

# Conflict and Congruence in One-Person, One-Vote and Racial Vote Dilution Litigation: Issues Resolved and Unresolved by *Board of Estimate v. Morris*

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## I. INTRODUCTION

This article provides a discussion of the United States Supreme Court's recent decision in *Board of Estimate v. Morris*<sup>1</sup> and an analysis of the implications of that decision for electoral and governmental structures in New York City and other American municipalities. These implications involve not just one-person, one-vote issues, with which the case is directly concerned, but also a number of issues related to racial vote dilution.

The narrow holding of the *Morris* case is that the traditional structure for selecting members of New York City's powerful Board of Estimate violates the equal protection clause of the fourteenth amendment. In arriving at that conclusion, the Supreme Court unanimously reaffirmed that the one-person, one-vote requirement applies to elected general purpose local governments. The Court was also unanimous in rejecting the Banzhaf Index for calculating the deviation of different sized districts from population equality. Finally, a substantial majority

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<sup>1</sup> 109 S. Ct. 1433 (1989).

of the *Morris* Court ruled that at-large positions on a local government representative body should be included in the calculus when determining the extent to which local electoral districts deviate from the ideal of population equality.

This level of near unanimity on a Court that, during the same Term, has been deeply divided on key constitutional issues, may seduce many commentators into ignoring the potentially significant implications of the *Morris* case. Though the opinion makes only a small addition to the one-person, one-vote jurisprudence, its rejection of the Banzhaf Index raises some difficult questions for many counties in New York State, whose electoral arrangements have long been structured under that Index. Also, by approving, in dicta, the use of at-large local government positions as a means of dampening the deviation of local districts from population equality, the *Morris* Court may have created new difficulties in racial vote dilution cases. Those cases have generally discouraged the use of at-large positions because of their potential for diluting the votes of members of racial and language minorities. Hence, the *Morris* decision may have highlighted one of the areas in which the quantitative aspect of voting rights litigation (one-person, one-vote cases) is potentially in conflict with the qualitative aspect of voting rights (racial vote dilution cases).

In addition to these potential future implications of the Supreme Court's decision, the *Morris* litigation itself and the related charter revision process provide the raw material for an interesting case study of the interaction between law and politics in the nation's largest city. The voting rights jurisprudence allows a court, usually a federal court, to alter the electoral arrangements and, in some cases, the governmental structure of a city. As a result, voting rights litigation, or even the threat of litigation, may profoundly affect local politics. The *Morris* case and related Charter Revision Commission activities have had a pronounced effect upon the governmental structure of New York City.

Given the complexity of the issues in the *Morris* case and the surrounding political environment, this article begins with a straightforward description of the Board of Estimate and the lower court opinions in the case. Next, the Supreme Court's opinions is discussed in detail. Finally, aspects of the opinion are criticized and its political and legal implications for local government structures around the country are analyzed. In particular, implications for vote dilution litigation are considered.

## II. HISTORY OF THE NEW YORK CITY BOARD OF ESTIMATE AND THE MORRIS CASE

### A. *The New York City Board of Estimate Before the Morris Case*

The Board of Estimate has eight members — three officials elected citywide (Mayor, Comptroller, and City Council President), plus five borough presidents.<sup>2</sup> Though these officials are not elected directly to the Board, the City Charter provides that membership on the Board of Estimate is automatic for holders of these eight positions.<sup>3</sup> Indeed, the primary source of governmental power for the borough presidents is membership on the Board, which has broad powers over contracting, city-owned property, land use, and budgetary matters.<sup>4</sup> On most issues, the three city-wide members have two votes each. On some budgetary matters, however, the Mayor is not allowed to vote.<sup>5</sup>

<sup>2</sup> New York City is composed of five boroughs, each of which is a county. Thus, Brooklyn is Kings County, Queens is Queens County, Staten Island is Richmond County, the Bronx is Bronx County, and Manhattan is New York County. The voters of each borough elect a borough president.

The City Council is composed of 35 members, elected from single-member districts. The prior system of electing ten members of the City Council on a borough-wide basis, i.e., two per borough, was invalidated on one-person, one-vote grounds in *Andrews v. Koch*, 528 F. Supp. 246 (E.D.N.Y. 1981), aff'd mem., 688 F.2d 815 (2d Cir. 1982), aff'd sub nom. *Giacobbe v. Andress*, 459 U.S. 801 (1982).

<sup>3</sup> New York City, N.Y., Charter § 61 (1977).

<sup>4</sup> At the time of the suit, section 67 of the New York City Charter stated that it was the duty of the Board of Estimate to:

1. Grant leases of city property and concessions for the use of city property and enter into leases of property to the city for city use.
2. Make recommendations to the mayor or the council in regard to matters of city policy whenever requested or on its own initiative.
3. Hold public hearings on any such matter of city policy or other matters within the scope of its responsibilities whenever requested by the mayor or required to do so by this charter or other provision of law or whenever the public interest will be benefited thereby.
4. Have final authority respecting the use, development and improvement of city land.
5. Have authority to approve standards, scopes and final designs of capital projects.
6. Have power to supersede a community board or withdraw from a community board delegated powers of such community board for violation of law, malfeasance or misfeasance by three-quarters vote after notice to members of the community board and a public hearing.
7. Hold a hearing on tax abatement applications relating to the development of city land where the granting of such applications involves the exercise of administrative discretion by any city agency.

Id. § 67.

<sup>5</sup> The Mayor initially submits a proposed budget to the Board, whose members (other than the Mayor) may then "increase, decrease, add or omit any unit of appropriation . . .

The predecessor of the Board of Estimate was created in 1864 to estimate the expense of operating a metropolitan police force for the cities of New York and Brooklyn, which at that time were separate entities. In 1898, the counties of New York, Kings, and Richmond, along with parts of other counties and a variety of municipalities and special purpose districts, consolidated to form what is now New York City. The Board's makeup was designed to give the boroughs included in the newly formed city some voice in metropolitan decisions affecting local matters.<sup>6</sup>

*B. Morris Case: Round I*

In December 1981, Beverly Morris and two other registered voters from the Borough of Brooklyn filed suit against Defendants City of New York, Mayor Edward I. Koch, and the other seven members of the Board of Estimate.<sup>7</sup> Plaintiffs, who were represented by the New York Civil Liberties Union, contended that the electoral structure for selecting members of the Board of Estimate devalued their right to vote by assigning one vote on the Board to each borough (cast by the borough's president), despite the wide variance in population among the boroughs. For example, the 1980 census revealed a Brooklyn population of 2,230,936 and a Staten Island population of only 352,151.<sup>8</sup>

Plaintiffs claimed this voting structure violated the "one-person, one-vote" requirement of the Equal Protection Clause of the fourteenth amendment.<sup>9</sup> The "one-person, one-vote" requirement mandates that election districts, as nearly as practicable, must have equal populations. *Reynolds v. Sims*<sup>10</sup> applied the requirement to state legislative districts. It was later extended to general purpose local governments<sup>11</sup> and school boards.<sup>12</sup> Subsequently, exceptions were made for certain spe-

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or add or omit or change any terms or conditions of it." Charter, § 120 (1977). The Board may not, however, reject the proposal itself. The Mayor can veto any changes made by the Board, but this veto can be overridden by a two-thirds vote of the Board (again excluding the Mayor's two votes) or by a two-thirds vote of the City Council. For a description of the substantial changes proposed by the New York City Charter Revision Commission, see *infra* note 91 and accompanying text.

<sup>6</sup> Brief for Municipal Appellants and Appellant Straniere at 4, *Board of Estimate v. Morris*, 109 S. Ct. 1433 (1989).

<sup>7</sup> *Morris v. Board of Estimate*, 551 F. Supp. 652 (E.D.N.Y. 1982).

<sup>8</sup> See City of New York Dep't of City Planning, Demographic Profile 6-17 (1983).

<sup>9</sup> 551 F. Supp. at 653.

<sup>10</sup> 377 U.S. 533 (1964).

<sup>11</sup> See *Avery v. Midland County*, 390 U.S. 474 (1968).

<sup>12</sup> See *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970); see also *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

cial purpose districts.<sup>13</sup> Some early cases also exempted judicial elections,<sup>14</sup> and others seemed to exempt indirectly elected, non-legislative bodies.<sup>15</sup>

The *Morris* case was heard in the U.S. District Court for the Eastern District of New York before Judge Neaher. The district court initially granted summary judgment for defendants, based upon the court's reasoning that the Board, because it was effectively appointed by law,<sup>16</sup> was not an elected body, and that its functions were administrative and executive rather than legislative (with the exception of budgetary matters).<sup>17</sup> For these reasons, the district court ruled that the Board did not fall within the purview of the fourteenth amendment's one-person, one-vote standard.<sup>18</sup>

The Court of Appeals for the Second Circuit reversed the district court's decision and remanded the case for further findings.<sup>19</sup> Specifically, the Second Circuit held that the fourteenth amendment applies to *ex officio* boards, where membership on such boards is automatic upon election to office.<sup>20</sup> The Second Circuit also rejected the district court's distinction between legislative and administrative functions, pointing out that it had been abandoned by the Supreme Court.<sup>21</sup> Finally, the Second Circuit observed that Staten Island's loss of a significant amount of its current power on the Board if plaintiffs' proposed adjustment in the electoral structure were implemented would be a natural and acceptable "characteristic of a representative democracy."<sup>22</sup>

<sup>13</sup> See *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (water storage board); *Ball v. James*, 451 U.S. 355 (1981) (water and electricity supply board).

<sup>14</sup> See *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), *aff'd mem.*, 409 U.S. 1095 (1973).

<sup>15</sup> See *Sailors v. Board of Educ.*, 387 U.S. 105 (1967). But see *Hadley*, 397 U.S. at 55-56. See generally M.D. Gelfand, *Federal Constitutional Law and American Local Government* 1-53 (1984).

<sup>16</sup> 551 F. Supp. at 656. See *supra* note 3 and accompanying text.

<sup>17</sup> 551 F. Supp. at 656 (citing *Bergerman v. Lindsay*, 25 N.Y. 2d 405, 409, 255 N.E. 2d 142, 144, 306 N.Y.S. 2d 898, 901 (1969) (New York City Board of Estimate not sufficiently legislative in nature to be covered by one-person, one-vote requirement), cert. denied, 398 U.S. 955 (1970); *Sailors*, 387 U.S. 105). See *supra* note 15 and accompanying text.

<sup>18</sup> 551 F. Supp. at 657.

<sup>19</sup> *Morris v. Board of Estimate*, 707 F.2d 686 (2d Cir. 1983) (Lasker, J., joined by Kaufman and Newman, JJ.).

<sup>20</sup> *Id.* at 689.

<sup>21</sup> *Id.* at 690 (quoting *Hadley*, 397 U.S. at 55-56).

<sup>22</sup> *Morris*, 707 F.2d at 691.

C. *The Morris Case: Round II*

On remand, Judge Neaher bifurcated the district court's proceedings, resolving first the issues of methodology and degree of malapportionment in the election districts<sup>23</sup> and later the question of possible justifications for the deviation from population equality.<sup>24</sup> The court limited its analysis to quantitative malapportionment because plaintiffs had not included the qualitative aspect of voting rights in their case.<sup>25</sup>

The district court held that the appropriate standard for determining the extent of deviation from population equality was the test articulated in *Abate v. Mundt*.<sup>26</sup> The court added that the presence of at-large members on the Board did not render this test inapplicable,<sup>27</sup> nor did those positions require a modification of the *Abate* test.<sup>28</sup> Judge Neaher further found that the Board could not be analogized to a flotalial district<sup>29</sup> for the purpose of determining the constitutionality of its structure.<sup>30</sup> He reasoned that the Board was a complete legislative body, while a flotalial district is only one component of such a body. Therefore, in applying the *Abate* test to calculate population deviation, the effect of the at-large representatives was not considered by the district court.<sup>31</sup> Application of the unmodified *Abate* test produced a deviation from population equality of 132.9% between the City's most

<sup>23</sup> *Morris v. Board of Estimate*, 592 F. Supp. 1462, 1464 (E.D.N.Y. 1984).

<sup>24</sup> See *infra* notes 33-44 and accompanying text.

<sup>25</sup> 592 F. Supp. at 1465-66. For a discussion of the qualitative issue — racial vote dilution — raised by the Board's electoral structure, see *infra* notes 108-118 and accompanying text.

<sup>26</sup> 403 U.S. 182 (1971). The Supreme Court held that "electoral apportionment must be based on the general principle of population equality" and applied this requirement to the electoral structure for the Rockland County (N.Y.) legislature, which was based upon districts that corresponded with the County's five towns. *Id.* at 185. The Court upheld the apportionment plan, despite its total deviation of 11.9%, "based on the long tradition of overlapping functions and dual personnel in Rockland County government and on the fact that the plan. . . [did] not contain a built-in bias tending to favor particular political interests or geographic areas." *Id.* at 187.

<sup>27</sup> 592 F. Supp. at 1467.

<sup>28</sup> *Id.* at 1471.

<sup>29</sup> A flotalial district contains two or more component districts but is itself only one district in a larger electoral plan. For example, a jurisdiction might be composed of six districts. Districts 1 through 6, with Districts 5 and 6 (flotalial districts) being composed of, respectively, Districts 1 and 2 and Districts 3 and 4. Voters in Districts 1, 2, 3, and 4 elect one representative from their component (single-member) district and participate in the election of an additional representative from the flotalial district of which they are a part. See generally Moncrief and Joula, *When the Courts Don't Compute: Mathematics and Flotalial Districts in Legislative Reapportionment Cases*, 4 J.L. & Pol. 737 (1988). For further discussion of flotalial districts, see *infra* note 77.

<sup>30</sup> 592 F. Supp. at 1469.

<sup>31</sup> *Id.* at 1474.

populous borough, Brooklyn, and its least populous, Staten Island.<sup>32</sup>

In the second part of the proceedings on remand, the district court first considered whether the interests advanced by the City to justify the enormous deviation were valid, then whether the electoral structure for the Board of Estimate furthered those interests.<sup>33</sup> While noting that the Supreme Court has not clearly defined all that may be considered a valid or legitimate state or local policy in this area,<sup>34</sup> the district court rejected several interests advanced by defendants as "manifestly invalid."<sup>35</sup> The district court did catalog several of defendants' proffered interests which it found to be valid, including continuing a history of "borough residential-political consciousness," preserving natural borough boundaries, and protecting the integrity of subordinate governmental units.<sup>36</sup>

The district court also identified the effectiveness of the Board as a legitimate policy consideration, distinguishing between the undifferentiated desire for strong government, rejected by the court as too gen-

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<sup>32</sup> *Id.* at 1475. Using the *Abate* methodology, the 132.9% deviation from population equality for the Board of Estimate is the sum of the percentage (57.7) by which Brooklyn, the City's most populous district (population 2,230,936), exceeds the ideal district population (1,414,206), and the percentage (75.2) by which Staten Island, the least populous (352,151), falls below this ideal district size. See *Morris*, 109 S. Ct. at 1441 n.7. The ideal district size is the average population of all the districts in the jurisdiction. See *Connor v. Finch*, 431 U.S. 407, 416-18 (1977); *White v. Regester*, 412 U.S. 755, 761-64 (1973). See generally Gelfand, *supra* note 15, at 11 n.48.

<sup>33</sup> 647 F. Supp. at 1466-67 (citing *Brown v. Thomson*, 462 U.S. 835, 852 (1983) (Brennan, J., dissenting)). Brennan's dissent argued that a court, upon a finding of 10% variance, should consider the policy goals advanced as explanation by the government; determine whether these goals, if legitimate, were furthered by the electoral plan in question; and then decide whether the deviation, even if justified, is small enough to pass constitutional muster.

Though *Brown* itself allowed a substantial deviation, the case arose in the unusual posture of a challenge only to a single legislative district, which corresponded with the state's least populous county. The *Brown* dissenters specifically noted that the decision was limited to its facts. *Brown*, 462 U.S. at 850.

<sup>34</sup> 647 F. Supp. at 1467.

<sup>35</sup> *Id.* at 1468. Judge Neaher found that, contrary to defendants' assertions, there was demonstrable injury to the population inflicted by the existing electoral plan, specifically the devaluation of some citizens' votes, even though no distinct racial or political group was, at that time, involved in the case. This injury existed despite the claimed ameliorative effect of the at-large members. *Id.* at 1468-69. The district court also held that the alleged singularity of the Board had no political utility and, therefore, could not be considered a valid government interest. *Id.* at 1470. The court rejected the City's desire for a strong government as too general a claim. *Id.* at 1470 (quoting *Karcher v. Daggett*, 462 U.S. 725, 741 (1983)). Finally, the court found that the boroughs, as governmental entities, were not entitled to equal representation because the crux of the one-person, one-vote equal protection rule is the voting rights of individual citizens, not of governmental subunits. 647 F. Supp. at 1470-71.

<sup>36</sup> 647 F. Supp. at 1471-72 (citing *Abate*, 403 U.S. at 185).

eral,<sup>37</sup> and the narrower objective of maintaining an efficient Board.<sup>38</sup> The court treated the need for meaningful representation for citizens of all boroughs as an important interest, but it evaluated that interest in terms of influence and power in rough proportion to population distribution, not as a concept of one-borough, one-vote.<sup>39</sup> The court also recognized the role the Board played in maintaining balance within city government through its ability to check the power of the mayor, "markedly curbing extradepartmental ascendancy," and its function as a forum for borough interests, supplementing the City Council.<sup>40</sup>

Defendants were required to demonstrate, in light of these cognizable interests, that there was no structural plan that would "satisfactorily embrace the legitimate considerations and diminish the deviation" present under the current scheme.<sup>41</sup> The district court accepted the electoral systems suggested by plaintiffs<sup>42</sup> as potential alternatives that, while still furthering the valid policy considerations recognized by the court, more closely met the one-person, one-vote mandate of population equality.<sup>43</sup> The court's acceptance of alternatives undercut defendants' ability to carry their burden of justification; therefore, the court found the current structure of the Board unconstitutional.<sup>44</sup>

On appeal, the Second Circuit affirmed the lower court's decisions. Judge Oakes wrote the opinion of the court, and Judge Newman, who had been on the panel that considered the first appeal in the case, separately concurred.<sup>45</sup> The Second Circuit held that the district court had properly adopted the unmodified *Abate* test<sup>46</sup> because the one-person, one-vote rule requires that all qualified voters have an "equally effective voice in the election process."<sup>47</sup> The proper inquiry concerns the relative power of voters to elect representatives, not their relative power to influence particular Board decisions.<sup>48</sup> Therefore, reasoned the court, the added influence a voter may have due to the presence on the

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<sup>37</sup> See supra note 35 and accompanying text.

<sup>38</sup> 647 F. Supp. at 1472-73.

<sup>39</sup> Id. at 1474.

<sup>40</sup> Id. at 1475.

<sup>41</sup> Id.

<sup>42</sup> Plaintiffs' proposals included a weighted voting system, a proportional representation system, and a borough residency requirement for the Board. Id. at 1476-78. Weighted voting is discussed infra notes 95-107 and accompanying text.

<sup>43</sup> 647 F. Supp. at 1478.

<sup>44</sup> Id. at 1478-79.

<sup>45</sup> *Morris v. Board of Estimate*, 831 F.2d 384 (2d Cir. 1987).

<sup>46</sup> Id. at 387.

<sup>47</sup> Id. at 388 (emphasis in original) (quoting *Avery v. Midland County*, 390 U.S. 474, 480 (1968)).

<sup>48</sup> 831 F.2d at 389.

Board of at-large members should not be a consideration in determining proper apportionment.<sup>49</sup> Judge Oakes acknowledged that if the at-large members always and necessarily controlled the decisions of the Board, analysis of voting power might have required consideration of the role of the at-large members.<sup>50</sup>

The Second Circuit also affirmed the application of the *Abate* test only to the single-member districts (the boroughs),<sup>51</sup> reasoning that each borough president represented a constituency separate from, not a component of, the constituency represented by the at-large members.<sup>52</sup> These constituencies are differentiated by the interest a citizen may have as a resident of, for example, Brooklyn, and the interest the same citizen may have as a resident of New York City.

Judge Oakes opined that combining the representation a voter has in the at-large officials (Mayor, City Council President, and Comptroller) with the representation the voter has in his or her borough president would result in a useless measure that could not reflect the real influence of any individual voter over Board decisions.<sup>53</sup> Thus, the Second Circuit rejected the Banzhaf Index as unrealistic in terms of practical electoral politics, because the central premise of the Banzhaf analysis is that fairness in voting power should be measured by the ability of an individual voter, through the election of a particular representative, to affect the outcome of Board decisions.<sup>54</sup>

The Second Circuit upheld the district court's finding that the interests proffered by the City did not justify the population deviation, even assuming that a deviation of 132.9% could be justified.<sup>55</sup> Judge Oakes also pointed out that the lower court's finding — that alternative electoral structures would further the City's goals while more closely approximating population equality — precluded maintenance of the current

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<sup>49</sup> *Id.* at 388-89.

<sup>50</sup> *Id.* at 389 n.5. In a concurring opinion, Judge Newman agreed with Judge Oakes that, in this case, the power of the at-large members was not sufficient to overcome the population variance among the single-member districts. He observed, however, that there was a threshold beyond which the size of the voting power of the at-large members would become not only relevant to a determination of constitutional apportionment, but decisive. *Id.* at 394-95 (Newman, J., concurring). That threshold was not reached under the facts of *Morris*. *Id.* at 395.

<sup>51</sup> *Id.* at 391.

<sup>52</sup> *Id.* at 392.

<sup>53</sup> *Id.* at 392-93.

<sup>54</sup> *Id.* at 390. The Banzhaf Index is described and analyzed *infra* notes 66-73 and accompanying text.

<sup>55</sup> 831 F.2d at 393. Though expressing doubt that such deviation could ever be constitutional, the Second Circuit did not reach that question.

system.<sup>56</sup>

### III. THE SUPREME COURT'S OPINION

#### A. *One-Person, One-Vote Reaffirmed*

The City and Intervenors Straniere and Ponterio appealed the Second Circuit's judgment to the U.S. Supreme Court. Amicus briefs, supporting various viewpoints, were filed by the Citizens Union of New York, former Mayor Beame, former Manhattan Borough President Sutton, State Senator Marchi, Peter Vallone and other City Council members, Professor John Banzhaf, and the Staten Island League for Better Government. The Court did not, however, have the benefit of any briefs from groups representing governments outside New York.

In *Morris*, the Supreme Court unanimously reaffirmed that the one-person, one-vote principle applies to elected local governmental bodies, including the Board of Estimate.<sup>57</sup> In a strongly worded opinion, Justice White,<sup>58</sup> writing for a unanimous Court, rejected the City's "suggestion that because the Board of Estimate is a unique body wielding non-legislative powers, board membership elections are not subject

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<sup>56</sup> *Id.* See supra notes 41-44 and accompanying text.

<sup>57</sup> *Board of Estimate v. Morris*, 109 S. Ct. 1433 (1989).

<sup>58</sup> Justice White has written a prodigious number of voting rights opinions for the Court. See, e.g., *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987) (upholding a broad interpretation of U.S. Attorney General's power under § 5 of the Voting Rights Act of 1965, codified at 42 U.S.C. § 1973); *Davis v. Bandemer*, 478 U.S. 109 (1986) (claim of political party gerrymandering justiciable under Equal Protection Clause); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166 (1985) (change of date for election by jurisdiction "covered" under § 4 of Voting Rights Act required preclearance under § 5 of that Act); *City of Port Arthur v. United States*, 459 U.S. 159 (1982) (preclearance under § 5 of the Voting Rights Act properly conditioned upon requirement that there be no majority-vote requirement for certain at-large elections); *Rogers v. Lodge*, 458 U.S. 613 (1982) (discriminatory purpose, required in racial vote dilution cases premised upon Equal Protection Clause, can be proven by circumstantial evidence); *Wise v. Lipscomb*, 437 U.S. 535 (1978) (court's endorsement of city council's electoral plan does not override preclearance requirement of § 5 of the Voting Rights Act); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (upholding state legislative reapportionment plan, which increased percentage of nonwhites in certain districts in order to comply with Justice Department requirements under § 5 of the Voting Rights Act); *City of Richmond v. United States*, 422 U.S. 358 (1975) (annexation that decreases percentage of black population in district does not violate Voting Rights Act if there are objectively verifiable, legitimate reasons for the annexation); *White v. Regester*, 412 U.S. 755 (1973) (upholding remedy for racial vote dilution in local government structure); *White v. Weiser*, 412 U.S. 783 (1973) (upholding a strict standard for deviations from one-person, one-vote in congressional districting); *Ely v. Klahr*, 403 U.S. 108 (1971) (allowing election under inadequate plan because of special circumstances); *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (establishing one-person, one-vote and addressing racial vote dilution issues in a multimember legislative district);

to review under the prevailing reapportionment doctrine."<sup>59</sup> Instead, he insisted, "No distinction between authority exercised by state assemblies, and the general governmental powers delegated by these assemblies to local, elected officials, suffices to insulate the latter from the standard of substantial voter equality."<sup>60</sup> After citing *Reynolds*, *Avery*, and *Hadley*, Justice White explained that

[t]hese cases are based on the propositions that in this country the people govern themselves through their elected representatives and that "each and every citizen has an inalienable right to full and effective participation in the political processes" of the legislative bodies of the Nation, state, or locality as the case may be.<sup>61</sup>

More specifically:

If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts. Hence the Court has insisted that seats in legislative bodies be apportioned to districts of substantially equal populations.<sup>62</sup>

Justice White briefly reviewed the Board's extensive land use, franchise, contracting and budgetary powers,<sup>63</sup> and then concluded that the Board fit "comfortably within the category of governmental bodies whose powers are general enough and have sufficient impact throughout the district' to require that elections to the body comply with Equal Protection strictures."<sup>64</sup>

Next, the Court rejected the City's argument that the Board should

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*Avery v. Midland County*, 390 U.S. 474 (1968) (extending one-person, one-vote requirement to general purpose local governments).

See also *Thornburg v. Gingles*, 478 U.S. 30, 82 (1986) (White, J., concurring) (interpreting 1982 amendment of § 2 of the Voting Rights Act); *Oregon v. Mitchell*, 400 U.S. 112, 229 (1970) (White, J., concurring and dissenting) (regarding Congress's power to ban literacy tests for voters and to regulate voting rights of 18 year-olds).

<sup>59</sup> *Morris*, 109 S. Ct. at 1437.

<sup>60</sup> *Id.* (citing *Avery v. Midland County*, 390 U.S. 474, 481 (1968); *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970)).

<sup>61</sup> 109 S. Ct. at 1438 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).

<sup>62</sup> 109 S. Ct. at 1438.

<sup>63</sup> See *supra* notes 4-5 and accompanying text. Given the extensive powers of the Board of Estimate, the Court could not rule, and the defendants could not even argue, that the Board was similar to the limited purpose water storage and electricity supply districts that had been excluded from the one-person, one-vote requirement in *Tulare*, 410 U.S. 719 (1973) and *Ball*, 451 U.S. 355 (1981). See *supra* notes 13-15 and accompanying text.

<sup>64</sup> 109 S. Ct. at 1439 (quoting *Hadley*, 397 U.S. at 54).

be allowed to survive the constitutional challenge because the three at-large members (those who were elected citywide) held six of the eleven votes on the Board. The Court observed that the City's calculation was erroneous because the at-large members often did not vote together, thus allowing a substantial role for representatives elected from those boroughs with wide population disparities.<sup>65</sup> Further, the mayor did not vote at all on many budgetary matters, thus greatly increasing the role of the borough presidents of smaller boroughs in that important field.

### B. Banzhaf Index Rejected

Despite this discussion of the actual voting patterns on the Board, the Court rejected use of the Banzhaf Index as a mechanism for measuring deviations of the election districts from population equality.<sup>66</sup> Use of the Index would have resulted in a deviation in "voting power" on the Board of 30.8% on non-budgetary matters, and an even higher percentage on budgetary issues (because the mayor does not vote).<sup>67</sup> Cit-

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<sup>65</sup> 109 S. Ct. at 1439. Later in his opinion, Justice White quoted the portion of Judge Oakes' opinion debunking the City's argument that the at-large members formed a controlling voting bloc on the Board.

"[I]n fact, there is no such 'bloc'. Rather, this supposed 'bloc' consists of three persons having two votes each who are free to, and do, vote on different sides of various issues. Only if all three vote together are they bound to carry the day. . . . It follows that there is no majority-at-large voting bloc bound to control the Board and that this case is far removed from the hypotheticals offered by the Board and Amicus Banzhaf."

Id. at 1441 n.6 (quoting *Morris*, 831 F.2d 384, 389 n.5 (1987)). See also *supra* note 5.

<sup>66</sup> The Banzhaf Index was first developed by John J. Banzhaf III while he was in law school. John Banzhaf is now Professor of Law and Legal Activism at George Washington University Law Center. The Index was explained and refined in numerous articles, and several courts have relied on the Index. See Banzhaf, *One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation*, 36 *Geo. Wash. L. Rev.* 808 (1968); Banzhaf, *Multi-Member Electoral Districts — Do They Violate the "One Man, One Vote" Principle?*, 75 *Yale L.J.* 1309 (1966); Banzhaf, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 *Rutgers L. Rev.* 317 (1965). See also *infra* notes 95-98 and 101-102 and accompanying text.

<sup>67</sup> 109 S. Ct. at 1440. Professor Banzhaf himself filed an amicus brief both in the Second Circuit and in the Supreme Court, arguing that he had an interest in defending the proper use of the Index. Justice White provided the following description of how the Index would be applied to the Board of Estimate:

[T]he method. . . to determine an individual voter's power to affect the outcome of a board vote first calculates the power of each member of the board to affect a board vote, and then calculates voters' power to cast the determining vote in the election of that member. . . . A citizen's voting power through each representative is calculated by dividing the representative's voting power by the square root of the population represented. . . . Calculated in this manner, the maximum deviation in the voting power to control Board outcomes is 30.8% on

ing his own opinion in *Whitcomb v. Chavis*,<sup>68</sup> and the opinion of Judge Oakes below, Justice White concluded that the Banzhaf Index was "unrealistic" because it failed to take account of other factors affecting actual election outcomes, e.g., partisanship, prior voting patterns and race. He also described the Index as merely a "theoretical explanation of each board member's power to affect the outcome of board actions."<sup>69</sup> Though Justice White conceded that the approach of *Reynolds* and its progeny may be "imperfect," because it does not focus upon how a legislature works in practice, he insisted that "it does assure that legislators will be elected by and represent citizens in districts of substantially equal size."<sup>70</sup>

This approach is parallel to the Supreme Court's analysis in racial vote dilution cases, which has focused upon racially polarized voting under certain electoral structures,<sup>71</sup> and has deferred broadly to the findings and conclusions of the lower courts.<sup>72</sup> These racial vote dilution cases involve qualitative aspects of voting rights that are much harder to measure than the quantitative mandate of one-person, one-vote. Yet in both types of cases the Court, rather than focusing upon the "difficult and ever-changing task" of measuring how a local legislative body works in practice, stresses key measurable variables at the level of the individual citizen or voter (population equality, or demographic patterns and racially polarized voting). The Court rejects "a mathematical calculation that itself stops short of examining the actual day-to-day operations of the legislative body."<sup>73</sup> Thus, in both situa-

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non-budget matters, and, because of the Mayor's absence, a higher deviation of budget issues.

*Id.* at 1439-40. For a more elaborate explanation of how the Banzhaf Index operates in a number of contexts, see Brief of Amicus Curiae Prof. John Banzhaf in *Partial Support of Appellant, Board of Estimate v. Morris*, 109 S. Ct. 1433 (1989) (Nos. 87-1022, 87-1112) (emphasis in original).

<sup>68</sup> 403 U.S. 124, 145-46 (1971) (described in note 58).

<sup>69</sup> 109 S. Ct. at 1440. For similar reasons, he rejected intervenor-defendant Ponterio's suggestion that the Court should focus only on each borough representative's tie-breaking power on the board. Not only did this approach suffer from the same flaws as the Banzhaf Index, which it merely modified, but, to some extent, it was considered inconsistent with the Court's prior insistence that equal protection analysis in voting cases should focus "on representation of people, not political or economic interests." *Id.* at 1441 n.5 (citing *Reynolds*, 377 U.S. 533, *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (invalidating durational residency requirement for voter registration)).

<sup>70</sup> 109 S. Ct. at 1440. The Court added that the "personal right to vote is a value in itself." *Id.*

<sup>71</sup> See *Thornburg v. Gingles*, 478 U.S. 30 (1986) (focusing upon compactness of racial or language minority group and racially polarized voting by minority and majority under certain demographic patterns).

<sup>72</sup> See *id.* at 77-79; *Rogers v. Lodge*, 458 U.S. 613, 621 (1982).

<sup>73</sup> 109 S. Ct. at 1440 (*Morris* court rejecting Banzhaf Index). See also the *Gingles* test,

tions, the Court prefers not to attack complex and detailed political analysis with a tool it believes can clear only half of the thicket. However, the Court's own methodology is probably incomplete from the political scientist's perspective, and may ultimately prove incomplete, even for the judicial task of restructuring local electoral arrangements.

*C. Inclusion of At-Large Members in the Calculation of Deviation from Population Equality and Consideration of the City's Attempted Justifications*

In *Morris*, a clear majority of the Supreme Court also rejected the lower court's ruling that the at-large members should not be included when calculating the deviation from population equality of the Board's electoral system. Justice White, joined by six members of the Court, observed that the Second Circuit employed the same formula for measuring deviation that the Supreme Court has "utilized without exception since 1971," and he acknowledged that his opinion in *Avery* had not considered the effect of the at-large members upon the one-person, one-vote calculation.<sup>74</sup> He noted, however, that the treatment of at-large members had not been raised as an issue in *Avery* as it was in *Morris*. He opined that "the voters in each borough vote for the at-large members as well as their borough president, and they are also represented by those members."<sup>75</sup>

Justices Brennan and Stevens, though joining in the remainder of the opinion, disagreed with the majority's inclusion of at-large members in the calculation. They agreed with Judge Oakes' observation that combining at-large and single-member positions in a calculation wrongly mixes two different forms of representation.<sup>76</sup>

Though factoring the at-large members into the calculation appeared to reduce the deviation to about 78%,<sup>77</sup> the Court still found the City's

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described *supra* note 71, which is essentially a simplifying gloss upon the many factors identified in the Senate Report on the 1982 Amendments to the Voting Rights Act of 1965, and Justice White's opinion in *Gingles*, suggesting a further simplification. 478 U.S. at 82-83 (White, J., concurring).

<sup>74</sup> 109 S. Ct. at 1441-42 & n.8.

<sup>75</sup> *Id.* at 1441. Hence, he considered at-large members "a major component in the calculation [that] should not be ignored." *Id.* at 1441-42.

<sup>76</sup> See *id.* at 1443 (Brennan J., concurring in part and concurring in the judgment). See also *supra* notes 51-54 and accompanying text.

<sup>77</sup> The Court based this figure upon agreement of the parties at trial, with some confirmation in the oral argument. See 109 S. Ct. at 1442 & n.9. The computation appears to be based upon the "component method" used to calculate deviation when floterial districts are involved. See *Kilgarlin v. Martin*, 252 F. Supp. 404, 422 n.28 (S.D. Tex. 1966), *rev'd in part and remanded sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967).

proffered interests insufficient to justify such a large deviation. In particular, Justice White relegated to a footnote his firm rejection of defendants' strongly pressed argument that the longevity of the Board could somehow justify the substantial deviation from population equality.<sup>78</sup> For the same reasons the courts below had concluded that this and related city interests could not justify a 132% deviation, the Supreme Court concluded that they could not justify a 78% deviation.<sup>79</sup> Indeed, Justice White argued, "no case of ours has indicated that a deviation of some 78% could ever be justified."<sup>80</sup>

Justice Blackmun's concurring opinion agreed with the Court's inclusion of the at-large members in the calculation, and, somewhat hesitantly, agreed with the rejection of the Banzhaf Index.<sup>81</sup> He went on to note, however, that even the 30.8% deviation calculated by the Banzhaf Index was too large to be constitutional.<sup>82</sup>

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Under the component method, each district (in this case, borough) is considered to "possess," in addition to its individual representative (the borough president), a "share" of the at-large representatives (Mayor, Comptroller, and City Council President) proportional to its population. See Moncrief & Joula, *supra* note 29, at 741-45.

Another method (the "aggregate method") of calculating the deviation had been proposed by intervenor Ponterio, but was rejected by the district court. *Morris*, 592 F. Supp. at 1469-70. Under the aggregate method of calculation, the total population of the floterial and underlying single-member districts is divided by the total number of district and floterial representatives. The resulting number is considered to be the "district" size for that area, which is then compared to the ideal district size for the jurisdiction as a whole. See Parker, *The Virginia Legislative Reapportionment Case: Reapportionment Issues in the 1980's*, 5 *Geo. Mason U.L. Rev.* 1, 33 (1982). The aggregate method has been criticized for being based upon unrealistic assumptions. See *id.* at 34 ("this method is extremely misleading"); Moncrief & Joula, *supra* note 29, at 744.

<sup>78</sup> "[W]e are not persuaded by arguments that explain the debasement of citizens' constitutional right to equal franchise based on exigencies of history or convenience." 109 S. Ct. at 1442 n.10 (citing *Reynolds*, 377 U.S. 533 (1964), and other early one-person, one-vote cases). Nor can longevity justify an electoral system that produces racially discriminatory results in violation of § 2 of the Voting Rights Act. See *Westwego Citizens for Better Government v. Westwego*, 872 F.2d 1201, 1210 (5th Cir. 1989). The authors were counsel for appellants in the *Westwego* case.

<sup>79</sup> 109 S. Ct. at 1442-43. While observing that the courts below had rejected the City's asserted justifications because the proffered interests could be served by less discriminatory methods of structuring the Board, the Supreme Court took no position on the constitutionality of the alternative board structures discussed by the lower courts. See *id.* at 1443 n.11. See *supra* notes 41-44, 56, and accompanying text.

<sup>80</sup> 109 S. Ct. at 1442 (citing *Brown*, 462 U.S. 835 (1983); *Mahan v. Howell*, 410 U.S. 315 (1973) (16.4% deviation)). In fact, *Brown* had upheld a greater deviation, but the case was restricted to its facts. See *supra* note 33. This strong statement by the *Morris* Court should prevent any possible expansion of the fact-specific *Brown* decision.

<sup>81</sup> 109 S. Ct. at 1443 (Blackmun, J., concurring in part and concurring in the judgment).

<sup>82</sup> *Id.*

## IV. UNRESOLVED ISSUES

A. *Why Did The Supreme Court Take the Case?*

Justice Blackmun's opinion raises the question of why the Supreme Court agreed to full briefing and argument in *Morris*. After all, the Second Circuit had correctly invalidated the electoral structure of the Board of Estimate, so statements about the Banzhaf Index, and even those regarding inclusion of the at-large members, are really dicta, unnecessary to the decision that the disparity among the populations of the boroughs is too great to pass muster under the one-person, one-vote standard.

Indeed, given the near unanimity on the Court and the small contribution made by the majority opinion to one-person, one-vote jurisprudence, one must wonder why the Court noted probable jurisdiction rather than summarily affirming the Second Circuit's decision. Discussions with several actors involved in various aspects of the litigation reveal that, as with many cases of group decisionmaking, there may be multiple explanations. One possibility is that some Justices wrongly perceived that there was a more significant issue lurking in the case, e.g., racial vote dilution, a special purpose district with a general franchise or a non-legislative or otherwise unique historical governing body.<sup>83</sup> Another possibility is that some Justices felt it worthwhile to reaffirm the one-person, one-vote standard prior to the 1990 census, which will require reapportionment of the nation's state and general purpose local governments. Though this motive alone cannot be considered a sufficient reason to take the case, as there was little question that the standard continued to apply, the transcript of the argument suggests some Justices were concerned about a clear articulation of the appropriate methodology for calculating deviations.<sup>84</sup> Also, there was some value in the *Morris* Court's insistence that large deviations would not be tolerated, and that *Brown v. Thomson* would be restricted to its peculiar facts.<sup>85</sup> Unfortunately, as explained below, the new aspects of the decision — the rejection of the Banzhaf Index and the inclusion of the at-large members in the deviation calculus — are likely to generate

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<sup>83</sup> See Jurisdictional Statement, at i-ii, *Board of Estimate v. Morris*, 109 S. Ct. 1433 (1989) (Nos. 87-1022, 87-1112) (describing the Board as a "limited-purpose regional governing body for a municipality that is an amalgam of numerous different political subdivisions," as a body with "non-legislative local powers," and as a "substate regional governing body.").

<sup>84</sup> See Official Transcript Proceedings Before the Supreme Court of the United States at 14-24, 39-41, 49-50, *Board of Estimate v. Morris* (Nos. 87-1022 and 87-1112).

<sup>85</sup> See *supra* note 80 and accompanying text.

both new problems and more litigation for several cities other than New York.

A more general explanation for accepting the case is that members of the Court felt it inappropriate for the federal courts to invalidate the electoral structure of the largest local government in the United States without full briefing and argument. This notion seems to be reinforced by the belief among at least some Justices that cases coming to the Court on appeal had a greater claim to the Court's attention than those raised by petition for certiorari.<sup>86</sup> Yet the Court, while allowing the City full briefing and argument, gave the City's principal arguments short shrift.

Furthermore, the one-year delay that resulted from the Court agreeing to hear the case both delayed and redirected the New York City charter revision process.<sup>87</sup> A Charter Revision Commission had been appointed by Mayor Koch on December 16, 1986, in response to the November ruling by the district court that the electoral structure for the Board of Estimate violated the one-person, one-vote requirement.<sup>88</sup> After months of study and discussion, the Commission's Chairman presented several far-ranging proposals concerning the Board of Estimate for the Commission's approval, but the announcement that the Supreme Court had noted probable jurisdiction in *Morris* caused the Commission to delay consideration of any proposals affecting the powers of elected officials until after the Court's final decision.<sup>89</sup>

The Commission's term expired in November 1988, so the Mayor had to appoint a new Commission with some overlapping member-

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<sup>86</sup> Compare Scalia, Oliver Wendell Holmes Bicentennial Lecture, Harvard Law School, Feb. 14, 1989, at 17-18 (forthcoming at 56 U. Chi. L. Rev. —, — (fall 1990)) (suggesting that the Court may have felt compelled to take more dormant commerce clause cases than desirable because they fall within the Court's "mandatory" jurisdiction) with R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 241-42 (6th ed. 1986) (listing commentators who suggest that the Court treats certiorari and appeal cases much the same). The Court's jurisdiction on appeal was largely eliminated by Act of June 27, 1988, Pub. L. No. 100-352, §§ 1, 2, 102 Stat. 662 (repealing in whole or in part 28 U.S.C. §§ 1252, 1254).

<sup>87</sup> Plaintiffs-Appellees had informed the Court: "The Charter Revision Commission has already completed its first round of public hearings. Draft ballot proposals are expected this spring. Regardless of the outcome of this litigation, reform of the Board of Estimate is all but assured." Motion to Affirm at 18, *Board of Estimate v. Morris*, 109 S. Ct. 1433 (1989) (Nos. 87-1022, 87-1112).

<sup>88</sup> See *supra* notes 23-44 and accompanying text.

<sup>89</sup> See *High Court Takes Appeal Over Fate of Estimate Board*, N.Y. Times, Apr. 5, 1988, at A1, col. 4 (city ed.); *Tumult in the Political Laboratory*, *id.* at A22, col. 1 (city ed.) (editorial). Instead, the Commission presented five proposals on other aspects of the Charter to the voters in November 1988, all of which were approved.

ship.<sup>90</sup> The new Commission's proposals, made after the Supreme Court's decision, call for abolition of the Board of Estimate and reallocation of its powers and those of other city offices. The proposals are now scheduled for a November 7, 1989, referendum.<sup>91</sup> Elections for the positions of Mayor, Comptroller, City Council President, and the five borough presidencies (i.e., all the members of the Board of Estimate) are also scheduled for that date, so candidates have been running for these offices without knowing the precise powers of the positions involved. Hence, the one-year delay slowed the charter revision process, allowed the malapportioned Board to continue for another year, and may have created both campaign and electoral confusion.

On the other hand, the Court's *Morris* decision, though creating potential problems for other cities,<sup>92</sup> effectively eliminated weighted voting as an option for the New York City Board of Estimate. Also, it can be argued that the one-year delay has resulted in important changes in the composition of the Charter Revision Commission<sup>93</sup> and the political life of the City.<sup>94</sup> These developments may result in

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<sup>90</sup> The Chairman (Richard Ravitch) ran unsuccessfully for Mayor; one member (Frank Macchiarola) ran unsuccessfully for Comptroller. See *The New York Primary: Dinkins Sweeps Past Koch for Nomination; Giuliani Easily Wins Republican Primary; Mayor Offers Help*, N.Y. Times, Sept. 13, 1989, at A1, col. 6 (city ed.). A third member (Father Joseph O'Hare) became chair of the Campaign Finance Board. Also, former Mayor Wagner asked not to be reappointed. Hence, three members and the chairman were replaced. The new chairman is Frederick A.O. Schwarz, Jr., former Corporation Counsel of the city of New York (roughly the equivalent of city attorney).

<sup>91</sup> See New York City Charter Revision Comm'n, Summary of Final Proposals (1989).

<sup>92</sup> See *infra* notes 103-105, 119-128, and accompanying text.

<sup>93</sup> The changes are described *supra* note 90. See Mauro, *Voting Rights and the Board of Estimate: The Emergence and Evolution of an Issue*, 37 *Proceedings of the Academy of Political Science* — (Fall 1989) (arguing that the Schwarz Commission members have been more attuned to the issue of racial voting rights).

<sup>94</sup> During that year, Manhattan Borough President David Dinkins, the only black member of the Board of Estimate, decided to run for Mayor. On September 12, 1989, he won the Democratic Party primary, beating incumbent Mayor Koch. See *The New York Primary: A Sense of Quiet Strength; Dinkins Triumph Is Built on Dissatisfaction with Koch and on an Unthreatening Image*, N.Y. Times, Sept. 13, 1989, at A1, col. 4 (city ed.). Dinkins had strongly opposed reform of the Board, had pressed the defense of the *Morris* case, and had proposed various weighted voting plans in an attempt to save the Board. See, e.g., *New York Board of Estimate Angry at Move to Abolish It*, N.Y. Times, Feb. 2, 1988, at A1, col. 3 (city ed.); *Minority Officials Seek Revised Board of Estimate*, N.Y. Times, Mar. 1, 1988, at B4, col. 3 (city ed.); Barrett, *A Dinkins Dive? Campaigning Against the Charter*, Village Voice, May 23, 1989, at 14, col. 1. Dinkins was one of the few blacks to be elected borough president without first being appointed to the position. See generally Mauro, *Minority Membership on the Board of Estimate: The Pursuit of Fair and Effective Representation* (Feb. 17, 1988) (memorandum to New York City Charter Revision Comm'n), reprinted in *Submission Under Section 5 of the Voting Rights Act for Preclearance of Proposed Amendments to the New York City Charter*, [hereinafter *Submission Under Section 5*] at Exhibit 17(a) (Aug. 11, 1989). At

broader acceptance of proposals more sensitive to racial voting rights concerns and in an election more focused on local issues.

*B. Can Weighted Voting Survive the Court's Rejection of the Banzhaf Index?*

"Weighted voting"<sup>95</sup> has been used as a mechanism for satisfying the one-person, one-vote requirement while preserving electoral districts that vary widely in population. Though New York City has not employed a system of weighted voting, the issue arose at various points in the *Morris* litigation<sup>96</sup> and the charter revision process.<sup>97</sup> In the wake of the *Morris* Court's rejection of the Banzhaf Index, many jurisdictions that have relied upon weighted voting must now consider whether they can continue to employ weighted voting systems that have been developed and justified under the Banzhaf Index.<sup>98</sup>

Weighted voting systems allow a representative body to be kept to a smaller size while respecting existing political subdivisions. In such systems, the representatives from the more populous subdivisions are allocated more votes to account for the larger populations they represent.<sup>99</sup> As a result, the representative body is smaller — which some

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this writing, it seems very likely that his successor in that position, like his predecessor, will be white. See Holtzman, Hynes and Messinger Shake the Old Order, *N.Y. Times*, Sept. 13, 1989, at B1, col. 2 (city ed.). His own campaign, and his departure from the Board, clearly changed the political landscape on the issue of Board abolition.

<sup>95</sup> "Weighted voting" in this context refers to the assignment of differential weights to the votes of representatives, not to the voter — and generally unconstitutional — practice of giving additional weight to some voters, especially rural voters. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975). But cf. *Ball v. James*, 451 U.S. 355 (1981) (concerning landowners, with votes allocated on basis of amount of land owned, in electricity generation and water supply district); *Salyer Land Co. v. Tulare Basin Water Storage Dist.*, 410 U.S. 719 (1973) (additional weight can be given to landowners in special limited purpose district); supra notes 13-15. Nor does "weighted voting" refer to the modern approach of cumulative voting. See generally Engstrom, Taebel & Cole, *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 *J.L. & Pol.* 469 (1989); Still, *Alternatives to Single-Member Districts*, in *Minority Vote Dilution* 249 (C. Davidson ed. 1984).

<sup>96</sup> See supra note 42.

<sup>97</sup> See infra notes 110-118.

<sup>98</sup> See, e.g., *League of Women Voters v. Nassau County Bd.*, 737 F.2d 155 (2d Cir. 1984), cert. denied sub nom. *Smarts v. Nassau County Bd. of Supervisors*, 469 U.S. 1108 (1985); *Greenwald v. Board of Supervisors*, 567 F. Supp. 200 (S.D.N.Y.), aff'd mem., 742 F.2d 1434 (2d Cir. 1983); *Franklin v. Krause*, 32 N.Y.2d 234, 344 N.Y.S.2d 885, 298 N.E.2d 68 (1973), appeal dismissed, 415 U.S. 904 (1974); *Iannucci v. Board of Supervisors*, 20 N.Y.2d 244, 282 N.Y.S.2d 502, 229 N.E.2d 195 (1967).

<sup>99</sup> In effect, the votes of the representative from a multimember district are aggregated and placed in the hands of a single representative.

policymakers prefer — than a body based on multimember (or numerous single-member) districts.

The courts of the State of New York, where weighted voting has been most prevalent (more than twenty counties), have rejected a simplistic, strictly arithmetic calculation of weighted votes<sup>100</sup> because such an approach tends to overvalue the votes of more populous jurisdictions.<sup>101</sup> Instead, those courts have required that the counties employing weighted voting assign votes to representatives based on models of the representatives' "voting power," as measured by the Banzhaf Index. Complex mathematical algorithms are used to determine the number of votes that must be assigned to a representative so that he or she can determine the outcome of votes taken by the governing body in the same proportion as his or her district's population bears to the total population of the entire jurisdiction. Using this approach, a representative whose district accounts for 30% of the jurisdiction's population would be assigned sufficient voting power to determine the outcome of 30% of the governing body's decisions.<sup>102</sup>

In *Iannucci v. Board of Supervisors*,<sup>103</sup> the New York Court of Appeals required that proponents of a weighted voting plan must bear the burden of proving that it meets the one-person, one-vote requirement. The only method thus far approved by the New York courts for doing so is the Banzhaf Index, which, regardless of its theoretical soundness, was roundly rejected by the U.S. Supreme Court, at least when utilized

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<sup>100</sup> For example, simple arithmetic weighting would allot 40 percent of the votes on the governing body to a representative elected from a district that had 40 percent of the population of the entire jurisdiction.

<sup>101</sup> For example, in Nassau County a simple arithmetic calculation of weighted votes would have given 56% of the County Board's (weighted) votes to a single representative from the Town of Hempstead. That person could never have been outvoted and, therefore, effectively would have held 100% of the "voting power." By contrast, weighting votes under the Banzhaf Index of "voting power" requires that the representative from Hempstead should cast the crucial vote 56% of the time. See *Franklin v. Krause*, 32 N.Y.2d at 242, 344 N.Y.S.2d at 891-92, 298 N.E.2d at 72-73; *League of Women Voters v. Nassau County Bd.*, 737 F.2d at 156-60. See generally Johnson, *An Analysis of Weighted Voting as Used in Reapportionment of County Governments in New York State*, 34 Alb. L. Rev. 1 (1969).

Different "weights" may have to be assigned to the votes when a supermajority (e.g., two-thirds of the governing body's weighted votes) is required for particular subjects. See *id.* at 29-38.

<sup>102</sup> See *League of Women Voters v. Nassau County Bd.*, 737 F.2d at 156-60, 167-69; *Franklin v. Krause*, 32 N.Y.2d at 242, 344 N.Y.S.2d at 891-92, 298 N.E.2d at 72-73; *Iannucci v. Board of Supervisors*, 20 N.Y.2d at 251-53, 282 N.Y.S.2d at 508-09, 229 N.E.2d at 199-200. See generally Banzhaf, *Weighted Voting*, *supra* note 66; Johnson, *supra* note 101.

<sup>103</sup> 20 N.Y.2d 244, 282 N.Y.S.2d 502, 229 N.E.2d 195 (1967).

as a mechanism for measuring the deviation from ideal district size.<sup>104</sup> *Morris*, then, has cast considerable doubt upon the continuing validity of the method employed by courts in weighted voting cases. Hence, it is now an open question whether the courts will fall back upon straight arithmetic weighting (with its tendency to overvalue populous districts),<sup>105</sup> or will refuse to allow any form of weighted voting.

Even before the *Morris* decision, there had been some judicial dissatisfaction with weighted voting. At least two Appellate Division decisions had treated weighted voting only as an interim or last-choice approach.<sup>106</sup> Furthermore, in a post-*Morris* case, the County Attorney of Suffolk County has argued that *Morris*, by its rejection of the Banzhaf Index, effectively killed weighted voting.<sup>107</sup>

### C. Racial Vote Dilution Issues

In addition to the issues raised by casting doubt upon the vitality of the Banzhaf Index, the *Morris* decision may have significant implications for racial vote dilution cases brought in other jurisdictions. These implications include the racial vote dilution aspects of weighted voting systems and of "mixed" electoral systems.

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<sup>104</sup> See supra notes 66-73 and accompanying text. It should be noted, however, that Banzhaf himself disagrees. See *N.Y. Times*, July 25, 1989, at A22, col. 5 (city ed.) (letter to the editor by J. Banzhaf) ("As creator of the Banzhaf Index, I must protest that its death has been greatly exaggerated."). Yet even he observes that weighted voting "may not be the best or fairest way to give all New Yorkers equally effective representation." *Id.*

<sup>105</sup> See supra notes 102-104 and accompanying text.

<sup>106</sup> See, e.g., *Angell v. Tompkins County Bd. of Representatives*, 90 A.D.2d 896, 456 N.Y.S.2d 510 (1982) (only as interim measure); *English v. Lefever*, 94 A.D.2d 755, 462 N.Y.S.2d 695 (1983) (only if no practical alternatives are available).

It should also be noted that none of the cases upholding weighted voting systems on one-person, one-vote grounds have considered Voting Rights Act challenges to weighted voting. See *infra* notes 115-118 and accompanying text.

<sup>107</sup> Though the trial term of the New York Supreme Court for Nassau County rejected this argument, see *Curcio v. Boyle*, 142 Misc. 2d 1030, 542 N.Y.S.2d 1005 (Nassau County 1989), that opinion was reversed on the ground that the proponents of the weighted voting proposal had failed to carry the *Iannucci* burden of proving that their proposal would meet the one-person, one-vote requirement. See *Curcio v. Boyle*, 147 A.D.2d 194, 542 N.Y.S.2d 1009 (1989).

Professor Scarrow, scholar of New York State politics, also has taken the position that, after *Morris*, weighted voting can no longer be used. See *N.Y. Times*, July 11, 1989, at A18, col. 5 (letter to the editor by H. Scarrow). So have the Executive Director and the Director of Research of the New York City Charter Revision Commission. See Lane-Mauro memorandum to Judah Gribetz, reprinted in *New York City Charter Revision Comm'n. Submission Under Section 5*, supra note 94, at Exhibit 24 (c).

### 1. Weighted Voting Systems

The existence *vel non* of racial vote dilution resulting from the electoral structure of the New York Board of Estimate was not raised in the *Morris* litigation.<sup>108</sup> The primary reason is that the action was filed in December 1981, prior to both the 1982 Amendments to the Voting Rights Act and the liberalization of the standard for proving discriminatory intent under the Equal Protection Clause.<sup>109</sup> Civil rights advocacy groups did not intervene in *Morris* or file a separate challenge to the Board of Estimate structure premised upon racial vote dilution, apparently out of the belief that the *Morris* challenge could ultimately succeed on one-person, one-vote grounds. Racial issues could then be considered in crafting a remedy.

Though the New York City Charter Revision Commission was appointed to address the one-person, one-vote malapportionment, racial voting issues also were considered during the charter revision process. The Charter Revision Commission rejected weighted voting as an alternative,<sup>110</sup> largely in response to the concerns raised about the issue of racial vote dilution under the Voting Rights Act.<sup>111</sup> Instead, the Commission eventually proposed an expanded City Council and a

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<sup>108</sup> See *Morris v. Board of Estimate*, 592 F. Supp. 1462, 1465-66 (S.D.N.Y. 1984) (" '[Plaintiffs'] argument is not, at this time, . . . a racial discrimination claim under the Equal Protection Clause.' ") (quoting Plaintiff's Brief at 28 n.65).

<sup>109</sup> At the time the suit was filed, plaintiffs had to prove that the challenged electoral structure evinced a discriminatory purpose in order to establish a claim of racial vote dilution under either the Equal Protection Clause or § 2 of the Voting Rights Act. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In the summer of 1982, the Act was amended to create, *inter alia*, a more lenient "results" standard. That same year, the Supreme Court, in *Rogers v. Lodge*, 458 U.S. 613 (1982), ruled that discriminatory purpose could be proved by circumstantial evidence. See generally Gelfand, *supra* note 15, at 48. The first Supreme Court case to interpret amended § 2 was not issued until 1986. See *Thornburg v. Gingles*, 478 U.S. 30 (1986).

<sup>110</sup> Early in the Commission's deliberations, several plans were proposed by various interested parties to retain the basic Board structure but alter the number of votes assigned to Board members so as to reflect the population of the areas represented.

<sup>111</sup> See Gelfand & Allbritton, *The New York City Board of Estimate and Racial Voting Rights Law: Prospects and Pitfalls*, 37 Proceedings of the Academy of Political Science — (Fall 1989) (condensed version of report submitted by the authors to the New York City Charter Revision Commission in January 1988). The full report and other consultants' reports that followed are reprinted in F. Mauro, *Voting Rights and the Board Of Estimate: A Compilation of Advisory Opinions, Memoranda, Correspondence, and Related Materials* (New York City Charter Revision Comm'n 1988). See also Panel Is Advised It Must Abolish New York City Board of Estimate, *N.Y. Post*, Feb. 3 1988, at 15 (quoting Brooklyn Borough President Howard Golden: "We're in the hands of professors and lawyers. You know what that means to politicians — we're dead.").

special districting body.<sup>112</sup> The Commission adopted the proposals after several meetings held between July 31 and August 2, 1989. These proposals were submitted<sup>113</sup> to the Justice Department on August 11, 1989, for approval under the "preclearance" process mandated by § 5 of the Voting Rights Act.<sup>114</sup> The charter revision proposals will be presented to the voters of New York City in November 1989.

Litigation dealing with racial vote dilution (the fair and effective representation requirement) has not to date directly examined the racial and language minority representation aspects of weighted-voting systems. Yet an analysis of the principles underlying racial vote dilution cases<sup>115</sup> reveals that a weighted-voting system for the Board of Estimate could confront serious barriers under the Voting Rights Act. Even if such a weighted-voting plan were precleared,<sup>116</sup> it might be subject to a serious challenge under the Equal Protection Clause and under § 2 of the Voting Rights Act.<sup>117</sup>

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<sup>112</sup> See generally New York City Charter Revision Comm'n, Summary of Final Proposals (1989). For a concise description of the key role of the racial vote dilution issue in the charter revision process, see Mauro, *supra* note 93 (article by the Commission's Director of Research).

<sup>113</sup> See New York City Charter Revision Comm'n, Submission Under Section 5, *supra* note 94.

<sup>114</sup> See generally Voting Rights Act of 1965, § 5, 42 U.S.C. § 1973 (1982). "Covered" state and local governments — those that historically have used voting "tests" or language requirements and that have had depressed levels of minority voter registration or turnout, see *id.* § 4, 42 U.S.C. § 1973b (b) (1982) — must obtain approval before implementing any change in a "standard, practice, or procedure with respect to voting." *Id.* § 1973c (1982). Though most covered jurisdictions are in the South, some states and counties in other parts of the country also are subject to the preclearance requirement, including three New York City boroughs: Manhattan, Brooklyn, and the Bronx. See 28 C.F.R. § 51.4, Appendix (1988).

This mandatory prior approval, which examines whether proposed changes in electoral arrangements have a discriminatory purpose or effect, see 28 C.F.R. §§ 51.52, 51.54 (1988), must be obtained from the U.S. Attorney General or from the U.S. District Court for the District of Columbia. The "preclearance" system was established in recognition of the inherent inability of the Justice Department to conduct ongoing investigations of all electoral changes proposed by each covered jurisdiction. See *Perkins v. Matthews*, 400 U.S. 379, 391 n.10 (1970). See also *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987) (approving the Justice Department's broad authority); Hancock & Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 *Urb. Law* 379 (1985); Butler, *An Evaluation of Whether a Weighted Voting System for the Board of Estimate Would Comply with Section 5 of the Voting Rights Act* (Feb. 1988) (arguing that the Justice Department exercises broad discretion in the preclearance process), reprinted in Mauro, *supra* note 111, at 108.

<sup>115</sup> For a discussion of the difficulties presented by at-large and multimember systems, see *infra* notes 119-128 and accompanying text.

<sup>116</sup> See Butler, *supra* note 114 (arguing that preclearance would be unlikely, given the Justice Department's broad discretion in the preclearance process).

<sup>117</sup> See Gelfand & Allbritton, *supra* note 111. See also Adams, *Application of the*

In particular, weighted-voting systems can run afoul of the fair and effective representation requirement in three ways: the difficulty in electing representatives of affected minorities to the governing body; the submerision of minority interests by the practical necessity of a representative casting all of his or her weighted vote as a unit; and the severe inhibition of informal alliances on the governing body.<sup>118</sup>

## 2. "Mixed" Electoral Systems

Mixed systems — those which employ both single-member districts and at-large positions — have been adopted by various local governments.<sup>119</sup> The majority's decision in *Morris* to require that at-large positions be included when calculating the deviation of an electoral system from population equality<sup>120</sup> could encourage the use of more mixed systems.<sup>121</sup> Mixed systems may now be regarded as more desirable by governmental decision-makers because the inclusion of additional at-large positions will reduce the likelihood that deviations among single-member districts will be considered violative of the one-person, one-vote requirement. The addition of at-large members to a council, however, increases problems in racial vote dilution litigation, where the jurisprudence generally disfavors at-large positions<sup>122</sup> and multimem-

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Voting Rights Act of 1965 to a Weighted Voting Plan for New York's Board of Estimate (March 4, 1988); Redlich & Parker, Legal Evaluation of Proposed Structural Changes in New York City Board of Estimate (March 7, 1988). The Adams and Redlich & Parker memoranda are reprinted in Mauro, *supra* note 111, at 176 and 216, respectively.

<sup>118</sup> These arguments are further elaborated in Gelfand & Allbritton, *supra* note 111.

<sup>119</sup> See McDonald & Engstrom, Minority Representation and Councilmanic Election Systems: A Black and Hispanic Comparison, in *Ethnic and Racial Minorities in Advanced Industrial Democracies* (A. Messina, L. Rhodebeck, F. Wright & L. Fraga eds.) (Greenwood Press, forthcoming) (noting that twenty-seven percent of municipalities in the United States with a population of over 2,500 have mixed electoral systems).

<sup>120</sup> *Board of Estimate v. Morris*, 109 S. Ct. 1433, 1441-42 (1989). See *supra* notes 74-82 and accompanying text. By simply adopting a calculation agreed upon by some of the parties, the Court failed to specify a method for calculating the extent to which at-large positions dampen the deviations among single-member districts. See also Moncrief & Joula, *supra* note 29, at 745-49 (criticizing the Court for lack of leadership by failing to specify the appropriate methodology for calculating flotalerial districts).

<sup>121</sup> See Karlan, Maps and Misreadings, The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 *Harv. C.R.-C.L.L. Rev.* 173, 185 (1989) ("*Reynolds* provided a smokescreen [under which] jurisdictions claimed that they had abandoned existing district systems [and adopted at-large systems] because the different-sized districts violated the one-person, one-vote principle.") (citations omitted).

<sup>122</sup> See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986) (striking down five of six multimember districts in state legislative scheme); *Collins v. City of Norfolk*, 1989 WL 92013 (4th Cir. Aug. 18, 1989) (reversing district court that had upheld at-large system); *Citizens For a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987) (striking down system composed entirely of at-large seats), cert. denied, 109 S. Ct. 3213 (1989);

ber districts.<sup>123</sup> Instead, single-member districts are the electoral arrangement most favored by the federal courts.<sup>124</sup>

At-large officials, by their very nature, are not intended to serve the interests of any particular racial, ethnic, or geographic minority. Local government systems with positions elected at-large, for the most part, were established by "reform" movements which sought to avoid the parochialism they believed arose from ward-based electoral systems.<sup>125</sup> In systems with such positions, the Supreme Court has observed: "A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts."<sup>126</sup> An empirical study by Professors Richard Engstrom and Michael McDonald supports this

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Dillard v. Crenshaw County, 831 F.2d 246 (11th Cir. 1987) (same); McNeil v. City of Springfield, 658 F. Supp. 1015 (C.D. Ill. 1987) (same), appeal dismissed, 818 F.2d 565 (7th Cir. 1987); Sierra v. El Paso Indep. School Dist., 591 F. Supp. 802 (W.D. Tex. 1984) (invalidating system of seven at-large trustees).

The authors served as counsel for Plaintiffs-Respondents in the *Gretna* case in the Supreme Court.

In some cases, however, mixed systems have been upheld. See, e.g., City of Port Arthur v. United States, 459 U.S. 159 (1982) (upholding, subject to district court's imposition of plurality requirement, system of four single-member districts, two floterial districts, and three at-large seats, including Mayor); Beer v. United States, 425 U.S. 130 (1976) (upholding system of five single-member districts, two at-large seats in city with substantial black population).

<sup>123</sup> When multimember districts are used, two or more representatives are elected from a single, relatively large district rather than from separate, smaller districts of equal size; multimember districts involve, in effect, several simultaneous at-large elections. Like at-large elections, multimember district elections "tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district." Rogers v. Lodge, 458 U.S. 613, 616 (1982) (emphasis in original). See also Davidson and Korbel, At-Large Elections and Minority Group Representation, in *Minority Vote Dilution*, supra note 95, at 65-81 (analyzing studies on the effects of at-large, multimember, and mixed systems).

<sup>124</sup> See Wise v. Lipscomb, 437 U.S. 535, 540 (1978). Accord East Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 639 (1976); Chapman v. Meier, 420 U.S. 1, 19-20 (1975); Connor v. Johnson, 402 U.S. 690, 692 (1971) (effectively requiring that court-made districting plans be single-member).

<sup>125</sup> Davidson and Korbel, At-Large Elections, supra note 123, at 67-71 (expressing the view that these "structural reformers" were motivated primarily by dissatisfaction with recent ethnic immigrants' enfranchisement).

<sup>126</sup> Rogers, 458 U.S. at 616. At-large systems also present other, more subtle, barriers to full electoral participation by minority groups. Candidates for at-large seats must campaign in larger geographical areas. Larger areas require higher campaign costs, which can deter the entry of candidates whose supporters (and contributors) are poorer. These candidates are precisely the ones who should be encouraged to participate in the electoral process if the fair and effective representation requirement is to be fully satisfied.

judicial conclusion.<sup>127</sup> Their study found that underrepresentation of blacks in public office is most severe in southern municipalities, where at-large electoral systems are more common.<sup>128</sup>

Because the Voting Rights Act mandates a "totality of the circumstances" rule, it is difficult to formulate any bright-line test about the level of at-large representation that can lead to a violation of the Act. As a very general rule, though, the votes of members of affected minority groups stand less chance of dilution if the at-large officials wield relatively little power. Hence, the outcome in any particular case will be determined by the district court's view of the prior voting and demographic patterns in the area involved.

### 3. Issues Involving Remedies and Judicial Elections

As noted above, *Reynolds v. Sims*<sup>129</sup> applied the quantitative one-person, one-vote requirement to state legislative districts.<sup>130</sup> The decision was later extended to most local government elections.<sup>131</sup> The *Reynolds* Court also, however, articulated a broader, more qualitative goal for electoral systems: "[T]he achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment. . . ."<sup>132</sup> "Fair and effective representation" later emerged as its own requirement, in a number of cases ruling that certain electoral

<sup>127</sup> Engstrom & McDonald, *The Election of Blacks to Southern City Councils: The Dominant Impact of Electoral Arrangements*, in *Blacks in Southern Politics* 245, 255 (L. Moreland, R. Steed & T. Baker eds. 1987). See also McDonald & Engstrom, *Minority Representation*, supra note 119 (analyzing effect of mixed electoral systems upon black and Hispanic office-holding). These authors are prominent expert witnesses in voting dilution cases.

<sup>128</sup> Engstrom & McDonald, supra note 127, at 255. The underrepresentation is exacerbated by the prevalence of "anti-single-shot" voting rules. *Id.* "Anti-single-shot" provisions require electors to vote for each available position, or have their ballots invalidated. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 38 & n.5 (1986); *City of Rome v. United States*, 446 U.S. 156, 184 & n.19 (1980). Such provisions require minorities to "waste" votes for candidates who may not be perceived as representatives of minority interests. See S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 205-06 [hereinafter "Senate Report"]. Single-shot voting may also be thwarted by requirements that each candidate run for a specific seat. See, e.g., *Gingles*, 478 U.S. at 39 n.6; *City of Rome*, 446 U.S. at 185 n.21.

<sup>129</sup> 377 U.S. 533 (1964). See also *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (interpreting Article I, § 2 of the U.S. Constitution to mandate the same standard for congressional districts); *Karcher v. Daggett*, 462 U.S. 725 (1983) (extremely small deviations acceptable for state legislative districts are unacceptable for congressional districts).

<sup>130</sup> The relevant inquiry is whether "the vote of any citizen is approximately equal in weight to that of any other citizen." 377 U.S. at 579.

<sup>131</sup> See supra note 11 and accompanying text.

<sup>132</sup> 377 U.S. at 565-66.

structures, while complying with the one-person, one-vote requirement, may nonetheless reduce the opportunity of members of minority groups to "participate in the political process and to elect legislators of their choice."<sup>133</sup> Racial vote dilution cases enforcing this "fair and effective representation" requirement can be premised upon the Equal Protection Clause of the fourteenth amendment,<sup>134</sup> the fifteenth amendment,<sup>135</sup> or the Voting Rights Act of 1965 (as amended).<sup>136</sup> Hence, modern state and local electoral arrangements must comply with both the quantitative one-person, one-vote and the qualitative fair and effective representation requirements.<sup>137</sup>

<sup>133</sup> *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); *White v. Regester*, 412 U.S. 755 (1973). Naturally, the factual proof in these qualitative cases is more difficult than in the quantitative one-person, one-vote cases. Because outcomes are often fact-bound, the burden of proof is quite important.

<sup>134</sup> *Mobile v. Bolden*, 446 U.S. 55, 65-67 (1980), required that plaintiffs challenging an electoral structure under the fourteenth or fifteenth amendments must prove discriminatory intent on the part of the state or local government employing the structure. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982), later ruled that "discriminatory intent need not be proved by direct evidence" in equal protection cases, but can be inferred from circumstantial factors. These factors include electoral patterns, historical discrimination of various forms, unresponsiveness of elected officials, and structural factors (e.g., large electoral districts, majority vote requirements). *Id.* at 623-27. See generally Gelfand, *supra* note 15, at 38-48.

<sup>135</sup> The fifteenth amendment is a useful device only for challenging direct and obvious barriers to registration and voting by members of minority groups. See *Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plaintiffs asserting a fifteenth amendment claim must prove a "purposefully discriminatory denial or abridgement by government of the freedom to vote"); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (invalidating alteration of city's boundaries from square to 28-sided figure that excluded almost 400 black voters but no white voters from the city); *Terry v. Adams*, 345 U.S. 461 (1953) (culmination of line of "White Primary Cases," holding that various attempts to exclude blacks from official and unofficial political party primaries violated fifteenth amendment).

<sup>136</sup> See generally 42 U.S.C. § 1973 (1982). This Act, as amended over the years, provides a fairly comprehensive structure for preserving and protecting the voting rights of racial and language minorities. The Act bans numerous overt barriers to registration, such as literacy and language proficiency tests. Furthermore, it forbids state and local governments from imposing or applying any "voting qualification or prerequisite to voting or standard, practice, or procedure. . . which results in a denial or abridgement of the right of any citizen. . . to vote on account of race or color", or membership in a language minority. *Id.* § 1973(a) (1982) (emphasis added). This "results" standard is measured by the "totality of the circumstances" in each case. See *Thornburg v. Gingles*, 478 U.S. 30 (1986); Senate Report, *supra* note 128, at 28-29. Given the lower burden of proof under this results standard, compared to the intent standard in equal protection or fifteenth amendment cases, see *supra* notes 135-136, plaintiffs generally prefer to base racial vote dilution suits upon the Voting Rights Act. See generally Gelfand & Allbritton, *supra* note 111 (describing the development of cases under §§ 2 and 5 of the Voting Rights Act).

<sup>137</sup> See generally Gelfand, *supra* note 15, at 37-38. As Professor Tribe puts it:  
There is a guarantee of some form of mathematical equality: every individual

The one-person, one-vote standard was developed to correct malapportioned legislatures, which had come to be dominated by a minority of the population — rural citizens. Hence, that standard attempts to prevent domination by a minority of the will of the majority.<sup>138</sup> On the other hand, the racial vote dilution cases involving the Voting Rights Act and the “fair and effective representation” aspect of the Equal Protection Clause are attempts by Congress and the Supreme Court to protect voters who are members of racial and ethnic minorities. In these cases, affected minorities are protected from being dominated by a bloc-voting white majority. The traditional remedy at the local government level has involved drawing single-member districts, some of which have black (or Hispanic)<sup>139</sup> majorities, to replace at-large electoral systems.<sup>140</sup>

The potential conflict between the remedies for these two voting rights requirements is highlighted when a proposed remedy for a one-person, one-vote violation creates racial vote dilution problems. For example, the weighted voting proposals designed to preserve the New York City Board of Estimate raised serious questions under § 2 of the Voting Rights Act.<sup>141</sup> Alternatively, given the demographics of a particular area, a plan might be able to include a majority-black district only by creating a district that is much less populous than the other, majority-white districts. Such a plan might be challenged on one-person, one-vote grounds by the defendant government or intervening voters who reside in other districts. The conflict could also arise where the

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has the right to have her district represented in proportion to its population. There is, as well, a more elusive guarantee of fair representation: certain mathematically palatable apportionment schemes will be overturned because they systematically circumscribe the voting impact of specific population groups.

L. Tribe, *American Constitutional Law* 1063 (2d ed. 1988).

<sup>138</sup> See *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964). This was recognized by the Second Circuit in *Morris*: “[T]he fact that a minority may regularly be overshadowed by its more populous neighbors under a proportional voting scheme is one characteristic of a representative democracy.” *Morris v. Board of Estimate*, 707 F.2d 686, 691 (2d Cir. 1983), *aff’d*, 109 S. Ct. 1433 (1989).

<sup>139</sup> See *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988) (discussing the appropriate approach when two minority groups are involved), *cert. denied*, 109 S. Ct. 3213 (1989); see also *United Latin Am. Citizens v. Midland Indep. School Dist.*, 648 F. Supp. 596 (W.D. Tex. 1986), *aff’d*, 829 F.2d 546 (5th Cir. 1987) (*en banc*).

<sup>140</sup> See cases cited in first paragraph of note 122 *supra*. See generally Blacksher, *Drawing Single Member Districts to Comply With the Voting Rights Amendments of 1982*, 17 *Urb. Law.* 347 (1985).

<sup>141</sup> See *supra* notes 108-118 and accompanying text. Cf. *East Jefferson Coalition for Leadership and Dev. v. Parish of Jefferson*, 703 F. Supp. 28 (E.D. La. 1989) (rejecting floterial districts in § 2 case, and citing Second Circuit opinion in *Morris* and vagaries of one-person, one-vote deviation calculation). The authors serve as counsel for plaintiffs-appellees in *East Jefferson*.

only possible districting plan with an acceptable deviation from population equality also, through "packing"<sup>142</sup> or "fracturing,"<sup>143</sup> prevents minority voters from electing sufficient representatives of their choice. To avoid such a conundrum, the parties and the district court should try to investigate remedies other than the traditional single-member district, such as alternative voting systems.<sup>144</sup>

A possible vehicle to illuminate this potential tension between one-person, one-vote remedies and racial vote dilution remedies would be a case challenging the districting for elected judgeships.<sup>145</sup> Two courts of appeals have held that judicial elections are subject to the Voting Rights Act.<sup>146</sup> By contrast, judicial elections have long been exempted from the one-person, one-vote requirement.<sup>147</sup>

In *Chisom v. Edwards*,<sup>148</sup> the Court of Appeals for the Fifth Circuit held that elections to the Louisiana Supreme Court must meet the requirements of § 2 of the Voting Rights Act. The Fifth Circuit noted that the Act had consistently been interpreted "in a manner which affords it 'the broadest possible scope' in combatting racial discrimination."<sup>149</sup> The

<sup>142</sup> "Packing" occurs when members of a minority group are concentrated into very few districts, thereby reducing their electoral strength. See, e.g., *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984) (Chicago's redistricting plan for aldermanic seats violated § 2 by "packing" more black voters in certain districts than needed to obtain a substantial majority), cert. denied, 471 U.S. 1135 (1985); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1147 (N.D. Ill. 1983) (3-judge court) (improper "packing" of majority black districts). See generally Parker, *Racial Gerrymandering and Legislative Reapportionment, in Minority Vote Dilution*, supra note 95, at 85, 96-99.

<sup>143</sup> "Fracturing" occurs when geographically concentrated minority group members are split among many districts, thereby reducing their voting effectiveness in any particular district. See, e.g., *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss.) (Mississippi's congressional redistricting plan fractured black populations), aff'd mem., 469 U.S. 1002 (1984); *Ketchum*, 740 F.2d 1398 (Chicago's plan fractured black and Hispanic populations). See generally Parker, supra note 142, at 89-92.

<sup>144</sup> See generally Engstrom, Taebel & Cole, supra note 95; Karlan, supra note 121, at 221-36; Still, supra note 95.

<sup>145</sup> The authors first developed this argument in Gelfand & Allbritton, *Recent Developments in Voting Rights in the U.S.*, HiMoN Diskussionbeiträge, DP 121/88 (Siegen, Germany 1988).

<sup>146</sup> See *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), cert. denied sub nom. *Roemer v. Chisom*, 109 S. Ct. 390 (1988); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988). See also *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987).

<sup>147</sup> See, e.g., *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), aff'd mem., 409 U.S. 1095 (1973); *Voter Information Project v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980).

<sup>148</sup> 839 F.2d 1056 (5th Cir. 1988), rev'g 659 F. Supp. 183 (E.D. La. 1987).

<sup>149</sup> 839 F.2d at 1059 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

court<sup>150</sup> found that elections for judicial positions fall within the express language of the Voting Rights Act.<sup>151</sup> The court also found persuasive prior decisions holding that changes in judicial electoral systems are subject to the preclearance requirement.<sup>152</sup>

The Supreme Court declined to grant the writ of certiorari sought by the State in *Chisom*.<sup>153</sup> Though little can be read into a denial of certiorari,<sup>154</sup> it should be noted that *Chisom* presented the underlying legal issue — whether judicial elections are subject to the requirements of § 2 of the Voting Rights Act — with pristine clarity, uncluttered by tangential factual issues.<sup>155</sup> Hence, if the Court were inclined to disagree with the Fifth Circuit, such a decision would have been appropriate in *Chisom* before the district court in that and many other cases involving elected judgeships proceeded with time-consuming, expensive fact-bound trials.

One commentator has cautioned that governments might seek to take advantage of the “loophole” created by the exemption of judicial elections from the one-person, one-vote requirement.<sup>156</sup> The author argues, primarily on policy grounds, that the courts should end the exclusion of judicial elections from the ambit of one-person, one-vote.<sup>157</sup> He observes that, otherwise, plaintiffs would be unable to challenge a system that undervalues black electors’ votes by giving proportionally more elected judges to predominantly white districts than to predominantly black districts.<sup>158</sup>

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<sup>150</sup> Judge Johnson wrote the court’s opinion, which was joined by Judges Brown and Higginbotham.

<sup>151</sup> 839 F.2d at 1059-60 (citing § 14(c)(1) of the Voting Rights Act, covering “candidates for public or party office”).

<sup>152</sup> See *Kirksey v. Allain*, 635 F. Supp. 347 (S.D. Miss. 1986); *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff’d mem.*, 477 U.S. 901 (1986). See also *supra* note 114 and accompanying text (describing the preclearance requirement).

<sup>153</sup> See *Roemer v. Chisom*, 109 S. Ct. 390 (1988).

<sup>154</sup> See *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973). But cf. *United States v. Shubert*, 348 U.S. 222, 229 n.10 (1955) (Lack of precedential value of denial of certiorari “is particularly appropriate where the decision sought to be reviewed is essentially a *factual* determination.”) (emphasis added); *Brown v. Allen*, 344 U.S. 443, 456 (1953) (“a minority of this Court is of the opinion that there is no reason why a district court should not give . . . such weight to our denial as the District Court feels the record justifies”) (plurality).

<sup>155</sup> The district court has just ruled for defendants. See *Chisom v. Roemer*, Civ. Action No. 86-4052 (E.D. La. Sept. 13, 1989). Hence, the upcoming appeal will raise a variety of complex factual and legal issues that were not present in the original appeal.

<sup>156</sup> See Note, *Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination*, 98 *Yale L.J.* 1193 (1989).

<sup>157</sup> *Id.* at 1208-13.

<sup>158</sup> *Id.* at 1203 n.85 (giving examples from Alabama and North Carolina).

Plaintiffs would not be prevented, however, from raising racial vote dilution claims in the context of a *state-wide* challenge to such unequal judicial districts, regardless of whether a dilution claim could be mounted in a particular district. A case attacking the districting of elected judges, then, appears to provide the appropriate milieu to highlight the tension between racial vote dilution and one-person, one-vote remedies. A district court would then face a situation in which the traditional remedy — districts with equal populations — has only theoretical attraction, rather than legal force. In the absence of a mandate for the traditional paradigm and its associated benchmark, a district court might prefer to investigate innovative remedies not necessarily based upon the geographically constrained single-member district.<sup>159</sup>

#### V. CONCLUSION

Considering the course of the *Morris* litigation, the Supreme Court, from the perspective of New York City, could have summarily affirmed the decision of the Second Circuit. Instead, by hearing the case, the Court allowed a one-year delay in the New York City charter revision process. Moreover, statements in the opinion that added something new to voting rights jurisprudence — rejection of the Banzhaf Index and inclusion of at-large positions in the calculation of deviation from population equality — are likely to lead to problems in other jurisdictions that were not represented, as parties or amici, before the Court. In particular, the Court's encouragement of local government positions elected on an at-large basis is on a collision course with the Court's other decisions in the racial vote dilution area.

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<sup>159</sup> See Karlan, *supra* note 121, at 179, 226-27.