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Salyer, Ball, and Holt: Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution

Melvyn R. Durchslag*

There is no debate about the right to vote being fundamental to American democracy. But the Supreme Court's reliance on the equal protection clause to ensure that right has led to an "interest" exception. That exception queries whether the plaintiffs are sufficiently interested in the activities of a governmental unit to merit the equal right of participation.

This Article focuses on the interest exception—how political "interest" might be defined and how that definition affects the problem of vote dilution. The Article posits that in the three cases where the Court has relied on the interest exception to sustain an exclusionary and/or voting scheme, it has failed to focus on the determinative question. The question that must be answered is whether granting claimants' assertion of franchise rights would cause a dilution of the current voters' power and thus a disruption of the political community.

Because dilution is the central concern, courts must analyze the powers delegated to the particular governmental entity, against whom and for whose benefits those powers may be exercised, and whether the resulting benefit and burden distribution comports with the manner in which the franchise is distributed. The Article concludes that absent an overriding concern of dilution, the claimants' asserted right to vote must be granted.

INTRODUCTION

THE PRINCIPLE that the right to vote is central to our political system dates to our earliest conceptions of republicanism.¹ To

¹ See Wesberry v. Sanders, 376 U.S. 1, 17 (1963) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under
Thomas Jefferson, the ability of those governed to select their governors was the bulwark of individual freedom. As he wrote, "[A]ction by the citizens in person, in affairs within their reach and competence, and in all others by representatives, chosen immediately, and removable by themselves, constitutes the essence of a republic." Likewise, James Madison wrote, in Federalist Paper 39, that a republican government "which derives all of its powers, directly or indirectly, from the great body of the people and . . . administered by persons holding their office during pleasure" is the only government "reconcilable with the genius of the people of America."

True, our notions of who constitutes that "great body of the people" has never included all persons or, indeed, all citizens. Constitutional amendments were required to extend the franchise to women and blacks. Aliens, even resident aliens, have not, at least in this century, enjoyed the right to vote. Similarly, minors, even some old enough to serve in the armed forces, have been denied the right to vote. And, until recently, property qualifications were the rule rather than the exception. But those excep-
tions to political participation are merely a commentary on earlier conceptions of social and political equality, and in no sense a denial of our fundamental conceptions of republicanism.

It is no wonder, then, that the principle of "rule in accord with the consent of a majority of those governed"9 found expression in article IV, section 4, the guarantee clause,10 and was, conceptually at least, the foundation for the Supreme Court's 1928 determination that a city's grant of public powers to persons not saddled with political accountability was a violation of the fourteenth amendment's due process clause.11 However, this fundamental principle remained a largely unfulfilled promise until 1962 when the Court, in Baker v. Carr,12 established the applicability of the fourteenth amendment to the manner in which states allocated their franchise right. That case, coupled with Reynolds v. Sims,13 occasioned an egalitarian revolution that provided for a broad franchise: wealth14 and property15 qualifications were soon dis-

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Footnotes:

10. U.S. CONST. art. IV, § 4. The meaning of the guarantee clause has never been clear. That may partially explain why the Court has consistently treated questions arising thereunder as "political." See Pacific States Tel. and Tel. Co. v. Oregon, 223 U.S. 118 (1912); Luther v. Borden, 48 U.S. (7 How.) 1 (1849). Nevertheless, those who have written about the guarantee clause at least agree that the clause was designed to (1) permit the federal government to aid in quelling rebellions against legitimate state authority, and (2) guarantee that no state government would adopt an autocracy or monarchy as its model. See generally W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (1972); Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 MINN. L. REV. 513 (1962). Others see a relationship between the guarantee clause and the right of suffrage. For example, Justice Frankfurter's dissent in Baker v. Carr, 369 U.S. 186, 297–98, 300–01 (1962), characterized the plaintiff's claim as little more than a guarantee claim wearing an equal protection mask. That position has considerable support. See J. ELY, supra note 1, at 118 n.*; W. WIECEK, supra at 69; Bonfield, supra at 526–27, 542; Van Alynynne, The Fourteenth Amendment, The Right to Vote, and The Understanding of the Thirty-Ninth Congress, 1965 SUP. CT. REV. 30, 50–51; see also In re Duncan, 139 U.S. 449, 461 (1891) (article IV requires popular elections).
11. Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Eubank v. City of Richmond, 226 U.S. 137 (1912). Those cases, while nominally dealing with whether governmental powers can be delegated to private persons, were bottomed on a concern that those whose property rights were limited had no apparent opportunity to influence the governmental decision. See infra notes 141–48 and accompanying text. But cf. Sager, Insular Majories Unabated: Varth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1405–07 (1978) (treating Eubank and Roberge as "plebiscite democracy" cases).
pensed with, as were all but the narrowest residency\textsuperscript{16} and "interest"\textsuperscript{17} requirements.

The path charted by these cases, however, was not without its twists. \textit{Avery v. Midland County}\textsuperscript{18} applied the \textit{Reynolds} equal representation standard in striking down a Texas statute which permitted the election of four of five county commissioners from unequally populated districts. But \textit{Avery} appended a bit of pre-scient dicta:

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.\textsuperscript{19}

Thus was born the so-called "interest exception" to the "one person-one vote" principle of \textit{Reynolds}.

The exception reappeared one year later in \textit{Kramer v. Union Free School District}.\textsuperscript{20} There the Court struck down a New York statute limiting the right to vote in school board elections to property owners or lessees, their spouses, and parents or guardians of children enrolled in the local schools. While the Court based its holding on the under- and overinclusive nature of the statute, a la \textit{Avery}, it suggested a justification for an interest-based franchise discrimination: "We . . . express no opinion as to whether the State . . . might limit the exercise of the franchise to those 'primarily interested' or 'primarily affected.'"\textsuperscript{21}

Four years after \textit{Kramer}, the Court in \textit{Salyer Land Co. v. Tulare Lake Basin Water Storage District}\textsuperscript{22} relied on the \textit{Avery} and \textit{Kramer} dicta to uphold a voting scheme for a water storage district defined by the state as a political subdivision,\textsuperscript{23} which excluded all but property owners from voting and then weighted the votes of those property owners according to the proportion of total

\begin{itemize}
  \item\textsuperscript{16} Dunn v. Blumstein, 405 U.S. 330 (1972); \textit{cf.} Burns v. Fortson, 410 U.S. 686 (1973) (per curiam) (upholding 50-day waiting period in order to serve the states' "important interest in accurate voter lists"); \textit{Marston v. Lewis}, 410 U.S. 679 (1973) (per curiam).
  \item\textsuperscript{17} Kramer v. Union Free School Dist., 395 U.S. 621 (1969).
  \item\textsuperscript{18} 390 U.S. 474 (1968).
  \item\textsuperscript{19} \textit{Id.} at 483–84.
  \item\textsuperscript{20} 395 U.S. 621 (1969).
  \item\textsuperscript{21} \textit{Id.} at 632.
  \item\textsuperscript{22} 410 U.S. 719 (1973). While this Article's analysis concentrates on the Court's opinion in \textit{Salyer}, it applies as well to a companion case decided the same day, \textit{Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.}, 410 U.S. 743 (1973) (per curiam).
  \item\textsuperscript{23} 410 U.S. at 740 (Douglas, J., dissenting).  
\end{itemize}
acreage owned within the district. And in 1981, in *Ball v. James*, the Court extended the *Salyer* holding to a state-created special district which provided water and electrical services to much of metropolitan Phoenix, Arizona. Sandwiched between *Salyer* and *Ball* was *Holt Civic Club v. City of Tuscaloosa*, in which the Court upheld an Alabama statute subjecting persons who resided within one and one-half miles of Tuscaloosa, Alabama to the laws of that city, applied outside its boundaries, without the co-extensive right to participate in the selection of the officials who promulgated those laws. And while the Court in *Holt* did not explicitly rely on the interest exception hinted in *Avery* and *Kramer*, its holding can only be understood by assuming that the Court believed that residents of the extraterritorial police jurisdiction were less interested in Tuscaloosa's government than were the city residents.

With many others, I am critical of these three decisions, not so much for their results (as I will demonstrate, *Salyer* was correctly decided) as for the analysis, or lack of analysis, which the Court employed. Unlike those critics, however, I will not focus on whether the Court should have used strict scrutiny rather than ra-

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25. In this Article, the term "special district" means an entity established by the state to provide a single benefit or service. This is to be distinguished from a general purpose unit of local government which is a multi-purpose entity possessing the power to distribute a variety of governmental services and the power to promulgate and enforce general rules of behavior. Unlike others, I do not draw the distinction any more finely to include differences in taxing and/or bonding powers, manner of formation, or the like. For more in depth treatments of the distinctions, see generally J. BolleNS, SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES (1957); Comment, Voter Restrictions in Special Districts: A Case Study of the Salt River Project, 1969 Ariz. St. L.J. 636, 636-40 [hereinafter cited as Comment, Voter Restrictions]; Comment, An Analysis of Authorities: Traditional and Multicounty, 71 Mich. L. Rev. 1376, 1376-89 (1973).


27. See infra notes 149-62 and accompanying text.


29. See infra notes 74-97 and accompanying text.
tional basis, although I tend to agree with those who find fault with the Court's use of the latter standard. Instead, my focus will be on "interest," how it might be defined and how that definition affects the concept of vote dilution. Sayer, Ball, and Holt will be the primary vehicles by which the flaws in the Court's analysis will be illustrated, and an analysis more appropriate to the real problem will be posited: that of recognizing and attempting to accommodate both the interests of those seeking a participatory right and those already possessing it.

The focus of the inquiry shifts if the problem posed by Sayer, Ball, and Holt is viewed as one which attempts to reconcile the competing interests of those possessing the franchise with those who do not. Dilution is the claim of those currently enfranchised; the right to vote is the cry of those precluded. The question is whether granting the claimants' assertion of franchise rights would inject a "foreign element" into the political process, diluting the current voters' power and thus disrupting the political community. However, before worrying about disruptions to a political community, one must first determine whether the entity in which participation is sought is political (public) or private.

I. Political Versus Private Decisionmaking: Mandating Individual Sacrifice to Achieve Generalized Benefit

Professor Frank Michelman has defined the difference between public and private entities as follows: "[G]overnments are distinguished by their acknowledged, lawful authority—not dependent on property ownership—to coerce a territorially defined
and imperfectly voluntary membership by acts of regulation, taxation, and condemnation.\(^3\) That definition combines two concepts unique to public entities: (1) the power to redistribute wealth among its members—to require individual sacrifice in order to achieve some broader societally determined objective, and (2) to enforce both the goal and the means of achieving it (the redistribution) against persons who disagree with a particular action, but can do very little about it, *ex post*, because their very membership in the body invoking the action is less than voluntary. Since neither proposition is obvious, and both have come under some criticism of late, each must be separately considered.

A. *The Nature of The Powers*

It is my contention that the sanctioned possession of redistributive powers is unique to public bodies\(^3\)\(^4\) and thus if the question is whether a particular body is public or private one must look to the powers it possesses. Examples of redistributive powers are not hard to find. Taxes are levied against all in order to provide transfer payments to the needy few. One landowner is required to sacrifice the economic benefits of constructing a forty-story apartment building on a half-acre of land (1) because to do so might impose undesired costs on immediate neighbors, and (2) because all members of the community, whether neighbors or not, are better off with a coherent living environment than one subject to haphazard development.\(^3\)\(^5\) Similarly, a decision to allocate


\(^{34}\) Stigler, *The Tenable Range of Functions of Local Government*, in STAFF OF JOINT ECONOMIC COMM., FEDERAL EXPENDITURE POLICY FOR ECONOMIC GROWTH 213, 216-17 (Jt. Comm. Print 1957) reprinted in F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 91-92 (1970); see also City of La Grande v. Public Employees Retirement Bd., 284 Or. 173, 185, 586 P.2d 765, 771 (1978) (Judge Hans Linde stated that "[weighing] the benefit-cost ratios of competing social demands . . . is the very substance of politics."); J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT 190-92 (1962) (redistribution is natural product of a non-unanimous voting scheme); F. MICHELMAN & T. SANDALOW, supra, at 87-92 (redistribution is one, if not the major, function of government). This is not to say that all powers exercised by governmental bodies are redistributive. Some are clearly not, and others, such as zoning, may be questionable. On the other hand, redistributive powers are uniquely public, and for voting purposes, the possession of public powers makes the entity public. But see R. Ellickson, Cities and Homeowners Associations, Working Paper No. 3, at 6 (June 1982) (unpublished manuscript on file with Case Western Reserve Law Review) (private homeowners associations often possess powers akin to public powers).

\(^{35}\) Whether these two "public benefits" are true is not altogether clear despite our unshakeable faith that they are. See J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961). B. SEIGAN, LAND USE WITHOUT ZONING (1972). But whether true or
community resources for an attractive lake or ocean front will not succumb to challenge from a taxpayer who does not favor aquatic activities because such an expenditure adds to the overall desirability of the community. In short, the exercise of public powers contemplates what Lindblom calls "partisan mutual adjustment."\textsuperscript{36} It involves a complex process of ordering priorities in a market where (1) conflicting values among individuals and groups are taken as a given,\textsuperscript{37} (2) there is an interdependence between one individual's choices and those of another,\textsuperscript{38} and (3) "[w]hatever policies are decided on will ordinarily suit some group's ends or goals . . . [b]ut . . . will not suit another group's goals, and can always therefore be condemned as irrational."\textsuperscript{39} It is these factors which make the exercise of public powers unique\textsuperscript{40} and which, absent some other disqualifying factor,\textsuperscript{41} require participation by the diverse interests affected.\textsuperscript{42}

false, if the arguments are sufficiently plausible, the debate should be limited to the legislative arena. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

37. \textit{Id.} at 226-45.
38. J. BUCHANAN & G. TULLOCK, \textit{supra} note 34, at 4-5.

40. The common wisdom, as expressed by economists who have studied decision theory, is that individual decisions are based on principles of individual utility maximization. The aggregation of each individual's utility maximizing decision produces an aggregate social good which the economists refer to as "Pareto Optimality." \textit{See}, e.g., Arrow, \textit{Public and Private Values} in \textit{HUMAN VALUES AND ECONOMIC POLICY} 15 (S. Hook ed. 1967).

This state of affairs is not necessarily "heaven"; it is rather the best that can be done given a particular (and presumably fixed) distribution of wealth. \textit{See} Junger, \textit{A Recipe for Bad Water: Welfare Economics and Nuisance Law Mixed Well}, 27 CASE W. RES. L. REV. 3, 32 (1976). This does not necessarily mean that wealth redistributive decisions cannot be or are not made; it only means that when made, they are made for "selfish" rather than normative reasons. As Buchanan and Tullock state, "Private action . . . presents little difficulty; the ultimate decision-maker is assumed to be the acting individual. However, collective action is wholly different." J. BUCHANAN & G. TULLOCK, \textit{supra} note 34, at 6.

Admittedly, the above description is a drastic oversimplification. Moreover, the notion that group decisions, even private group decisions, are nothing more than an aggregate of individual utility decisions is not universally accepted by economists. \textit{See}, e.g., M. OLSON, \textit{THE LOGIC OF COLLECTIVE ACTION} (rev. ed. 1971).

41. \textit{See infra} note 140.

42. \textit{See} F. MICHELMAN \& T. SANDALOW, \textit{supra} note 34, at 251 (suggesting that conflicting interests undercut any rationale of "virtual representation" and thus require the widest range of participation); \textit{cf.} Washington \textit{ex rel.} Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Eubank v. City of Richmond, 226 U.S. 137 (1912) (exercise of public police powers by persons whose selfish interests preclude the possibility of respecting competing interests and of compromise violates due process).

Contrast this with the private business corporation, a common device for private collective decisionmaking. A corporation attracts capital from diverse sources to be used in a
It is true, as Professor Robert Ellickson has pointed out, that some private organizations, such as homeowners associations, possess power akin to public powers. They may impose assessments to pay for the services afforded residents, they may regulate the peace and security of the community, and they may even "take" property under some circumstances. Are these associations then public, thus requiring a per capita voting scheme similar to that required in *Reynolds v. Sims* and *Avery v. Midland County*? The answer is no for two reasons. First, redistribution in a governmental context (as opposed to a contribution to a private charity) connotes something involuntary. One who voluntarily joins an organization knowing in advance that it will take $100 of his dues and devote it to improving the living standard of B has not been subject to a redistribution of wealth. Second, even if he has, the redistribution is *ex ante* and not *ex post*. Indeed, as Professor Ellickson notes, an *ex post* change in who gets what from whom, so common in public bodies, is either prohibited altogether or subject to an extra majoritarian vote in homeowners associations.

**B. The Coercive Requirement—Determining Those "Affected"**

As Professor Ellickson suggested flaws in an analysis based exclusively on the nature of the powers, so Professor Gerald Frug suggests that we cannot distinguish public from private entities based on whether the powers possessed may be coercively im-

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venture designed to increase the value of that capital. R. Posner, *Economic Analysis of Law* § 14.1–3, at 289–96 (2d ed. 1977). It is assumed that all those who contribute risk capital to such a venture do so with an understanding that the worth of their investment will be increased. And whether viewed in terms of shareholder or entity responsibility, the fiduciary duties imposed upon corporate managers are designed to ensure that the value of maximizing the interests of the corporation and, derivatively, its shareholders, are not subverted to other interests. See generally H. Henn, *Handbook of the Law of Corporations and Other Business Enterprises* §§ 235–41, at 457–82 (2d ed. 1970). Even where the corporation is permitted to use assets for "nonbusiness" purposes, traditionally there must be some finding of corporate benefit. *Id.* § 183, at 350. Finally, the shareholder's gain can be defined solely in monetary terms and is distributed proportionately to the amount of one's investment; the greater the investment the greater the dollar return. This is the basis of a proportionate participation scheme instead of the per capita scheme required by *Reynolds v. Sims*, 377 U.S. 533 (1964). For an application of these principles specifically to *Salyer*, see Note, *Opening the Floodgates*, supra note 28, at 890–93.

43. R. Ellickson, *supra* note 34, at 5–11.

44. *Id.*

45. *Id.* at 11, 17–27. If Professor Stigler is correct, *supra* note 34, provisions prohibiting *ex post* redistributions may be unnecessary in private organizations; natural competitive forces would produce the same result. Professor Ellickson does not seem to disagree. R. Ellickson, *supra* note 34 at 8–9.
posed upon nonconsenting persons. His basic argument is that private corporations (individually or as a group) wield such enormous economic power over matters essential to human existence that no one can hide from their force. People are thus coerced to abide by the economic decisions of the corporate world much like they are coerced to abide by the decisions of government. It would be too easy to brush aside Professor Frug's arguments as inapposite to the problem of determining who has voting rights and in what description of entity. For if his analysis is correct, so too is Justice Rehnquist's observation in Holt that there is no basis for distinguishing between residents directly affected by a city's powers and nonresident neighbors who are only indirectly affected thereby. It is then a small jump to justify the majority decisions in Salyer and Ball. Since we all must abide the decisions of those more powerful than ourselves, the nature of these decisions, political or private, is irrelevant; the only important thing is the nature of the activity. Is it traditionally governmental or not?

Admittedly, it is difficult to distinguish between those affected by, and thus interested in, the exercise of power from those who are not. The complexity of our economic and political systems causes all of us to be affected by the decisions of others to some extent, regardless of the private or public nature of those decisions. But to say that is not to admit the unimportance of the question, "How are we affected?" Nor does it prove Justice Rehnquist's point that it is irrelevant to determining whether political participation is necessary. A simple example, while not dispositive of where the line should be drawn, is illustrative of the distinction. If a local government decides to zone for large lots, requiring construction of single family dwellings on five acres of land, simple laws of supply and demand dictate that a prospective land owner will pay more for land in the same housing market

46. Frug, The City as a Legal Concept, 93 HARV. L. REV. 1059, 1132-36 (1980). Professor Frug does not directly address the problem of voting rights. His point is that cities have been given too little authority and the public/private distinction is no reason to continue that condition.

47. Id.

48. 439 U.S. at 69-70.

49. I doubt that Professor Frug would carry his argument to deny voting rights to persons affected by public corporations; his commitment to democratic processes is clear from his article. See Frug, supra note 46, at 1119, 1148-49.
than if the zoning permitted postage stamp lots.\textsuperscript{50} In the sense that Professor Frug speaks about it, that landowner is coerced into paying more money for his desired lot.\textsuperscript{51} And, as an economist would analyze it, the landowner's wealth has been redistributed to those residing within the regulating municipality. But whatever an economic analysis might produce, this kind of effect is not what does or what should trigger the right to vote.\textsuperscript{52} The potential landowner outside the regulating municipality can build his home on his lot; the only question is how much will it cost. But one who lives within the territorial limits of the hypothetical municipality has no choice regarding the use of the postage stamp lot; it simply cannot be used for a home at any price. That person is thus more than affected; that person is governed. Moreover, he is governed in a manner which is different than a member of a private corporation. When the hypothetical municipality decides to zone for large lots, it is making a decision that one person must sacrifice his desire for a cheap home so that the benefits of an idyllic environment can be maintained for others.\textsuperscript{53} Finally, the involuntary nature of the sacrifice is different from what Professor Frug hypothesizes. A car owner dissatisfied with the price of a Chevrolet can purchase a Honda, or he can build his own from scrap parts. He does not have to give up his citizenship to do either. But one must do exactly that to run away from the certainty that some group with whom he disagrees will look to him to bear the burden of making someone else better off. It is the contemplated requirement that some must submit to burdens that they do not consent to and which are disproportionate to the benefits they receive (or perceive they receive) that mandates that each person so affected have the same ability as his neighbors to influence the outcome of public decisions. In short, the landowner must be assured of an equal right to vote.\textsuperscript{54}

\textsuperscript{50} This is apparently the only kind of effect which the majority saw in either \textit{Salyer}, 410 U.S. at 730-31, or in \textit{Holt}, 439 U.S. at 69-70.

\textsuperscript{51} It would not seem to matter to Professor Frug whether the money was pulled from one's pocket by a municipality exercising its zoning powers or by General Motors exercising its pricing policies.

\textsuperscript{52} As Justice Brennan pointed out in \textit{Holt}, "There is a crystal-clear distinction between those who reside in Tuscaloosa's police jurisdiction, and who are therefore subject to that city's police... ordinances, and those who... are merely affected by the indirect impact of the city's decisions." 439 U.S. at 87 (Brennan, J., dissenting).

\textsuperscript{53} This is not to suggest that the hypothetical landowner is without benefit. He shares the public good of an idyllic environment. The point is that the landowner might prefer a different benefit.

\textsuperscript{54} Indeed, our commitment to participation in public decisions is so strong that even
In *Salyer*, *Ball*, and *Holt* the complaining parties were clearly affected by the decisions of the respective public bodies; their standing to litigate depended on that. The issue was whether they were governed by the actions of the districts. That question could only be answered by looking closely at the powers given the respective governmental bodies. Were they empowered to require sacrifices from some in order to fulfill the desires of others, or were those powers limited to the classically private search for the maximization of individual, private benefits without finding those benefits in the sacrifices of others?

**C. The Requirement of Equality and the Problem of Dilution**

As argued above, to determine whether *Salyer* and *Ball* are indeed different from *Avery* or *Kramer* one must consider not the particular functions of the public entity in question but the powers granted that entity to pursue those functions. But that is only those most vociferous in their opposition to judicial interference with majoritarian decisionmaking accept the proposition that any attempt to deny or dilute that participatory right must be supported by a “compelling state interest.” See, e.g., L. Lusky, *By What Right?* 65 (1975).


56. The *Salyer* and *Ball* analysis seemingly asks the question, “When is some enough?” In *Salyer*, for example, the Court recognized that the district “[was] vested with some typical governmental powers.” 410 U.S. at 728 (emphasis added). These powers were apparently insufficient given the governmental powers it could have possessed or what other governmental units possess. *Id.* at 729. See also *Ball* v. James, 451 U.S. at 366 (“[T]he District cannot impose . . . property . . . or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools [etc.]”)

If this is the Court’s test, it violates Justice Frankfurter’s injunction that “‘usual’ governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion.” New York v. United States, 326 U.S. 572, 580 (1946). See Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 Harv. L. Rev. 1065, 1072-74 (1977) (criticizing the use of a “traditional governmental” test to define the protections afforded by the tenth amendment). Moreover, it extends the analytical error of National League of Cities v. Usery, 426 U.S. 833 (1976), to an area of far greater consequence—an individual’s right to vote. At least one member of the Court has recognized this analytical error in a recent opinion. See *Equal Employment Opportunity Comm’n v. Wyoming*, 103 S. Ct. 1059, 1067 (1983) (Stevens, J., concurring) (*National League of Cities* incorrectly decided).
the first inquiry. Because the issue arises under the equal protec-
tion clause, it is one of equality. There is thus a second question:
whether those claiming the equal franchise are in fact similarly
situated with those presently possessing the franchise.

II. Salyer and Ball: Public or Private Decisionmaking?

Salyer and Ball involved entities whose purposes were limited
to delivering a defined set of public utility services. It was just
such entities which Avery suggested might call for a different set of
principles governing franchise rights. The difference between
these entities and those possessing more general powers and pre-
rogatives was alluded to in Reynolds v. Sims:

Since legislatures are responsible for enacting laws by which all
citizens are to be governed, they should be bodies which are
collectively responsive to the popular will. And the 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 re-
spect to the allocation of legislative representation, all voters, as
citizens of a State, stand in the same relation regardless of
where they live.57

The notion that Reynolds only applies where it can be assumed
that all members of a political community stand in the same rela-
tion to the governing prerogatives of that community was picked
up by Justice Fortas in Avery and formed the basis of his dissent:

[The Reynolds] rule is appropriate to the selection of mem-
bers of a State Legislature. The people of a State are similarly
affected by the action of the State Legislature. Its functions are
comprehensive and pervasive. They are not specially concen-
trated upon the needs of particular parts of the State or any
separate group of citizens. As the Court in Reynolds said, each
citizen stands in “the same relation” to the State Legislature.
Accordingly, variations from substantial population equality in
elections for the State Legislature take away from the individ-
ual voter the equality which the Constitution mandates. . . .

But the same cannot be said of all local governmental units,
and certainly not of the unit involved in this case. Midland
County’s Commissioners Court has special functions—directed
primarily to its rural area and rural population. Its powers are
limited and specialized, in light of its missions. Residents of
Midland County do not by any means have the same rights and
interests at stake in the election of the Commissioners. Equal

57. 377 U.S. at 565.
ity of the rights and interests of the various segments of the voting population. It does not require that they all be treated alike, regardless of the stark difference in the impact of the Commissioners Court upon them.58

By approaching the problem posed by Avery in terms of "the reality of the rights and interests of the various segments of the voting population," Justice Fortas demonstrated his concern with the dilution which inevitably occurs when dissimilarly situated individuals are treated as if they were similar. Why then was Reynolds applied to the facts of Avery? The Court's answer is unclear, but it seems to rest on the perception by the majority that the Commissioners Court had the ability to make decisions which implicated "immediate choices among competing needs"59—choices which implicated all citizens of the county "whether they reside inside or outside the city limits."60 The Court rejected the argument that because most of the county's activities were for the benefit of those who lived outside the city, the malapportionment was justified. And it did so on the basis of the powers which the county possessed, powers that made it possible for the county to determine whether the city dwellers could be made to sacrifice in order to benefit the rural dwellers.61 Thus Justice Fortas was wrong. It was not the body's activities which were important, but its powers. And because those powers included the government's ability to coerce sacrifices from one group and apply them to another, it is diluent of neither interest to give the other a right of participation. To remain consistent with Avery, the decisions in Salyer, Ball, and Holt must be analyzed in the same manner.

A. General Principles

While both the Tulare Lake Basin Water Storage District and the Salt River Project Agriculture Improvement and Power District look more like private than public entities,62 that distinction is not determinative of the right to vote. Neither is the number of

58. 390 U.S. at 498-99 (Fortas, J., dissenting) (emphasis added).
59. Id. at 483.
60. Id. at 484.
61. Id. "[I]t may not be mere coincidence that a body... with three of its four voting members chosen by residents of the rural area... devotes most of its attention to the problems of that area, while paying for its expenditure with a tax... on city residents... ." Id.
62. As Justice Stewart said in Ball, "[T]hough the state legislature has allowed water districts to become nominal public entities, ... the districts remain essentially business enterprises... ." 451 U.S. at 368. See also Casper, Apportionment and the Right to Vote: Standards of Judicial Scrutiny, 1973 Sup. Ct. Rev. 1, 31 n.100; Garton, One Person, One
people "served" by the district, nor the nature of the district's activity. Rather, an individual's right to vote for those who govern a special district ought to depend upon an analysis of two questions. The first is whether, in implementing the district's powers, the governing board must necessarily compromise some individuals' interests in order to gain an overall benefit not susceptible of measurement in individual terms. In answering this question one must identify those burdened and those benefitted to determine who, if anyone, may be excluded from electoral participation in the district's affairs. The second question is whether the benefits and burdens of the district's activities are necessarily distributed only in proportion to some variable such as wealth or property ownership. The answer to this question determines whether the franchise, once given, can be weighted according to the variable by which the benefits and burdens are distributed.

The general constitutional principles governing the disposition of both questions are relatively clear. Most of the cases raising the first question, like Salyer and Ball, have involved the right to participate in the selection of those exercising governing authority. Except for those cases (plus Holt), the rule has been that those who are governed have the right to participate in the selection of those who govern. The rationale for this rule is simple in its idealism: governance requires that on occasion some interests will be weighted more heavily than some others, and therefore all of those whose interests are thrown into the balance must be afforded the right to influence how the balance is drawn.


63. The relative size of the Salt River Project's operations was one of the bases the court of appeals used to distinguish Ball from Salyer. James v. Ball, 613 F.2d 180, 183 (9th Cir. 1979). The Supreme Court, properly I think, did not recognize this distinction as constitutionally significant. 451 U.S. at 367-70.

64. This is the basis of the Court's decision in both Salyer, 410 U.S. at 728-29, and Ball, 451 U.S. at 370. In both cases, the Court's discussion of disproportionate effect originates in the nature of the activities rather than in the nature of the power to implement those activities.

65. See, e.g., Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious . . . than that of having a voice in the election of those who make the laws under which . . . we must live.").

66. See A. De Grazia, Apportionment and Representative Government 10-11 (1963); R. Dixon, Democratic Representation 57 (1968); Mayo, How Can We Justify Democracy?, in Political Power, Community and Democracy 235 (E. Keynes & D. Ricci eds. 1970) (Democracy "is the system . . . with the minimum of coercion, not so much because the majority is presumed to favour every policy, as that policy emerges from discussion and pressure in which all may share."). The ideal obviously has not been reached. Resident aliens have no right to vote, see Rosberg, supra note 6; nor do convicted
Even when the issue is not the selection of those who exercise governing authority but rather whether a particular activity ought to be undertaken, the analysis is the same. *Hill v. Stone* is illustrative: the decision to build a new city library cannot be left only to those taxpayers who might pay for it, simply because the benefits to be derived from the city's purchasing library facilities have nothing to do with who pays the costs thereof. Viewed from the perspective of dilution, the point might be better explained. The state's argument regarding the validity of the statute conditioning the right to vote on "rendering" property for taxation was simply that since taxpayers would foot the bill for the library, they should determine whether it should be built. But that is too narrow an argument, since it takes no account of why a city provides library facilities. Libraries generally contribute to a more literate society, which is itself a benefit enjoyed by all. Who will read the books, who will pay for them, and whether there is any relationship between the two categories are all unimportant considerations in the context. That some must suffer a financial burden either in an absolute or relative sense, does not mean that others are not equally "affected" by the decision and thus equally interested in its outcome. That burden is simply one of those costs imposed by living in an organized society based on majority rather than unanimous consent. Thus, since the burdens of a decision not to build a library transcend the burdens of taxation occasioned by a contrary decision, and since the benefits of the library cannot be limited to those who might directly avail themselves of the service which it offers, there is no basis, rational or


70. See *Heavens v. King County Rural Library Dist.*, 66 Wash. 2d 558, 404 P.2d 453 (1965) (benefits from public library cannot be isolated to owners of real property); cf. *Knox v. O'Brien*, 7 N.J. Super. 608, 611, 72 A.2d 389, 391 (1950) ("A democracy would fail to meet the challenge if it were not to approve the right of the state to adopt legislation having for its ends standards of education which may destroy illiteracy, and clothe its . . . citizens with academic attainments.").

71. See J. BUCHANAN & G. TULLOCK, supra note 34, at 43–84. The authors develop the notion that the decision to enter an organized governing system does impose individual costs, but costs which are generally less than those imposed by the alternatives.
otherwise, to limit participation to less than the full political community.

*Hill v. Stone* can also illustrate the analysis of the second question relating to the right to weight votes according to interest. If Texas had given one vote to each citizen of Ft. Worth and then had given additional votes—say, in some proportion to the number of library cards each family possessed or the number of books checked out of the library during a given period of time—that scheme would be equally unconstitutional. Since the benefits to the community of a better-read and thus more literate and educated populace transcend (or, more fairly, cannot be measured in terms of) the benefit each family receives by reading a given number of books, the state cannot apportion the franchise; *Reynolds* and its progeny at least teach that much.\(^\text{72}\) In short, the state may not vest disproportionate decisional authority in persons who are both benefitted and burdened randomly from public decisions. To do so would dilute the vote of some and enhance that of others in a purely arbitrary fashion, like the malapportionment in *Reynolds*.

All of this is crucial to determining whether *Salyer* and/or *Ball* were properly decided. Both cases involved the absolute exclusion of some “residents”\(^\text{73}\) from the right to vote, while apportioning the franchise according to the amount of land owned. Thus, these decisions are justifiable only if the benefits derived from and the sacrifices required because of the district’s activities arose solely because of the ownership of land within the district and if those benefits and sacrifices could be measured only in terms of the proportionate amount of land owned.

B. Salyer Land Co. v. Tulare Lake Basin Water Storage District

*Salver* and *Ball* present facts which implicate questions of both exclusion and proportionate distribution of the franchise. The overriding issue common to both questions, however, is whether the respective districts possessed the statutory power to allocate benefits and burdens to reflect something other than economic proportionality. In *Salver* the answer is no; neither the district board’s statutory powers nor the methods available to

\(^{72}\) L. Tribe, *supra* note 28 § 13-7, at 749-50; see also *supra* notes 28-32 and accompanying text.

\(^{73}\) Unlike *Holt*, in both *Salyer* and *Ball* those asserting participatory rights lived within the district’s boundaries.
implement those powers were sufficient to conclude that the district possessed any redistributive or reallocative powers.

First, under California law a water storage district is formed with reference to a specific project. The petition to form a district must describe the contemplated project, and the California Department of Water Resources must investigate "the practicability, viability and utility" of the proposed project. Once approved in principle, the project must then be reduced to specific plans and specifications and submitted to the state treasurer for approval. In the event that the project is not undertaken within three years, the attorney general can ask that the district be dissolved.

Second, the cost of the specified project is borne, not uniformly, but only in proportion to the specific benefits received. In other words, water storage districts projects are financed by special assessment. This financing device provides all of the notice and protest rights which accrue anytime a public body undertakes a public project which benefits an identifiable group of individuals within the community. Should a project only benefit portions of the district, the statute mandates the formation of sub-districts, called improvement districts, which include only those lands in fact benefitted; those lands are assessed for the cost of the project only in proportion to the benefit actually received.

Finally, tolls and charges not related to specific assessments may be levied only against those receiving the service rendered,

75. Id. § 39425(b)-(f).
76. Id. § 39600. The California Department of Water must then hold hearings, in part to determine the viability of the specific project. Id. § 39776(b).
77. Id. § 42200 (West Supp. 1982).
78. Id. § 42275-76.
79. Id. §§ 48400, 27701 (West 1966).
80. Id. § 46176.
81. Special assessments, unlike taxes, are not imposed upon all persons engaged in a particular activity according to a uniform or graduated rate. Special assessments are only imposed upon persons who derive a specific, measurable benefit from a particular public improvement over and above that derived by the community at large and then only to the extent of that benefit. 2 C. Antieau, Local Government Law § 14.33, at 14-61 to -62 (1981); 14 E. McQuillan, The Law of Municipal Corporations § 38.33, at 125-32 (3d rev. ed. 1970). See generally Gaines, The Right of Non-Property Owners to Participate in a Special Assessment Majority Protest, 20 U.C.L.A. L. Rev. 201, 204-12 (1972).
82. 2 C. Antieau, supra note 81, § 14.13, at 14-23 to -24.
again only in proportion to the benefit which the service provides. In short, the district may not require one person to pay for a service rendered to another.\(^8^4\) Thus, like a private corporation and unlike general purpose local governments or even special purpose units such as school districts, a water storage district possesses no \textit{powers} (as contrasted with \textit{purposes}) which can fairly be characterized as public. A water storage district may not allocate the benefits and burdens of its activities except in proportion to a single variable—land.\(^8^5\) It has no power to require individual sacrifices or to subordinate one person’s interests to those of another.\(^8^6\)

Much of the above rings hollow, however, when one considers the circumstances that prompted the litigation in \textit{Salyer}—that is, a decision by the governing board to table a proposal to divert flood waters, with the result that approximately forty-five percent of the total land in the district was flooded.\(^8^7\) Arguably, that decision was classically public—a decision by elected governors that some persons must make sacrifices not required of others in order that the majority benefit. Thus viewed, the Court’s response that flood control was only an “incident to the exercise of the district’s primary functions,”\(^9^8\) was weak, if not simply wrong. Water storage districts are specifically empowered to construct facilities in order to “afford security for life and property.”\(^8^9\)

More crucially, the Court’s response misses the issue: whether the district, in implementing any of its primary or collateral “func-

\footnotesize{\textsuperscript{84.} \textit{Id.} \textsection 43006 (West Supp. 1982).}\
\footnotesize{\textsuperscript{85.} In this context, one’s land is analogous to the capital contributed to a private economic venture.}\
\footnotesize{\textsuperscript{86.} The only prerogative which a water storage district board possesses inconsistent with the proportional distribution requirement is the ability to assess a fixed amount per acre for the initial costs to establish the district. \textit{Cal. Water Code} \textsection 46000-10 (West 1966 & Supp. 1982). This assessment, being a uniform levy per acre, resembles the more traditional ad valorem tax imposed by a school board. An ad valorem tax is levied at a fixed tax rate against the value of property, irrespective of whether that value is increased as a result of the district’s activity, or whether the person paying the tax directly enjoys the services financed by that tax. But the California Supreme Court in \textit{Tarpey v. McClure}, 190 \textit{Cal.}, 593, 213 P. 983 (1923), held that the plaintiffs had not overcome the strong presumption favoring legislative determinations of special benefit thereby disposing of an attempt to define such an initial assessment as anything other than a benefit tax. \textit{See also City of Monticello v. LeCrone}, 414 \textit{IlI.}, 550, 111 N.E.2d 338 (1953). Viewed in terms of the distinction between private and public decisions, the California court held that one person was not being required to pay for a benefit bestowed upon another. The assessment, the court reasoned, reflected a legislative determination that start-up costs benefitted all landowners in proportion to the amount of land which they owned.}\
\footnotesize{\textsuperscript{87.} 410 U.S. at 737–38 (Douglas, J., dissenting).}\
\footnotesize{\textsuperscript{88.} \textit{Id.} at 728–29 n.8.}\
\footnotesize{\textsuperscript{89.} \textit{Cal. Water Code} \textsection 43153 (West 1966).}
tions," has the power to engage in the kind of interest balancing characteristic of public decisionmaking. If so, the participation of those whose interests are being balanced is required.

However sympathetic one is to the plight of those who found their land and homes under water, it is difficult to view the flood control decision as involving any balancing at all, public or otherwise. The vote was nothing more than a statement by those who owned fifty-five percent—the unflooded land—that they were unwilling to shoulder the burden of paying for a benefit to be derived solely by others. Indeed, waiver aside, the board did not have the power to assess the majority for a benefit that majority would not receive. The most the board could have done would have been to adopt the flood control plan and then impose the costs on those whose land would have benefitted thereby.

More importantly, there was a disjunction in Salyer between the problem which precipitated the litigation and the suggested remedy, a per capita voting scheme. Had the plaintiffs received what they wanted, would their land have been less likely to be under water after the next flood? An affirmative answer is problematic since the assumed new majority would be unable to impose the cost of a flood control project on the assumed new, and presumably unwilling, minority. The only financing power granted the district by the state, special taxation, requires a perceptible benefit to those on whom taxes are imposed. The facts as presented by the Court indicate that the decision to forego the

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90. This statement has no normative content. It would have been commendable, even just, for the majority landowners to have taken a more charitable position. Certainly, actions by public officials which subordinate majoritarian interests to improve the lot of the minority are not unusual. See, e.g., Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding the "minority set-aside" provision of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) (Supp. V 1981)); University of Cal. Regents v. Bakke, 438 U.S. 265 (1978) (striking down a plan of minority preferences for admission to medical school); Kahn v. Shevin, 416 U.S. 351 (1974) (upholding state tax exemption for widows); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act, 42 U.S.C. § 2000a (1976)). The point is simply that charity is not required.

91. This will be referred to as a one person-one vote scheme even though it varies from the norm. Here the plaintiffs were apparently not challenging the voting rights of corporate landowners—indeed one plaintiff group contained smaller corporate landowners. They only wanted landowners (resident and otherwise) and nonpropertied residents to share the franchise on a per capita rather than a per acre basis. 410 U.S. at 730.

92. I am assuming that whether a flood control plan would benefit those bearing the costs thereof depends primarily on topographical considerations. Therefore, if the topography did not dictate a benefit in 1969, it probably would not in 1979 or 1980. The assumption that a per capita voting scheme would produce a new majority on the board derives from the fact that the four corporations, which controlled 85% of the land, would be reduced to one vote each under plaintiff's theory. Id. at 723.
flood control plan was a private one. It involved no public interest balancing—no determination that tangible sacrifices be made by some in order that all might be better off. The decision was simply a refusal to impose economic burdens on those who would not benefit in any way. Thus, the decision is consistent with, if not mandated by, the only method of financing permitted by the state.93

Because the interests promoted by restricting the right to vote to landowners are the same as those promoted by weighting the vote according to the amount of land owned, the validity of the absolute exclusion also determines the validity of the weighted vote. Decisions of the district’s governing board are limited to conferring specific economic benefits on specified individuals. It necessarily follows, then, that the franchise, like that in a private corporation or cooperative, is not only limited to benefitted individuals but is specifically limited in terms of the benefits those individuals can expect of the district’s activities—in this case increased agricultural production. The voting scheme adopted for California water storage districts, unlike that in *Hill v. Stone*,94 apportions the vote in accordance with expected benefits, since agricultural output is generally measured according to per acre production. Indeed, to mandate constitutionally any other apportionment scheme might have severely limited California’s options for irrigating arid lands. For example, had the Court imposed a one person-one vote franchise obligation on California water storage districts, the state could have complied without altering the existing statutory structure for financing projects. However, because the benefit requirement would have remained as a

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93. *See supra* text accompanying notes 80–90. Moreover, it is consistent with the general rule of municipal tort liability that absent a specific statutory duty, a local governmental entity is not liable for failing to take measures to prevent flooding of private lands. *See*, e.g., Office Park Corp. v. County of Onondaga, 64 A.D.2d 252, 409 N.Y.S.2d 854 (1978), aff’d, 48 N.Y.2d 765, 399 N.E.2d 950, 423 N.Y.S.2d 920 (1979).

To the extent that the decision was more than “selfish,” that it was a conscious decision of a public body to impose costs on a minority in order to confer a benefit on the majority, the decision was arguably a taking for which compensation was due under a theory of inverse condemnation. *See* Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 663–67 (1958); cf. Dooley v. Town Plan & Zoning Comm’n, 151 Conn. 304, 197 A.2d 770 (1964) (zoning lands as wet lands is an unconstitutional taking).


barrier to the imposition of a financial burden, the existing veto power of large landowners would have been preserved, assuming their financial resources were needed to support the cost of any given project. The forum for the exercise of that veto merely would have been shifted from the boardroom to the courts.

California could, of course, have amended the statute to give districts the power to levy not only benefit taxes but general taxes as well. That would have transformed the districts' decisional powers from private to public, since some persons would undoubtedly be required to shoulder a financial burden the direct benefits of which would be enjoyed by others. But the constitutionality of such a scheme might be suspect as well: some benefit is required before a tax can be imposed, and special purpose governmental units can measure that benefit only in terms of the special purposes for which the district is formed. Consequently, due process principles might stand as a barrier to achieving the voter equality which the equal protection clause contemplates. Thus, what was at stake in Salyer was neither an abstract principle of voter equality nor, as Justice Douglas perceived it, corporate control of democratic processes. Rather, it was the ability of the state to form limited, special benefit districts to achieve purposes, which, while public in their broad sense, confer specific benefits on identifiable individuals.

While the result in Salyer may have been correct, the Court's analysis was flawed. First, it used a test which looked to the functions performed rather than the powers granted. Second, the reasons for both the exclusion of nonlandowners and the weighting of landed votes according to acreage owned were simply assumed to exist. The sole acceptable rationale for both the exclusion and

95. Myles Salt Co. v. Board of Comm’rs, 239 U.S. 478 (1916); State ex rel. Davis v. City of Stuart, 97 Fla. 69, 120 So. 335 (1929); cf. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940) (controlling question is “whether the state has given anything for which it can ask return”). But cf. Roberts v. Richland Irrigation Dist., 289 U.S. 71, 75 (1933) (“lands may be taxed to pay for local improvements although they receive no actual benefits”) (emphasis added); Valley Farms Co. v. County of Westchester, 261 U.S. 155, 164 (1923) (“all lands within the district . . . may be connected with . . . the sewer and we cannot say that they derive no benefit therefrom”) (emphasis added); American Commuters Ass’n v. Levitt, 405 F.2d 1148, 1152-53 (2d Cir. 1969) (proportionality between tax burdens and benefits not required).


the weighted voting is that the benefits and burdens of a district's activities are distributed only in proportion to a single variable—land. It was therefore necessary for the Court to have determined (1) the relationship between the district's powers and the factor used to weight the vote, and (2) whether benefits and burdens of the district's activities were in fact distributed proportionally according to that factor. That the Court did not do. Indeed, there is nothing in the opinion to suggest that the Court was even conscious that those questions were dispositive. Instead, the Court used a simple bootstrap; it assumed that statutory structure established statutory validity. Without looking very closely either at the benefits conferred by the district or the manner in which those benefits were conferred, the Court said, "[T]he costs of district projects are assessed . . . in proportion to the benefits received" and "charges . . . are collectible from persons receiving . . . benefit in proportion to the services." 98 And while the Court was lucky to have guessed right on the result, the flawed analysis, when applied to Ball v. James, produced an incorrect result.

C. Ball v. James

There are similarities between the Salt River Project Agricultural Improvement and Power District and the Tulare Lake Basin Water Storage District. Both were created to irrigate arid agricultural lands, 99 and they share the limited purposes of supplying water and its by-product, power, to those residing within its boundaries. Neither possesses any general regulatory or police powers. The similarities, however, end there.

Unlike California water storage districts, Arizona agricultural improvement districts are not limited to specific projects. 100 And unlike a California water storage district, the successful operation of any particular project is not a condition to the Arizona district's continued existence. 101 More importantly, Arizona does not re-

98. Id. at 729.
100. An agricultural improvement district board, without prior approval either from a higher governmental authority or from the electors of the district, may undertake any project "necessary to carry out the purposes of [such a district]." Ariz. Rev. Stat. Ann. § 45-934 (1956). Compare this with the provisions of the California statute at pp. 17-18.
101. Compare this with the California statute supra note 79 and accompanying text.
quire that any of the lands included within the district be specially benefitted by the activities of the proposed district. The statute merely provides that no lands shall be included within the district if, in the judgment of the County Board of Commissioners, those lands will not "be benefited generally or specially" by the district's irrigation activities.102 Thus, unlike California water storage districts, Arizona agricultural improvement districts are not premised on a distribution of benefits proportionate to the amount of land owned.

Neither are Arizona agricultural districts financed according to any premise that burdens are to be distributed only in proportion to the benefits derived. The budgetary and tax system of an Arizona agricultural improvement district operates much like that of most general purpose local government units which are dependent upon property taxes for most of their revenues. The district's directors prepare an estimated annual budget for submission to the county containing a statement of anticipated expenditures necessary to pay the annual interest on outstanding indebtedness, to repay any principal on that indebtedness which may become due in that year, and to meet other incidental expenses of the district.103 Estimated district revenues from the sale of electric power are then deducted from this gross expense figure.104 The balance needed, including a fifteen percent contingency for taxpayer default, becomes the aggregate dollar tax levy.105 Thus, unlike the

103. Id. § 45-101A, B.  
104. Id. § 45-101C.  
105. Tax levies in the district were apparently insignificant because of the revenues generated from the sale of power. The court of appeals found 98% percent of the district's revenues came from its utility operations. James v. Ball, 613 F.2d 180, 184 (9th Cir. 1979); see also 451 U.S. at 370-71 n.19. Additionally, no general obligation bonds had been issued since 1973. All capital improvements since 1973 have been financed by revenue bonds, secured only by the income from the sale of power. Even previously issued general obligation bonds secured by the taxing power of the district, had been serviced from power revenues. See 613 F.2d at 184. But cf. 451 U.S. at 382 (White, J., dissenting) ("general obligation bonds . . . are being . . . retired from the District's general revenues") (emphasis added). Assuming that Justice White is using "general revenues" loosely to mean revenues from the sale of power, taxes were, at most, used to pay administrative expenses.

The fact that the district's electricity "business" was successful, however, should not determine the constitutional franchise issue. That issue must be determined by looking to the powers which the legislature has conferred upon the district, not whether the district chooses or finds it necessary to exercise those powers. This point was overlooked both in Ball and in Salyer. The Court, however, cannot be completely faulted for this oversight. The premise of plaintiffs' major argument seemed to be that their contribution through power purchases almost totally supported the district's operations. This permitted the majority's rejoinder characterizing the plaintiffs as mere consumers of a product normally
district in *Salyer* where excess power revenues are used after the fact to reduce pro rata any benefit assessment levied, the power revenues in *Ball* are used before the fact to determine the total amount which must be assessed. The county determines a tax rate by dividing the net figure (produced by subtracting the estimated expenses from anticipated power revenue) by the total number of acres in the district. That tax rate is then multiplied by the number of acres owned by each person to determine that person's tax liability. Thus, unlike the district in *Salyer*, the tax levied by an Arizona agricultural improvement district is not a special assessment at all but rather is akin to a general ad valorem property tax. The only significant difference between the district's levy in *Ball* and the normal ad valorem property tax is that the latter tax rate is applied against the value of the land, not the number of acres owned. But that difference hardly transforms something universally conceded to be a general redistributive tax into a special benefit assessment. The formula merely substitutes one variable, acreage, for another variable, value, leaving the potential redistributive effect of the tax unaltered. At the very least, the

supplied by private producers. 451 U.S. at 370. Indeed, the plaintiffs might have been "voluntary" consumers in the sense that any consumer of electric power from a private utility franchised by a municipality is a "voluntary" consumer. See id. at 370 n.18 (15% of the land within the district received power from a private utility). In the narrow sense that the majority rejected the simplistic claim that those who contribute to a public enterprise must, for that reason alone, have the right to vote, the Court is probably correct. Cf. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (merely because one is burdened with the costs of government is not sufficient to distinguish that person's interests from those benefitted by governmental activities); Kollar v. City of Tuscon, 319 F. Supp. 482 (D. Ariz. 1970), aff'd, 402 U.S. 967 (1971) (nonresident utility customers not entitled to vote in a utility revenue bond election).

To the extent that those who purchased power from the district were not "voluntary" consumers, a point unrevealed by the facts, the Court's error in *Ball* was compounded. By using the power revenues to subsidize the cost of water distribution, both for agriculture and nonagricultural purposes, 451 U.S. at 369, the burdens of providing the benefits of the district were shifted to persons who were not benefitted at all by those activities. See id. at 384 (White, J., dissenting). Thus, the district's directors exercised what is akin to a general power to distribute the burdens of the district's operations disproportionately from those who pay for electrical power to those who benefit from the water. Furthermore, because the franchise was given only to landowners, and not to those burdened, some affected by the redistribution of burdens had no voice in selecting those who exercised the redistributive power. How that differs from *Kolodziejski*, or indeed *Kramer*, where a maldistribution of benefits and burdens required universal suffrage, is difficult to comprehend.

106. CAL. WATER CODE § 47701 (West 1969).

107. For a very brief description of how general ad valorem property taxes are levied and how that process mirrors the one described in the text, see O. OLDMAN & F. SCHOETTE, STATE AND LOCAL TAXES AND FINANCES 243-44 (1974).

108. The Court's statement that the "[d]istrict cannot impose ad valorem property taxes," 451 U.S. at 366, is thus somewhat misleading, particularly if the Court meant to
difference in district financing should have encouraged the Court to scrutinize the voting scheme in *Ball* more closely than in *Salyer*. Such scrutiny would have shown the powers which the legislature conferred on the district to conduct its admittedly narrow purposes justified neither the exclusion of nonproperty owners from the franchise nor the weighting of the landed vote.\(^{110}\)

In excluding nonproperty owners from the franchise, *Ball* is clearly inconsistent with previous cases which had held similar exclusions unconstitutional. Those excluded from voting in *Ball* were related to the district in the same way as those excluded from voting on a city bond issue in *Cipriano v. City of Houma*.\(^{110}\) Admittedly, the city of Houma was a “traditional” municipality while the agricultural improvement district was not.\(^{111}\) But because the question related to the right to vote on a single purpose bond, the issue in *Cipriano* was unrelated to the nature of the governmental entity which proposed to issue that bond. Rather the issue turned on the relevance of property ownership to the right of participation in a decision which determined the future ability to provide a single utility service.\(^{112}\) Whatever *Ball* said, it is difficult

\(^{109}\) The weighted voting scheme was not directly challenged. The plaintiffs were lessees and persons who owned less than one acre of land. *See* James v. *Ball*, 613 F.2d 180, 181 (9th Cir. 1979). When the suit was filed, the Arizona statutes permitted only property owners who owned more than one acre of land to vote. Therefore, all of the plaintiffs were absolutely excluded. After the district court's decision, Arizona amended its statutes to permit fractionalized voting by those who owned less than one acre of land. *Id.* at 181-82 n.1. The action was not certified as a class action, *id.* at 186, nor did the court of appeals decide the case under the amended statute, *id.* at 182 n.1. Therefore, the only claim which could be raised by those plaintiffs owning less than one acre of land was the validity of the exclusion. Therefore, neither the court of appeals nor the Supreme Court discussed the disproportionate voting issue, apart from the general exclusion issue. Both the court of appeals' reasoning, *id.* at 185, and the Supreme Court's statement of the plaintiff's claim, 451 U.S. at 360, would, however, lead one to conclude that the courts decided both issues.


\(^{111}\) That was the basis on which the *Ball* Court distinguished *Cipriano*. *See* 451 U.S. at 366 n.11.

\(^{112}\) As the *Cipriano* Court said, the issue was “whether all those excluded are in fact substantially less interested or affected than those the statute includes.” 395 U.S. at 704 quoting Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969). And since “[p]roperty owners, like nonproperty owners, use the utilities and pay the rates . . . the
to distinguish between the right to participate in a bond issue plebiscite on better utility services (Cipriano) and the right to vote for members of a public entity who decide the terms and conditions under which utility services will be provided (Ball).

The Ball Court’s response was the same as that in Salyer when the plaintiffs argued an interest in that district’s flood control activities. That is, “the electric power functions were . . . incidental to the water functions which are the District’s primary purpose.” But even if this distinction between a district’s primary and secondary functions is constitutionally significant, it merely permitted the exclusion of those whose only relationship to the district was that of an electric power consumer. What of those who also received water but were either denied the vote or whose vote was given less weight than that of others? The Court’s response is somewhat vague but seems to rest on the same foundation as that which denied consumers of power the right to vote: those who received water from the district for nonagricultural purposes were simply indirect or secondary consumers, through their municipal governments, of the district’s primary service.

The facts justifying that conclusion, however, are somewhat confused. The court of appeals held that up to forty percent of the total water distributed by the district was “used and paid for in a manner unrelated to agriculture or landownership.” The Supreme Court denied that water distribution was unrelated to land ownership but did not deny (and apparently admitted) that some water was used for purposes unrelated to agriculture. More importantly, the Court admitted that city landowners had water entitlements because they were landowners; they had merely “chosen the cities as their receiving agents.” Moreover, the cities themselves apparently had entitlement privileges to water which they presumably used for general public purposes.

impact of the. . . bond issue. . . is unconnected to their status as property taxpayers.” Id. at 705.

113. 451 U.S. at 368.

114. The Arizona courts think the distinction has some importance. See Uhmann v. Wren, 97 Ariz. 366, 392, 401 P.2d 113, 130 (1965) (agricultural improvement district cannot condemn property for erection of power transmission line, unless it can be shown that sale of transmitted power is incidental to reclamation functions and not an end in itself).

115. See supra note 105.


117. 613 F.2d at 184.

118. 451 U.S. at 367.

119. Id. at 365 n.9.

120. Id.
Finally, approximately fifteen percent of the water in the rural parts of the district was used for "schools, parks and playgrounds"—those services characterized in City of Phoenix v. Kolodziejski as of general public interest, unrelated to the ownership of real property. At least these facts should have raised the question about the relationship between the service provided and the franchise criteria of land ownership. The Ball Court, however, dismissed the significance of the disparate use of the district's water service functions. This was done despite the fact that the disparate use of water for agricultural and nonagricultural purposes created a disparity in the benefit from the district's primary service. At least in Salyer one could say a priori that the water distribution function of the district directly benefitted each parcel of land and thus each landowner, qua landowner, and that benefit was directly proportional to the amount of land owned. But that cannot be said of Ball, where water was distributed both to rural farmers who used the water for land-related purposes and to urban dwellers who did not. It is true, of course, that the availability of water increases the value of land whatever its use, at least when compared to its likely value if no water were available. But the same can be said of the distribution of power in Cipriano. And since Cipriano holds that land ownership is irrelevant to franchise rights because the benefits derived from the distribution of power are unrelated to that factor, then Ball is incorrect in recognizing the validity of the same criterion applied to another utility service—water.

Determining whether the vote was properly weighted according to acreage owned is even more problematic. To weight the vote one must establish a functional relationship between the distribution of the benefits and burdens of the district's activities and the factor by which the vote is weighted—amount of land owned. The Arizona statute itself denies that such a relation-

121. Id.
123. 451 U.S. at 365 n.9.
124. The district court in Cipriano upheld the property ownership qualification on the grounds that (a) property owners have a more permanent, thus greater, stake in the community than nonproperty owners, (b) utility operations could provide funds for the city's activities and thus relieve property owners' tax burden, (c) failure to meet amortization on the revenue bond issue might adversely affect the city's credit, and (d) the quality of utility services might affect property values. Cipriano v. City of Houma, 286 F. Supp. 823, 827 (E.D. La. 1968), rev'd, 395 U.S. 701 (1969). The Supreme Court failed to see the relevance of any of those arguments. 395 U.S. at 704-05.
125. See supra text accompanying notes 72-73.
ship exists. First, all lands which can be either specially or generally benefitted by a single water system can be included within the district's territory and thus subject to the burdens as well as the benefits of the district's activities. Consequently, unlike the landowners in Salyer, those in Ball could have been forced to share in the district's burdens without being benefitted in any specific way. Second, the statutory power to impose a uniform tax rate against all property is a far cry from a benefit tax or special assessment, because the financial burdens and the financial benefits of the district's activities might be totally unrelated. Indeed, to turn the issue around, it is doubtful that the water distribution functions of the Salt River Project could have been financed from a single formula special assessment applicable to each parcel of land within the district. Such a formula assumes not only a special benefit equal to the assessment but also that the particular activity financed benefits all lands assessed in the same way; the only variable is the size of each parcel and its proportionate share of the benefit. In a district where disparate use produces disparate benefits, as was true in Ball, benefit taxation is unavailable as a financing option, at least without creating subdistricts. Therefore, when the required link between the financial burden imposed and the benefit received is missing, a single formula special assessment is unavailable. And a voting scheme which rests on an assumption that such a link is present is also unavailable.

Finally, the issue in Ball did not, as it did in Salyer, implicate

126. See supra note 102.
127. Specific, definable benefit is not the sine qua non to general taxation. See, e.g., State ex rel. Pan American Prod. Co. v. Texas City, 157 Tex. 450, 303 S.W.2d 780, appeal dismissed, 355 U.S. 603 (1957). Benefit taxation, however, requires a measurable economic benefit to those lands assessed equal to or greater than the assessment imposed. See generally 2 C. Antieau, supra note 81, § 14.02, at 14-8 to -11; F. Michelman & T. Sandalow, supra note 34, at 516-17. To the extent that a landowner is specially assessed for a benefit enjoyed by the public at large, there has been a violation of the taking clause. See, e.g., Mullins v. City of El Dorado, 200 Kan. 336, 436 P.2d 837 (1968); see also supra note 81. Assuming that the Court was correct and that the district in Ball was indeed a special district as in Salyer, then the tax permitted by the Arizona statute, see supra note 105, should have been treated statutorily as a special assessment. See supra notes 95 and 96. That the statute, by requiring only a general benefit, does not so treat it is further evidence that the Court's conclusion regarding the nature of the district is questionable, if not simply wrong.
128. This, in large part, is the basis of the court's determination in Ruberoid Co. v. North Pecos Water & Sanitation Dist., 158 Colo. 498, 408 P.2d 436 (1965), that the power to apply a general or uniform tax rate is evidence that an entity has broader powers than merely conferring special benefits on identifiable individuals.
129. See, e.g., Wing v. City of Eugene, 249 Or. 367, 437 P.2d 836 (1968) (differing benefit zones created to account for variegated benefits from downtown parking facility).
the ability of the state to implement its functions through a special purpose entity with limited financing prerogatives. Arizona specifically precluded that concern by providing the alternative of a one land owner-one vote scheme. Thus, the most that can be said of the district's voting scheme in Ball is that those creating that district in 1937 thought they would be better off vis-a-vis other persons within the district under a weighted voting scheme than with equality of sufferage for each landowner. For the Court to use that history to support rather than to reject the district's voting scheme, is curious, to say the least. Indeed, whatever one might say about the district in Ball resembling that in Salyer in 1937, by 1981 that had changed. And that change made its voting scheme not only outmoded but unconstitutional as well.133

III. Holt Civic Club v. City of Tuscaloosa: The Issue of Membership in a Political Community

The Court in Salyer and Ball should have focused its inquiry on whether the particular entity was political—that is, whether it possessed the power to impose particularized burdens in order to achieve more generalized benefits. In Holt,134 the interest balancing power of the entity was a given, and thus the Court had no need to inquire into the public versus private nature of the entity. That difference aside, there is a striking similarity between Salyer and Ball on the one hand and Holt on the other. In all three cases the outcome should have turned on the relationship between the plaintiffs' interests in the entity and the powers which the state conferred on the entity. Unfortunately, the Holt Court did not focus on this question. Indeed, it is difficult to isolate exactly what the Court did focus on. Before analyzing the opinion, however, it is important to recognize what issues were not involved in Holt.

130. See supra text accompanying notes 92–98.
132. 451 U.S. at 359–60.
133. The Arizona legislature apparently recognized both the outmoded nature of its voting scheme and its possible constitutional problems when it amended the statutory scheme to permit four of fourteen directors to be elected at large on a one landowner-one vote basis. Id. at 359 n.2. Cf. Dusch v. Davis, 387 U.S. 112 (1967) (upholding a multi-member district scheme for electing city council members whereby some were elected at large and others according to the borough in which they lived). The amended statute did not go far enough—nonlandowners were still excluded and the weighted vote was retained for approximately 70% of the board. Indeed, the amendment is additional evidence that the benefits of the district, to say nothing of its burdens, are not distributed in proportion to the amount of land owned.
134. 439 U.S. 60 (1978); see supra text accompanying notes 26–27.
A. What Holt Did Not Involve

First, Holt did not involve the franchise right of persons whose only relationship with Tuscaloosa was that of municipal service consumers. The plaintiffs in Holt complained that they were subject to Tuscaloosa's laws. The ability of a municipality to provide services to nonresidents is far different from its ability to exercise police powers against nonresidents. Police powers are coercive—they are rules fashioned to govern an individual's behavior with regard to another—and they are enforced by criminal sanctions. Decisions to extend services beyond municipal boundaries, on the other hand, are not designed to control individual action. Rather, they are decisions defining the beneficiaries of municipal largess. As such, any burden resulting from extraterritorial extensions of municipal services falls only on those who contribute to municipal resources (that is, taxpayers), not on those to whom the services are extended.135

Second, Holt did not involve the exercise of only a single power. While the extraterritorial powers granted to Tuscaloosa did not encompass the full panoply of municipal authority, the city was not limited to regulating only those extraterritorial activities which threatened harm to city residents. Like the Millian concepts which underlie the exercise of police powers generally,136

135. The difficulties with a municipality's provision of services beyond its own boundaries have centered around the exercise of territorial sovereignty over "foreign soil." Thus, most such extraterritorial provisions are accomplished pursuant to state authorization. See, e.g., State v. City of Riviera Beach, 397 So. 2d 685 (Fla. 1981) (issuance of industrial development bonds for construction of plant outside city limits). See generally 1 C. Antieau, supra note 81, § 5.11, at 5-25 to -30; F. Sengstock, Extraterritorial Powers in the Metropolitan Area 16-44 (1962); Sandalow, The Limits of Municipal Power Under Home Rule: A Role for The Courts, 48 Minn. L. Rev. 643, 695-700 (1964). Courts approving the extraterritorial delivery of municipal services, absent specific state authorization, usually rely on the governmental/proprietary distinction to hold that the extension of services, being proprietary, does not implicate the exercise of sovereign prerogatives. See, e.g., Norvell v. City of Danville, 355 S.W.2d 689, 691-92 (Ky. Ct. App. 1962); Birge v. Town of Easton, 274 Md. 635, 643, 337 A.2d 435, 440 (1975). But cf. City of McMinnville v. Howenstine, 56 Or. 451, 109 P. 81 (1910) (constitutional home rule provision interpreted to permit the exercise of eminent domain outside city limits).

Quite apart from questions of conflicting sovereignty the extraterritorial provision of municipal services should be treated as any other expenditure—if a "public purpose" for the expenditure exists, it is valid. City of Pueblo v. Flanders, 122 Colo. 225, 225 P.2d 832 (1950). Public purpose is generally held to be a legislative, not a judicial, question. State ex rel. Taft v. Campanella, 50 Ohio St. 2d 242, 246, 364 N.E.2d 21, 24 (1977); Basehore v. Hampden Indus. Dev. Auth., 433 Pa. 40, 48-49, 248 A.2d 212, 217 (1968). See generally 2 C. Antieau, supra note 81, § 15.04-.05, at 15-10 to -16.

136. While a precise definition of police power is probably impossible, its exercise "necessarily interferes . . . with the liberty of the citizen . . . . This interference is justified
municipal exercise of extraterritorial coercive powers have traditionally been founded on an implicit power to regulate external activities which are detrimental to the municipality's residents. As noted by Frank Sengstock, "Germs do not stop at the corporate limits; vice, protected by the shield of inactivity of township supervisors, may plague a core city; social problems know no artificial political boundaries. To protect itself, a city must be able to extend the effects of its ordinances beyond its corporate limits." Absent any relationship between external activities and the health, safety, and welfare of those within the municipality, the state, in conferring extraterritorial powers, "is treading on dangerous grounds."

Third, the plaintiffs in Holt were not mere casual visitors or commuters to Tuscaloosa. These plaintiffs were residents of a physical area which, like the city itself, was governed by the Tuscaloosa city fathers. Consequently, their interests were "affected" by Tuscaloosa's political decisions because, as residents, the plaintiffs had a long-term stake in the policies which those decisions supported.

Extraterritorial taxing cases, however, reached a contrary result primarily because the courts do not base their decisions on the lack of political participation. Instead courts find a taking has occurred when, as is typical of these cases, one individual is assessed for the sole benefit of another. See, e.g., City of Sedalia v. Shell Petroleum Corp., 81 F.2d 193, 197 (8th Cir. 1936) (interpreting tax ordinance to apply only within the city's boundaries to avoid taking clause problems). See generally Comment, The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities, 45 U. Chi. L. Rev. 151, 157-60 (1977). As the student commentator points out, Malone stands as the only case striking down the exercise of extraterritorial police power on due process grounds. Id. at 160.

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137. F. SENGSTOCK, supra note 135, at 45. (emphasis added).
138. Id. at 50-51. See also White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932) (extraterritorial exercise of taxing power a violation of due process); Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907) (extraterritorial delegation of police powers unconstitutional under state due process clause); cf. City of Sedalia v. Shell Petroleum Corp., 81 F.2d 193, 197 (8th Cir. 1936) (interpreting tax ordinance to apply only within the city's boundaries to avoid taking clause problems). See generally Comment, The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities, 45 U. Chi. L. Rev. 151, 157-60 (1977). As the student commentator points out, Malone stands as the only case striking down the exercise of extraterritorial police power on due process grounds. Id. at 160.

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139. The term "resident" has a variety of meanings depending upon the legal context in which it is used. In this Article the term "resident" is defined in relation to domicile, i.e., one who intends "to make that place [his] home for the time at least." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18, at 70 (1971). See generally Reese & Green, That Elusive Word, "Residence", 6 Vand. L. Rev. 561 (1953). Indeed, for voting purposes, that may be the only constitutionally sufficient definition. Ramey v. Rockefeller, 348 F. Supp. 780, 788 (E.D.N.Y. 1972); cf. Whatley v. Clark, 482 F.2d 1230 (5th Cir. 1973), cert. denied, 415 U.S. 934 (1974) (statute creating different standards of proof of domicile for students and nonstudents is a violation of equal protection).
sions articulated, not because the decisions were applied against them as visitors or commuters.

B. What Holt Did Involve

Holt presented the question whether there is a good reason to grant the franchise to some individuals governed by a political entity while denying it to others governed by that same entity when both classes were governed because of their residence. Nearly seventy years ago, in *Eubank v. City of Richmond*, the Court held that delegating public decisionmaking authority to persons who carry no burden of public accountability was fundamentally inconsistent with our republican traditions. Admittedly, the precise holding of *Eubank* and its subsequent counterpart, *Washington ex rel. Seattle Title Trust Co. v. Roberge*, is not easy to determine. *Eubank* and *Roberge* can be read to require that public decisions be made according to certain fixed constitutional procedures. More commonly, they are read to mean that there

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140. As the Court stated in Dunn v. Blumstein, 405 U.S. 330, 344 (1972), the purpose of requiring one to be a resident before extending political rights is "to preserve the basic conception of a political community." And, as properly stated by Justice Brennan's dissent in *Holt*, "At the heart of our . . . conception of a 'political community,' . . . is the notion of a reciprocal relationship between the process of government and those who subject themselves to that process . . . ." 439 U.S. at 82 (Brennan, J., dissenting); see also *Texas v. White*, 74 U.S. (7 Wall.) 700, 720 (1868) (defining a state to be "a people or community of individuals united . . . in political relations"). Thus, residency helps define membership in the political community. As stated by Judge Friendly in *Ramey v. Rockefeller*, 348 F. Supp. 780, 788 (E.D.N.Y. 1972): "[A] test of intention to remain 'permanently' or 'indefinitely' is constitutionally permissible because a person who does not have such a long-range interest in the community will have voting choices that are distorted in accord with the limited nature of his interest."

The interest of the state in insuring that only those with sufficient interest have political rights goes beyond the simplistic argument negated in *Carrington v. Rash*, 380 U.S. 89 (1965). In *Carrington*, the Court held that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Id.* at 94. Public decisionmaking assumes that individuals will be required to sacrifice short-term desires for more generalized benefits. Normal political debate will undoubtedly produce disagreement about what those benefits ought to be, who ought to share in them, and who should bear the burdens of producing them. But to add nonresidents to that debate would likely create a schism over the objectives themselves. This schism would develop between those who view the objectives of a political entity solely as a nine-to-five sanctuary and those who view it in significantly broader terms. The fundamental character of the political entity might be altered depending upon which view has the most votes. As a result of the disunity over the objectives themselves, the view which does not prevail is likely to be permanently ignored by that which does, making political compromise difficult.

141. 226 U.S. 137 (1912).
142. 278 U.S. 116 (1928).
is something basically unfair about delegating public power to persons privately interested in the outcome. But the essential unfairness to the individual affected, addressed in both readings, is the inability to influence democratically a decision which determines the appropriate use of one's property. In neither Eubank nor Roberge did the Court question whether the regulation imposed was substantively reasonable. That question was irrelevant because the process by which both decisions were made was flawed, not because the decisions failed to track certain procedural niceties but because they did not recognize the sine qua non of public decisionmaking—that those who sacrifice must have some structured input to the decisional process. If politics is the art of compromise, then the franchise is the structural means by which compromise can be assured.

This fundamental precept is found not only in Eubank and Roberge but also in Avery v. Midland County. Avery held that equal representation at the state level—the level at which basic delegation decisions are made—is insufficient to cure the constitutional infirmity of inadequate representation at the local level—the level at which redistributive decisions are made.

I do not mean to say that Holt and Eubank are identical cases; they clearly are not. Nor do I suggest that Eubank retains all of its old vitality; it undoubtedly does not. But if part of what rubbed the Court the wrong way in Eubank and Roberge was that some small aspect of the plaintiffs' lives was governed by political strangers, it is hard to understand why the Holt Court was not disturbed when a much larger aspect of the plaintiffs' lives was so governed. The Holt Court gives only the simplistic answer that

Sun Wong, 426 U.S. 88 (1976), to establish that who makes policy decisions is part of the "due process of lawmaking"). In a somewhat narrower approach Professor Lawrence Sager suggests that the constitutional requirement of deliberative decisionmaking applies only when (1) "substantial constitutional values are placed in jeopardy by the enactment at issue" and (2) "substantive review of the enactment by the judiciary is largely unavailable." Sager, supra note 11, at 1418 (emphasis in original).


145. As Judge Linde noted, "[T]he process, explicitly or implicitly, [is measured] by the standard of its legitimacy—the basic constitutional standard of democratic accountability or, if you will, of a republican form of government." Linde, supra note 143, at 240. See also Jaffe, supra note 144, at 206–12.

146. 390 U.S. 474 (1968).

147. See Sager, supra note 11, at 1406–08.

148. The mere fact that those who exercised public powers in Eubank and Roberge were private citizens rather than public officials should be of no consequence. In Eubank and Roberge, as in Holt, those exercising public prerogatives were appointed with public
the physical boundary determines the right to vote. It is difficult to rationalize *Holt* in terms of that ipse dixit, however. First, the *Holt* Court itself recognized that political boundaries are "imaginary." More fundamentally, *Holt* ignores the fundamental question posited by *Carrington v. Rash* and *Evans v. Cornman*; that is, whether the plaintiffs' interests in the political community in which they resided were so significantly different from those who were granted the franchise as to justify a denial of the franchise. In a loose sense both the majority and Justice Stevens' concurrence recognized that concern, but neither opinion articulated precisely why the interests of the Tuscaloosa citizens and those of the police jurisdiction were so terribly divergent. The Court could have avoided that question completely by requiring de facto annexation as a prerequisite to constitutionally required franchise rights. Indeed, some of the Court's language points precisely in that direction. But to have done so the Court probably would have had to overrule *Evans v. Cornman*. Instead, the majority chose to distinguish *Cornman* cryptically, and somewhat out of context, by finding the *Holt* plaintiffs not "subject to such 'important aspects of state powers' as [the] authority 'to levy and collect . . . taxes. . . .'" Justice Stevens repeated that Tuscaloosa lacked taxing authority and furthermore did not "control the zoning of . . . property or the operation of . . . parks, hospitals, schools, and libraries . . . bridges and highways."

If these opinions suggest that those powers, or any combination of them, are somehow more "important" than the powers del-

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149. 439 U.S. at 69. It would have been possible to have justified the physical boundary lines as a reasonable administrative tool defining the political community. *Cf.* Marston v. Lewis, 410 U.S. 679 (1973) (upholding 50-day waiting period requirements as a reasonable device to insure the preparation of accurate voting records and to prevent fraud); Burns v. Fortson, 410 U.S. 686 (1973) (same). But the boundaries of Tuscaloosa's legislative jurisdiction were as clear as were its physical boundaries.


152. 439 U.S. at 73 n.8.

153. It would have been possible to distinguish *Evans* on the ground that Maryland's denial of resident status to NIH residents deprived them of all franchise, in national as well as state and local elections. 439 U.S. at 72 n.7. *See also id.* at 77 (Stevens, J., concurring). However, that certainly was not the basis of the decision in *Evans*.

154. 439 U.S. at 73 n.8. The statement is out of context because the Court did not even reach the question of divergent interests until after it had "stripped [the case] of its voting rights attire." *Id.* at 70. Despite the Court's analysis, that question was central to the plaintiffs' voting rights claim.

155. *Id.* at 77 (Stevens, J., concurring).
egated to Tuscaloosa, and that their exercise is a condition of the franchise right, the opinions are simply wrong. Even admitting that there is something constitutionally significant about our historical fear of excessive taxation, and giving some presumptive weight to a taxpaying resident’s right to vote, payment of taxes is not the determinative factor. There is no reason to distinguish taxing powers from other governing powers. Interest balancing demands participation by all who are called upon to bear the burdens of securing some more general benefit; it does not depend upon whether the political entity is exercising its taxing powers or its regulatory powers.

Justice Stevens’ concentration on zoning powers and the provision of municipal services is equally perplexing. It is possible to suggest that zoning powers may permit Tuscaloosa to impose burdens on residents of the police jurisdiction in order to benefit its own residents. Most zoning laws, however, are structured to permit exceptions where the burdens imposed, either in isolation or in comparison to other similarly situated land owners, are excessive. And the provision of municipal services, such as parks and highways, provides less compelling reasons for extending the franchise than does the exercise of police powers. First, there is no compulsive dimension to the distribution of municipal services; those who are provided services are not governed by the political entity providing the service. Second, the distribution of services is solely a question of the allocation of municipal resources, thus, the decision to extend or not to extend those serv-

156. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819) (“the power to tax involves the power to destroy”).


160. *See supra* p. 31, cf. Ball v. James, 451 U.S. at 370 (mere consumers of municipal services have no right to vote). There are occasions when individuals may be compelled to purchase municipal services. For example, it is common to include in a revenue bond indenture a provision requiring all persons within a certain service area to purchase the service from the providing entity/issuer during the period when the bonds are outstanding. *See, e.g.*, Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449 (Iowa 1970). These provisions, however, are inserted to protect the bondholders by assuring a constant stream of revenue; they are not in any sense designed to redistribute the benefits and burdens of governmental activity. Thus even if one of Professor Michelman’s criteria for distinguishing the public from the private is met, the other is not. *See supra* text accompanying note 33.

161. *See supra* text accompanying note 135.
ices to nonresidents can have no adverse impact on their interests. Those outside the municipal boundaries, to whom the extension of services is proposed, are akin to donees of an unexecuted gift. A decision to extend services will benefit these recipients, but a decision not to extend services is in reality nothing more than a decision that the services, if they are to be provided by government at all, will be provided by another level of government.\textsuperscript{162}

The long and the short of \textit{Holt} is that the Court bungled the issues before it. First, the Court mishandled the importance of the municipal boundary line. It either overstated the line's significance,\textsuperscript{163} or failed to recognize the next question, which is whether the boundary line was arbitrary in light of the powers granted to Tuscaloosa. Second, the Court saw a federalism issue which did not exist. Institutionally, there is no doubt "that States have [wide latitude] in creating various types of political subdivisions and conferring authority upon them.\textsuperscript{164} But that was not the issue in \textit{Holt}.\textsuperscript{165} Even if it were, the question should have been framed in

\begin{footnotes}
\item[162] As Justice Stevens noted, "[T]he provision of parks, hospitals, schools, and libraries and the construction and repair of bridges and highways—are entrusted here to the county government . . . ." 439 U.S. at 77 (Stevens, J., concurring).
\item[163] This is not to suggest that boundary lines are of no importance in determining membership in a political community. They are at least presumptive and will most likely be deterministic since the right of \textit{equal} political participation depends on all persons being similarly situated with respect to the particular political entity. \textit{See} Reynolds v. Sims, 377 U.S. 533, 565 (1964). Sometimes however the nature and breadth of the municipal powers delegated by the state make the municipal boundary a suspect, if not an irrational, measure of membership in the political community. \textit{Holt}, I think, was such a case.
\item[164] 439 U.S. at 71.
\item[165] Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), did in fact involve that issue. The plaintiffs in \textit{Hunter} claimed that a Pennsylvania statute establishing the procedure for annexation of smaller cities by larger ones violated the due process clause because it permitted annexation upon the majority vote of all persons within both cities without accounting separately for the votes of those in the smaller community. Although not framed in these terms, the plaintiffs were claiming fourteenth amendment and contract clause protection for the right of \textit{existing} local self-government. \textit{See generally} F. Michelman \& T. Sandalow, \textit{supra} note 34, at 179–85; Frug, \textit{The City as a Legal Concept}, 93 Harv. L. Rev. 1057, 1059, 1062–67, 1109–17 (1980). The same can be said of Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977), upholding a New York statute which, unlike the one in \textit{Hunter}, required a concurrent majority to approve a new county charter. The complaint in \textit{Lockport} was that \textit{too much} voting power was given to those residing in smaller communities. The Court held the statute permissible, because "a restructuring of local government is felt quite differently by the different county constituent units." \textit{Id.} at 272. The Court's approval of Lockport's opposite, unilateral annexation plans, gives the state virtually unbridled discretion to define the boundaries of its governmental subunits. \textit{See} Koplin v. Village of Hinsdale, No. 73C947 (N.D. Ill. April 4, 1974) \textit{aff'd mem.} 419 U.S. 888 (1974); Adams v. City of Colorado Springs, 308 F. Supp. 1397 (D. Colo.) \textit{aff'd mem.} 399 U.S. 901 (1970). These cases, however, did not approve the state's ability to deny or dilute the vote of those who are subject to the ongoing regulatory powers of a political
terms of whether the recognition of the plaintiffs' claim of franchise would have, in any significant way, limited the state's ability to distribute its governmental prerogatives among a variety of political subunits.

More accurately, *Holt* should have been viewed as pitting the plaintiffs' claims of participatory rights against those of the Tuscaloosa residents. Stated in another way, the critical issue in *Holt* was whether the success of the plaintiffs' claim would have diluted the votes of those who resided in Tuscaloosa. Had the Court seen that as the issue, it could have used a dilution analysis. Application of such an analysis not only would have been consistent with *Reynolds v. Sims* and its progeny but would have been determinative of *Sa/yer* and *Ball* as well.

IV. BALANCING COMPETING INTERESTS: THE COMMON THREAD OF VOTER DILUTION

Voter dilution cases fall into two broad categories. First, there are those in which dilution occurs because (1) some persons are given votes weighted more heavily than others similarly situated merely on the basis of residence, (2) votes are weighted according to a factor which the state determines is reflective of "interest," or (3) persons are excluded altogether from voting because the state deems them to be "uninterested." Second, there are those in which dilution occurs because equal franchise is granted to persons allegedly without interest, or with significantly lower interests.

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166. See infra notes 167–207 and accompanying text.
167. Note, *State Restrictions on Municipal Elections: An Equal Protection Analysis*, 93 Harv. L. Rev. 1491 (1980) (classifying the cases as "inclusion" and "exclusion" cases). Dilution as used in this Article is not the same concept as when the word is used in racial discrimination cases such as *White v. Register*, 412 U.S. 755 (1973), and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In those cases dilution means effective denial of the right to vote of an identifiable interest group. See *Butler, Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 La. L. Rev. 851, 853, 901, 907–09 (1982). Rather, dilution as used here defines a situation where some are required to share their vote with others whose interests are significantly less.
less interest than other voters.\textsuperscript{171}

While my primary focus will be on the latter possibility, it is important to recognize that the two categories are not distinct.\textsuperscript{172} The Court in either category must decide whether different treatment is required because of some difference which relates to the right of participation in a political entity. Thus “interest,” implicitly or explicitly, must be the touchstone of the Court’s analysis.\textsuperscript{173} Moreover, the plaintiffs’ claim to an equal franchise must be balanced against competing claims. In \textit{Reynolds} the competing claim was institutional, that of constitutional federalism.\textsuperscript{174} The individual interests of those who possessed the more heavily weighted vote played no role because, a priori, they were not “affected” by state legislative decisions any differently than those with the less weighty vote. Concerns for nonclaimant individuals, however, arise in cases like \textit{Avery}, \textit{Salyer}, and \textit{Holt} because it is not as obvious as it was in \textit{Reynolds} that all persons are uniformly affected by the governments in question. The less “interest” the claimants have in decisions of the entity in which they seek the vote, the more likely it is that granting their claim will dilute the vote of those who already possess it.\textsuperscript{175}

\begin{itemize}
  \item \textsuperscript{172} Note, supra note 167, at 1501–02.
  \item \textsuperscript{173} The question of interest never arose in legislative reapportionment cases, such as \textit{Reynolds}, because the state did not suggest that the disproportionate weight given rural voters was designed to recognize their differing interests in state government. But in \textit{Avery} v. \textit{Midland County}, 390 U.S. 474 (1968), the first case to mention interest as a possible distinguishing criteria, the state court specifically found that “the Commissioners Court ‘disproportionately concern[s] the rural areas.’” \textit{Id.} at 483.

For a view that interest should not play a significant role in determining the right to vote see \textit{L. Tribe}, supra note 28, § 13-11, at 763–65 and § 16-56, at 1132.
  \item \textsuperscript{174} 377 U.S. at 624 (Harlan, J., dissenting); see also \textit{Dixon}, \textit{The Warren Court Crusade for the Holy Grail of “One Man-One Vote”}, 1969 Sup. Ct. Rev. 219, 223–24.
  \item \textsuperscript{175} 390 U.S. at 498–99 (Fortas, J., dissenting); see supra text accompanying note 58. \textit{Avery}, however, was not a case in which urban dwellers were denied the right to vote for county officers. Like \textit{Reynolds}, it was a case in which county officers were elected from districts of unequal population. Therefore, even if one accepts the validity of Justice Fortas' concern, there is no reason to assume that the disproportionate weight of any particular individual’s vote reflected the extent of that individual’s disproportionate interest in the decisions of the Commissioners Court.
\end{itemize}
A. The Proper Inquiry

To resolve the dilution problem, the Court must engage in an essentially factual inquiry which requires the fact finder to examine the benefits which a governmental unit is empowered to bestow and the burdens which it is empowered to exact. The Court then must determine the merits of the plaintiffs’ franchise claim—whether they share sufficiently in those burdens and benefits that granting them the franchise will not unduly dilute the participatory rights of those already possessing it.

Problematic as such an inquiry might be, it has several advantages over the Court’s present approach. First, it purports to decide similar cases according to a similar and “neutral” principle, thereby attempting to rationalize rights of political participation in terms of the political powers to which an individual is subjected. Second, it attempts to resolve the problem in a concrete rather than an abstract manner by examining what is really at stake—the interest of those who desire a participatory role versus those who might suffer if that participation is granted.

B. Application of the Inquiry

Some cases are relatively easy to resolve. Ball v. James, for example, presented a situation where the district not only possessed reallocative taxing power, but also presented a per capita scheme of distributing burdens and benefits rather than a proportional one. The normal constitutional requirement of shared power on a per capita basis would have meant little more to the enfranchised landowners than to have allocated the franchise according to the statutory per capita allocation of the district’s burdens and benefits. While that would have diluted the control which the larger landowners possessed, it would have done so only because their influence was originally disproportionate to their interests. In that sense, Ball is indistinguishable from Avery and Reynolds. Granting the franchise in Salyer, on the other hand, would not have resulted in parity with the manner in which the district distributed benefits and burdens. Instead, the landowners’ interests would have been diluted by forcing them to share political power with persons who by statute could reap few of the benefits and would shoulder a lesser percentage of the district’s financial burdens. Salyer then is the unusual case in which the only two factors that necessarily produce a dilution of the existing franchise conjoin: (1) the statutory structure of the govern-
mental entity in question requires the distribution of its benefits and burdens only in proportion to a specified factor—land; and (2) those requesting a share of the district's political power neither possess that specified factor (or possess proportionately less of it) nor have an interest in the entity's activities which could be satisfied under the existing statutory allocation of benefits and burdens.\textsuperscript{176}

\textit{Cipriano,}\textsuperscript{177} \textit{Kolodziejski,}\textsuperscript{178} and \textit{Hill}\textsuperscript{179} were like \textit{Ball} in the sense that there could be no vote dilution of those the state chose to enfranchise because their interests and the interests of those denied the vote were indistinguishable. In \textit{Cipriano}, "[p]roperty owners, like nonproperty owners, use the utilities and pay the rates."\textsuperscript{180} Thus, the benefits and burdens of the bond issue fell "indiscriminately on property owner and nonproperty owner alike."\textsuperscript{181} Since all who used the City's utility services were equally benefitted and burdened, all were interested in exactly the same way and to the same extent. The same analysis can be applied to \textit{Kolodziejski} and \textit{Hill} though not so easily. Quite apart from a property taxpayer's ability to shift the incidence of that tax,\textsuperscript{182} in neither \textit{Kolodziejski} nor \textit{Hill} was there any relationship between the benefits of the activities being financed by the bond

\textsuperscript{176} See supra pp. 20-22. This is not to say that the plaintiffs in \textit{Salyer} were not "interested" in whether or not the district adopted a flood control plan, nor is it to say that they were not "affected" by the district's failure to adopt such a plan. See Martin, \textit{The Supreme Court and Local Reapportionment: Voter Inequality in Special-Purpose Units}, 15 Wm. & Mary L. Rev. 601, 610-14 (1974). It is to say that the district did not have the statutory capacity to match the burdens of the plan with the benefits to be derived therefrom. Sadly, the protection of the plaintiffs' lives and property rested with the county—a governmental unit unhampered by the requirement that burdens be imposed only in proportion to benefits. See \textit{Cal. Water Code} §§ 8100–8129 (West 1971) (granting counties flood control powers). The plaintiffs' ability to influence the county to spend tax dollars for their benefit was probably less, despite their presumed right to vote, than their ability to influence the district's board of directors.

\textsuperscript{177} Cipriano v. City of Houma, 395 U.S. 701 (1969); see supra notes 110–12, 124 and accompanying text.

\textsuperscript{178} City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); see supra note 105.

\textsuperscript{179} Hill v. Stone, 421 U.S. 289 (1975); see supra notes 67–73 and accompanying text.

\textsuperscript{180} 395 U.S. at 705.

\textsuperscript{181} \textit{Id.} \textit{Cipriano} involved a revenue bond in which rate payers provided the funds to meet the debt obligation; whether they were also property owners was irrelevant. See supra note 112.

\textsuperscript{182} There is no agreement on whether the incidence of the real property tax can be shifted forward from the taxpayer to the consumer or backward to the factors of production. See generally J. Due & A. Friedlander, \textit{Government Finance: Economics of the Public Sector} 414–28 (1977); D. Netzer, \textit{Economics of the Property Tax} 32–40 (1966) (ability to shift the incidence of the tax depends upon demand for the product); O. Oldman & F. Schoettle, supra note 107, at 96-98, 348–63.
issues and the burdens of paying for those activities other than the theoretical possibility that property values might increase *randomly* because city services have improved. That alone distinguishes those cases from *Salyer*. As the *Hill* Court explained *Kolodziejski*, "The residents of the city, whether property owners or not, had a common interest in the facilities that the bond issue would make available . . . ."\(^{183}\) In discussing the facts before it, the *Hill* Court noted that "the construction of a library is not likely to be of special interest to a particular, well-defined portion of the electorate."\(^{184}\) Since compulsory redistribution is the distinguishing characteristic of public decisionmaking, one's interest in the governmental entity's political decisions cannot be determined solely by who pays the bill; those who benefit, to the extent they are different persons, also have an interest in the redistributive decision.

*Kramer v. Union Free School District*\(^{185}\) presented a more difficult case only because those permitted to vote appeared to be the only ones who benefitted from or were burdened by the activities of the school district. However, that was not the case. Educational services provide benefits which both exceed those to the direct consumers—the only school children—and which cannot be measured in terms of the financial burdens imposed. Thus, like the library in *Hill v. Stone* or the parks, sewer systems, playgrounds and public buildings in *Kolodziejski*, use cannot be the sole determinate of interest. The benefits of living among an educated populace, the benefits to employers of having an educated workforce and the like\(^{186}\) are sufficient to have permitted *Kramer* to influence educational policy without diluting the vote of those who either directly consume those services or pay the cost thereof. This is confirmed by the police power justification for truancy laws\(^{187}\) and the restriction on educational financing to general tax-

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\(^{183}\) 421 U.S. at 296.

\(^{184}\) Id. at 299. *See supra* pp. 16-17. The dissent relies on grounds unrelated to the relative interests of those enfranchised and those not. It questions whether the requirement that some property be taxed as a condition to voting is, in reality, a property qualification at all, and if so, whether the burden imposed is de minimis. 421 U.S. at 302-08 (Rehnquist, J., dissenting).


Moreover, to the extent that direct consumers are benefitted, the amount of their benefit is difficult, if not impossible, to quantify either generally or proportionately to the financial burden exacted.

Holt, unlike Salyer, Ball, and Kramer, presented the dilution issue in a context which was familiar to the lower courts\textsuperscript{189}—attempting to define interest in the general decisional prerogatives of a general purpose unit of local government. \textit{Avery v. Midland County}\textsuperscript{190} presents the easy case in this category. In \textit{Avery}, the nature of the local government's powers did not permit clear distinctions among persons subject to those powers. Justice Fortas' concern in \textit{Avery} that urban voters might dilute rural interests in a government primarily operated to serve rural interests was answered by the Second Circuit in \textit{Clark v. Town of Greenburgh}.\textsuperscript{191} In \textit{Clark}, the Court held that some interest in the political decisions of a particular entity was a sufficient interest to overcome any claim of dilution: "That the village residents may have less interest in Town elections than the residents of the unincorporated area does not 'dilute' the votes of the latter group... voter 'interest' in this sense will always vary from group to group and issue to issue, but this does not 'dilute' the vote of any group in the constitutional sense."\textsuperscript{192}

\textit{Holt} was distinguishable from \textit{Avery} and \textit{Clark} only because in \textit{Holt} the extraterritorial powers were specifically delineated by statute, thus making it easier to see both the dimension of the dilu-


\textsuperscript{189} See \textit{supra} note 171. The plaintiff voters in those cases claimed the dilution rather than a dilution analysis being utilized to determine the rights of those either denied the franchise or given a lesser quantum of vote. \textit{But see} Oliver v. Mayor of Savannah Beach, 346 F.2d 133 (5th Cir. 1965) (plaintiffs were not permitted to vote despite owning property because they resided outside the county in which Savannah Beach is located).

\textsuperscript{190} 390 U.S. 474 (1968).

\textsuperscript{191} 436 F.2d 770 (2d Cir. 1971). In \textit{Clark}, the town was primarily empowered to govern those residing outside incorporated villages. The town had two budgets, one of which included the incorporated villages. This budget, the "Town Entire Budget," constituted five percent of the total budget expenses and receipts of the town. In addition, village residents were \textit{entitled} to some town services such as those provided by the town assessor and the town's recreational facilities. \textit{Id.} at 772.

\textsuperscript{192} \textit{Id.} at 772. This reasoning is also the basis for the Supreme Court's decisions in \textit{Cipriano} and \textit{Avery}. 
tion problem and the interests at risk. The language of the Fourth Circuit in *Locklear v. North Carolina State Board of Elections* is, therefore, more poignant in the *Holt* context: "The inevitable consequence of permitting the city electorate to vote for certain members of the county board is to give them a voice in the operation of the county schools and those noncooperative aspects of their operation in which there is no showing that they have any interest." Arguably, granting the franchise to residents of the police jurisdiction in *Holt* would have given them an equal voice in matters outside their representational interest. Tuscaloosa's elected officials daily made regulatory, fiscal, and administrative decisions in which residents of the police jurisdiction were no more interested (and in some cases perhaps less interested) than commuters or temporary visitors. With respect to those decisions, the grant of general franchise rights conceivably would have had one of two effects. First, dilution would occur by giving police jurisdiction residents the equal right to influence political decisions irrespective of whether those decisions would benefit or burden them in any way. Second, those whose constituency included the nonresident voters could have taken these voters' interests into account only when the representative perceived them to be affected. This second possibility, however, would not only be difficult, but would turn republicanism topsy-turvy by bifurcating political accountability under one head.

Under this analysis, the question in *Holt* becomes whether the interests of the police jurisdiction residents were so foreign to the

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193. 514 F.2d 1152 (4th Cir. 1975).
194. *Id.* at 1156 (emphasis added).
195. One commentator has suggested alternatives to an "all or nothing" equal participation right at the municipal level. See Note, *supra* note 138, at 171-78. All of these alternatives with the exception of management by appointed state officials and governance by an appointive special purpose district, assume direct electoral participation by all those governed in the selection of their governors. The validity of these two exceptions depends upon how broadly one reads *Sailors v. Board of Educ.*, 387 U.S. 105 (1967). Under the California Supreme Court's ruling in *People ex rel Younger v. County of El Dorado*, 5 Cal.3d 480, 487 P.2d 1193 (1971), the fourteenth amendment is not implicated when a governing body is appointed and not elected. Notwithstanding, *Sailors* seems to rest on the "non-legislative character" of the chosen officials rather than on the state's choice of an appointed instead of an elected body. 387 U.S. at 108. Apart from the guarantee clause, however, there does not appear to be a theory with which to attack such an appointive system of government. That clause, and analogous clauses in state constitutions, have generally not been interpreted to restrict a state's ability to delegate political power to an appointive body. *See W. WIECEK, supra* note 10, at 254-60. *But cf.* Nahmod, *Reflections on Appointive Local Government Bodies and a Right to an Election*, 11 Duq. L. Rev. 119 (1972) (equal protection, due process, or non-delegation can provide a theory for attacking appointive systems).
everyday political decisionmaking of Tuscaloosa that recognition of their claims would dilute the participatory rights of the city residents, thereby altering their influence over the policies which only affect them. In that respect, Holt fell somewhere between Salyer and Little Thunder v. South Dakota.196 In Salyer, the benefits of and burdens imposed by the governmental entity were confined to the same select few persons and the entity had no interest balancing or redistributive powers. Little Thunder, on the other hand, was an Eighth Circuit decision invalidating a South Dakota statute which granted an "organized" county full governmental powers over a neighboring "unorganized" county without granting the residents of the unorganized county commensurate franchise rights.197

On the spectrum of Salyer to Little Thunder, Holt falls considerably closer to the latter. The only powers which the Holt majority said applied to residents which could not be exercised against nonresidents were ad valorem taxation, zoning, and eminent domain powers. The majority was not totally accurate with respect to two of these three powers. Subdivision regulations could be exercised in the police jurisdiction, as could master plan development regulations "which, in the commission's judgment, bear relation to the planning of such municipality."198 And while it is

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196. 518 F.2d 1253 (8th Cir. 1975).
197. Justice Rehnquist's majority opinion distinguishes Little Thunder on the ground that Holt was not a case in which "a city has annexed outlying territory in all but name." 439 U.S. at 73 n.8. Curiously, however, the majority does not seem to require de facto annexation as a precondition to a successful franchise claim. The same footnote which distinguishes Little Thunder further provides "[n]or do we have here a case like Evans v. Cornman." Id. (emphasis added). This implies that Evans still stands despite the impossibility of characterizing it as a de facto annexation case.

As a separate query, it is puzzling why the Court thought it necessary to deal with Little Thunder and Evans as though the two established unrelated principles. If Evans is still good law after Holt, Little Thunder would be a fortiori. The only factual difference between the cases is that the Evans plaintiffs resided within Maryland's boundaries, 398 U.S. at 421-22, whereas the Little Thunder plaintiffs resided outside the boundaries of the entity in which they sought participation. Compare Justice Rehnquist's language in Holt, 439 U.S. at 68-69. But the significance of "residency" is unclear from Holt's treatment of Evans—"because inhabitants of the NIH enclave were residents of Maryland and were just as interested in and connected with electoral decisions . . . as their neighbors." Id. at 68 (emphasis added). Is residence (a) merely relevant to, (b) presumptive of, or (c) determinative of the right to vote? Furthermore, what role does "interest" play? Can it be used to (a) enfranchise disenfranchised nonresidents, cf. Little Thunder, (b) disenfranchise those who are "residents" but whose interests are not equal to other residents, cf. Holt, 439 U.S. at 69; or (c) merely determine whether the entity's physical boundary line is an arbitrary determinant of the political community? Cf. Myles Salt Co. v. Board of Comm'rs, 239 U.S. 478 (1916). Little Thunder v. South Dakota, 518 F.2d 1253 (8th Cir. 1975).

198. 439 U.S. at 62 n.3.
generally true that Alabama municipalities may not exercise eminent domain powers extraterritorially, they may if land is needed for water supply, sewage or drainage facilities, or for parks and other recreational facilities. But even if the Court was completely correct, the relevance of its statement is not immediately apparent.

If, on the spectrum of Salyer to Little Thunder, Evans v. Cornman is the break point, it is hard to see why Holt should fall on the Salyer side, particularly if the issue is whether the extension of the franchise will dilute the vote of city residents. NIH residents were not subject to ad valorem property taxation, nor, presumably, could their land be taken by the state by eminent domain. Yet that was not determinative of the issue. More importantly, merely because they were not taxed does not mean that the police jurisdiction residents had no interest in the allocation of municipal revenues. They contributed directly to municipal revenues through mandatory licensing fees for operating their businesses in the police jurisdiction and contributed indirectly like those claiming the franchise in Kolodziejski. Moreover, Tuscaloosa's criminal ordinances governed and protected the nonresident Holt plaintiffs in their place of residence. The nonresident plaintiffs, therefore, had a significant interest in both the ordinances' sub-

199. See, e.g., Coden Beach Marina Inc. v. City of Bayon La Batre, 284 Ala. 718, 228 So.2d 468 (1969); City of Birmingham v. Brown, 241 Ala. 203, 2 So.2d 305 (1941).
203. NIH residents were, however, subject to certain state "situs" taxes—taxes imposed because of where income is earned or money spent, e.g., income, gasoline, sales, and use taxes. Evans, 398 U.S. at 424. Commuters and casual visitors are presumably subject to such situs taxes as sales and gasoline taxes. Furthermore, all residents and nonresidents earning income in Maryland are assessed income taxes. Md. Ann. Code art. 81, §§ 287, 294 (1980). Thus, NIH resident's payment of these taxes could not have been the basis for determining that their interests in Maryland's governmental decisions were indistinguishable from those of other residents.
204. It is hard to distinguish on the basis of interest between residents of the NIH, who were taxed because of their physical presence within the legislative domain of Maryland, and the plaintiffs in Holt, who were taxed because of their physical presence within the legislative domain of Tuscaloosa. The license fee cannot be characterized as an exaction for the privilege of doing business rather than a tax; the Supreme Court, in another context, has refused to bottom constitutional rights on such a claim. See Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977). That residents of the police jurisdiction only paid one-half the privilege tax Tuscaloosa residents paid is certainly not indicative of less interest in the city's affairs. It is hard to believe that the Court would have decided Holt differently if Tuscaloosa could have imposed the same fee on police jurisdiction residents as on city residents. Indeed, if Holt would have been decided differently on that basis, the Court's decision is even less comprehensible than I first believed.
stantive provisions and the resources allocated to their enforcement. This interest was indistinguishable from that of the Kolodziejski plaintiffs.

If Kramer is still good law (and there is no reason to doubt that it is), it is irrelevant that the Tuscaloosa residents were affected differently than the police jurisdiction residents. Furthermore, if the political decisions of Tuscaloosa affected the nonresident plaintiffs by requiring regulatory or financial sacrifices in the interests of the larger community, then it is difficult to accept any justification for excluding them from the political community. The Court should have focused on the only determinative question: whether a forced per capita sharing of power with nonresidents would have injected the influence of people with so little at stake in Tuscaloosa's long-term goals that the city's residents would have suffered. The facts in Holt did not present a situation that stark; indeed, it is difficult to see how recognition of the plaintiffs' claim would have politically harmed the city's residents at all. At most, Tuscaloosa residents, like the large rural landowners in Ball, would have lost their questionable prerogative as surrogate representatives of third party interests. And absent any dilution of Tuscaloosa residents' political interests, it is hard to see what or whose interests the Court was protecting in Holt other than a "Hunteresque" interest in federalism. That interest, however, is an irrelevant abstraction when applied to anything other than an attempt to secure local self-government through the fourteenth amendment.

205. It is possible to argue that Holt did not present a compelling case for the extension of the franchise because of "virtual representation." See generally, J. Ely, supra note 1, at 82-87. The same laws and enforcement mechanisms which applied to the plaintiffs also applied to the Tuscaloosa residents. This provided some structural assurance that the plaintiffs' interests would not be derogated to those of the city residents. Phrased another way, there was no reason in Holt to assume that the plaintiffs would be called upon to bear any different or any greater burdens than the city residents. Arguably, therefore, the plaintiffs' lack of franchise produced no harm. This argument seemingly underlies Justice Stevens' concurring opinion which emphasizes the breadth of the plaintiffs' challenge to the facial validity of Alabama's power to delegate extraterritorial powers. 439 U.S. at 77-78.

While I believe Dean Ely is correct in saying that the concept of virtual representation has played and should play some role in the Court's review of legislative action, it is unique, to say the least, to argue that virtual representation should be used to deny equally interested persons the right to vote. Cf. Evans v. Cornman, 398 U.S. 419 (1970) (nonresidents granted franchise because their interests were the same as residents'); Carrington v. Rash, 380 U.S. 89 (1965) (serviceman granted franchise because his interests were the same as residents').

206. See supra notes 164-65 and accompanying text.

207. See supra notes 174-75.
V. Conclusion

I think the Court reached the wrong result in Ball and Holt; however, that is not my essential objection to these cases. My objection focuses on the Court's application of the so-called "interest" exception to Avery v. Midland County. The Court has failed to analyze systematically the interests of those denied the vote and compare them to the interests of those granted the vote. The Court, more often than not, has analyzed the issue in terms of platitudinous abstractions such as whether the functions performed are traditionally governmental. In doing so, the Court avoided defining the competing interests at stake and did not determine the extent to which the plaintiffs' claims, if sustained, would have created a constitutionally recognizable conflict between those interests and those of the enfranchised.

If Reynolds and Avery mean anything, they mean that the state may not deny a claim of equal participation unless a court finds some overriding concern. I have suggested two concerns which may override a claim for equal participation. One is federalism—the right of the state to determine the size and scope of those governmental subunits necessary to fulfill the state's responsibilities. The second, and the more significant, is the right of those presently enfranchised to share power only with others who, like themselves, are required to make sacrifices in order to benefit from membership in the relevant community. Any reconciliation of these sometimes conflicting claims must occur within an analytical framework which avoids "buzz words" like "traditional governmental functions." Instead, the courts must analyze the powers delegated the particular entity, against whom and for whose benefit those powers may be exercised and whether the benefit and burden distribution resulting from the exercise of those powers comports with the manner in which the franchise is distributed.

Of Salyer, Ball, and Holt, only Salyer reached a proper con-

210. See Dixon, Local Representation: Constitutional Mandates and Apportionment Options, 36 GEO. WASH. L. REV. 693, 696–97 (1968). Cases such as Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), and Koplin v. Village of Hinsdale, No. 73C947 (N.D. Ill. April 4, 1974), aff'd mem. 419 U.S. 888 (1974), can be read to say that the concept of one person-one vote will not stand in the way of that, but only that, state interest.
clusion and, seemingly, did so quite accidentally. The statute creating the district mandated that benefits and burdens be distributed only in proportion to the amount of land owned, thereby making the plaintiffs' claim for a per capita franchise diluent of the larger landowners' interests. But in Ball and Holt, the state had determined to distribute the benefits and burdens of the particular entity differently—by a per capita scheme in Ball and randomly in Holt. Having decided on a per capita or random scheme, as the case may be, for allocating governmental benefits and burdens, it is difficult to explain a voting scheme which rests on a factor irrelevant to the allocation of those benefits and burdens.

The absence of a principled approach in Salyer, Ball, Holt, and indeed Kramer has produced the worst of two possible worlds. On the one hand, these cases have produced no law at all, good or bad; taken individually or together they establish neither a rationale for their conclusions nor a principle of analysis. All we have are results, two of which are incorrect. On the other hand, these cases stand as constitutional testimony that single purpose units of local government, whatever their powers, possess a different relationship with their "citizens" than do general purpose units. Worse yet, Holt seems to say that except in the extreme case like Little Thunder, there is no political relationship between such a governmental unit and persons who reside outside its boundaries. Why either proposition is true, or even presumptively true, remains a mystery. To take the mystery out of its results, the Court must do something more than an ad hoc leap from a Salyer to a Ball or from an Evans to a Holt. Even to define the problem in normative terms—the extension of the franchise being "good" and the contraction of the franchise being "bad"—will not do. Because the grant of the franchise to one carries the possibility of diluting the vote of another, there is sometimes "difficulty in determining the direction in which the handle is turning." What is needed is a principle which will permit the Court to analyze the claim for participation not abstractly, not in isolation, but in terms

211. See supra text accompanying notes 102-08.
212. 439 U.S. at 61-62. Randomly does not mean arbitrarily. Rather, it means that not everyone benefits in the same way or to the same extent from each governmental decision made by a general purpose unit of government. Nor, as the facts of Hill, Kolodziejski, and Kramer establish, will all those benefitted be saddled with the burdens to the same extent.
213. The quote is taken out of context from Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 STAN. L. REV. 603, 607 (1975).
of the other interests likely to be affected by the recognition of that claim. The dilution principle accomplishes that.