EXTRA MAJORITY ELECTION RULES IN RETROSPECT

On June 7, 1971, in *Gordon v. Lance*,[1] the Supreme Court reversed a decision of the West Virginia Supreme Court[2] and held that the requirement of the West Virginia Constitution that revenue bonds must be approved in a referendum by at least 60 per cent of all votes cast therein before local governments are authorized to issue such bonds[3] did not violate the equal protection clause of the United States Constitution.[4]

In reversing the West Virginia court, the Supreme Court distinguished prior decisions[5] concerning infringements upon the vote from the issue presented by extra majority rules as found in the West Virginia Constitution. The significant distinction found by the Court was that an extra majority requirement does not "fence out" from the vote nor dilute the vote of an "independently identifiable group," such as voters belonging to a certain race or living in a certain geographic area.[6] The Court also observed that the Federal Constitution itself contains provisions requiring extra majorities,[7] implying that if extra majority rules are proper for the United States Constitution, the constitutionality of the use of such rules by the states should not be questioned.

The decision of the Supreme Court in *Gordon* was the basis for the summary disposition of cases then pending before the Court which also presented the issue of the constitutionality of extra majority rules in other states.[8] An analysis of one of these cases, *Brenner v.*

1. 403 U.S. 1 (1971).
2. Lance v. Board of Education, 153 W. Va. ———, 170 S.E.2d 783 (1969), *aff'd sub nom.* Gordon v. Lance, 403 U.S. 1 (1971).
3. W. VA. CONST. art. X, § 1.
4. U.S. CONST. amend. XIV, § 1.
5. Cipriano v. City of Houma, 395 U.S. 701 (1969); Gray v. Sanders, 372 U.S. 368 (1963).
6. 403 U.S. at 5.
7. *Id.*
8. Bogert v. Kinzer, 403 U.S. 914 (1971), *aff'g* 93 Idaho 515, 465 P.2d 639 (1970); Brenner v. School District, 403 U.S. 913 (1971), *aff'g* 315 F. Supp. 627 (W.D. Mo. 1970); Alhambra City School District v. Mize, 403 U.S. 927 (1971), *aff'g* 2 Cal. 3d 806, 471 P.2d 515, 87 Cal. Rptr. 867 (1970); Rimarcik v. Johansen, 403 U.S. 915 (1971), *aff'g* 310 F. Supp. 61 (D. Minn. 1970); Westbrook v.

School District,[9] provides an insight into some of the many issues raised as to the constitutionality of extra majority voting rules.

Elections were held on May 20 and July 1, 1969, in Kansas City, Missouri, in an attempt to gain voter approval of an increase in the tax levy for support of the school district of the city. Both times a simple majority of the voters approved the levy increase, but each time the levy increases failed to pass because less than two-thirds of the voters voted for approval, as required by the Missouri Constitution.[10] Plaintiffs, qualified voters of Kansas City who supported the tax increase, sued in district court for a declaratory judgment to determine the constitutionality of the Missouri Constitution's two-thirds majority requirement.

The plaintiffs contended that those articles of the state constitution and the enabling legislation enacted under them which required extra majority elections were a denial of the republican form of government. The plaintiffs also argued that an extra majority rule was a dilution of the vote and thus an infringement of a basic constitutional right which may be justified only by a showing of a compelling state interest; otherwise such an infringement on the right to vote would be a denial of equal protection of the laws.[11]

The district court rejected the plaintiffs' contention that the Missouri Constitution's two-thirds rule was in conflict with the concept of a republican form of government and held that the plaintiffs' reliance on *The Federalist* to support their argument was misplaced. As for the plaintiffs' argument of a denial of equal protection of the laws, the district court concluded that prior Supreme Court decisions in voting rights cases rejected equal protection arguments similar enough to the argument in *Brenner* to be controlling. The district

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Mihaly, 403 U.S. 922 (1971), *aff'g* 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970). The *Gordon* court did not rule as to the constitutionality of extra majority rules if applied to the election of representatives or if the rule demanded an extremely high percentage of the vote. 403 U.S. at 8 n.6.

9. 315 F. Supp. 627 (W.D. Mo. 1970).

10. Mo. CONST. art. 6, § 26(b):

> Any county, city, incorporated town or village or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per cent of the value of the taxable tangible property . . . .

Mo. CONST. art. 10, § 11(c):

> In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefore . . . .

11. 315 F. Supp. at 628-29.

court held that there was no violation of the one man-one vote principle by a dilution of the vote in elections for approval of tax levies or municipal revenue bonds, because the one man-one vote principle was only applicable to the election of representatives. In any case, the court concluded that only the traditional equal protection test was required in judging the constitutionality of the two-thirds rule, and found that the Missouri extra majority rules did in fact satisfy the test of compelling state interest.[12]

On the republican form of government issue the court found the plaintiffs' reliance on *The Federalist No. 22* to be misplaced and "out of context."[13] The district court supported this conclusion by quoting from *No. 51,* in which Hamilton said that "if men were angels no government would be necessary," and *No. 10,* where Madison spoke of the need to provide a system of checks and balances against "the superior force of an interested and overbearing majority."[14] But it is the court's quotation from *The Federalist* which is out of context.

In *No. 51* Hamilton was arguing for the principle of the separation of powers now found in the Constitution, by showing the necessity of such a separation with an analogy between the nature of government and the nature of man.

> But what is government itself, but the greatest of all reflections of human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.[15]

It is difficult to understand how the court is able to infer from this quotation an argument by Hamilton supporting the idea of minority rule by means of an extra majority election rule.

In *No. 10* Madison was concerned over the possibility of an "overbearing majority," but he was specifically concerned with the possibility of a faction, be it minority or majority, which might gain power and rule only through self-interest, to the detriment of others. But Madison's solution was not that the will of a minority should hold sway or that only the consensus of an extra majority would be sufficient protection against rule by small factions. Instead his solution was to "[e]xtend the sphere, and you take in a greater variety of par-

12. *Id.* at 642.
13. *Id.* at 629.
14. *Id.*
15. The FEDERALIST No. 51 at 285 (Colonial Press ed. 1901) (A. Hamilton).

ties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens . . . ."[16]

It is difficult to understand why the plaintiffs' reliance on *No. 22* was misplaced, as the district court stated. Hamilton argued against the proposition that all states should have an equal voice. He feared that equal representation among the states would in reality be inequality among the people, since a majority of the states might have only a minority of the total population. Hamilton's fear of an election scheme that would allow a minority of the people to hold the power of decision over the will of the majority seems quite relevant for an argument against the use of extra majority rules in elections where in fact the power of decision is given to a minority of the electorate.[17]

The court also gave considerable weight to the fact that in the Constitution itself there is "the utilization of a two-thirds majority vote on questions considered to be of particular difficulty and importance . . . ."[18] But this use of analogous provisions in the Constitution to support state legislative or constitutional schemes has been rejected by the Supreme Court in the past.[19]

Though the district court's dismissal of the plaintiffs' republican form of government argument lacked support from *The Federalist* or even prior Supreme Court decisions, it is still doubtful that this type of argument is sufficient in and of itself to justify declaring extra majority rules unconstitutional. Certainly, historical research to discover the intent of the founding fathers lends in the discerning of the proper construction to be given the Constitution, but such historical evidence divorced from almost two hundred years of judicial

16. THE FEDERALIST No. 10 at 50 (Colonial Press ed. 1901) (J. Madison).

17. Nearer the question of extra majority requirements, Hamilton goes on to say that "[t]o give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is, in its tendency, to subject the sense of the greater number to that of the lesser." THE FEDERALIST No. 22 at 114 (Colonial Press ed. 1901) (A. Hamilton). And in further discussing the idea of requiring more than a majority, Hamilton observed that "[t]he necessity of unanimity in the public bodies, or of something approaching toward it, has been founded upon a supposition that it would contribute to security. But its real operation is to . . . destroy the energy of government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto to the regular deliberations and decisions of a respectable majority." *Id.*

18. 315 F. Supp. at 629.

19. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963).

interpretation should not be the sole basis on which to decide an important constitutional issue of today.

The district court's conclusion that the plaintiffs' equal protection argument had already been rejected by the Supreme Court was based on prior decisions by the Supreme Court in various voting rights cases in which equal protection arguments were rejected.[20] But for the most part, the claimed infringements on the right to vote in the cases cited by the court in *Brenner* were substantially different from the claimed denial of equal protection because of the dilution of the vote by extra majority rules. The *Brenner* court noted a Supreme Court decision upholding an electoral scheme in which county school board members were elected by appointed district school board members.[21] The Supreme Court had rejected the equal protection attack by characterizing this scheme as an appointive rather than an elective process.[22] Also cited were two multi-district cases,[23] but in these cases the claim of a violation of the one man-one vote principle was rejected because it was seen "merely as the basis of residency of candidates, not for voting or for representation."[24]

Of all the cases cited, only two rejected equal protection arguments which might be considered as controlling the argument against extra majority rules in elections. The first was an old decision in which the Supreme Court upheld a Michigan plan for presidential elections whereby presidential electors were voted for by districts rather than at large.[25] Thus Michigan's electoral college vote could go to the candidate who carried the most districts even though he might not receive a majority of the state's popular vote. The continued vitality of this decision in light of the one man-one vote principle is in serious question.[26]

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20. Adams v. City of Colorado Springs, 399 U.S. 901 (1970); Turner v. Clay, 397 U.S. 39 (1970); McDonald v. Board of Elections, 394 U.S. 802 (1969); Dusch v. Davis, 387 U.S. 112 (1967); Sailors v. Board of Education, 387 U.S. 105 (1967); Forston v. Morris, 385 U.S. 231 (1966); Forston v. Dorsey, 379 U.S. 433 (1965); McPherson v. Blacker, 146 U.S. 1 (1892).

21. Sailors v. Board of Education, 387 U.S. 105 (1967).

22. *Id.*

23. Dusch v. Davis, 387 U.S. 112 (1967); Forston v. Dorsey, 379 U.S. 433 (1965).

24. 379 U.S. at 438.

25. McPherson v. Blacker, 146 U.S. 1 (1892).

26. The only evidence the district court gave for the continued vitality of *McPherson* was Justice Harlan's concurring opinion in Williams v. Rhodes, 393 U.S. 23 (1968). But Justice Harlan has consistently rejected the one man-one vote principle as not required by the equal protection clause. *See, e.g.*, Reynolds

The other case which might have been seen as controlling the equal protection argument in *Brenner* was *Turner v. Clay*,[27] a summary decision in which the Supreme Court dismissed the plaintiffs' appeal from a decision of the South Carolina Supreme Court. The South Carolina court had upheld[28] a provision of the South Carolina Constitution which required that in incorporation elections of cities with a prospective population of over 5,000, the approval "of a majority of the electors residing and entitled by law to vote within the district proposed to be incorporated,"[29] was necessary. The *Brenner* court concluded that the Supreme Court had made a decision on the merits,[30] when actually it is unclear whether the Supreme Court decision did in fact rest on a conclusion that extra majority rules were not a denial of the equal protection of the laws, because of the summary nature of its decision. The fact that in *Turner* an incorporation election was at issue may distinguish it from *Brenner,* because the Supreme Court has traditionally given the states a great deal of leeway over incorporation procedures.[31] Also, the Supreme Court might have viewed the rule requiring a majority of all potential voters instead of only a majority of all actual voters in an election distinguishable from the extra majority requirement of a two-thirds rule.

The district court further explained its rejection of the plaintiffs' equal protection argument by concluding that

> the primary difficulty with plaintiffs' one man, one vote argument is that it fails to take into account the factual situation presented in the apportionment cases in which that principle was articulated and applied. Those cases related to elections in which representatives are chosen to represent the people.[32]

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v. Sims, 377 U.S. 533 (1964) (dissenting opinion); Gray v. Sanders, 372 U.S. 368 (1963) (dissenting opinion); Baker v. Carr, 369 U.S. 186 (1962) (dissenting opinion).

27. 397 U.S. 39 (1970), *dismissing appeal from* Clay v. Thornton, 253 S.C. 209, 169 S.E.2d 617 (1969).

28. 253 S.C. at 217, 169 S.E.2d at 620.

29. S.C. CONST. art. 8, § 2.

30. The district court cited considerable authority to support its contention that such summary decisions by the Supreme Court are in fact decisions upon the merits of the cases. *See, e.g.,* Zucht v. King, 260 U.S. 174 (1922); Sugarman v. U.S., 249 U.S. 182 (1919); Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902); STERN AND GROSSMAN, SUPREME COURT PRACTICE § 4.28 (1950). 315 F. Supp. at 643.

31. *See, e.g.,* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); *but see* Gomillion v. Lightfoot, 364 U.S. 339 (1960).

32. 315 F. Supp. at 633. This distinction between the constitutional protection given representative elections and elections for other types of decisions has been

But attempts to determine the extent of constitutional protection given to elections by a consideration of the purpose or impact of the election have been consistently rejected by the Supreme Court. The same strict equal protection test has been repeatedly applied to all elections regardless of the subject or purpose when laws denying access to the franchise have been attacked as a denial of equal protection.[33]

The *Brenner* court recognized these decisions, but distinguished them since they did not speak to the issue of malapportionment.[34] But the court essentially ignored the Supreme Court decision of *Hadley v. Junior College District,*[35] in which the one man-one vote principle was applied to the election of trustees for a junior college district, where dilution of the vote because of malapportionment was recognized. Instead the *Brenner* court noted that *Hadley* reiterated the principle that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the equal protection clause of the Fourteenth Amendment,"[36] and the court admitted that this principle also had been applied in *Kramer v. Union Free School District,*[37] *Cipriano v. City of Houma,*[38] and *City of Phoenix v. Kolodziejski.*[39] The *Brenner* court concluded that these cases still have not "presented the question of whether the Equal Protection Clause commands the application of the political principle of majority rule to a state school bond and tax levy election."[40] The court could see no relationship between the application of the one man-one vote principle in *Hadley* and its application to all types of elections in which the vote may be unequally weighted.

In light of the decision in *Hadley,* it is hard to understand the court's insistence in distinguishing between reapportionment cases and extra majority cases, unless it makes this distinction to avoid contend-

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given wide support. *See* Bogert v. Kinzer, 93 Idaho 515, 465 P.2d 639 (1970), *aff'd,* 403 U.S. 914 (1971); Comment, *Equal Protection of the Laws,* 83 HARV. L. REV. 1911, 1917 (1969-70); Note, *Judicial Activism and Municipal Bonds: Killing Two-Thirds with One Stone,* 56 VA. L. REV. 295, 318 (1970).

33. *See, e.g.,* City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School District, 395 U.S. 621 (1969).

34. 315 F. Supp. at 634.

35. 397 U.S. 50 (1970).

36. 315 F. Supp. at 636, *quoting from* Harper v. Virginia State Board of Elections, 383 U.S. 663, 665 (1966).

37. 395 U.S. 621 (1969).

38. 395 U.S. 701 (1969).

39. 399 U.S. 204 (1970).

40. 315 Supp. at 636.

ing with the application of the one man-one vote rule to extra majority elections, which would necessitate a per se prohibition of all extra majority rules as a denial of equal protection.[41] But other cases have struck down extra majority laws without categorically stating that all extra majority laws are on their face an unconstitutional denial of equal protection of the laws.[42]

Although the *Brenner* court concluded that only the traditional equal protection test should have been applied to Missouri's two-thirds rule, it found that the Missouri extra majority rule did in fact meet the compelling state interest test.[43] The district court decided that the two-thirds requirement for the approval of the issuance of general obligation bonds was justified by the past bad experiences suffered by the state, as in the panic of 1873 when financial disaster overwhelmed many local governments (this situation had been aggravated by thoughtless incurring of debts by general obligation bonds). Ever since then, Missouri legislatures have supported the need to control strictly such future indebtedness by making it harder for local communities to gain voter approval of bond issues. The court pointed to historical evidence that if the two-thirds rule had not been included, voters would not have approved past constitutions for the state of Missouri.[44] Further, the court noted that the support of public education has always been a hotly contested political issue, and that "experience established that unless at least two-thirds of all the citizens in the proposed school district were committed in advance, it would not be likely that the school would be adequately supported by the local community."[45]

From the evidence it presented the court seems to have decided that the compelling state interest test is met when a law deals with a question over which the people have shown a great deal of anxiety and concern. But in essence what the court has said is that the will of the majority is insufficient when a hotly disputed issue is being considered. Although an extra majority rule is reasonably related to the policy of discouraging future indebtedness of local governments, and

41. *See, e.g.,* Lance v. Board of Education, 153 W. Va. ———, 170 S.E.2d 783 (1969), *aff'd sub nom.* Gordon v. Lance, 403 U.S. 1 (1971).

42. *See, e.g.,* Rimarcik v. Johansen, 310 F. Supp. 61 (D. Minn. 1970), *aff'd,* 403 U.S. 915 (1971); Westbrook v. Mihaly, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970), *aff'd,* 403 U.S. 922 (1971).

43. 315 F. Supp. at 637.

44. *Id.* at 639.

45. *Id.* at 640.

may help to insure that schools will be adequately supported by their communities, there is still lacking a sufficient justification for state infringement of its citizens' fundamental rights as required by the compelling state interest test.

The case law which developed the criteria which a state must show in order to demonstrate a compelling interest seems to have focused upon the need for the state to use only that method of achieving a proper goal for which there is no reasonable alternative that does not infringe constitutional rights.[46] The district court did not explain why a two-thirds majority was the only reasonable alternative to achieve protection against over-indebtedness by local governments or to guarantee widespread support for the state's public schools; and as for the goal of obtaining the taxpayers' support for the schools, the claim than an extra majority requirement on a school tax referendum is the only method of generating enthusiasm for support of the public schools is clearly without merit. Certainly, a program by the state to improve relations between schools and communities or an upgrading of the quality of public education (which might be effected by higher school taxes) would also serve the policy of gaining public support for the schools without infringing upon voting rights.

Not only did the district court fail to explain why the extra majority rules were the only reasonable alternative for achieving the goals which the court attributed to them, but the court also gave no evidence to show that the two-thirds requirements in Missouri have furthered the achievement of these goals. The court did not explain how the defeat of past bond referenda and school tax levies has saved local governments from bankruptcy nor how it has kept the people from abandoning their public school system.

In *Shapiro v. Thompson*[47] the Supreme Court suggested that substantial proof is necessary to show that infringement of a fundamental right has markedly alleviated the problem which the state law in question meant to solve.[48] Given the vague, general nature of the goals the *Brenner* court attributed to the two-thirds rule, the dearth of actual evidence showing that use of the two-thirds rule has helped to achieve the cited goals, and the absence of an explanation why an extra majority requirement was the only reasonable method available to the state to achieve such goals, the court failed to justify its con-

46. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).
47. 394 U.S. 618 (1969).
48. *Id.* at 635.

clusion that Missouri's two-thirds rule satisfied the compelling state interest test and thus justified an otherwise unconstitutional infringement of a fundamental right.

The court, however, did raise a serious question as to whether an extra majority rule should be open to a constitutional attack as an infringement upon one's right to vote, if such a rule is looked upon as merely a "decisional rule" apart from the election itself.[49] The argument supporting this position seems to be, that as long as one is not unjustly denied access to the vote, and as long as each vote is counted and given equal weight, a state law that merely decides how the votes are to be used or counted (whether a simple majority rule or some extra majority rule is employed, or whether the vote is used as controlling the issue of the election or as merely advisory upon the state government) is sufficiently removed from affecting the citizen's right to vote and thus is beyond constitutional attack.[50]

The problem with this argument is that it ignores the reality of the actual effect of an extra majority rule. The logic that is able to distinguish between the dilution of the vote because of malapportionment, and dilution of the final weight a vote is given because of a two-thirds majority rule, fails to explain why this distinction should be maintained when the outcome of either method of dilution is the same. A minority of the voters is given the power of decision over the will of the majority. By whatever means it is done, a dilution of one's vote in "[i]ts operation contradicts that fundamental maxim of republican government, which requires that the sense of the majority should prevail."[51]

With its decision in *Gordon v. Lance*,[52] in light of which *Brenner* was summarily affirmed, the Supreme Court ignored the reality of the impact of extra majority rules upon the effectiveness of one citizen's vote and the logical relationship between an effective vote and the right to vote. Instead the Court has restrained the inevitable logic of its prior decisions[53] by severely limiting the application of equal

49. 315 F. Supp. at 631.

50. *See, e.g.*, Comment, *Equal Protection of the Laws*, 83 HARV. L. REV. 1911, 1918 (1969-70); Note, *Judicial Activism and Municipal Bonds: Killing Two-Thirds with One Stone*, 56 VA. L. REV. 295, 320 (1970).

51. THE FEDERALIST No. 22 at 113 (Colonial Press ed. 1901) (A. Hamilton).

52. 403 U.S. 1 (1971).

53. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963).

protection principles in dilutions of the vote to instances where only a clearly identifiable group is involved.

The affirmation of the constitutionality of extra majority rules clearly marks a change in direction by the Supreme Court in protecting the individual citizen's right to vote against diverse state electoral schemes which infringe upon the right of each citizen to participate fully and equally in the electoral process.

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