reapportionment cases, the Supreme Court firmly rejected the use of local governments as the units of representation on legislative bodies.[25] In *Reynolds v. Sims*,[26] the Court required state legislatures to be apportioned according to population, without regard to the state's existing political subdivisions.[27] As the *Reynolds* Court famously held, "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities."[28]

One-person, one-vote triggered a reapportionment revolution. Most jurisdictions complied with the one-person, one-vote mandate by transitioning to equal-population districting.[29] These newly formed districts nearly always disrupted the boundaries of existing political communities, such as counties, towns, and cities.[30] Weighted voting emerged in the midst of this upheaval, as a compromise, designed to preserve representation for existing political subdivisions, while providing each voter with an equally weighted vote.

This Part argues that weighted-voting systems satisfy the one-person, one-vote requirement. Section A argues that weighted voting equalizes the weight of each vote by allocating legislative votes in proportion to population. Section B argues that the Court's preference for single-member, equal-population districts can be overcome by a competing desire to preserve representation for existing political subdivisions.

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24. Stephanopoulos, *supra* note 21, at 1387–88.

25. Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105, 1110 (1999) (noting that in its one-person, one-vote cases the Court endorsed a population-based theory of representation); Gardner, *supra* note 23, at 1238 (noting that "the Court not only formally rejected, but also decisively delegitimized, the new doctrine's logical and historical alternative: one community, one vote"); Karlan, *supra* note 22, at 174 ("*Reynolds* represented a decisive rejection of a conception of representation that allocated the opportunity to exercise effective political power on the basis of geography.").

26. 377 U.S. 533 (1964).

27. *Id.* at 568.

28. *Id.* at 562.

29. Bruce E. Cain et al., *From Equality to Fairness: The Path of Political Reform Since* Baker v. Carr, *in* PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 8–10 (Thomas E. Mann & Bruce E. Cain eds., 2005).

30. *See* Cain et al., *supra* note 29, at 8 ("The equal population criterion inevitably wreaked havoc on geographic representation since in many instances homogeneous communities of interest had to be split or combined in order to achieve population equality among districts."); Cain, *supra* note 25, at 1107–08 (describing the one-person, one-vote requirement's disruptive effect on geographic districting); Gardner, *supra* note 23, at 1257 (noting that "recognized local political communities" were broken up "because their populations fail to add up to the required numbers"); Stephanopoulos, *supra* note 21, at 1412 (describing disruption of local government boundaries following the one-person, one-vote requirement).

Section C briefly surveys the case law, noting that both New York's highest court and the U.S. Court of Appeals for the Second Circuit have held that weighted voting satisfies the one-person, one-vote requirement.

A. *Equalizing the Weight of a Vote*

The constitutional one-person, one-vote doctrine requires that legislatures be apportioned on a population basis so that each person has a mathematically equally weighted vote.[31] As Professor Pamela Karlan explains, the one-person, one-vote cases are "'based solely on a mathematical analysis' that shows that the votes of persons in one district are devalued relative to the votes of persons in a less-populated district."[32] This Section argues that weighted-voting plans, like multimember plans, satisfy the one-person, one-vote requirement so long as (1) votes in the legislative body are allocated in proportion to population, and (2) the maximum deviation from population equality is within a constitutionally permissible range.

1. Proportional Representation

Though the Court has expressed a strong preference for single-member, equal-population districts,[33] they are not strictly required. To the contrary, in 1965, in *Fortson v. Dorsey*,[34] the Supreme Court expressly held that the one-person, one-vote requirement does not require the formation of equal-population districts.[35] In *Fortson*, the Supreme Court upheld a redistricting plan that consisted of a mixture of multimember and single-member districts.[36] The Court determined that there is "clearly no mathematical disparity" in the weight of each vote because each district elects a number of representatives in proportion to its population.[37] In 1971, in *Whitcomb v. Chavez*,[38] the Supreme Court again held that multimember districts in which representatives were allocated in proportion to population satisfied the mathematical one-person, one-vote requirement.[39]

Both multimember districts and weighted-voting districts equalize the weight of an individual vote by increasing the number of legislative votes

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31. Karlan, *supra* note 22, at 176.

32. *Id.*

33. *See, e.g.*, Connor v. Johnson, 402 U.S. 690, 692 (1971) ("[S]ingle-member districts are preferable to large multi-member districts as a general matter.").

34. 379 U.S. 433 (1965).

35. *Id.* at 438–39.

36. *Id.*

37. *Id.* at 437.

38. 403 U.S. 124 (1971).

39. *Id.* at 145–46.

in proportion to the district's population. Multimember districts equalize the weight of individual votes by increasing each district's number of representatives—and therefore the number of legislative votes—in proportion to its population. Weighted-voting districts equalize the weight of individual votes by increasing the number of legislative votes each representative casts in proportion to the district's population.

To illustrate, assume an average-sized district has 1,000 residents. Residents of a single-member, equal-population district would elect a single representative with a single vote in the legislative body. Residents of a multimember district with 2,000 residents would elect two representatives, each of whom would then have a single vote in the legislative body. Residents of a weighted-voting district with 2,000 residents would elect a single representative who would cast two votes. In each district, the ratio of residents to legislative votes is 1,000 to 1. Although the populations vary, the numeric weight of each vote is exactly the same.

2. Deviation from Population Equality

Courts typically determine whether an apportionment plan complies with the one-person, one-vote requirement by calculating the plan's maximum deviation from population equality.[40] The maximum deviation is the range by which the most overrepresented constituency differs from the most underrepresented.[41] If the largest district is two percent larger than the ideal, and the smallest district is one percent smaller than the ideal, then the overall range, or maximum population deviation, is three percent.

The Court applies different standards to congressional districts versus state and local plans.[42] At the national level, the Court insists on strict equality, requiring that congressional districts be "as nearly equal in population . . . as practicable."[43] In state and local apportionment plans,

40. .Karlan, *supra* note 22, at 176.

41. Courts refer to this range in a variety of ways. *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 98–99 (1997) ("overall population deviation"); Bd. of Estimate v. Morris, 489 U.S. 688, 700 (1989) ("maximum percentage deviation"); Connor v. Finch, 431 U.S. 407, 417 (1977) ("maximum deviation"); Chapman v. Meier, 420 U.S. 1, 23 (1975) ("deviation," "variation," and "total population variance").

42. *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1149 (noting that the Court insists on strict equality in congressional districts, but affords greater flexibility to state and local districts); Mahan v. Howell, 410 U.S. 315, 322 (1973) (noting while "population alone has been the sole criterion of constitutionality in congressional redistricting . . . broader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting").

43. White v. Weiser, 412 U.S. 783, 795–97 (1973) (invalidating districts that were not as mathematically equal as possible); *see* Karcher v. Daggett, 462 U.S. 725, 734 (1983) (rejecting New Jersey congressional reapportionment with less than one-percent deviation from population

however, the Court has adopted a more flexible approach, generally permitting state and local districts to deviate up to ten percent from the ideal size.[44]

In weighted-voting schemes, courts calculate the maximum deviation using a weighted-vote formula that compares the percent of population an official represents to the percent of votes allocated to that official.[45] Because votes are allocated in proportion to population, weighted-voting plans generally do not deviate from population equality. If an official whose town contains ten percent of the population is allocated ten percent of the votes, the maximum deviation is zero percent. Weighted voting plans, thus, produce precise mathematical equality.

B. *Districting around Political Subdivisions*

In its reapportionment cases, the Supreme Court rejected using political subdivisions as the sole unit of representation on legislative bodies.[46] The Court did not, however, negate the importance of political subdivisions more generally. Indeed, the *Reynolds* Court itself recognized the preservation of political subdivisions as a legitimate factor in state districting, though it could not justify the enormous population disparity in that case.[47] In the words of the Court, "a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained."[48]

Last term, in *Evenwel v. Abbott*, the Court confirmed that state and local legislative districts are permitted to deviate to "accommodate traditional districting objectives," such as "preserving the integrity of

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equality); Kirkpatrick v. Preisler, 394 U.S. 526, 531–32 (1969) (rejecting plan with six-percent population deviation and rejecting the suggestion that there is a point at which population differences among districts become de minimis); State *ex rel.* Stephan v. Graves, 796 F. Supp. 468, 470, 473 (D. Kan. 1992) (ruling that plan with a "maximum population deviation" of .94% was unconstitutional regardless of the fact that the plan maintained whole counties in each congressional district).

44. *See* Voinovich v. Quilter, 507 U.S. 146, 161 (1993) (noting ten-percent threshold); Brown v. Thomson, 462 U.S. 835, 842 (1983) ("[The Court's] decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under ten percent falls within this category of minor deviations."). *But see* Larois v. Cox, 300 F. Supp. 2d 1320, 1340 (N.D. Ga. 2004) (finding that ten-percent threshold is presumptively constitutional but not immune from constitutional attack), *aff'd mem.*, 542 U.S. 947 (2004).

45. Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 80 F.3d 42, 49 (2d Cir. 1996) (citing League of Women Voters v. Nassau Cty. Bd. of Supervisors, 737 F.2d 155, 170 (2d Cir. 1984)) (comparing the "percent of total population represented by a given local official to the percent of weighted votes allocated to that official").

46. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

47. *Id.* at 580–81.

48. *Id.* at 580.

political subdivisions."[49] Thus, the Court regularly tolerates deviations from population equality when adequately justified by a state policy preserving the boundaries of existing political subdivisions, such as counties, towns, or cities.[50] In the 1971 case of *Abate v. Mundt*,[51] for example, the Court approved of a multimember apportionment plan for Rockland County, New York, which had been drawn so its electoral districts corresponded precisely with the county's five existing towns.[52] The Court upheld the plan despite its 11.9% deviation, explaining that local needs "may sometimes justify departures from strict equality" and that the "exact [town–district] correspondence" was desirable because it facilitated interlocal cooperation.[53]

In addition to recognizing the value of preserving towns on the county legislature, the Court has recognized the value of preserving counties on the state legislature. In 1973, in *Mahan v. Howell*,[54] for example, the Court endorsed a Virginia district plan with a 16.4% total deviation that had been carefully drawn to avoid crossing city or county boundaries.[55] The Court agreed that dividing counties into multiple districts would harm county voters. In particular, the Court noted that if counties were split, "[t]he opportunity of [their] voters to champion local legislation [would be] virtually nil," and their "representation [would be] no representation at all so far as local legislation is concerned."[56] Thus, the Court determined that the state's policy of preserving local government boundaries justified the deviation.[57]

Ten years later, in *Brown v. Thomson*,[58] the Court approved of a Wyoming apportionment plan with an eighty-nine-percent maximum deviation from population equality.[59] The Court held that the state's policy of using counties as representative districts and allocating at least one representative to each county was supported by substantial and

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49. 136 S. Ct. 1120, 1124 (2016).

50. Brown v. Thompson, 462 U.S. 835, 841 n.5, 847; Mahan v. Howell, 410 U.S. 315, 324–25, 334 (1973) (upholding plan with 16.4% total deviation the Virginia General Assembly had carefully drawn to avoid crossing city or county boundaries).

51. 403 U.S. 182 (1971).

52. *Id.* at 184–86.

53. *Id.* at 185, 187; *see also* NANCY MAVEETY, REPRESENTATION RIGHTS AND THE BURGER YEARS 46 (1991) (describing *Abate* as "the first Burger decision that is clearly consistent with the conceptualization of territorial representation"); Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, 198 (noting that with *Abate* "the Court began a retreat from the extreme rigidity of its 1969 position").

54. 410 U.S. 315 (1973).

55. *Id.* at 324–25, 334.

56. *Id.* at 324–25.

57. *See id.*

58. 462 U.S. 835 (1983).

59. *See id.* at 846.

legitimate state concerns. Specifically, the Court recognized that the various counties had "different and distinctive" needs and were the primary administrative agencies of the state government.[60] In 1994, the U.S. District Court for the Northern District of Ohio similarly upheld an Ohio legislative-district plan with a total deviation of 13.81%, for House districts, that was a result of a rational state policy preserving county lines.[61]

At the same time, the Court has rejected deviations that exceed ten percent that were not adequately supported by state policies preserving political boundaries. In *Chapman v. Meir*,[62] for example, the Court struck down an apportionment plan with a 20.14% deviation, noting that "[i]t is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines."[63] Similarly, in *Kilgarlin v. Hill*,[64] the Court rejected a county-based apportionment plan where the state did not demonstrate "why or how respect for the integrity of county lines required the particular deviations."[65]

C. *Weighted-Voting Jurisprudence*

Despite its preference for equal-population districts, the Court regularly permits state and local apportionment plans to deviate from population equality in order to accommodate the boundaries of political subdivisions. In *Abate v. Mundt*,[66] the Supreme Court recognized that political subdivisions play an important role in the structure of New York counties. Until the 1960s, New York counties were governed by a Board of Supervisors composed of a single representative from each town within the county.[67] The Court's holding in *Reynolds v. Sims*[68] and *Avery v. Midland County*[69] rendered New York's traditional "one-town, one-vote" legislative structure unconstitutional. Roughly half of the counties in New York responded to these rulings by replacing their county Boards with county legislatures composed of single-member, equal-population

60. *Id.* at 841 n.5.

61. Quilter v. Voinovich, 857 F. Supp. 579, 583, 586–87 (N.D. Ohio 1994).

62. 420 U.S. 1 (1975).

63. *Id.* at 25.

64. 386 U.S. 120 (1967).

65. *Id.* at 121, 124 (striking down a Texas statute using single-member, multimember, and floterial districts that created a maximum population deviation of 26.48% as an "unconstitutional 'crazy quilt'").

66. 403 U.S. 182 (1971).

67. *See* N.Y. STATE ASS'N CTYS., *supra* note 4, at 14. For an overview of the structure of New York counties, see *id.* at 4.

68. 377 U.S. 533, 568 (1964).

69. 390 U.S. 474, 476 (1968).

districts.[70] The other half, however, adopted weighted-voting systems to preserve the town-based structure of their county Boards.[71] More than a dozen counties continue to use weighted voting.[72]

Under traditional weighted-voting plans, the registered voters in each town elect one town supervisor, who represents the town on the county Board of Supervisors.[73] Each town supervisor casts a number of votes based upon the town's population.[74] Thus, a representative whose town contains twenty percent of the county population would cast twenty percent of votes on the County Board. Other counties increase representation for more densely populated areas by subdividing cities into wards, each of which elects its own representative,[75] or by increasing the

70. Grofman & Scarrow, *supra* note 6, at 288–89.

71. Charo, *supra* note 13, at 784; *see also* Grofman & Scarrow, *supra* note 6, at 288–89 (noting three factors that led N.Y. counties to adopt weighted voting, including the history of weighted voting in Nassau County, a commission report recommending weighted voting for the state legislature and the nature of county politics in New York); Emery, *supra* note 6, at 161 (noting that New York adopted weighted voting to enable town mayors to continue to serve as county legislators).

72. *See supra* note 4 and accompanying text; *see also* N.Y. STATE ASS'N CTYS., *supra* note 4, at 9–10. Counties that preserved their Boards generally do not have an elected executive. Instead, an appointed county manager or the Board itself manages these counties. *Id.* Without ruling out the possibility that others exist, the Author could only find one jurisdiction outside of New York that, until recently, used weighted voting. In 2013, Barnstable County, Massachusetts, voted to replace its weighted-voting system with a single-member, equal-population legislature. *See Recommendation of the Charter Review Committee*, BARNSTABLE CTY. (Nov. 13, 2013), http://www.barnstablecounty.org/wp-content/uploads/2010/09/12-4-13-Meeting-Packet.pdf.

73. Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 886 F. Supp. 242, 244 (N.D.N.Y. 1995) (describing Delaware's weighted-voting plan following the 1990 census), *aff'd*, 80 F.3d 42, 43 (2d Cir. 1996); *see also* Reform of Schoharie Cty. v. Schoharie Cty. Bd. of Supervisors, 975 F. Supp. 191, 192 (N.D.N.Y. 1997) (describing Schoharie County's weighted-voting plan), *aff'd*, 152 F.3d 920 (2d Cir. 1998); Iannucci v. Bd. of Supervisors of Wash. Cty., 229 N.E.2d 195, 196 n.1 (N.Y. 1967) (noting that supervisors on the Board had one vote despite vast population differences between towns).

74. *See, e.g.*, *Iannucci*, 229 N.E.2d at 195. For an illustration, see MONTGOMERY CTY., N.Y., POPULATION AND WEIGHTED VOTE 2010 (2012), https://www.co.montgomery.ny.us/sites/public/government/planning/charter/Charter_Forms/Reference_Materials/Legislative_Districts/Mont%20Co%20Weighted%20Vote%20Map.pdf (last visited June 7, 2016); Heather Nellis, *Voting Math Will Undergo Slight Chance*, AMSTERDAM RECORDER, Apr. 18, 2011, at A1 (describing allocation of votes in Montgomery County). In 2012, Montgomery County replaced its weighted voting system with a legislature consisting of nine members elected from equal-population districts. *See* MONTGOMERY CTY. CHARTER art. 2, § 2.01 (2012); *see also* MONTGOMERY CTY., LOCAL LAW FILING (2012), https://www.co.montgomery.ny.us/sites/public/government/locallaws/LocalLawScans/023.pdf (compiling documents relating to Local Law # 2).

75. Cortland County subdivides its densely populated city and suburban towns into electoral districts. Cortland Cty., Legislative and Election Districts (2013); *see* Slater v. Bd. of Supervisors of Cortland, 330 N.Y.S.2d 947, 948–50 (Sup. Ct. 1972) (upholding Cortland County's apportionment plan), *aff'd*, 346 N.Y.S.2d 185 (App. Div. 1973).

number of representatives each district elects in proportion to the district's population.[76]

Both the Second Circuit and the N.Y. Court of Appeals have held that weighted voting satisfies the one-person, one-vote requirement.[77] In 1973, in *Franklin v. Krause*,[78] the N.Y. Court of Appeals upheld Nassau County's weighted-voting scheme against an Equal Protection challenge.[79] In upholding the plan, which used towns as electoral districts, the *Franklin* court emphasized the Supreme Court's tolerance for flexible local governance structures and the value of preserving representation for political subunits—towns and cities—on the County Board.[80] Thereafter, the Supreme Court dismissed an appeal of the New York decision for want of a federal question.[81] Subsequent cases have treated this dismissal as a decision on the merits.[82] In other words, by dismissing the appeal for want of a federal question, the Supreme Court effectively determined that weighted voting at the local level does not violate the federal constitution but is instead a matter of state law.[83]

More recently, in *Roxbury Taxpayers Alliance v. Delaware County Board of Supervisors*,[84] the Second Circuit upheld Delaware County's weighted-voting plan under which each town elected a single representative to the County Board.[85] The court rejected the claim that the Equal Protection Clause requires single-member, equal-population districts and held that weighted voting satisfies the one-person, one-vote

76. Schenectady County increases the number of members each district elects in proportion to the district's population and then divides the total number of votes between the district's members. SCHENECTADY CTY., N.Y., CHARTER art. II, § 2.04(F) (2015); *see* Michael Lamendola, *Schenectady County Legislature Pushes for Weighted Voting*, DAILY GAZETTE (Apr. 12, 2011), https://dailygazette.com/article/2011/04/12/0412_weighted.

77. *See, e.g.*, *Reform of Schoharie Cty.*, 975 F. Supp. at 194–95; *Roxbury Taxpayers All.*, 80 F.3d at 49; Franklin v. Krause, 298 N.E.2d 68, 69 (N.Y. 1973); Iannucci v. Bd. of Supervisors, 229 N.E.2d 195, 198 (N.Y. 1967); *Slater*, 346 N.Y.S.2d at 185.

78. 298 N.E.2d 68 (N.Y. 1973).

79. *Id.* at 73.

80. *See id.* at 70, 73 (noting that preserving town boundaries facilitates local taxing and the delivery of local services and that merging these units into equal-population districts "would be to sacrifice practicality for an abstraction").

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

82. *See* Roxbury Taxpayers All. v. Del. Cty. Bd. Of Supervisors, 886 F. Supp. 244, 247–48 (N.D.N.Y. 1995).

83. *See id.* (noting that "[t]his type of dismissal is deemed to reach the merits of the case, and creates binding precedent").

84. 80 F.3d 42 (2d Cir. 1996).

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

requirement so long as votes are allocated in proportion to population.[86] As the court explained, "[b]y having each town elect a representative, the County assures that the interests of every town, no matter how small, are considered by the Board, and that no town suffers from permanent lack of representation on account of its size."[87] The Second Circuit reaffirmed this holding two years later in *Reform of Schoharie County v. Schoharie County Board of Supervisors*.[88] In *Schoharie County*, the court upheld a weighted-voting scheme which used towns as electoral districts and gave each supervisor "a number of votes roughly proportionate to his or her town's percentage share of the total population of the County."[89]

In addition, the federal courts have twice *ordered* counties to adopt weighted-voting schemes to remedy malapportioned districts. In 1997, the U.S. District Court for the Southern District of New York ordered Rockland County to remedy its malapportioned districts by redistricting or by adopting weighted voting.[90] Similarly, in 2001, after numerous failed attempts to adopt a districting plan, the U.S. District Court for the Western District of New York ordered Erie County to maintain its existing 1990 districts and use weighted voting to comply with the one-person, one-vote requirement.[91] With nearly a century of use, countywide weighted voting is firmly entrenched in New York as an apportionment mechanism that enables counties to preserve representation for political subdivisions in their legislative bodies.

II. WEIGHTED VOTING AND POLITICAL SUBDIVISIONS

The constitutional principle of "one-person, one-vote" requires that legislatures be apportioned on a population-basis. The primary means of complying with the one-person, one-vote requirement is to elect representatives to a legislative body from districts of equal population. Drawing single-member districts of substantially equal population forces legislators to ignore, or at best minimally accommodate, existing political communities. This is not an accident. In its early reapportionment cases, the Court made clear that in districting plans, population equality trumped all other possible considerations, including preserving the integrity of existing political subdivisions, such as county lines.

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86. *Roxbury Taxpayers All.*, 80 F.3d at 48 (holding that where unequal-population districts are used, weighted voting may be used to provide voters with a "degree of representation on the governing body that is proportionate to the percentage that the district's population bears to the population of the political unit as a whole").

87. *Id.* at 45.

88. 975 F. Supp. 191 (N.D.N.Y. 1997).

89. *Id.* at 192.

90. Abate v. Rockland Cty. Legislature, 964 F. Supp. 817, 830 (S.D.N.Y. 1997).

91. Korman v. Giambra, No. 01-CV-0369E(SR), 2001 WL 967552, at *1 (W.D.N.Y. Aug. 8, 2001).

While equal-population districting rapidly resolved the problem of malapportioned districts, extinguishing the link between local government boundaries and electoral district boundaries has created new problems. In particular, as this Part explains, equal-population districting leads to gerrymandering, inhibits the formation of political communities, and hinders regional governance. Section A notes that equal-population districts are inevitably gerrymandered to influence electoral outcomes. Section B argues that equal-population districts are inconsistent with the conception of local governments as independent polities *and* as administrative arms of the state. Section C suggests that equal-population districting prevents the formation of regional governance mechanisms needed to address modern multijurisdictional problems.[92] This Part argues that weighted-voting systems remedy each of these problems by preserving the integrity of local government boundaries.

A. *Remedy for Political Gerrymandering*

Equal-population districting has led to the problem of political gerrymandering. The boundaries of single-member, equal-population districts must be redrawn every ten years to maintain population equality. The redistricting process, once praised as an effective response to malapportioned districts, is now widely condemned as "an open invitation to gerrymandering."[93] Politicians deliberately manipulate district boundaries "to protect incumbents and to maintain or extend advantages enjoyed by the dominant party."[94] Redistricting is blamed for reducing the number of competitive election districts around the nation, decreasing government responsiveness, and creating a sense that elections are meaningless.[95] In his 2016 State of the Union Address, President Barack Obama flagged gerrymandering as one of the fundamental problems with American politics and called for an end to the practice of drawing districts so that "politicians can pick their voters, and not the other way around."[96]

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92. *See* Ashira Pelman Ostrow, *Emerging Counties? Prospects for Regional Governance in the Wake of Municipal Dissolution*, 122 YALE L.J.F. 187, 200–01 (2013), http://yalelawjournal.org/forum/emerging-counties-prospects-for-regional-governance-in-the-wake-of-municipal-dissolution (evaluating obstacles to regional governance).

93. Gardner, *supra* note 18, at 555–56.

94. *Id.* at 555.

95. *Id.* at 556; Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 112 (2000) (stating gerrymandering "contributes to the popular perception that elections do not matter"); Carl Hulse, *Seeking to End Gerrymandering's Enduring Legacy*, N.Y. TIMES (Jan. 25, 2016), http://www.nytimes.com/2016/01/26/us/politics/seeking-to-end-gerrymanderings-enduring-legacy.html?_r=0 (quoting experts who state that "[p]eople are so upset that their votes don't count anymore").

96. Hulse, *supra* note 95.

Although the Court has twice held that partisan gerrymandering can violate the Constitution, it has yet to develop a workable test for determining when that occurs.[97] In *Davis v. Bandemer*,[98] the Supreme Court recognized a cause of action for political gerrymandering, holding that an electoral process violates the right to vote if it results in the "consistent[] degrad[ation] . . . of voters' influence on the political process as a whole."[99] The "consistent degradation" standard has been difficult to apply, leaving scholars and courts struggling to understand the contours of this aspect of the right to vote.[100]

In 2004, in *Vieth v. Jubelirer*,[101] the Court revisited its test for partisan gerrymandering. A plurality in *Vieth* would have reversed *Bandemer* and declared partisan gerrymandering nonjusticiable.[102] Meanwhile, three dissents proposed separate standards for determining when partisan districting violates the Constitution.[103] As Justice Kennedy observed in his concurring opinion, "there are yet no agreed upon substantive principles of fairness in districting," and as a result, "we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."[104]

The Court's struggle to identify unconstitutional partisan gerrymandering reflects the conflict inherent in legislative districting. When elected officials are charged with drawing their own district boundaries, they will inevitably do so with an eye toward retaining or increasing their power.[105] As Professor James Gardner has observed, "All

97. See Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion) (rejecting numerous standards for measuring political gerrymandering); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 423 (2006) (finding that the appellants had not provided "a reliable standard for identifying unconstitutional political gerrymanders").

98. 478 U.S. 109 (1986) (plurality opinion).

99. *Id.* at 113, 132.

100. *Vieth*, 541 U.S. at 282 ("In the lower courts, the legacy of the plurality's test [in *Bandemer*] is one long record of puzzlement and consternation."); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1684 (1993) ("Bandemer is a mass of confusion on what the Court actually believes is the constitutional harm."); Stephanopoulos, *supra* note 21, at 1382 ("Scholars puzzled over what values the standard sought to capture . . . .").

101. 541 U.S. 267 (2004) (plurality opinion).

102. *Id.* at 281.

103. *See id.* at 339 (Stevens, J., dissenting) (proposing inquiry focused on partisan intent); *id.* at 346–52 (Souter, J., dissenting) (proposing burden-shifting framework); *id.* at 360–65 (Breyer, J., dissenting) (proposing test based on risk of "unjustified entrenchment" by political minority).

104. *Id.* at 307–08 (Kennedy, J., concurring).

105. *See, e.g.*, *id.* at 285–86 (majority opinion) (indicating that partisanship is an "ordinary and lawful motive" in redistricting).

districting is in some sense gerrymandering: someone stands to gain or lose from any conceivable redrawing of district lines."[106]

Commentators have proposed numerous reforms including: various substantive constitutional standards of fair political competition;[107] sophisticated measures of district compactness;[108] and procedural reforms, such as the use of independent districting commissions,[109] or approval by referendum.[110]

Each of these proposals seeks to reform the redistricting process itself. Weighted voting provides another avenue for reform. Rather than tinkering with an inherently political process, weighted voting avoids it all together.[111] Weighted voting satisfies the one-person, one-vote requirement by adjusting the number of votes in the legislature rather than by adjusting the lines on a map.[112] Weighted voting thus eliminates the

106. Gardner, *supra* note 23, at 1260.

107. *See* Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After* LULAC v. Perry, 6 ELECTION L.J. 2, 4–6 (2007) (arguing for a standard of symmetrical partisan bias for evaluating the constitutionality of districting plans); *see also* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 213 (2003) (arguing for a standard of partisan fairness, responsiveness, and accountability); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 615–17 (2002); Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 570–74 (2004).

108. Richard G. Niemi et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. POL. 1155, 1159 (1990) (identifying and classifying the components of compactness); Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 339–51 (1991) (proposing various compactness standards).

109. Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1812–13 (2012).

110. Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 688 (2006).

111. Michael Halberstam, *Process Failure and Transparency Reform in Local Redistricting*, 11 ELECTION L.J. 446, 449 (2012) ("Redistricting is inherently political . . . because it involves competition and bargaining between interest groups about the allocation of political power."); Kang, *supra* note 110, at 688–89 (arguing that redistricting is an inherently political process); Justin Levitt, *Essay: Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513, 516 (2011) (arguing that redistricting is an inherently political process "in that multiple complex tradeoffs are required among multiple goals, with no outcome that clearly serves all of the population equally").

112. Weighted voting does not eliminate the possibility that municipal boundaries themselves might be altered to affect electoral outcomes. Indeed, local government boundaries are notoriously drawn along socioeconomic and racial lines to exclude low-income residents and racial minorities. *See* Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1143 (2008); Ostrow, *supra* note 92, at 197. A complete analysis of the interaction between municipal boundary changes and electoral politics is beyond the scope of this Article. For the moment, suffice it to say that municipal boundaries have an identity and purpose that transcends electoral politics and are less likely to be altered to further partisan goals. As

redistricting process that gives rise to claims of partisan gerrymandering.

B. *The Role of Local Governments*

Equal-population districts are also inconsistent with the conception of local governments as independent polities and as administrative arms of the state.[113] Ignoring local government boundaries in electoral districting undermines their status as independent democracies.[114] Ironically, it is because local governments are considered independent political communities that the one-person, one-vote requirement even applies at the local level.[115] As a matter of federal constitutional law, local governments have traditionally been treated as administrative arms of the state.[116] In the seminal case of *Hunter v. City of Pittsburgh*,[117] the Supreme Court characterized local governments as "political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them."[118]

Under *Hunter*, local government formation rests in the "absolute discretion" of the state;[119] states are free to enable the formation of local governments or abolish them completely. If, as *Hunter* suggests, local governments are mere creatures of the state, then the one-person, one-vote requirement should not apply to local governments. Instead, as Richard Briffault has argued, "a state ought to be able to design local governments along the lines it deems appropriate to effectuate its purposes."[120]

In *Avery v. Midland County*,[121] however, the Court rejected *Hunter*'s unidimensional view of local governments as administrative agents and instead recognized that, in practice, "the States universally leave much

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Professor James Gardner explains, "[w]e simply do not draw city or county lines for the purpose of making city and county elections competitive; such jurisdictions are understood to have political identities distinct from and far more important than the mere partisan affiliation of the residents who happen to inhabit them at any given moment." Gardner, *supra* note 18, at 586.

113. 1 MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS § 2:13 (3d ed. 2005) (noting that local governments serve both "to assist in the government of the state as an agent of the state" and "to regulate and to administer the local and internal affairs of the territory in which it is incorporated").

114. Avery v. Midland Cty., 390 U.S. 474, 481 (1968) (recognizing that local governments exercise autonomous policy making authority in a variety of areas).

115. *See* Briffault, *supra* note 6, at 341.

116. *Id.* at 347.

117. 207 U.S. 161 (1907).

118. *Id.* at 178.

119. *Id.*

120. Briffault, *supra* note 6, at 347.

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

policy and decisionmaking to their governmental subdivisions."[122] In *Avery*, the Court considered the composition of the Commissioners Court of Midland County, Texas, which had been districted to enable a tiny rural minority to elect a majority of the body's members.[123] The Court noted that the government at issue, a county-wide commissioners court, performed a number of functions that generally affected the residents of the county, including the imposition of countywide property taxes and the administration of welfare services.[124] In requiring local governments to comply with the equal-population standard, the Court recognized that local governments functioned as independent democratic governments, with constituents of their own.[125]

Equal-population apportionment plans that disregard local government boundaries are thus inconsistent with the Court's own view of local governments as democratically accountable government bodies and, in fact, prevent them from serving as a locus of political participation. As Professor Gardner has argued: "A boundary that is continually moving is one that is unlikely to serve as any kind of imaginative focal point for communal identity, much less as a dividing line between genuinely distinct political communities."[126]

In addition, equal-population districting interferes with the state's ability to use local governments, particularly counties, as administrative agents. Counties serve as the primary administrative subunit of state government, charged with performing state functions and delivering state services within county territory.[127] In that capacity, counties carry out state functions such as: running elections; assessing, collecting, and distributing property; operating highway and road networks; recording legal documents like deeds and marriages; operating jails and courthouses; and administering public assistance programs.[128] Until the reapportionment era, counties also served as the primary unit of representation in state legislatures. Equal-population districting eliminates that possibility and requires states to find other means of structuring their internal administration.

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122. *Id.* at 481.

123. *Id.* at 476.

124. *Id.* at 484.

125. *See id.* at 485–86; *see also In re* Reapportionment of Colo. Gen. Assembly, 45 P.3d 1237, 1248 (Colo. 2002) (en banc) (noting that "[c]ounties and the cities within their boundaries are already established as communities of interest in their own right, with a functioning legal and physical local government identity on behalf of citizens that is ongoing").

126. Gardner, *supra* note 23, at 1242 (footnote omitted).

127. *See* Ostrow, *supra* note 92, at 200.

128. *See* Anderson, *supra* note 112, at 1140.

C. *Regional Governance*

Equal-population districting inhibits the formation of regional governments. Modern metropolitan regions span city, county, and state borders.[129] Most Americans live in a small general-purpose municipality, such as a village or city, located within a much larger metropolitan region.[130] This nested growth pattern—independent municipality within interdependent region—is troubling for a variety of reasons. From a socio-economic perspective, it has polarized metropolitan regions into areas of concentrated wealth and concentrated poverty. The suburbs grow at the expense of the urban core, raising concerns regarding distributive justice and the economic welfare of the metropolitan region as a whole.[131] From a legal and political perspective, the nested growth pattern gives rise to a jurisdictional mismatch. Municipal action has an impact far beyond municipal boundaries.[132] Yet, there is no politically accountable unit of government coterminous with the relevant territory with the capacity to address regional concerns.[133]

Equal-population districting makes it nearly impossible to create a regional legislature.[134] In fact, an insistence on equal-population districting resulted in the dissolution of two existing regional governments—New York City's Board of Estimate, which had been

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129. Ostrow, *supra* note 92, at 200–01.

130. Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 483–84 (2007).

131. Ostrow, *supra* note 92, at 200–01; *see* Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1428–29 (2012) (describing suburbinization and analyzing its impact on racial and economic polarization).

132. Ostrow, *supra* 92, at 191 (describing extraterritorial impact of local government activity). *See generally* Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1408–09 (2012) (arguing that in the aggregate, local government activity can have significant regional and national consequences).

133. *See* Lisa T. Alexander, *The Promise and Perils of "New Regionalist" Approaches to Sustainable Communities*, 38 FORDHAM URB. L.J. 629, 637–41 (2011) (describing the failure of local government law to account for local actions); Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL. 505, 511 (2005) (noting a mismatch between governmental structures that allocate power to small localities and the regional economy); Reynolds, *supra* note 130, at 498–99 (noting jurisdictional mismatch).

134. Briffault, *supra* note 6, at 404 ("[E]qual population representation may impede city-county consolidations, regional governments, or similar efforts to create governance structures capable of addressing metropolitan area-wide problems."); Cain, *supra* note 25, at 1110 (noting that equal-population districting prevents the formation of regional federations). The Supreme Court Justices who opposed extending the one-person, one-vote requirement to local governments expressed this concern. *See* Hadley v. Junior Coll. Dist., 397 U.S. 50, 60–61 (1970) (Harlan, J., dissenting); *id.* at 70 (Burger, C.J., dissenting); Avery v. Midland Cty., 390 U.S. 474, 490–91 (1968) (Harlan, J., dissenting); *id.* at 496–97 (Fortas, J., dissenting); *id.* at 510 (Stewart, J., dissenting).

composed of the five boroughs of New York City,[135] and the regional government of the Seattle metropolitan area, which had been composed of hundreds of independent municipalities in the Seattle metropolitan area.[136] Similarly, a proposal to establish a regional government in the San Francisco Bay area was defeated when its planners concluded that they could not preserve representation for individual municipalities within the regional government.[137]

Of course, equal-population districting is not the only obstacle to regionalism. Proposals for the formation of metropolitan-scale municipal governments with general taxing and regulatory authority have faced insurmountable political opposition and have consistently failed to yield results.[138] And while localities have been willing to participate in efficiency-oriented initiatives that create economies of scale, improve the quality of municipal services, or decrease local taxes, they resist equitable initiatives that redistribute resources, promote racial and economic integration, or constrain local land-use authority.[139]

Nonetheless, a number of factors may increase the drive toward regional reform. First, as economic and environmental problems increasingly transcend local boundaries, even small municipalities might benefit from collaborating on complex multijurisdictional problems.[140] Moreover, an increasing number of state and federal programs require the formation of regional entities to address multijurisdictional problems.[141]

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135. Bd. of Estimate v. Morris, 489 U.S. 688, 703 (1989) (ruling that governmental interest in preserving representation for each Borough could not justify a seventy-eight-percent deviation from the one-person, one-vote requirement).

136. Cunningham v. Municipality of Metro. Seattle, 751 F. Supp. 885, 895 (W.D. Wash. 1990) (holding governmental interest in preserving regional legislature did not justify large deviation from one-person, one-vote requirement).

137. Cain, *supra* note 25, at 1110.

138. Ostrow, *supra* note 92, at 191.

139. *Id.* at 191, 193; *cf.* HENRY CISNEROS, U.S. DEP'T OF HOUS. & URBAN DEV., REGIONALISM: THE NEW GEOGRAPHY OF OPPORTUNITY 8–9 (1995) (distinguishing "things-regionalism" aimed at systems maintenance and efficiency from "people-regionalism" aimed at lifestyle issues and equity).

140. Briffault, *supra* note 6, at 344–45 (discussing the need for representative government that has the capacity and perspective to address changing society); Ostrow, *supra* note 132, at 1400 ("In a world where capital and information flow freely across national and subnational boundaries, few regulatory matters can be cabined within the jurisdictional lines of a single state, let alone a single locality.").

141. For examples of federal programs that require the formation of regional entities, see Sustainable Communities Regional Planning Grant Program Advance Notice and Request for Comment, 75 Fed. Reg. 6689, 6690 (Feb. 10, 2010) (providing grants to regional consortium in order to promote "regional planning efforts that integrate housing and transportation decisions, and increase [the capacity of communities to modernize] land use and zoning [plans]"); MARK SOLOF, N. JERSEY TRANSP. PLANNING AUTH., INC., HISTORY OF METROPOLITAN PLANNING ORGANIZATIONS 17 (1998), http://www.njtpa.org/getmedia/b95661af-dfd4-4e3d-bb87-

Weighted-voting provides one mechanism for structuring a regional entity. New York's county-wide weighted-voting plans illustrate this approach. Each town within the county elects a representative whose vote is weighted in proportion to the population of the town. Weighted voting satisfies the one-person, one-vote requirement and enables each town to be represented as a town despite disparate populations. Weighted voting, thus, preserves representation for independent municipalities in a regional body.

III. INEQUALITIES IN LEGISLATIVE REPRESENTATION

As Part I explains, weighted voting satisfies the quantitative one-person, one-vote requirement by equalizing the mathematic weight of each vote. In addition, Part II demonstrates that by using political subdivisions as electoral districts, weighted voting prevents gerrymandering, strengthens the role of local governments and removes an obstacle to regional governance. Despite these advantages, critics have long argued, and this Part recognizes, that weighted voting generates inequality in several other dimensions of legislative representation. First, weighted voting does not provide each person with an equal degree of functional representation. A single legislator with a double vote cannot perform double the legislative functions, serve on double the number of committees, or maintain double the contact with her constituents. As a result, residents of more populous districts may be functionally underrepresented.

Weighted voting also generates inequality in legislator power. From a political perspective, a legislator with a larger percentage of the total vote will be more influential in the legislative body, and more sought after by voting coalitions and lobbyists. From a mathematical perspective, a legislator with a larger percentage of the total vote will have voting power in excess of population. A legislator with fifty-one percent of the vote, for example, will have one hundred percent of the *voting power*. Moreover, weighted-voting plans have the potential to suppress racial and political electoral minorities.[142] In a weighted-voting system, each representative is elected at-large, from the district as a whole. As in other at-large schemes, a geographically concentrated minority group that would constitute a majority of an equal-population district may constitute only a minority of a larger, more populous, weighted-voting district. As a result, the minority group may be unable to elect any representatives.

39e617619c7b/MPOhistory1998.pdf.aspx (summarizing federal legislation that required regional planning).

142. Thornburg v. Gingles, 478 U.S. 30, 47 (1986) ("This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.").

Though the Supreme Court has never addressed the constitutionality of weighted voting, this Part argues that weighted voting does not violate the Equal Protection Clause. Section A argues that the Equal Protection Clause does not require equal functional representation. Section B argues that the Equal Protection Clause does not require equal voting power. Section C demonstrates that the Supreme Court permits the use of at-large voting systems that have a similar capacity to dilute minority voice. Thus, this Part argues that while it is important to recognize the tradeoffs inherent in weighted-voting apportionment plans, these tradeoffs do not preclude their use.

A. *Functional Representation*

Weighted voting systems do not provide each voter with an equal degree of functional representation. The voting rights literature traditionally recognizes two forms of vote dilution—quantitative and qualitative. Quantitative vote dilution occurs when districts vary in size so that the votes of residents in the more populous districts are numerically diluted.[143] The one-person, one-vote cases deal with quantitative vote dilution. Qualitative vote dilution occurs when electoral practices marginalize the political strength of identifiable groups of voters, for example, when district lines are gerrymandered to prevent racial minorities from constituting a majority of an electoral district. In these cases, the quality of representation is reduced because the voter has less opportunity to elect a candidate of his choice, despite the fact that his vote is weighted equally with all other votes cast in the same election.[144]

Weighted voting implicates a third form of vote dilution, which this Article terms "functional vote dilution." Functional vote dilution occurs because the number of votes each legislator casts, and correspondingly, the number of residents each legislator represents, varies between districts. Functional vote dilution impacts the quality of representation in contradictory ways. Voters in more populous districts may be functionally underrepresented because they have fewer physical representatives advocating on their behalf. At the same time, voters in less populous districts may be functionally underrepresented because their representatives have less votes, and less power, than other representatives. Nonetheless, this Section suggests that the Equal Protection Clause does not include a right to equal functional representation.

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143. Grant M. Hayden, *The Limits of Social Choice Theory: A Defense of the Voting Rights Act*, 74 TUL. L. REV. 87, 91 (1999); Karlan, *supra* note 22, at 176.

144. Hayden, *supra* note 143, at 94; Karlan, *supra* note 22, at 176.

1. Recognizing Functional Vote Dilution

Weighted voting compensates residents in more populated districts by granting their legislators additional votes. Yet this adjustment addresses only one component of legislative representation. Legislators do far more than simply vote. They participate in policy making by serving on legislative committees, by participating in floor debates, and by developing expertise in various policy areas. Furthermore, they provide a range of constituent services—maintaining contact with residents and district stakeholders, helping constituents navigate government bureaucracies, and allocating funds within the district.[145]

In contrast to the number of votes, these functional aspects of representation cannot be weighted. In an early case rejecting weighted voting, a New York court noted: "If voting were the only important function of a legislator, [weighted voting] would probably not offend 'the basic standard of equality' among districts. But legislators have numerous important functions that have nothing directly to do with voting . . . ."[146] Similarly, another court observed: "The question arises as to whether a legislator from Little Falls is permitted to make 9 times as many speeches, 9 times as many telephone calls and have 9 times as much patronage? When they serve on a committee together, does one legislator have 9 times as much power on that committee?"[147]

In addition to performing legislative tasks, the number of representatives each district elects shapes the deliberative dynamic and

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145. *See* Heinz Eulau & Paul D. Karps, *The Puzzle of Representation: Specifying Components of Responsiveness*, 2 LEGIS. STUD. Q. 233, 241 (1977) (outlining three varieties of non-policymaking responsiveness: service responsiveness, allocation responsiveness, and symbolic responsiveness); Joshua Bone, Note, *Stop Ignoring Pork and Potholes: Election Law and Constituent Service*, 123 YALE L.J. 1406, 1412 (2014) (listing three broad categories of constituent service activities: "(1) 'representative-as-ombudsman,' i.e., a representative's attempts to help constituents or groups navigate government bureaucracies; (2) 'accessibility,' i.e., a representative's efforts to keep in touch with constituents and, particularly, district stakeholders; and (3) 'appropriations,' i.e., a representative's use of influence within the legislative process to deliver discretionary funds back to district interests").

146. WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 923 (S.D.N.Y. 1965) (not vacated as to constitutionality of fractional voting), *appeal dismissed*, 379 U.S. 986 (1965), *aff'd*, 382 U.S. 4 (1965), *vacated in part as moot*, 384 U.S. 887 (1966); *see also* Briffault, *supra* note 6, at 408 (describing functions of legislators); Grofman & Scarrow, *supra* note 6, at 293 ("Perhaps the most conspicuous feature of a court decision which approves weighted voting . . . is that it assumes a very narrow view of the role of an elected representative").

147. Morris v. Bd. of Supervisors, 273 N.Y.S.2d 453, 456–57 (Sup. Ct. 1966); *see also* Briffault, *supra* note 6, at 408 ("A legislator from a large district may be given proportionately more votes than a legislator from a small district, but she cannot engage in proportionately more activities, devote herself to the negotiation of proportionately more bills, or be in proportionately more places at the same time.").

influences the outcome of the deliberation.[148] In some cases, two representatives may be more effective than a single representative with a double vote.[149] In other cases, however, a single representative with a double vote may wield disproportionate power on the legislature. As one court observed, "Representatives of the larger districts, because of the weighting of their votes, necessarily have greater influence over the passage of legislation."[150]

Residents of larger districts may receive more services and legislative attention, simply because their representative has less need to compromise or build coalitions on the legislative body.[151] Lobbyists and other interest groups are more likely to focus on representatives wielding a larger vote, rather than dividing their efforts equally between multiple representatives, each wielding a single vote.[152] Thus, residents of smaller districts might find that their interests are consistently overlooked. Weighted voting deprives these residents of the opportunity to elect a representative that is as powerful as the representative elected from a larger district.[153]

2. Functional Representation and the Equal Protection Clause

In the aftermath of *Reynolds v. Sims*, which extended the one-person, one-vote requirement to state legislative districts, several states considered adopting weighted-voting schemes as a means of complying

148. Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1803 (2002) ("[T]he presence of people in the room—and not just their voting power—has an effect on the outcome. . . . Adding more people from the more populous towns would change the dynamic of the discussion."); Weinstein, *supra* note 16, at 46 ("A deliberative democratic body—a legislature at its best—requires application of the concept of 'one man, one vote' within the body itself, so that rational argument among equals can take place.").

149. Bannister v. Davis, 263 F. Supp. 202, 209 (E.D. La. 1966); *see also* Frug, *supra* note 148.

150. Iannucci v. Bd. of Supervisors of Wash. Cty., 279 N.Y.S.2d 458, 459 (App. Div. 1967), *aff'd*, 229 N.E.2d 195 (N.Y. 1967); *see* Morris v. Bd. of Supervisors, 273 N.Y.S.2d 453, 457 (Sup. Ct. 1966) ("All of the personal attributes and characteristics of the elected legislator, his diligence, intelligence, ability, practicality, interest and knowledge concerning pending ligislation [sic] should not be frustrated by the weight of a colleague who may be able to cast 8, 10 or 12 times his vote on any given issue.").

151. Wesolowski, *supra* note 6, at 1906.

152. *See* WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 924 (S.D.N.Y. 1965) (noting that smaller districts are disadvantaged because lobbyists "will tend to woo only those legislators with full votes, since more effort is involved in convincing a series of legislators who share one vote"), *appeal dismissed*, 379 U.S. 986 (1965), *aff'd*, 382 U.S. 4 (1965), *vacated in part as moot*, 384 U.S. 887 (1966) (not vacated as to constitutionality of fractional voting).

153. *See* Abate v. Rockland Cty. Legislature, 964 F. Supp. 817, 830 (S.D.N.Y. 1997); Note, *The Application of Reynolds*, 79 HARV. L. REV. 1248, 1256–57 (1966) (arguing that voters in smaller districts would object because their representatives would have far less bargaining power than representatives of larger districts).

with the one-person, one-vote requirement without disturbing the existing arrangement of unequal districts.[154] When these apportionment plans were challenged, courts in several states, including Hawaii,[155] Louisiana,[156] Nebraska,[157] and New York,[158] determined that weighted voting in state legislatures did not comply with the Equal Protection Clause's equal-weight requirement because it did not equalize representation in aspects other than voting.[159]

In New York, for example, the legislature considered four apportionment plans, two of which involved weighted voting.[160] A report prepared by a Citizen's Committee appointed by the Governor argued that weighted voting would cause "a dilution of legislative representation" because many legislative functions, such as speaking on the floor and committee membership, cannot be weighted.[161] In *WMCA, Inc. v. Lomenzo*,[162] the Southern District of New York agreed, concluding that weighted voting violated the Equal Protection Clause.[163]

In *Evenwel v. Abbott*,[164] however, the Supreme Court suggested that there is no federal constitutional right to equal functional representation.[165] In *Evenwel*, the Supreme Court rejected the claim that the Equal Protection Clause requires states to equalize the number of eligible voters in each district.[166] Instead, the Court upheld a state legislative map that equalized the total population of each district.[167] According to the Court, total-population apportionment promotes "equitable and effective representation," "[b]y ensuring that each representative is subject to requests and suggestions from the same

154. Banzhaf, *supra* note 14.

155. *E.g.*, Burns v. Gill, 316 F. Supp. 1285, 1293 (D. Haw. 1970).

156. *E.g.*, Bannister v. Davis, 263 F. Supp. 202, 209 (E.D. La. 1966).

157. *E.g.*, League of Neb. Municipalities v. Marsh, 209 F. Supp. 189, 195 (D. Neb. 1962).

158. *E.g.*, WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 923 (S.D.N.Y. 1965), *appeal dismissed*, 379 U.S. 986 (1965), *aff'd*, 382 U.S. 4 (1965), *vacated in part as moot*, 384 U.S. 887 (1966) (not vacated as to constitutionality of fractional voting).

159. *See also* Jackman v. Bodine, 205 A.2d 735, 736 (N.J. 1964); Brown v. State Election Bd., 369 P.2d 140, 149 (Okla. 1962).

160. *See* Charo, *supra* note 13, at 786.

161. N.Y. CITIZENS COMM. ON REAPPORTIONMENT, REPORT TO GOVERNOR NELSON A. ROCKEFELLER 36 (1964).

162. *WMCA, Inc.*, 238 F. Supp. at 923.

163. *Id.* at 924. Although the state appealed this issue, the Supreme Court did not address it. *See* Charo, *supra* note 13, at 788 ("In 1966, following judicial reapportionment of the legislature and agreement of all parties, the Supreme Court 'vacated as moot' the judgment of the district court as to [the weighted-voting plans].").

164. 136 S. Ct. 1120 (2016).

165. *Id.* at 1132 & n.14.

166. *Id*.

167. *Id*.

number of constituents."[168] Yet, the Court acknowledged that constituents do not have a constitutional right "to equal access to their elected representatives."[169] Thus, under *Evenwel*, equal functional representation seems to be a reasonable state policy, but not a constitutional mandate.

Indeed, at the national level, the number of residents each legislator represents already varies dramatically. The Constitution guarantees each state at least one seat in the House of Representatives, even if its total population is lower than the average population of House districts nationwide.[170] As a result, a representative from the state of Montana represents almost twice as many residents as a representative from the adjacent state of Wyoming.[171] In the Senate, the population disparity is obviously far more extreme. Each state elects two senators, despite the fact that the most populous state, California, has sixty-six times more people than the least populous state, Wyoming.[172] Senate staffing allowances, however, vary by state population so that senators from more populous states are able to hire larger staffs.[173] This process allows senators to perform their legislative functions despite vast discrepancies in state population. Though representation in the Senate is quite obviously unique, variable staffing allowances could similarly be used to equalize functional representation in weighted-voting systems.

In contrast to state-wide plans, in countywide weighted-voting plans, courts have generally dismissed concerns over equal functional representation.[174] In *Iannucci v. Board of Supervisors*,[175] New York's highest court upheld weighted voting and determined that inequalities in

168. *Id.* at 1132.

169. *Id.* at 1132 n.14.

170. U.S. CONST. art. I, § 2, cl. 3.

171. Evenwel v. Abbott, 136 S. Ct. 1120, 1144 (2016) (Alito, J., concurring) (citing census data).

172. *Id.*

173. PAUL E. DWYER, CONG. RESEARCH SERV., RL30064, CRS REPORT FOR CONGRESS: CONGRESSIONAL SALARIES AND ALLOWANCES, CONGRESSIONAL RESEARCH SERVICE 7 (2004), http://www.menshealthnetwork.org/library/CRSCongresssalariesRL30064.pdf. In the fiscal-year-2013 legislative-branch appropriations bill, the size of the average Senate staffing allowance was $3,209,103, with individual accounts ranging from $2,960,716 to $4,685,632, depending on the population of the senators' states. S. REP. NO. 112-197, at 20 (2012).

174. Grofman & Scarrow, *supra* note 6, at 293 ("In approving weighted voting the New York courts have either ignored these arguments completely or not deemed them to be of overriding importance."); *see also* Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 80 F.3d 42, 49 (2d Cir. 1996) (noting that despite inequalities in functional representation "there is nothing in the record to indicate that [the County's] weighted-voting system provides representation that is not qualitatively fair and effective").

175. 229 N.E.2d 195 (N.Y. 1967).

legislator power are not constitutionally significant.[176] The *Iannucci* Court recognized that, "in any weighted voting scheme, those representatives who cast the larger aggregates of votes can be expected to have greater influence with their colleagues than representatives with only a single vote."[177] The *Iannucci* Court maintained, however, that there is "nothing unconstitutional in a disparity of influence" among the representatives.[178] The court concluded that the number of votes was just one among many variables that legitimately influence legislator power.

The Second Circuit came to a similar conclusion in *Reform of Schoharie County v. Schoharie County Board of Supervisors*.[179] In *Schoharie County*, the district court rejected the claim that weighted voting apportionment plans violate the Equal Protection Clause because they do not equalize functional representation. The towns in Schoharie County varied in size—from 332 to 7270 residents.[180] Nonetheless, the court determined that there was no qualitative difference in the voters' access to their elected representative, or in any of the other nonvoting functions, such as participation in committees, legislative debate or discussion with other supervisors.[181] On appeal, the Second Circuit affirmed the district court's decision, holding that at the local level, supervisors are likely to be able to provide fair and effective representation despite the fact that the towns differ in size.[182]

Indeed, inequalities in functional representation are arguably less compelling in local apportionment plans than they are in state-wide plans. The Supreme Court has long emphasized the need for flexibility in local governance, noting in *Avery v. Midland County* that the one-person, one-vote requirement is not intended to act as a "roadblock in the path of innovation, experiment, and development among units of local government."[183] The Supreme Court has thus cautioned against a rigid approach to population equality in local apportionment plans, noting that "an unrealistic overemphasis on raw population figures" may cause

176. *Id.* at 198–99.

177. *Id.*

178. *Id.* at 199.

179. 975 F. Supp. 191 (N.D.N.Y. 1997), *aff'd*, 152 F.3d 920 (2d Cir. 1998).

180. This number includes students from SUNY Cobleskill. *Id.* at 192. The court later states that the population of the largest town is 5670, which presumably does not include those SUNY students. *Id.* at 193 n.1.

181. *Id.* at 196.

182. 152 F.3d at 920. The Supreme Court similarly tolerates "slightly greater percentage deviations" from population equality at the local level because "local legislative bodies frequently have fewer representatives," and local legislative districts have smaller populations than do their state and national counterparts. Abate v. Mundt, 403 U.S. 182, 185 (1971).

183. Avery v. Midland Cty., 390 U.S. 474, 485 (1968).

courts to overlook other factors more critical to an "acceptable representation and apportionment arrangement."[184]

Moreover, at the local level, voters have the capacity to influence policy making in a variety of ways apart from functional representation in the legislative body. Local governments offer numerous forums for meaningful participation in local decision and policy making. Residents can participate in local zoning boards, business improvement districts and neighborhood councils, among others.[185] These sub-local political institutions exhibit the traits most closely associated with political participation: they are small, yet powerful.[186] Citizen participation in policy making is presumably easier at the local level.[187] The costs of participation in terms of the time, energy, and money needed to reach out, engage, and persuade other members of the polity are likely to be lower in smaller units than in larger ones.[188] Thus, at the local level, voters need not rely solely on the power of their vote to affect policy but can participate directly in a variety of ways.[189]

B. *Inequality in Voting Power*

In addition to inequality in political power, critics of weighted voting, notably Professor John Banzhaf, argue that population-based weighted voting does not equalize voting *power*, or the mathematic probability

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184. Gaffney v. Cummings, 412 U.S. 735, 749 (1973); *see also* League of Women Voters, 737 F.2d 155 (noting that the Supreme Court's review of local apportionment plans is "noteworthy for the nonpromulgation of strict mathematical tests," so that "the theme—especially concerning units of local government—has been flexibility").

185. Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 374 (2008). *See generally* Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366 (1999) (detailing business improvement districts); Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 166–87 (2008) (providing an overview of neighborhood councils).

186. Ostrow, *supra* note 132, at 1443.

187. *See* Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 303 (2011).

188. *See* ROBERT A. DAHL & EDWARD R. TUFTE, SIZE AND DEMOCRACY 41–42 (1973).

189. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 321 (2003) ("The smaller the polity in geography and in population, the easier it is for the people (1) to monitor what their government is doing, (2) to criticize or praise, and therefore (3) to affect public policy."); *see also* Gardner, *supra* note 23, at 1247 ("The local arena thus provides a much more congenial environment for citizens to derive the developmental benefits of democratic participation than national or other comparatively remote levels of government because the opportunities for participation are more numerous on the local level, and because individuals can make more of a difference in small-scale local politics.").

each legislator has of determining legislative outcomes.[190] To illustrate, consider a jurisdiction where a single district contains sixty percent of the total population. If the legislator representing that district is granted sixty percent of the total number of votes, the legislator will have one hundred percent of the *voting power* in the legislature.[191] In contrast, in a legislature composed of equal population districts, each legislator casts a single ballot and has an equal power to affect the legislative outcome.[192]

Rather than allocate votes in proportion to population, Banzhaf argued that votes should be apportioned so that each legislator is able to determine the outcome of as many legislative matters as they would have been able to determine in a legislature composed of equal population districts.[193] Using the so-called Banzhaf Index to adjust the allocation of weighted votes, an official whose district contains fifteen percent of the county population would be assigned a number of weighted votes needed to cast the tie-breaking vote in fifteen percent of the board's decisions.[194]

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190. According to Professor Banzhaf:

> In almost all cases weighted voting does not do the one thing which both its supporters and opponents assume that it does: weighted voting does not allocate voting power among legislators in proportion to the population each represents because *voting power is not proportional to the number of votes a legislator may cast*.

Banzhaf, *supra* note 14, at 318; *see also* John F. Banzhaf III, *Multimember Electoral Districts—Do They Violate the "One Man, One Vote" Principle?*, 75 YALE L.J. 1309, 1310 (1966) (providing a mathematical method for measuring voting power to display the "inequities" of multimember districts); John F. Banzhaf III, *One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation*, 36 GEO. WASH. L. REV. 808, 809 (1968) (arguing that disparities in legislative voting power have an impact on representation).

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

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

193. *See* Whitcomb v. Chavis, 403 U.S. 124, 145─46 n.23 (1971) (explaining the Banzhaf method); Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 886 F. Supp. 242, 246 (N.D.N.Y. 1995) ("This system used a computer driven statistical analysis to assign 'voting power' to each representative, so that the power of each representative to affect the outcome of votes by casting the tie-breaking ballot in a theoretical number of possible voting combinations was equal to the percentage of the total county population of his or her town."), *aff'd*, 80 F.3d 42 (2d Cir. 1996); Jackson v. Nassau Cty. Bd. of Supervisors, 818 F. Supp. 509, 522 (E.D.N.Y. 1993) ("[T]he crux of the Banzhaf theory is that the true test of voting power is the ability to cast a tie-breaking, or critical vote."); Grofman & Scarrow, *supra* note 6, at 290–92.

194. In Delaware County, the district court distinguished between population-based and Banzhaf-based weighted voting models as follows:

> In the simple arithmetic model, the number of actual votes are distributed in proportion to the percentage of the total district population in each unit. In a

In contrast, under a population-based system, the official would be assigned fifteen percent of the total number of votes.[195]

The voting power argument has had mixed results. In an early New York case, the New York Court of Appeals accepted Banzhaf's argument and required counties to use Banzhaf-based weighted voting plans to equalize each legislator's voting power.[196] The Supreme Court, however, has twice rejected Banzhaf's arguments and held that inequality in voting power does not violate the Equal Protection Clause.[197] The Court first rejected Banzhaf's voting power argument in the context of multimember districts in the 1971 case of *Whitcomb v. Chavis*.[198] In *Whitcomb*, the plaintiffs argued that multimember districts do not satisfy the one-person, one-vote requirement because they do not equalize the voting power of each voter.[199] The Supreme Court, however, rejected Banzhaf's definition of voting power and held that multimember districts in which representatives were allocated in proportion to population satisfied the quantitative one-person, one-vote requirement.[200]

The Court next rejected Banzhaf's argument in its 1989 decision in *Board of Estimate v. Morris*.[201] In *Morris*, the Court invalidated the "one-borough, one-vote" apportionment scheme for NYC's Board of Estimate.[202] The City calculated the total deviation from population equality using the Banzhaf Index, and argued that the deviation was justified by the City's interest in preserving its borough-based system.[203]

Banzhaf-based model, the weighted votes are apportioned to each representative based on the theoretical voting power each representative should possess.

Roxbury Taxpayers All., 886 F. Supp. at 248 n.10. *See generally* DAN S. FELSENTHAL & MOSHE MACHOVER, THE MEASUREMENT OF VOTING POWER: THEORY AND PRACTICE, PROBLEMS, AND PARADOXES 82–83, 142, 160 (1998) (noting that the U.S. Electoral College and the European Union use variations of the Banzhaf Index to adjust voting power).

195. *Roxbury Taxpayers All.*, 886 F. Supp. at 248 n.10.

196. Iannucci v. Board of Supervisors, 229 N.E.2d 195, 199 (N.Y. 1967) (requiring that each "legislator's voting power, measured by the mathematical possibility of his casting a decisive vote, must approximate the power he would have in a legislative body which did not employ weighted voting"); *see also* Franklin v. Krause, 298 N.E.2d 68, 70 (N.Y. 1973) (upholding Banzhaf-based weighted voting plan); Grofman & Scarrow, *supra* note 6, at 292 (describing *Iannucci* as a "remarkable decision, standing as one of the most conspicuous examples ever recorded of a judicial decision based squarely on the findings of scholarly research").

197. Bd. of Estimate v. Morris, 489 U.S. 688, 699 (1989); Whitcomb v. Chavis, 403 U.S. 124, 147 (1971); *see also* Paul H. Edelman, *Making Votes Count in Local Elections: A Mathematical Appraisal of At-Large Representation*, 4 ELECTION L.J. 258, 271 (2005).

198. 403 U.S. 124 (1971).

199. *Id.* at 147.

200. *Id.* at 145–46.

201. 489 U.S. 688 (1989).

202. *Id.* at 690–91.

203. *Id.* at 697–98.

The Supreme Court, however, dismissed the Banzhaf Index as merely a "theoretical explanation of each board member's power to affect the outcome of board actions."[204] The Court calculated the deviation from population equality using a population-based apportionment formula and determined that the resulting seventy-eight-percent deviation could not be justified based on "exigencies of history or convenience."[205]

Despite the Supreme Court's rejection of the Banzhaf Index, the status of Banzhaf-based weighted-voting plans remains unsettled.[206] The New York Court of Appeals decision requiring counties to adopt Banzhaf-based weighted voting plans has not been overturned.[207] As a result, counties in New York continue to use Banzhaf-based systems. Essex County, for example, used the Banzhaf Index to adjust its allocation of votes following the 2010 census.[208]

In contrast, the federal courts require that votes be allocated in proportion to population.[209] In *Reform of Schoharie County v. Schoharie County Board of Supervisors*,[210] for example, the district court upheld a weighted-voting scheme under which each supervisor cast "a number of votes roughly proportionate to his or her town's percentage share of the total population of the County."[211] In some cases, however, the Banzhaf Index produces an allocation of votes that mirrors the allocation that would be produced if votes were distributed in proportion to population, making it possible to comply with both the federal and state standard.[212]

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204. *Id.* at 699.

205. *Id.* at 702–03 n.10.

206. *See* Jackson v. Nassau County Board of Supervisors, 818 F. Supp. 509, 535 (E.D.N.Y. 1993) (striking down Nassau County's Banzhaf-based weighted-voting plan); *see also* Emery, *supra* note 6, at 168 ("[W]eighted voting, as we now know it under the Banzhaf scheme, has to be eliminated."); M. David Gelfand & Terry E. Allbritton, *Conflict and Congruence in One-Person, One-Vote and Racial Vote Dilution Litigation: Issues Resolved and Unresolved by* Board of Estimate v. Morris, 6 J.L. & POL. 93, 113 (1989) ("*Morris*, then, has cast considerable doubt upon the continuing validity of the method employed by courts in weighted voting cases.").

207. Iannucci v. Washington County, 229 N.E.2d 195, 199 (N.Y. 1967).

208. Lohr McKinstry, *Slight Power Shift*, PRESS REPUBLICAN (Apr. 13, 2012), http://www.pressrepublican.com/news/local_news/slight-power-shift/article_16140991-dc49-5e84-aaa6-cfbda4470f50.html (noting that in Essex County, the town of Ticonderoga has thirteen percent of the county population and thirteen percent of the *voting power*, not thirteen percent of the actual number of votes).

209. Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 80 F.3d 42, 48 (2d Cir. 1996) (upholding weighted-voting plan that provides voters with representation "that is proportionate to the percentage that the district's population bears to the population of the political unit as a whole"); *Jackson*, 818 F. Supp. at 535 (rejecting the Banzhaf model).

210. 975 F. Supp. 191 (N.D.N.Y. 1997).

211. *Id.* at 192.

212. *Id.* at n.1 (noting only "minor differences between the votes allotted by the Banzhaf method . . . and those which would be allotted by strictly arithmetical computation" (alteration in

C. *Minority Vote Dilution*

Under a weighted-voting plan, each district's representative is elected at-large from the district as a whole. At-large voting tends to minimize the voting strength of minority groups by permitting the political majority to elect all of the district's representatives.[213] As the Supreme Court has explained, a distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts.[214]

A typical example in a multimember jurisdiction is a five-member county commission in a county where black persons make up forty percent of the population. Although black voters may prefer different candidates, the white sixty-percent majority can always outvote the black minority, shutting out black voters and filling all five seats with white-preferred candidates.[215] So too in a weighted-voting jurisdiction, the white majority can always outvote the black minority and elect a white-preferred candidate.[216] For this reason, the Supreme Court prefers single-member districts unless there is "a 'singular combination of unique factors' that justifies a different result."[217]

Still, at-large voting is not per se unconstitutional.[218] Instead, particular instances of at-large voting are subject to challenge under § 2 of the Voting Rights Act if they dilute the voting strength of racial minorities. In 1966, in *Burns v. Richardson*,[219] the Court held that the use of multimember state legislative districts is not per se unconstitutional.[220]

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original)); Grofman & Sparrow, *supra* note 6, at 298 (noting that except in rare cases with extreme population deviations between districts, the allocation of votes based upon the Banzhaf-based model deviates only slightly from the strict arithmetic model).

213. Thornburg v. Gingles, 478 U.S. 30, 47–48 (1986) (quoting Burns v. Richardson, 384 U.S. 73, 88 (1966)) (recognizing that "multimember districts and at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'"); *see also* O'Neill, *supra* note 18, at 348–49 ("The discrimination inherent in at-large voting is widely recognized. Academics criticize at-large voting for suppressing minority representation.").

214. *See Thornburg*, 478 U.S. at 46─48.

215. Mulroy, *supra* note 22, at 338.

216. *See* Briffault, *supra* note 6, at 411. Some have suggested that a concern about the minority vote dilution features of weighted voting and likelihood of a Voting Rights challenge led New York City to abolish the Board of Estimate rather than maintain borough representation with weighted votes. *See* Frank J. Mauro, *Voting Rights and the Board of Estimate: The Emergence of an Issue*, 37 PROC. ACAD. POL. SCI. 62, 67 (1989).

217. Connor v. Finch, 431 U.S. 407, 415 (1977) (quoting Mahan v. Howell, 410 U.S. 315, 333 (1973)).

218. *E.g.*, City of Mobile v. Bolden, 446 U.S. 55, 57 (1980).

219. 384 U.S. 73 (1966).

220. *Id.* at 88.

The Court noted, however, that the use of multimember districts may be "subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'"[221] Subsequently, in *City of Mobile v. Bolden*,[222] the Supreme Court refused to invalidate the use of multimember districts unless the plaintiffs could show discriminatory purpose.[223]

In response, in 1982, Congress amended the Voting Rights Act "to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test.'"[224] In *Thornburg v. Gingles*,[225] the Court explained, "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[226]

Under the *Gingles* test, a minority group that contends that the multimember form of districting violates its constitutional rights must demonstrate that: (1) it is sufficiently large and geographically compact to constitute a majority in a single-member legislative district, (2) it is politically cohesive, and (3) the majority votes are sufficient, as a bloc, to enable the majority to usually defeat the preferred candidate of the minority.[227] The *Gingles* test has been extended to equal-population districts and would likely apply to weighted-voting districts as well.[228] Courts will reject weighted-voting plans under § 2 of the Voting Rights Act if they diminish the influence of racial minorities, regardless of whether they were intended to do so. Thus, weighted voting is constitutional, though compliance with the Voting Rights Act will impose some limits on the jurisdictions in which weighted voting can be implemented.

IV. HYBRID WEIGHTED-VOTING PLANS

Although weighted voting systems equalize the mathematical weight of each vote, they do not equalize all aspects of legislative representation. Instead, as Part III explains, weighted voting generates inequality in

221. *Id.*

222. 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (amended 1982), *as recognized in* Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

223. *Id.* at 70, 73.

224. *Thornburg*, 478 U.S. at 35.

225. 478 U.S. 30 (1986).

226. *Id.* at 47.

227. *Id.* at 50–51.

228. *See* Growe v. Emison, 507 U.S. 25, 40–42 (1993) (applying the *Gingles* test to single-member, equal-population districts).

functional representation and voting power, and increases the risk of minority vote dilution. While these considerations deserve careful attention from a policy perspective, Part III argues that they do not render weighted voting unconstitutional per se. The Supreme Court has never directly addressed the constitutionality of weighted voting, but it has indicated that the Constitution does not require equality in functional representation or in voting power, and does not preclude the use of at-large voting systems despite the risk of minority vote dilution. Moreover, as this Part explains, the inequalities inherent in weighted-voting plans decrease as districts become closer in size. Indeed, equal-population districts have long been preferred precisely because they equalize functional representation and legislator power, and reduce the risk of minority vote dilution.

Thus, this Part proposes combining weighted voting with equal-population districts to form districts that correspond to political subdivisions, yet contain roughly the same number of people. Section A argues that weighted voting is uniquely able to equalize the mathematical weight of each vote across unequal-population districts. Indeed, while both weighted-voting and multimember districting preserve representation for political units, only weighted voting does so without producing any deviation from numeric equality. Section B demonstrates that combining weighted voting with equal-population districts maximizes the advantages of each apportionment system. Hybrid weighted-voting districts prevent gerrymandering and preserve representation for political subdivisions; equalize functional representation and legislator power; reduce the risk of minority vote dilution; and satisfy the quantitative one-person, one-vote requirement.

A. *Weighted-Voting Versus Multimember Districting*

Both multimember districts and weighted-voting districts are designed to preserve representation for political subdivisions while complying with the one-person, one-vote requirement.[229] In a multimember system, each district elects a number of representatives in proportion to the district's population. In a weighted-voting system, each district elects a single representative, whose vote is weighted in proportion to the district's population.

Though both systems use proportional representation to equalize the mathematical weight of each vote, the single representative feature of weighted voting creates more troubling inequalities in voter representation. First, it is the single representative feature of weighted voting that produces functional vote dilution.[230] In a multimember

229. *See supra* Section I.A.

230. *See supra* Section III.A.

system, each elected representative can perform all of his non-voting functions. He can serve on a committee, participate in legislative hearings, meet with constituents, and vote in the legislative body. In contrast to weighted voting, multimember districting provides equal functional representation to each resident.[231]

In addition, the single representative feature of weighted voting distorts legislator power. This is true in both a political sense—lobbyists and interest groups are more likely to target those legislators wielding the highest number of votes—as well as from a mathematical perspective, where, as John Banzhaf demonstrated, weighted voting disproportionately increases the voting power of legislators from more populous districts.[232]

Finally, although both multimember districts and weighted-voting districts have the capacity to dilute minority voice, weighted voting magnifies the impact in two ways. First, in multimember districts, there is the potential, particularly using cumulative voting or other alternative voting mechanisms, for a minority group to get one or two seats.[233] In contrast, in a weighted-voting district, the majority elects a single representative. The minority has no opportunity to elect any representatives. Second, in multimember districts, the individual representatives may disagree with each other and cast conflicting votes. In a weighted-voting district, however, the single representative casts all her votes in a bloc, thereby fully eliminating representation for racial and political minorities within a weighted-voting district.

Moreover, although the current consensus clearly favors single-member, equal-population districts, multimember districts have long been used in the United States.[234] Until the 1960s, many states used multimember districts to preserve representation for political subdivisions, such as counties, in their state legislatures.[235] The National Conference of State Legislatures reports that in 2009, thirteen states used multimember districts in their legislatures.[236] Weighted voting, in

231. Of course, representatives who are elected at-large, as in a multimember district, will be accountable to the entire jurisdiction, rather than to a particular subset of the jurisdiction, as in a single-member district. The merits of at-large representation versus single-district representation have long been debated and need not be addressed here. *See generally* Edelman, *supra* note 197, 258–63; Ruth C. Silva, *Compared Values of the Single- and the Multi-Member Legislative District*, 17 W. POL. Q. 504, 506 (1964).

232. *See supra* Section III.B.

233. Mulroy, *supra* note 22, at 341.

234. Edelman, *supra* note 197, at 260.

235. *Id.*; *see also* James A. Gardner, Foreword, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 914–15 (2006).

236. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 1, at 136–37.

contrast, has never been widely used and has rarely been considered as an alternative approach to electoral districting.[237]

Why then use weighted voting rather than multimember districting? Simply put, multimember districting can make it difficult to preserve representation for political subdivisions within a constitutionally permissible deviation from population equality. To allocate a whole number of representatives to each multimember district, the number of representatives must be rounded up or down. The rounding process can create impermissibly large deviations from population equality and result in the creation of an unreasonably large legislative body. Weighted voting, and only weighted voting, is capable of equalizing the numeric weight of each vote across unequal-population districts with the mathematical precision required to consistently meet the constitutional one-person, one-vote requirement.

1. Deviation from Population Equality

The Supreme Court has established a presumption of constitutionality for state and local apportionment plans that deviate by less than ten percent from population equality.[238] Multimember districting can make it difficult to stay within that range. For example, consider a county districting plan where the smallest district has 100 residents. In that county, a town with 151 residents would be allocated two representatives, while a town with 149 residents would have only one. Although the population of these two towns is nearly identical, the first receives twice as much legislative representation as the second.[239]

The Supreme Court acknowledged this concern in its 1971 decision in *Abate v. Mundt*.[240] In *Abate*, the Court upheld Rockland County's multimember districting plan that used the county's five towns as electoral districts.[241] Under Rockland County's plan, the smallest town was allocated one representative, a town that was 4.3 times as large was allocated 4 representatives, while a town that was 4.8 times as large was

237. *See supra* notes 6–12.

238. Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016) ("Where the maximum population deviation between the largest and smallest district is less than 10%, the Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule."); Brown v. Thomson, 462 U.S. 835, 842 (1983) ("[The Court's] decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.").

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

240. 403 U.S. 182 (1971).

241. *Id.* at 184 n.1.

allocated 5 representatives.[242] Because the number of representatives each town elected was rounded to the nearest whole number, the plan deviated from population equality by 11.9%.[243] The *Abate* Court noted the potential for multimember districting to produce large deviations, but mindful of the new and experimental nature of the Rockland County Plan, refused to invalidate it on that basis, stating: "[W]e express no opinion on the contention that, in future years, the Rockland County plan may produce substantially greater deviations than presently exist. Such questions can be answered if and when they arise."[244]

Indeed, when a federal court reconsidered Rockland County's multimember districting plan thirty years later, it observed that the plan had, in fact, produced a substantially greater deviation from population equality and could no longer be sustained.[245] The court ordered Rockland County to reduce its deviation below the constitutionally permissible threshold by districting for single-member, equal-population districts or by adopting weighted voting which, the court acknowledged, would enable it to preserve its town-based legislative body.[246]

In contrast to multimember districting, weighted-voting schemes have no trouble preserving representation for existing political units without deviating from population equality. Because weighted-voting schemes grant each representative a percentage of the total number of votes, there is no need to round the number of votes allocated to each representative. If a town containing 4.3% of the population is granted 4.3% of the votes, there is zero-percent deviation from population equality.[247] Weighted-voting systems, thus, produce precise mathematical equality.

2. Size of the Legislative Body

In addition to producing a large deviation from population equality, multimember districting systems may cause the legislature to become unreasonably large. For example, if a district with 100 residents is allocated one representative, then a district with 1,000 residents would have ten representatives, and a district with 2,000 residents would have twenty representatives. The total size of the legislature can quickly

242. *Id.* at 184–86.

243. *Id.* at 185–87.

244. *Id.* at 186 n.3.

245. Abate v. Rockland Cty. Legislature, 964 F. Supp. 817, 830 (S.D.N.Y. 1997).

246. *Id.*

247. Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 80 F.3d 42, 49 (2d Cir. 1996) (calculating deviation by comparing the "percent of total population represented by a given local official to the percent of weighted votes allocated to that official").

become unwieldy.[248]

Moreover, there is an inherent tension between keeping the legislature a manageable size and keeping deviations from population equality within constitutional limits. In Rockland County, for example, population changes reflected in the 1980 federal census increased the deviation from equality from 11.9% to 26.4%.[249] To reduce the deviation to a barely acceptable 17.8% deviation, the County had to increase the size of the legislature from 18 to 21 representatives.[250] Following the 1990 census, the deviation had risen to an unconstitutional 19.8%.[251] To reduce the deviation to a constitutionally permissible ten percent, the County would have had to increase the size of the legislature to forty-two members, an increase that would have defeated the County's goal of maintaining an efficient legislative body.[252]

Weighted voting, quite obviously, avoids this problem entirely by limiting each district to a single representative regardless of the size of the district. Indeed, the district court suggested weighted voting as an alternative to multimember districting because it would enable Rockland County to preserve representation for each constituent town on the county board, while maintaining a small legislative body and providing each resident with an equally weighted vote.[253] In many cases, weighted voting is the only apportionment plan that enables a legislative body to meet all three criteria simultaneously.

B. *Hybrid Weighted-Voting Systems*

As the district court in *Abate v. Rockland County Legislature* noted, weighted-voting would have permitted Rockland County to preserve representation for each town on the county legislature while providing each resident with a mathematically equally weighted vote. Indeed, more than a dozen counties in New York use weighted voting for precisely that purpose. In some New York counties, each town elects a single representative whose vote is weighted in proportion to the town's population.[254] In Delaware County, for example,

> the registered voters in each town periodically elect one town supervisor. The elected town supervisor represents his

248. Gardner, *supra* note 18, at 584; *id.* at 588 (noting that in a large multimember district, "the sheer amount of information voters must process may exceed the capacity and interest even of well-informed and highly motivated voters").

249. *Rockland Cty. Legislature*, 964 F. Supp. at 820–21.

250. *Id.* at 830.

251. *Id.* at 818.

252. *Id.* at 821.

253. *See id.* at 830.

254. *See supra* notes 67–70.

> or her town on the county Board of Supervisors. Thus, voters of each town are represented by a single member of the board, regardless of the population of the town in which they reside and vote.[255]

Votes on the Board are distributed according to each town's percentage of the total county population. The smallest town contains 1% of the total county population and is allocated 1% of the total number of votes on the Board. The largest town contains 14% of the total county population and is allocated 14% of the total number of votes.[256]

If towns vary significantly in size, however, a traditional "one-town, one-representative" model has the potential to generate significant inequality in the non-voting dimensions of legislative representation. If a town with 5% of the population and a town with 40% of the population are each represented by a single legislator, residents of the larger town will be underrepresented because they have only one physical representative on the legislature, and overrepresented because their representative casts close to a majority of the total number of votes.

If districts are roughly the same size, however, these inequalities are reduced. Roughly-equal-population districts can be formed by subdividing densely populated urban areas into electoral districts and combining sparsely populated rural areas together. Roughly-equal-population districts provide each voter with an equal degree of functional representation and each legislator with an equal degree of voting power. In addition, equal-population districts reduce the risk of minority vote dilution. Indeed, the traditional remedy where at-large elections cause vote dilution has been to carve the jurisdiction into geographic subdistricts, each of which would elect just one representative. Combining weighted voting with equal population districts goes even further and increases minority representation in two ways. First, population equality eliminates the risk that electoral minorities will be submerged within a larger district. Second, fixed district boundaries eliminates the risk that boundaries will be gerrymandered to reduce representation for electoral minority groups.

This hybrid weighted-voting format has long been used by Cortland County, a county with distinct rural, suburban and urban areas.[257]

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255. Roxbury Taxpayers All. v. Del. Cty. Bd. of Supervisors, 886 F. Supp. 242, 244 (N.D.N.Y. 1995).

256. For the current allocation of votes, see *Board of Supervisors 2016*, DEL. COUNTY, http://www.co.delaware.ny.us/departments/cob/bos.htm (last visited June 5, 2016).

257. CORTLAND COUNTY CONSOLIDATED PLAN 5 (2002) http://www.cortland-co.org/documentcenter/view/1188 (describing history of Cortland County and noting that the "County consists of 19 municipalities, including 15 towns, three villages, and one city," and that most development is located in and around the city).

Cortland County's legislative map contains nineteen roughly-equal legislative districts.[258] At the time of its adoption, the districts ranged in population from 2,100 to 2,700 residents.[259] These roughly-equal districts were created by subdividing the city of Cortland and three more populous suburban towns into legislative districts, and by grouping rural towns with smaller populations together to form legislative districts.[260] To satisfy the one-person, one-vote requirement, each district was allocated a number of votes in proportion to its population.[261]

By combining elements of weighted voting with equal-population districting, Cortland created an apportionment plan with districts that corresponded to existing political boundaries, yet were close enough in size not to raise serious concerns about functional representation, legislator power or minority representation. In upholding the constitutionality of Cortland County's plan, the New York court observed:

> It unites the smaller towns possessing similarity of interests into legislative districts; it divides the two larger towns into legislative districts. The city's boundary is not pierced. It creates legislative districts much closer in population than if weighted voting were used on the basis of existing towns and city wards in which populations vary from 493 to 7469.[262]

Cortland County's plan thus maximized the advantages of both equal-population and weighted-voting apportionment.

Voters in Cortland continue to approve of this approach. Following the 2010 census, Cortland County considered several possible redistricting plans, one of which would have eliminated weighted voting.[263] In 2012, the voters passed a referendum to maintain their hybrid weighted-voting/equal-population system.[264]

Indeed, as this Part demonstrates, hybrid weighted-voting plans harmonize numerous districting priorities. First, mapping electoral district boundaries onto political subdivisions preserves representation for political subunits and prevents gerrymandering. Second, forming roughly equal-population districts minimizes inequalities in legislative

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258. CORTLAND CTY., *supra* note 75.

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

260. *Id.*

261. *Id.*

262. *Id.* at 950.

263. Catherine Wilde, *Smaller Legislature on Tuesday's Ballot*, CORTLAND STANDARD (Nov. 1, 2012), http://www.cortlandstandard.net/articles/11012012n.html (noting the legislators did not endorse eliminating weighted voting by cutting down the number of representatives to thirteen because it was "too drastic and would never pass").

264. *See* CORTLAND COUNTY, N.Y., RULES OF ORDER art. XI (2014).

representation and prevents minority vote dilution. Finally, using weighted voting produces the precise numeric equality required to satisfy the constitutional one-person, one-vote requirement.

CONCLUSION

The constitutional one-person, one-vote doctrine requires that legislatures be apportioned on a population basis. Most jurisdictions comply by electing representatives from single-member, equal-population districts. While these districts equalize the mathematical weight of each vote, they sacrifice other legitimate districting priorities. Instead, this Article proposes a hybrid weighted-voting format that satisfies the quantitative one-person, one-vote requirement while preserving representation for political units and preventing gerrymandering.