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Robert M. Myers

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PUBLIC OFFICIALS REPRESENT ACRES, NOT PEOPLE:

*SALYER LAND CO. v. TULARE LAKE BASIN WATER STORAGE DISTRICT*¹

In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, the United States Supreme Court upheld the constitutionality of a special-purpose district voting scheme² that disenfranchised nonland-owning residents of the district and granted each landowner one vote for each \$100 of assessed land value.³ The majority opinion delivered by Justice Rehnquist, and joined in by Chief Justice Burger and Justices Stewart, White, Blackmun, and Powell, is the most recent development in a long series of cases that have attempted to ascertain the exact limits and contours of the voter equality principles as they apply to units of local government.⁴ While certainly not conclusive

1. 410 U.S. 719 (1973).

2. Special districts have been a part of American governmental structure since the early 1800's. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *THE PROBLEM OF SPECIAL DISTRICTS IN AMERICAN GOVERNMENT 1* (1964) [hereinafter cited as *ADVISORY COMMISSION REPORT*]. The purposes and functions of a special district are defined as follows:

[Special districts] are organized entities, possessing a structural form, an official name, perpetual succession, and the rights to sue and be sued, to make contracts, and to obtain and dispose of property. They have officers who are popularly elected or are chosen by other public officials. They have a high degree of public accountability. Moreover, they have considerable fiscal and administrative independence from other governments. The financial and administrative criteria distinguish special districts and other governments from all dependent or subordinate districts and from authorities which, lacking one or both of these standards, are not governmental units. . . . Unlike most other governments, individual special districts usually provide only one or a few functions.

J. BOLLENS, *SPECIAL DISTRICT GOVERNMENT IN THE UNITED STATES 1-2* (1957) [hereinafter cited as *BOLLENS*]. See generally Makielski, *The Special District Problem in Virginia*, 55 VA. L. REV. 1182 (1969); Mitchell, *The Use of Special Districts in Financing and Facilitating Urban Growth*, 5 URBAN LAW. 185 (1973); Novak, *Legal Classification of Special District Corporate Forms in Colorado*, 45 DENVER L.J. 347 (1968). School districts, while admittedly "special," are classified separately.

3. 410 U.S. at 724-25.

4. See, e.g., *Abate v. Mundt*, 403 U.S. 182 (1971); *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970); *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Avery v. Midland County*, 390 U.S. 474 (1968). Voter equality at the local level has engendered much controversy and commentary. See, e.g., Dixon, *Local Representation: Constitutional Mandates and Apportionment Options*, 36 GEO. WASH. L. REV. 693 (1968); Gaines, *The Right of Non-Property Owners to Participate in a Special Assessment Majority Protest*, 20 U.C.L.A.L. REV. 201 (1972); Grant & McArthur, "One Man-One Vote" and County Government: Rural, Urban and Metropolitan Im-

on the subject, *Salyer* appears to call a halt to the ongoing extension of these principles to additional local governmental units.⁵

I. VOTER EQUALITY AT THE LOCAL LEVEL

The constitutional standard by which voting restrictions in state and local elections must be judged is the equal protection clause of the fourteenth amendment.⁶ When a statutory classification is challenged as being violative of equal protection, courts generally articulate their conclusions in accordance with one of the two "accepted" standards of review.⁷ Under the "traditional" standard, such a classification will be sustained if it bears "some rational relationship to a legitimate state [purpose]."⁸ The second or "strict" standard will be employed if the classification is identified as "suspect" or found to infringe upon a "fund-

plications, 36 GEO. WASH. L. REV. 760 (1968); Hagensick, "One Man-One Vote" and County Government, 36 GEO. WASH. L. REV. 778 (1968); Martin, *The Supreme Court and Local Reapportionment: the Third Phase*, 39 GEO. WASH. L. REV. 102 (1970); Martin, *The Constitutional Status of Local Government Reapportionment*, 6 VAL. U.L. REV. 237 (1972); Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21 (1965); Comment, *One Man-One Vote and Judicial Selection*, 50 NEB. L. REV. 642 (1971); Comment, *The Impact of Voter Equality on the Representational Structures of Local Government*, 39 U. CHI. L. REV. 639 (1972); Comment, *Annexation Elections and the Right to Vote*, 20 U.C.L.A.L. REV. 1093 (1973).

5. See notes 243-53 *infra* and accompanying text.

6. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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.

U.S. CONST. amend. XIV, § 1 (emphasis added).

7. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 18-44 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); *Bullock v. Carter*, 405 U.S. 134, 142 (1972); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 806-07 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 658-63 (1969) (Harlan, J., dissenting). See Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther]; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

8. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973); *cf. McGowan v. Maryland*, 366 U.S. 420, 425 (1961). Under the traditional standard, broad latitude is given to the state:

State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26. See, e.g., *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911).

amental interest."⁹ If this standard is found to be applicable, a "compelling state interest" in the classification must be demonstrated before the statute will be sustained.¹⁰

The two most common forms of voting impairments that have been attacked on equal protection grounds are the superficially similar prob-

9. Before the strict test will be applied there must be a suspect classification or a fundamental interest involved. Suspect classifications include those based on race, color, religion, or alienage. *See, e.g., In re Griffiths*, 413 U.S. 717, 721-22 (1973); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Oyama v. California*, 332 U.S. 633, 644-46 (1948). Fundamental interests have been said to include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); the right to move from state to state, *Shapiro v. Thompson*, 394 U.S. 618 (1969); and the right to vote, *Carrington v. Rash*, 380 U.S. 89 (1965). Where voting rights are concerned, this strict test will apply whenever the state action "touches upon" or burdens the right to vote in a normal governmental election. Thus, the strict test is applied where the right to vote has been denied, *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); where it has been diluted, *Reynolds v. Sims*, 377 U.S. 533 (1964); or where it has been conditioned upon the payment of a fee, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

There is a wide division between the traditional and strict standards of review:

Some situations evoked the aggressive "new" equal protection, with scrutiny that was "strict" in theory and fatal in fact; in other contexts, the deferential "old" equal protection reigned, with minimal scrutiny in theory and virtually none in fact.

Gunther, *supra* note 7, at 8 (footnote omitted). The rigidity of this two-tier classification has come under increasing criticism. *See, e.g., Vlandis v. Kline*, 412 U.S. 441, 458-59 (1973) (White, J., concurring); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting). Professor Gunther sees the Court developing a "newer" equal protection standard. According to Gunther, "recent developments would view equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases." Gunther, *supra* note 7, at 20. In short, it would put "new bite" into the traditional standard:

[E]xtreme deference to imaginable supporting facts and conceivable legislative purposes was characteristic of the "hands off" attitude of the old equal protection. Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing.

Id. at 21. *See, e.g., United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973); *McGinnis v. Royster*, 410 U.S. 263 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). *But see Tribe, The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 5-6 (1973).

10. *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972); *City of Phoenix v. Kolodziejcki*, 399 U.S. 204, 205, 209 (1970); *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *cf. Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).

lems of dilution and disenfranchisement.¹¹ Dilution is implicated when government officials are elected from districts of varying population size.¹² Such a procedure conflicts with one of the basic tenets of representative government—that “the weight of a citizen’s vote cannot be made to depend on where he lives.”¹³ For in a system grounded in representative government, it is axiomatic that a majority of the people should elect a majority of the people’s representatives.¹⁴

In *Reynolds v. Sims*,¹⁵ the Supreme Court held that where state legis-

11. Professor Dixon argues that the courts have failed to adequately distinguish between the concepts of dilution and disenfranchisement:

In *franchise cases*, a [voter] has an absolute right to equality. *Representation cases* are not franchise cases. But the instinctive inclination in many briefs and opinions to treat the two as one fostered a strong tendency to import the absolute equality principle, which is necessary as a democratic postulate in the franchise cases, into the quite different field of representation cases

. . . .

The essential theory of the majority in the reapportionment cases, rightly or wrongly, was to view reapportionment disputes as simply one more round of “right to vote” cases, i.e., *franchise cases*, substantially divorced from those considerations of representation and group political dynamics which have been suggested in this work as necessary corollaries of a “voting rights” approach to legislative apportionment.

R. DIXON, *DEMOCRATIC REPRESENTATION* 181, 282 (1968), *quoted in Comment, Voter Restrictions in Special Districts: A Case Study of the Salt River Project*, 1969 L. & Soc. ORDER 636, 640 n.20.

12. There can be no violation of the equal protection clause unless the individual’s vote is somehow diluted. (See notes 124-26 *infra* and accompanying text for a discussion of weighted voting schemes which can also present problems of dilution.) In *Dusch v. Davis*, 387 U.S. 112 (1967), the Court upheld a “Seven-Four Plan” for the reapportionment of borough councilmanic seats. Under the plan eleven councilmen were to be elected at large. *Id.* at 114. Four of the members were to be elected without regard to their residence. The other seven members were elected by all the voters, but each had to reside in one of the seven boroughs which were of substantially unequal size. *Id.* The Court upheld the plan because each councilman was a representative of the entire city, not just the borough in which he resided. *Id.* at 115.

Also, the principle of “one person, one vote” does not apply to judicial elections since judges do not act in a representative capacity. McKay, *Reapportionment and Local Government*, 36 GEO. WASH. L. REV. 713, 733 (1968). See, e.g., *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff’d mem.*, 409 U.S. 1095 (1973); *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff’d mem.*, 409 U.S. 807 (1972); *New York State Ass’n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967); *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio), *appeal dismissed*, 385 U.S. 3 (1966); *Stokes v. Fortson*, 234 F. Supp. 575 (M.D. Ga. 1964).

13. *Reynolds v. Sims*, 377 U.S. 533, 567 (1964). See generally R. DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* (1968); R. MCKAY, *REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION* (1965); *REAPPORTIONMENT IN THE 1970’s* (N. Polsky ed. 1971); *REPRESENTATION* (J. Pennock & J. Chapman eds. 1968); *REPRESENTATION AND MISREPRESENTATION: LEGISLATIVE REAPPORTIONMENT IN THEORY AND PRACTICE* (R. Goldwin ed. 1968).

14. 377 U.S. at 565.

15. 377 U.S. 533 (1964). In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court upheld the right to challenge the constitutionality of a Tennessee legislative ap-

lative districts are concerned,¹⁶ the equal protection clause commands "one person, one vote":¹⁷

We hold that, as a *basic constitutional standard*, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.¹⁸

Although the *Reynolds* Court indicated that some divergences from a strict population standard were permissible,¹⁹ it explained that population must be the "controlling consideration."²⁰ Therefore, no state justification, however compelling, could defeat its application. Two problems, however, were left for subsequent judicial resolution. Since *Reynolds* only applied to state legislatures, it was unclear as to which other types of elective bodies the utilization of population as a "controlling consideration" in the distribution of the franchise was required,²¹ and even if this requirement were found to be applicable, it was also unclear as to which divergencies from the population standard could survive constitutional challenge.²²

While dilution involves the diminution of the weight of a person's vote, disenfranchisement involves the discriminatory denial of the franchise to certain otherwise qualified individuals.²³ Until recently, the Supreme Court upheld restrictions on the exercise of the franchise if

portionment plan. Prior to that time the Court avoided any judicial interference with state apportionment plans on the ground that they involved a "political question" and, therefore, were not justiciable. See, e.g., *South v. Peters*, 339 U.S. 276 (1950); *Colegrove v. Green*, 328 U.S. 549 (1946). In *Reynolds*, the Court enunciated the principle of "one person, one vote" as the standard with which to evaluate state legislative apportionment plans.

16. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court dealt with the problem of congressional district malapportionment. There, the concern was not with the equal protection clause but with article one:

We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.

Id. at 7-8 (footnotes omitted).

17. The phrase "one person, one vote" apparently originated in Justice Douglas' majority opinion in *Gray v. Sanders*, 372 U.S. 368 (1963), wherein he stated:

The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

Id. at 381.

18. 377 U.S. at 568 (emphasis added).

19. *Id.* at 579-81.

20. *Id.* at 581.

21. See notes 28-60 *infra* and accompanying text.

22. See notes 248-53 *infra* and accompanying text.

23. See note 73 *infra*.

they were reasonably related to a valid state purpose.²⁴ But with the development of the strict standard of review, voting schemes by which a state granted the right to vote to some bona fide residents of requisite age and citizenship and denied the franchise to others have been unable to meet the required test,²⁵ *i.e.*, the restriction was necessary to promote the state's articulated goal and that there was a "compelling state interest" for the restriction.²⁶ Prior to *Salyer*, it was thought that this close judicial examination was necessitated in any election of a public official.²⁷

A. Dilution

*Sailors v. Board of Education*²⁸ was the first local government reapportionment case to be decided on the merits by the United States Supreme Court.²⁹ Under attack was a system by which members of a county school board were selected by a group composed of delegates from local boards. Since each local board sent only one delegate and since each represented a different number of voters, it was contended that their equal vote at the meeting was antithetical to the principle of "one person, one vote."³⁰

The statutory powers of the county school board, although limited, included the power to appoint a county school superintendent, to prepare an annual budget, and to levy taxes.³¹ Justice Douglas, writing

24. See, *e.g.*, *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45, 51 (1959); *United States v. Classic*, 313 U.S. 299, 315 (1941); *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937); *Pope v. Williams*, 193 U.S. 621, 633 (1904); *Mason v. Missouri*, 179 U.S. 328, 335 (1900); *Davis v. Beason*, 133 U.S. 333, 346 (1890).

25. See, *e.g.*, *Goosby v. Osser*, 409 U.S. 512, 522 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 356-57 (1972); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 212-13 (1970); *Evans v. Cornman*, 398 U.S. 419, 426 (1970); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626-27 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966); *Carrington v. Rash*, 380 U.S. 89, 96 (1965). See also *Hebert v. Police Jury*, 245 So. 2d 349 (La.), *rev'd mem.*, 404 U.S. 807 (1971); *Stewart v. Parish School Bd.*, 310 F. Supp. 1172, 1181 (E.D. La.), *aff'd mem.*, 400 U.S. 884 (1970). But see *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973); *Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743, 744-45 (1973); *Burns v. Forston*, 410 U.S. 686 (1973); *Martson v. Lewis*, 410 U.S. 679, 680-81 (1973); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 810 (1969).

26. See notes 9-10 *supra* and accompanying text.

27. See notes 186-88 *infra* and accompanying text.

28. 387 U.S. 105 (1967).

29. In *Moody v. Flowers*, 387 U.S. 97 (1967), the Court dismissed two local government reapportionment cases on jurisdictional grounds. In *Dusch v. Davis*, 387 U.S. 112 (1967), the Court determined that there was no voter dilution and thus failed to reach the issue. See note 12 *supra*.

30. 387 U.S. at 106-07.

31. *Id.* at 110 n.7.

for a unanimous Court,³² held that the principles of *Reynolds* were inapplicable to the county board since the method of selecting its governing body was "basically appointive rather than elective"³³ and since its functions were attributes of an administrative rather than of a legislative body.³⁴ While the elective-appointive distinction is still accepted,³⁵ the legislative-administrative distinction was shortly discarded.³⁶

In *Avery v. Midland County*,³⁷ the Court for the first time invalidated a local government voting scheme on the ground that it contravened the principles of "one person, one vote."³⁸ The entity involved was the Midland County Commissioners Court which was the governing body of the county. It consisted of five members—a county judge, elected at large from the entire county, and four commissioners, each elected from one of four districts within the county.³⁹ The unequal apportionment of the four districts was the basis of the constitutional challenge.⁴⁰

The Court, examining the legislative-administrative dichotomy set forth in *Sailors*, determined that the Midland County Commissioners Court could not "easily be classified in the neat categories favored by civics texts"⁴¹ because it exercised various functions that could have been denominated as legislative, administrative, or judicial.⁴² Thus the Court was led to discard the legislative-administrative distinction,⁴³ and, adopting a new test, stated that the Constitution "permits no substantial variation from equal population in drawing districts for units of local government having *general governmental powers* over the *entire geo-*

32. Justices Harlan and Stewart concurred in the result without opinion.

33. 387 U.S. at 109.

34. *Id.* at 110.

35. See note 244 *infra*.

36. See text accompanying notes 41-44 *infra*.

37. 390 U.S. 474 (1968).

38. Prior to *Avery*, the highest courts in a number of states had held that the principles of *Reynolds* applied to units of local government. See, e.g., *Miller v. Board of Supervisors*, 63 Cal. 2d 343, 405 P.2d 857, 46 Cal. Rptr. 617 (1965); *Montgomery County Council v. Garrot*, 222 A.2d 164 (Md. 1964); *Hanlon v. Towey*, 142 N.W.2d 741 (Minn. 1966); *Bailey v. Jones*, 139 N.W.2d 385 (S.D. 1966). *Contra*, *Brouwer v. Bronkema*, 141 N.W.2d 98 (Mich. 1966); *Avery v. Midland County*, 406 S.W.2d 422 (Tex. 1966), *rev'd*, 390 U.S. 474 (1968).

39. 390 U.S. at 476.

40. The estimated population of the four districts was 67,906; 852; 414; and 828. This substantial imbalance resulted by placing the county's only urban center entirely within one of the districts. *Id.* As a result, 2.9% of the county's residents elected a majority of the commissioners court.

41. *Id.* at 482.

42. *Id.*

43. *Id.* *Accord*, *Hadley v. Junior College Dist.*, 397 U.S. 50, 55-56 (1970).

graphic area served by the body."⁴⁴ Applying this test to the county commissioners court, the Court determined that it had the authority "to make a large number of decisions having a broad range of impacts on all the citizens of the county"⁴⁵ and, thus, the principles of "one person, one vote" were applicable.⁴⁶

The decision in *Avery* invited speculation as to the applicability of "one person, one vote" to other local government units, especially special-purpose districts. While it was clear that cities, towns, and counties met the test,⁴⁷ the opinion's explicit language indicated that some government entities might not:

Were the Commissioners Court a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions.⁴⁸

The amorphous character of the test, arising from the difficulty in determining when an entity exercised "general governmental powers," was an additional source of confusion.

The Supreme Court's next opportunity to clarify the situation was presented in *Hadley v. Junior College District*,⁴⁹ where the principle of *Avery* was extended to include school districts. Under attack was a method of allocating trustees for a junior college district that allegedly resulted in malapportionment.⁵⁰ Determining that education was a "vi-

44. 390 U.S. at 485 (emphasis added).

45. *Id.* at 483. The Court determined that the commissioners had the power to exercise a wide range of governmental functions. They could maintain buildings, administer welfare, and make determinations concerning school districts. It also had the power to set a tax rate, equalize assessments, and issue bonds. The Court ignored the finding of the Texas Supreme Court that the powers exercised by the entity were "negligible." *Id.* The Texas court had found that historical development had limited the activities of the commissioners court to the non-urban areas of the county. *Avery v. Midland County*, 406 S.W.2d 422, 428 (Tex. 1966). The Court, however, was concerned not with the activities of the commissioners court, but with the powers they could potentially exercise.

46. 390 U.S. at 484-85.

47. *Id.* at 481.

48. *Id.* at 483-84.

49. 397 U.S. 50 (1970).

50. Under Missouri law, separate school districts could establish by referendum a consolidated junior college district and elect six trustees to conduct the business of the district. The trustees of the district were apportioned among the separate school districts on the basis of "school enumeration," *i.e.*, the number of persons between the ages of six and twenty. Using school enumeration rather than district residents as the basis in which to apportion the trustees resulted in a claim of unequal representation.

tal governmental function,"⁵¹ the Court concluded that the powers of the district⁵² were "general enough and [had] sufficient impact throughout the district"⁵³ to support an application of the principles explicated in *Avery*.⁵⁴ The Court, however, was clearly unsatisfied with the analytical approach demanded by *Avery* and squarely recognized the difficulty of developing "judicially manageable standards" with which to distinguish between agencies which exercise general governmental powers and those which do not.⁵⁵ Instead, a presumption was adopted that "one person, one vote" applied whenever government officials were selected by popular election.⁵⁶ The only suggested qualification of this presumption was offered in the most tentative of terms:

It is of course *possible* that there *might* be *some* case in which a state elects certain functionaries whose duties are *so far removed* from normal governmental activities and *so disproportionately* affect different groups that a popular election in compliance with *Reynolds* . . . *might* not be required⁵⁷

Thus with the exception of a weak disclaimer buried in the *Hadley* decision, the pre-*Salyer* interpretive context suggested that population was to be the "controlling consideration" in the election of every public official in the United States.⁵⁸ While the Court did not demand mathematical exactness,⁵⁹ it clearly required that state schemes which con-

The Kansas City district, which contained 60% of the consolidated junior college district's population, elected only three of the six trustees. *Id.* at 51.

51. *Id.* at 56.

52. The powers of the district's trustees included the levy and collection of taxes, issuance of bonds, hiring and firing of teachers, making of contracts, collection of fees, supervision and disciplining of students, passing on petitions to annex school districts, acquisition of property by condemnation, and the overall management of the district. *Id.* at 53.

53. *Id.* at 54.

54. *Id.*

55. *Id.* at 55.

56. *Id.* at 56. The Court stated this presumption as follows:

[A]s a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.

Id.

57. *Id.* (emphasis added). Compare the approach of *Avery*, quoted in text accompanying note 51 *supra*.

58. 397 U.S. at 56.

59. One of the most recent and least discussed of the voter equality cases dealing with local government is *Abate v. Mundt*, 403 U.S. 182 (1971). In *Abate*, the Court approved a reapportionment plan for a county board of supervisors which resulted in

tributed to the dilution of a person's vote were contrary to the basic principles of representative government.⁶⁰

B. Disenfranchisement

In *Kramer v. Union Free School District*,⁶¹ *Cipriano v. City of Houma*,⁶² and *City of Phoenix v. Kolodziejski*,⁶³ the Supreme Court had occasion to deal with various voting schemes that attempted to restrict the franchise to those "primarily interested in the outcome of the elections involved."⁶⁴ In each case, the Court invalidated the statutory scheme. *Kramer* involved franchise restrictions in a New York school district election. To be eligible to vote in district elections⁶⁵ an otherwise qualified district resident had to meet one of the following addi-

a total deviation from population equality of 11.9%. *Id.* at 184. For over 100 years the county had been governed by a board of supervisors consisting of the supervisors of the county's five constituent towns, but population growth had resulted in substantial malapportionment. *Id.* at 183. In order to preserve the close cooperation between the five towns and the county, a reapportionment plan was submitted that proposed the creation of an eighteen member county legislature elected from five districts that corresponded exactly to the boundaries of the five towns. Each district was assigned legislators in the proportion of its population to that of the smallest district. *Id.* at 184.

While adhering to the principle of careful judicial scrutiny, the Court noted that departures from strict equality may sometimes be permissible when based on the peculiar needs and circumstances of the local community. *Id.* at 185. The Court then went on to approve the plan based upon "the long tradition of overlapping functions and dual personnel in . . . [the] [c]ounty 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.

While the Court made reference to "departures from strict equality," it should be noted that the concept of "strict equality" has never been defined with respect to state and local reapportionment. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and *Welles v. Rockefeller*, 394 U.S. 542 (1969), the Court defined the term "strict equality" as it applied to congressional redistricting:

[T]he command of Art. I, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.

394 U.S. at 531. See, e.g., 19 DE PAUL L. REV. 152 (1969); 13 ST. LOUIS U.L.J. 637 (1969); 15 VILL. L. REV. 223 (1969). This notion of "mathematical exactness" has never been applied by the Court to state legislative districts. See notes 248-53 *infra* and accompanying text.

60. See text accompanying notes 13-14 *supra*.

61. 395 U.S. 621 (1969).

62. 395 U.S. 701 (1969).

63. 399 U.S. 204 (1970).

64. See note 73 *infra*.

65. New York law provides that school boards in districts which are primarily rural or suburban may be selected at an annual meeting of the qualified school voters. N.Y. EDUC. LAW § 2012 (McKinney Supp. 1972). This was the method used by the Union Free School District to select its governing body. 395 U.S. at 622-23.

tional requirements: (1) be an owner or lessee of taxable real property located within the district; (2) be a spouse of such a person; or (3) be a parent or guardian of a child enrolled in a district school.⁶⁶ The sole issue for resolution by the Court was whether or not this scheme violated the equal protection clause.⁶⁷ The Court, utilizing the strict standard of review,⁶⁸ determined that it did.⁶⁹

The district had argued that the state had a legitimate interest in limiting the district's elections to those "primarily interested" in school affairs.⁷⁰ The Court held that even if such a purpose were considered to be constitutionally legitimate, the statute's system of classification was not precisely tailored to accomplish it.⁷¹ The classification was over-inclusive in that it included many persons tangentially interested in school affairs and under-inclusive in that it excluded many persons with a substantial interest in decisions affecting education, *e.g.*, teachers.⁷²

In *Cipriano*, the Court, in a per curiam opinion, applied the principles of *Kramer* to a revenue bond election called to finance the operations of a city's utility system. Under Louisiana law only property owners were permitted to vote in such an election.⁷³ It was the city's con-

66. 395 U.S. at 623.

67. *Id.* at 625. The Court was careful to note what was not at issue in the case. No attack was made on the power of the state to impose reasonable citizenship, age, and residency requirements as a precondition to the exercise of the franchise. Only the additional requirements were of concern to the Court. See note 73 *infra*.

68. 395 U.S. at 626. See notes 9-10 *supra* and accompanying text. Of significant importance in its application of the strict standard was the Court's focus of attention on the denial of the franchise, rather than the purpose of the election:

Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

395 U.S. at 626-27 (footnotes omitted). The Court further stated that the need for strict scrutiny would be undiminished simply because under a different statutory scheme the office could have been filled by appointment rather than by an election. *Id.* at 628-29. Nor did the type of governmental powers exercised by the entity change the need for the strict test. *Id.* at 629. See text accompanying notes 186-88 *infra*.

69. 395 U.S. at 632.

70. *Id.* at 630-31.

71. *Id.* at 632. If the Court had decided that the classification accomplished the state's articulated goal, it would then have had to determine whether or not "the interest promoted by limiting the franchise constitute[d] a compelling state interest." *Id.* at 632 n.14.

72. *Id.* at 632 (footnote omitted).

73. 395 U.S. at 702. Historically, the ownership of property or the payment of taxes was related to voter competency. J. PHILLIPS, *MUNICIPAL GOVERNMENT AND ADMINISTRATION IN AMERICA* 175 (1960). While today a state has the power to impose reasonable requirements and qualifications to promote intelligent or responsible voting (*see*,

tion that property owners held a " 'special pecuniary interest' in the election, because the efficiency of the utility system directly affect[ed] 'property and property values' and thus 'the basic security of their investment in [their] property [was] at stake.' " ⁷⁴ Again, without deciding whether or not the franchise could be restricted to those " 'primarily interested,' " the Court determined that the statutory scheme did not fulfill the state's articulated goal since those excluded had as much interest in the outcome of the election as those the statute included. ⁷⁵ This conclusion was based on the fact that both property owners and nonproperty owners used the services of the utility, paid for its operations, and benefited by the projects financed by its revenues. ⁷⁶

The question posed in *Kolodziejski* was whether or not the limitation of the franchise to property owners in a city's general obligation bond election violated the equal protection clause. ⁷⁷ In substance, the city contended that property owners were more "interested" in such elections for two reasons. First, by statute, property taxes were required to be levied in an amount sufficient to service the bonds. ⁷⁸ Second, the bonds were in effect a lien on the real property since they were secured by the city's general taxing power. ⁷⁹ Therefore, the city argued that the state was justified in recognizing the "unique interests" of property owners by excluding others from participation in bond elections. ⁸⁰

While acknowledging that the interests of property owners were

e.g., *Carrington v. Rash*, 380 U.S. 89 (1965); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959); *Pope v. Williams*, 193 U.S. 621 (1904)), the notion that property ownership or the payment of taxes promotes the intelligent use of the ballot is unjustified. There is no relation between property ownership or the payment of taxes and voter competency. Thus, the restriction of the ballot to property owners or taxpayers is not a reasonable requirement to promote intelligent voting. See *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966). Therefore, the only reason that can be asserted to support such a restriction is that it separates persons with a substantial interest in the outcome of the election from those with little or no interest. See Comment, *Ownership of Land as a Prerequisite to the Right to Vote: Equal or Unequal Protection*, 117 U. PA. L. REV. 594 (1969).

74. 395 U.S. at 704.

75. *Id.* at 706.

76. *Id.* The Court stated:

Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike.

Id. at 705.

77. 399 U.S. at 205.

78. *Id.* at 208 (footnote omitted).

79. *Id.*

80. *Id.*

somewhat different from the interests of nonproperty owners, the Court found no basis upon which to conclude that the interests of nonproperty owners were substantially less than those included within the grant of the franchise.⁸¹ Factors considered determinative by the Court were that all residents of the city had an interest in the services and facilities financed by the bonds and that all residents, property owners and nonproperty owners alike, contributed to the retirement of the bonds.⁸²

Thus, although the *Kramer* line of cases did not absolutely preclude the states from confining the electorate to those persons "primarily interested," it seems equally clear that state attempts to experiment with innovative structural arrangements were greeted with suspicious constitutional examination. While the Court did not arbitrarily impose any particular structural mechanism upon the states,⁸³ it was obviously pre-

81. *Id.* at 212.

82. The parties had stipulated that in the past more than half of the debt service requirements came from taxes other than real property taxes and that nonproperty owners as well as property owners contributed to those taxes. *Id.* at 209-10. The Court went even further and stated that even if the property tax completely serviced the bonds, the justification would still be insufficient since both landlords and commercial establishments pass the taxes on to their tenants and customers as a cost of doing business. Based on this analysis, the Court concluded that "virtually all residents share the burden of property taxes imposed and used to service general obligation bonds." *Id.* at 211.

Furthermore, the Court noted that there was no adequate state reason to justify the restriction in light of the fact that only fourteen states had similar restrictions. *Id.* at 212-13. The Court stated that the other thirty-six states that did not have such a restriction did not have any more difficulty issuing the bonds than those states that did. Additionally, it noted that none of the fourteen states were shown to have special problems that could be considered a compelling state interest for such a restriction. *Id.*

83. There is no prescribed structure for local government units. The United States Constitution makes no mention of local government. From a strict legal standpoint, local governments are but creatures of the state:

Municipal corporations owe their origin to, and derive their power and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. . . . They are, so to phrase it, the *tenants at will* of the legislature.

City of Clinton v. Cedar Rapids & M.R.R.R., 24 Iowa 455, 475 (1868) (Dillion, J.), quoted in Hanson, *Toward a New Urban Democracy: Metropolitan Consolidation and Decentralization*, 58 GEO. L.J. 863, 869 n.20 (1970). As a consequence, local government units can exercise only those powers expressly authorized by the state's constitution or statutes.

While there is no inherent right to local self-government (*see* J. WINTERS, STATE CONSTITUTIONAL LIMITATIONS ON SOLUTIONS OF METROPOLITAN AREA PROBLEMS 5-14 (1961)), such a right is often delegated to local government by the state through home

pared to demand that certain constitutional prerequisites be scrupulously followed:⁸⁴

To generalize, one can say that where an election of public officials is undertaken, a voter may not be discriminated against so that his vote counts less than any other, whether such discrimination is accomplished by unequal districting, irrational limitation of the electorate, or any other electoral scheme.⁸⁵

The Court had hinted that these broad ranging principles might be subject to qualification, but prior to *Salyer* it had yet to determine whether or not the proscription of *Reynolds* against dilution applied to special-purpose districts, nor had it decided whether or not a state could limit the franchise to those "primarily interested" in the outcome of an election. The result was to invite the lower courts to strike down a wide variety of voting schemes, and while many lower courts were prepared to accept the invitation,⁸⁶ many were not.⁸⁷

rule or other provisions. And the common provision provides for the local government entity to resemble a "miniature republic":

Agreeing with de Tocqueville that "[a] nation may establish a free government, but without municipal institutions it cannot have a spirit of liberty," American civic culture envisions each town or city as a "miniature republic."

Hanson, *Toward A New Urban Democracy: Metropolitan Consolidation and Decentralization*, *supra* at 870, quoting 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 61 (H. Reeve transl. 1945) and R. WOOD, *SUBURBIA, ITS PEOPLE AND THEIR POLITICS* 20-53 (1959). Although the "miniature republic" concept is the norm, there appears to be no federal constitutional limitation on other methods of control. See note 244 *infra*.

84. Without such principles great abuses in the democratic process could result. A good example is *Griffin v. Board of Supervisors*, 60 Cal. 2d 318, 384 P.2d 421, 33 Cal. Rptr. 101 (1963), wherein three of the five members of the county board of supervisors were elected by approximately 17 per cent of the voters. See also *Dundee v. Orleans Parish Bd. of Supervisors of Elections*, 434 F.2d 135, 136 (5th Cir. 1970) (parish board of assessors was elected from seven districts varying in population from 34,415 to 260,510); *Bowden v. Stacey*, 309 F. Supp. 510, 511 (S.D. Ala. 1970) (four county commissioners districts varied in population from 1,300 to 3,790); *Freeman v. Dies*, 307 F. Supp. 1028, 1030-31 (N.D. Tex. 1969) (districts for state board of education varied from 205,409 to 1,243,158); *Slater v. Board of Supervisors*, 319 N.Y.S.2d 633, 634 (Sup. Ct. 1971) (eleven of the twenty-five supervisors were elected by one-fifth of the population of the county).

85. Herget, *The Impact of the Fourteenth Amendment on the Structure of Metropolitan and Regional Governments*, 23 *HASTINGS L.J.* 763, 783 (1972).

86. See, e.g., *Scott v. Lack*, 332 F. Supp. 220, 222 (E.D. Tex. 1971) (offices of county commissioners declared vacant and new elections ordered to insure equal protection); *Dameron v. Tangipahoa Parish Police Jury*, 315 F. Supp. 137, 139-41 (E.D. La. 1970) (apportionment plan of parish school board prohibited by the equal protection clause); *Bowden v. Stacey*, 309 F. Supp. 510, 513 (S.D. Ala. 1970) (districts for county commissioners that ranged in population from a low of 1,300 and high of 3,790 prohibited by the equal protection clause); *West v. Moore*, 305 F. Supp. 683, 688 (W.D.N.C. 1969) (malapportionment and grant of two votes to chairman of six member county commissioners prohibited by the equal protection clause); *Sebesta v. Miklas*, 272 So. 2d 141, 146-47 (Fla. 1972) (20.5% maximum variation between districts of uni-

fied county council prohibited by equal protection clause); *Stanley v. Southwestern Community College Merged Area*, 184 N.W.2d 29, 38 (Iowa 1971) (districts for school district contrary to "one person, one vote" but board allowed to continue to function for reasonable period of time); *In re Apportionment of Ionia County Bd. of Comm'rs*, 198 N.W.2d 2, 7 (Mich. Ct. App. 1972) (diversity of urban and rural interests not a proper justification for deviations from equal population); *State ex rel. Pagni v. Brown*, 497 P.2d 1364, 1366-67 (Nev. 1972) (apportionment plan for county commissioners that required commissioners to be elected from various areas of the county violated "one person, one vote"); *Slater v. Board of Supervisors*, 319 N.Y.S.2d 633, 634 (Sup. Ct. 1971) ("one person, one vote" violated by a scheme in which towns with one-fifth of the population elected eleven of the twenty-one supervisors).

87. *See, e.g., LoFrisco v. Schaffer*, 341 F. Supp. 743, 748-51 (D. Conn.), *aff'd mem.*, 409 U.S. 972 (1972) (minority election scheme for school board did not violate the equal protection clause); *Mayes v. Teague*, 341 F. Supp. 254, 255-56 (E.D. Tenn. 1972) ("one person, one vote" not violated when seven members of the school board were elected at large even though members were required to live in districts of varying population sizes); *Obermiller v. Siegel*, 340 F. Supp. 208, 210 (D. Neb. 1972) (equal protection clause not violated when districting for county supervisors did not consider "likeness of interest among the people of each geographical election district"); *Pate v. El Paso County*, 337 F. Supp. 95, 100 (W.D. Tex.), *aff'd mem.*, 400 U.S. 806 (1970) (staggered terms for county commissioners not a violation of equal protection clause); *Grisbaum v. McKeithen*, 336 F. Supp. 267, 275 (E.D. La. 1971) (maximum population variance of 5.9% for parish council not impermissible); *Kaelin v. Warden*, 334 F. Supp. 602, 605 (E.D. Pa. 1971) (limited voting scheme that permitted each voter to vote for two of three commissioners of county not a violation of "one person, one vote"); *Rutledge v. State*, 330 F. Supp. 336, 339-41 (W.D. La. 1971) (equal protection not denied when electors of parish board included residents of city that had separate school system); *Kollar v. City of Tucson*, 319 F. Supp. 482, 483-85 (D. Ariz. 1970), *aff'd mem.*, 402 U.S. 967 (1971) (residency within municipal boundary a valid restriction on the right to vote in municipal water bond election); *Blanco v. Gangloff*, 265 A.2d 502, 506-07 (Conn. Super. Ct. 1970) (minority representation statute for selecting board of an administrative body not a violation of "one person, one vote"); *District Bd. of Health v. Chancey*, 500 P.2d 845, 849 (Idaho 1972) (budget committee of public health district that consisted of representatives of boards of county commissioners within the boundaries of district not a violation of "one person, one vote"); *People ex rel. Hanrahan v. Caliendo*, 277 N.E.2d 319, 325 (Ill.), *appeal dismissed*, 406 U.S. 965 (1972) (no requirement that the authorities for urban transportation district be elected rather than appointed); *Cohen v. Hoyer*, 280 A.2d 778, 783 (Me. 1971) ("one person, one vote" held inapplicable to school district because of lack of systematic built-in discrimination); *Waters v. Putnam*, 183 N.W.2d 545, 550-51 (Minn. 1971) (apportionment of board of managers of watershed district not prohibited by equal protection); *Meadowlands Regional Dev. Agency v. State*, 270 A.2d 418, 441 (N.J. Super. Ct. 1970), *aff'd on other grounds*, 304 A.2d 545 (N.J. 1973) ("one person, one vote" inapplicable to municipal committee comprised of the mayors of the constituent municipalities that varied in population sizes); *Smith v. Common Council*, 321 N.Y.S.2d 803 (Sup. Ct. 1971) (apportionment plan for common council of city not contrary to "one person, one vote" when ten wards varied in sizes from a low of 1,202 to a high of 1,232); *Community College v. School Dist.*, 287 A.2d 844, 846-47 (Pa. Comm. Ct. 1972) (appointive scheme for community college district not prohibited by "one person, one vote"); *Hedrick v. County Court*, 172 S.E.2d 312, 314 (W. Va. 1970) (appointive scheme for board of directors of public library not prohibited by the equal protection clause).

II. SPECIAL DISTRICTS IN CALIFORNIA: PRELUDE TO *Salyer*

California has created a number of special districts that employ voting schemes restricting the franchise to landowners.⁸⁸ Often concomitant with this restriction is a system of weighted voting⁸⁹ that gives each landowner votes in proportion to the value of his land holdings.⁹⁰ These districts, some of the earliest established government entities in the state,⁹¹ perform relatively limited functions⁹² and, therefore, present an ideal context in which to test the outer reaches of the dual issues of dilution and disenfranchisement.⁹³

Prior to the decision in *Salyer*, there had been no conclusive resolu-

88. See, e.g., CAL. PUB. RES. CODE ANN. § 9140 (West 1956) (resource conservation districts); CAL. WATER CODE ANN. § 34027 (West 1956) (California Water Districts); *id.* § 41000 (West 1966) (water storage districts); *id.* § 50016 (West Supp. 1974) (reclamation districts); *id.* § 70121 (West 1966) (levee districts); CAL. WATER CODE APP. § 1-5 (West 1968) (Levee District No. 1); *id.* § 2-1 (Swamp Land District No. 150); *id.* § 3-3 (Reclamation District No. 317); *id.* § 4-3 (protection districts); *id.* § 21-2 (Knights Landing Drainage District); *id.* § 106-7 (Brannan-Andrus Levee Maintenance District); *id.* § 115-1.3 (West Supp. 1974) (North Delta Water Agency). See BOLLENS, *supra* note 2, at 250.

89. The weighted voting schemes hereinafter discussed refer to systems whereby voting power is proportionately distributed in relation to the amount of land the voter owns. There is another type of weighted voting device that has been given some consideration as a method of producing voter equality in state legislative apportionment plans. Instead of equalizing district populations by redistricting, each legislator would be allowed to cast a number of votes in proportion to the number of people he or she represented. See, e.g., *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916 (S.D.N.Y. 1965), *aff'd per curiam*, 382 U.S. 4 (1965), *vacated as moot*, 384 U.S. 887 (1966); *Thigpen v. Meyers*, 231 F. Supp. 938 (W.D. Wash.), *aff'd in part per curiam*, 378 U.S. 554 (1964). See generally Banzhaf, *One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation*, 36 GEO. WASH. L. REV. 808 (1968); Banzhaf, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 RUTGERS L. REV. 317 (1965); Comment, *Equal Representation and the Weighted Voting Alternative*, 79 YALE L.J. 311 (1969).

90. See, e.g., CAL. WATER CODE ANN. § 35003 (West Supp. 1974) (California Water Districts); *id.* § 41001 (West 1966) (water storage districts); *id.* § 50704 (West Supp. 1974) (reclamation districts); CAL. WATER CODE APP. § 3-5 (West 1968) (Reclamation District No. 317); *id.* § 4-3 (protection districts); *id.* § 21-2 (Knights Landing Drainage District); *id.* § 106-7 (Brannan-Andrus Levee Maintenance District); *id.* § 115-2.2 (West Supp. 1974) (North Delta Water Agency). See BOLLENS, *supra* note 2, at 250.

91. See, e.g., ch. 349, § 1, [1874] Cal. Stat. 511 (Levee District No. 1); ch. 629, § 1, [1874] Cal. Stat. 867 (Swamp Land District No. 150); ch. 379, § 1, [1878] Cal. Stat. 562 (Reclamation District No. 317); ch. 63, § 1, [1880] Cal. Stat. 55 (protection districts).

92. See ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT, ANALYSIS OF CALIFORNIA DISTRICT LAWS (1965). See notes 240-42 *infra* and accompanying text.

93. See notes 28-87 *supra* and accompanying text.

tion of the propriety of these voting schemes. The first California case to deal with the validity of one of these schemes, in light of the voter equality cases,⁹⁴ was *Schindler v. Palo Verde Irrigation District*.⁹⁵ The district, which was formed to deal with the problems of flood control and irrigation in the Palo Verde Valley,⁹⁶ was financed solely from assessments made against landowners⁹⁷ and was invested with the governmental powers necessary to carry out its relatively circumscribed functions.⁹⁸ The *Schindler* court was faced with the validity of the statutory formula that gave each landowner one vote for each \$100 of assessed land value.⁹⁹ Although the voting scheme also restricted the franchise to landowners,¹⁰⁰ that issue was not properly before the court.¹⁰¹

94. Earlier challenges to the validity of many of these voting schemes in light of California constitutional provisions had been previously resolved. See note 242 *infra*.

95. 1 Cal. App. 3d 831, 82 Cal. Rptr. 61 (1969). See also *Lake Howel Water & Reclamation Dist. v. State*, 268 So. 2d 897, 899-901 (Fla. 1972), wherein the court held that the voting scheme of a drainage district which restricted the franchise to landowners and weighted the vote did not violate the equal protection clause.

96. The Palo Verde Irrigation District was formed by special act of the legislature in 1923. CAL. WATER CODE APP. §§ 33-1 *et seq.* (West 1968). The district was formed to protect the land within its boundaries from flood and overflow (*id.* § 33-14) and to construct dams, reservoirs, and works for the collection of water for the district, and to do everything necessary to furnish sufficient water for irrigation and domestic purposes (*id.* § 33-10).

97. *Id.* § 33-27.

98. The district may enter into contracts; employ such agents, employees and officials as are necessary; acquire property by condemnation, purchase or lease; construct dams, reservoirs, and irrigation works; enter upon any lands for the purpose of making surveys (CAL. WATER CODE APP. § 33-10 (West 1968)); issue bonds (*id.* § 33-15); levy assessments (*id.* §§ 33-25, -26); and set charges and tolls for water and proscribe rules for its use (*id.* § 33-10a).

99. CAL. WATER CODE APP. § 33-6 (West 1968) provides:

Any person, firm or corporation owning any real property and/or the improvements thereon, or any interest in real property and/or the improvements thereon (but not including personal property) which interest or ownership is assessed on the last preceding equalized assessment roll of the district (and only the owners of property so assessed) shall be entitled to vote at any election, special or general, for the election of trustees, or for any other purpose pertaining to the affairs of said district. Each property owner so qualified to vote shall be entitled to cast one vote for each one hundred dollars of assessed valuation or fraction thereof greater than fifty dollars

100. *Id.*

101. The suit was brought by a landowner of the district on behalf of himself and other landowners challenging the weighted voting scheme on the ground that it violated the equal protection clause. 1 Cal. App. 3d at 833, 82 Cal. Rptr. at 61-62. Plaintiff conceded his lack of standing to challenge that part of the voting scheme that restricted the franchise to landowners. *Id.* at 835, 82 Cal. Rptr. at 63. In *Barber v. Galloway*, 195 Cal. 1, 231 P. 34 (1924), this provision of the voting scheme was upheld against a challenge that it violated provisions of the California constitution. See note 242 *infra*.

The court first stated that the voting scheme did not present a "one person, one vote" issue since there was no assertion of dilution through improper districting.¹⁰² Rather the court defined the issue in terms of disenfranchisement:

The precise issue before us is the validity of a statute which classifies voters by apportioning voter influence to landowners ostensibly in proportion to the degree to which they are interested in and affected by the operation in the district¹⁰³

Therefore, "[a]ny disparity in the statutory grant of the franchise, whether it be in the quantum of influence distributed among the voters or in the total denial of franchise to some and its grant to others,"¹⁰⁴ must be subjected to the strict guidelines of *Kramer*.¹⁰⁵

Having made this initial determination of the appropriate standard, the court then proceeded directly to the question of whether there was a compelling state interest which justified the statutory voting scheme. In the court's opinion, the state had a compelling interest in the "reclamation of waste lands through flood protection, drainage and irrigation works."¹⁰⁶ Since the district could not have been formed unless land-

102. 1 Cal. App. 3d at 836, 82 Cal. Rptr. at 64.

103. *Id.* By adopting this line of analysis the court was able to avoid deciding whether or not "one person, one vote" principles applied to special-purpose districts. In *Thompson v. Board of Directors*, 247 Cal. App. 2d 587, 55 Cal. Rptr. 689 (1967), the court held inapplicable the principles of "one person, one vote" to an irrigation district. The court set forth the following guidelines in ascertaining whether or not the government entity involved should be adjudged by those principles:

[I]f the principal purpose of a district is to provide a service or services which can be and are sometimes provided by a private or quasi-public corporation (such as a public utility company), and if in the accomplishment of this purpose it does not exercise general powers of government, it is not subject to the "one man, one vote" rule. If, however, its principal purpose is to govern or if its functions are primarily governmental in nature, or if not governmental in nature they are accomplished by the exercise of general powers of government, it meets the test, and the doctrine is applicable.

Id. at 592, 55 Cal. Rptr. at 692-93. The court then concluded that the irrigation district provides services which can be performed by a quasi-public corporation and that the district did not exercise general governmental powers. Thus, the principles of "one person, one vote" were inapplicable. *Id.* at 593, 55 Cal. Rptr. at 693.

In *Girth v. Thompson*, 11 Cal. App. 3d 325, 89 Cal. Rptr. 823 (1970), the court, without deciding the issue, implied that the principles of "one person, one vote" were applicable to an irrigation district. The court, however, also stated that population was not the only factor that had to be considered:

[T]he constitutional guarantee of equal protection of the law, which is the parent of the "one man, one vote" rule, does not prohibit the state from prescribing a standard of equality between the divisions based on land as well as population.

Id. at 329, 89 Cal. Rptr. at 826.

104. 1 Cal. App. 3d at 837, 82 Cal. Rptr. at 65.

105. *Id.*

106. *Id.* at 839, 82 Cal. Rptr. at 66. See, e.g., *People ex rel. Chapman v. Sacra-*

owners had the dominant voice in its operation,¹⁰⁷ the court determined that the restriction of the franchise to landowners was necessary to promote the state's compelling interest.¹⁰⁸ The court then concluded that the weighting of the landowners' votes did not violate the principles of *Kramer*:

[T]he benefits and burdens accrue to each landowner in proportion to the extent of land owned, [and, therefore,] the grant of [the] franchise in proportion to the assessed value of land ownership fairly distributes voting influence among those primarily and directly interested in direct proportion to the stake each has in the District.¹⁰⁹

The *Schindler* court seemed inextricably lost in its reasoning process. Its first error was the curious assumption that dilution could occur only through improper districting,¹¹⁰ but the court's own phrasing of the issue before it indicates that the weighting of votes according to the amount of land owned is a dilution question—not one of disenfranchisement.¹¹¹ The proper analytical approach was thus to be found in *Avery*, not *Kramer*.

But even if the *Kramer* analysis were the appropriate test in this context, the court's approach was still incorrect, for, under the guidelines of that case, the first question which must be resolved is whether the voting scheme was necessary to promote the state's articulated goal, a question the opinion did not even pose.¹¹² And finally, even if the

mento Drainage Dist., 155 Cal. 373, 103 P. 207 (1909). In creating the Palo Verde Irrigation District, the California Legislature declared that the state had "a primary and supreme interest in securing to the inhabitants and property owners . . . the greatest possible use, conservation and protection of the waters of the Colorado river" CAL. WATER CODE APP. § 33-1 (West 1968).

107. In the court's opinion, the interests of those excluded were substantially less than those included in the grant of the franchise:

The activities of the District no doubt affect the economy of the area and to that extent District affairs may be of interest to all inhabitants irrespective of land ownership, but such general interest, standing alone, cannot be said to constitute, as a matter of law, a direct, primary and substantial interest entitling all inhabitants to vote. Such general economic interest is indirect, not primary and substantial.

1 Cal. App. 3d at 839, 82 Cal. Rptr. at 66. The court apparently ignored the legislative purpose in establishing the district. See note 106 *supra*. One of the main reasons the district was established was to provide flood protection for the area, which would seemingly affect property owners and nonproperty owners equally.

108. 1 Cal. App. 3d at 839, 82 Cal. Rptr. at 66.

109. *Id.*, 82 Cal. Rptr. at 66-67.

110. *Cf. Burrey v. Embarcadero Municipal Improvement Dist.*, 5 Cal. 3d 671, 678, 488 P.2d 395, 400, 97 Cal. Rptr. 203, 208 (1971). See *Gaines, The Right of Non-Property Owners to Participate in a Special Assessment Majority Protest*, 20 U.C.L.A. L. REV. 201, 222-24 (1972) [hereinafter cited as *Gaines*].

111. See text accompanying notes 103-04 *supra*.

112. See notes 61-82 *supra* and accompanying text.

state's interest were in fact a sufficiently compelling one to restrict the franchise to landowners and even if it were necessary to promote the state's articulated goal, the court offered no justification at all for the *weighting* of each landowner's vote. Despite its obvious weaknesses, the decision does illustrate a judicial willingness to acknowledge that there are some limits to the reaches of the voter equality principles.

While the decision in *Schindler* gave some support for the validity of similar voting schemes in other special districts, the question did not reach the Supreme Court of California until the case of *Burrey v. Embarcadero Municipal Improvement District*.¹¹³ In *Burrey*, the court was faced with a challenge to the validity of the voting scheme of the Embarcadero Municipal Improvement District (hereinafter referred to as EMID) which both restricted the franchise to landowners¹¹⁴ and gave each landowner one vote for each dollar of assessed land value.¹¹⁵ The EMID was created by the California Legislature in 1960¹¹⁶ to foster municipal improvements in an uninhabited area of the state and to serve as a catalyst in the development of a private small craft harbor.¹¹⁷ To achieve these aims the EMID, which was governed

113. 5 Cal. 3d 671, 488 P.2d 395, 97 Cal. Rptr. 203 (1971).

114. Ch. 81, §§ 19-20, [1961] Cal. Stat. 1st Extr. Sess. 444 (1960). Corporations and legal representatives of landowners are also allowed to participate in district elections.

115. Ch. 81, § 64, [1961] Cal. Stat. 1st Extr. Sess. 447 (1960) provides, "Each voter shall have one vote for each one dollar (\$1) in assessed valuation of land owned by him as shown by the last equalized assessment roll." As a result of the decision in this case, this provision was amended to read: "Each voter shall have one vote." Ch. 95, § 4, [1972] Cal. Stat. 130.

116. Ch. 81, [1961] Cal. Stat. 1st Extr. Sess. 441 (1960). Beginning in 1960, the California Legislature created a number of special districts designed to be tools in the hands of land developers:

The continuing quest of all land speculators has been the search for new sources of capital to finance their ventures. The California speculator has recently discovered that he can employ special districts and other public agencies to provide him with a significant credit subsidy. With boundary lines artfully drawn to include only the promoter's land, a special district becomes a tightly controlled operating division of the promoter's organization—an operating division which can use its bonding powers to raise risk capital independent of the subscriber's own credit resources or capital reserve.

Willoughby, *The Quiet Alliance*, 38 S. CAL. L. REV. 72 (1965). See ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT, TRANSCRIPT OF PROCEEDINGS ON THE SUBJECT OF THE INDEPENDENT SPECIAL DISTRICTS USED IN LAND DEVELOPMENT SITUATIONS (1962). The EMID is just such a district. Having serious problems since its inception, the EMID languished in bankruptcy for five years allegedly as a result of the actions of the land developers who became its first directors. Two of the district's land developer-directors were indicted by the Los Angeles County Grand Jury on charges of criminal conspiracy to misappropriate public funds, grand theft, and violation of corporate recording laws. See *People v. Steele*, 235 Cal. App. 2d 798, 45 Cal. Rptr. 601 (1965).

117. 5 Cal. 3d at 674, 488 P.2d at 397, 97 Cal. Rptr. at 205.

by a board of directors elected by landowners,¹¹⁸ was invested with broad governmental powers similar, in most respects, to those of a municipality.¹¹⁹ Residents of the EMID brought suit alleging that the district's voting scheme violated the equal protection clause.¹²⁰

The court first examined the issue of weighted voting. Since the EMID was invested with powers characteristic of most cities,¹²¹ the court concluded that it exercised "general governmental powers" similar to those exercised by the government units in *Avery* and *Hadley*,¹²² and, therefore, determined that the principles of "one person, one vote" were applicable.¹²³

Unlike the *Schindler* court, the *Burrey* court recognized that the right to vote could be wrongfully denied, debased, or diluted "when the weighted vote is based on property value as well as district apportionment,"¹²⁴ and perceived no distinction of constitutional importance between these methods of weighting votes.¹²⁵ The court stated that the

118. Ch. 174, § 1, [1969] Cal. Stat. 424-25.

119. The EMID is authorized to provide the major services and utilities that a city normally supplies its residents. It is empowered to provide facilities for street and highway lighting; collection, treatment, and disposal of sewage, industrial wastes, storm waters, and garbage; the production, storage, treatment, and distribution of water for public and private purposes; and drainage and reclamation. Ch. 672, § 1, [1970] Cal. Stat. 1302. The district is authorized to operate a police department (ch. 81, § 79, [1961] Cal. Stat. 1st Extr. Sess. 447 (1960)); may make and enforce all regulations concerning the removal of garbage and refuse, and the supplying of sewage, water, storm water, and police protection service, a violation of which constitutes a misdemeanor (ch. 81, § 97, [1961] Cal. Stat. 1st Extr. Sess. 449 (1960)); may compel all residents and property owners to use its sewage and garbage disposal services (ch. 81, § 98, [1961] Cal. Stat. 1st Extr. Sess. 449 (1960)); and collect charges for the services and facilities furnished by it. It may also provide recreational facilities, including a private small craft harbor. Ch. 672, §§ 1-2, [1970] Cal. Stat. 1302-03.

To carry out these activities the district is given a wide range of governmental powers. The district may finance its operations by collecting tax on both real and personal property within the district (ch. 81, § 162, [1961] Cal. Stat. 1st Extr. Sess. 453 (1960)) and by incurring bonded indebtedness (ch. 81, § 87, [1961] Cal. Stat. 1st Extr. Sess. 448 (1960)). The district has the power of eminent domain for the condemnation of private property within the district. Ch. 81, § 81, [1961] Cal. Stat. 1st Extr. Sess. 448 (1960). The district may also acquire, hold, and dispose of property within or without the district. Ch. 81, § 80, [1961] Cal. Stat. 1st Extr. Sess. 448 (1960).

120. 5 Cal. 3d at 672-73, 488 P.2d at 396, 97 Cal. Rptr. at 204. The action was before the court on resident-petitioners' petition for a writ of mandate and for extraordinary relief.

121. See note 119 *supra*.

122. 5 Cal. 3d at 676-77, 488 P.2d at 399, 97 Cal. Rptr. at 207. See notes 37-60 *supra* and accompanying text.

123. 5 Cal. 3d at 677, 488 P.2d at 399, 97 Cal. Rptr. at 207.

124. *Id.* at 678, 488 P.2d at 400, 97 Cal. Rptr. at 208.

125. *Id.*

judicial focus must always be whether or not an individual's constitutionally protected right to vote is impermissibly impaired:

From an individual viewpoint, it hardly matters to the voter whether it is his next door neighbor, a stranger in another district, or a nonresident land developer whose vote is assigned substantially more weight than his own: the disparity dilutes his voting strength and makes of his attempt to affect the court of his local government through the ballot box a bootless and empty gesture.¹²⁶

Having established that the "one person, one vote" cases were applicable to the EMID, the court reached the "inescapable" conclusion that the weighted voting provision of the act was unconstitutional.¹²⁷ Indeed, the court condemned this land based system as reminiscent of feudal land structure which permitted the "land-wealthy" to control the destiny of the "land-poor."¹²⁸

Relying on *Kramer, Cipriano, and Kolodziejski*, the *Burrey* court next concluded that the restriction of the franchise to landowners was also constitutionally defective. In the enactment of the EMID, the legislature proclaimed that its interest in restricting the franchise to landowners was to limit participation in the operations of the district to those "primarily concerned."¹²⁹ Since the EMID provided the services characteristic of a city, the court had no difficulty in concluding that the interests of nonlandowning residents were not substantially less than those of landowners and that the exclusion thus failed to accomplish its stated purpose.¹³⁰ Furthermore, the attempt to justify the voting

126. *Id.*

127. *Id.* at 679, 488 P.2d at 400, 97 Cal. Rptr. at 208.

128. *Id.*, 488 P.2d at 401, 97 Cal. Rptr. at 209.

129. Ch. 81, § 220(g), [1961] Cal. Stat. 1st Extr. Sess. 457-58 (1960) provides:

The land in the district is not owned by residents. The owners are the ones primarily concerned with the district and the ones who will be supporting the district. The owners should therefore hold the voting power. Since no general law district with the necessary powers provides for voting by owners, special legislation is necessary.

This language was deleted from the statute in 1972. Ch. 95, § 7, [1972] Cal. Stat. 130-31.

130. 5 Cal. 3d at 681, 488 P.2d at 402, 97 Cal. Rptr. at 210. Nonlandowners had a vital interest in the district because it furnished utilities, set charges for its services, set a tax rate, and had the power to tax both real and personal property. *Id.* The court noted:

Nonlandowners resident in the EMID are even more clearly interested and affected than the excluded voters in *Kramer, Cipriano, and Kolodziejski* by virtue of the district's power to require them to use its sewage services, its power to provide (or withhold) police and fire protection and its power to pass regulations having the force of law. In short, each of the residents of the EMID have virtually the same interest in the affairs of the district as they would in any municipal government.

Id.

scheme was difficult to reconcile with the fact that a substantial number of people who had become residents of the district were "more deeply concerned and affected by many of the district's powers than the developers."¹³¹

III. *Salyer*: THE VALIDATION OF A RESTRICTED VOTING SCHEME

The decision in *Burrey*, although potentially distinguishable because of the expansive powers of the EMID, raised serious doubts as to the validity of similar voting schemes in other special-purpose districts in California.¹³² In *Salyer*, the United States Supreme Court removed many of these doubts. The Tulare Lake Basin Water Storage District,¹³³ which is located in California's great central valley,¹³⁴ was

131. *Id.* at 682, 488 P.2d at 403, 97 Cal. Rptr. at 211. The court distinguished *Cooper v. Leslie Salt Co.*, 70 Cal. 2d 627, 451 P.2d 406, 75 Cal. Rptr. 766 (1969), which involved the voting scheme of the Estero Municipal Improvement District, ch. 82, [1961] Cal. Stat. 1st Extr. Sess. 459 (1960). The Estero District was enacted at the same time as the EMID and was identical in all respects; however, in 1967 the legislature amended the Estero act to provide for a gradual transference of control to residents by allowing them at each successive election the exclusive selection of an increasing number of the governing body until all board members were elected by residents. Ch. 1511, § 5, [1967] Cal. Stat. 3594-95. The court in *Cooper* determined that since the transfer of control would be completely accomplished by 1971, there was no reason to interfere with the method designed to assure resident control which had been enacted by the legislature. 70 Cal. 2d at 638, 451 P.2d at 413, 75 Cal. Rptr. at 773. In *Burrey*, the court did not determine whether *Kolodziejski* required the legislature to provide a more expeditious transfer of power than provided for in *Cooper*. 5 Cal. 3d at 683 n.11, 488 P.2d at 404 n.11, 97 Cal. Rptr. at 212 n.11.

132. The *Burrey* court noted that the decision in *Schindler* was difficult to reconcile with the voter equality cases of the United States Supreme Court. However, the court noted that there was no necessity to face that question since the powers and purpose of the irrigation district involved in *Schindler* were substantially less general than those possessed by the EMID. 5 Cal. 3d at 682 n.8, 488 P.2d at 402-03 n.8, 97 Cal. Rptr. at 210-11 n.8. *Accord*, *Curtiss v. Board of Supervisors*, 7 Cal. 3d 942, 957-58 n.19, 501 P.2d 537, 548 n.19, 104 Cal. Rptr. 297, 308 n.19 (1972).

133. California Water Storage Districts are organized pursuant to the Water Storage District Act, CAL. WATER CODE ANN. §§ 39000 *et seq.* (West 1966). Such districts engage in the storage and distribution of water, operate any drainage or reclamation works connected therewith, may cooperate with other agencies regarding flood control, incidentally generate and distribute hydroelectric power, and sell and distribute hydroelectric power when not necessary for its own uses and purposes. There are eight of these districts in California and they have a combined acreage of 927,843 acres. STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING WATER UTILITY OPERATIONS OF SPECIAL DISTRICTS OF CALIFORNIA 3 (Fiscal Year 1971-1972) [hereinafter cited as ANNUAL REPORT].

The Tulare Lake Basin Water Storage District consists of approximately 193,000 acres. Four large landowners, Salyer Land Co., West Lake Farms, South Lake Farms, and J.G. Boswell Co., own almost 85% of the land in the district. Another 189 landowners own up to 80 acres each for a total of 2.34% of the agricultural acreage of

formed as a local response to the basin's water problems.¹³⁵ The district is a public entity¹³⁶ governed by a board of directors¹³⁷ elected by the qualified voters of the district. Only landowners are qualified to vote,¹³⁸ and each landowner is entitled to one vote for each \$100 of assessed land value.¹³⁹ In a suit filed by landowners, a landowner-

the district. J.G. Boswell Co. has the largest number of votes, 37,825, which are enough to elect a majority of the district's board of directors. Its control is so firmly established that there has not been an election for directors of the district since 1947. 410 U.S. at 735.

134. The Valley, an elongated structural trough of low elevations, is the "food basket of California," producing half of the state's farm income. In the twentieth century, it has become one of the world's important irrigated regions—today three of its counties rank among the top ten nationally in total agricultural value. As a farming subregion it has superlative endowment—level terrain, productive soils, streams and groundwater for irrigation, a long season with a dry harvest period, good transportation facilities, and access to markets.

This long basin, only slightly smaller than the Sierra Nevada or the Mojave Desert, approximates 25,000 square miles in area and houses about 15 per cent of California's people. It stretches for about 450 miles from Redding in the north to the foot of the Grapevine (the "Ridge Route" or Interstate 5) south of Bakersfield, thus extending more than half the length of the state.

D. LANTIS, R. STEINER & A. KARINEN, CALIFORNIA: LAND OF CONTRAST 340 (2d ed. 1970).

135. See 410 U.S. at 722.

136. Before a voter equality problem arises, it must first be shown that there is an election in a public district. Cf. *Sailors v. Board of Educ.*, 387 U.S. 105 (1967); see note 244 *infra*. Professor Weinstein states the problem as follows:

Before the problems posed by particular forms of special purpose units of local government are considered, it is necessary to point out an elementary distinction of applicable constitutional law. The state itself or any person engaged in "state action" must meet certain minimum constitutional standards in contacts with the public But while the individual has the right to demand that he be treated appropriately by an agency engaged in "state action," he does not necessarily have the right to participate in the control of that agency in the same way he participates, as a voter, in control of the state. The Supreme Court reapportionment cases held only that when an agency of the state is controlled by voters, all voters must be treated as equally as possible. They did not hold that every agency of the state needs to be in the charge of elected officials.

Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21, 33 (1965). To illustrate this distinction, Professor Weinstein cites the example of *Marsh v. Alabama*, 326 U.S. 501 (1946). According to Weinstein, the "Court's treatment of the company town [in *Marsh*] as a municipality for the purpose of protecting freedom of speech in no way suggested that those who lived there could elect the town's managers." Weinstein, *supra* at 33-34. An interesting question, beyond the scope of this Comment, is whether or not the voter equality cases would be applicable if the owners of the company town extended the right to select the town's managers to the town's residents.

137. CAL. WATER CODE ANN. § 40658 (West 1966).

138. *Id.* § 41000. The landowner does not have to be otherwise qualified to participate in elections in California. Thus, nonresidents of the district, corporations, and fiduciaries are allowed to vote if they are landowners within the district. *Id.* §§ 41003-04.

139. CAL. WATER CODE ANN. § 41001 (West 1966) provides:

Each voter may vote in each precinct in which any of the land owned by him

lessee, and non-landowning residents of the district,¹⁴⁰ a three-judge federal district court¹⁴¹ ruled against their claim that the statutory voting scheme "invidiously discriminated" against them in violation of the equal protection clause,¹⁴² and they appealed directly to the United States Supreme Court.¹⁴³

A. *Exclusion of Residents and Resident-Lessee*

Justice Rehnquist, writing for the Court, first examined that portion of the voting scheme which restricted the franchise to landowners. Appellants had argued that the exclusion of nonlandowning residents was unconstitutional "since nonlandowning residents have as much interest in the operations of a district as landowners who may or may not be residents."¹⁴⁴ Appellants were obviously relying on the principles enunciated in *Kramer*, *Cipriano*, and *Kolodziejski* to support this assertion.¹⁴⁵ These cases involved restriction of the franchise to those who were said to be "primarily interested" in the government entities involved.¹⁴⁶ In each case, the Court held that even if the franchise could be so restricted, the statutory scheme did not accomplish the state's articulated goal because those excluded were not substantially less interested than those to whom the franchise was granted.¹⁴⁷ The appellants in *Salyer* hoped to demonstrate that they had an interest in the operations of the district which was not substantially less than that of the interests of landowners.¹⁴⁸

However, the Court did not agree that the *Kramer* line of cases was

is situated and may cast one vote for each one hundred dollars (\$100), or fraction thereof, worth of his land, exclusive of improvements, minerals, and mineral rights therein, in the precinct.

140. Appellants commenced their action under 42 U.S.C. § 1983 (1970), seeking declaratory and injunctive relief in an effort to prevent the water storage district from giving effect to certain of the district's voting provisions.

141. Three-judge district courts are ordinarily required when an injunction against the enforcement of a state statute is sought (28 U.S.C. § 2281 (1970)), and are convened pursuant to 28 U.S.C. § 2284 (1970).

142. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 342 F. Supp. 144, 146 (E.D. Cal. 1972).

143. 28 U.S.C. § 1253 (1970) provides:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

144. 410 U.S. at 726. Nonlandowners claimed to have an interest in the purported flood control activities of the district. The majority viewed these as only incidental activities of the district. See note 159 *infra*.

145. 410 U.S. at 726.

146. See notes 61-82 *supra* and accompanying text.

147. *Id.*

148. 410 U.S. at 726.

applicable to the water storage district, and, in so deciding, formulated a new distinction. In *Kramer, Cipriano, and Kolodziejski*, according to the reasoning of the *Salyer* Court, "one person, one vote" was applied because the government unit involved exercised "general governmental powers" as that term was defined in *Avery* and extended in *Hadley*.¹⁴⁹ Yet, in each of the former cases the Court exhibited no interest in the nature of the government unit involved. In fact, the *Kramer* Court explicitly manifested its lack of interest:

Nor is the need for close judicial examination affected because the district meetings and the school board do not have "general" legislative powers. Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not.¹⁵⁰

Moreover, *Kramer*, which dealt with disenfranchisement in a school district election, was decided before the Court had extended the principle of *Avery* to school districts in *Hadley*.¹⁵¹ The *Salyer* Court tried to obfuscate this fact by stating that both *Kramer* and *Hadley* "extended the 'one person, one vote' principle to school districts . . ." ¹⁵² By equating the distinct issues of disenfranchisement and dilution, the Court avoided the automatic application of the strict standard of review and held that *Kramer, Cipriano, and Kolodziejski* are applicable only to units of government exercising "general governmental powers."

Therefore, the crucial issue from the Court's perspective was to determine whether or not the district exercised "general governmental powers." The Court concluded that because the water storage district had a "limited special purpose"¹⁵³ and because its activities had a "disproportionate effect"¹⁵⁴ on landowners, it fit the exception mentioned in *Avery*.¹⁵⁵ With respect to the district's limited purpose, the Court, although conceding that the district was vested with some "typical governmental powers,"¹⁵⁶ was of the opinion that it had "relatively limited

149. *Id.* at 727.

150. 395 U.S. at 629; see note 68 *supra*.

151. See notes 49-57 *supra* and accompanying text.

152. 410 U.S. at 727.

153. *Id.* at 728.

154. *Id.*

155. See text accompanying note 48 *supra*.

156. 410 U.S. at 728 (footnote omitted). The district has a wide range of governmental powers to accomplish its assigned functions. It has the power to contract for the construction of district projects (CAL. WATER CODE ANN. § 43152 (West 1966)); employ and discharge persons on a regular staff (*id.* § 43152); acquire by condemnation all property necessary for its purposes (*id.* § 43500); issue general obligation bonds and issue interest-bearing warrants (*id.* §§ 44900-45900); levy assessments and

authority,"¹⁵⁷ for the primary purpose of the district was to provide for the acquisition, storage, and distribution of water for agricultural use.¹⁵⁸ Furthermore, the Court noted that the district did not engage in the performance of any other services usually undertaken by a municipal body.¹⁵⁹

The Court reached the conclusion that the activities of the district "disproportionately affect[ed] landowners"¹⁶⁰ in light of the unique method in which the district was financed and operated.¹⁶¹ Since the costs of the district were assessed against the land in proportion to the benefits received¹⁶² and since the charges for district services were collectable in the same proportion,¹⁶³ the Court believed that:

[T]here is no way that the economic burdens of district operations can fall on residents *qua* residents, and the operations of the districts primarily affect the land within their boundaries.¹⁶⁴

Based on its "limited purpose" and the "disproportionate effect" of district operations on landowners, the Court found it understandable that the "statutory framework for election of directors . . . focus[e]d on the land benefited, rather than on people as such."¹⁶⁵

Since the district fit the exception mentioned in *Avery*,¹⁶⁶ the Court concluded that the principles of the voter equality cases were inappli-

charges (*id.* § 46000 (West Supp. 1974)); and cooperate, including by contract, with any other public agency, state or federal (*id.* § 43151 (West 1966)).

157. 410 U.S. at 728.

158. *Id.*

159. *Id.* at 728-29. The Court summarily rejected appellants' argument that the district was engaged in flood control activities. The Court determined that the only flood control activities the district could engage in were when cooperating with other public agencies and thus concluded that any flood control activities were incidental to the primary function of the district—water storage and distribution. *Id.* at 728 n.8.

160. *Id.* at 729.

161. See notes 204-05 *infra* and accompanying text.

162. CAL. WATER CODE ANN. § 46000 (West Supp. 1974); *id.* § 47180.

163. *Id.* §§ 43003, 43006 (West Supp. 1974).

164. 410 U.S. at 729 (footnote omitted).

165. *Id.* at 729-30. The Court noted that California had not extended the franchise to all residents or to all residents with some exceptions, but instead, had extended the franchise to all landowners, whether resident or non-resident, and whether a natural person or not. *Id.* at 730. Because the appellants had not challenged the right of nonresident and corporate landowners to vote (see note 138 *supra*), the Court further believed that to allow residents to vote "would engraft onto the statutory scheme a wholly new class of voters in addition to those enfranchised by the statute." 410 U.S. at 730. The reason for engaging in this analysis is somewhat unclear, for it would appear that these remarks are unrelated to the question of whether or not the district exercised "general governmental powers." See text accompanying notes 153-55 *supra*.

166. 410 U.S. at 728.

cable to its elections.¹⁶⁷ This determination dictated the subsequent resolution of the case; since the voter equality principles did not apply, neither did the strict standard of review.¹⁶⁸ Dealing first with the exclusion of residents, the Court stated that the appropriate test with which to assess their equal protection claim was:

[W]hether the State's decision to deny the franchise to residents of the district while granting it to landowners was "wholly irrelevant to achievement of the regulation's objectives."¹⁶⁹

Under this "minimal scrutiny in theory and virtually none in fact,"¹⁷⁰ the inescapable conclusion was that the exclusion of residents was constitutional.¹⁷¹

A "rational" basis for the statutory exclusion was premised on the assumption that the interests of district residents were minimal¹⁷² and the belief that exclusion was required to attract landowner support for the formation and operation of the district. Although the Court acknowledged that the activities of the district affected all residents to some extent, this interest was held to be only incidental when compared with the interests of district landowners.¹⁷³ Furthermore, since the district was to be financed solely by landowners, the Court determined

167. *Id.* at 730.

168. See notes 8-9 *supra* and accompanying text.

169. 410 U.S. at 730, quoting *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947).

170. *Gunther*, *supra* note 7, at 8.

171. 410 U.S. at 730-31.

172. *Id.* It should be noted that this is not the same test that the Court undertook earlier (see text accompanying notes 153-65 *supra*) when it was analyzing the character of the government unit. There, the Court was interested in the interests of residents only in determining the nature of the government unit. Here, the Court is looking for a rational basis to support the statutory exclusion.

173. Although acknowledging that the district affects all residents of the district, Justice Rehnquist was not impressed by this fact:

Since assessments imposed by the district become a cost of doing business for those who farm within it, and that cost must ultimately be passed along to the consumers of the produce, food shoppers in far away metropolitan areas are to some extent likewise "affected" by the activities of the district. Constitutional adjudication cannot rest on any such "house that Jack built" foundation, however.

410 U.S. at 730-31. Compare Thomas Jefferson's criticism of a bill to grant a federal charter to a mining company:

Congress are authorized to defend the nation. Ships are necessary for defence; copper is necessary for ships; mines, necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at "This is the House that Jack Built"? Under such a process of filiation of necessities, the sweeping clause makes clean work.

G. GUNTHER & N. DOWLING, CONSTITUTIONAL LAW 223-24 (8th ed. 1970), quoting 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 501 (rev. ed. 1926); and the Court's reasoning in *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 209-10 (1970), especially that discussed in note 82 *supra*.

that the California Legislature reasonably could have concluded that such support would not have been forthcoming unless landowners as a group had the dominant voice in district operations.¹⁷⁴ In addition, the Court observed that it could not be said to be "unfair or inequitable" to restrict the franchise to landowners since they as a group incurred all the costs.¹⁷⁵ Based upon these considerations, the Court concluded:

Landowners as a class were to bear the entire burden of the district's costs, and the State could *rationaly* conclude that they, to the exclusion of residents, should be charged with responsibility for its operation.¹⁷⁶

Having decided that *residents* could constitutionally be excluded from district participation, the Court next determined that *lessees* could likewise be excluded. While the Court accepted appellants' contention that lessees had an interest in the activities of the district analogous to landowners, it stated:

[T]he question for our determination is not whether or not we would have lumped them together had we been enacting the statute in question, but instead whether "if any state of facts reasonably may be conceived to justify" California's decision to deny the franchise to lessees while granting it to landowners.¹⁷⁷

In its search for "*rational*" justifications for the exclusion of lessees, the Court found a number of reasons, including the avoidance of possible ballot manipulation, landowner objection, and problems of voting administration, that adequately justified California's exclusion.¹⁷⁸

Justice Douglas dissenting, joined by Justices Brennan and Marshall, concluded that the statutory exclusion of residents and lessees was unconstitutional¹⁷⁹ in light of the strict standards of the disenfranchisement cases.¹⁸⁰ Relying on *Kramer*, Justice Douglas argued that even if the franchise could be limited to those "primarily interested," that

174. CAL. WATER CODE ANN. § 39400 (West 1966) sets forth the initial requirements for the establishment of a water storage district:

A majority in number of the holders of title to land irrigated or susceptible of irrigation from a common source and by the same system of works, who are also the holders of title to a majority in value of the land may propose the formation of a district under the provisions of this division or the formation of the district may be proposed by not less than 500 petitioners, each of whom is the holder of title to land therein and which petitioners include the holders of title to not less than 10 percent in value of the land included within the proposed district.

175. 410 U.S. at 731.

176. *Id.* (emphasis added).

177. *Id.* at 732, quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

178. *Id.*

179. *Id.* at 736.

180. *Id.*

limitation would be upheld only if those excluded were substantially less interested than those included in the grant of the franchise.¹⁸¹ In Justice Douglas' words, the majority's assertion that landowners were primarily interested was a "great distortion"¹⁸² since the activities of the district, "irrigation, water storage, the building of levees, and flood control, implicate the entire community."¹⁸³ As in *Kramer, Cipriano*, and *Koldziejski*, Justice Douglas would have held the exclusion unconstitutional because of the substantial interests of lessees and residents.¹⁸⁴ He thus concluded that residents, lessees, and landowners should all participate in the affairs of the water storage district.¹⁸⁵

As indicated previously, there is no support for the Court's assertion that *Kramer, Cipriano*, and *Koldziejski* are applicable only when the government entity exercises "general governmental powers."¹⁸⁶ The language in *Kramer* is broad and general, and would appear to apply to all elections for public officials.¹⁸⁷

This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.¹⁸⁸

An individual's right to cast a ballot should be afforded the same degree of protection whether the election is for a state legislator, members of a school board, or the directors of a water storage district. As the Court stated in *Yick Wo v. Hopkins*,¹⁸⁹ "[T]he political franchise of voting . . . is regarded as a fundamental political right, because preservative of all rights."¹⁹⁰ With the multiplicity of government units in this country,¹⁹¹ "[s]tatutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any ef-

181. *Id.*, quoting *Kramer v. Union Free School Dist.*, 395 U.S. 621, 632 (1969).

182. *Id.* at 737.

183. *Id.* at 738.

184. *Id.*

185. *Id.*

186. See text accompanying notes 149-52 *supra*.

187. *Gaines*, *supra* note 110, at 218-19.

188. 395 U.S. at 626.

189. 118 U.S. 356 (1886).

190. *Id.* at 370. See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626 (1969); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

191. California contains roughly 6,000 tax-leaving units of government. The average citizen is within the jurisdiction of at least four of these subdivisions in addition to the state and federal jurisdictions.

R. RUTH & B. STONE, CALIFORNIA'S POLITICAL PROCESS 17 (1973).

fective voice in the governmental affairs which substantially affect their lives."¹⁹² This is exactly what happened in *Salyer* as a result of the Court's less-than-exacting standard of review.¹⁹³

Under the *Kramer* test, the exclusion of residents and lessees would be strictly scrutinized to determine, first, if their exclusion was necessary to promote the state's articulated goal and, second, if there was a "compelling state interest" to support the exclusion.¹⁹⁴ A strong argument can be made that the exclusion of residents would survive the *Kramer* test. The Court, in analyzing the interest of landowners to determine the nature of the government unit, correctly determined that the district has a "disproportionate effect" on district landowners.¹⁹⁵ Compared with the interests of landowners, nonlandowning residents of the district are in fact "substantially less interested or affected"¹⁹⁶ in the operations of the district. The district's residents receive none of the services that the entity is authorized to perform and do not finance its operations, nor is the district authorized to deal with problems that affect their lives.¹⁹⁷ Therefore, the statutory scheme is sufficiently tailored to accomplish the state's articulated goal of restricting the franchise to those "primarily interested."

There is also a compelling state justification that can be offered in support of the statutory exclusion. Although there is some question as to the validity of the assertion,¹⁹⁸ the Court stated that the district

192. *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626-27 (1969) (footnote omitted).

193. See text accompanying notes 201-02 *infra*.

194. See notes 8-9 *supra* and accompanying text.

195. See text accompanying notes 160-64 *supra*.

196. *Kramer v. Union Free School Dist.*, 395 U.S. 621, 632 (1969).

197. Unlike other districts engaged in the supply of agricultural water, water storage districts are not significantly involved in the supply of water for domestic use. *Contra*, J. BAIN, R. CAVES & J. MARGOLIS, *NORTHERN CALIFORNIA'S WATER INDUSTRY: THE COMPARATIVE EFFICIENCY OF PUBLIC ENTERPRISE IN DEVELOPING A SCARCE NATURAL RESOURCE* 78 (1966). Of California's eight water storage districts, only one—the Arvin-Edison Water Storage District—is engaged in the sale of water for residential use. *ANNUAL REPORT*, *supra* note 133, at 256-57.

As the majority found, the flood control activities of the district appear to be only incidental to its primary function. 410 U.S. at 728 n.8. *But see* 410 U.S. at 737 (Douglas, J., dissenting); *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 98 (1973). The district may not engage in flood control activities that benefit residents, and thus the interest of residents is substantially less than the interests of landowners in the district. Kings County, the county in which the Tulare Lake Basin Water Storage District is located, is authorized to deal with flood control problems. *See, e.g.*, CAL. WATER CODE ANN. §§ 8100, 8110 (West 1971).

198. In *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1 (1973), it is asserted that the fact that irrigation districts (CAL. WATER CODE ANN. §§ 20500 *et seq.* (West

could not have been formed or operated without the landowner support which the voting scheme was designed to solicit.¹⁹⁹ This alone would be a sufficient justification for the exclusion since the district would not exist without it.²⁰⁰

On the other hand, it is obvious that the exclusion of lessees could not survive the *Kramer* test, for as the Court conceded, the "[l]essees undoubtedly do have an interest in the activities of . . . [the] district analogous to that of landowners"²⁰¹ Thus, their exclusion does not accomplish the state's articulated goal of limiting the franchise to those "primarily interested."

As the exclusion of lessees attests, the Court's approach to the issue of disenfranchisement poses a serious threat that individuals who are

1956)), function without such a system of voting is demonstrative proof that there is no special need for such a system in water storage districts. 87 HARV. L. REV. at 103. This argument, however, ignores the realities of irrigation district operations. Irrigation districts, like water storage districts, require significant landowner support in the formation process. CAL. WATER CODE ANN. § 20700 (West 1956). To attract this support, landowners are assured control of the districts. Although the franchise is not restricted to landowners, only landowners are qualified to be directors of the district. *Id.* § 21100 (West Supp. 1974). Additionally, a number of irrigation districts now restrict the franchise to landowners. *Id.* §§ 20527.5-20527.7, 20527.9 (West Supp. 1974).

Irrigation districts, unlike water storage districts, perform a significant number of services that affect non-landowning residents. *Id.* §§ 22075-233 (West 1956). See ANNUAL REPORT, *supra* note 133, at 8 (over 25% of water sales are for residential use). Thus, the legislature has determined that all residents should be allowed to participate in district elections.

Although water storage districts may be able to operate without the restricted voting scheme, even the experience of irrigation districts reflects the need to attract landowner support. California does have a compelling state interest in the development of its water resources. See, e.g., CAL. CONST. art. 14, § 3; CAL. WATER CODE ANN. §§ 100, 104-05 (West 1971); *Schindler v. Palo Verde Irrigation Dist.*, 1 Cal. App. 3d 831, 839, 82 Cal. Rptr. 61, 66 (1969); *People ex rel. Chapman v. Sacramento Drainage Dist.*, 155 Cal. 373, 379-81, 103 P. 207, 211 (1909); cf. 410 U.S. at 721-23. The restricted voting schemes in water storage districts are arguably designed to further this important goal by expeditiously encouraging landowner support.

199. 410 U.S. at 731.

200. Arguably, when the state's articulated goal is to limit the franchise to those "primarily interested" (or, in other words, to exclude those with no concern) in the government unit, that justification alone serves a compelling state interest. If the state has sufficiently established that a person has "no concern with the outcome of an election, it is not a denial of equal protection to deny him the right to vote." 67 MICH. L. REV. 1260, 1261 n.5 (1969). In other words, the excluded party has as much right to vote in the district's election as a resident of Los Angeles has to vote in San Francisco's election (although San Francisco's government may somewhat affect him). In both instances, it is not unfair to exclude the individual from participation. See 67 MICH. L. REV. 1260, 1261 n.5 (1969).

201. 410 U.S. at 732.

substantially affected by a government entity can be excluded from participation in its elections. For once it is initially decided that the entity meets the *Avery* test, its voting scheme will be examined under the traditional standard. Indeed, the Court's analysis would seem to require the application of the traditional test even if the excluded group is the group that is disproportionately affected by the government unit. Suppose that in *Salyer* the statutory scheme excluded landowners who owned less than 100 acres.²⁰² Under the Court's analysis, the fact that the voting scheme is different should not change the result as to the character of the government entity (or the test to be employed). In determining the applicability of the voter equality principles, the Court looked not to the interests of the excluded party, but to the nature of the government unit. Thus, if the Court's reasoning were followed, the nature of the voting scheme should not change the result of the threshold determination of which test to apply. The exclusion of landowners with less than 100 acres, like the exclusion of lessees, would be analyzed by the traditional test. Such an anomalous result surely raises questions as to the wisdom of the majority's approach to the exclusion issue.

B. Dilution—*The Weighted Voting Scheme*

The Court devoted little attention to the portion of the statutory scheme that gave each landowner one vote for each \$100 of assessed land value.²⁰³ Since the Court had previously determined that the voter equality decisions were inapplicable to the water storage district, the traditional standard of review was employed. The Court summarily rejected appellants' assertion that equality of voting was being evaded as inconsistent with "the realities of water storage district operation."²⁰⁴

202. See, e.g., NEV. REV. STAT. § 539.123 (1967) (must be the holder of title to five or more acres to vote in irrigation district); N.D. CENT. CODE ANN. § 61-05-03 (1960) (must own at least five acres to vote in irrigation district); S.D. COMPILED LAWS ANN. tit. 46, § 12-2 (1967) (must own at least ten acres to vote in irrigation district).

203. The J.G. Boswell Co. has 37,825 votes, which are enough to give it control of the district's governing body. 410 U.S. at 735; see note 142 *supra*. Small landowners are given some protection against tyrannical treatment at the hands of large landowners. In order to approve a district project, both a majority of votes cast and a majority of voters are required for approval. CAL. WATER CODE ANN. § 42355 (West Supp. 1974). This gives small landowners a negative influence with which to protect themselves from crippling assessments.

204. 410 U.S. at 734. Appellants also relied on *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), for the proposition that wealth has "no relation to resident-voter qualifications." 410 U.S. at 733. The Court rejected this argument on the same grounds that it rejected the dilution argument. *Id.* at 733-34. In *Harper*, the Court stated:

The Court considered it controlling that the costs of the district's operations were assessed against landowners in proportion to the benefits received:

Thus, as the District Court found, "the benefits and burdens to each landowner . . . are in proportion to the assessed value of the land." We cannot say that the California legislative decision to permit voting in the same proportion is not *rationaly* based.²⁰⁵

The weighted voting scheme thus survived the less-than-exacting examination of the traditional test.

Justice Douglas, dissenting, contended that the scheme was unconstitutional because the district "surely performs 'important governmental functions' which 'have sufficient impact throughout the district' to justify the application of the *Avery* principle."²⁰⁶ Justice Douglas thus attempted to circumvent the question left open in *Avery*:

[Whether or not] a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents . . . [could be] apportioned in ways which give greater influence to the citizens most affected by the organization's functions.²⁰⁷

Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.

383 U.S. at 668 (citation omitted). Justice Harlan, dissenting in *Shapiro v. Thompson*, 394 U.S. 618 (1969), stated that in *Harper*, "[t]he criterion of 'wealth' apparently was added to the list of 'suspects' as an alternative justification . . ." *Id.* at 658. However, the Burger Court has generally been reluctant to treat discrimination based on wealth as a suspect classification. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 18-29 (1973); *James v. Valtierra*, 402 U.S. 137 (1971); *Gaines*, *supra* note 110, at 234-37.

205. 410 U.S. at 734 (emphasis added and citation omitted). The district court did conclude that the unequal land size of the divisions within the district violated the equal protection clause:

The present divisions have not been redivided for 40 years. Total assessed valuation of the land in Division 4 is nearly three times greater than the total assessed valuation in Division 10 (Division 4—\$1,954,547; Division 10—\$688,425). The result is that \$100 of assessed valuation in Division 10 has almost three times the voting power of \$100 of assessed valuation in Division 4. In addition, Division 4 has 110 separate landowners, whereas Division 10 has only 4. Each division is entitled to one director on the District's Board of Directors. Consequently, the 110 landowners in Division 4 have only one-third the representation on the Board when compared with Division 10.

Such malapportionment presents a classic violation of equal protection 342 F. Supp. 144, 146-47 (1972). The water storage district did not appeal this conclusion to the Supreme Court. The determination of the district court is consistent with the traditional standard of review. Unless there were some rational state policy to justify the disproportionate land size of the district's divisions, there would be a violation of equal protection.

206. 410 U.S. at 740.

207. 390 U.S. at 483-84.

Clearly to accept the majority's assumption that the water storage district in *Salyer* is the type of district described in the *Avery* exception is only to *recognize* the issue presented, not to *decide* it. In the first place, to say, as did the *Salyer* majority, that the exception in *Avery* applies does not answer the question as to what equal protection standard is applicable; and secondly, even if the traditional standard were to apply, can there be any rational justification for a system of voting that places *control* of a government agency in the hands of *one* large landowner?²⁰⁸

In *Avery*, the Court suggested that there might be some government entities where the popular election requirements of *Reynolds*—"one person, one vote"—would not be required.²⁰⁹ But it nowhere suggested that the strict standard of review would be inapplicable. The basic rationale for the *Avery* exception can be explicated by language from *Reynolds*:

[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live.²¹⁰

As the language in *Avery* suggests, the Court envisioned some limited government entities where the fact that an individual resided in the geographic area of the district would not, by itself, mean that he stood in the same relation to the government action as other individuals. Thus, strict voter equality would possibly have been inapplicable, and the apportionment of the government unit could validly consider an area or group's primary interest.

208. See note 133 *supra*. Justice Douglas furnished information tending to show that the J.G. Boswell Co. was controlling this public entity in furtherance of its own pecuniary goals:

From its inception in 1926, this district has had repeated flood control problems. Four rivers, Kings, Kern, Tule, and Kaweah, enter Tulare Lake Basin. South of Tulare Lake Basin is Buena Vista Lake. In the past Buena Vista has been used to protect Tulare Lake Basin by storing Kern River water in the former. That is how Tulare Lake Basin was protected from menacing floods in 1952. But that was not done in the great 1969 flood, the result being that 88,000 of the 193,000 acres in respondent district were flooded. The board of the respondent district—dominated by big landowner J.G. Boswell Co.—voted 6-4 to table the motion that would put into operation the machinery to divert the flood waters into the Buena Vista Lake. The reason is that J.G. Boswell Co. had a long-term agricultural lease in the Buena Vista Lake Basin and flooding it would have interfered with the planting, growing, and harvesting of crops the next season.

410 U.S. at 737.

209. 390 U.S. at 483-84. See text accompanying notes 47-48 *supra*.

210. 377 U.S. at 565.

But this problem is not present in water storage districts; the people who have no interest in the unit have been excluded from participation. Since all landowners are similarly situated, they should have an equal voice in the operations of the government unit.²¹¹ Therefore, even though the *district* apparently falls within the *Avery* exception, "one person, one vote" should apply to landowners and lessees because the rationale for the *Avery* exception has no application to those who maintain an interest in land within the district.²¹²

Even assuming that the traditional standard were properly employed, the Court failed to assess the realities of the weighted voting scheme by laconically concluding that it was rationally based. As Justice Douglas indicated, the results of such a system of voting were to enable one large landowner to elect a majority of the directors of the water storage district.²¹³ While property qualifications as a precondition to voting have a lengthy historical basis in this country,²¹⁴ the concept of a one person electorate is at odds with American tradition. Based on the American experience, there can be no rational basis to support a system of voting that places permanent control of a government entity in the hands of one large landowner decade after decade.²¹⁵

C. *The Inclusion of Corporate Voters*

Although the appellants did not challenge the inclusion of corporate voting,²¹⁶ Justice Douglas sentimentously dissented from their participation:

211. See text accompanying note 210 *supra*. Although large landowners may receive more services and thus pay more for district operations, the impact of district decisions affects small landowners to an equal extent. In fact, smaller landowners with less economic resources may be more greatly affected than the larger landowners.

212. See text accompanying notes 209-10 *supra*.

213. See note 133 *supra*.

214. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 685-86 (1966) (Harlan, J., dissenting). See J. PHILLIPS, *MUNICIPAL GOVERNMENT AND ADMINISTRATION IN AMERICA* 175 (1960).

215. See notes 133, 208 *supra*. Justice Douglas furnished information that tended to support the conclusion that the district was being operated to further the pecuniary interests of its ruling landowner. See note 208 *supra*. John Stuart Mill succinctly criticized such a state of affairs existent when

[o]ne man of superhuman mental activity manages the entire affairs of a mentally passive people. Their passivity is implied in the very idea of absolute power. The nation as a whole, and every individual composing it, are without any potential voice in their own destiny. They exercise no will in respect to their collective interests. All is decided for them by a will not their own, which it is legally a crime for them to disobey. What sort of human beings can be formed under such a regimen?

J. S. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 37 (Library of Liberal Arts ed. 1958).

216. 410 U.S. at 730.

It is indeed grotesque to think of corporations voting within the framework of political representation of people. . . . [I]t is unthinkable in terms of the American tradition that corporations should be admitted to the franchise. Could a State allot voting rights to its corporations, weighting each vote according to the wealth of the corporation? Or could it follow the rule of one corporation, one vote?²¹⁷

Continuing, Justice Douglas stated:

Four corporations can exercise these governmental powers as they choose, leaving every individual inhabitant with a weak, ineffective voice. The result is a corporate political kingdom undreamed of by those who wrote our Constitution.²¹⁸

From a standpoint of policy, Justice Douglas' remarks are undoubtedly sound. But the real question is whether or not there is any constitutional provision that prevents corporate participation in water storage district operations.

It seems clear that a state can constitutionally *deny* corporations the right to vote in most elections,²¹⁹ but can a state constitutionally *grant*

217. *Id.* at 741.

218. *Id.* at 742; see note 208 *supra*.

219. While corporations are considered "persons" within the meaning of the equal protection and due process clauses of the fourteenth amendment (Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 79-80 (1938); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Louis K. Liggett Co. v. Lee, 288 U.S. 517, 536 (1933); Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 187-89 (1888); see Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202, 236 (1946)), this is not to say that they are being denied equal protection when the state denies them the right to vote.

A corporation is usually regarded as a "person" within the meaning of particular constitutional provisions unless the provision is one which is peculiarly limited to natural persons. H. HENN, *LAW OF CORPORATIONS* 111 (2d ed. 1970). Thus, in addition to enjoying the protection of the equal protection and due process clauses, a corporation is entitled to the fourth amendment's protection against unreasonable searches and seizures (Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208-09 (1946)); and the fifth amendment's protection against deprivation of liberty or property without due process of law. Minneapolis & St. L. Ry. v. Beckwith, 129 U.S. 26 (1889). A corporation, however, is not entitled to the privileges or protections of other provisions of the Constitution because they only extend to natural persons. Thus, a corporation is not afforded the privilege against self-incrimination provided by the fifth amendment (Wild v. Brewer, 329 F.2d 924 (9th Cir.), *cert. denied*, 379 U.S. 914 (1964)); and is not a citizen within the privileges and immunities clauses of article four, section two, and the fourteenth amendment. Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1869).

The fact that a corporation does not fall within constitutional provisions dealing with citizenship or natural persons is of great significance. As the Court stated in Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869):

The term citizens as there used [privileges and immunities clause of article four] applies only to natural persons, members of the body politic, owing allegiance to

the franchise to a corporation?²²⁰ Until Justice Douglas' dissent in *Sal- yer*, this question does not seem to have arisen. There is, of course, no textually demonstrable provision of the Constitution which would prohibit such a grant. Justice Douglas' "analysis" in terms of the "gro- tesqueness" of the proposition is hardly satisfying. It harkens back to the "natural law" of "fundamental fairness" and "shocked consci- ences" which typified Justices Frankfurter and Harlan's analysis of some areas of fourteenth amendment due process²²¹—an analytical

the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed.

Id. at 177. See 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 113-14 (rev. vol. 1963). A corporation not being a citizen, cannot claim the privi- leges afforded to those who are.

In *Reynolds v. Sims*, 377 U.S. 533, 544 (1964), the Court stated that the Consti- tution protected the right of "all qualified citizens to vote." Therefore, non-citizen cor- porations which are merely creatures of the state (1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 113 (rev. vol. 1963)), cannot claim that there is a discriminatory classification by being denied the right to vote. *Cf.* *Sugarman v. Dou- gall*, 413 U.S. 634, 648, 648 n.13 (1973). And even if there were a classification requiring justification by the state, their exclusion would surely meet both the tests of the traditional and strict standards of review. (Certainly, the strict test would not be employed since the right of corporations to vote is not a "fundamental" right).

220. Many state legislatures apparently believe that they can. In California, corpo- rations have been permitted to vote in water storage districts since 1923 (ch. 419, § 12, [1923] Cal. Stat. 962), and in California Water Districts (see note 241 *infra*) since 1913. Ch. 387, § 24, [1913] Cal. Stat. 832. Other states have also granted the franchise to corporations. See, e.g., FLA. STAT. ANN. § 298.11 (Supp. 1973); MO. ANN. STAT. § 245.060 (1963); NEB. REV. STAT. § 31-407 (1968); NEV. REV. STAT. § 539.123 (1967); N.D. CENT. CODE ANN. § 61-05-06 (1960); S.D. COM- PILED LAWS ANN. tit. 46, § 12-2 (1967); UTAH CODE ANN. tit. 73, § 7-4 (1953); WASH. REV. CODE ANN. § 87.60.150 (Supp. 1972); W. VA. CODE §§ 19-21-3, 19-21- 7 (1971); WYO. STAT. ANN. § 41-299 (1959); State *ex rel.* *Harris v. Hansen*, 117 N.W. 412, 415-16 (Neb. 1908).

Those districts in which corporations are allowed to vote are in rural areas where the functions of the government body are land directed. While property ownership as the basic requirement of voter eligibility long ago disappeared (BOLLENS, *supra* note 2, at 250), these districts retained it because of the close relationship between the ac- tivities of the district and property ownership. Since the focus of voter eligibility was on land ownership, many states allowed all land owners to participate whether or not natural persons.

221. See, e.g., Justice Frankfurter's opinion for the Court in *Rochin v. California*, 342 U.S. 165 (1952):

[W]e are compelled to conclude that the proceedings by which . . . [the con- viction in this case] was obtained do more than offend some fastidious squeamish- ness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.

Id. at 172. See also *Duncan v. Louisiana*, 391 U.S. 145, 172 (1968) (Harlan, J., dis- senting); *Pointer v. Texas*, 380 U.S. 400, 409 (1965) (Harlan, J., concurring); *Malloy v. Hogan*, 378 U.S. 1, 20 (1964) (Harlan, J., dissenting); *Mapp v. Ohio*, 367 U.S. 643, 683 (1961) (Harlan, J., dissenting); *Poç v. Ullman*, 367 U.S. 497, 541

technique which Justice Douglas has himself roundly condemned.²²² A complete exploration of the problem of corporate voting is beyond the scope of this Comment, but it is suggested that if the problem does arise, no satisfactory solution will be found if the Court allows itself to be swayed by visions of "corporate political kingdoms undreamed of" by those who have been given the solemn duty of being the supreme arbiters of the meaning of the Constitution.

Instead, it is suggested that the appropriate framework for analysis will be found in the equal protection clause. A direct application of the "one person, one vote" principles could be employed to strike down the grant of the franchise to corporations. Since a corporation can only act through individuals—persons who presumably have a vote in their own right—it could be argued that these individuals have been accorded a greater voice in the political selection process.²²³ In other words, a case of dilution would be established and, therefore, the statutory grant of voting rights would be subject to a constitutional infirmity. On the other hand, it is not difficult to envision situations where no conceivable case of dilution could be established, situations where no person associated with the corporation had a vote of his own in a particular election. This is especially obvious in water storage districts when no corporate director, officer or shareholder owns land in the district. Thus, while the equal protection clause would appear to be an appropriate point of departure, some corporate voting arrangements will be difficult to attack on traditional constitutional grounds. Indeed, in the water district situation, once the decision has been made that

(1961) (Harlan, J., dissenting); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (Frankfurter, J., for the Court); *Adamson v. California*, 332 U.S. 46, 67-68 (1947) (Frankfurter, J., concurring).

222. See, e.g., Justice Douglas' concurring opinion in *Rochin v. California*, 342 U.S. 165 (1952):

[W]e cannot in fairness free the state courts from . . . [the command of the fifth amendment] and yet excoriate them for flouting the "decencies of civilized conduct" when they admit the evidence. That is to make the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here.

Id. at 179. See also *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (Black, J., concurring, joined by Douglas, J.); *Wolf v. Colorado*, 338 U.S. 25, 40 (1949) (Douglas, J., dissenting); *Adamson v. California*, 332 U.S. 46, 70 (1947) (Black, J., dissenting, joined by Douglas, J.). But see Justice Douglas' dissent in *Poe v. Ullman*, 367 U.S. 497 (1961):

Yet to say that a legislature may do anything not within a specific guarantee of the Constitution may be as crippling to a free society as to allow it to override specific guarantees so long as what it does fails to shock the sensibilities of a majority of the Court.

Id. at 518 (footnote omitted).

223. See note 219 *supra*.

the controlling consideration in the distribution of the franchise should be land ownership and not population, it is difficult to see why people who exercise the power of ownership through the vehicle of a corporation should be denied the franchise.²²⁴ Permitting the state to grant the franchise to such persons by bestowing it directly upon the corporation avoids the troublesome questions that would inevitably be associated with any state attempt to determine *which* natural persons involved with the corporation should be given *what* fraction of the vote or votes involved. By granting the vote directly to the corporation the state permits the internal political forces of the business to decide for themselves how their power might be exercised. If the decision to distribute the franchise according to the amount of land owned is constitutionally permissible, the decision to grant the ballot to the owners directly (corporate or otherwise) seems no less permissible.

IV. THE IMPACT OF *Salyer* ON LOCAL GOVERNMENT STRUCTURE

The Court in *Salyer* has affirmatively established that there are limits to the voter equality principles by holding them inapplicable to water storage districts. The key to the applicability of the voter equality cases now appears to be the nature of the government entity involved. In *Salyer*, the water storage district fit the *Avery* exception "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group"²²⁵ The impact of *Salyer* will thus depend on how many government entities can meet this exception. By determining whether or not a government unit performs a "special limited purpose" and whether or not its activities "disproportionately affect" a definable group, a workable test can be developed to determine the applicability of the voter equality cases.

A. *Special Limited Purpose*

Language from *Salyer* will assist in the illumination of the concept of "special limited purpose":

[The water storage district] has relatively limited authority. . . . It provides *no other* general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body. There are no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundaries, and it does not have a fire department, police, buses,

224. See *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 96 n.8 (1973).

225. 410 U.S. at 728.

or trains.²²⁶

Although the question is not free from difficulty, the Court appears to be defining most special-purpose districts in this country.²²⁷ The court emphasizes the fact that the district provides "no other general public services,"²²⁸ which tends to support the proposition that when only one general public service is provided the requirement of "special limited purpose" is satisfied. Since one of the dominant characteristics of a special district is that it is statutorily limited to providing a single service,²²⁹ most special districts would meet the Court's definition of "special limited purpose."²³⁰

B. *Disproportionate Effect on a Definable Group*

Although every government unit has varying impacts on the citizens within its jurisdiction, it is difficult to define with reasonable precision any group of citizens that can be said to be disproportionately affected.²³¹ This is generally so because the services of many government entities "implicate the entire community."²³² Special-purpose districts can be grouped into eleven categories based on the functions they perform:

They are health and sanitation; protection to persons and property; road transportation facilities and aids; nonroad transportation facilities and aids; utilities; housing; natural resource and agricultural assistance; education; parks and recreation; cemeteries; and miscellaneous.²³³

As the categories indicate, most of the services performed are ones in which the public as a whole would have an interest.

Should it be asserted that the activities of a given special-purpose district "disproportionately affect" a definable group, three factors should be considered in analyzing the interests of persons that are said

226. *Id.* at 728-29 (emphasis added and citation omitted).

227. See note 2 *supra*.

228. 410 U.S. at 728-29 (emphasis added).

229. BOLLENS, *supra* note 2, at 21; ADVISORY COMMISSION REPORT, *supra* note 2, at 3.

230. Some special districts, like the Embarcadero Municipal Improvement District (see notes 113-31 *supra* and accompanying text), provide a wide range of services. In fact, the powers granted to some special districts are more extensive than those exercised by cities and towns in some states. ADVISORY COMMISSION REPORT, *supra* note 2, at 3.

231. See generally ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, PERFORMANCE OF URBAN FUNCTIONS: LOCAL AND AREA-WIDE (1963).

232. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 738 (1973) (Douglas, J., dissenting).

233. BOLLENS, *supra* note 2, at 21.

to be outside that group:

- (1) *Does the district have the power to tax the persons or property of other than the group that is said to be disproportionately affected?*²³⁴
- (2) *Does the district have police or regulatory power over persons other than the group that is said to be disproportionately affected?*²³⁵
- (3) *Does the district have power to engage in activities that directly affect the quality of life of a group other than the one that is said to be disproportionately affected?*²³⁶

If the answer to any of these three questions is in the affirmative, it is contended that the district does not "disproportionately affect" a de-

234. The power of taxation is defined as follows:

Although various definitions have been given from time to time by the courts, the definition which is most commonly approved is that taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs.

16 E. MCQUILLEN, *THE LAW OF MUNICIPAL CORPORATIONS* § 44.02 (rev. vol. 1972) (footnotes omitted).

235. See C. RHYNE, *MUNICIPAL LAW* 528-29 (1957).

236. Determining when an activity directly affects the quality of life of an individual will not be difficult in most circumstances. A person can be directly affected by a government activity in two major ways: (1) he or she can be the direct recipient of the government service in some tangible manner, *e.g.*, refuse collection; or (2) he or she can be among the class of persons intended to be benefited by the service. If a person is not directly receiving the government service, it must be determined if the individual is an intended beneficiary of the government activity. This inquiry presents little difficulty because most government services can be said to affect the public or general welfare:

Generally . . . it appears that under circumstances of particular cases, public welfare includes public convenience, general prosperity, the greatest welfare of the public, all the great public needs, . . . whatever is required for the public good, the suppression of all things hurtful to the comfort and welfare of society, and finally all regulations which promote the general interest and prosperity of the public.

8 E. MCQUILLEN, *THE LAW OF MUNICIPAL CORPORATIONS* § 25.20 (rev. vol. 1965) (footnote omitted). Thus, even though the government body directly provides a service to a class of persons, all citizens are directly affected by the entity because the services are designed to benefit the community as a whole. See *ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, PERFORMANCE OF URBAN FUNCTIONS* 42-44 (1963). This is true of units engaged in the function of education (*id.* at 76); libraries (*id.* at 88); parks and recreation (*id.* at 103-05); fire protection (*id.* at 114); police protection (*id.* at 128); public welfare (*id.* at 141-42); public health (*id.* at 154); hospitals (*id.* at 168); air pollution control (*id.* at 181); refuse collection and disposal (*id.* at 190); water supply and sewage disposal (*id.* at 209); housing (*id.* at 237); and transportation (*id.* at 262).

From the above analysis, it is contended that with regard to most government units there cannot be defined a class of persons who either are not the direct recipient of the government service or are not within the class to be benefited by the service. This is not surprising, for in most of American society the activities of a part affect the whole. See 6 E. MCQUILLEN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24.34 (rev. vol. 1969). This is not always the case in rural America. See notes 237-42 *infra* and accompanying text.

finable group. For the power to tax,²³⁷ the power to regulate, or the power to affect the quality of one's life style indicates that an individual has a very substantial interest in the operation of the government unit involved.

Under the above analysis, most special-purpose districts would not meet the *Avery* exception because their activities do not "disproportionately affect" any given group. Two factors support this conclusion. First, a district's taxing base will often not correspond exactly to its service base.²³⁸ Secondly, most districts are engaged in activities that affect the quality of life of the community; health, sanitation, school, fire, police, transportation, utilities, etc., are services that implicate all residents.²³⁹

Although under this analysis most special districts would not fall within the *Avery* exception, there are a number, mostly in rural areas, that would. Reclamation districts and drainage districts, like water storage districts are land directed.²⁴⁰ Their primary function is to

237. Since a tax is an "enforced contribution to provide for the support of government" (United States v. La Franca, 282 U.S. 568, 572 (1931)), it gives an individual a substantial interest in the government unit being supported. As one writer observed, taxation involves far reaching consequences:

Taxation may create monopolies or it may prevent them; it may diffuse wealth or it may concentrate it; it may promote liberty and equality of rights, or it may tend to the establishment of tyranny and despotism; it may be used to bring about reforms, or it may be so laid as to aggravate existing grievances and foster dissension and hatred between classes; taxation may be so contrived by the skillful hand as to give free scope to every opportunity for the creation of wealth or for the advancement of all true interests of states and cities, or it may be so shaped by ignoramus as to place a dead weight on a community in the race for industrial supremacy.

R. ELY, TAXATION IN AMERICAN STATES AND CITIES 55 (1888).

238. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, ALTERNATIVE APPROACHES TO GOVERNMENTAL REORGANIZATION IN METROPOLITAN AREAS 8-10 (1962); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, GOVERNMENTAL STRUCTURE, ORGANIZATION AND PLANNING IN METROPOLITAN AREAS 15 (1961); ADVISORY COMMISSION REPORT, *supra* note 2, at 34-37.

239. See note 236 *supra*. In an urban area, because of the complex interrelationships, most of the activities of a governmental entity can be said to substantially affect the community as a whole:

In matters of social and governmental regulation a diverse population crowded into a small area must be differentiated from rural populations. In an urban center the relation of the individual to the community is quite unlike his relation in a rural section. The mere concentration of population creates a degree of interdependence between the individual and the community as a whole. That is to say, the existence of populous cities in which the sanitary conditions and ethical habits of every householder affect every other householder has created new rights and new duties. So it may be said that independence as hitherto understood has been supplanted by interdependence.

6 E. McQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 24.34 (rev. vol. 1969).

240. See ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT, ANALYSIS OF CALIFORNIA DISTRICT LAWS (1966).

assist owners of land engaged in agricultural pursuits, and they are not authorized to perform services that directly affect the quality of life of nonlandowners. Therefore, those district's engaging in these limited functions which have *Salyer*-type voting schemes²⁴¹ would appear to meet the *Avery* exception.²⁴²

241. An issue still remaining to be decided is the effect of California's constitutional prohibition against property ownership as a voter qualification: "No property qualification shall ever be required for any person to vote or hold office." CAL. CONST. art. 1, § 24. A number of old California cases have held that when a special district with few or no residents makes land ownership the qualification for participation in the selection process for the district's governing body, this participation constitutes a property owner appointment rather than an election. See, e.g., *Barber v. Galloway*, 195 Cal. 1, 231 P. 34 (1924); *Tarpey v. McClure*, 190 Cal. 593, 213 P. 983 (1923); *People ex rel. Chapman v. Sacramento Drainage Dist.*, 155 Cal. 373, 103 P. 207 (1909); *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 P. 1016 (1897). The continued validity of these cases is questionable. See *Burrey v. Embarcadero Municipal Improvement Dist.*, 5 Cal. 3d 671, 677 n.6, 448 P.2d 395, 399 n.6, 97 Cal. Rptr. 203, 207 n.6 (1971). If the courts should decide that these voting schemes were violative of the California constitutional provision, a new classification could most likely be developed to overcome the objection. Some criteria, other than property ownership, could conceivably be developed in identifying those primarily interested in the district, and the franchise could be accordingly restricted.

242. See notes 88 and 90 *supra*. The major exception is California Water Districts, CAL. WATER CODE ANN. §§ 34000 *et seq.* (West 1956). These districts are organized to acquire, construct, and maintain works for the production, storage, and distribution of water for irrigation, domestic, industrial, and municipal purposes, and drainage or reclamation in connection therewith. *Id.* § 35401. The districts may also acquire, construct, and operate facilities for the collection, treatment, and disposal of sewage, waste, and storm waters of the district. *Id.* § 35500 (West Supp. 1974).

There are 159 of these districts, and they encompass a combined acreage of 2,749,833. ANNUAL REPORT, *supra* note 133, at 3. A district is governed by a board of directors elected by the qualified voters of the district. Only landowners are entitled to vote (CAL. WATER CODE ANN. § 34027 (West 1956)) and each is entitled to one vote for each one dollar of assessed land value (*id.* § 35003 (West Supp. 1974)). These districts are located primarily in rural areas of California and provide needed services that would otherwise be unavailable because of the absence of other governmental bodies in the area.

Financial transactions of the districts indicate that they are substantially engaged in the supply of water for other than agricultural use:

<i>Water Sales Fiscal Year 1971-72</i>	
<i>Residential</i>	\$1,865,705
<i>Business</i>	331,785
<i>Industrial</i>	382,201
<i>Irrigation</i>	11,714,462
<i>Water Services Fiscal Year 1971-72</i>	
<i>Fire Prevention</i>	\$35,458

ANNUAL REPORT, *supra* note 133, at 7.

The supply of water for irrigation, domestic, industrial, and municipal purposes, and the provision of sewer services indicate that this special district does not "disproportionately affect" only landowners. All residents have a substantial interest in such services. The constitutionality of the voting scheme in California Water Districts is arguably suspect since the voter equality principles should apply.

V. THE FUTURE OF VOTER EQUALITY AT THE LOCAL LEVEL

Unless the Supreme Court chooses to ignore the impact that most special-purpose districts have on all resident citizens,²⁴³ the voter equality principles will still be applicable to most government entities. Therefore, *Salyer* does not provide general support for a legislative limitation of the franchise to interested voters of a government entity. If such were not the case, there would be an immense danger of excluding individuals from equal participation in the activities of government entities that substantially affect their lives.²⁴⁴

243. In *Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973), the Court, in a per curiam opinion delivered the same day as *Salyer*, applied the principles of that case to a Wyoming Watershed Improvement District. The district was formed pursuant to a referendum which, under Wyoming law, was limited to landowners. WYO. STAT. ANN. §§ 41-354.8 & -354.9 (1973). The district sought a right of entry onto the appellant's land for the purpose of undertaking studies to determine the feasibility of constructing a dam and reservoir. Appellant resisted, and the district brought suit. Appellant argued that the district was illegally formed because the provision limiting the referendum to landowners violated the equal protection clause. The trial court ruled against appellant on the merits and the Wyoming Supreme Court affirmed. *Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 490 P.2d 1069 (1971). The United States Supreme Court affirmed:

As in *Salyer*, we hold that the State could rationally conclude that landowners are primarily burdened and benefited by the establishment and operation of watershed districts and that it may condition the vote accordingly.

410 U.S. at 745. Justice Douglas again dissented, and was joined by Justices Brennan and Marshall. Since the activities of the watershed district involved the construction of a dam, Justice Douglas concluded that important environmental issues were involved, issues of concern to all the residents of the district:

It is . . . inconceivable that a body with the power to destroy a river by damming it and so deprive a watershed of one of its salient environmental assets does not have "sufficient impact" on the interests of people generally to invoke the principles of *Avery* and *Hadley*.

Id. at 749.

244. See *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 104 (1973). The general trend of state legislation, however, is not to restrict the franchise in special purpose district elections, but to eliminate elections by providing alternate methods of selection of the district's governing body. Elections in special-purpose districts are generally disfavored because of the lack of voter participation:

The election of a group of local citizens to operate a special district has been cited by many as the democratic approach, providing for a high degree of local autonomy. However, others are of the opinion that this does not always produce the desired "grass roots" control that it is presumed to since district government in an urban area tends to be confusing to the citizen. In order to be a conscientious citizen residents of some areas would have to keep up with the activities of as many as 10 to 12 governments. Poor district voting records indicate that the average citizen has little interest in the day-to-day activities of districts, probably due to the large number and their relatively small scale operation.

FINAL REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT, SPECIAL DISTRICTS IN THE STATE OF CALIFORNIA: PROBLEMS IN GENERAL AND THE CONSOLIDATION OF SEWER AND FIRE DISTRICT ACTS 31 (Assembly Interim Committee Reports 1957-1959). See also ADVISORY COMMISSION REPORT, *supra*

Nonetheless, *Salyer* does indicate that the Supreme Court is depar-

note 2, at 67-68; S. SCOTT & J. CORZINE, SPECIAL DISTRICTS IN THE SAN FRANCISCO BAY AREA: SOME PROBLEMS AND ISSUES 3 (1964).

Alternate selection techniques include appointment by the board of supervisors of the county wherein the district is located (*see, e.g.*, CAL. AGRIC. CODE ANN. § 8501 (West 1968) (citrus pest districts); CAL. HEALTH & SAFETY CODE ANN. § 2240 (West 1970) (mosquito or vector control districts)); *ex officio* control by the board of supervisors (*see, e.g.*, CAL. WATER CODE APP. § 28-3 (West Supp. 1974) (Los Angeles Flood Control District); CAL. HEALTH & SAFETY CODE ANN. § 24220 (West 1967) (air pollution control districts); CAL. WATER CODE APP. § 51-7 (West 1968) (Santa Barbara County Water Agency)); and a mixed county-city selection procedure (*see, e.g.*, CAL. PUB. UTIL. CODE ANN. § 30201 (West 1973) (Southern California Rapid Transit District); CAL. HEALTH & SAFETY CODE ANN. § 24352 (West Supp. 1974) (Bay Area Air Pollution Control District); CAL. HARB. & NAV. CODE § 6240 (West Supp. 1974) (port districts)).

Local government units that utilize appointment as the means of selecting their governing body are not immune to constitutional attack on the grounds of violating voter equality. *See Nahmod, Reflections on Appointive Local Government Bodies and a Right to an Election*, 11 DUQUESNE L. REV. 119 (1972). California has a number of special districts in which the governing body of the district is appointed by the various political subdivisions within its boundaries. *See, e.g.*, CAL. PUB. UTIL. CODE ANN. § 30201 (West 1973) (Southern California Rapid Transit District); CAL. HEALTH & SAFETY CODE ANN. § 24352 (West Supp. 1974) (Bay Area Air Pollution Control District); CAL. GOV'T CODE ANN. §§ 66800-01 (West Supp. 1974) (Tahoe Regional Planning Compact).

A good example is the Tahoe Regional Planning Agency. California and Nevada entered into a compact, with the approval of Congress, to provide the Lake Tahoe area with planning, conservation, and resource development. CAL. GOV'T CODE ANN. § 66801 (West Supp. 1974). To accomplish this purpose the Tahoe Regional Planning Agency was established as a separate legal entity. *Id.* The governing body is selected in the following manner:

One member appointed by each of the County Boards of Supervisors of the Counties of El Dorado and Placer and one member appointed by the City Council of the City of South Lake Tahoe. Each member shall be a member of the city council or county board of supervisors which he represents and, in the case of a supervisor, shall be a resident of a county supervisorial district lying wholly or partly within the region.

One member appointed by each of the Boards of County Commissioners of Douglas, Ormsby and Washoe Counties. . . .

. . . .

One member appointed by the Governor of California and one member appointed by the Governor of Nevada. . . .

The Administrator of the California Resources Agency or his designee and the Director of the Nevada Department of Conservation and Natural Resources or his designee.

Id. The agency has the power to adopt ordinances, rules, regulations, and policies to effectuate regional planning. *Id.*

In *People ex rel. Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971), the counties of El Dorado and Placer contended that the method of selecting the governing body of the agency violated the "one person, one vote" principle. The court stated that it was clear that the governing body of the agency did not represent equal numbers of residents within the region and concluded that "one person, one vote" was obviously violated if applicable to the manner in which the governing body was selected. *Id.* at 503-04, 487 P.2d at 1208, 96 Cal. Rptr. at

ting from the strict application of the voter equality principles.²⁴⁵ In the previous decisions of the Court, voting in all local elections received vigorous protection.²⁴⁶ The refusal of the Court to afford the same protection in *Salyer* is a reflection of its favorable attitude toward the concept of flexibility in the structural arrangements of government.²⁴⁷

This attitude is vividly elucidated in the recent state legislative reapportionment cases decided by the Court.²⁴⁸ The Court has determined

568. Relying on *Sailors*, the court went on to hold that the principle of "one person, one vote" did not apply to the agency since the governing body was appointed. *Id.* at 504, 487 P.2d at 1209, 96 Cal. Rptr. at 569. See generally *Egan v. Wisconsin State Bd. of Vocational, Technical & Adult Educ.*, 332 F. Supp. 964 (E.D. Wis. 1971); *Wallis v. Blue*, 263 F. Supp. 965 (N.D. Ga. 1967); *O'Keefe v. Atascadero County Sanitation Dist.*, 21 Cal. App. 3d 719, 98 Cal. Rptr. 878 (1971); *Latham v. Board of Educ.*, 201 N.E.2d 111 (Ill. 1964); *Meadowlands Regional Dev. Agency v. New Jersey*, 270 A.2d 418 (N.J. Super. Ct. 1970), *aff'd. on other grounds*, 304 A.2d 845 (N.J. 1973); *Bergerman v. Lindsay*, 255 N.E.2d 142 (N.Y. 1969), *cert. denied*, 398 U.S. 955 (1970).

245. See *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 104 (1973).

246. See notes 28-82 *supra* and accompanying text.

247. See note 252 *infra*.

248. In *Mahan v. Howell*, 410 U.S. 315 (1973), the Court approved a reapportionment plan for the House of Delegates of the Virginia General Assembly that had a maximum deviation from population equality of 16.4%. *Id.* at 319. The Court was squarely faced with the issue of whether or not the absolute equality principles that the Court had applied in congressional redistricting in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (see note 59 *supra*), and *Wells v. Rockefeller*, 394 U.S. 542 (1969) (see note 59 *supra*), were applicable in the context of state legislative reapportionment. In *Connors v. Williams*, 404 U.S. 549 (1972), the Court had expressly reserved decision on this issue. *Kirkpatrick* and *Wells* dealt with congressional redistricting and were based on the decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964). Therefore, in *Mahan* the Court engaged in a comparison of the principles of *Wesberry* and *Reynolds*. The Court noted that in *Reynolds* there was language suggesting that more "flexibility was constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting." 410 U.S. at 321. Indeed, the Court noted that in state legislative redistricting, factors such as the integrity of political boundaries and the insurance of some voice to its political subdivisions could be considered so long as the overriding objective of substantial population equality was met. *Id.* at 322. By contrast, the Court stated that in *Wesberry* it was recognized that there was "no excuse for the failure to meet the objective of equal representation for equal numbers of people in congressional districting other than the practical impossibility of drawing equal districts with mathematical precision." *Id.* at 322. Thus, the Court propounded:

[W]hereas population alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, § 2, broader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting because of the considerations enumerated in *Reynolds v. Sims*.

Id.

The Court therefore concluded that the application of the "absolute equality" test of *Kirkpatrick* and *Wells* to state legislative reapportionment could impede the normal functioning of state and local government entities and should not be employed. *Id.* at 323. Some deviations from the equal population principle were permissible, according to the Court, if "based on legitimate considerations incident to the effectuation of

that the concept "one person, one vote" does not demand mathematical equality when the issue is state reapportionment.²⁴⁰ The present rule appears to be that if the maximum deviation from population equality is less than 10 percent no violation of equal protection is established,²⁵⁰ and deviations between 10 and 16 percent may be justified if "based on legitimate considerations incident to the effectuation of a rational

a rational state policy.'" *Id.* at 325, quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). The Court then went on to approve the Virginia plan because it could "reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions" (*id.* at 328) and held that 16.4% variation did not exceed constitutional limits. *Id.* (The Court stated that there was no precise formula to determine the permissible range of percentage deviations. While acknowledging that 16% "may well approach tolerable limits" it concluded that it did not exceed them. *Id.* at 329.)

In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court approved a reapportionment plan for the House of the Connecticut General Assembly that had a maximum deviation from population equality of 7.83%. *Id.* at 737. The Court held that a prima facie violation of the equal protection clause had not been established by such a small deviation. *Id.* at 741. In other words, the state need not articulate any justification when only minor deviations from population equality are established. *Id.* at 745. This conclusion, the Court stated, could be based solely on the fact that the statistical material used in reapportionment (the United States Census) is "inherently less than absolutely accurate." *Id.* Based on such a realization, the Court stated it "makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted." *Id.* at 745-46. Furthermore, the Court pointed out that even if the census were absolutely accurate when taken, district populations are constantly changing. *Id.*

Gaffney is a significant development; if only minor deviations are shown, no judicial intervention is required or permitted. *Id.* at 749. Indeed, the Court strongly reprimanded the lower federal courts for their needless interference in state reapportionment:

That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should be bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.

Id. at 749-50.

In *White v. Regester*, 412 U.S. 755 (1973), decided the same day as *Gaffney*, the Court approved a reapportionment plan for the Texas House of Representatives that had a maximum deviation from population equality of 9.9%. *Id.* at 761. The Court, relying on *Gaffney*, concluded that a person was not denied "fair and effective" representation by minor deviations in population equality among districts. *Id.* at 765. Greater deviations, according to the Court, most likely would "not be tolerable without justification 'based on legitimate considerations incident to the effectuation of a rational state policy.'" *Id.* (emphasis added), quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). The Court in *White* did affirm the lower court's invalidation of two multimember districts on the ground that they were designed to deny political representation to racial minorities. *Id.* at 665-70. See generally *Whitcomb v. Chavis*, 403 U.S. 124 (1970); Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV. 666 (1972); Comment, *Effective Representation and Multimember Districts*, 68 MICH. L. REV. 1577 (1970).

249. *Mahan v. Howell*, 410 U.S. 315, 323 (1973).

250. *White v. Regester*, 412 U.S. 755, 761 (1973).

state policy."²⁵¹ The Court has noted that to apply an absolute equality standard could interfere with the normal functioning of state and local governments,²⁵² and has strongly reprimanded the lower federal courts for needless interference in apportionment cases.²⁵³

CONCLUSION

In *Salyer*, the Court has definitively established that there are limits

251. *Mahan v. Howell*, 410 U.S. 315, 325 (1973), quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). What considerations the present Court will deem legitimate remains to be seen. For example, the California Legislature, although commanding that district divisions be drawn as nearly equal to population as possible, has authorized the Kern County Water Agency (CAL. WATER CODE APP. §§ 99-1 *et seq.* (West 1968)), to consider other factors as well. The factors specified include: (1) topography; (2) geography; (3) cohesiveness, contiguity, integrity, and compactness of territory; and (5) community of interest of divisions. *Id.* § 99-7.1 (West Supp. 1974). Assuming that the voter equality principles are applicable to this district, the courts must determine whether or not the consideration of these factors is constitutionally permissible.

252. *Id.* at 323. As the Court indicated in *Sailors v. Board of Educ.*, 387 U.S. 105 (1967), if government entities are to respond to today's challenges, structural flexibility is desirable: "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions." *Id.* at 110-11. Strict numerical application of "one person, one vote" has been viewed as a hindrance to this needed flexibility, especially in the area of metropolitan consolidation. See, e.g., Comment, *The Impact of Voter Equality on the Representational Structures of Local Government*, 39 U. CHI. L. REV. 639, 640 (1972).

It would indeed be anomalous if a mechanical application of the voter equality principles, which are designed to insure effective participation in government, should deny the citizen effective and innovative government. This is especially the case in the area of metropolitan consolidation where the "one person, one vote" principles have been seen as a barrier to regional governments, since the suburban and rural areas that would be least benefited by such a consolidation would generally be unwilling to subject themselves to it if the voter equality principles would assure urban areas, which would be most benefited by the consolidation, the dominant voice. *Id.* See Leiken, *Governmental Schemes for the Metropolis and the Implementation of Metropolitan Change*, 49 J. URBAN L. 667 (1972).

253. *Gaffney v. Cummings*, 412 U.S. 735, 750 (1973). The Court stated that this case was a good example of what should not happen in the federal courts. The state had proposed a plan for the House that had a maximum variation of 7.83%. Appellees proposed four alternate plans for the House, one of which had a maximum variation of 2.6%. The district court appointed a master who came up with a plan for the House that had a maximum variation of only 1.16%. *Id.* As the Court stated:

Was the Master compelled, as a federal constitutional matter, to come up with a plan with smaller variations than were contained in appellees' plans? And what is to happen to the Master's plan if a resourceful mind hits upon a plan better than the Master's by a fraction of a percentage point? Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally "better" when measured against a rigid and unyielding population-equality standard.

The point is, that such involvements should never begin. . . . [S]tate reapportionment is the task of local legislatures

Id. at 750-51.

to the dilution and disenfranchisement principles by holding them inapplicable to a special-purpose district. In so doing, the Court has mistakenly combined the dilution and disenfranchisement principles by establishing the *Avery* test as the threshold inquiry for their applicability.²⁵⁴ The result is the approval of a voting scheme that would be characterized as inequitable by most persons.²⁵⁵

But for the Court to strike down the voting scheme would have propelled it on a course it was unwilling to take; one which would have been in conflict with the judicial restraint of the Burger Court and acted as a catalyst for unlimited challenges to state and local government voting schemes in the lower federal courts. Instead, the Court distinguished old principles²⁵⁶ and in the process created new ones in the hope of allowing state and local governments freedom to effectively function.²⁵⁷ By "distinguishing" these principles the Burger Court has revolutionized the constitutional philosophy surrounding the right to vote. If the Warren era's approach could be summed up in the simple aphorism that, "Legislators represent people, not trees or acres,"²⁵⁸ apparently the Burger Court is prepared to state that some public officials represent acres and trees, not people.

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254. See text accompanying notes 149-51 *supra*.

255. Although there is no justification for the system of weighted voting (see notes 209-15 *supra* and accompanying text), it would appear that the restriction of the franchise to landowners is constitutionally valid. See notes 186-200 *supra* and accompanying text. This is, however, not to say that the restriction of the franchise to landowners is desirable. See BOLLENS, *supra* note 2, at 250. But since the restriction violates no constitutional provision, the decision to eliminate such a restriction should be made by the legislature:

Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes.

Harper v. Virginia Bd. of Elections, 383 U.S. 663, 686 (1966) (Harlan, J., dissenting).

256. See Kalven, *The Supreme Court, 1970 Term—Foreword: Even When a Nation is at War—*, 85 HARV. L. REV. 3 (1971).

257. See note 252 *supra* and accompanying text.

258. 377 U.S. at 562.