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New York City's Charter Revision: The Political Aftermath

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NEW YORK CITY'S CHARTER REVISION: THE POLITICAL AFTERMATH*

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A. Introduction

The principle of "one person, one vote," arose relatively late in the constitutional history of the United States and resulted from the civil rights movement of the late 1950's early 1960's. This principle mandates that legislative electoral schemes adequately reflect an individual's vote in proportion to the population in which that individual is represented. Recent revisions to the New York City Charter came about as a result of the application of this principle to the manner in which voting power was being apportioned in local government.

This article first discusses New York City's political structure and the manner in which the citizens of its five boroughs were represented under the old Board of Estimate. The article then reviews the constitutional challenges to this electoral scheme which led to a revision of New York City's Charter, and explains the rationale behind these revisions and the impact on the methodology of apportioning votes in local elections. Next, the article points out unintended consequences resulting from these revisions which have proven to be problematic. And finally, the article concludes that while the Charter revision legally complies with the "one person, one vote" principle, it is questionable whether the new legislative scheme effectively provides voters with proportional representation.

Historically, the Supreme Court was reluctant to determine the constitutionality of reapportionment of districts because it considered the matter to be a "political thicket."[1] Civil rights

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[1] Colegrove v. Green, 328 U.S. 549, 555 (1946).

challenges to voting schemes only related to one's right to vote, not to the individual value of that vote. It was not until the seminal case of *Baker v. Carr*,[2] in 1962, that the principle of "one person, one vote" came under the direct scrutiny of the Supreme Court. In *Baker*, the Court held that reapportionment of state assembly seats was justiciable under the Equal Protection Clause of the 14th Amendment.[3] Two years later, in *Reynolds v. Sims*,[4] the Court held that the Equal Protection Clause covers all voters in the election of state legislators, and that the seats in both houses of a bicameral state legislature must be apportioned on the basis of population.

The issue of local apportionment was further addressed by the Supreme Court in *Hadley v. Junior College Dist. of Metropolitan Kansas City*.[5] In that case, the Court held that whenever a local government selects its officials by popular election, and these officials are selected from separate districts, the Equal Protection Clause requires that each district be established on a "one person, one vote" basis. Because New York City's political structure is extremely diverse, in terms of ethnic makeup and

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[2] 369 U.S. 186 (1962).(Plaintiffs, Tennessee voters, alleged that a 1901 state statute which apportioned that state's General Assembly seats according to the 1900 federal census, and which had not been reapportioned since, was an "arbitrary and capricious" reapportionment in violation of the 14th Amendment's Due Process Clause).

[3] U.S. CONST. amend. XIV; § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[4] 377 U.S. 533 (1964) (Involving a challenge to the Alabama state legislative apportionment scheme which was based on the 1900 census and which the plaintiffs claimed discriminated against voters in counties whose population had grown proportionately far more than that of other counties since the taking of that census).

[5] 397 U.S. 50 (1970).

geographical placement, the *Baker*, *Reynolds*, and *Hadley* decisions were integral in shaping subsequent representation suits challenging New York City's voting scheme. In *Morris, et.al v. Board of Estimate of New York City*,[6] the Supreme Court held that the City's legislative electoral scheme under the Board of Estimate did not accord all votes equal weight. Since this manner of representation was in violation of the constitutionally mandated "one person, one vote" principle, the voting scheme under the New York City Charter was revised to comply with the Court's ruling.

B. New York City's Governmental Structure

New York City is comprised of five boroughs, each a separate unit of the City and each a county of New York State. The boroughs are Manhattan, the Bronx, Brooklyn, Queens and Staten Island. The City has a tripartite system of government made up of the Mayor, the City Council and the Board of Estimate. The outer boroughs, the Bronx, Staten Island, Queens and Brooklyn had been separate political entities until the end of the 19th century when they merged with Manhattan (New York). The boroughs retained many of their former powers, some of which were coextensive with that of the Office of the Mayor and the City Council. These powers were concentrated in the Board of Estimate, the third leg of the political triumvirate which governed the City, whose members were the five Borough Presidents, the Mayor and the City Council President. The major powers wielded by the Board of Estimate were budgetary and land use decision-making capabilities.

Under the 1961 revision of the New York City Charter, the Board of Estimate was expanded to include the City Comptroller. Apportionment of the votes was as follows: the Mayor, the Comptroller, and the President of the City Council each had four votes; and the five Borough Presidents each had two votes. Thus, while there were twenty-two votes in all, the borough presidents only had ten votes, or less than 50% and the borough presidents of Brooklyn and Queens, whose constituencies made up more than

[6] 489 U.S. 688 (1989).

57% of the 1960 census, had only four of the twenty-two votes or slightly more than 18% of the voting power.[7] As will be discussed below, the *Baker v. Carr* doctrine would eventually result in a series of lawsuits which sought to bring New York City's government in line with the "one person, one vote" principle.

C. The Politics of New York City

1. Political History

One of the earlier political ballyhoos in New York City occurred in 1940 when a dispute arose between the staffs of then Mayor Fiorello H. LaGuardia and City Council President Joseph T. Sharkey regarding who would be the acting mayor when the elected mayor was out of the city. This seemingly petty squabble wound up in court because the vice-chairman of the City Council sued the Board of Estimate and the Deputy Mayor over the right to preside over the Board of Estimate as the designee of the City Council president.[8] In reviewing the matter, the Appellate Division held that the Deputy Mayor should preside in the absence of his superior. The Court's sole dissenter, however, argued that the City Charter appeared to be contradictory in its delegation of powers, because one section of the Charter mandated that the Council President assume mayoral duties in the mayor's absence from the city, while another section allowed the deputy mayor to sit on the Board of Estimate in those circumstances and exercise all the mayor's powers except that of chairman.[9]

In 1942, another political struggle, this time between Mayor LaGuardia and the City Council, wound up in court. During an investigation by the City Council, the Council subpoenaed Mayor LaGuardia to appear and testify before a special commission. The mayor refused to appear and the mayor's refusal to comply with the subpoena was subsequently reviewed by the Court of Appeals,

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[7] *See* table at note 14 *infra.*

[8] Sharkey v. LaGuardia, 259 A.D. 557 (1st Dept. 1940).

[9] *Id.* at 571.

New York State's highest court.[10] The Court of Appeals noted that under the existing city charter, the Mayor and the City Council were created as "mutually independent co-ordinate executive and legislative branches of the city government." [11] The court held that the City Council "is clothed with ample statutory powers to compel the attendance of any officer" of the city administration and the production of pertinent official documents by any officer.[12]

Another conflict between branches of City government surfaced in 1969 regarding the proposed electoral scheme for New York City's Board of Education. In *Oliver v. Board of Education*,[13] the constitutionality of the election procedure for the May, 1970, Board of Education seats was challenged in federal court. Representation on the Board of Education resembled that of the Board of Estimate, with one member to be elected by each of the five boroughs and two members appointed by the mayor. Unlike the Board of Estimate, however, neither the City Council President nor the Comptroller were permitted to vote.

The plaintiffs in *Oliver*, residents and registered voters of Brooklyn, argued that "one person, one vote" should be applied to Board of Education elections. The plaintiffs' primary complaint was that under the 1960 census, residents and registered voters of the most populous county (Kings) had nearly eight times the population of the least populous county (Richmond),[14] yet each

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[10] Matter of LaGuardia v. Smith, 288 N.Y. 1 (1942).

[11] *Id.* at 2.

[12] *Id.* at 3.

[13] 306 F. Supp. 1286 (E.D.N.Y. 1969).

[14] *Id.* at 1288

Borough	1960 Population
New York County (Manhattan)	1,698,281
Bronx County (Bronx)	1,424,815
Kings County (Brooklyn)	2,627,319
Queens County (Queens)	1,809,578

borough had equal representation on the Board. The plaintiffs maintained that this population disparity amounted to a denial of equal protection to Brooklyn voters, despite the fact that the Board of Education had no taxing power, and was thus not a governmental body required to comply with the "one person-one vote" principle under *Reynolds*.

The court agreed with the plaintiffs and held that *Reynolds v. Sims*[15] did apply to school board elections. The court specifically noted that the board "has broad powers to run the city schools" and even though New York City granted some autonomy to boards of local school districts, the board retained overall control.[16] The lack of taxing power by the board was not crucial to the court's decision.[17] The court, however, refused to enter an injunction against the upcoming election, preferring instead to retain jurisdiction of the case while allowing the state legislature an opportunity to amend the statute.

The court further stated that the "one-person, one vote" doctrine did not apply to the interim Board of Education because its members were appointed by the five Borough Presidents who were themselves elected in a manner that complied with the "one person, one vote" requirement. Since the "choice of members of the county school board did not involve an election and since none was required for these non-legislative offices, the principle of 'one man, one vote' has no relevancy."[18] This, then was the political background into which the "one person, one vote" controversy would one day interject itself.

2. The Effect of Budgetary Politics On The

Richmond County (Staten Island) 221,991

[15] *See* 377 U.S. 533 *supra* note 4.

[16] *Id.* at 1290-91.

[17] *Id.* at 1291.

[18] *Id.* at 1289 (quoting Sailors v. Board of Education of the County of Kent, 387 U.S. 105, 111 (1967)).

Representational Structure of New York City

Under the revised 1961 New York City Charter, the budget making power of the Board of Estimate did not allow the Board to either draft or revoke a budget which was not subject to change by the City Council or the Mayor. The Charter authorized the mayor to prepare an expense budget which he would then submit to the Board of Estimate and the City Council. Although the City Council was the body "vested with the legislative power of the city,"[19] both the Council and the Board of Estimate were merely reactive to the executive branch. They had little or no input into the mayor's budget-making process and could not prepare a budget on their own. While either the Board of Estimate or the Council could alter the original budget by adding or eliminating items, the mayor could veto any changes he disapproved of.[20] These changes were reflected in the final budget unless the mayor's veto was overridden.[21]

The veto override required a two-thirds vote of both the City Council and the Board of the Estimate, with the voting in concurrent terms. The Board's twenty-two votes were comprised of two from each borough president and four each for the Mayor, the Comptroller and the City Council President. To make the veto override even more difficult, the 1961 charter withdrew the mayor's four votes from the Board of Estimate's twenty-two, thus basing the two-thirds override requirement on only a total of eighteen votes. Yet, the mayor could still cast his four votes against a veto override. Since all the borough presidents combined only had ten votes, an alliance between the Mayor, the Council President and the Comptroller could foil any override attempt. Without an alliance with the City Council President or the Comptroller, all the Borough Presidents together were still short two votes and thus, would be unable to override the mayor's veto.

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[19] NEW YORK CITY, N.Y. CHARTER Chapter 2, § 21 (1961) (same provision in 1991 Charter).

[20] *Id.* at § 120.

[21] *Id.* at § 121(b).

On the other hand, if the City Council President or the Comptroller challenged the mayor's veto, they would need the votes of at least four of the five Borough President on the Board to override. It was under this scenario that the borough presidents had bargaining power, enabling them to obtain favors for supporting the mayor.

In *Bergerman v. Lindsay*,[22] borough presidents who represented the Bronx and Brooklyn, two boroughs in which the population was grossly disproportionate to the representation, brought legal action challenging the election process of the Board of Estimate. The New York Court of Appeals applied the *Avery* test,[23] which requires the court to determine whether a local unit comprised of multiple members (the Board of Estimate) had "general governmental powers over the entire geographic area" under the "one-person, one-vote" principle.[24] The Court of Appeals focused on the budget-making role of the Board and concluded that it was not of such legislative character as to prohibit the selection of executives from boroughs of unequal sizes.[25]

The Court in *Bergerman* further held that the Board of Estimate did not function as a legislature within the meaning of the drafters of the Charter because of its limited role in the budgetary process. The court noted that the City Council was expressly

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[22] 25 N.Y.2d 405 (1969).

[23] Avery v. Midland County, 390 U.S. 474, 485 (1968). In *Avery*, the plaintiffs, residents of Midland County, Texas, challenged the makeup of the County Commissioners Court, which was the governing body. The plaintiffs alleged that their rights under the Equal Protection Clause of the 14th Amendment had been violated due to a "gross disparity in population" among the four districts: one district which included the city of Midland had a population of 67,906; the other districts had populations of 852; 414; and 828.

[24] *Id.*

[25] "The Board of Estimate in its present statutory frame is the result of a purpose to apportion and distribute budget-making among city executives and legislative officers. In structure and composition it seems quite unique." 25 N.Y.2d 405, 411.

established as "the local legislative body of the city,"[26] and concluded that "the Board of Estimate must be regarded as an indigenous local governmental institution which neither fits fully into the role of a legislative body nor has "general governmental powers over entire geographic area" as required by *Avery*.[27] Thus, the Board of Estimate did not fall into the category of governmental bodies required to comply with the "one-person, one-vote" principle. Furthermore, twelve of the twenty-two votes (those of the Mayor, the City Council President and Comptroller) arose out of city-wide elections, and the voting process for these elections did adhere to the "one person, one vote" principle.

In 1981, those arguing in favor of "one person, one vote" were successful in overturning the election of at-large members to the City Council.[28] Under Sections 22 and 23 of the old Charter, the City Council consisted of a president elected on a city-wide basis, thirty-five members to be elected from districts that were subject to redistricting after each federal decennial census, and two at-large members from each of the five boroughs (one Democrat and one Republican). That year, in *Andrews v. Koch*,[29] registered voters of Kings County, including one black voter and one Hispanic voter, sued the City arguing that the six-fold disparity in population between Brooklyn and Staten Island resulted "in a debasement or dilution of their voting rights...as effectively as would a total denial of suffrage."[30] Basing their complaint on the *Reynolds v. Sims* line of decisions,[31] the plaintiffs alleged that the at-large elections violated the Equal Protection Clause of the 14th Amendment.

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[26] *Bergman*, 25 N.Y.2d at 410 quoting NEW YORK CITY, N.Y. CHARTER Chapter 2, §§ 21, 27 (1962).

[27] 25 N.Y.2d 405, 411.

[28] Andrews v. Koch, 528 F. Supp. 246 (E.D.N.Y. 1981).

[29] 528 F. Supp. 246.

[30] *Id.* at 248.

[31] *See supra* note 4 and accompanying text.

The defendants, Mayor Edward Koch, City Council President Carol Bellamy and other city officials, argued that "statistical variations alone cannot displace legitimate political goals which non-proportional voting systems may constitutionally seek to advance."[32] According to the city officials, the at-large electoral scheme met two desirable goals: (1) the ensured inclusion of minority (Republican) representation from each borough on the overwhelmingly Democratic Council; and (2) the assurance of adequate representation of borough-wide interests "in replacement of the diminished powers of the Board of Estimate."[33] The city officials further argued that the equal at-large representation was necessary to maintain "detente" among the boroughs.[34]

The court rejected the latter argument, citing *Avery v. Midland County*[35] and *Abate v Mundt*[36] and noted that there was a total deviation from population equality of 50.4%, more than four times the 11.9% maximum deviation approved by the *Abate* court.[37] The Court held that such deviation was unconstitutional because "a voter in the Bronx or Staten Island gets substantially more representation for his or her ballot than a voter in Brooklyn or Queens," and this, the court held, was unconstitutional.[38]

It has been argued that by the 1980's the City Council had become merely a rubber-stamp for the administration. The Council no longer dared assert its rights as elected voices of the people the way it had done fifty years earlier when it subpoenaed Mayor LaGuardia. In fact, the last three mayors of New York, John V. Lindsay, Abraham Beame, and Edward I. Koch all misused

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[32] *Andrews*, 528 F.Supp. at 248.

[33] *Id.* at 249.

[34] *Id.* at 251, n. 8.

[35] 25 N.Y.2d 405 (1969).

[36] 403 U.S. 182 (1971).

[37] *Andrews*, 528 F. Supp. at 250 (*citing* Abate v. Mundt, 403 U.S. 182, 184).

[38] *Id.* at 251.

executive orders that went beyond the stated legislative policy of the council, without any objection by the council members. The Council silently acquiesced this usurpation of their policy-making capacity and the executive orders were all struck down by the courts only after being challenged by private groups.[39] These executive orders, all involving anti-discrimination promulgations were enacted by the mayors, while the City Council, the body empowered to legislate, neither legislated nor protested this usurpation of their power.

D. Legal Challenges to New York City's Structure

1. The Challenge to the 1974 Statewide Redistricting Plan

Before and during the drive to reform New York City's charter, a series of voter and taxpayer-launched legal challenges to other elected bodies were taking place.[40] These challenges were based on specific allegations that the constituencies in question were not receiving representation consistent with constitutionally

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[39] Matter of Broidrick v. Lindsay, 39 N.Y.2d 641 (1976); Matter of Fullilove v. Beame, 48 N.Y.2d 376 (1979); Subcontractors Trade Ass'n v. Koch, 62 N.Y.2d 422 (1984); Under 21, Catholic Home Bureau for Dependent Children v. City of N.Y. 65 N.Y.2d 344 (1985); Salvation Army v. Koch, 65 N.Y.2d 422 (1985).

[40] *See, e.g.*, Coalition for Education in District One v. Board of Elections of City of New York, 370 F.Supp 42 (S.D.N.Y. 1974)(invalidating a school board election on the grounds of racial discrimination); Campbell v. Board of Education, 310 F. Supp. 94 (E.D.N.Y. 1970) (holding that proportional representation on local New York City school board did not deny equal protection since there was no identifiable group discriminated against); Franklin v. Mandeville, 32 A.D.2d 953 (2d Dept. 1969) (holding that weighted voting plan for county board of supervisors of Nassau County violated "one person, one vote" concept); MacKenzie v. Travia, 55 Misc.2d 1016 (N.Y. Sup. Ct. 1968) (holding that "one man, one vote" was not applicable to members of the Board of Regents).

mandated reapportionment[41] and that their apportioned representation violated the Equal Protection Clause of the Fourteenth Amendment.

In the 1970 federal decennial census, New York's congressional delegation was reduced from 41 to 39.[42] As required by the New York State Constitution, the state legislature enacted a reapportionment scheme for the Congressional, State Assembly and State Senate.[43] Traditionally the state Assembly has been dominated by the Democratic Party, and the State Senate by the Republican Party. When the issue of redistricting arose, it became obvious that a compromise was necessary. A redistricting plan was adopted in 1972 which led to districts with low minority representation.[44] So low, in fact, that the districts violated the Voting Rights Act of 1965.[45] As a result, in *New York State v. United States*,[46] the District Court for District of Columbia[47]

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[41] U.S. CONST. art. I, § 2, cl. 3 ("...The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such a manner as they shall by Law direct...").

[42] Flateau v. Anderson, 537 F. Supp. 257, 259 (S.D.N.Y. 1982).

[43] N.Y. CONST. art's. III & IV. (requiring adjustment of Congressional, Assembly and State Senate districts after each federal decennial census).

[44] *Flateau*, 537 F.Supp. at 259.

[45] 42 U.S.C. § 1973 (1965).

[46] 65 F.R.D. 10 (D.D.C. 1974).

[47] *Flateau*, 537 F. Supp. at 260, n.5. ("Section 5 {of 42 U.S.C. § 1973(c)} provides in pertinent part:

> (W)henever a State or political subdivision ... shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice,or procedure does not have the purpose and

entered an order placing the counties of Kings, New York and the Bronx under the provisions of the Act. Then, in *Flateau v. Anderson,*[48] the Southern District approved changes in the boundaries of 16 of 150 Assembly districts, 8 out of 60 Senate districts and 4 out of the 39 congressional districts.[49]

In *Flateau,* the plaintiffs, a group of registered voters, brought a class action suit opposing the reapportionment.[50] The plaintiffs claimed that because of the substantial increase in minority populations (particularly in the Bronx and Brooklyn) in face of an overall decrease in New York State's population, the existing (1974) reapportionment plan violated the *Reynolds v. Sims* rule which guaranteed the opportunity for equal protection of all voters in the election of state legislators and required that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. The plaintiffs were joined by the Puerto Rican Legal Defense and Education Fund which also charged that the existing state legislative district lines were violative of the 15th Amendment and the Voting Rights Act of 1965.[51] The defendants' position at trial placed them in a quandary. They conceded that if the apportionment plan was enacted, it would violate the Equal Protection Clause of the 14th Amendment.[52] On the other hand, one defendant, Senate Majority Leader Anderson, argued that under the state's constitution, the legislature was allowed to take up to six years after the taking of the federal

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will not have the effect of denying or abridging the right to vote on account of race or color ...").

[48] 537 F. Supp. 257 (S.D.N.Y. 1982).

[49] *Id.* at 260. (The New York amendment was codified in 1974 N.Y. LAWS c. 588, c. 589).

[50] 537 F. Supp. 257.

[51] *Id.* at 259.

[52] *Id.* at 261.

census to arrive at a new apportionment scheme,[53] and was therefore not required to immediately amend the electoral scheme.

The court held that any alleged infringement of the right to vote requires close scrutiny.[54] It concluded that since the defendant state legislative leaders concurrence was needed to effect any reapportionment plan, such reapportionment would not occur without the court's intervention.[55] The court further noted that the "substantial equality" requirement of *Reynolds* was applicable and stated that the deviations in the districts were "of such a magnitude, that if presently enacted would constitute *per se* violations of the equal protection principle of 'one person, one vote.'"[56]

2. The Morris Challenge to the Board of Estimate

At the same time that the redistricting plan was being litigated, the residents of Brooklyn successfully challenged the apportionment of voting power on the Board of Estimate. In *Morris, et.al v. Board of Estimate of New York City*,[57] the plaintiffs brought a class action suit on behalf of registered voters, alleging that the citizens of Brooklyn were grossly under-represented on the Board of Estimate in New York City.[58] The district court held: (1) there was indeed malapportionment of voting power; (2) the *Abate* test was the appropriate method to determine the deviation from the court standard; (3) the City had the burden of proving its rationale for such a gross deviation; and (4) the City's expressed reasons not to change the Board's voting scheme did not significantly outweigh the harm done by the departure from

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[53] *Id.* at 259.

[54] *Id.* at 263.

[55] *Id.* at 262.

[56] *Id.* at 264.

[57] 489 U.S. 688 (1989).

[58] 551 F. Supp. 652 (E.D.N.Y. 1982).

the "one person, one vote standard."[59]

On appeal,[60] the Second Circuit rejected the City's arguments that at-large city-wide elected officials were improperly excluded from the computation of the deviation (which, if included would have reduced the impermissible deviation), and that the lack of weight granted to the City's asserted interests in maintaining the Board of Estimate contradicted the Court's decisions in other local governmental schemes. Unsatisfied with that result, the City appealed to the Supreme Court in 1989.[61] The Supreme Court upheld the determinations of the District Court and refused to find that the Second Circuit had erred in its reconciliation of the relationship of the "one person, one vote" standard" with the New York City Board of Estimate's composition, and thus, the issue was remanded to the District Court.[62]

3. Methodology of Reapportionment under the Charter Revision

The immediate question facing the parties on remand in the District Court related to the method used by the court in determining the deviation from the constitutionally mandated standard of "one person, one vote." A second issue was whether or not New York City had a legitimate interest in maintaining a local governmental institution such as the Board of Estimate.

The plaintiffs in *Morris*, all Brooklyn residents, argued that their vote was devalued because of the composition of the new Board of Estimate.[63] They favored a scheme that would weigh the Borough Presidents' vote on the Board in proportion to their respective borough populations or, in the alternative, they wanted

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[59] 592 F. Supp. 1462 (E.D.N.Y. 1984); 647 F. Supp. 1463 (E.D.N.Y. 1986) (on remand).

[60] 831 F.2d 384 (2nd Cir. 1987).

[61] 489 U.S. 688 (1989).

[62] 647 F. Supp. 1463 (E.D.N.Y. 1986).

[63] 592 F. Supp. at 1464.

the court to determine that any deviation from proportion would be computed by a population based method.[64] This would create a presumption under the "one person, one vote" standard that Brooklyn, which had six times the population of Staten Island, would receive six times the representation.

The defendant in the case, the Board of Estimate of the City of New York, although aware of the equal protection arguments the plaintiff made, argued that no change was required for the deviations in relative voting strength.[65] They based their claim on methodology approved in other voting rights suits such as the Benzhaf Index, a mathematical analysis under which one can determine the percentage that one voting district deviates from another in relation to their respective populations.[66] The defendants focused on the relative power of voters in the various boroughs to influence board decisions. This approach involved recognizing the weighted voting of the three city-wide members and aggregating the voters total effect, and a claim that the Benzhaf Index showed a only a 30.6% deviation.[67] The court rejected the defendant's methodology as "theoretical."[68]

One intervenor-defendant, Frank V. Ponterio, a Staten Island resident, argued that the Board of Estimate was analogous to a "floterial district," the super-district being the city and the sub-districts the five boroughs. The District court rejected this reasoning, holding:

> By analogy or otherwise, the Board is not akin to a "single floterial district". . . . In *Davis v.Mann*, 377 U.S. 678, 686 n.2, 84 S.Ct. 1441, 1445 n.2, the court defined that model . . . [F]loterial district . . . refer[s] to a legislative district which in-

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[64] 592 F. Supp. at 1465.

[65] *Morris*, 592 F. Supp. at 1462.

[66] Note, *Fair and Effective Representation; Power to the People*, 26 HASTINGS L.J. 190, 195 (1974).

[67] *Morris*, 592 F.Supp at 1470.

[68] *Id.* at 1473-74.

> cludes . . . several separate districts . . . which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned.[69]

In citing qualifying voting schemes in other jurisdictions, the District Court also found that the Board of Estimate overvalued the city-wide officers' power and undervalued the borough representatives' power to determine any particular outcome.[70]

The District Court relied on the *Abate* test, which required that:

> The maximum percentage deviation is determined by adding the percentage deviation above the population mean of the district with the greatest number of voters to the percentage deviation below the population mean of the district with the fewest number of voters.[71]

In applying the test, the District Court found the individual inequalities to be:

Borough	Population	Deviation
Brooklyn	2,230,936	-57.7%
Queens	1,891,325	-33.7%
Manhattan	1,427,533	- 0.9%
Bronx	1,169,115	k17.4%
Staten Island	352,121	k75.2%

> Computing the -57.7% variance of Brooklyn as the most under-represented borough with the +75.2% variance of Staten Island as the most over-represented borough, the maximum deviation is 132.9%.[72]

The court specifically excluded the at-large representatives from consideration under this plan, rejecting the City's Benzhaf

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[69] *Id.* at 1468.

[70] *Id.* at 1471.

[71] Abate V. Mundt, 403 U.S. 182, 184 n.1 (1971).

[72] *Id.* at 1475.

Index and Ponterio's "floterial district" arguments.[73] The court qualified its result with the example of *Travis v. King*,[74] where the apportionment scheme in Hawaii was upheld, even though it retained separate island-based representative districts, a voting scheme unique to the Hawaiian islands.[75] The *King* case was an example of geographic and economic insularity. The Court ordered the parties to submit a list of agreed upon and disputed policies presently served by the board to determine whether there were legitimate interests being furthered by the current composition of the Board of Estimate.[76]

4. RATIONALE

As relevant to those issues, defendants in the "Joint Stipulation of Policies and Interest" offered a list of considerations in support of maintaining the status quo:

1. Absence of any demonstrable injury to the populations of the more heavily populated boroughs as a consequence....
2. Uniqueness of the Board as a form of local government because of its composition and voting allocation.
3. Meaningful representation of the citizens of the lesser populated boroughs, especially Staten Island.
4. Preservation of the boroughs as legitimate representational entities in local government.
5. Use of natural and historical borough boundaries to define representational entities in local government.
6. Historical treatment of boroughs as separate governmental entities.
7. Necessity of retaining borough representation on the Board in light of abolition of such representation on the City

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[73] *Morris*, 592 F.Supp at 1469.

[74] 552 F. Supp. 554, 560 (D. Haw. 1982).

[75] *Morris*, 592 F.Supp at 1476.

[76] *Id.* at 1477.

Council.

8. Effectiveness of a Board composed of only eight members.
9. The long standing dual role of borough representatives as both Borough President and the member of the Board.
10. Coordination of City and Borough governmental authority and responsibility.
11. Ability to balance differing interests and needs, and to accommodate development and long term planning requirements of both the boroughs and the City as a whole.
12. Flexibility to meet changing societal needs, particularly in a large municipality whose local government is complex.
13. Correlation between the functions of the Board and the impact of those functions upon the boroughs, particularly in regard to the formulation of the capital budget, in order to assure that different parts of the City get their fair share of service contracts and capital budget allocation which might otherwise go to those portions of the City contributing the most tax dollars.
14. Necessity and effectiveness of borough representation in local government as an intermediate size entity, with city-wide representation being larger and community board representation being smaller.
15. Ability of the Board as presently constituted to eliminate undue concentration of executive power and to supplement the City Council, which retains the general legislative power of the city.
16. Effectuation of delegated police-power responsibilities.
17. Equality of voting power on the Board among the boroughs as boroughs.[77]

In an extended analysis of the defendants' concerns, the Court recognized the historic concerns of numbers 5, 6 and 9, "the Board's time rooted membership evidences on-going borough residential political consciousness."[78] The court respected political boundaries as a legitimate concern as well as upholding

[77] Morris v. Board of Estimate, 647 F. Supp. 1463, 1468.

[78] *Id.* at 1472.

the integrity of political subdivision, numbers 4, 6, 7, 9, and 14.[79]

The District Court analyzed the City's claims which dealt with effectiveness (numbers 4, 8, 10, 11, 12, 13 and 14) and found that under the New York State Constitution,[80] "effective local self-government and intergovernmental cooperation are expectations of the people of the state."[81] Citing the fiscal crisis of the mid-1970's as an example, the Court found that the Board dealt effectively with large and complex problems.[82] However in those stipulated concerns dealing with meaningful representation, numbers 4, 7, 9, and 14, the District court found it difficult to formulate an appropriate definition that would fit the Board of Estimate. The "one borough, one vote" formulation is antithetical to the "one person, one vote" doctrine.[83] Because of historical considerations and natural boundaries, the retention of the boroughs as political subdivisions was regarded by the court as a "legitimate consideration."[84] The court's analysis, while validating many of the City's concerns, lightened but did not relieve the City of the burden of justifying the Board composition. The court said the City must also demonstrate that no alternative plan would satisfactorily embrace the legitimate considerations and diminish the deviation, and ordered the Board's voting plan to be recast with all deliberate speed.[85]

E. The New Charter

On November 7, 1989, the residents of New York City

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[79] Reynolds v. Sims, 377 U.S. 533, 578-579 (1964).

[80] N.Y. CONST. art. IX, § 1 (McKinney 1969).

[81] *Morris*, 647 F.Supp 1463, 1471.

[82] *Id.* at 1472.

[83] *Id.* at 1473.

[84] *Id.* at 1474.

[85] *Id.* at 1475.

voted to adopt a new city charter.[86] Under the new Charter, the Board of Estimate was abolished while the City Council was expanded and given wider powers.[87] The most important difference under the new charter is that final authority for land use planning and zoning policy has become the City Council's responsibility.

Procedurally, all comprehensive land use planning and zoning proposals and urban renewal plans must go to the Council. The Council is the final arbiter when the City Planning Commission approves an application over the objection of a Community Board and a Borough President. The Council must abide by its Fair Share doctrine, which requires it to consider whether communities would be overburdened or undeserved by council actions when city facilities are at issue. Under the new charter, land use procedures are dealt with differently than under the Board of Estimate, and this has influenced the style and voting patterns of the new council. Community Boards are involved in the process at an earlier stage than under the Board of Estimate, and are thus supplying the Community Boards with more information than they had previously. While giving local community officials a greater opportunity to shape the broad outlines of a project, the new Charter gives them less influence on critical details at the end. Despite this drawback, some Community Boards fear that without the Board of Estimates' Calendar of Meetings, they will not be informed about important political issues in time to create proper position statements. In addition, land use planning and zoning has become an essential part of the Borough President's role, and all Borough Presidents have increased their land use planning and zoning budgets.[88]

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[86] Alan Finder, *Overhaul of New York City Charter is Approved, Polls Show*, N.Y. TIMES, Nov. 8, 1989, at B1.

[87] *Id.*

[88] The 1991-1992 Borough President's land use budgets were:

Borough	Staff Allocation	Budget	Housing

F. AN EXAMPLE OF THE PROBLEMS CAUSED BY THE ADOPTION OF THE CHARTER

One similarity between the present City Council and the former Board of Estimate is the political maneuvering that counters the effect of proportional representation. On high profile matters, such as land use decisions concerning the construction of incinerators within a community, members of the Board of Estimate have often followed the lead of colleagues whose districts were most affected by the Board of Estimate's action. This style of voting is referred to as legislative parochialism. The move away from legislative parochialism is implicit in the Supreme Court's characterization of the "one person, one vote" doctrine, and although many Council members argue that this voting trend is on the decline, it is important to analyze the Council's decision-making process in high profile matters to determine whether the Council has, in fact, adopted a new style or is actually maintaining the legislative parochialism of its predecessor. This section discusses the manner in which the City Council dealt with a major land-use decision, and shows that the decline in legislative parochialism did not necessarily result in proportional representation.

There are a number of factors other than legislative parochialism that influence the decision-making process in the City

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Bronx	9	$350,000.	$4500000.
Brooklyn*	2 (Director & Assistant)	N/A	$4600000.
$10,600.000 on water front and industrial parks.			
Manhattan	12	$475,000.	N/A
Queens	8 plus 40 person task force to review zoning.	$340,000.	$3200000.
Staten Island	2	$154,000.	$600,000.

* Brooklyn has maintained the Borough Hall specialist system, which makes budget numbers difficult to derive. Claudia H. Deutsch, *How New Charter Effects Land Use*, N.Y. TIMES, Sept. 6, 1992, at Sec. 10, p. 3.

Council. Council members have a duty to further the interests of their constituents while at the same time, they must also develop consensus to pursue the city's overall interests. Also, under the new City Charter, the voting of Council Members is influenced by the powerful position of the Council Speaker. These factors played an integral role in the Council's recent adoption of a long-term waste management policy for the City, which was approved in August, 1992.[89]

In 1989, the City adopted legislation stating that the City recycle 1400 tons of garbage per day by April, 1991 and 2100 tons (25% of total waste per day), by 1994.[90] However by March of 1991 the city was only collecting 1150 tons of recycled material.[91] Faced with budget cutbacks, unrealistic goals and public apathy, the city was forced to build incinerators instead of pursuing the recycling plan. The Mayor's office was faced with the unpopular alternative of building incinerators because of: (1) the failed recycling program; (2) the Fresh Kills (Staten Island) landfill is nearing capacity and will have to be closed within ten years; and (3) the potential congressional prohibition on the export of waste to neighboring states. In addition, the State legislature mandated that the City develop a long term waste management proposal.

At the end of March, 1991, the Mayor proposed a waste management plan. This proposal included the development of a city-wide recycling program which is to be completed by April, 1994 that requires the City to recycle 41% of its total daily waste;[92] the construction of one super-incinerator at the Brooklyn Navy Yard and the upgrading of the City's three existing incinera-

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[89] Michael Specter, *Pact on Garbage in New York City*, N.Y. TIMES, Aug. 18, 1992, at A1.

[90] Administrative Code of the City of New York § 16-140(2).

[91] Allan R. Gold, *Recycling Program in New York Falls Behind Second Year Goals*, N.Y. TIMES, Mar. 9, 1991, at A26.

[92] Calvin Sims, *Dinkins Offers Changes in Solid Waste Disposal*, N.Y. TIMES, Mar. 31, 1992, at B3.

tors so that 18% of the city's daily waste will be burnt;[93] and a reduction in the amount of waste that is either sent to the Fresh Kills landfill or exported to neighboring states. The waste management plan also mandated the construction of six recycling processing centers and four composting plants for institutional waste.[94]

Five days prior to the release of the Mayor's waste management plan, the Council took its first step in influencing the city's long-term policy goals in this area. While the Charter does not explicitly require the Council to consider long-term policy plans, the Council voted for jurisdiction over the waste management plan by requiring the Mayor to submit the plan to the Council. At this point, most Council members objected to the waste management plan because too much emphasis was placed on incineration and not enough on guarantees that the City would live up to its recycling commitments.[95]

Most Council members based their objections on strong grassroots opposition to incineration. This opposition came from two different factions. Environmental groups, who were opposed to either all incineration or only to excessive use of incineration, objected to the Mayor's plan on the grounds that he was reneging on his campaign promise to prevent incinerator construction.[96] Also, communities adjacent to the proposed Brooklyn Navy Yard Incinerator and the City's three existing incinerators objected to the waste management plan, claiming that the pollution created by the incinerators would damage their health.[97] Most Council members opted to protect their constituents rather than face the harsh reality that the City had to burn its garbage, and thus refused to go along with the Mayor's plan for waste management.

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[93] Allison Mitchell, *Groups Vow to Battle Incinerator*, N.Y. TIMES, Apr. 29, 1992, at B1.

[94] Calvin Sims *supra* note 91.

[95] *Id.*

[96] Allison Mitchell, *supra* note 92.

[97] *Id.*

In July, 1992, with over thirty members of the Council still opposing the Mayor's waste management plan, the Council voted to extend the time limit for approval of the plan six more weeks.[98] It is during this six week period that the other two factors, the influence of Council Speaker Vallone and the development of consensus, affected the decision-making process of the Council.

Before proceeding to an analysis of the Council's compromise with the Mayor's office, it is essential to understand the power of the Council Speaker. The Speaker hires and administers the Council's central staff, which is comprised of 247 analysts, lawyers and investigators.[99] In addition, the Speaker controls the purse strings for stipends, the appointment of committee chairpersons and the Council's formal agenda. Critics of Speaker Vallone accuse his appointees of being fiercely loyal to the Speaker's interests while ignoring the interests of the Council members to whom they were as-signed.[100] The resulting power of the Speaker is felt when high profile issues, such as the final vote on the waste management plan, come before the Council, and he is capable of influencing the Council's decision.

In late July and early August, 1992, a compromise between the Mayor's office and Speaker Vallone was reached.[101] The compromise called for the closing of two incinerators, one in Greenpoint, Brooklyn and the other in Maspeth, Queens; the beginning of a city-wide, curbside recycling plan to be in place by the Fall of 1993 instead of April, 1994; the construction of a super-incinerator at the Brooklyn Navy Yard; the elimination of the Staten Island ashfill; and the exportation of toxic waste produced by the Brooklyn Navy Yard's incinerator.[102] During the negotia-

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[98] James C. McKinley, Jr., *Council Postpones Action on Garbage Plans*, N.Y. TIMES, July 10, 1992, at B2.

[99] James C. McKinley, Jr., *New Council is Becoming More Powerful*, N.Y. TIMES, July 28, 1992, at B1.

[100] *Id.*

[101] Michael Specter, *supra* note 88.

[102] *Id.*

tion of this compromise, there was an attempt to rally Council members from Staten Island and Queens by proposing legislation which would benefit their constituencies as a means of countering the opposition of Council members from Brooklyn and Manhattan.

For example, proposed legislation eliminating the ashfill site in Staten Island ensured support for the compromise plan from Staten Island members. Similarly, Queens Council Member Walter L. McCaffery, an outspoken critic of incineration, was induced to vote for the compromise plan because his constituents would directly benefit from proposed legislation to close the Maspeth Incinerator.[103] Proponents of the compromise plan even attempted to gain support from Brooklyn districts adjacent to the Greenpoint Incinerator by proposing that it be closed down. However, the Council Members representing these districts, Victor L. Robles and Mary Pinkett, voted against the compromise.[104] Also, as an appeal to garner the vote of Brooklyn's Spring Creek Council member, Howard Berman, Chairperson of the Council's Finance Committee, the plan's supporters included a ban on the construction of incinerators in Spring Creek, Brooklyn.

One obstacle to the ratification of this compromise had been the mayor's refusal to make the construction of the Brooklyn Navy Yard's super incinerator in 1996 dependent on full compliance with the city-wide, curbside recycling program.[105] However, during final negotiation of the compromise, the mayor agreed that the construction of the super-incinerator at the Brooklyn Navy Yard would be dependant on the City's compliance with a comprehensive recycling program. The Mayor's compromise insured approval of the plan because now Council members could vote for the plan knowing that the city would be forced to comply with the recycling portion of the plan in order to build incinerators. As a result of this compromise the Council appropriated $300,000.00 towards the recycling program, nearly ten times the amount allocated under

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[103] Michael Spector, *Hope, Off Ash Heap, New York City Fought Over an Incinerator, But Real Focus is on Recycling*, N.Y. TIMES, Aug. 29, 1992 at A1.

[104] *Id.*

[105] *Id.*

prior legislation.[106]

The waste management plan was approved on August 27, 1992, by a vote of 36 to 15, and resulted in both positive and negative criticism of the Council's decision-making process.[107] According to supporters, the passage of the waste management plan shows that the Council is prepared to influence long-term city policy and challenge the mayor on long-term decisions, and also that some members of the Council are willing to compromise and establish political consensus when it results in a greater benefit to the city. However, many Council members from Brooklyn believe they were betrayed on the incineration issue. These Council members claim that as local community members and politicians, they are best able to assess the needs of their communities. They therefore felt that their opinions should have been accorded serious consideration when determining the outcome of such an important issue. They argue that legislative parochialism has merit where the views of certain communities are at odds. While, Speaker Vallone's power brokering is not far removed from the Board of Estimate's legislative parochialism, it can presently be legitimated by virtue of his position's power. Therefore, Council members need to find a balance between preventing legislative parochialism, pursuing their constituent's interests, establishing consensus on long-term City interests and responding to the balance of power between the Council and its Speaker.

Conclusion

Democracy is a human endeavor. The Constitution, the courts, and the new Charter can all provide the mechanisms around which the principle of "one person, one vote" can be put into practice. However, the application of this principle cannot necessarily guarantee that all voters will profit from proportional representation. Therefore, it is up to elected officials to ensure that their constituents, in New York City and elsewhere, have a voice in

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[106] *Id.*

[107] Alan Finder, *In a Vote at Sunrise, a New Dawn for New York Politics*, N.Y. TIMES, Aug. 28, 1992, at B3.

local government, and ultimately, it is the voters at election time who must remedy any perceived shortcomings in their representation.

The final question to be addressed is whether the consequences of the charter revision, such as the elimination of the Board of Estimate and the expansion of the size and political power of the City Council, have brought New York City's governmental process in line with the apportionment goal of "fair and effective representation" and the "one person, one vote" standards under *Reynolds* and the "rational consideration" standard under *Avery*. Increasing the size of the Council as a means of more equitably distributing power is the obvious step towards effectuating the "one person, one vote" standard. For example, Brooklyn, the borough with the largest population, should have the greatest representation in City government.

Under the current scheme, Brooklyn has the most of representatives in City government and thus the City is complying with the proportional requirements of "one person, one vote." However, despite this "proportional representation," the Council decided to place the super-incinerator in the Brooklyn Navy Yard. The Brooklyn delegation was outvoted by the other boroughs because Brooklyn's interests were outweighed by the need for a comprehensive waste management plan for the entire city.

Discontent still exists in the boroughs over a variety of issues besides the construction of the Brooklyn Navy Yard's super incinerator, such as secession from the City by Staten Island and dissatisfaction with central school board policy in Queens. Brooklyn Borough President Howard Golden, who opposed the 1990 Charter Revision, has now proposed that the State Legislature create a Commission on Borough Governance.[108] Golden suggests that the boroughs regain the political clout, vis a vis the mayor, which was lost when the Board of Estimate was abolished. He also proposes a decentralization of land use and budgetary allocations that begin at the borough level rather than in the mayor's office. Borough President Golden has received support

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[108] Allison Mitchell, *Borough Presidents Seek Stronger Role in City*, N.Y. TIMES, Feb. 24, 1993 at B2.

from Queens Borough President Claire Shulman and Staten Island Borough President Guy V. Molinari[109] in his quest, however, City Council Speaker Peter Vallone is opposed to the creation of such a commission. Silent on the matter are the City council members who look to Vallone for appointments on the Council committees as well as for filling patronage positions for their supporters.

In Staten Island, the move for secession will go to vote in the November, 1993 elections.[110] With the secession issue come a host of legal problems such as whether New York City property in Staten Island can be taken over by a new municipality without violating the Takings Clause of the Constitution, and which of the services constitutionally mandated by the old municipality must a new municipality supply to its residents.

Finally, even the Charter's attempt to increase minority representation has recently been legally challenged.[111] Richard Ravitch, former chairman of the Charter Commission, brought a suit against the City alleging the unconstitutionality of Section 50(b)(1) of the Charter, which created the racial makeup of the 15-member commission empowered to draw the new Council districts. The Charter provided that the commission include at least one resident from each borough and members, of the racial and ethnic minorities protected by the Federal Voting Rights Act "in proportion as close as practicable, to the population in the city."[112] The Council appointed eight members and the mayor appointed seven members, with a resultant makeup of seven whites, four blacks, three Hispanics and one Asian-American.

The District Court found that while the "inclusion of minority viewpoints in a process will lead to a more fair and evenhanded presentations of varying perspectives," the use of the term "proportion" has "an unmistakable meaning" and "is, of itself,

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[109] *Id.*

[110] *Id.*

[111] Ravitch v. City of New York, 90 Civ. 5752 (S.D.N.Y. 1993).

[112] *Id.*

constitutionally suspect."[113] The Court ruled that this was too broad a remedy because it established "a rigid appointment system keying appointment to population numbers and would stay in effect indefinitely."[114]

Finally, it appears that even though the new City Charter applies the "one person, one vote" principle, the internal mechanism of New York City politics has not allowed its goal to be realized. Minority representation has, in fact, significantly increased. However, the overall goal of giving more voice to the voter has instead created a second centralized power base in the persona of the City Council Speaker. The larger boroughs, whose populations should have put them in a leadership role in City governance, are sometimes unable even to protect the unique needs of their local citizenry and Brooklyn voters still remain without "proportional representation" on the City Council.

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[113] *Id.*

[114] *Id.*