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Federalizing Through the Franchise: The Supreme Court and Local Government

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Decisionmaking at the local government level has been significantly affected by both national legislation and federal court decisions seeking to protect the right to vote. Indeed, Professor Sentell feels that the Supreme Court, through decisions invalidating restrictions on the franchise, has involved itself to an unparalleled degree in heretofore purely local affairs. In examining these decisions, the author queries if legitimate voting regulations may be now imposed by local governments. In so doing he focuses upon the Court's equal protection analysis of extraordinary majority vote requirements and elections restricted to certain segments of the electorate and upon the expansive judicial treatment given the federal review provisions of the Voting Rights Act of 1965.

I. INTRODUCTION

IN the last few years, the microscope of constitutional law has been focused with considerable intensity upon the local governments of this country. This development may, of course, be viewed as but one aspect of the Warren Court's drive toward ideals of individual equality, a drive which led the Court to fasten national norms on both state and local governments.[1] This may well have been the Court's own view as it first extended the one man, one vote principle[2] to local governments.[3] Under this view, it can be argued that little deserving of special treatment is presented by the Court's relationship with local government.

From another standpoint, however, the developments are indeed noteworthy. Local government is, after all, *local* government. Although many of its problems are shared by both state and federal governments, some, such as annexation, are unique. Moreover, even those of

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1 A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 103-10 (1970).

2 *See* Reynolds v. Sims, 377 U.S. 533 (1964).

3 *See* Hadley v. Junior College Dist., 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968). *See generally* Sentell, Avery v. Midland County: *Reapportionment and Local Government Revisited*, 3 GA. L. REV. 110 (1968); Sentell, *Reapportionment and Local Government*, 1 GA. L. REV. 596 (1967). Reprints of these articles may be found in R. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW (1969).

a general complexion—taxation, for example—can have unusual ramifications at the local level.[4] Whatever the extent to which the Court recognizes these distinctions, inherent in our federal system, they are real ones, and they are important.

In any event, it is clear that the Supreme Court has involved itself to an unprecedented degree in local affairs. The key to this involvement has been the franchise. The citizen's right to vote has provided the Court with a tool for fashioning principles from precepts both judicial and statutory in origin. Whether the Court will make further incursions into local affairs as other cases arise rests with the future. To be sure, the 1970 Term seemingly marked a Court less willing than its predecessors to extend existing legal doctrines.[5] Yet speculation about the Supreme Court's doctrinal paths is at best hazardous, and in light of shifts in the Court's membership for the current Term, is surely foolhearty. At this juncture, then, it seems most appropriate to offer a chronicle of this intriguing chapter of our constitutional history.

II. A Restricted Electorate in Local Affairs

A. A Developing Concept in Equal Protection

Among the most exciting of the Warren Court's constitutional innovations was the development of the "new" equal protection analysis. Historically unproductive,[6] the equal protection clause of the fourteenth amendment was infused with a vitality of seemingly remarkable proportions. This infusion was adminstered in a series of cases[7] which call to mind the Supreme Court's earlier feats with substantive due process.[8] The entire exercise has been well noted,[9] however, and only the briefest synopsis need here be sketched.

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4 *See, e.g.*, Serrano v. Priest, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

5 This transformation in the Court's attitude was manifest in a number of areas. *See, e.g.*, McKiever v. Pennsylvania, 403 U.S. 528 (1971) (juvenile delinquency proceedings); Abate v. Mundt, 403 U.S. 182 (1971) (local government reapportionment); United States v. Reidel, 402 U.S. 351 (1971) (obscenity); United States v. White, 401 U.S. 745 (1971) (warrantless electronic surveillance); Labine v. Vincent, 401 U.S. 532 (1971) (illegitimacy); Harris v. New York, 401 U.S. 222 (1971) (criminal procedure); Younger v. Harris, 401 U.S. 37 (1971) (federal intervention in state criminal trials); Oregon v. Mitchell, 400 U.S. 112 (1970) (congressional power under fourteenth amendment). *See generally The Supreme Court—1970 Term*, 85 Harv. L. Rev. 3 (1971).

6 It is fashionable to quote Mr. Justice Holmes' characterization of the equal protection clause as "the last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927).

7 *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Levy v. Louisiana, 391 U.S. 68 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

8 *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

9 *See, e.g.*, Cox, *Foreword: Constitutional Adjudication and the Promotion of Human*

Under the traditional, or "rational basis," mode of equal protection analysis, the judicial inquiry is directed solely toward a determination of whether the challenged classification bears a reasonable relation to a permissible state object. The standard is a permissive one, and it engages a presumption of the statute's constitutionality. Hence, "[a] statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it."[10] In effect, the traditional equal protection approach acknowledges the variety of state and local problems and the necessity of permitting states leeway to experiment in fashioning solutions to these problems.[11]

The "new" equal protection standard of review, on the other hand, evinces a move away from a standard of restrained review to one of actively gauging the strength of the governmental interests purportedly advanced by the classification in question. This more stringent "compelling state interest" test is activated whenever the unequal treatment is based on a "suspect classification," such as race[12] or alienage,[13] or whenever it impairs a "fundamental" right or interest such as voting[14] or interstate movement.[15] In the hands of the Court of the late 1960's, this concept appeared capable of almost infinite expansion.[16]

Although it may be argued that the 1970 Term limited the scope of the equal protection analysis,[17] the Court does not appear to have

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Rights, 80 HARV. L. REV. 91 (1966); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

10 McGowen v. Maryland, 366 U.S. 420, 426 (1961).

11 *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949). *See generally* Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

12 *E.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

13 *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

14 *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

15 *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

16 As Professor Cox expressed it: "Once loosed, the idea of Equality is not easily cabined . . . ." Cox, *supra* note 9, at 91.

17 The Court in its 1969 Term indicated that the class of specially protected fundamental interests is limited to those interests "guaranteed by the Bill of Rights." Dandridge v. Williams, 397 U.S. 471, 474 (1970). The Court also included the freedom of interstate movement as a protected freedom. *Id.* at 474 n.16. Thus, in the 1970 Term it refused to characterize as fundamental interests the access to judicial relief, Boddie v. Connecticut, 401 U.S. 371 (1971), or the receipt of welfare benefits, Dandridge v. Williams, *supra*. Moreover, the Court rejected the suggestion of earlier decisions that certain classifications are inherently suspect and will be subjected to active review. *Compare* James v. Valtierra, 402 U.S. 137 (1971), *with* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (wealth); *and* Labine v. Vincent, 401 U.S. 532 (1971), *with* Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy).

questioned its earlier holdings that the franchise is our most important political right.[18] It was the right to vote, as noted earlier, that provided the Court with an avenue for bringing national standards to bear on local governmental affairs. It was a route which, in 1969 and 1970, the Court seemed increasingly willing to travel. Although 1971 witnessed fewer such excursions, the relationship between the franchise, the equal protection clause, and local government remains an apt subject for discussion.

B. The "New" Equal Protection Analysis and Local Government

A general franchise is one thing; arguably, the right to participate in every decision made by "the people" in a community is another. Certainly the essence of local government encompasses local decisions on local affairs. In affairs considered to have primary impact upon only a segment of a community, however, who is to make the local decision? Does it make for better local government to restrict the decisionmaking process to those primarily affected? At least some states and localities have apparently so concluded. The tension between this approach and the Supreme Court's equal protection scrutiny of classifications affecting the franchise is forcefully illustrated in the recent cases of *Kramer v. Union Free School District*,[19] *Cipriano v. City of Houma*,[20] and *City of Phoenix v. Kolodziejski*.[21]

In *Kramer*, an attack was made on a New York statute which restricted the vote in certain school districts to the owners or lessees of taxable realty and the parents or guardians of children enrolled in district schools. In an opinion written by Chief Justice Warren, the Court declared the statute an unconstitutional denial of equal protection to those excluded from the vote.

Relying on the reapportionment cases, Chief Justice Warren declared that unjustified discrimination in the distribution of the franchise "undermines the legitimacy of representative government."[22] Accordingly, the Court found the traditional standard of review inappropriate, and turned instead to a determination of "whether the exclusions are necessary to promote a compelling state interest."[23] New York offered in justification its interest in limiting the vote to those " 'pri-

18 *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).
19 395 U.S. 621 (1969).
20 395 U.S. 701 (1969).
21 399 U.S. 204 (1970).
22 Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969).
23 *Id.* at 627.

marily interested' in school affairs."[24] Even assuming that such a limitation was permissible, however, the Court found that the statutory classifications in question had failed to meet "the exacting standard of precision we require of statutes which selectively distribute the franchise."[25] Rather, these classifications included "many persons who have, at best, a remote and indirect interest in school affairs" while excluding "others who have a distinct and direct interest in the school meeting decisions."[26] Thus, the Court did not decide whether a state could legitimately restrict the vote in local elections to those deemed to be primarily affected; it only held that the New York statutory distinctions failed to achieve the articulated state purpose.

The dissenting opinion in *Kramer*, written by Justice Stewart and concurred in by Justices Black and Harlan, advanced three grounds in support of the New York statute. First, Justice Stewart declared that there was no constitutional distinction under the traditional rationality test between these voting classifications and otherwise valid requirements based on age, residency, and literacy. Because an "inevitable concomitant" of any classification scheme might be the failure to include all persons possessing a real stake in the elections, there could be no justification for the conclusion that the classification in issue bore no rational relation to the articulated state purpose "unless this Court is to claim a monopoly of wisdom regarding the sound operation of school systems in the 50 states . . . ."[27] Second, the dissent found the majority's adoption of the "compelling interest" standard inappropriate because the statutory classifications were not racial in nature and because suffrage was not a constitutionally conferred right. Finally, the dissent asserted that there had been no violation of the plaintiff's right to equal protection, regardless of the test used. Exclusion from the school district elections did not deny him access to decisions affecting general governmental policy because those elections were of a limited nature, conducted for a specific purpose.[28] He retained full access to the election of state representatives, who promulgated these classifications, as well as to all processes by which state and federal assistance to the school districts was determined.

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24 *Id.* at 631.

25 *Id.* at 632.

26 *Id.*

27 *Id.* at 638.

28 The dissent criticized the majority's undifferentiated references to "the franchise," analogizing to limiting participation in water, lighting, and sewer districts. *Id.* at 640 n.9.

In the companion case of *Cipriano v. City of Houma*,[29] the Court was presented with a challenge to a Louisiana statute which limited the vote on public utility revenue bonds to the owners of taxable realty. The state argued that the owners of taxable property had a "special pecuniary interest" in such elections, since the quality of the utility system directly affected "property and property values," placing "the basic security of their investment in . . . property . . . at stake."[30] The Court's per curiam opinion, relying exclusively on *Kramer*, found the statute violative of equal protection because of its failure to delineate with requisite precision the class of voters "specially interested in the election."[31] The Court found that the revenue bond issue, because it was to be financed by the utility's operating revenues rather than by property taxes, was of substantial interest to all those served by the utility, whether property owners or not.

The three Justices who had dissented in *Kramer* filed concurring opinions in *Cipriano*. Justices Black and Stewart distinguished this case from *Kramer* on the ground that it involved a voter classification "wholly irrelevant to achievement of the state's objective."[32] Justice Harlan failed even to mention *Kramer*, but felt himself bound by other voting decisions from which he had dissented.[33]

An open question after *Kramer* and *Cipriano* was the extent to which the "new" equal protection standard (and its attendant "exacting standard of precision") would permeate local government finance. An answer was ventured in *City of Phoenix v. Kolodziejski*,[34] decided almost exactly one year after *Kramer* and *Cipriano*. At issue was an Arizona statute which limited to real property taxpayers the right to participate in municipal elections on the issuance of general obligation bonds. Typically, general obligation bonds are secured by the general taxing power of a municipality, a power primarily directed at property. Thus, they differ from revenue bonds, such as those involved in *Cipriano*, which are ordinarily serviced by funds derived from the operation of the facility being financed. Nonetheless, Justice White concluded that

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29 395 U.S. 701 (1969).

30 *Id.* at 704.

31 *Id.*

32 *Id.* at 707.

33 *E.g.*, Avery v. Midland County, 390 U.S. 474 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

34 399 U.S. 204 (1970).

> [i]t is unquestioned that all residents of Phoenix, property owners and nonproperty owners alike, have a substantial interest in the public facilities and the services available in the city and will be substantially affected by the ultimate outcome of the bond election at issue in this case. Presumptively, when all citizens are affected in important ways by a government decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. . . . Placing such power in property owners alone can be justified only by some overriding interest of those owners that the state is entitled to recognize.[35]

Moreover, the Court observed, revenues other than property taxes were legally available to service the general obligation bond; in fact, more than one-half the debt of the bonds in question would be serviced by nonproperty taxes to be paid by all municipal residents.[36]

At this point, therefore, the Court appeared to have converted the factual situation into one directly controlled by *Cipriano*: property taxpayers, as such, were not peculiarly burdened by the outcome of the election because all citizens were responsible for the bonded debt; therefore, a classification on the basis of paying property taxes failed to adequately advance the interest of the state which sought to restrict the franchise to "specially interested" voters. Under this approach, the legality of a franchise limitation in a bona fide general obligation bond election would have to await further litigation. But the Court was not content to wait. Even if the municipality depended exclusively upon property taxes for servicing the bonds, and Phoenix did not, the franchise restriction would be impermissible because the burden of property taxes is borne only in part by property owners; part of that burden is shifted to the tenant in case of rental property and to the public at large in the case of commercial property. The Arizona statute, therefore, unconstitutionally denied equal protection to the excluded nonproperty owning taxpayers.

In a dissent in which Chief Justice Burger and Justice Harlan joined, Justice Stewart viewed the case as being controlled by no previous decision. He distinguished *Kramer* as involving the election of a public official and conceded that it was controlled "rightly or wrongly" by the one man, one vote concept of *Reynolds v. Sims*.[37] In the

35 *Id.* at 209.

36 *Id.* at 209, 210 n.5.

37 *Id.* at 215.

instant case, however, the municipal council which initiated the bond program was not alleged to have been invalidly elected. *Cipriano* was distinguished as involving a classification which irrationally linked revenue bonds to property owners.[38] But the bonds in this case created a burden which legally fell upon the property owners, and which operated as a lien upon their property. Furthermore, the utilization of any other revenues for this purpose was only optional. Justice Stewart concluded that "[t]his is not the invidious discrimination that the Equal Protection Clause condemns, but an entirely rational public policy."[39]

C. An Appraisal

Invocation of the compelling state interest doctrine, it will be recalled, depends upon whether the challenged legislation involves a "suspect" criterion or impringes upon a "fundamental" right. To date, the doctrine's application to local governmental affairs has been triggered by state statutes restricting the franchise. Yet why is the franchise deemed fundamental and why is it accorded special protection under the fourtenth amendment? The Court can lay claim to no constitutional adjuration to grant favored status to the right to vote. Nor can the Court point to any special judicial competence in matters of democratic theory. How, then, does the Court distinguish voting from the multitude of other seemingly essential human activities?

The answer is grounded in the Court's firm, if rather vaguely articulated, belief that the right to vote touches, in the words of the Chief Justice in *Kramer*, "the foundation of our representative society."[40] The Court's rationale might be characterized as the "channel theory": in a representative democracy, the vote is the citizen's "channel" to fair treatment; it is "preservative of other basic civil and political rights."[41] Accordingly, the denial or the dilution of a citizen's right to vote demands close scrutiny, and can only be permitted in exceptional circumstances. It was the Warren Court's almost singleminded pursuit of this principle that led it into the tributaries of local government. That the approach savors of judicial subjectivity only heightens the tension between the Supreme Court's desire to protect the right to vote and its duty to recognize legitimate spheres of local autonomy under our federal system.[42]

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38 *Id.* at 216.

39 *Id.* at 218.

40 Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969).

41 Reynolds v. Sims, 377 U.S. 533, 562 (1969).

42 Nowhere was this tension more evident than in the Court's strained efforts to deal

The three "restricted electorate" decisions, *Kramer*, *Cipriano*, and *City of Phoenix*, at least stand for the proposition that application of the Warren Court's envigorated concept of equal protection will not be stayed because the alleged problem arises in a local setting or concerns matters highly local in nature. Read expansively, the "new" equal protection concept has provided nothing less than an expressway for Supreme Court involvement in local government.

Another point forcefully reaffirmed by these episodes was the Supreme Court's continuing willingness to create and innovate. As exciting as some may find this to be, how unenviable it renders the task of attempting to work with "the law of the land." If divining and applying this law is the special charge of the lower federal courts, how colossally unsuccessful they were in the cases here discussed! Of the ten lower federal judges considering *Kramer* and *Cipriano* at one stage or another, only one even indicated the possibility of judging those statutes by a test other than "rationality."[43] Indeed, the three-judge court in *Cipriano* was able to trace the continuing vitality of that test to Supreme Court decisions of "only a few weeks ago."[44] Moreover, as recently as *City of Phoenix*, at least three of the Justices themselves appeared unconvinced of the soundness of the innovation. Perhaps at this late date, all are now accustomed to the blazing of bold new trails by a divided Court. Still, such events should not go unnoticed simply because they have happened before.

Innovation by the Supreme Court in the area of equal protection and local government franchise has not lagged. Indeed, lower federal courts rendering decisions on these matters must now take into account last Term's decision in *James v. Valtierra*.[45] There the Court held that a

with the Voting Rights Act Amendments of 1970, 42 U.S.C. §§ 1973aa to 1973bb (1970). A badly split Court determined, *inter alia*, that Congress could not, under the enforcement clause of the fourteenth amendment, establish eighteen as a national voting age. Oregon v. Mitchell, 400 U.S. 112 (1970). Though the effect of the decision has been mooted by the adoption of the twenty-sixth amendment, the decision still stands as evidence of the Court's concern with the allocation of power between the state and national governments. A similar concern was reflected in Younger v. Harris, 401 U.S. 37 (1971), where the Court restrictively redefined the circumstances under which federal intervention into state criminal proceedings is permissible. *See also* Labine v. Vincent, 401 U.S. 532, 538-39 (1971) ("it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws").

43 *See* Kramer v. Union Free School Dist., 282 F. Supp. 70, 75 (E.D. N.Y. 1968) (Weinstein, J., dissenting).

44 Cipriano v. City of Houma, 286 F. Supp. 823, 826 (E.D. La. 1968).

45 402 U.S. 137 (1971).

California constitutional provision[46] requiring a local referendum to approve the development of low-rental housing projects was not violative of the equal protection clause. Justice Black, writing the majority opinion, could find no evidence that the referendum, otherwise a common method for participation in the political process, was intended to place a special burden on an identifiable racial minority: "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[47]

James is distinguishable from *Kramer*, *Cipriano*, and *City of Phoenix* in that it did not involve a "restricted electorate" situation; rather, the complaint in *James* was directed against committing a decision to an unclassified electorate. Therefore, it cannot be said that *James* points away from the strict holding of these decisions. Nevertheless, *James* does perhaps have significant implications in at least two areas. First, it would seem to reinforce a trend evident during the 1969 Term away from active review of state classification in areas of "fundamental interest" other than those "guaranteed by the Bill of Rights."[48] Justice Black studiously avoided any decisional construction along lines of "fundamental" personal rights or "suspect" criteria, such as wealth.[49] Secondly, the decision was justified on the basis of the salutory effect of giving local residents a voice in matters affecting their corporate destiny. This would indicate further recognition by the Court of the role state and local governments must play as experimental stations in our representative democracy.

What, then, has been the result of bringing the new equal protection

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46 CAL. CONST. art. XXXIV, § 1.

47 402 U.S. 137 (1971).

48 Dandridge v. Williams, 397 U.S. 471 (1970). In *Dandridge*, plaintiffs challenged as a denial of equal protection a Maryland maximum welfare grant regulation which limited to $250 the amount of benefits available to a single family. In upholding the constitutionality of the statute, Justice Stewart, for the Court, set forth the applicable equal protection standard:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

Id. at 485, quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 78 (1911).

49 Indeed, Justice Black abstained from even a limited review of the relationship between legislative purpose and the questioned classification. One commentator has remarked that "the Court apparently opted for a variant of 'rational basis' review which gave the challenged legislation what amounted to a rubber stamp." *The Supreme Court —1970 Term*, 85 HARV. L. REV. 3, 40 (1971).

guaranty to bear against the restricted electorate in local government? Did the fear of discrimination here leave no room at all for the handling of local affairs by interested, affected, and informed voters? The Court has been careful to reserve this broader question; it has expressly not decided whether the franchise can be limited to those otherwise qualified voters who might in addition be "primarily interested" in the election. Thus, all three of its decisions must be viewed as holding simply that the distinctions between voters did not serve the state's articulated purpose of achieving a "primarily interested" electorate. Whether this articulated purpose could have been justified by a compelling governmental interest was left unanswered. Perhaps the Court's only purpose in evolving the compelling interest standard in these opinions, therefore, was to bottom its rigorous analysis of what constituted a "primary interest" in the elections.

Whatever its purpose, the Court's invocation of the compelling interest standard has thus far been synonomous with invalidation of the statutory classification under review. In the exercise, such terms as "primary interest," "direct effect," and "primary effect" have been employed loosely indeed. At this point, one can only wonder whether degrees of electorate interest can be validly delineated at all. Given a local resident possessed of such general qualifications as age and citizenship, can he be effectively excluded from any local election? Is there any such election which, under the compelling interest standard, would not affect him in important ways? After designing the standard in *Kramer* and *Cipriano*, by the time it got to *Phoenix* the Court was exuberantly deciding questions which it admitted were not even presented by the litigation.

III. Special Majority Vote Requirements in Local Elections

A. A Place to Stop?

Another traditional provision in many jurisdictions—with particular significance in local elections—is the requirement of more than a simple majority vote for the accomplishment of stated purposes. Of special importance in the realm of local government fiscal policies, such provisions have recently been the target of equal protection attacks. Undeniably affecting the franchise, would they also fall victim to the Supreme Court's compelling interest standard?[50]

[50] For a prediction of the invalidity of such provisions, see Hagman & Disco, *One-Man One-Vote as a Constitutional Imperative for Needed Reform of Incorporation and Boundary Change Laws*, 2 Urban Law. 459, 467 (1970).

The case of *Lance v. Board of Education*[51] presented challenges to two such provisions in the constitution of West Virginia.[52] One of these required a sixty percent majority vote in order for political subdivisions to incur bonded indebtedness; the other required sixty percent voter approval for additional local tax levies in excess of stated limitations. In the county election which precipitated the litigation, some 51.55% of the total votes favored the issuance of bonds for school purposes, and 51.51% of the votes approved an additional tax levy in the county.[53] The plaintiffs alleged that they had voted with the majority on both issues, and demanded that local authorities proceed with levying the taxes and selling the bonds.[54] They sought judgments declaring the special vote requirements invalid; specifically, they complained that the effect of these requirements was to dilute the weight of affirmative votes to the advantage of negative votes.[55] This effect, they contended, was violative of the equal protection clause of the fourteenth amendment.[56]

In its consideration of the case, a majority of the Supreme Court of Appeals of West Virginia agreed with the plaintiffs' contentions.[57] In its opinion, the state court traced the United States Supreme Court's evolution of the one man, one vote concept, noting particularly its applicability to the dilution of a citizen's vote. The West Virginia court conceded that utilization of the concept had been primarily restricted to elections of public officials, but thought its principle to have been stated "in general terms and without qualification under the Equal

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51 — W. Va. —, 170 S.E.2d 783 (1969).

52 W. VA. CONST. art. 10, §§ 1, 8. In addition, certain state statutory provisions, W. VA. CODE ANN. §§ 13-1-4, 13-1-14 (Supp. 1971), implement article 10, section 8 of the West Virginia constitution and were similarly challenged.

53 — W. Va. at —, 170 S.E.2d at 785.

54 The plaintiffs further alleged that over a four-year period, 1964 to 1968, six proposals for additional funds for school purposes had been rejected in local elections in the county, although each of the proposals had received a majority of affirmative votes. *Id.* at —, 170 S.E.2d at 788.

55 Focusing upon the sixty percent requirement, they argued that "a negative vote has one and one-half the force of an affirmative vote . . . ." *Id.* at —, 170 S.E.2d at 786.

56 They also argued violation of the Constitution's guaranty of a republican form of government, but the court found it unnecessary to pass upon that argument. *Id.* at —, 170 S.E.2d at 790.

57 In an emotional dissenting opinion, President Haymond of the West Virginia court contended that the court was without power to invalidate provisions of the state constitution, that this decision would also invalidate numerous other special vote requirements in West Virginia, that the United States Constitution contained similar provisions, and that these requirements were not inconsistent with the one man, one vote principle. *Id.* at —, 170 S.E.2d at 791.

Protection Clause."[58] Without mentioning the "compelling interest" rationale, the court viewed both *Kramer* and *Cipriano* as pointing in that direction,[59] stating that

> the right of the voter to equal protection . . . is fully as sound, sacred and important when he is voting on issues involving taxation, public revenue and the promotion of an adequate public school system, as when he is voting for the nomination or election of a constable, a state senator, a governor or any other public official to represent the voter in government.[60]

The court rejected the defendants' reliance upon provisions of the United States Constitution which were contended to be "repugnant to the idea of majority rule."[61] Provisions of the Constitution, said the court, could not permit a state to deny to a person equal protection under the fourteenth amendment.[62] Finally, the court expressed its confidence in the ability of majority rule to handle local fiscal matters.[63] Indeed, it feared that if the challenged provisions were allowed to stand, there would be "no escape from the conclusion that the weight and force of such a vote may legally be debased and diluted virtually to the point of total extinction."[64] Consequently, both special majority vote requirements were held violative of equal protection.[65]

Almost exactly one year after its decision in *City of Phoenix*, a

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58 *Id.* at —, 170 S.E.2d at 789. "The application of that general principle has not, to our knowledge, been denied in any other area of voting in public elections." *Id.*

59 It deemed *Cipriano* in point "because it dealt with a local election and the rights of voters in an election dealing with the issuance of municipal bonds as distinguished from an election to nominate or elect public officials." *Id.* at —, 170 S.E.2d at 789.

60 *Id.* at —, 170 S.E.2d at 790-91.

61 *Id.* at —, 170 S.E.2d at 790. The provisions mentioned by the court were special vote requirements for treaty ratification, amending the Constitution, and overriding a presidential veto.

62 *Id.* at —, 170 S.E.2d at 790.

63 *Id.* at —, 170 S.E.2d at 791.

64 *Id.* at —, 170 S.E.2d at 791.

65 For a complete description of the facts of the case, and critical treatment of the West Virginia court's approach in deciding it, see Note, *Extraordinary Majority Requirements and the Equal Protection Clause*, 70 COLUM. L. REV. 486 (1970). This Note's thesis is that the reapportionment cases were based upon geographical classification of voters, which has no applicability in the area of special majority vote requirement, and that *Kramer* and *Cipriano* dealt with voter exclusion rather than vote-weighing. It contends that a proper equal protection approach would have been specific inquiry into the justifications for the extraordinary majority requirements in terms of the "compelling interest" rationale. Thus, it is the state court's reasoning rather than its result in the *Lance* case which is questioned.

majority of the Supreme Court, in *Gordan v. Lance*,[66] emphatically disagreed with the West Virginia court's holding. In his brief opinion for the Court, Chief Justice Burger viewed the state court's decision as relying primarily upon the cases of *Gray v. Sanders*[67] and *Cipriano v. City of Houma*.[68] In both instances, said the Chief Justice, that reliance "was misplaced."[69] Elaborating briefly, he stressed that the important point in those decisions had been the absence of a valid relation between the interest of the complainants and the subject matter of the election.[70] Thus, in *Gray* the dilution of voting power had been tied to geographic location,[71] and in *Cipriano* its denial had been based upon property ownership.[72] Moreover, he pointed out that "the dilution or denial was imposed irrespective of how members of those groups actually voted."[73] In contrast, the provisions challenged in *Gordon* applied "equally to all bond issues for any purposes":[74] "we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing."[75] Accordingly, the Court rejected the notion that any "sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote."[76]

With the value of the precedents relied upon by the state court thus discounted, the Chief Justice conceded that the special majority requirements effected a dilution of the franchise.[77] "Certainly," he said, "any departure from strict majority rule gives disproportionate power to the minority."[78] To those who had studied the Court's three prior "restricted electorate" opinions, this concession might well have appeared the pivotal point for the *Gordon* decision. Having conceded this

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66 403 U.S. 1 (1971). *Gordon* was decided on June 7, 1971.

67 372 U.S. 368 (1963). This decision invalidated Georgia's county unit system of counting votes in primary elections for state-wide offices.

68 395 U.S. 701 (1969).

69 403 U.S. at 4.

70 *Id.*

71 *Id.* "Votes for the losing candidate were discarded solely because of the county where the votes were cast." *Id.* at 5.

72 *Id.* "*Cipriano* was no more than a reassertion of the principle, consistently recognized, that an individual may not be denied access to the ballot because of some extraneous condition . . . ." *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 "Although West Virginia has not denied any group access to the ballot, it has indeed made it more difficult for some kinds of governmental actions to be taken." *Id.* at 5-6.

78 *Id.* at 6.

point, how—under the analyses of those opinions—could the Court possibly avoid a confrontation with the compelling interest rationale, or at least a probe of West Virginia's "articulated interest" in the requirements? The Court performed this remarkable feat by failing even to allude to the compelling interest standard of equal protection, and by articulating a purpose of its own:

> It must be remembered that in voting to issue bonds voters are committing, in part, the credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand. That the bond issue may have the desirable objective of providing better education for future generations goes to the wisdom of an indebtedness limitation: it does not alter the basic fact that the balancing of interests is one for the State to resolve.[79]

If this was not the "old" rationality approach to equal protection, what was it?

Whatever one denominates the approach, the Court made mention of two points in justification of it. First, it argued that nothing in the Constitution or prior cases "requires that a majority always prevail on every issue."[80] Second, the Constitution itself expressly provides for special majority votes both on certain substantive issues[81] and in "entire areas of legislation":[82]

> Whether . . . matters of finance and taxation are to be considered as less "important" than matters of treaties, foreign policy or impeachment of public officers is more properly left to the determination of the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment.[83]

Accordingly, concluded the Court, as long as the special majority vote requirements "do not discriminate against or authorize discrimination

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79 *Id.* at 6-7.

80 *Id.* at 6. Indeed, said the Court, in Fortson v. Morris, 385 U.S. 231 (1966), it had upheld the power of a state legislature to elect a governor when no candidate had received a majority of the popular vote. *See* Sentell, *The Electoral Function of State Legislatures: An Illustrative Example*, 22 MERCER L. REV. 1 (1971).

81 403 U.S. at 6. "[T]he provisions on impeachment and ratification of treaties are but two examples." *Id.*

82 *Id.* The Court noted that many state constitutions insulate fiscal matters from majority control.

83 *Id.*

against any identifiable class,"[84] they are not violative of "the Equal Protection Clause or any other provision of the Constitution."[85]

Could this be the same Court that operated under the broad mandate of the fourteenth amendment in the "restricted electorate" cases?

Gordon, and to some extent its companion cases of *Whitcomb v. Chavis*[86] and *Abate v. Mundt*,[87] represent a trend on the part of the Court which is "anti-majoritarian" in nature. Whereas the reapportionment cases emphasized the equal treatment of every citizen's vote, the Court in *Gordon* found proper a legislative scheme which weighs

84 *Id.* The Court could see no constitutional distinction between these special majority requirements "and a state requirement that a given issue be approved by a majority of all registered voters." *Id.* at 7.

85 *Id.* at 8. The Court expressly intimated no view as to the validity of requiring unanimity, giving veto power to "a very small group," or requiring special majorities for election of public officers. *Id.* at 8 n.6.

86 403 U.S. 124 (1971). In *Whitcomb*, black voters who resided in a ghetto of Marion County, Indiana (which includes Indianapolis), attacked the constitutionality of that county's multi-member district makeup, under which several state legislators were elected at large. The claimants showed that over an eight-year period the proportion of ghetto residents elected to the legislature was less than the ghetto's proportion of the total election district population. Consequently, it was alleged that these voters were unconstitutionally underrepresented and could avail themselves of only a limited opportunity to participate in the political process.

Although emphasizing the Court's readiness to invalidate any governmental scheme which sought to further discrimination, Justice White could find no evidence that the segment of the population in question was denied the opportunity to vote, choose a political party, or participate in partisan affairs on less than an equal basis with residents of other parts of the county. Absent such a showing of invidious discrimination, Justice White could only conclude that "the failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes." 403 U.S. at 153. In other terms, a showing of less than proportionate representation in the state legislature, without more, was insufficient to indicate that the ghetto residents were being denied access to the political system through a dilution of their voting strength. The Court, accordingly, reversed the lower court's determination that the multi-member district plan was impermissable.

87 403 U.S. 182 (1971). In *Abate*, petitioners challenged a Rockdale County, New York reapportionment plan under which a county legislature composed of eighteen members was to be elected from five legislative districts, corresponding to the county's five towns. The number of representatives assigned each town was to be determined by dividing its population by that of the smallest town in the county. As a result, a total of 11.9% deviation from equality was produced. In upholding the constitutionality of the plan, the Court stated that greater deviation from equality was permissable for local government apportionment plans because "viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing social needs." 403 U.S. at 185. Justice Marshall, writing the majority opinion, found two findings of fact to be persuasive. First, there was a long tradition of overlapping personnel and close cooperation between Rockdale County and its five member towns. Second, there could be found no "built-in bias tending to favor particular political interests or geographic areas." *Id.* at 187.

one person's vote more heavily than that of another. Justice Harlan, writing a concurring opinion in *Whitcomb*, refused to allow this shift in the judicial winds to pass without an appropriate marker.[88] He saw in these three decisions an implicit rejection of the philosophy of majoritarianism as a rule of decision to be applied in cases dealing with voter qualifications and reapportionment. This philosophy, which regards majority rule as the principle canon of social organization and which found its clearest statement in the one man, one vote concept of the earlier decisions,[89] was thought by Justice Harlan to rest on the "personal commitments"[90] of some of the members of the Court who had ignored the fact that "the scheme of the Constitution is not one of majoritarian democracy, but of federal republics, with equality of representation a value subordinate to many others . . . ."[91] As a result, the Court had become embroiled in a "political thicket"[92] from which it now sought to escape. Justice Harlan concluded by expressing the hope that "the Court will frankly recognize the error of its ways in ever having undertaken to restructure state electoral processes."[93]

B. Some Observations

The Supreme Court and the ides of June had again worked their special magic upon local governments. From *Kramer* and *Cipriano* (June 1969) to *City of Phoenix* (June 1970) to *Gordon* (June 1971) was an intriguing, albeit confusing, journey for these governments. Although the answers given by the Court in each decision were different, so also were the questions presented; thus, it is difficult to emerge with a general principle. Against the restrictiveness of *Kramer*, *Cipriano*, and *City of Phoenix*, the permissiveness of *Gordon* can be explained as deriving from a basically distinguishable problem on the one hand, or from a change in basic Court philosophy on the other.

The problems presented by these cases differ factually and conceptually. Although *Kramer* involved the popular election of an office holder, while *Cipriano* and *City of Phoenix* were concerned with bond elections, the effect of the challenged provision in each case was to

88 Whitcomb v. Chavis, 403 U.S. 124, 165 (1971) (separate opinion by Justice Harlan). Justice Harlan's opinion in *Whitcomb* also stated the reasons for his concurring opinions in *Gordon* and *Abate*.

89 *E.g.*, Gray v. Sanders, 372 U.S. 368 (1963).

90 403 U.S. at 166.

91 *Id.*

92 *Id.* at 170.

93 *Id.*

completely exclude potential voters from the polls. Nevertheless, it is difficult to derive from these decisions a rule with regard to when a class of voters may be excluded from a "special purpose" election. Rather than answering this question, the "restricted electorate" cases were based on the fact that the statutory classifications at issue did not accurately identify those parties who were in fact "specially interested" in the outcome of the elections.

It is not quite as difficult to posit some guidelines where a special majority vote requirement is being considered, rather than a statute seeking to restrict the franchise to one group of citizens. It is certain after *Gordon* that such a requirement is entirely appropriate when an election such as a bond referendum is involved, and when no otherwise eligible voter is excluded. The Court has not yet decided whether an extra-majority vote requirement for the election of a public official would be permissible.[94] However, it has been argued persuasively that it would not.[95]

The cases differ from another standpoint. In the restricted electorate cases, the classifications utilized could be viewed as favoring property taxpayers at the expense of nonproperty owners. In *Gordon*, on the other hand, the Court could identify no "discreet and insular minority"[96] either favored or disadvantaged by the special majority requirement.[97]

By *City of Phoenix*, the Court had fashioned this principle: "[W]hen all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise."[98] Yet in *Gordon* the Court agreed that citizens were affected in important ways by the bond referendum, but nevertheless upheld the validity of what it also appeared to concede was a form of weighted voting. The logical conclusion might be that in *Gordon* the Court finally found an articulated state purpose sufficient to meet its compelling interest doctrine. But the Court never alluded to such an approach in its entire *Gor-*

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94 Gordon v. Lance, 403 U.S. 1, 8 n.6 (1971).

95 *See* 83 HARV. L. REV. 1911, 1916-17 (1970).

96 403 U.S. at 5.

97 In *Whitcomb*, there existed an electoral group apparently susceptible to a statutory scheme which would operate as a device to promote racial or economic discrimination. There was no such "device" present in the state districting plan, however, and the Court refused to deem the denial of legislative seats to losing candidates a denial of equal protection. Whitcomb v. Chavis, 403 U.S. 124, 153 (1971).

98 City of Phoenix v. Kolodziejski, 399 U.S. 204, 209 (1970).

don opinion; indeed, it failed even to cite its *Phoenix* decision. The most it offered by way of rationale was that the issuance of bonds entailed long-lasting results and thus the state's demand of special majority approval was not an "unreasonable" one, however wise or unwise it might be. Thus, the Court appeared to revert to the rationality standard of equal protection, that more permissive standard which it had so roundly condemned the lower federal courts for continuing to apply in the restricted electorate cases. The final resolution of the questions left unanswered by these cases must await the passage of time and future Court decisions.

In sum, it is difficult not to wonder whether *Gordon* and its companion cases, considered along with the implications of *James* and other cases[99] and with the change in Court personnel, may portend a shift from judicial activism toward a greater judicial tolerance of legislative experimentation. Yet, even advocates of such changes certainly share Justice Harlan's desire for a more disciplined explanation from the Court. They, too, would like to know whether the Court views *Gordon* as a stopping point, and if it does, why.

IV. Local Changes Indirectly Affecting the Franchise

Direct exclusion from the franchise is one thing; local changes having some indirect bearing upon its exercise may be another. Changes of this latter nature are being litigated with increasing frequency, and the Supreme Court has recently taken a bold approach to them as well. Admittedly, this approach takes its immediate roots in legislative action rather than constitutional guarantees, but it is unquestionably a part of the development here being traced.

A. The Background

Before plunging directly into the Court's current exercise in statutory interpretation, a brief indication of the relevant prior case law should be given. Local changes of the nature now under discussion have on occasion been considered by the Court under general claims of constitutional violation. Perhaps two of the best known of these occasions might be mentioned, simply to provide a backdrop against which the Court's recent decisions can be viewed.[100]

Shortly after the turn of the century, the Court, in *Hunter v. City of Pittsburgh*,[101] was presented with a challenge to the validity of a Penn-

99 *E.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

100 Certainly there is no pretense of completeness in this chronicle.

101 207 U.S. 161 (1907).

sylvania statute which provided for the consolidation of contiguous municipalities.[102] The effect of that statute was to permit a large municipality to petition for consolidation with a smaller municipality and to secure that consolidation by a vote of citizens in both municipalities.[103] It was admitted that a majority of all the votes case in the election were in favor of the consolidation, but it was also admitted that a majority of the votes from the small municipality were against it.[104] The plaintiffs—who were citizens, voters, and taxpayers of the small municipality[105]—alleged violation of their constitutional rights in a number of respects.[106] For purposes here, their following allegation was especially noteworthy: "The law gave them a vote, but by a scheme which destroyed it. Legislation which thus destroys the vote it allows is not fair, just and reasonable."[107]

Mr. Justice Moody's opinion for a unanimous Court began by a process of elimination which today rings quaint indeed:

> We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration; those questions are for the consideration of those to whom the State has entrusted its legislative power, and their determination of them is not subject to review or criticism by this court.[108]

Then narrowing its focus, the Court proceeded to consider two claims under the United States Constitution. First, it rejected the theory advanced by the plaintiffs that an implied contract existed between them and the municipality of which they were citizens.[109] The consolidation's result of requiring taxation for purposes other than those of the municipality, they argued, impaired the obligation of this contract and thereby violated the Constitution.[110] The Court's answer was a model

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102 Act of Feb. 7, 1906, §§ 1, 2, 4, 7, 8, [1906] Pa. Laws Ex. Sess. 7-9.

103 The statute provided for a petition, a public hearing, an election, various effects of consolidation upon existing debts and the like, and established the form of government of the new municipality. *See* 207 U.S. at 161-64.

104 The trial court had ordered the consolidation and this had been affirmed by the Supreme Court of Pennsylvania. *See id.* at 168.

105 The small municipality itself was later permitted to intervene.

106 The closest the plaintiffs appeared to come to an argument of equal protection was the allegation that the statute "is in violation of the law of the land, it being unfair, unjust and unequal . . . ." *Id.* at 167. Nowhere in its opinion did the Court mention equal protection.

107 *Id.* at 171.

108 *Id.* at 176.

109 The Court said this was a "novel proposition." *Id.* at 177.

110 U.S. CONST. art. I, sec. 9, para. x.

of brevity: "It is difficult to deal with a proposition of this kind except by saying that it is not true."[111]

The plaintiffs' second claim was that the consolidation's burden of additional taxation would deprive them of their property without due process of law. It was this claim which at least indirectly touched upon the franchise. The effect of the consolidation statute upon that right, it was contended, was to invalidly permit the voters of the large municipality to overpower those of the small municipality and compel consolidation without consent.[112] Recognizing this to present a question of first impression, the Court nevertheless found its solution in "principles long settled."[113] One of these principles, the Court reasoned, was that municipalities were creatures of the state whose powers could be dealt with by the state in its absolute discretion:[114]

> All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.[115]

For these reasons, the plaintiffs' action was rejected and the Pennsylvania supreme court's affirmation of the order of consolidation was sustained.[116]

The passage of the years and the results of claims sounding in other contexts have taken their toll of the broad principles enunciated in *Hunter*. The most popular example of the contraction process is the Supreme Court's famous 1960 decision in *Gomillion v. Lightfoot*.[117] In issue was the sufficiency of allegations challenging the validity of a local statute enacted by the Alabama legislature.[118] The effect of the

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111 207 U.S. at 177. This would be "utterly inconsistent with the nature of municipal corporations . . . ." *Id.*

112 *Id.* at 177.

113 *Id.*

114 *Id.* at 178.

115 *Id.* at 179.

116 The Court did note the possibility of a different holding in respect to the state's power over property held by a municipality in its proprietary capacity. But that question, it held, was not presented by the record in this case. *Id.* at 181.

117 364 U.S. 339 (1960).

118 Act of July 15, 1957, § 1, [1957] Ala. Laws 185. The statute purported to redefine the boundaries of Tuskegee, Alabama.

statute, it was claimed, was to alter the boundaries of a municipality from the shape of a square to "an uncouth twenty-eight-sided figure."[119] The alleged result was the removal "from the city [of] all save only four or five of its 400 Negro voters while not removing a single white voter or resident."[120] The plaintiffs, prior Negro municipal citizens, alleged discrimination violative of the fourteenth amendment's due process and equal protection clauses and a denial of the right to vote violative of the fifteenth amendment.[121] Upon holdings of dismissal by both the district court and the court of appeals,[122] certiorari was granted by the Supreme Court.[123]

Writing the Court's opinion, Justice Frankfurter saw two arguable barriers to the plaintiff's petition. One of these was the *Hunter* line of cases, holding the state to possess broad powers over municipalities;[124] the other was the "political question" analysis of *Colegrove v. Green*.[125] Yet positing his approach squarely upon the fifteenth amendment, Justice Frankfurter concluded that the lower courts had erred in dismissing the complaint.

Noting the absence of any argument by the defendants that the statute served a "countervailing municipal function,"[126] Justice Frankfurter thought that their reliance upon *Hunter* was misplaced:[127]

> Thus, a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.[128]

Not considered in those cases, he continued, was a claim founded upon

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119 364 U.S. at 340.

120 *Id.* at 341.

121 The action was for a declaratory judgment of unconstitutionality and for an injunction against municipal action under the statute. *Id.* at 340.

122 167 F. Supp. 405 (M.D. Ala. 1958), *aff'd*, 270 F.2d 594 (5th Cir. 1959), *rev'd*, 364 U.S. 339 (1960).

123 The Court was careful to note that it was not concerned with whether the plaintiffs could prove their claims but only with their right to have the chance to attempt to do so. 364 U.S. at 341.

124 "We freely recognize the breadth and importance of this aspect of the State's political power." *Id.* at 342.

125 328 U.S. 549 (1946).

126 364 U.S. at 342.

127 "They are authority only for the principle that no constitutionally protected contractual obligation arises between a State and its subordinate governmental entities solely as a result of their relationship." *Id.* at 343.

128 *Id.* at 344.

the fifteenth amendment, "which forbids a State from passing any law which deprives a citizen of his vote because of his race."[129] The petition here presented such a claim.[130]

Likewise distinguished was the thrust of *Colegrove*.[131] Affirmative legislative discrimination against a readily isolated segment of a racial minority was not immunized by that decision.[132] In *Gomillion*, the legislature had done more than redraw municipal boundaries so as to incidentally inconvenience the plaintiffs:[133]

> While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.[134]

In finding the plaintiffs' petition to state a constitutional cause of action, the Court's opinion thus frowned upon the denial of a municipal franchise. In doing so, however, it was careful to avoid the broader claims of due process and equal protection and to confine its decision to the specifically stated prohibition of the fifteenth amendment. Indeed, this was the point with which the concurring opinion of Mr. Justice Whittaker took issue.[135] Viewing the Court's reliance upon the fifteenth amendment as questionable,[136] he contended that the statute constituted "an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment."[137]

Hunter and *Gomillion* provide a broad outline of the case law, current as of 1960, against which recent developments must be viewed.

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129 *Id.* at 345.

130 "Legislative control of municipalities, no less than other state powers, lies within the scope of relevant limitations imposed by the United States Constitution." *Id.* at 344-45.

131 "The decisive facts in this case . . . are wholly different from the considerations found controlling in *Colegrove*." *Id.* at 346.

132 *Id.*

133 "[I]t is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries." *Id.* at 347.

134 *Id.* The Court said: "That was not *Colegrove v. Green*." *Id.*

135 *Id.* at 349.

136 He based this view on the point that the petitioners' fifteenth amendment rights had not been violated as long as they possessed the same privileges as others in the area to which they had been relegated. *Id.* at 349.

137 364 U.S. at 349.

B. Congressional Movement and Judicial Interpretation

1. The Voting Rights Act of 1965.—Expressly declaring its intent "to enforce the fifteenth amendment," Congress enacted the Voting Rights Act of 1965.[138] This statute, later characterized by the Supreme Court as "a complex scheme of stringent remedies,"[139] purported to prohibit voting discrimination in certain areas of the country.[140] Among its many lengthy provisions are those which determine its applicability to certain states and political subdivisions,[141] those which suspend literacy tests and other voting qualifications for five years following discrimination,[142] those which suspend new voting regulations pending their review by federal authorities,[143] those which authorize assignment of federal examiners to list qualified voters for elections,[144] those which authorize appointment of federal poll watchers,[145] and those which authorize civil and criminal sanctions against interference with voting rights.[146]

For purposes of this discussion, the most noteworthy of the above provisions is section 5,[147] dealing with federal review of new voting regulations. That section requires subject states or political subdivisions to seek approval from the United States Attorney General,[148] or a declaratory judgment from the United States District Court for the District of Columbia,[149] when they "enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on

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138 42 U.S.C. §§ 1971, 1973-73p (1970) [hereinafter cited as The 1965 Act].

139 South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

140 These were areas, the Court later said, "where voting discrimination has been most flagrant." *Id.*

141 The 1965 Act § 4, 42 U.S.C. § 1973b (1970). The coverage formula established by § 4 depends upon a determination by the Attorney General that a state or subdivision maintained a voting "test or device" on November 1, 1964, and upon that of the Director of the Census that less than 50% of the state's voting age residents were registered on that day or voted in the 1964 presidential election.

142 The 1965 Act § 4, 42 U.S.C. § 1973b (1970).

143 The 1965 Act § 5, 42 U.S.C. § 1973c (1970).

144 The 1965 Act §§ 6-7, 9, 13, 42 U.S.C. §§ 1973d-e, 1973g, 1973k (1970).

145 The 1965 Act § 8, 42 U.S.C. § 1973f (1970).

146 The 1965 Act §§ 11-12, 42 U.S.C. §§ 1973i-j (1970).

147 The 1965 Act § 5, 42 U.S.C. 1973c (1970).

148 The regulation is to be submitted to the Attorney General and he then has 60 days in which to interpose an objection to it.

149 This is to be a judgment that the regulation "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The 1965 Act § 5, 42 U.S.C. § 1973c (1970).

November 1, 1964."[150] Until one of these clearances has been obtained, application of the new "qualification, prerequisite, standard, practice, or procedure" is suspended.[151]

The major challenge to the Voting Rights Act of 1965 was presented in *South Carolina v. Katzenbach*,[152] a proceeding in which South Carolina sought a declaratory judgment that the statute was unconstitutional.[153] In his opinion for the Court, Chief Justice Warren treated the various objections to the statute "as additional aspects of the basic question presented by the case."[154] That question he phrased as follows: "Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?"[155]

The Chief Justice's first undertaking was to elaborate the ground rules for resolving this question.[156] He did so by formulating the fundamental principle of the fifteenth amendment: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[157] Here, then, was a situation in which the rationality test was still in vogue. Under this test, the Court rejected the argument that the fashioning and the application of specific remedies was an exclusively judicial function: "Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment."[158]

Though the Court noted that passage of the Voting Rights Act of 1965 constituted "an inventive manner" of implementing the fifteenth amendment,[159] it had no qualms as to its validity. Remedy without prior adjudication merely shifted "the advantage of time and inertia from the perpetrators of the evil to its victims."[160] Confinement of these

150 The 1965 Act § 5, 42 U.S.C. § 1973c (1970).

151 The 1965 Act § 5, 42 U.S.C. § 1973c (1970). "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall be to the Supreme Court." *Id.*

152 383 U.S. 301 (1966).

153 The petitioner also sought to enjoin enforcement of the statute by the Attorney General. *Id.* at 307.

154 *Id.* at 324. In deciding some of these "additional aspects," the Court held that a state was not a "person" under the due process clause of the fifth amendment, nor did it possess standing to invoke the bill of attainder clause, or the principle of separation of powers.

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.* at 327.

159 *Id.*

160 *Id.* at 328.

remedies to a small number of jurisdictions was likewise acceptable legislative action.[161] The Court deemed it irrelevant that the Act excluded jurisdictions in which other means of voting discrimination were employed. "Legislation," it said, "need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience."[162]

The Court admitted that section 5 of the Act "may have been an uncommon exercise of congressional power . . . ."[163] Nonetheless, it was justified by the "exceptional conditions" within the knowledge of Congress.[164] Having reason to suppose that evasive maneuvers would be forthcoming, Congress responded "in a permissibly decisive manner" in suspending new voting regulations pending their scrutiny by federal authorities.[165] For these reasons, therefore, the Court held that the Voting Rights Act was "a valid means for carrying out the commands of the Fifteenth Amendment."[166]

Dissenting in part from the Court's holding was the special opinion written by Mr. Justice Black.[167] He took issue with the majority's approval of section 5 of the Act, a section he viewed as unconstitutional for two reasons.[168] First, he contended that the requirement of obtaining a prior declaratory judgment approving a local provision forced the district court to issue an advisory opinion. Thus, the requirement violated the constitution's command of a case or controversy for federal jurisdiction.[169] His "second and more basic objection" to the section was that it rendered any constitutional distinction "between state and federal power almost meaningless."[170] If the states' reserved powers

161 *Id.* As of the date of this litigation, coverage of the statute had been extended to the states of South Carolina, Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, and to specified counties in North Carolina, Arizona, Hawaii, and Idaho. *Id.* at 318.

162 *Id.* at 331. "There are no States or political subdivisions exempted from coverage under sec. 4(b) in which the record reveals recent racial discrimination involving tests and devices. This fact confirms the rationality of the formula." *Id.*

163 *Id.* at 334.

164 *Id.*

165 *Id.* at 335.

166 *Id.* at 337. The Court had previously determined that "the only sections of the Act to be reviewed at this time are §§ 4(a)-(d), 5, 6(b), 7, 9, 13(a), and certain procedural portions of § 14 . . . ." *Id.* at 317.

167 *Id.* at 355.

168 He agreed with the remainder of the Court's holdings.

169 At least, he said, "it is a far cry from the traditional constitutional notions of a case or controversy as a dispute over the meaning of enforceable laws or the manner in which they are applied." *Id.* at 357.

170 *Id.* at 358.

amounted to anything, he argued, "they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them."[171] If such a requirement could be imposed in regard to voting, other subjects as well might be brought within this federal "veto" power:[172]

> The judicial power to invalidate a law in a case or controversy after the law has become effective is a long way from the power to prevent a State from passing a law. I cannot agree with the Court that Congress—denied a power in itslf to veto a state law—can delegate this same power to the Attorney General or the District Court for the District of Columbia.[173]

This avowedly inadequate glimpse of the Voting Rights Act of 1965, as well as its constitutional underpinnings in *South Carolina v. Katzenbach*, will hopefully suffice as background.

2. Selection of Local Officials.—The offices in the local government complex are numerous and encompass functions which vary widely in nature. The filling of these offices is an important process, and the applicable legal principles constitute a significant chapter in local government law. For this reason, the Supreme Court's infusion of the one man, one vote concept into the process was an event of considerable importance.[174] Although this evolution has still not run its full course,[175] the Court has at least attempted to delineate some boundaries. For instance, in *Sailors v. Board of Education*,[176] the Court held the concept not applicable to members of county boards of education, for the reason that the scheme of their selection was appointive rather than elective.[177] Again, in *Dusch v. Davis*,[178] the Court refused to in-

171 *Id.* at 359. He observed: "The requirement that States come to Washington to have their laws judged is reminiscent of the deeply resented practices used by the English crown in dealing with the American colonies." *Id.* at n.2.

172 *Id.* at 360.

173 *Id.* at 361.

174 Avery v. Midland County, 390 U.S. 474 (1968). *See* Sentell, *Reapportionment and Local Government*, 1 GA. L. REV. 596 (1967); Sentell, Avery v. Midland County: *Reapportionment and Local Government Revisited*, 3 GA. L. REV. 110 (1968).

175 *See, e.g.*, Hadley v. Junior College Dist., 397 U.S. 50 (1970) (equal protection clause violated when separate school district comprising 60% of the vote of total district restricted to election of only 50% of trustees from that separate district under state statutory formula).

176 387 U.S. 105 (1967).

177 This was permissible, said the Court, because the boards performed functions not legislative in the classical sense. *Id.* at 111.

178 *Id.* at 112.

validate the election of municipal councilmen from boroughs of unequal populations, on the ground that the councilmen were elected by the municipal voters at large rather than by only the voters of their boroughs.[179] Accordingly, movement toward such extended schemes of selection could be anticipated on the part of local governments.[180]

In 1966 the Mississippi legislature enacted two changes in the methods of selecting certain local officials. One of these was a statute which permitted counties to change the election of their boards of supervisors from a system of district election to one of election at large.[181] The other was a statute which compelled eleven specified counties to name their superintendents of education by appointment rather than by an optional system of selection.[182] Voters and potential candidates for the offices sought to enjoin both these changes, charging that they were subject to and had not complied with the federal review requirements of section 5 of the Voting Rights Act.[183] In separate litigation, two three-judge district courts summarily rejected these challenges.[184] The opinions stated simply that the legislative changes were not of the type which came within the purview of the section. Direct appeals from these decisions were taken to the Supreme Court, which consolidated the cases and decided them both in *Allen v. State Board of Elections*.[185]

Chief Justice Warren, in his majority opinion, stated that the principal issue was

> whether these provisions fall within the prohibition of § 5 that prevents the enforcement of 'any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to

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179 This was permissible, said the Court, as long as the scheme was not a mere front for discrimination. *Id.* at 117.

180 *See* Sentell, *Reapportionment and Local Government*, 1 GA. L. REV. 596, 635-42 (1967).

181 Act of May 27, 1966, ch. 290, § 1, [1966] Miss. Laws 374, *amending* MISS. CODE ANN. § 2870 (1957). Prior to this change, all counties in Mississippi were divided into five districts with each district electing one member of the board of supervisors.

182 Act of June 17, 1966, ch. 406, § 1, [1966] Miss. Laws 744, *amending* MISS. CODE ANN. § 6271-08 (1957). Prior to this alteration, these counties had possessed the option of either electing or appointing their superintendents.

183 The 1965 Act § 5, 42 U.S.C. § 1973c (1970).

184 The change in respect to the election of county supervisors was litigated in Fairley v. Patterson, 282 F. Supp. 164 (S.D. Miss. 1967). The change in respect to the selection of county school superintendents was litigated in Bunton v. Patterson, 281 F. Supp. 918 (S.D. Miss. 1967).

185 393 U.S. 544 (1969). The style of the case came from still another litigated change of law in Virginia. *See* Allen v. State Bd. of Elections, 268 F. Supp. 218 (E.D. Va. 1967). That change, however, was not peculiar to local governments.

> voting' unless the State first complies with one of the section's approval procedures.[186]

After disposing of preliminary jurisdictional questions,[187] the Chief Justice turned to theories advanced by the defendants for limiting the scope of the section.[188] He conceded that the legislative history of the Voting Rights Act revealed testimony by an Assistant Attorney General that the statute was intended to deal only with the problem of voter registration.[189] Still, he concluded that the statute's "legislative history on the whole" indicated a congressional intent "to reach any state enactment which altered the election law of a covered State in even a minor way."[190] For this conclusion, he relied upon the testimony of other governmental officials,[191] upon remarks by both sides in debate over the bill,[192] and upon the legislative decision not to include even the minor exceptions which had been agreed to by Attorny General Katzenbach.[193] Moreover, he emphasized, the statute itself gave a broad interpretation to the right to vote,[194] compatible with such Court decisions as *Reynolds v. Sims*.[195]

Likewise rejected was the argument that section 5's application to the changes here might create problems in the implementation of reapportionment legislation in the states.[196] That question, said the Court, "is not properly before us at this time."[197] Thus, "we leave to another case a consideration of any possible conflict."[198]

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186 Allen v. State Bd. of Elections, 393 U.S. 544, 550 (1969).

187 These included holdings that private litigants possessed standing for relief under § 5, that such an action could be brought in local district courts, and that disputes involving coverage of § 5 should be determined by three-judge courts. *Id.* at 557, 560, 563.

188 The Court did agree that in the Voting Rights Act, Congress "drafted an unusual, and in some aspects a severe, procedure . . . ." *Id.* at 556.

189 This was the answer given during the House Judiciary Committee subcommittee's hearing by Assistant Attorney General Burke Marshall. *Id.* at 564.

190 *Id.* at 566. "We are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant case be subject to the § 5 approval requirements." *Id.*

191 These were statements made by then Attorney General Nicholas Katzenbach. *Id.* at 567-68.

192 These were remarks by Senators Hart, Talmadge, and Tydings. *Id.* at 568 n.32.

193 For example, such exceptions included a change from paper ballots to voting machines. *Id.* at 568.

194 It recognized "that voting includes 'all actions necessary to make a vote effective,'" said the Court. *Id.* at 566.

195 377 U.S. 533 (1964).

196 "Appellees urge that Congress could not have intended to force the States to submit a reapportionment plan to two different courts." 393 U.S. at 565.

197 *Id.* at 569.

198 *Id.* "There is no direct conflict between our interpretation of this statute and the principles involved in the reapportionment cases." *Id.*

With a broad statutory scope now structured, the Court focused upon the two Mississippi statutes before it. The shift from district to at-large election of county supervisors, it reasoned, could effect the very dilution in voting power proscribed by *Reynolds*.[199] "Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole."[200] The shift would, therefore, "nullify their ability to elect the candidate of their choice . . . ."[201] Equally suspect was the change from election to appointment of school superintendents.[202] After this change, a citizen was barred from selecting an officer formerly subject to his approval.[203] Admittedly, the change might not have been motivated by discrimination; nonetheless, the purpose of § 5 was to submit such changes to scrutiny."[204]

The Court therefore concluded that each of the Mississippi statutes fell within the terms of section 5.[205] Expressly indicating no opinion as to the constitutionality of the statutes, it remanded the cases to the district courts with instructions to enjoin enforcement of the statutes until they had been subjected to the federal approval requirements.[206]

In a separate opinion,[207] Justice Harlan forcefully dissented from "the Court's extremely broad construction" of section 5.[208] Agreeing that the section's coverage extended to all state laws which changed voter registration and ballot counting processes, he did not agree with the Court's inclusion of "all those laws that could arguably have an impact on Negro voting power, even though the manner in which

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199 *Id.*

200 *Id.*

201 *Id.*

202 The Court characterized this "an important county officer in certain counties." *Id.*

203 "The power of a citizen's vote is affected by the amendment." *Id.*

204 *Id.* at 570.

205 *Id.* at 569. The Court rejected the argument that the service of briefs in these cases upon the Attorney General constituted a sufficient submission of the statutes to him under § 5. "A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act." *Id.* at 571.

206 Conceding that "these § 5 coverage questions involve complex issues of first impression—issues subject to rational disagreement," the Court declined to set aside the elections and gave only prospective effect to its decision in this case. *Id.* at 572. It was this part of the Court's decision from which Justices Marshall and Douglas dissented. *Id.* at 594.

207 *Id.* at 582.

208 *Id.* at 583. He also disagreed with the majority's holding of prospective operation. *Id.* at 593-94.

the election is conducted remains unchanged."[209] He then undertook to explain his rationale.

Justice Harlan's first point was that interpretation of section 5 called for consideration of its role in the Voting Rights Act. This role, he argued, was "to march in lock-step" with the Act's coverage section, section 4.[210] Congress had "moved only against those techniques that prevented Negroes from voting at all."[211] Indeed, the language of section 5 itself evidenced that "Congress was clearly concerned with changes in procedure with which voters could *comply*."[212] By ignoring this contextual approach, Harlan asserted, the Court permitted "the tail to wag the dog," and accomplished "a revolutionary innovation in American government"—one that went far beyond section 4.[213]

The Court was also in error, Justice Harlan argued, in reading the statute as based upon the voting concept of the *Reynolds* line of cases.[214] Those reapportionment cases, prohibiting a dilution of voting power, were grounded upon the fourteenth amendment. The Voting Rights Act, on the other hand, was expressly founded upon the fifteenth amendment.[215] Thus, the leading case was not *Reynolds v. Sims*, but *Gomillion v. Lightfoot*, with its considerably less expansive concept of voting.[216] This was the concept which should have been employed in construing the Act.[217]

Finally, Harlan maintained that the Court's use of legislative history was unrealistic.[218] Not only did this history reveal an "unequivocal statement" which was "diametrically opposed" to the Court's construction, but also the other materials provided "little more support" for the Court's position.[219]

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209 *Id.* at 583.

210 *Id.* at 584. "The two sections cannot be understood apart from one another." *Id.*

211 *Id.* at 585. "Congress did not intend to restructure state governments." *Id.*

212 *Id.* at 587.

213 *Id.* at 585.

214 *Id.* at 588.

215 *Id.* Indeed, he observed, Congress had expressly refused to base § 5 upon its power under the fourteenth amendment.

216 *Id.* at 589. "As the reapportionment cases rest upon the Equal Protection Clause, they cannot be cited to support the claim that Congress, in passing this Act, intended to proceed against state statutes regulating the nature of the constituencies legislators could properly represent." *Id.*

217 *Id.* at 588. "This is a statute we are interpreting, not a broad constitutional provision whose contours must be defined by this Court." *Id.*

218 *Id.* at 590.

219 *Id.* As a basis for this assertion, he reviewed the statements of the Attorney General upon which the majority had relied.

Upon the basis of this rationale, Mr. Justice Harlan turned to the specific Mississippi statutes in issue and drew a distinction between them.[220] The shift from district to at-large election, he reasoned, did not come within his interpretation of section 5. Otherwise, he wondered, how would a court "go about deciding whether an at-large system is to be preferred over a district system"?[221]

> Under one system, Negroes have *some* influence in the election of *all* officers; under the other, minority groups have *more* influence in the selection of *fewer* officers. If courts cannot intelligently compare such alternatives, it should not be readily inferred that Congress has required them to undertake the task.[222]

Moreover, he continued, this shift "does not require a voter to *comply* with anything at all, and so does not come within the scope of the language used by Congress" in section 5.[223] Consequently, this statute was not, in his view, subject to the federal approval requirement.

However, the change from the elective to the appointive scheme, concluded Justice Harlan, presented a more difficult problem.[224] But at least under one approach, it enacted a "voting qualification of the most drastic kind."[225] Conceding counter arguments to exist,[226] he nevertheless agreed that "on balance" this statute did fall within section 5.[227]

After the Court's decision in *Allen*, the only question remaining was that of just how far its approach would be carried. Some four months later, a phase of this question was provocatively presented to a three-judge district court in the case of *Perkins v. Matthews*.[228] Among the issues included in this litigation was a somewhat frustrating variation of the *Allen* theme. The Mississippi legislature had enacted a statutory shift from ward to at-large election for members of municipal governing

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220 "Section 5, then, should properly be read to require federal approval only of those state laws that change either voter qualifications or the manner in which elections are conducted." *Id.* at 591.

221 *Id.* at 586.

222 *Id.*

223 *Id.* at 587.

224 *Id.* at 592.

225 *Id.* "While under the old regime all registered voters could cast a ballot, now none are qualified." *Id.*

226 "One can argue that the concept of a 'voting qualification' pre-supposes that there will be a vote." *Id.* at 592.

227 *Id.* The final dissenting opinion in the case was that by Mr. Justice Black, reiterating his view from *South Carolina v. Katzenbach* that § 5 was unconstitutional. 393 U.S. at 595.

228 301 F. Supp. 565 (S.D. Miss. 1969).

authorities. This statute had been enacted in 1962, more than three years prior to the adoption of the Voting Rights Act of 1965. On the surface, therefore, this shift preceded and was free of the Act's deadline of November 1, 1964. In its elections of 1965, however, the municipality of Canton, Mississippi had failed to comply with the 1962 statute and had continued to elect its aldermen by wards.[229] When, in its 1969 elections, the municipality proposed to finally comply with the 1962 statute, municipal voters complained that such compliance would constitute a change from the procedure in fact in effect on November 1, 1964. Thus, this 1969 change was invalid, they contended, until subjected to the federal approval requirements of the Voting Rights Act.[230]

Rejecting the plaintiffs' contention, a unanimous three-judge court viewed the 1962 statute as bringing "cities in compliance with the one-man-one-vote rule."[231] Moreover, said the court, this statute "could not have been enacted for the purpose of thwarting" the Voting Rights Act of 1965.[232] The municipality's violation of the statute in its 1965 elections, said the court, did not justify its continued violation in 1969.[233] Indeed, to do so would invalidate the latter election. The plaintiffs' reason for desiring continued violation, thought the court, was that "in one ward Negro citizens are in the overwhelming majority," and thus could elect a member of their race.[234] "We do not think, however, that this issue is to be decided by these considerations."[235]

Another attack leveled by the plaintiffs in *Perkins* was directed against the municipality's relocation of polling places in four of its wards.[236] This change also, they alleged, must obtain federal approval. Disagreeing, the three-judge court noted the practical reasons for the changes[237]

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229 No reason was given for the failure to comply.

230 A single district judge had temporarily enjoined the holding of the municipal primaries at the plaintiffs' request.

231 301 F. Supp. at 568. The court cited Dusch v. Davis, 387 U.S. 112 (1967), as authority, and said this statute left "to all the inhabitants an equal voice in the election of their municipal officials, something which Congress could not abrogate without a Constitutional Amendment." 301 F. Supp. at 568.

232 *Id.*

233 *Id.* "We are not impressed with the argument that Congress intended to freeze unlawful election procedures." *Id.*

234 *Id.*

235 *Id.* Also, said the court, "since a majority of the voters in Canton are black it is equally true that under the 1962 Act the black voters have the power, if they wish to be influenced by race alone to elect an all black governing body." *Id.*

236 Apparently, this had not been accomplished by statute.

237 These included such matters as lack of space, more ample facilities, and withdrawal of permission to continue to use private property. *Id.*

and observed that the same number of polling places would remain in each ward: "No voter will have to go outside his ward to vote."[238] Accordingly, the complaint was dismissed.[239]

Perkins v. Matthews[240] thus presented the Supreme Court with its most recent opportunity to deal with local government and the Voting Rights Act. Seizing upon this opportunity, Justice Brennan wrote the Court's majority opinion. His view of the three-judge court's approach was that in the main it had considered the wrong issue in the case.[241] The only question for resolution at that level, he explained, was whether the election changes in issue were covered by section 5's requirement.[242] Instead, the court below had determined whether these changes effected discrimination—a determination committed by the Voting Rights Act to the federal authorities. Rather than remand the case so that the lower court could make the coverage determination, however, Justice Brennan proceeded to resolve that issue.[243]

Conceding that the shift from ward to at-large election arose in "a peculiar context," Justice Brennan thought it still must go the way of *Allen*.[244] Even though this shift had been compelled by the statute of 1962, the municipality had not complied with it in the 1965 election.[245] From this, Justice Brennan reasoned that had an election been held in November 1964, it too would have been conducted on a ward basis. "Consequently, we conclude that the procedure *in fact* 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards."[246] The municipality's proposal to change to the at-large system for the 1969 election, therefore, came within the coverage of section 5.

The relocation of polling places, the Court declared, was clearly within section 5's coverage.[247] "The accessibility, prominence, facilities and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise."[248] Locations at remote places

238 *Id.*

239 The temporary injunction was dissolved. *Id.*

240 400 U.S. 379 (1971).

241 "The three-judge court misconceived the permissible scope of its inquiry into appellants' allegations." *Id.* at 383.

242 This, he said, had been settled by *Allen. Id.*

243 He did this "in the interest of judicial economy." *Id.* at 386.

244 *Id.* at 394.

245 This hindsight thus destroyed the presumption that officials will act in accordance with law.

246 *Id.* at 395 (emphasis in original).

247 "The abstract right to vote means little unless the right becomes a reality at the polling place on election day." *Id.* at 387.

248 *Id.*

or in areas of potential intimidation, might well have the effect of abridging the black citizens' franchise. Accordingly, the Court thought that section 5 clearly "requires prior submission of any changes in the location of polling places."[249]

Upon the basis of this reasoning, the Court reversed the three-judge court's decision and remanded the case. Further, it ordered that the election changes be enjoined until compliance with section 5 had been demonstrated.[250]

Two dissenting opinions were written in *Perkins,* one by Justice Harlan,[251] and the other by Justice Black.[252] Although he agreed with the majority holding on the change of polling places, Justice Harlan did not agree that the shift from ward to at-large election required federal approval. Section 5's requirement should be interpreted to mean the procedure required by state law on November 1, 1964, he argued, and not the procedure actually used at that time.[253] Thus, he believed "that the change from election at large occurred on the effective date of the 1962 state statute"[254] and should be unaffected by the Voting Rights Act.

Justice Black forcefully disagreed with the majority's holding. The municipality's alteration of the four polling places, he thought, was a matter "peculiarly and exclusively fit for local determination."[255] The majority's holding, not based on the slightest indication of racial discrimination, he characterized as "utter degradation of the power of the States to govern their own affairs."[256] The Court's other holding, said Justice Black, forced the municipality to violate its admittedly valid statute of 1962 unless it obtained permission to abide by it from the federal government.[257] Moreover, he pointedly observed, "it is beyond my comprehension how the change from wards to an at-large election can discriminate against Negroes on account of their race in a city that has an absolute majority of Negro voters."[258]

3. Municipal Annexation.—Perkins v. Matthews presented still

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249 *Id.* at 388.

250 *Id.* at 397.

251 *Id.* (Harlan, J., concurring in part and dissenting in part).

252 *Id.* at 401 (Black, J., dissenting).

253 *Id.*

254 *Id.* at 400.

255 *Id.* at 403. He relied heavily upon his dissent in *South Carolina v. Katzenbach.*

256 *Id.* at 403.

257 *Id.* at 404.

258 *Id.* at 405.

another issue, by far the most interesting of any yet mentioned. On three separate occasions since 1964, the municipality of Canton had extended its boundaries by the annexation of additional territory. The plaintiffs argued that the result of these annexations was to dilute the effectiveness of the vote of black citizens, and thus should have been submitted for federal approval.[259]

The three-judge district court had found that the result of all three annexations was to add more white voters than black voters, but that the majority of the electorate in the municipality nevertheless remained black.[260] It could not believe that the Voting Rights Act reached this situation: "Congress could not have intended such a result unless it were shown to be a stratagem deliberately designed to overturn a black majority at the municipal polls."[261] The court thus rejected the plaintiff's contention.

In what appears to be its most far-reaching decision yet rendered under the Voting Rights Act, the Supreme Court reversed this holding as well.[262] Here again, said Justice Brennan for the majority, the lower court had considered questions which section 5 reserved for determination by the federal authorities.[263] Once again, he proceeded to decide the coverage question which he thought the three-judge court had ignored.

Municipal annexations affect voting, said Justice Brennan, in two ways. First, they determine "who may vote in the municipal election and who may not."[264] Second, they dilute "the weight of the votes of the voters to whom the franchise was limited before the annexation."[265] In *Allen,* Justice Brennan noted, the Court had held that Congress had, in order to prevent dilution of voting power, adopted the *Reynolds* concept of voting. Thus, the *Perkins* majority reasoned that "[i]n terms of dilution of voting power, there is no difference between a change from district to at-large election and an annexation which changes both the boundaries and ward lines of a city to include more

259 301 F. Supp. 565, 566 (S.D. Miss. 1969), *rev'd,* 400 U.S. 379 (1971).

260 This was agreed, said the court, by all the witnesses. *Id.* at 567.

261 *Id.* The court thought it significant that one of the annexations had brought no white voters into the municipality at all.

262 Perkins v. Matthews, 400 U.S. 379 (1971).

263 "This emerges with particular clarity in the court's consideration of the annexations." *Id.* at 385.

264 *Id.* at 388. They made this determination by including certain voters within the municipality and leaving others outside.

265 *Id.*

voters."[266] Even *Gomillion* provided "a clear-cut illustration of the potential of boundary changes for 'denying or abridging the right to vote on account of race or color.' "[267] Accordingly, the district court was directed to enjoin enforcement of the changes until compliance with section 5 could be demonstrated.[268]

Justice Harlan's dissent extended to the Court's holding on annexation.[269] Neither here nor in *Allen,* he argued, was there "evidence of a legislative intent to go beyond the State's election law and to reach matters such as annexations, which affect voting only incidentally and peripherally."[270] He questioned the Court's reliance upon the Attorney General's interpretation, which he thought was discounted by that official's inaction. He pointed out, for instance, that of a total of more than 140 municipal boundary changes in South Carolina and Georgia, only one had been submitted to the Attorney General.[271]

In his dissent, Justice Black saw his earlier fears in *Katzenbach* now fully realized:[272]

> This case poignantly demonstrates the extent to which the Federal Government has usurped the function of local government from the local people to place it in the hands of the United States District Court for the District of Columbia and the United States Attorney General, both of which are over a thousand miles away from Canton, Mississippi.[273]

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266 *Id.* at 390. Annexation, said the Court, "constitutes the change of a 'standard, practice or procedure with respect to voting.' " *Id.* at 388.

267 *Id.* at 389. The Court viewed other considerations also as converging to a conclusion of § 5's applicability. For instance, it quoted from a study by the United States Civil Rights Commission, to the effect that "gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters." *Id.* Further, it noted recent testimony by officials of the Justice Department that the Attorney General regarded annexations to fall within the coverage of § 5. *Id.* at 391. It was true, the Court conceded, that a table prepared by the Justice Department showed that of the Southern states, "only South Carolina has complied rigorously with § 5." *Id.* at 393 n.11. But, it reasoned; "the only conclusion to be drawn from this unfortunate record is that only one State is regularly complying with § 5's requirement." *Id.* The Court particularly noted the lack of compliance by the State of Georgia, which had many annexations and other election changes in its session laws that had never been submitted to the Attorney General. *Id.*

268 The Court said that "since the District Court is more familiar with the nuances of the local situation than are we, and has heard the evidence in this case, we think the question of the appropriate remedy is for that court to determine, after hearing the views of both parties." *Id.* at 397.

269 *Id.*

270 *Id.* at 398-99.

271 *Id.* at 399 n.1.

272 *Id.* at 401.

273 *Id.* at 402.

These annexations, he observed, did not alter the racial balance of the municipality, particularly where an absolute majority of the electorate was black. Thus, he argued that the Court here "permits the use of an unconstitutional means in a case where the *parties have not shown racial discrimination.*"[274]

Justice Black found particularly mystifying the separate opinion of Chief Justice Burger and Justice Blackmun, in which they said that "given the decision" in *Allen*, they would join in the Court's judgment.[275] In a footnote to his own opinion, Justice Black professed a lack of understanding of their meaning.[276] Neither of them had been members of the Court when *Allen* was decided, he said, and "they are certainly not bound by the Court's past mistakes if they think as I do, that *Allen* was a mistake."[277]

C. *Observations*

From *Hunter v. City of Pittsburgh* to *Perkins v. Matthews* is a long way.[278] For a court to traverse this distance in a little more than 60 years is a notable feat. It is true, of course, that *Perkins* purported to depend upon intervening congressional movements, but much of that dependence appears illusory. For who, upon a mere reading of the opinions, does not believe that the Supreme Court's view of local government in this country has not changed? Again, the key has been the franchise—which was certainly more drastically affected by the consolidation in *Hunter* than by the annexation in *Perkins*. Any bridge between the two thought to be provided by *Gomillion* is a slender one, for the actions there condemned were extreme and racial, and the Court's rationale was narrowly focused upon the fifteenth amendment. In any event, against the backdrop of the two early cases, recent occurrences provide a striking contrast.

This is not to detract from the significance of the enactment of the Voting Rights Act of 1965. Even though expressly grounded upon the fifteenth amendment, the provisions of that statute are stringent and inventive, as evidenced by section 5's distrust of the federal district courts in its designation of an approval forum. But, after all, statutes stand as they are interpreted; and thus far the Supreme Court's in-

274 *Id.* at 404-05 (emphasis in original). Mr. Justice Black also disagreed with the remedy adopted by the Court which, he said, departed from precedent and suggested to the district court that it might be appropriate to invalidate the 1969 election and require a new one. *Id.* at 407.

275 *Id.* at 409 n.8.

276 *Id.*

277 *Id.*

278 This is not to suggest that the specific result in *Hunter* would be different today.

terpretation of the Voting Rights Act has been nothing short of remarkable.

Starting with *Katzenbach* and continuing through *Perkins*, the Court has shown state and local governments that no mercy through construction will be shown. When coverage is open to question, the presumption is in the affirmative, no matter how local or minute the matter being litigated. For the most part, the Court has justified this approach merely by magnifying the evil against which it viewed the statute to be directed. The end, it has seemed altogether too often to declare, justifies the means—this can be done simply because it can be done. When rationale has been deemed necessary at all, the most the Court has offered up has been a "rationality" formula, the same test which it was so roundly condemning in evaluating state statutes. In terms of reasoned, scholarly, judicial analysis, the dissenters have been more persuasive.

Some of the by-products of the Court's exercise here are interesting. For instance, its extension of section 5's coverage in *Allen* required something more than the fifteenth amendment upon which Congress expressly based the statute. The Court found this extra ingredient in its own prior reapportionment decisions affording protection against dilution of the franchise in general. Justice Harlan pointed out that those decisions had been based upon the equal protection clause of the fourteenth amendment. Their utilization to find congressional intent here, he observed, appeared to greatly expand the express language of the statute. In *Perkins*, the Court answered the Harlan criticism by expressly agreeing with it! Not only does this expansion create a potential conflict with local government reapportionment, it imposes an impossible task of evaluating intangibles upon the Attorney General and the District Court of the District of Columbia. If these approval forums take their task seriously, they are in for sleepless nights.

Finally, after *Perkins v. Matthews*, it is difficult to conceive of local governmental actions which are not at least arguably within the coverage of section 5. What change, under what standard of that case, may not be said to have a possible impact upon voting? If the annexation of an all black territory into a municipality with a black majority of the electorate must be submitted for approval, then little would appear to escape. If this is not the destination at which the Court has now arrived, then the process of boundary drawing would appear its immediate project for the future.

V. CONCLUSION

The chronicle here unfolded demonstrates, if anything, the United States Supreme Court's extensive preoccupation with local government during its last three terms. Beginning with *Kramer* and *Allen* in 1969 and continuing through *Gordon* and *Perkins* in 1971, the Court has submerged itself in grass roots government. Except for *Gordon*, the exercise might be fully characterized as the federalizing of that government by means of the individual's right to vote. The extent to which *Gordon* detracts from such a characterization remains an open question at this point.

In any event, the existence of a "new" compelling interest standard of equal protection has received emphatic confirmation. The Court's utilization of this standard as a justification for reviewing the articulated purposes of restricted electorates constitutes a provocative subject for analysis. After *Kramer*, *Cipriano*, and *Phoenix*, the question is whether any degree of electorate interest can be constitutionally delineated. The intrigue inherent in these episodes is surpassed only by that resulting from the Court's refusal to employ the compelling interest doctrine in dealing with the special majority vote requirement. Admittedly encroaching upon the franchise, that requirement was nevertheless upheld by an approach sounding in the rationality standard of equal protection. Whatever the correct explanation for this, the Chief Justice's opinion in *Gordon* may be viewed as suggesting a hesitation on the part of the Court to further expand its involvement in local government.

Fully as noteworthy has been the Court's employment of the Voting Rights Act of 1965. Shunning confinement of that statute's express fifteenth amendment foundation, the Court has utilized the equal protection clause here, also. After *Allen* and *Perkins*, few details of local government appear free of the statute. Here too, the franchise awaits realistic refinement.