Who Rules at Home?: One Person/One Vote and Local Governments

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Twenty-five years ago, in *Avery v Midland County*,¹ the United States Supreme Court extended the one person/one vote requirement to local governments. *Avery* and subsequent decisions applying federal constitutional standards to local elections² suggested a change in the legal status of local governments and appeared to signal a shift in the balance of federalism. Traditionally, local governments have been conceptualized as instrumentalities of the states.³ Questions of local government organization and structure were reserved to the plenary discretion of the states with little federal constitutional oversight.⁴ In contrast, *Avery* assumed that local governments are locally representative bodies, not simply arms of the states. *Avery* and its progeny, therefore, imposed new restrictions on state provisions for the organization of local governments. Commentators have expressed concern that rigid application of federal constitutional principles could deprive states and localities of the flexibility essential to make local governments responsive to the tremendous diversity of local conditions.⁵

Has local government structure been federalized by constitutional protection of the right to vote in local elections? Has the

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¹ 390 US 474 (1968).

² See, for example, *Kramer v Union Free School District No. 15*, 395 US 621 (1969); *Cipriano v City of Houma*, 395 US 701 (1969); *Hadley v Junior College District of Metropolitan Kansas City*, 397 US 50 (1970); *City of Phoenix v Kolodziejewski*, 399 US 204 (1970); *Hill v Stone*, 421 US 289 (1975).

³ See, for example, Gerald E. Frug, *The City as a Legal Concept*, 93 Harv L Rev 1057 (1980).

⁴ *Hunter v City of Pittsburgh*, 207 US 161 (1907), best exemplifies this traditional position.

⁵ See, for example, Tom C. Clark, *Symposium—One Man-One Vote and Local Government: Introduction*, 36 Geo Wash L Rev 689 (1968); Comment, *The Impact of Voter Equality on the Representational Structures of Local Government*, 39 U Chi L Rev 639, 639 (1972) ("the majority of commentators now believe that the voter equality requirement is a significant obstacle to the effective functioning of many existing forms of local government and the creation of regional governments"); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U Pa L Rev 1519 (1982).

model of local governments as locally representative democracies supplanted the traditional view of local governments as administrative arms of the state? Certainly, one person/one vote has had a direct impact on many localities. In just the last few years, lawsuits premised on the one person/one vote principle have resulted in the invalidation of New York City's Board of Estimate,⁶ Chicago's school decentralization plan,⁷ the regional government of the Seattle metropolitan area,⁸ and the funding mechanism for Southern California's rapid transit system.⁹ Furthermore, hundreds of other localities now engage in the decennial redrawing of district lines and the consequent alteration of local political power. In each instance, the extension of the franchise or the enforcement of the requirement that votes be equally weighted brings local electoral practices into compliance with the norms of representative democracy that the Supreme Court has mandated for state legislatures.

Nevertheless, the effect of *Avery* on the balance of federal and state power in determining local government structure and on the conceptualization of local government has been less certain and more complex than these publicized cases suggest. The Supreme Court has circumscribed the reach of federal constitutional concern, effectively exempting many local governments and many categories of local elections from strict judicial scrutiny. The federalization of local election law has been partial, and the states retain considerable control over the organization and structure of local governments.

This Article considers the scope of federal constitutional protection of the right to vote at the local level. It examines the difficulties inherent in strictly applying the notion that an equally weighted vote is central to representative government—an idea that emerged from judicial review of the relatively simple legislative arrangements of our national and state governments—to the byzantine set of institutions known as American local government.

⁶ *Board of Estimate of City of New York v Morris*, 489 US 688 (1989). See text accompanying notes 242-48.

⁷ *Fumarolo v Chicago Board of Education*, 142 Ill 2d 54, 566 NE2d 1283 (1990). See text accompanying notes 126-31. See generally John M. Evans, *Let Our Parents Run: Removing the Judicial Barriers for Parental Governance of Local Schools*, 19 Hastings Const L Q 963 (1992).

⁸ *Cunningham v Municipality of Metropolitan Seattle*, 751 F Supp 885 (W D Wash 1990). See notes 131 and 256 and text accompanying note 258.

⁹ *Southern California Rapid Transit District v Bolen*, 269 Cal Rptr 147 (Cal App 1990). This decision was ultimately reversed in *Southern California Rapid Transit District v Bolen*, 1 Cal 4th 654, 3 Cal Rptr 2d 843, 822 P2d 875 (1992) (en banc). See text accompanying notes 150-65.

Local government is strikingly different from other levels of government, and not simply because local governments are territorially smaller. Local government organization does not abide by the "plain vanilla" model¹⁰ characteristic of state or federal government: a single legislative body with general lawmaking powers over a broad jurisdiction with democratic accountability to the residents of that jurisdiction. Instead, specialization, fragmentation, overlap, and boundary change are pervasive characteristics of our local government structure, and they raise considerable conceptual difficulties for resolving questions of representation at the local level.

Local governments are often thought of as little democracies, providing fora for participation, deliberation and collective action concerning a wide range of policy matters. But local governments perform other functions as well. Many thousands of local governments are functionally specialized, limited to providing a particular service or improvement to a discrete subset of the community. The state effort to give special or exclusive representation in the governance of these local units to a constituency limited to fee payors or service recipients conflicts with a view of the locality, modelled on the upper levels of government, as simply a small state, democratically responsible to the territorial jurisdiction as a whole.

Local governments vary in scale, ranging from the neighborhood to the metropolitan region. The large number of overlapping localities in fragmented metropolitan areas often results in local governments affecting areas beyond their borders, and having different degrees of impact on residents within their borders, to an extent far greater than at the state or national level. It is difficult to match jurisdiction and constituency precisely, or to assure that all members of the constituency have the same degree of interest in a particular local government. Claims that particular groups are over- or underrepresented raise knotty problems of determining exactly what a fair representation of groups differentially affected by a particular local government ought to be.

The plasticity of local boundaries presents further questions. Local governments are regularly created, subjected to territorial or

¹⁰ "Plain vanilla" comes from Professor Carol Rose's criticism of the use of the federal Constitution as the standard—or "plain vanilla"—model of a constitution as a basis for critiquing other constitutions. See Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 Nw U L Rev 74 (1989). I would echo but modify her criticism to reflect the fact that, in considering questions of government structure, both state legislatures and Congress are often accorded "plain vanilla" status.

functional modification, combined with other localities, or carved out of pre-existing local entities.¹¹ Who is to participate in decisions concerning local boundary changes? If local residents are given an electoral role, how ought their votes be counted: as the votes of individuals in the electorate of the entire area or as the votes of members of existing communities within the area? There is simply no analogue concerning representation in questions of boundary change at the state or national level.

The fundamental premise of federal voting rights law is that democratic government means government by consent of the governed. As the Supreme Court observed in *Wesberry v Sanders*, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”¹² In its voting cases, the Court has presumed a close nexus of residency within a jurisdiction, the impact of that jurisdiction’s government on residents, and the right to equal representation in the jurisdiction’s elections and government. But due to the variety of local powers and the complexity of local structures, the effects of local government actions, even on residents, are not a simple binary matter of “impact/no-impact.” Local institutional arrangements focusing on service delivery or infrastructure finance, providing for extraterritorial regulation, or authorizing boundary changes raise difficult questions concerning what it means to govern and who is governed by a local decision. In local government cases, the Court has struggled with the relationship between jurisdiction and impact and the implications of this relationship for voting rights—particularly where a local government has sharply different degrees of impact on differently situated residents within its borders.

A rigid application of the federal constitutional standard for the protection of the franchise to all local elections could have resulted in close judicial scrutiny of a wide variety of institutional arrangements central to local government but alien to the state or federal experience. Instead, the Supreme Court limited constitutional concern to the local government issues comparable to those found at the state and national levels—the ongoing governance of general purpose governments. Boundary change, extraterritorial authority, and many special districts, have been defined as largely

¹¹ See, for example, Joel C. Miller, *Municipal Annexation and Boundary Change*, in International City Management Association, *The Municipal Year Book 1986* 72 (ICMA, 1986).

¹² *Wesberry v Sanders*, 376 US 1, 17 (1964).

outside the scope of constitutional protection. This has limited the impact of one person/one vote on many traditional state-authorized local arrangements, preserving considerable flexibility for state regulation of governance at the local level. In so doing, however, the Court has been unable to develop a consistent analysis of how differential government impact should affect voting rights and representation. Rather, the Court has pursued a two-track approach. For one set of local votes, the Court has presumed that all residents are comparably affected by local government actions, has strictly scrutinized deviations from one person/one vote, and has rigidly enforced the federal norm of equal representation. In the other, the Court has applied a much less stringent standard, has deferred to state claims that a locality has sufficiently different degrees of impact on those subject to its actions to justify exclusions from the franchise, and has denied that voting rights have been abridged. The encounter between one person/one vote and American local governments thus tells us something about both the uncertain conceptual underpinnings of our dominant conception of representation and the multiple roles local governments play in American life.

This Article has four parts. Part I examines *Avery v Midland County* and the other Supreme Court cases that extend federal constitutional protection of the right to vote to local elections. These cases develop and implement the model of local democracy in its core area—general purpose governments.

Part II considers the Supreme Court's treatment of some local governments as more akin to private enterprises, and, therefore, exempt from the rule of local democracy. The distinction benefits only landowners, and not other groups with special interests in the quality of particular local services. The lack of a clear principle for determining which governments are "proprietary" and which are "governmental" has, at times, made the distinction difficult to apply. Further, the uncertain scope of the proprietary district exception has validated a legal framework in which important public functions may be broken away from general purpose governments and vested in special units not subject to local democratic control.

Part III addresses the questions of representation raised by extraterritoriality, boundary changes, and overlapping governments. Although these issues often involve general purpose governments subject to one person/one vote, the courts have not considered themselves strictly bound to the democratic model. Instead, the notion of local government as state instrumentality, carrying out the state's police and general welfare functions at the local

level, retains vitality in this setting. In these cases, constitutional protection of the right to vote has been accommodated to the state power to create local governments and to define and alter their jurisdictions and political constituencies.

Part IV considers subunit representation in local governments of regional scope. A central thrust of one person/one vote is the definition of "representation" in terms of population. This may be an obstacle to the formation of regional governments because small localities might refuse to join a regional entity unless they are guaranteed their own distinct voice—larger than their population might warrant—in the resulting area-wide government.¹³ Moreover, citizen understanding of and participation in government decisionmaking may be enhanced where regional government districts are coterminous with community or neighborhood lines, even where neighborhoods differ in population.¹⁴ It is difficult to determine whether the equal population rule has, in fact, obstructed the formation of metropolitan area governments, because few such governments were considered either before or after *Avery*. The local aversion to regional government has been sufficiently great that it is difficult to conclude that one person/one vote alone is responsible for the lack of movement towards regional government. Nevertheless, a doctrine flexible enough to accommodate landowner-ship-based governments and considerable state discretion in the allocation of the franchise in boundary changes or instances of overlapping governments has been far more rigid in its refusal to recognize the possibility of distinctive political subdivision interests in regional elective local governments. Today's metropolitan areas face political, economic and social problems that transcend local boundaries. There is a growing need for representative governance structures with the capacity and perspective to address issues of regional scope, while maintaining local units that can continue to focus on matters of community or neighborhood significance. Thus, I will suggest the need for a fourth model of local government—regional federation—to supplement the existing models of local government as local democracy, proprietary enter-

¹³ See, for example, *Avery*, 390 US at 493-94 (Harlan dissenting); Robert G. Dixon, Jr., *Rebuilding the Urban Political System: Some Heresies Concerning Citizen Participation, Community Action, Metros, and One Man-One Vote*, 58 Georgetown L J 955, 974-84 (1970).

¹⁴ See, for example, Joseph P. Viteritti, *The New Charter: Will It Make a Difference?*, in Jewel Bellush and Dick Netzer, eds, *Urban Politics New York Style* 413, 426 (M.E. Sharpe, 1990) (discussing lack of coterminality between community service districts and city council districts).

prise, and state agency in order to comprehend fully the variety of roles local governments can play in the American political system.

The Conclusion offers some brief observations concerning the insights into both the organization of local government law and the conceptual underpinnings of the one person/one vote doctrine gained from examining the application of one person/one vote to local governments. The difficulties of applying the one person/one vote doctrine to local governments illuminate the multiple functions and sometimes conflicting conceptions of local government at work in our system and raise questions about the place of the one person/one vote doctrine itself as a bedrock norm in our theory of representation.

I. ONE PERSON/ONE VOTE AND THE MODEL OF LOCAL DEMOCRACY

In a series of cases in the late 1960s and early 1970s, the Supreme Court subjected local governments to the same constitutional standards of representation and enfranchisement as the states. The Court required representation on local government bodies to comply with one person/one vote and subjected restrictions on the local franchise to exacting judicial scrutiny, sustaining them only if necessary to further a compelling state interest. In developing the model of local democracy, the Court steered away from the dizzying variety of local elections and refused to allow the states to give greater representation to groups the states deemed primarily interested in a particular government's actions. Instead, the Court emphasized the extent to which a local government's actions affect the people of the jurisdiction as a whole rather than any subset of the community; it gave an expansive definition of the sort of interest in local government action that could be the basis of an adult resident's claim to the local franchise; and it treated the state's decision to fill an office or make a decision through a local election as creating a strong presumption in favor of participation in the election by the entire local electorate.

A. *Avery v Midland County* and General Purpose Governments

The Court began the extension of one person/one vote to local governments in 1968, four years after it had first developed the principle in the context of elections to state legislatures¹⁵ and the

¹⁵ *Reynolds v Sims*, 377 US 533 (1964). See also *Gray v Sanders*, 372 US 368 (1963) (applying one person/one vote to a county unit system of counting votes for party primary elections of United States Senators and other statewide officers).

House of Representatives.¹⁶ In *Avery v Midland County*,¹⁷ the Court examined the Commissioners Court of Midland County, Texas, which had been districted to enable a tiny rural minority to elect a majority of the body's members.¹⁸ Three arguments might have preserved this arrangement: that local governments are not covered by the equal population principle at all; that even if some local governments are subject to one person/one vote, the commissioners court is not a legislative body and, therefore, is exempt from the rule; and that even if federal constitutional standards for representative bodies apply to the commissioners court, the state could bias the districting in favor of rural residents because the county's primary function is to provide services and regulation for rural areas.

¹⁶ *Wesberry*, 376 US 1.

¹⁷ 390 US 474 (1968). In 1967, the Supreme Court had considered four cases that raised districting questions within local governments, but "refused to meet the issue squarely." Robert G. Dixon, Jr., *Local Representation: Constitutional Mandates and Apportionment Options*, 36 Geo Wash L Rev 693, 697 (1968). Two of these cases, *Moody v Flowers and Board of Supervisors v Bianchi*, were dismissed together on jurisdictional grounds. 387 US 97 (1967). In the other two cases, *Sailors v Board of Education of Kent County*, 387 US 105 (1967), and *Dusch v Davis*, 387 US 112 (1967), the Court "reserved the question whether the apportionment of municipal or county legislative agencies is governed by *Reynolds v. Sims*," *Dusch*, 387 US at 114, but then "assume[d] *arguendo*" that *Reynolds* did apply to local elections, *Sailors*, 387 US at 109, 111; *Dusch*, 387 US at 114, and found that the representation systems challenged in the two cases were not unconstitutional. *Sailors* concerned a Michigan system for selecting members of a county school board that the Court deemed "basically appointive rather than elective." 387 US at 109. *Dusch* involved elections to a local council in which all council members were elected at large, but some were required to be residents of territorial subunits that varied widely in population. The Court found that the subunits were "merely [] the basis of residence for candidates, not for voting or representation," 387 US at 115, quoting *Fortson v Dorsey*, 379 US 433, 438 (1965); thus, there was no one person/one vote problem.

¹⁸ The Commissioners Court was composed of five members. One, the County Judge, was elected at large from the entire county and in practice cast a vote only to break a tie. The other four were commissioners elected from districts. One district, consisting of the city of Midland, had a population of 67,906. The other three districts had a total population of 2094. 390 US at 476.

The Texas Constitution provided for the division of the counties of Texas "into four commissioners precincts" for the election of commissioners but did not provide that districts be of equal population. *Avery v Midland County*, 406 SW2d 422, 425 (Tex 1966) (quoting Tex Const, Art V, § 18). The *Avery* trial court had found that the Midland County apportionment had been adopted "for political expediency, to maintain the status quo" and reflected "a gross abuse of . . . discretion" by the commissioners court. *Id.* at 424-25 (quoting trial court findings). The trial court invalidated the apportionment. *Id.* The Texas Supreme Court agreed that the apportionment was invalid but rejected the argument that either the federal or the state constitution required districts of equal population, determining that "the convenience of the people in the particular circumstances of a county may require—and constitutionally justify—a rational variance from equality in population." *Id.* at 428. The Texas Supreme Court required that districting be based on the "number of qualified voters, land areas, geography, miles of county roads and taxable values." *Id.*

The first argument was premised on the traditional view, articulated in *Hunter v City of Pittsburgh*,¹⁹ that localities are juridically mere administrative arms of the state, not autonomous governments. The Supreme Court had reaffirmed just this point in *Reynolds v Sims*,²⁰ explaining that although representation in Congress could be based on states,²¹ state legislative districts must be based primarily on population and not on the representation of local governments. As *Reynolds* noted, citing *Hunter*, states are "separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government," but "[p]olitical subdivisions of States—counties, cities, or whatever . . . have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions."²² As "the fountainhead of representative government in this country,"²³ state legislatures must be subject to the equal population principle, but local governments might not be so constrained since they exist to carry out the *state's* governmental functions.

The *Hunter* view of local government as a creature of the state suggests that a state ought to be able to design local governments along the lines it deems appropriate to effectuate its purposes. *Avery*, however, rejected this line of argument. Although the Constitution does not require the states to have local governments, to make them locally elective or locally accountable, or to grant them lawmaking autonomy, the Supreme Court found that the states, in fact, "characteristically provide for representative government—for decisionmaking at the local level by representatives

¹⁹ 207 US 161 (1907).

²⁰ 377 US 533, 575 (1964).

²¹ Each state regardless of population is represented by two Senators. Each state regardless of population is guaranteed one seat in the House of Representatives. The guarantee of one seat per state means that House district populations will differ somewhat from state to state. The one person/one vote principle has been interpreted to require strict intra-state equality of district population, not strict interstate district equality.

²² 377 US at 574-75. This discussion of the nature of local governments arose in the context of the Court's rejection of the so-called "federal analogy" as a defense for malapportioned state legislatures. Proponents of the federal analogy argued that when states utilize the county as a unit of representation in the legislature—designing state senates on a one county/one vote rule and state lower houses with a minimum of one representative per county and the remaining seats distributed among counties according to population—they are simply following the model set forth in the federal Constitution for the structure of Congress. See *id.* at 571-72. In dismissing the federal analogy, the Court sharply contrasted the "sovereign" aspect of the states with the distinctly subordinate status of local governments. *Id.* at 574-75.

²³ *Id.* at 564.

elected by the people.”²⁴ In practice, local governments “universally” exist, enjoy considerable “policy and decisionmaking” autonomy, and operate as representative institutions.²⁵ States that provide for elective local governments must abide by the constitutional rules for representative democracies. Thus, the equal population principle applies at the local level.²⁶

The second argument grew out of an earlier hint by the Supreme Court that one person/one vote might be limited to “legislative” bodies and thus might not apply to “administrative” entities.²⁷ The Texas Supreme Court had determined that the county commissioners court was essentially an administrative agency, not a local version of the state legislature. According to the Texas court, “[t]he primary function of the commissioners court is the administration of the business affairs of the county. Its legislative functions are negligible and county government is not otherwise comparable to the legislature of a state.”²⁸

The commissioners court blended administrative and legislative powers. It lacked general lawmaking authority, but it was responsible for equalizing tax assessments and setting the tax rate pursuant to a state formula, conducting elections, letting contracts, issuing bonds, adopting a county budget, and administering peacekeeping, public welfare services, roads, and bridges.²⁹ Many other local governments do not abide by the tripartite separation of powers characteristic of the federal and state governments. Local government is marked by a profusion of boards, commissions, and authorities that combine legislative and executive authority

²⁴ *Avery*, 390 US at 481.

²⁵ *Id.*

²⁶ *Id.* The Court also dismissed the argument that local majorities are adequately protected by their ability to seek state legislative restructuring of local governments to prevent malapportionment. One argument for judicial enforcement of the one person/one vote principle at the federal or state level is the need for some constitutional rule that prevents a current legislative majority from manipulating the electoral rules to entrench itself. The malapportionment of a local governing body is subject to correction by the state. Indeed, in the aftermath of *Reynolds v Sims*, the residents of the urban portion of Midland County, or of other rural-dominated malapportioned counties, could have sought redress from a state legislature comporting with the principles of equally populated districts and majority rule. In finding that one person/one vote is a constitutional prerequisite for democratic local governments, the Court determined that a properly apportioned state legislature could not authorize a malapportioned local body. *Id.* at 481 n 6.

²⁷ *Sailors*, 387 US at 108, 110 (referring to the “nonlegislative character” and “administrative functions” of a county board of education).

²⁸ *Avery*, 406 SW2d at 426 (citation omitted).

²⁹ *Avery*, 390 US at 483.

over various governmental functions.³⁰ In some areas there might be no one local body with broad enough authority to be deemed the local equivalent of the state legislature.

Avery rejected the effort to confine the one person/one vote principle to legislative bodies. Instead, the Court catalogued the commissioners court's powers, found it had authority "to make a large number of decisions having a broad range of impacts,"³¹ and, therefore, held that it must comply with the "one ground rule for the development of arrangements of local government"—one person/one vote.³²

The third argument contended that a county government, unlike a state legislature, could be structured to favor a particular constituency because that constituency has a particular stake in the county government's operation. Texas, like most other states, is entirely subdivided into counties. In a sense, counties appear to be in the same relation to the state as states are to the nation. But, whereas only one state government has jurisdiction in any given state, there was another general-purpose local government in Midland County—the City of Midland. City dwellers in Midland County received most of their services from, and engaged in collective local decisionmaking through, their own city government. The commissioners court, although possessing legal jurisdiction over both city and noncity areas of the county, was in practice the local government for the rural areas.³³ According to the Texas Supreme Court, the functions that fell within the commissioners court's limited jurisdiction—"roads, bridges, taxable values of large land areas—disproportionately concern[ed] the rural areas."³⁴ If representation in the commissioners court were based solely on population, "[t]he voice of the rural areas [would] be lost for all practical pur-

³⁰ As the Supreme Court noted, local governments "cannot easily be classified in the neat categories favored by civics texts." *Id.* at 482.

³¹ *Id.* at 483.

³² *Id.* at 485.

³³ *Avery*, 406 SW2d at 428. As the Texas Supreme Court had determined, "[t]heoretically, the commissioners court is the governing body of the county But developments during the years have greatly narrowed the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county."

³⁴ *Id.* The county government did wield considerable power over city residents, but most of those powers were in the hands of officials who were elected on a countywide basis, with city dwellers enjoying their proportionate share in the county electorate. These officials included the assessor and collector of taxes, the county attorney, the sheriff, the treasurer, the county clerk, and the county surveyor. *Avery*, 390 US at 505 (Fortas dissenting). According to the Texas Supreme Court, "the various officials elected by all the voters of the county have spheres that are delegated to them by law and within which the commissioners court may not interfere or usurp." *Avery*, 406 SW2d at 428.

poses.”³⁵ Thus, the Texas court concluded that some districting bias in favor of rural residents was appropriate to assure rural residents effective representation in their own local government.

The United States Supreme Court, however, focused on the commissioners court’s potential to affect all county residents. The commissioners court may have attended only to its rural constituents, but it possessed authority to make “a substantial number of decisions that affect all citizens,” including city residents.³⁶ The Court reversed the Texas Supreme Court’s reasoning, seeing in the commissioners court’s concentration on rural matters not a justification for continued rural domination but the baleful consequences of past malapportionments that gave rural residents the upper hand in deliberations.³⁷ The Midland County situation may have too closely resembled the rural domination of state legislatures, which *Reynolds* had so recently and controversially invalidated, to have been sustained, even though the presence of another local government that provided city residents with their own general purpose government could have provided the basis for a different decision.

The Court left open the possibility that in another setting differences in governmental impact might justify departures from equal population representation. For “a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents,” those more affected by the government’s decision might be given a greater electoral voice than those less affected.³⁸ But, emphasizing the broad formal powers of the commissioners court over city residents, the Court found that all citizens of the county, including the city dwellers, were affected by the county unit’s powers.³⁹

B. Applying *Avery* to Special Purpose Elections and Special Purpose Districts

After *Avery*, a central theme would be the tension between state efforts to design local governments serving particular local constituencies (and arranging systems of local voting and representation accordingly), and the claims by other local residents that they are sufficiently affected by a local unit’s action that they too

³⁵ *Id.*

³⁶ *Avery*, 390 US at 484.

³⁷ *Id.*

³⁸ *Id.* at 483-84.

³⁹ *Id.* at 484.

ought to be enfranchised or equally represented. How the Court assessed the extent of the impact of a particular locality's action, and the nature of the burden of proof it placed upon the state, would be pivotal in determining whether the state could design local elections or governments accountable to particular constituencies.

*Cipriano v City of Houma*⁴⁰ and *City of Phoenix v Kolodziej-ski*⁴¹ considered state laws that limited the vote in municipal bond issue elections to taxpayers—the vestige of a long history of property-based voting in municipal elections. This tradition reflects both the role of property owners as providers of the principal source of local government revenue and the function of municipal governments of providing services to property.⁴²

Cipriano involved Louisiana laws that allowed only property taxpayers to vote in elections called to approve the issuance of revenue bonds by a municipal utility. The Louisiana rule effectively excluded about sixty percent of the city's registered voters from the bond issue election.⁴³ No federal constitutional provision requires popular approval of the decision to incur debt, and the bond issue vote was merely a "limited purpose election" rather than an election to the city's governing body. Nevertheless, the Court determined that because the right to vote had been granted to some and not to others, strict scrutiny applied and the restriction could be sustained only if necessary to promote a compelling state interest.⁴⁴

The Court rejected the city's contention that property owners had a "special pecuniary interest" in the efficient operation of the utility system and, thus, a special stake in the outcome of the bond election.⁴⁵ The revenue bond would be financed by charges imposed on utility users, and both property owners and non-property owners used the utility system and paid utility bills. Although the profits from the utility system's operations were paid into the general fund of the city and so could be used to reduce the burden on property owners who paid the taxes that financed city services, that did not create a sufficiently great distinction between the interests of property owners and the rest of the community.

⁴⁰ 395 US 701 (1969).

⁴¹ 399 US 204 (1970).

⁴² See also *Hill*, 421 US 289 (invalidating Texas requirement of concurrent majorities of all voters and of taxpayers to approve bond issue).

⁴³ *Cipriano*, 395 US at 705.

⁴⁴ *Id.* at 704.

⁴⁵ *Id.*

City of Phoenix was harder than *Cipriano*⁴⁶ because the case concerned an election called to authorize the issuance of general obligation bonds. Arizona, along with thirteen other states,⁴⁷ limited the franchise in some or all general obligation bond issue elections to qualified voters who also paid real property taxes to the municipality. Under Arizona law, property taxes were to be levied to service this indebtedness.⁴⁸ Property taxpayers, thus, would be directly burdened by the bond issue. Moreover, the general obligation bonds were secured by the general taxing power of the municipality. The bonds were "in effect a lien on the real property subject to taxation by the issuing municipality,"⁴⁹ so that the property taxpayers were ultimately at risk for repayment of the debt.

Although the Court recognized that "owners of real property have interests somewhat different from the interests of non-property owners,"⁵⁰ *City of Phoenix* followed *Avery* in assuming that the community-wide consequences of the local vote outweighed any differences in impact the bond and taxes might have for property owners. The Court looked first to the municipal improvements that would be financed by the bond issue and found that the benefits would accrue to property owners and nonowners alike. Because all residents would be "substantially affected" by the outcome of the election, "presumptively" the Constitution would not permit the exclusion of qualified electors from the franchise.⁵¹

Turning to the financial burden the bonds would impose, the Court noted that although the nominal source of revenue for debt service was the property tax, in practice Phoenix had been collecting about half the revenues it needed to repay its debts from other local taxes, which were paid by nonowners as well as owners of real property. More importantly, the Court determined that even if all the revenues to service the debt were to come from the property tax, that still would not justify the discrimination in the municipal

⁴⁶ *Cipriano* was the only one of the six local government one person/one vote decisions in the period from 1968 through 1971 in which there was no dissent. Justices Harlan, Stewart, and Fortas dissented in *Avery*, 390 US at 486, 495, 509 (respectively). Justices Harlan and Stewart and Chief Justice Burger dissented in *City of Phoenix*, 399 US at 215. Justices Black, Harlan, and Stewart dissented in *Kramer*, 395 US at 634. Justices Harlan and Stewart and Chief Justice Burger dissented in *Hadley v Junior College District*, 397 US 50, 59 (1970). Justices Brennan and Douglas dissented in *Abate v Mundt*, 403 US 182, 187 (1971).

⁴⁷ *Id.* at 213 n 11.

⁴⁸ *City of Phoenix*, 399 US at 205. The city was legally privileged to use other revenues for this purpose. *Id.*

⁴⁹ *Id.* at 208.

⁵⁰ *Id.* at 212.

⁵¹ *Id.* at 209.

franchise because “a significant part of the ultimate burden” would be passed along by residential property owners to their tenants and by commercial property owners to the Phoenix residents who consumed the goods and services they produced.⁵² The Court made little effort to substantiate its postulate that the incidence of the property tax was borne by the community as a whole rather than just the taxpayers, but it noted that the parties had stipulated that real property taxes were a cost of doing business for landlords “and as such ha[ve] a material bearing” on rents.⁵³ The Court did not discuss competition in the Phoenix rental market or the extent to which goods and services produced by Phoenix commercial property owners were consumed within the city rather than exported. Instead, the Court appeared simply to assume as a matter of moderately sophisticated common sense that the debt service burden, like the benefits from new facilities, would be widely diffused throughout the entire community.

Nor was the Court persuaded by the argument that the general obligation bond was a “lien” on property within the city “in the sense that the issuer undertakes to levy sufficient taxes to service the bond.”⁵⁴ The lien theory was predicated on “the risk of future economic collapse that might result in bond obligations becoming an unshiftable, unsharable burden on property owners.”⁵⁵ The Court was unwilling to base a limitation on the municipal franchise on such apocalyptic reasoning. As in *Avery*, the Court would not tolerate the continuation of a longstanding structural preference for one group within the community—even a group that might be more interested in or at risk from government action—in the local electoral process.

In *Kramer v Union Free School District No. 15*,⁵⁶ the Supreme Court again presumed that a local government’s action has a community-wide impact. *Kramer* involved a New York law that limited the right to vote in school board elections to the owners or renters of taxable property in the school district and to the parents of children enrolled in the district’s schools. The plaintiff was an otherwise eligible voter who had no children, lived with his parents, and neither owned nor leased taxable property.

⁵² Id at 210-11.

⁵³ Id at 210 n 6.

⁵⁴ Id at 212.

⁵⁵ Id.

⁵⁶ 395 US 621 (1969).

The Court could have treated the school district as a *Hunter*-style state instrumentality rather than as a local organ. In New York and most other states, education is a subject of plenary state power. *Avery* had cited the state practice of according localities home rule to justify the one person/one vote requirement,⁵⁷ but state control of education is typically unconstrained by any state constitutional protection of local autonomy. School boards have limited authority, do not enjoy home rule status, and are generally subject to considerable oversight by the state.⁵⁸

Kramer, however, dismissed the relevance of the differences between a school board and a city or county government. Strict judicial scrutiny of the limitation on the franchise was required, not because of “the subject” of the election, but because of the fact of an election.⁵⁹ The use of a local election to fill the seats on the school board made the school board a locally representative body. The state was not required to provide for an elective school board,⁶⁰ but having chosen to make the school board democratically accountable to a local electorate; the state’s definition of the electorate was subject to federal constitutional standards. The disenfranchisement of some adult resident members of the community would trigger close judicial examination.

The state defended its franchise requirement by arguing that the resulting school district electorate was the portion of the community “primarily interested in” and “primarily affected” by school board elections—parents and the direct and indirect payers of the property tax.⁶¹ In general, those who use or pay for, even indirectly, the district’s single service, would have a significantly greater stake in the operation of the local school system than other members of the community. Moreover, because of their enhanced interest, these groups ought to be willing to put in more time and effort to study school issues, deliberate, and pursue efficient and effective school policies. Indeed, the parents and payors arguably had an interest in not having their voice in school affairs diluted by those lacking a comparably strong connection to the schools.

The Court declined to decide whether a state has a compelling interest in limiting the local franchise to a “primarily interested”

⁵⁷ 390 US at 481.

⁵⁸ Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 Conn L Rev 773, 780 (1992).

⁵⁹ *Kramer*, 395 US at 629.

⁶⁰ *Id* at 628-29. See also *Cipriano*, 395 US at 704.

⁶¹ *Kramer*, 395 US at 630-32.

constituency. Instead, the Court found that the state had failed to align the franchise precisely with the group primarily interested; that is, the state had not enfranchised all those, and just those, "primarily interested" in school board elections. The state included those with "a remote and indirect interest in school affairs and, on the other hand, exclude[d] others who have a distinct and direct interest in the school meeting decisions."⁶²

The Court, however, never defined what constitutes an "interest" sufficient to justify a claim to the franchise in a special district election. Who had been enfranchised despite "a remote and indirect interest in school affairs?" In a footnote, the Court noted that "an uninterested unemployed young man who pays no state or federal taxes, but who rents an apartment in the district, can participate in the election."⁶³ Of course, in *City of Phoenix* the Court assumed that property taxes were passed along to just such renters; moreover, the plaintiff in *Kramer* had argued that he, too, was affected by the property tax, even though he neither paid it nor rented taxable property, because property tax levels affect the price of goods and services in the community.⁶⁴ In what way, then, was the "uninterested unemployed young man" actually uninterested if his rent was affected by school district tax levels? Similarly, in the same footnote the Court described the plaintiff as "interested in and affected by school board decisions,"⁶⁵ without ever indicating how the plaintiff was affected or what his interest was if he neither used the school district's services nor paid for them. Although it may be argued that all area residents are intrinsically affected by the quality of the local elementary and secondary school system, the Court did not justify its decision in these terms.⁶⁶ Instead, the Court's use of the term "interest," and its contrast between *Kramer* and his fictional unemployed counterpart, suggests that the relevant interests were subjective states of mind, rather than objective ties to school board operations. *Kramer* was attentive to and concerned about local school affairs. He was, therefore, "interested." His fictional unemployed counterpart was indifferent when the subject of education came up and therefore, not "interested." Thus, the state statute had failed to

⁶² Id at 632.

⁶³ Id at 632 n 15.

⁶⁴ Id at 630.

⁶⁵ Id.

⁶⁶ The Court noted that *Kramer* had framed his claim to an interest in school board operations in these terms. Id at 630. But the Court simply stated *Kramer's* contention of interest without commenting on it.

discriminate with sufficient precision when it sought to vest the school board franchise only in those "interested." *Kramer's* subjective approach to "interest" would make it impossible to so limit the franchise if any resident of the community, who is otherwise eligible to vote, can claim to be "interested" in the subject of the election.

Unlike the disenfranchisements or dilutions in other cases, there was nothing especially troubling about the franchise restriction in *Kramer*. The state had not excluded any traditionally victimized groups, such as women or racial minorities. There was no entrenchment of a territorial minority whose interests were arguably adverse to the demographic majority, as in the rural-dominated malapportioned bodies at issue in *Reynolds* and *Avery*. There was no class discrimination, as in the exclusion of nonowners of property or nonpayers of local taxes; the state permitted renters and propertyless parents to vote in school board elections. By applying "exacting" review to the franchise limitation in this context, *Kramer* underscored the significance of the Court's presumption that all adult residents of a local jurisdiction are comparably affected by and interested in that jurisdiction's governance.

Arguably, the public school district is a special case. Public elementary and secondary education is probably the most important locally provided service. Despite formal state control, the states have generally chosen to entrust substantial administrative and fiscal responsibilities to local school districts. Local control has been a highly prized value in elementary and secondary education and, although local control is often associated with parental control, it has been asserted that a public school system "has a more pervasive influence in the community than do most other" special districts.⁶⁷ But in *Hadley v Junior College District of Metropolitan Kansas City*,⁶⁸ the Court extended one person/one vote to a district with far less impact on most local residents and further removed from the traditional core functions of local government—a junior college district.

Hadley concerned the apportionment of the six-member board of trustees of the Metropolitan Kansas City Junior College District. The junior college district was composed of eight local school districts. The largest component school district received three of the seats, even though it had sixty percent of the population base.

⁶⁷ 395 US at 640 n 9 (Stewart dissenting).

⁶⁸ 397 US 50 (1970).

The other seven districts shared the remaining three seats, although they had only forty percent of the population base.⁶⁹

Following *Kramer*, the Court treated the fact that the junior college trustees were elected as dispositive. “[A]s a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions,” each qualified voter must be entitled to cast an equally weighted vote.⁷⁰ The Court left open the possibility “that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* [] might not be required.”⁷¹ But junior college trustees were governmental officials “in every relevant sense of that term.”⁷²

The Metropolitan Kansas City Junior College District was the first local government the Court examined in a one person/one vote case that had been created as an aggregation of other, smaller constituent local units. The Court did not see in the federative nature of the junior college district any justification for a departure from one person/one vote. The junior college district had resulted from a local referendum involving the component smaller school districts, and the trustee board structure was a compromise between the interests of large school districts and smaller ones. More populous districts were assured their own distinct seats on the board, whereas the smaller school districts were aggregated into one election district. But the larger districts received less than

⁶⁹ Missouri law provided for the allocation of seats on the board of trustees based on “school enumeration,” that is, the number of persons between the ages of six and twenty. If no one of the component school districts had one-third of the total school enumeration of the junior college district then all six seats would be filled at large. If, however, a district had at least one-third but less than one-half of the total enumeration, it was entitled to two seats, with the others filled at large from the other districts. If a district had at least one-half but less than two-thirds of the enumeration, it received three seats. If a district had more than two-thirds of the enumeration, it received four seats. For each apportionment, then, the number of seats allocated to a populous district was at the bottom end of its range. 397 US at 56-57. The Kansas City school district contained approximately 60% of the school enumeration, so voters in that district could elect three of the six junior college trustees. The remaining seven districts, with 40% of the enumeration, received the other three seats. *Id.* at 56-57.

The Court questioned but did not decide whether school enumeration figures and not population could be used as a basis for apportionment. *Id.* at 57-58 n 9.

⁷⁰ *Id.* at 56. The Court held there were no “judicially manageable standards” to determine the importance of an office or to distinguish for apportionment purposes between “legislative” and “administrative” officials. *Id.* at 55.

⁷¹ *Id.*

⁷² *Id.* at 56.

their population share and the smaller districts correspondingly more, although the extent of deviation was controlled so that larger districts would never be underrepresented by more than 16 $\frac{2}{3}$ percent, and the smaller districts would never be overrepresented by more than 16 $\frac{2}{3}$ percent more⁷³—a far cry from the malapportionment in *Avery* where five percent of the population received seventy-five percent of the seats on the commissioners court. Some deviation from equal population representation was inevitable so long as the junior college board was composed of constituent school districts of substantially differing populations and the constituent school districts were units of election for some board seats. As Justice Harlan pointed out in dissent, had the state corrected the underrepresentation of the largest district while still using school districts as election units and not changing the board's size, then the largest district would have been overrepresented.⁷⁴

Perhaps the Court was suspicious of a "built-in bias in favor of small districts,"⁷⁵ which may have conjured up the pro-rural preference of the apportionment schemes invalidated in *Reynolds* and *Avery*. In any event, the deviation from equality was deemed too substantial for the general principle of equally weighted votes. The federative structure of the board and the possibility that the apportionment scheme might have been a necessary inducement to some of the component districts to join the regional entity were treated as irrelevant to the constitutional question. In declining to liberalize the standard of review for federative governments, *Hadley* limited the options for the representation of constituent units in regional entities.⁷⁶

⁷³ Id at 56-57.

⁷⁴ Id at 68.

⁷⁵ Id at 58.

⁷⁶ A year after *Hadley* the Supreme Court slightly liberalized its approach to the representation of subunits in larger local governments. *Abate v Mundt*, 403 US 182 (1971), involved the Board of Supervisors of Rockland County, New York. The Board had traditionally consisted of the supervisors of each of the county's five constituent towns. "The result [had] been a local structure in which overlapping public services are provided by the towns and their county working in close cooperation." Id at 183. The five towns, however, were significantly unequal in population. Rockland sought to comply with *Avery* while continuing to use the towns as units of election to the Board. The smallest town elected one supervisor and the other towns became multimember districts. Nevertheless, adherence to town lines resulted in some deviation from mathematical equality and, thus, overrepresentation relative to population for some towns and underrepresentation for others. The total deviation from population equality, 11.9%, was greater than any the Supreme Court had upheld since it had articulated the one person/one vote rule. The Court, however, sustained the plan, finding that the benefits of respecting town lines, the "long tradition of overlapping func-

Kramer's and *Hadley's* stress on the fact of election, rather than the subject of the election, as the trigger for strict judicial review; *Hadley's* view that a junior college district performs governmental functions that require its representation structure to conform to one person/one vote; and *Kramer's* expansive definition of the sort of interest that would give an otherwise qualified local resident a claim to an equally weighted vote cast considerable doubt over the validity of restrictions in thousands of other special district elections. The dissenters in *Kramer* and *Hadley* expressed the fear that the decisions would bar states from limiting special district electorates to those who receive a district's services or pay for its operations.⁷⁷ The federal norm of full enfranchisement of the adult residents of the jurisdiction and equally weighted voting would appear to be applicable to virtually all local governments. *Kramer* and *Hadley*, however, proved to be the high-water mark in the Supreme Court's treatment of local governments as local democracies. The Court subsequently developed a new model of local government not subject to these norms, thus permitting the creation and survival of large numbers of local governments with specialized constituencies.

II. SPECIAL DISTRICTS AND THE MODEL OF PROPRIETARY GOVERNMENT

There are nearly 30,000 special districts in the United States, and the special district is our most rapidly growing form of local government.⁷⁸ For voting rights and representation purposes, the Supreme Court has conceived of some special districts as more like

tions" in Rockland County, and the lack of built-in favoritism for any particular towns justified the population deviation. *Id.* at 187.

The value of *Abate* as the basis for a model of local federative or regional government, however, is uncertain. The Court noted that "because [] all governmental entities are interrelated in numerous ways," it would be hesitant to accept the argument that intergovernmental coordination is a sufficient basis for greater use of small unit representation in larger local governments. *Id.* at 186. Rockland County's "long tradition" was a crucial fact supporting the outcome in *Abate*. Subsequently, the Court held that a state's interest in respecting political subdivisions may justify some modest departure from population equality in a state or local legislative body. But population equality remains the dominant criterion in legislative apportionment and the representation of political subdivisions is quite limited. See *Mahan v. Howell*, 410 US 315, 329 (1973) (16.4% deviation from equality in apportionment approaches, but does not exceed tolerable constitutional limit).

⁷⁷ *Kramer*, 395 US at 640 n 9 (Stewart dissenting); *Hadley*, 397 US at 61 (Harlan dissenting).

⁷⁸ See, for example, David L. Chicoine and Norman Walzer, *Governmental Structure and Local Public Finance* 8-16 (Oelgeschlager, Gunn, and Hain, 1985); William G. Colman, *State and Local Government and Public-Private Partnerships* 22 (Greenwood, 1989).

private enterprises than governments. The Court initially employed this model to exempt from the rigors of strict judicial scrutiny special districts created to aid agricultural development in sparsely populated areas. These districts gave landowners control over governmental subunits with authority limited to the storage, reclamation, and provision of water for farming. The Court, however, subsequently extended the proprietary model to a district that provides nonagricultural services, operates in an urban setting, and overlaps general purpose governments.

Although not all special districts have been treated as proprietary governments and many do not utilize landowner voting, the proprietary cases influence contemporary understandings of local government. The proprietary model underscores the continuing power of the idea, undercut in *Kramer* and the municipal bond cases, that those who have the primary financial stake in local operations ought to have a controlling voice in governance decisions. Given the power of the states to generate special districts and to place government functions in proprietary special districts that overlap or are coterminous with general purpose governments subject to the rules of democratic representation, it will sometimes be difficult to determine whether a particular local election will be subject to proprietary or democratic rules. With the increased reliance on special districts to fund public infrastructure,⁷⁹ there may be a conflict between the imperatives of financing public services and improvements and the normative commitment to participation by the community as a whole in decisions concerning the scope and financing of public facilities.

A. The Emergence of the Proprietary Model

In the Western states there are more than 700 specialized local governments created to manage that arid region's scarce water resources.⁸⁰ These governments plan and undertake projects for the acquisition, appropriation, diversion, storage, reclamation, conservation, and distribution of water and for irrigation. Typically, these districts may condemn land, issue debt, and impose assess-

⁷⁹ See, for example, Virginia Marion Perrenod, *Special Districts, Special Purposes: Fringe Governments and Urban Problems in the Houston Area* chs 1, 2, 5 (Texas A&M, 1984); John J. Harrigan, *Political Change in the Metropolis* 263-65 (Little, Brown, 4th ed 1989).

⁸⁰ See Tim De Young, *Governing Special Districts: The Conflict Between Voting Rights and Property Privileges*, 1982 *Ariz St L J* 419, 428 table 3 (tabulating irrigation and water conservation districts in eleven Western states).

ments on land in the district. The interest on water district debt, like other municipal bond interest, is exempt from federal income taxation.⁸¹ Most special purpose water districts are governed by locally elected boards of directors, with the franchise granted to the owners of land in the district and the votes allotted according to assessed valuation or acreage.⁸²

In *Salyer Land Co. v Tulare Lake Basin Water Storage District*,⁸³ decided three years after *Hadley*, the Supreme Court upheld a California law providing that only landowners could participate in elections for the governing board of the Tulare Lake Basin Water Storage District and that landowner votes would be allotted according to the assessed valuation of their lands in the jurisdiction. The Court determined that the water storage district, "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group,"⁸⁴ fell within *Hadley*'s provision of an exemption from *Reynolds* for the election of "certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups,"⁸⁵ that a popular election might not be required. As a result, the district's voting arrangements were not subject to strict judicial scrutiny.

The Court in *Salyer* was markedly more deferential to state determinations concerning local arrangements and much less protective of the interest of local residents in voting in local elections than it had been previously. The Court predicated the exception from the model of local democratic government on the "special limited purpose" of the water storage district and the "disproportionate effect of its activities on landowners." But neither "special limited purpose," nor "disproportionate effect" was adequately defined.

From the perspective of residents dependent on the district's water, it is not obvious that water storage is a more limited function than a junior college. Indeed, comparing governmental functions is just the sort of standardless exercise that *Hadley* had warned against in refusing to hinge the standard of review on the

⁸¹ *Id* at 425.

⁸² *Id* at 424 table 1. See also David L. Martin, *One Person, One Vote and California's Water Districts*, 8 *Natural Resources Lawyer* 9 n 2 (1973) (tracing history and case law of California water districts and weighing the needs of private utilities against the interests of the public).

⁸³ 410 US 719 (1973).

⁸⁴ *Id* at 728.

⁸⁵ *Id* at 727-28, quoting *Hadley*, 397 US at 56.

“importance” of an office.⁸⁶ Furthermore, although the California water storage district legislation established a fairly tight nexus linking receipt of water, assessment for water project costs, and the local vote,⁸⁷ the Court did not explain how the water district arrangement differed from the service-payment-franchise relationship in *Kramer*. Much as nonparents and nontaxpayers may be affected by the operations of a local school board, water storage district residents as well as landowners may be affected by district actions. Indeed, the *Salyer* litigation was apparently triggered by a decision of the district’s board that resulted in the flooding of lands where nonowner residents lived.⁸⁸

Salyer broke from *Kramer* and the municipal bond cases in assuming that the “economic burdens of district operations” were the sole interest that would support a claim to the franchise.⁸⁹ Moreover, even within the sphere of economic burdens *Salyer* departed from *City of Phoenix* in focusing only on those who paid district charges and assessments. The Court did not consider whether those costs might have been passed on to district residents who were the lessees of the district’s landowners.⁹⁰

In *Kramer* the Court had subjected the statutory linkage of service usage, payment, and function to strict scrutiny and assumed that district actions had sufficient impact on residents, in addition to users and payors of a district’s service, that their exclusion from the franchise could not survive exacting review. In contrast, the Court in *Salyer* took a comparable linkage of usage, payment, and function, and, without considering whether district actions might have broader impacts on district residents, proceeded to exempt the franchise restriction from strict scrutiny. It sufficed that the state had rationally concluded that the landowners who bear the burden of district costs should be given control over district governance.⁹¹

⁸⁶ 397 US at 55.

⁸⁷ The district’s revenues came only from landowners, either in assessments against land or in water charges. A delinquency in payment of an assessment became a lien on the land, and “residents *qua* residents” bore none of the district’s economic burdens. *Salyer*, 410 US at 729.

⁸⁸ *Id* at 737-38 (Douglas dissenting).

⁸⁹ *Id* at 729.

⁹⁰ See *Salyer Land Co. v Tulare Lake Basin Water Storage District*, 342 F Supp 144, 150 (E D Cal 1972) (three-judge court) (Browning concurring in part and dissenting in part) (lessees are “equally interested in the cost of the district’s projects, for this expense will be passed on to them by express agreement or in the form of increased rentals”).

⁹¹ *Salyer*, 410 US at 731.

Salyer's more liberal standard of review of the restricted local franchise suggests a different model of local government than the one seen in the cases in the line from *Avery* through *Hadley*.⁹² This is apparent in three ways. First, the notion of a local government as a small polity, with local political institutions representative of the local citizenry and providing an opportunity to voice concerns, protect interests, and participate in the determination of political issues that affect the community, was utterly absent from *Salyer*. That may have been because there was no community to speak of in the Tulare Lake Basin district. Local government as self-government by local residents is generally associated with urbanness and the greater degree of shared interests or common needs for public services or regulatory authority that stem from concentration of population. But only fifty-nine adults lived on the district's 193,000 acres, and they were primarily employees of the four agribusinesses that owned most of the district's land.⁹³ The district was a rural area whose population was far below the minimum necessary to incorporate a municipality.⁹⁴ As the Supreme Court emphasized, "[t]here are no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundaries, and it does not have a fire department, police, buses, or trains."⁹⁵ Although the Court used this description of a sparsely populated agricultural area to suggest that the district lacked "normal governmental" authority, the paucity of "towns, shops, hospitals, or other facilities" indicates not an absence of governmental

⁹² In *Associated Enterprises v Toltec Watershed Improvement District*, 410 US 743 (1973), a companion case decided the same day as *Salyer*, the Supreme Court sustained a Wyoming law that limited the franchise in the referendum for the creation of a watershed improvement district to landowners and provided that votes representing a majority of the acreage affected were necessary to approve a district. Like California water storage districts, Wyoming watershed districts are financed by assessments against the benefitted lands. The Court found that the district was "a governmental unit of special or limited purpose whose activities have a disproportionate effect on landowners within the district." *Id.* at 744. The Court noted that the statute authorizing the establishment of watershed districts, with the restriction on the referendum electorate, "was enacted by a legislature in which all of the State's electors have the unquestioned right to be fairly represented." *Id.* In *Avery* and *Kramer* the Court had sharply dismissed the relevance of a state legislature elected on the basis of universal adult suffrage and equal population representation in determining the constitutionality of local government representation or suffrage provisions. *Avery*, 390 US at 481; *Kramer*, 395 US at 628.

⁹³ *Salyer*, 410 US at 723.

⁹⁴ California requires a population of 500 registered voters as a precondition for a municipal incorporation. Cal Govt Code § 56043 (West 1983 & Supp 1993).

⁹⁵ *Salyer*, 410 US at 729.

power for the district's governing board but the lack of a community within the district appropriate for self-government.

Second, the absence of a local political community may have made it easier to see the water storage district as a creation of the state intended to address the problem of water management in the Tulare Lake Basin. The three-judge court that initially heard *Salyer* had applied strict scrutiny and found that the state had a compelling interest—"the development of its water resources." The court found that limiting the vote to landowners was necessary to further this interest because under state law district operations were financed by assessments against land, and it was "doubtful if the District would have been formed unless the persons paying the expenses could control them."⁹⁶ The state, however, could have imposed the water storage districts without local consent as long as the assessed landowners benefitted from district operations and were given a fair opportunity to challenge their particular assessments.⁹⁷ The state also could have addressed the water storage problem directly through a state agency financed by state revenues and operated by state officials, thus obviating the need for any local consent or any local participation in district management.

To survive strict scrutiny, a local landowner-financed and local landowner-controlled district created with the consent of local landowners must be necessary to address the agricultural water management problem. Placing control directly in the hands of those most directly affected by the district's operations may increase the likelihood that the district will operate effectively and efficiently to secure the interests of local landowners. But given the inherent incommensurability of voting rights and water management performance, there is no obvious calculus, under strict scrutiny, for determining whether the enhancement of district per-

⁹⁶ *Salyer*, 342 F Supp at 146. See also *Schindler v Palo Verde Irrigation District*, 1 Cal App 3d 831, 82 Cal Rptr 61, 66 (1969).

The three-judge court in *Salyer* did not make a separate determination that weighting votes according to assessed valuation was also necessary to attain the compelling state interest. The court merely observed that the benefits and burdens to each landowner were in proportion to assessed valuation "so permitting voting in the same proportion fairly distributes the voting influence." *Id.* In a separate opinion, Judge Browning agreed that the use of assessments to finance district operations justified restricting the franchise to those with an interest in district land, but he found that lessees as well as owners had an interest sufficient to obtain the franchise. *Id.* at 149-50 (Browning concurring in part and dissenting in part). He also found there was no compelling interest to support the weighting of votes according to assessed valuation, and he would have invalidated that provision. *Id.* at 151-52.

⁹⁷ See, for example, *Fallbrook Irrigation District v Bradley*, 164 US 112 (1896).

formance justifies the discrimination in the provision of the franchise. By using rational basis review, the Supreme Court reduced the burden on the state to justify its use of a local land-owner-controlled entity to address water problems in rural areas. *Salyer* thus returns to the state a measure of its traditional *Hunter*-style discretion to create and design local governments as state instruments for the management of localized problems.

Third, perhaps the most striking feature of the arrangement sustained in *Salyer* is the allotment of votes according to assessed valuation. Although property ownership as a qualification for voting has a long history in this country, votes were generally not allotted according to the amount or value of the property owned. In the municipal bond franchise cases, each property owner or taxpayer cast just one vote. Property ownership signalled that the voter had an economic stake in the community, and reflected the belief that the economic independence conferred by property ownership was a source of political independence.⁹⁸ But there was no assumption that the benefits of property ownership for improved deliberation and decisionmaking were scaled to the amount of property a person owned. Indeed, in the Tulare Lake district the use of assessment-weighted voting actually tended to cancel out the participation of most landowners because one corporation owned enough property in the district to command a majority of the votes, and the four largest owners together garnered approximately eighty-five percent.⁹⁹ Valuation-based voting could effectively disenfranchise small landowners. With the enfranchisement of nonresident corporate landowners and the use of valuation-based voting, water storage district voting resembles the voting arrangements of a private corporation or a cooperative.¹⁰⁰

⁹⁸ See, for example, Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, in Donald W. Rogers, ed, *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America* 19, 22-23 (Illinois, 1992). As Gordon Wood has recently observed, in late eighteenth century and early nineteenth century republican thought, "property was designed to protect its holders from external influence or corruption, to free them from the scramble of buying and selling, and to allow them to make impartial political judgments." Gordon Wood, *The Radicalism of the American Revolution* 269 (Random House 1991). In other words, the property qualification was seen as a means of creating a disinterested electorate, not a restriction of the franchise to interested voters.

⁹⁹ *Salyer*, 410 US at 735 (Douglas dissenting). Indeed, there had not been an election for several decades. *Id.*

¹⁰⁰ See Robert B. Hawkins, Jr., *Self-Government By District: Myth and Reality* 93 (Hoover Institution, 1976) (describing California's rural water districts as user cooperatives).

Salyer's acceptance of the proprietary model of local government was tacit, not express. Although the Court emphasized the close nexus of financial burdens and the franchise, the Court did not actually liken the district to a private corporation or cooperative. The sense of the opinion is that in a rural area without a local political community the state could discharge its responsibility for dealing with agricultural water management through an entity controlled by the owners of the lands that would finance and benefit from the state's arrangements.

Salyer left lower courts confused. Some interpreted the case expansively and permitted states to limit the franchise in a special district to landowners whenever landowner payments are the primary source of district revenues.¹⁰¹ Other courts read *Salyer* narrowly, finding that *Kramer's* strict scrutiny, rather than *Salyer's* more relaxed review, still framed the inquiry in local government voting cases. For these courts, *Salyer* concerned the supply of water to agricultural land, and *Kramer* still governed for special districts operating in urban areas or providing services for households rather than agriculture.¹⁰² These courts also followed *City of Phoenix's* analysis of economic burdens and found that assessment payors were not disproportionately affected by a special district if the district also collected user charges or if the burden of assessments was passed along to other area residents through rents and the prices of goods and services.¹⁰³

In *Ball v James*,¹⁰⁴ decided eight years after *Salyer*, the Supreme Court expanded *Salyer's* reach and fully established the model of the proprietary government exempt from the requirements of local democratic representation. *Ball*, however, was no clearer than *Salyer* in indicating when the proprietary model applies.

¹⁰¹ See, for example, *Phillippart v Hotchkiss Tract Reclamation District 799*, 54 Cal App 3d 797, 127 Cal Rptr 42, 43-44 (1975); *Simi Valley Recreation & Parks District v LAFCO of Ventura County*, 51 Cal App 3d 648, 124 Cal Rptr 635, 655-57 (1975); *Chesser v Buchanan*, 193 Colo 471, 568 P2d 39, 41 (1977) (tunnel improvement district).

¹⁰² See, for example, *Choudhry v Free*, 17 Cal 3d 660, 131 Cal Rptr 654, 552 P2d 438, 442-43 (1976) (district with 100,000 urban residents exempted from *Salyer*); *Johnson v Lewiston Orchards Irrigation District*, 99 Idaho 501, 584 P2d 646, 649-50 (1978) (district located almost entirely within the City of Lewiston and principally engaged in providing domestic water to residents of Lewiston exempt from *Salyer*). See also *Wright v Town Bd. of Town of Carlton*, 41 AD2d 290, 342 NYS2d 577 (1973), aff'd 33 NY2d 977, 353 NYS2d 739 (1974) (water district to serve the most populated areas of the town).

¹⁰³ See, for example, *Choudhry*, 552 P2d at 442-43; *Johnson*, 584 P2d at 649-50; *In re Extension of Boundaries of Glaze Creek Sewer Dist. of Jefferson Co.*, 574 SW2d 357, 363 (Mo 1978); *Wright*, 342 NYS2d at 581.

¹⁰⁴ 451 US 355 (1981).

Ball concerned the Salt River Project Agricultural Improvement and Power District, a water reclamation district in central Arizona. Like the Tulare Lake Basin district, the Salt River district stores and delivers water to landowners within the district's borders. The district is managed by a locally elected board, with only landowners permitted to vote, and their votes weighted according to the extent of their holdings.¹⁰⁵ The Salt River district, however, differed from the Tulare Lake Basin district in the nature of the community served, the extent of its powers, the source of its financing, and its overall impact.

Although the area was originally agricultural, at the time of the *Ball* litigation the Salt River district was substantially urban, encompassing nine incorporated municipalities including the city of Phoenix.¹⁰⁶ Nearly half of the land in the district was urban, and approximately forty percent of its water went to non-agricultural users.¹⁰⁷ In addition to storing and distributing water, the district generated and sold electric power, and approximately ninety percent of the district's 240,000 electric consumers were residential customers.¹⁰⁸ Although the statute creating the district authorizes it to raise money through assessments proportionate to acreage and to issue bonds secured by liens on the real property in the district, nearly all of the district's revenues, including the funds for servicing its debts, came from sales of electricity.¹⁰⁹

The Salt River district was, in terms of revenues and expenditures, one of the five largest special districts in the United States.¹¹⁰ Even without the formal powers of a general purpose government, the district, as one commentator recently found, has a broad impact over the metropolitan area—"vastly more influence over the lives of the people of Phoenix than do most conventional governments."¹¹¹ In Arizona, "water is the linchpin of the uni-

¹⁰⁵ Id at 359. Prior to 1969, voting power for district elections was apportioned according to acreage, with owners of less than one acre ineligible to vote. In 1969, owners of less than one acre were permitted to cast fractional votes in proportion to their acreage. In 1976, the board of directors was enlarged from 10 to 14 members. The original ten members were elected from geographic divisions within the district, with landowners voting according to acreage; the four new members were elected at large, with each landowner in the district having one vote in the at-large election. The district also had a president and a vice president elected at large on an acreage-weighted basis. Id at 359 n 2.

¹⁰⁶ See Comment, *Voter Restrictions in Special Districts: A Case Study of the Salt River Project*, 1969 L & Soc Order (Ariz St L J) 636, 658.

¹⁰⁷ De Young, 1982 Ariz St L J at 445 (cited in note 80).

¹⁰⁸ Id.

¹⁰⁹ *Ball*, 451 US at 360, 370 n 19.

¹¹⁰ Comment, 1969 L & Soc Order at 649 (cited in note 106).

¹¹¹ Joel Garreau, *Edge City: Life on the New Frontier* 193 (Anchor/Doubleday, 1991).

verse,” and the district, with its control over water and electricity prices, juggled the competing demands of urban residents, industry, agricultural users, and recreation.¹¹² At the time of the *Ball* litigation, the district subsidized agricultural water users with revenues from the sale of electricity.¹¹³

In *Ball*, the Supreme Court determined that despite the Salt River district’s considerable influence over the development of metropolitan Phoenix, the district “simply does not exercise the sort of governmental powers that invoke” strict scrutiny of restrictions on the franchise.¹¹⁴ Despite its extensive activities and economic clout, the district’s “primary and originating purpose”—the storage, conservation, and delivery of water—was “relatively narrow.”¹¹⁵ The district’s power over flood control was merely “incidental” to its primary water function and, thus, “not of decisive constitutional significance.”¹¹⁶ Nor did the district’s ability to generate and sell power broaden the nature of its governmental functions, because “the provision of electricity is not a traditional element of governmental sovereignty . . . and so is not in itself the sort of general or important governmental function that would make the government provider” subject to one person/one vote.¹¹⁷

The Court established the requisite nexus between district impact and the enfranchised constituency by focusing on the contingent liability of the district’s landowners. Although most of the district’s revenues came from non-landowners and it was unlikely that the district would ever have to impose a lien on district lands in order to repay its debts, the voting landowners “are the only residents of the District whose lands are subject to liens to secure District bonds” and the only ones subject to the district’s power to levy acreage-based taxes.¹¹⁸ The Court acknowledged that non-landowners would be affected by district operations, but held there was no requirement that the enfranchised group “be the only parties at all affected by the operations of the entity.”¹¹⁹

Ball crystallized the model of the proprietary local government. According to the Court, the district was only a “nominal”

¹¹² *Id.*

¹¹³ DeYoung, 1982 Ariz St L J at 445-46 (cited in note 80); Comment, 1969 L & Soc Order at 660 (cited in note 106).

¹¹⁴ *Ball*, 451 US at 366.

¹¹⁵ *Id.* at 367.

¹¹⁶ *Id.* at 367 n 12, citing *Salyer*, 410 US at 728 n 8.

¹¹⁷ *Id.* at 368.

¹¹⁸ *Id.* at 370.

¹¹⁹ *Id.* at 371.

public entity. It had a sufficiently “public character” that it could avoid state taxes, sell tax-exempt bonds, condemn property within its borders, and not be subject to the state’s regulatory oversight of public utilities.¹²⁰ But the district’s “public character” was purely formal; it was “essentially” a “business enterprise, created by and chiefly benefiting a specific group of landowners.”¹²¹ In fact, the district had two kinds of business-like relationships. The district sold water and electric power to area residents. But the mere fact that these consumer-residents were affected by the district’s business activities did not give them a claim to representation in its governance.¹²² The district, however, also had “investors”—the landowners within the jurisdiction whose lands were subject to the district’s power to impose land-based taxation and who might be at risk for the district’s obligations.¹²³ The Court determined that the state could treat the district like a proprietary enterprise and vest governance in the landowner-investors.

Local government as business enterprise gave the Court a new framework for considering questions of local government organization, thereby increasing the discretion accorded the states in the creation of locally representative public entities. If a local government is a business enterprise, then the organizing principles for political bodies—universal adult resident enfranchisement and equal population representation—need not apply. With the proprietary enterprise model as an option, a state may design a local government to be responsive and accountable to just a limited group within the locality without having to prove that the restriction on the franchise or the bias in local representation is narrowly focused on all those interested in the local government and necessary to the furtherance of a compelling state interest. Moreover, although based on the notion that the restrictive franchise is justified by the landowners’ stake in the special district enterprise, proprietary governments are not, in turn, subject to a rigid requirement that votes actually reflect the extent of a landowner’s potential liability. Proprietary governments may use assessment-based voting, acreage-based voting, or even one owner/one vote for qualified owners.¹²⁴

¹²⁰ Id at 359-60, 368 n 14.

¹²¹ Id at 368.

¹²² Id at 370.

¹²³ Id.

¹²⁴ See, for example, *Southern California Rapid Transit District v Bolen*, 1 Cal 4th 654, 3 Cal Rptr 2d 843, 822 P2d 875, 889-90 (1992) (in a special-benefit assessment district

The proprietary model is not a simple return to local government as state instrumentality. It validates governance only by those within the community who can be seen as investors. For a district with power to impose assessments on land, the investor group will consist of landowners. Although the Salt River district landowners did not bear the current economic burdens of the district, they were contingently liable for the district's obligations and were subject to the district's formal power to tax. In effect, *Ball* reversed the assumptions of *City of Phoenix*. Whereas in the democratic/governmental model, the nominal and contingent burdens of landowners were not enough to support a limitation on the franchise because costs were shared by other members of the community, in the proprietary setting contingent liability suffices to support an exclusive franchise for landowners, notwithstanding the potentially broad diffusion of costs throughout the district.

B. Choosing the Democratic or the Proprietary Model

Salyer and *Ball* cite two criteria for distinguishing proprietary from democratic local governments: the disproportionate impact of the district on landowners and the special limited purpose of the district. Neither criterion is analytically sound. The first is circular and the second can be arbitrary. The result has been confusion, coupled with a modest trend to expand the scope of the proprietary model to encompass special districts created to finance a broad range of urban infrastructure and public facilities.

1. Disproportionate impact.

The Supreme Court has provided two methods of assessing the impact of a local government's action in determining whether the franchise can be limited to a particular constituency. In the local democracy cases, those benefitted by the locality's performance of its services (or injured by defective or inadequate performance), and not only those who bear the district's costs, are consid-

with voting limited to commercial landowners, state legislature may adopt differing formulas for the allotment of votes and the calculation of assessments).

A proprietary government may also appoint representatives to its governing board from internal subunits of different populations without running afoul of the one person/one vote requirement. See *Concerned Citizens of Southern Ohio v Ohio Pine Creek Conservancy District*, 473 F Supp 334, 337-38 (S D Ohio 1977). But see *Salyer*, 342 F Supp at 146-47 (invalidating election divisions within the Tulare Lake Basin district where assessed valuation differed sharply among the divisions; the Supreme Court did not address the malapportionment in terms of interdivision differences in assessed valuation).

ered persons affected by or interested in the district's government. The local democracy cases utilize an expansive definition of economic impact and assume that those who initially pay local government taxes or assessments will pass those costs on to others so that the incidence of local financing is diffused throughout the community. The community as a whole is, thus, deemed affected by the local government. Few, if any, can maintain that they are so disproportionately affected by local action as to justify a representative scheme that benefits them. Even if landowner property is subject to liens in the event that the local government is unable to meet its obligations, the imposition of a lien will be treated as too remote a contingency to sustain a restriction on the franchise.

The proprietary model's method of assessing impact, as exemplified in *Salyer* and, especially, *Ball*, is to consider only those who bear the economic burdens of the local government's actions, not those whose sole interest is in its services. This alternative defines economic burden to include only those who are subject to assessments—ignoring the fees paid by non-landowner consumers of the district's services and costs passed along to the tenants or customers of landowners, and emphasizing the contingent liability of those whose lands may be subject to lien, regardless of how prosperous the district is or how unlikely it is that a lien will ever be imposed.

Thus, whether a district's actions have a disproportionate impact on a landowner constituency will turn on whether disproportionate impact is viewed through a proprietary or a democratic lens; yet the presence or absence of a disproportionate impact on landowners is supposed to determine whether the proprietary or democratic framework is applied. The analysis is entirely circular.

2. Special limited purpose.

The real work of distinguishing democratic from proprietary governments, then, must rely upon the notion of a special limited purpose. Some cases will be easy. Precedent clearly requires that elections in county and municipal governments and in districts that provide educational services¹²⁵ be based on the local democracy model.

¹²⁵ See also *Ball*, 451 US at 372 n 1 (Powell concurring) (*Hadley and Kramer* "reflect the Court's judgment as to the unique importance of education among the functions of modern local government").

In *Fumarolo v Chicago Board of Education*,¹²⁶ the Illinois Supreme Court recently found that *Kramer* and *Hadley* continued to apply, notwithstanding *Salyer* and *Ball*, when it invalidated the franchise and representation provisions of the Chicago School Reform Act. The Act provided for the creation of local school councils with a variety of powers for each of the grammar and high schools in the Chicago school system.¹²⁷ Each council was to consist of ten members, with parents of children enrolled in the local school to elect six of their number, community residents to elect two residents, and local school teachers to elect two teachers.¹²⁸ In invalidating the exclusion of non-parent residents from the electorate for most council seats, the Illinois Supreme Court determined that the councils' role in local education placed them outside the reach of the *Salyer-Ball* exemption and mandated the application of strict scrutiny.¹²⁹

Fumarolo underscores the degree to which the *Salyer-Ball* exemption is based upon a "proprietary" model of local government and not just a willingness to focus the franchise and representation in special districts on the special constituency of the districts. The proprietary model was unavailable in *Fumarolo* in part because the parents, although the primary consumers of local school services, could not be seen as "investors" in the council. As the court pointed out, "the cost of operating the community's schools falls directly or indirectly on virtually all community residents, for example, property taxes are imposed on all residents regardless of whether they have children attending the schools."¹³⁰ It is unlikely

¹²⁶ 142 Ill 2d 54, 566 NE2d 1283 (1990).

¹²⁷ These powers included the hiring and evaluation of the principal, the recommendation of textbooks and disciplinary and attendance policies, the evaluation of teaching resources, and the review of the principal's expenditure plan. *Fumarolo*, 566 NE2d at 1295.

¹²⁸ *Id.* at 1287.

¹²⁹ In defending the restricted franchise, the Chicago Board of Education contended that the local school councils were advisory rather than governing bodies. The Court determined that, although the district councils lacked the power to levy taxes or set basic educational policy for local schools, their functions were more than advisory, and the councils had considerable authority over local school operations. *Id.* at 1295-98.

¹³⁰ *Id.* at 1298. *Fumarolo* also followed *Kramer* and *Hadley* in assuming a pervasive effect of council operations on all community residents and a presumptive interest of all residents in educational activities. *Id.* As a result, "[i]t simply cannot be said that the activities and the performance of the local school council have a sufficiently disproportionate effect on those parents with children in current attendance at the public school" to justify the preference for parents and the discrimination against nonparent residents in representation on the local school councils. *Id.* at 1298-99. The Court suggested that if a rational basis test had been applied the preference for parents might have survived, because "there may be a rational relationship between giving parents of children currently attending the public

that beneficiaries of special district services can obtain special or exclusive representation in special district governance where they do not also bear the economic burdens of district operations. The proprietary model can only empower landowners or other taxpayers seen to have an economic stake in the "enterprise."¹³¹

Even for districts that provide just one or a handful of services and that have a landowner or taxpayer constituency, *Ball* and *Salyer* provide no theory for distinguishing general governmental functions from special limited purposes. Rather, the Court has proffered a laundry list of powers and "normal functions of government"—imposition of ad valorem taxes or sales taxes, enactment of laws governing the conduct of citizens, and the "maintenance of streets, the operation of schools, or sanitation, health, or welfare services."¹³²

The Court's reference to ad valorem taxation as governmental, and its treatment of the special districts in *Salyer* and *Ball*, which were financed by special assessments, as proprietary, has led some lower courts and commentators to treat the taxation/assessment distinction as critical.¹³³ The similarities of taxation and assessment as indicia of governmental power, however, are greater than their differences. Both taxation and assessment are coercive. The assessment, like the ad valorem tax, is a compulsory charge that can be imposed without the consent of the payor.¹³⁴ Moreover, the assessment has long been widely used by both general purpose and limited purpose governments to finance the construction and maintenance of public infrastructure and other public improve-

school an increased role in local educational governance and improvement in the school." *Id.* at 1299-1300.

¹³¹ See also *Cunningham v Municipality of Metropolitan Seattle*, 751 F Supp 885 (W D Wash 1990) (district that provides water pollution abatement and public transportation functions; departure from one person/one vote for geographic reasons not protected by proprietary principle).

¹³² *Ball*, 451 US at 366.

¹³³ See, for example, William A. Garton, *One Person, One Vote in Special District Elections: Two Ideas and an Illustration*, 20 SD L Rev 245, 258-61 (1975) (arguing that the difference between the power to tax and the power to levy special assessments explains why the court could reach different results in *Cipriano* and *City of Phoenix*, on the one hand, than it did in *Salyer*, on the other); *Foster v Sunnyside Valley Irrigation District*, 102 Wash 2d 395, 687 P2d 841, 850 (1984) (district engaged in the delivery of irrigation water and the generation of electric power exempt from federal one person/one vote requirement because "it is not empowered to impose ad valorem property or sales taxes, enact laws governing the conduct of citizens or administer the normal functions of government").

¹³⁴ *San Marcos Water District v San Marcos Unified School District*, 42 Cal 3d 154, 228 Cal Rptr 47, 720 P2d 935 (1986).

ments.¹³⁵ Indeed, by definition, a special assessment can only be imposed to fund a local public benefit.¹³⁶ This combination of coercive means and public ends indicates that assessments are as governmental as ad valorem taxation.

Nor is it obvious why "sanitation, health, or welfare services" are more normal functions of government than the storage and distribution of water. There are more than 3,000 local governments specially created to address water management functions.¹³⁷ How can a governmental activity so widespread not be a normal function of government?¹³⁸ It may be that the existence of private providers of water undercuts the appreciation of the extent of public water storage and distribution activity,¹³⁹ but surely the deter-

¹³⁵ See Eugene McQuillin, 14 *The Law of Municipal Corporations* ch 38 (Callaghan, 3d ed, 1987); C. Dallas Sands and Michael E. Libonati, 4 *Local Government Law* § 24.01 (Callaghan, 1982); Oliver Oldman and Ferdinand P. Schoettle, *State and Local Taxes and Finance* 412-16 (Foundation Press, 1974). See also *Bolen*, 822 P2d at 877-78 (citing uses of special assessment in California to fund construction of drains and sewers, residential subdivisions, gas distribution works, flood control projects, the redevelopment of blighted areas, and the construction of a transit tunnel).

¹³⁶ McQuillin, 14 *Municipal Corporations* § 38.11 (cited in note 135). The owner of land subject to assessment can require the assessing government to prove that the program funded by the assessment actually benefits the owner to the extent of the assessment as a condition for the assessment. Ad valorem taxpayers have no similar right to demand that taxation be conditioned on special benefits. But the right of assessment payors that payment be limited by benefit does not exempt them from the obligation to pay for a benefit they would rather not have. *Id.* See also Garton, 20 SD L Rev at 258-61 (cited in note 133).

¹³⁷ See Colman, *Public-Private Partnerships* at 22 (cited in note 78) (in 1987 there were 3,056 single-purpose governments with a function concerning water supply, and more than 5,600 that dealt with either water alone or water in combination with sewage).

¹³⁸ A survey, conducted by the International City Management Association, of the chief administrative officers of 3,200 municipal governments—that is, cities and not special districts—found that 77.7% assumed some responsibility for the provision of water. See Robert M. Stein, *Urban Alternatives: Public and Private Markets in the Provision of Local Services* 53, 64 (Pittsburgh, 1990) (table 3.5).

The formation of water districts often reflects one of the basic motivations for the creation of any coercive government program—that persons benefitted by an activity be compelled to pay for it. As Hawkins explains,

[i]n the case of land-voting districts, many would argue that since the benefits accrue only to a small group of individuals the activity should be privately undertaken, but in water projects such voluntary efforts are not always effective and responsive to the interests of all who benefit. An example is an irrigation district in which, as more water is transported to an area and spread over increasing amounts of land, the water table begins to rise; some individuals will benefit by staying out of the district and will capitalize on the rising water table. When a public entity is formed, free riders share equally in costs for benefits received.

Hawkins, *Self-Government by District* at 64 (cited in note 100).

¹³⁹ *Ball* summarily dismissed the significance of the Salt River district's power distribution activities in assessing whether the district was a governmental or proprietary government, citing a case involving a regulated private utility and asserting that the provision of electric power is not "a traditional element of governmental sovereignty." 451 US at 368,

mination of whether a public service is a normal function of government cannot turn on the absence of private sector alternatives, lest the role of private security forces, private carting services, and private schools undermine the "governmentalness" of the traditional governmental functions concerning public safety, sanitation, and primary education.

In determining whether an entity is a state actor subject to the constraints of the Fourteenth Amendment, the Court has placed considerable emphasis on the formal status of the actor and has increasingly tended to exempt private individuals and firms from treatment as state actors even when they perform important functions. It is not clear why the formal status of a political subdivision should not be comparably dispositive when the local franchise is at stake. Certainly, as *Hadley* recognized, it would avoid the inherently arbitrary task of determining which activities a government undertakes are "normal governmental functions" and which are not—a task complicated by the Court's disinterest in the positive evidence that a large number of governments undertake certain presumptively nongovernmental functions, such as supplying water and power.

There is no natural or functional distinction between "sanitation, health, or welfare services" and water and power.¹⁴⁰ Not surprisingly, lower courts have on occasion experienced difficulty in determining whether certain functions are governmental or proprietary. Is the provision of sewage disposal or garbage collection an aspect of the public health function, and thus governmental, or is it special and limited like water storage and irrigation?¹⁴¹ What of government activity concerning transportation? Is road mainte-

citing *Jackson v Metropolitan Edison Co.*, 419 US 345, 353 (1974). As with water, a sizeable fraction of municipalities assume some responsibilities with respect to the provision of electricity. Stein, *Urban Alternatives* at 64 (cited in note 138) (table 3.5; 43.8% of municipalities surveyed have some responsibilities concerning electricity).

¹⁴⁰ Indeed, the availability of water and power may have implications for local sanitation and health.

¹⁴¹ See, for example, *Goldstein v Mitchell*, 144 Ill App 3d 474, 494 NE2d 914, 920-21 (1986) (Illinois may limit franchise to landowners in drainage district, which has powers to levy assessments; incur debt, manage erosion and flooding, and collect and dispose of sewage); *Lane v Town of Oyster Bay*, 149 Misc 2d 237, 564 NYS2d 655 (Sup Ct 1990) (referendum on whether to extend boundaries of sanitation collection district limited to owners of taxable real property).

When faced with a special district that provided residential water and sewer service and had the power to pass misdemeanor ordinances concerning those services, a California appellate court determined that the district was neither a proprietary government nor a general purpose government and proceeded to develop its own standard of review that would permit both residential and landowner voting. *Bjornestad v Hulse*, 229 Cal App 3d 1568,

nance¹⁴² or tunnel construction¹⁴³ or mass transit¹⁴⁴ more like “sanitation, health, or welfare services” or more like water storage? Can these questions be meaningfully answered?

Following *Ball*, lower courts extended the reach of the proprietary model.¹⁴⁵ Recently, courts have applied the proprietary model to special districts created to finance urban infrastructure. The Florida Supreme Court, for example, sustained a state statute providing for the election, on a one acre/one vote basis, of the board of supervisors of a community development district.¹⁴⁶ The district is basically a device for developers to finance streets, drainage, and sewers on the urban fringe to improve the marketability of their developments.¹⁴⁷ The Florida court determined that the district’s powers “implement the single, narrow legislative purpose of ensuring that future growth in this State will be complemented by an adequate community infrastructure.”¹⁴⁸ The financing of basic community infrastructure was not an “exercise [of] general governmental functions.”¹⁴⁹ In effect, financing itself was treated as a special limited purpose, regardless of the nature or extent of the facilities financed. As a result, it was easy to limit the franchise to landowners “because they are the ones who must bear the initial

281 Cal Rptr 548 (1991) (applying rational basis test to statute that enfranchised nonresident landowners).

¹⁴² See, for example, *Stelzel v South Indian River Water Control District*, 486 S2d 65, 66 (Fla App 1986) (Florida may provide for “vote-by-acreage” for the operation of water control district that also has authority to construct, maintain, improve, and repair roads).

¹⁴³ *Chesser*, 568 P2d 39.

¹⁴⁴ *Southern California Rapid Transit District v Bolen*, 235 Cal App 3d 134, 269 Cal Rptr 147, 155 (1990) (“Public transportation, like public education, is an issue affecting all citizens.”), rev’d 822 P2d 875.

¹⁴⁵ See, for example, *Goldstein*, 494 NE2d at 918 (*Ball* “significantly expanded” *Salyer*); *Esler v Walters*, 56 NY2d 306, 452 NYS2d 333, 437 NE2d 1090 (1982) (treating *Ball* as expanding *Salyer*, and thus overturning *Wright v Town Bd. of Town of Carlton*, 33 NY2d 977, 353 NYS2d 739 (1974), 309 NE2d 137, affirming 41 AD2d 290, 342 NYS2d 577 (1973), which had held that restrictions on the franchise in a special district that supplied drinking water are subject to strict scrutiny, and holding that voting arrangements in a water district in which it is landowners whose property alone is subject to assessments and to liens for delinquencies are exempt from strict scrutiny).

¹⁴⁶ *State v Frontier Acres Community Development District Pasco County*, 472 S2d 455 (Fla 1985). The district’s powers include the issuance of bonds to finance the construction and acquisition of streets, drainage, and sewers. The bonds would be backed by special assessments against lands in the district. *Id.* at 456.

¹⁴⁷ See generally Perrenod, *Special Districts, Special Purposes* at 12-43 (cited in note 79) (discussing ability of developers to create and control urban fringe special districts that finance new infrastructure but ultimately pass costs on to future residents or annexing cities).

¹⁴⁸ *Frontier Acres*, 472 S2d at 457.

¹⁴⁹ *Id.*

burden of the district's costs."¹⁵⁰ If disproportionate impact may consist in ownership of land subject to assessments and contingent liability for the district's obligations, and if financing may itself be a special limited purpose when the funds are provided by assessments, then there is considerable potential for the use of the proprietary model to sustain limitations on the franchise to landowners when the funding of local public infrastructure is at issue.

3. Proprietary governments in general government settings.

Southern California Rapid Transit District v Bolen nicely illustrates the difficulty of determining whether a particular local election falls within the democratic or the proprietary paradigm, as well as the growing use of the proprietary model to justify landowner voting in a general government setting. California authorized the Southern California Rapid Transit District ("SCRTD") to create special benefit assessment districts to defray part of the costs of construction of a planned rapid transit line connecting downtown Los Angeles to North Hollywood. On the theory that the rail system would specially benefit landowners within a certain distance of the new rail stations, the SCRTD created two districts and sought to impose special assessments based on square footage on commercial parcels and improvements in the districts.¹⁵¹ Under California law, the assessments were subject to referendum, but only owners of real property subject to the assessment could vote, with votes allotted on the basis of the assessed value of the real property in the district.¹⁵²

Must the special assessment election be run on democratic lines or could the state limit participation in the assessment referendum to landowners? The ten California appellate judges who heard the case split evenly. The three judges of the Court of Ap-

¹⁵⁰ *Id.* See also *Bolen*, 822 P2d at 884 (vote on referendum to create special benefit assessment districts to fund a portion of rapid transit system may be limited to owners of commercial real property: "The narrow purpose for which the districts are established is reflected in a voting scheme that limits the franchise to those who will directly and primarily enjoy the benefits of transit station siting and shoulder the reciprocal burden of assessments—owners of commercial property.").

¹⁵¹ The SCRTD originally proposed to impose the assessment on all land in the district, but the Los Angeles City Council conditioned its consent to the assessment on the exemption of residential property. *Bolen*, 269 Cal Rptr at 150-51.

¹⁵² Qualified owners could cast one vote for each \$1000 of real property in the assessment district. *Id.* at 152. One aspect of the challenge to the property-based franchise was that assessments would be based on parcel size or floor area whereas votes in the referendum would be based on assessed valuation. Thus, "property owners with the most votes do not necessarily pay the highest assessments." *Id.*

peal, and two of the seven judges of the state Supreme Court, found the special assessment election controlled by *Kramer*, *Cipriano*, and especially *City of Phoenix*.¹⁵³ These judges saw the district's function as the provision of transportation, and "public transportation, like public education, is an issue affecting all citizens."¹⁵⁴ Thus a restriction on the referendum franchise would be subject to strict scrutiny. Nor did the special assessment disproportionately affect landowners. As in *City of Phoenix*, the entire community would benefit from the facility funded by the assessment.¹⁵⁵ Further, these judges assumed that the commercial landowners who pay the assessment will be able to "redistribute the burden to other commercial residents."¹⁵⁶ Thus, neither prong of the *Salyer-Ball* test applied, and strict scrutiny of the franchise restriction mandated extension of the franchise to others within the assessment districts.¹⁵⁷

The five-member majority on the California Supreme Court, however, framed the case entirely within the proprietary paradigm. Although they agreed with the lower court and the high court dissenters that public transportation is a general governmental function, the majority stressed the distinction between the transit district, an appointive body, which "of course is invested with and exercises substantial governmental powers,"¹⁵⁸ and the special assessment districts, which "lack virtually any of the incidents of government."¹⁵⁹ Those judges saw the "narrow purpose" of the special assessment district not as transportation but simply as "the recoupment of some of the added economic value conferred on commercial property resulting from its proximity to the transit stations."¹⁶⁰ The Supreme Court majority then applied the proprietary analysis of disproportionate impact and found the tight linkage of economic burden and the franchise dispositive. Although nonvoting residents of the districts, like Southern California residents living outside the assessment districts, would be affected by

¹⁵³ Id at 153-57; *Bolen*, 822 P2d at 895-96 (Kennard dissenting).

¹⁵⁴ *Bolen*, 269 Cal Rptr at 155.

¹⁵⁵ *Bolen*, 822 P2d at 895 (Kennard dissenting).

¹⁵⁶ Id at 896. See also *Bolen*, 269 Cal Rptr at 156-57.

¹⁵⁷ The Court of Appeal considered whether the unconstitutional restriction on the franchise might be severed from the statutory rapid transit financing scheme but concluded that the legislature "would not have enacted the special assessment law . . . without [] some provision for a referendum election." *Bolen*, 269 Cal Rptr at 158. The dissenters on the Supreme Court did not reach the issue.

¹⁵⁸ *Bolen*, 822 P2d at 884 (emphasis in original).

¹⁵⁹ Id at 883.

¹⁶⁰ Id at 884.

the rail system financed by the assessments, they would “bear no discernably direct financial burden as a result of the assessments.”¹⁶¹

At the heart of the division in *Bolen* was a disagreement over whether to determine the “governmental” nature of the special assessment district in isolation or in relation to the general governmental SCRTD. The Supreme Court majority focused exclusively on the special assessment districts and found them “little more than formalistic, geographically defined perimeters whose *raison d’être* is to serve as the conceptual medium” for imposing an assessment on those whose property would benefit from the rapid transit system.¹⁶² The special assessment district was a fundraising device, not a government. Therefore, democratic norms did not apply and the franchise could be limited to those commercial property owners obligated to “invest” in the district through the payment of assessments.

The Supreme Court dissenters agreed that a benefit assessment district “is merely a geographical area within the SCRTD’s borders identified by the Board for the purpose of imposing the assessment.”¹⁶³ But they drew the opposite conclusion for the allocation of the franchise. For them, the SCRTD, which created the assessment districts, imposed and collected the assessments, and would conduct any assessment referendum, was the relevant governmental body. Following *City of Phoenix*, a referendum conducted by such a government is subject to the franchise rules of the democratic model.¹⁶⁴

In *Bolen*, then, the analytical indeterminacy that marks the governmental/proprietary distinction was joined by a comparable uncertainty over whether to gauge the political effect and governmental role of a special district by looking at the particular district alone or in tandem with other local governments operating over the same territory. *Ball* permits courts to isolate special districts from the overlapping general purpose governments, although the Salt River district was certainly more than a mere fundraising device. Given the ability of states to proliferate special districts that overlap more general urban governments, if those special districts are examined in isolation, they can be treated as proprietary governments even if their actions have considerable impact on the

¹⁶¹ Id at 886.

¹⁶² Id at 883.

¹⁶³ Id at 894 (Kennard dissenting).

¹⁶⁴ Id at 894-95 (Kennard dissenting).

general governmental functions that are normally subject to democratic control.

Bolen underscores the significance of *Ball* in extending the proprietary model from the sparsely populated, exclusively agricultural setting of *Salyer*, where there may be no general purpose local government with powers adequate to the task,¹⁶⁵ to metropolitan areas where the service or facility in question could be provided by a democratically elected government. *Ball* and *Bolen* give the states considerable flexibility for deciding whether democratic rules or landowner control will operate in a particular case, because the two very different models of government could apply to substantially similar, albeit formally distinct, local elections. A referendum on whether to impose an assessment on property to fund public improvements conducted by a general purpose government must be open to all eligible voters because it is assumed that the benefits and burdens of the improvement and assessment will be diffused throughout the jurisdiction. But if the state authorizes the general purpose government to create a special assessment district to assess landowners for the benefits they will receive from the public improvements that will be funded by the assessment, then as *Bolen* indicates, the assessment district may be treated as a proprietary government. It appears that *City of Phoenix* may be avoided by the creation of a local entity whose sole purpose is to conduct a referendum, although if a general purpose local government had conducted that election, *City of Phoenix* would apply.

C. The Proprietary Model, Federalism, and the Local Vote

As Part I indicates, the *Avery-Hadley* line is an obstacle to state efforts to give special or exclusive representation to particular local constituencies. The reasons for special representation range from policy (that control by the specially affected constituency would increase the effectiveness and efficiency of local government performance) to politics (that the special government could not be created without the special constituency's consent, and that consent was contingent on the constituency obtaining special repre-

¹⁶⁵ In the past, counties, the territorially pervasive local governments, may have lacked the powers necessary to finance and operate major capital facilities. With the strengthening of county government in recent years and with the potential for extending broader powers and administrative capacity to counties today, there should be adequate general purpose governments in most places and the case for a special exemption from general constitutional principles concerning voting and representation for districts in sparsely populated areas is increasingly problematic.

sentation or control of the local entity). The democratic model of local government requires strict scrutiny of deviations from the norm of universal enfranchisement and equally weighted votes. It departs from the traditional deference to the states with respect to the design of governmental structures for the delivery of local services. With the presumption of pervasive effects of local government action, strict scrutiny spells the elimination of many traditional forms of local government.

The proprietary model provides a partial escape from the tension between political equality and federalism. By treating some local governments as governments only in name, and more like proprietary enterprises in fact, the Supreme Court carved out some creative space that allows states to design local units serving particular constituencies without directly flouting *Avery's* extension of the political equality norm to local governments. Political equality will be rigidly enforced within "governmental" local governments while states can have considerable discretion to empower landowner interests in "proprietary" local units. The problem, as in so many other settings, is the elusive nature of the governmental/proprietary distinction.¹⁶⁶ Explicit balancing of incommensurable equality and federalism concerns has ostensibly been avoided in favor of sorting localities into general purpose and special purpose units. But the lack of a clear analytical distinction between general governmental functions and special limited purposes as well as the existence of local units like the assessment districts in *Bolen* that may plausibly fall into either category suggests that the balancing has only been subsumed into the deliberations of individual judges concerning which model to apply.

The infrastructure financing cases, in particular, demonstrate the limited utility of the federal doctrinal framework in determining whether voting rights will be governed by democratic or proprietary rules. The special assessment and community development

¹⁶⁶ The governmental/proprietary distinction was "abandoned as untenable" in the field of intergovernmental tax immunities. *South Carolina v. Baker*, 485 US 505, 523 n 14 (1988), citing *New York v. United States*, 326 US 572 (1946). It "proved no more fruitful in the field of regulatory immunity under the Commerce Clause." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 US 528, 543 (1985). In *Garcia* the Court determined that the distinction could not be the basis for a limited Tenth Amendment protection of the states from Congressional regulation. *Id.* at 541-43. "The governmental-proprietary distinction has faded into the background as the principal determinant of local government liability in tort" due to the "the confusion, universally acknowledged, in the judicial attempts to define what is governmental and what is proprietary." Daniel R. Mandelker, Dawn Clark Netsch, Peter W. Salsich, Jr., and Judith Welch Wegner, *State and Local Government in a Federal System* 455 (Michie, 3d ed, 1989).

district devices permit the manipulation of the structure of local elections and allow states to shift important local decisions from a democratic to a proprietary setting. Form may dominate over substance when the special district financing mechanism is given priority over the general purpose nature of the facility or service thereby financed. Given the lack of a clear distinction between general and special limited purposes, an infrastructure financing district can be seen as a limited purpose government. Within the framework of a district whose sole purpose is raising revenue it is easy to find that the assessment-payers or landowners have a greater stake in the district's activity than non-paying residents. In many cases, the only constraint on the state or local ability to shift from general popular control to landowner elections will be state law doctrines, such as those that bar the creation of "special commissions" to perform municipal functions¹⁶⁷ or that limit the types of local improvements that can be financed by the special assessment.¹⁶⁸

State and local governments may rely on special assessment districts to finance local public improvements for reasons other than voting rules. Special districts are frequently created to avoid state constitutional constraints on local taxation or borrowing.¹⁶⁹ State tax and debt limitations often target the ad valorem tax on real property. Typically, they may apply only to governments that have the power to impose the property tax,¹⁷⁰ or they may only limit the property tax and obligations funded by the property tax.¹⁷¹ Governments without broader taxing authority or a special assessment that is defined as not a tax may be exempt from these restrictions on local government fiscal autonomy.¹⁷² With the

¹⁶⁷ See generally Chester James Antieau, 1 *Municipal Corporation Law* § 2.11 (Matthew Bender, 1989).

¹⁶⁸ See, for example, *Heavens v King County Rural Library District*, 66 Wash 2d 558, 404 P2d 453 (1965) (special assessment may not be used to fund a rural library because a library provides no special benefit to land).

¹⁶⁹ See, for example, Chicoine and Walzer, *Governmental Structure* at 71-72, 79, 220 (cited in note 78).

¹⁷⁰ See, for example, *Los Angeles County Transportation Commission v Richmond*, 31 Cal 3d 197, 182 Cal Rptr 324, 643 P2d 941 (1982) (Proposition 13 does not apply to special districts that do not have the power to levy a tax on real property).

¹⁷¹ Mandelker, Netsch, Salsich and Wegner, *State and Local Government* at 353 (cited in note 166) (tax limits); id at 347-49 (debt limits); NY Const, Art 8 § 4 (limits on local indebtedness based on percentages of average full valuation of local taxable real estate); id at Art 8 § 10 (limits on real estate taxes).

¹⁷² See, for example, *Solvang Municipal Improvement District v Board of Supervisors of Santa Barbara County*, 112 Cal App 3d 545, 169 Cal Rptr 391 (1980) (Proposition 13's limits on the property tax do not apply to special assessments.); *County of Fresno v Malm-*

spread of tax and debt limitations and of popular resistance to general tax increases, states and localities have turned to entities not subject to direct local popular control to undertake large-scale projects.¹⁷³ The model of proprietary government preserves to states and localities the option of using special assessment districts controlled by developers or commercial landowners to finance costly capital improvements.

The proprietary model is also a reminder of the widespread use of local government structures to circumvent direct popular control and facilitate the implementation of pro-business policies. Although much of the recent revival of interest in local government has focused on local government as a forum that enables people to participate in political decisionmaking,¹⁷⁴ and to engage in the deliberative activities that constitute communities,¹⁷⁵ much of the work of local governments, and of the rules of local government law, concerns the financing and operation of the public facilities necessary for local private economic activity.¹⁷⁶ Local governments are economic as well as political units, and they may be devices for using the coercive power of the state for private economic ends. Contemporary local governments struggle to attract and retain businesses,¹⁷⁷ often by financing the kinds of facilities they believe

strom, 94 Cal App 3d 974, 156 Cal Rptr 777 (1979) (same). See also Sands and Libonati, 4 *Local Government Law* § 24.01 at 24-2 (cited in note 135) ("special assessments [] are usually not subject to the restrictions imposed on general taxes").

¹⁷³ See, for example, Carolyn Teich Adams, *Philadelphia: The Slide Toward Municipal Bankruptcy*, in H.V. Savitch and John Clayton Thomas, eds, *Big City Politics in Transition* 29, 33-34 (Sage, 1991) (discussing Philadelphia's increased use of independent development corporations and public authorities to finance large-scale projects; these entities "can borrow money without having the loan count against the municipality's total indebtedness" and "can insulate development projects from electoral pressure"); id at 42-43 (use of downtown special service districts in which downtown business owners pay extra taxes to fund extra services); M. Gottdiener, *The Decline of Urban Politics: Political Theory and the Crisis of the Local State* 283 (Sage, 1987) ("Special service districts, nonelective and quasipublic agencies, joint business/State commissions and programs emanating from higher levels of government, have all taken over functions that once were administered by more direct means of public participation."); Annmarie Hauck Walsh, *Public Authorities and the Shape of Decision Making*, in Bellush and Netzer, *Urban Politics* 188, 188-99 (cited in note 14) (special authorities in New York are "teeming" and are "more important sources of investment in government-authorized projects than either state or city government").

¹⁷⁴ See, for example, Frug, 93 Harv L Rev 1057 (cited in note 3); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 Mich L Rev 930 (1988).

¹⁷⁵ See Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Fla L Rev 443 (1989).

¹⁷⁶ See generally Paul E. Peterson, *City Limits* (Chicago, 1981).

¹⁷⁷ See, for example, Ann O'M. Bowman, *The Visible Hand: Major Issues in City Economic Policy* 7-8 (NLC Working Papers, Nov 1987) (86% of mayors surveyed identified

will promote private economic activity within local boundaries.¹⁷⁸ This local "public entrepreneurship"¹⁷⁹ has affinities with the proprietary model. Businesses are seen as specially interested in and specially affected by local economic development activity. Moreover, cities and states have sought to create and expand local organizational forms such as the public authority, the public benefit corporation, the public-private partnership, or the special-service district¹⁸⁰ that shift economic development decisionmaking away from popularly elected bodies to entities that are independent of direct popular control and look to the business community as their principal constituency.¹⁸¹ In many cases there is no formal conflict with the norms of the democratic model of local governance because these institutions may not be elective, may be entirely private, or may be nominally subordinate to democratically elected city councils or state legislatures. In practice, however, many of these local government structures tend to shift decisions regarding economic development outside the realm of one person/one vote.

The development and expansion of the proprietary model mirrors this willingness to give powerful business groups an enhanced role in local economic development programs. Local governance and local policymaking are complex mixtures of allocational, redistributive, and economic development activities. The proprietary model both confirms the place of business-oriented concepts in the design and function of local governments and signals that federal constitutional law concerning the right to vote may not be able to provide a basis for challenging the state and local structures intended to strengthen the institutional role of business and limit direct popular control over local government decisions.

economic development as one of their three top priorities; 36% said it was their highest priority); Robin Paul Malloy, *Planning for Serfdom: Legal Economic Discourse and Downtown Development* (Pennsylvania, 1991) (discussing the legal, political, and economic implications of public/private cooperation and urban development and revitalization).

¹⁷⁸ See, for example, Dennis R. Judd, *Electoral Coalitions, Minority Mayors, and the Contradictions in the Municipal Policy Agenda*, in Mark Gottdiener, ed., *Cities in Stress: A New Look at the Urban Crisis* 145, 145 (1986) ("Entrepreneurial strategies constitute the heart of the municipal policy agenda of the 1980s.").

¹⁷⁹ Malloy, *Planning for Serfdom* at 10 (cited in note 177).

¹⁸⁰ See, for example, 1989 NY Sess Laws ch 282 (McKinney, 1989) (authorizing the creation of business improvement districts).

¹⁸¹ See, for example, Clarence N. Stone, *Regime Politics: Governing Atlanta, 1946-1988* 148 (Kansas, 1989); Adams, *Philadelphia* at 42 (cited in note 173).

III. THE CONTINUING ROLE OF THE STATE INSTRUMENTALITY MODEL

The proprietary cases indicate, in part, the persistence of the traditional view of local government as an arm of the state, carrying out state policies locally. Nor are the special districts the only instance of the continuing power of the state instrumentality model. Even where general purpose local governments are involved, the Supreme Court has on occasion deferred to state decisions concerning the local franchise. This is most apparent in the Court's decisions sustaining the power of states to give local governments extraterritorial authority and to determine the extent of electoral participation in decisions concerning local boundary change. Deference to state authority to shape the representational structure of general purpose local governments is also reflected in a number of lower court cases upholding state statutes that extend the vote to people with a relatively small stake in local elections. In each of these situations, although the state statute raised a question concerning discrimination in the availability of the local vote or the dilution of the local franchise though the unequal weighting of different groups participating in local decisions, the courts used tests less exacting than strict scrutiny, thereby giving states a measure of discretion in designing local governance.

A. Extraterritoriality

Many states grant some municipalities powers to provide public services and regulate conduct outside municipal boundaries.¹⁸² One commentator has observed that "[i]ncreasingly, as one of the efforts to cope with metropolitan problems, local governments are being given express grants of extraterritorial police powers."¹⁸³ These municipal extraterritorial powers may include zoning, prohibition of nuisances, licensing and regulation of business, criminal law enforcement, and general health and safety regulation.¹⁸⁴ Extraterritorial powers may advance the interests of the municipality by allowing it to regulate activities just beyond its borders that may have direct effects on the health, safety, or development of the municipality. Extraterritoriality may reflect state policies

¹⁸² See generally Frank S. Sengstock, *Extraterritorial Powers in the Metropolitan Area* (Michigan Law School, 1962); Antieau, 1 *Municipal Corporation Law* § 5.12 (cited in note 167).

¹⁸³ Antieau, 1 *Municipal Corporation Law* § 5.12 at 5-37 (cited in note 167).

¹⁸⁴ Sengstock, *Extraterritorial Powers* at 52-54 (cited in note 182); Antieau, *Municipal Corporation Law* § 5.12 (cited in note 167).

designed to facilitate central city expansion and limit the formation of new municipalities on the urban fringe by strengthening the power of the core city over fringe development and reducing the incentive of fringe areas to incorporate in order to receive urban services. Finally, extraterritoriality may be a way of providing necessary regulation and services to fringe areas without the population or resources to support their own municipal government.

From any of these perspectives, extraterritorial authority reflects the state's use of local government to accomplish its own ends. Moreover, extraterritoriality separates local government power from local representation. The municipality has direct governmental authority over nonresidents, and the fringe area residents, in turn, are subject to regulation by a government they do not elect. If the government of the municipality is locally elected, denying the franchise to fringe area residents subject to extraterritorial authority presents a serious voting rights problem.

*Holt Civic Club v City of Tuscaloosa*¹⁸⁵ involved an Alabama law giving the City of Tuscaloosa "police jurisdiction" over a three-mile radius outside the city limits without providing a concomitant extension of the franchise in Tuscaloosa elections to police jurisdiction residents.¹⁸⁶ Citing *Kramer*, the police jurisdiction residents contended that their exclusion from the Tuscaloosa franchise had to be subject to strict scrutiny.

The Supreme Court, however, sustained municipal extraterritorial authority without the extension of the franchise by sidestepping the implications for fringe area voting rights. The Court noted that judicial protection of the right to vote applies only to denials of "the franchise to individuals who were physically resident within the geographic boundaries of the governmental units concerned."¹⁸⁷ Even under the democratic model of local self-government, a local government is territorially based and as such "may legitimately restrict the right to participate in its political processes to those who reside within its borders."¹⁸⁸ The police jurisdiction residents were, of course, not residents of Tuscaloosa. That Tuscaloosa's actions affected police jurisdiction residents did not bolster their claim to a vote in Tuscaloosa elections because

¹⁸⁵ 439 US 60 (1978).

¹⁸⁶ Id at 61. Tuscaloosa's extraterritorial authority included the power to enforce its municipal police and sanitary ordinances; license business, trades, and professions; and collect license fees equal to one-half that chargeable to similar businesses within the city's corporate limits. Id at 61-62.

¹⁸⁷ Id at 68.

¹⁸⁸ Id at 68-69.

"[a] city's decisions inescapably affect individuals living immediately outside its borders," yet "no one would suggest that nonresidents likely to be affected by" municipal action "have a constitutional right to participate in the political processes bringing it about."¹⁸⁹ *Kramer's* principle that the disenfranchisement of any elector interested in or affected by a general purpose local government's action triggers strict scrutiny only applies within that government's borders.

In effect, the Court denied that *Holt* was a local voting rights case at all and, accordingly, looked only to see if extraterritoriality would satisfy the rational basis test. Noting that extraterritorial arrangements are longstanding and widespread, the Court found that states could reasonably determine that extraterritoriality satisfies the state's interest in providing "basic municipal services such as police, fire, and health protection"¹⁹⁰ on the urban fringe. Although the state could have used other local government arrangements to serve the urban fringe—such as formation of a fringe area government or administration by the county—the Court relied on *Hunter v City of Pittsburgh* to confirm that "the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them"¹⁹¹ encompasses extraterritoriality.¹⁹²

Holt reflects the continuing power of the state instrumentality model. To be sure, the Court's reliance on formal political boundaries in marking the contours of the local vote is unexceptionable. Any requirement of enfranchising all persons, including nonresidents, interested in or affected by a local government election would leave the size of local electorates indeterminate and poten-

¹⁸⁹ *Id.* at 69.

¹⁹⁰ *Id.* at 74.

¹⁹¹ *Id.* at 71, citing *Hunter*, 207 US at 178.

¹⁹² The Court cautioned that a different result might obtain if "a city has annexed outlying territory in all but name, and is exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits." *Id.* at 73 n 8, citing *Little Thunder v South Dakota*, 518 F2d 1253 (8th Cir 1975). In *Little Thunder*, the Court of Appeals applied strict scrutiny to invalidate the South Dakota statutes, which provided that officials of designated "organized counties" would function as the government for "unorganized counties" that consist mostly of reservation Indians, with only voters in the organized counties voting for the county officials. The court determined that "the officials of the organized county exercise substantial power over the affairs of individuals living in the unorganized counties." *Little Thunder*, 518 F2d at 1258. By contrast, Tuscaloosa lacked "the vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses," in the police jurisdiction, and, thus, extraterritorial regulation was not tantamount to annexation. *Holt*, 439 US at 73 n 8.

tially variable from issue to issue and could erode the connection between a particular community and its representatives.¹⁹³ Residency, or some other objective indicator of presence within the locality, as a prerequisite to the franchise may be “necessary to preserve the basic conception of a political community.”¹⁹⁴ But there were two formal state-created political boundaries in *Holt*—the corporate limits of the City of Tuscaloosa and the extraterritorial zone. The people in the police jurisdiction were not simply neighbors of Tuscaloosa indirectly affected by the city’s decisions but were, rather, residents of a defined territorial unit subject to a degree of direct city control. As a matter of voting rights jurisprudence, the Court would have had to determine which was the relevant political boundary for assessing discrimination in the availability of the franchise, the Tuscaloosa city limits or the outer perimeter of the extraterritorial zone, and, if the latter, consider whether a compelling state interest justified the limitation on the franchise to those within the city. Instead, the Court ignored the presence of two boundaries, and of two possible definitions of residents of Tuscaloosa. It was, thus, able to assume that extraterritorial authority without a concomitant extension of the franchise posed no local voting rights question.

By severing the voting rights issue from the extraterritorial authority question, the Court avoided the issue of representation raised by extraterritorial regulation. This issue runs through many of the local government voting rights cases: whether a state can determine that a local government has a differential impact on different groups within the government’s territorial jurisdiction and so structure representation on the local governing body to give a greater, or exclusive, voice to the group the state determines is primarily affected. The local democracy cases require a very tight nexus between the franchise and interest in the local government and assume that a local government’s impact is pervasive within its territory even if it primarily serves a particular constituency or receives its locally-raised revenues from a specific group. As a result, no limitation on the franchise or overrepresentation of a

¹⁹³ Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 Colum L Rev 775, 793 (1992).

¹⁹⁴ *Dunn v Blumstein*, 405 US 330, 343-44 (1972).

group favored by the state has been sustained for general purpose governments.¹⁹⁵

Holt would have been a close case if the outer perimeter of the police jurisdiction had been treated as the relevant local boundary and strict scrutiny had then been applied to the disenfranchisement of the police zone residents. The City of Tuscaloosa certainly had less power over the urban fringe than it did over residents within the corporate limits. The city could not levy ad valorem taxes, exercise eminent domain, or zone in the extraterritorial belt.¹⁹⁶ On the other hand, the city could enforce municipal police, sanitary, and business licensing requirements in the zone and collect license fees.¹⁹⁷ Residents of the police zone could have plausibly contended that they were at least as affected by Tuscaloosa as the nonparents and nontaxpayers were affected by the operations of the school district in *Kramer*. Applying the *Kramer* standard would have entailed a close consideration of the relationships of formal jurisdictional authority, differences in government impact within a jurisdiction, and the right to vote in local elections, with the burden on the state to justify the exclusion of fringe area residents from the municipal vote.¹⁹⁸ The Court, however, dismissed the voting rights problem rather than resolve it. Moreover, the constitutionality of extraterritoriality was determined by an invocation of the state instrumentality model of local government. Federal constitutional protection of the franchise would not require the elimination of a longstanding and widespread mechanism of local governance. The selection of the means of providing services and regulation in the urban fringe—municipal annexation, fringe incorporation, special district, county government, or municipal extraterritorial police jurisdiction—was a matter for the state. The dilemma from a voting rights perspective, that some qualified electors could vote for the governing body of a local government and other qualified electors also subject to direct regulation by that local government could not, was simply ignored.

¹⁹⁵ In the proprietary cases, the special limited purpose of the districts, the economic burdens of the landowner—"investors," and the assumption that those burdens gave the landowners a disproportionate interest in the special district, permitted the finding of the necessary franchise-interest nexus. Because extraterritoriality involves general purpose governments, the proprietary model is unavailable.

¹⁹⁶ *Holt*, 439 US at 73 n 8.

¹⁹⁷ *Id* at 61-62.

¹⁹⁸ See, for example, Note, *Holt Civic Club v. City of Tuscaloosa: Extraterritorials Denied the Right to Vote*, 68 Cal L Rev 126, 146-49 (1980) (discussing partial enfranchisement of fringe area residents).

B. Boundary Change¹⁹⁹

Boundary change is a widespread phenomenon at the local level. Every year thousands of municipalities annex territory, hundreds of municipalities detach territory, dozens of new municipalities are incorporated, and a handful of municipalities are merged, consolidated, or disincorporated.²⁰⁰ The processes of boundary change have implications for local government voting rights. Do local residents have a right to vote on local boundary changes? If the residents of one jurisdiction affected by a boundary change are enfranchised but residents of other jurisdictions directly affected by the same change are not—such as when residents of an area to be annexed may vote on the annexation but residents of the annexing city may not—does the discrimination in the availability of the franchise require a compelling state interest? If the residents of different jurisdictions affected by the same boundary change are all enfranchised, does federal constitutional protection of the vote require a single aggregate majority of all voters, or concurrent majorities of voters within each jurisdiction?

The Supreme Court has directly addressed only the last of these issues, but the Court's resolution of that question and its approach to extraterritoriality suggest that as a general rule voting on boundary changes is largely a matter for state determination. In *Town of Lockport v Citizens for Community Action*,²⁰¹ the Court considered a provision of the New York Constitution that enables a county to switch from a weak county to a strong county format, with a new administrative structure and enhanced regulatory capacity. Such a change requires the approval in a referendum of concurrent majorities of voters who live in cities and of those who live outside cities. A proposed charter change for Niagara County twice won approval of city voters and of a majority of all county voters, but each time was rejected by a majority of non-city voters and thus failed. City voters contended that the concurrent majority rule unconstitutionally diluted their votes, but a unanimous Supreme Court disagreed.

Lockport likened the county reorganization, which strengthened the county government and weakened other local units, to

¹⁹⁹ This section builds on my previous discussion of some aspects of the right to vote on local government boundary changes in Briffault, 92 Colum L Rev at 791-805 (cited in note 193).

²⁰⁰ See Joel C. Miller, *Municipal Annexation and Boundary Change*, in International City Management Association, *Municipal Year Book 1988* 59, 64 (ICMA, 1988) (table 1/3).

²⁰¹ 430 US 259, 260-61 (1977).

“the structural decision to annex or consolidate.”²⁰² A decision to adopt the “strong county” form, like an annexation or a consolidation, could have a differential impact on the “separate and potentially opposing interests” of city and noncity voters.²⁰³ The Court assumed that in an annexation or consolidation proceeding a state could require separate consents from the voters of each unit affected by the boundary change. The electorate of each unit could be given veto power over the annexation or consolidation, even though the negative vote of a small unit could outweigh the affirmative vote of a larger one or of the two units considered together.²⁰⁴ By analogy, New York could require the concurrent approval of the charter change by different groups of county voters.²⁰⁵

Lockport’s indication that a state could require separate consents of the constituent units in an annexation or consolidation is dictum, but the sense is clear. The Court did not explicitly consider voting rights in boundary change cases, but emphasized the “wide discretion the States have in forming and allocating governmental tasks to local subdivisions”²⁰⁶ and indicated that it would defer to a state’s determination “that the residents of the annexing city and the residents of the area to be annexed formed sufficiently different constituencies with sufficiently different interests.”²⁰⁷ Votes could be tabulated on a separate constituency basis, rather than across constituency borders. *Lockport*, however, does not mandate, as a matter of constitutional protection of the local franchise, a concurrent majority rule. *Lockport* cited *Hunter v City of Pittsburgh*, which had sustained a state consolidation law that provided for a single majority of the aggregate of the voters of the two cities proposed for consolidation, over the protest of the voters of the smaller city that they were being swallowed up without their consent.²⁰⁸ *Lockport* and *Hunter* taken together indicate that the issue is not one of voting rights but of plenary state authority to

²⁰² Id at 271.

²⁰³ Id.

²⁰⁴ Id at 271-73.

²⁰⁵ *Lockport* cannot be read simply as authorizing a supermajority requirement for a decision that has extraordinary significance for a polity. The Court had previously sustained supermajority requirements, but only on condition that the supermajority rule not privilege a particular group because of “group characteristics” such as “geographic location.” *Gordon v Lance*, 403 US 1, 4 (1971) (sustaining 60% voter approval requirement as precondition for issuance of bonded indebtedness). The concurrent majority requirement in *Lockport*, however, turned on geographic location.

²⁰⁶ *Lockport*, 430 US at 269.

²⁰⁷ Id at 271.

²⁰⁸ Id at 271, citing *Hunter*, 207 US at 174-79.

require separate consents of different territorial constituencies or to aggregate all the voters into one constituency.²⁰⁹

Lockport and *Holt*, and the invocation of *Hunter* in both cases, also suggest the resolution of the other boundary change voting rights issues. As *Holt* indicated, constitutional interest attaches when the state gives the vote to some local residents but not others. Combined with *Hunter*'s determination that the states have "absolute discretion" to "expand or contract the territorial area [of a city], unite the whole or a part of it with another municipality . . . with or without the consent of the citizens, or even against their protest,"²¹⁰ it is apparent that local residents have no federal constitutional right to have a local boundary change put to a popular vote.²¹¹ Further, although discrimination in voting rights will be subject to strict scrutiny once the franchise is provided, strict scrutiny stops at the local jurisdictional boundary line, and, as *Lockport* and *Holt* indicate, the states will have considerable discretion in selecting the determinative boundary line.²¹² When the residents of one jurisdiction are entitled to vote on a boundary change, but the residents of other jurisdictions affected are not, strict scrutiny will not apply to this interjurisdictional discrimination.²¹³ The issue will be treated not as a matter of voting rights but as a question of state boundary change policy.²¹⁴ Therefore,

²⁰⁹ See, for example, *City of Humble v Metropolitan Transit Authority*, 636 SW2d 484 (Tex App 1982) (sustaining scheme for referendum on creation of a metropolitan transit authority that required the separate consents of some incorporated cities, while combining other cities into a single election unit).

²¹⁰ 207 US at 178-79.

²¹¹ See, for example, *Carlyn v City of Akron*, 726 F2d 287, 290 (6th Cir 1984) (no right to vote concerning detachment of territory from one jurisdiction and annexation to another); *Berry v Bourne*, 588 F2d 422, 424 (4th Cir 1978) (no right to vote on annexation).

²¹² As previously noted, there were two relevant boundary lines in *Holt*: the city limits of Tuscaloosa and the outer perimeter of the police jurisdiction. The Court deferred to the state of Alabama's determination that the city limits were the border for the provision of the franchise in Tuscaloosa elections. Similarly, there were two relevant boundary lines in *Lockport*: the distinction between the city and noncity portions of Niagara County, and the borders of the County itself. Although the Court treated the reorganization of the county government as if it were a boundary change, Niagara County had been united as a single county unit since the beginning of the nineteenth century. A comparison with *Avery*, 390 US 474, is instructive, because in that case the Court declined the invitation to consider Midland County as composed of two distinctive units—the city and rural areas—and instead insisted upon treating the County as a single unit.

²¹³ See, for example, *St. Louis County v City of Town and Country*, 590 F Supp 731 (E D Mo 1984); *Moorman v Wood*, 504 F Supp 467 (E D Ky 1980); *Murphy v Kansas City*, 347 F Supp 837 (W D Mo 1972); *Adams v City of Colorado Springs*, 308 F Supp 1397 (D Colo 1970), *aff'd*, 399 US 901 (1970).

²¹⁴ The state's plenary authority to choose which jurisdictions will be able to vote on a boundary change does not extend to discriminations within a general purpose jurisdiction.

the states have plenary authority to implement policies that encourage or impede various types of boundary changes by determining that the residents of some but not all units affected will get to vote on a proposed change, much as the state can decide whether to require concurrent majorities or a single majority from the aggregate local electorate.

The only difficult question concerns secession or detachment of territory. In justifying a state rule that would require separate consents of jurisdictions proposed for consolidation or merger, *Lockport* noted that “[t]he fact of impending union alone would not so merge them into one community of interest as constitutionally to require that their votes be aggregated.”²¹⁵ Arguably, in a secession or detachment there is at the time of the vote a single jurisdiction, and therefore any effort to limit the vote on secession to just one group in that community—such as the residents of the area seeking secession—should be subject to strict scrutiny. This was, for a time, the position of the California Supreme Court.²¹⁶ In a case involving the secession of a school district from a larger unified school district, the California court reasoned that because secession had an impact on the well-being of the district as a whole, all voters in the unified school district were entitled to participate in the secession vote.²¹⁷

There are, however, two problems with special treatment for secession referenda. First, it may be difficult to distinguish a secession from other forms of boundary change. Due to the overlapping of local governments, a municipal incorporation or municipal annexation of unincorporated territory may have the effect of the detachment of that territory from the county. Typically, the county’s powers to collect revenues or regulate land use and development will be reduced when unincorporated territory is attached to or be-

State efforts to restrict the vote on an annexation to landowners or to require the separate consent of landowners have been subject to strict scrutiny and invalidated. See, for example, *Hayward v Edwards*, 456 F Supp 1151 (D SC 1977), *aff’d as Hayward v Clay*, 573 F2d 187 (4th Cir 1978) (where annexing and annexed areas voted separately, approval of voters of each could be required, but freeholders of annexed area could not be given veto); *Mayor and Council of City of Dover v Kelley*, 327 A2d 748 (Del 1974) (statutory and city charter provisions providing for weighting votes in annexation according to assessed valuation of real estate owned by each eligible voter unconstitutional in the absence of a compelling state interest).

²¹⁵ *Lockport*, 430 US at 271.

²¹⁶ *Fullerton Joint Union High School District v State Board of Education*, 32 Cal 3d 779, 187 Cal Rptr 398, 654 P2d 168 (1982).

²¹⁷ 654 P2d at 184-85.

comes a municipality.²¹⁸ Conversely, a city may initiate a detachment to rid itself of unwanted territory, thereby displacing a burden to the surrounding county,²¹⁹ or a secession may be just the first step in a two-step process of shifting territory from one existing municipality to another.²²⁰

Second, from a voting rights perspective a secession is not a unique form of boundary change. The claim to the franchise is driven by the argument that the disenfranchised group is as interested in and affected by the election as those enfranchised. Annexations and consolidations may have as great an impact on the residents of the areas proposed for merger as a secession or detachment would on the area that would lose territory. An annexation or consolidation may result in the loss of local autonomy for a smaller area absorbed into a larger one,²²¹ or may impose new burdens of service provision or regulation on a jurisdiction required to accept new territory.²²² To strictly scrutinize a state decision limiting the franchise in a secession election on the theory that the residents of the jurisdiction seceded from are as affected by the outcome of the referendum as those seeking secession implies the need for the same standard for all other restrictions on boundary change voting.²²³ Alternatively, strict scrutiny limited to restrictions on voting in secession referenda would have the curious effect of providing municipalities with a measure of constitu-

²¹⁸ See, for example, *St. Louis County*, 590 F Supp at 736-37; *Carlyn*, 726 F2d at 289; *Board of Supervisors of Sacramento County v Local Agency Formation Commission of Sacramento County*, 3 Cal 4th 903, 13 Cal Rptr 2d 245, 838 P2d 1198, 1200 (1992), cert denied, 61 USLW 3645 (1993). See also *Marcus v Baron*, 456 NYS2d 29 (1982) (a village in the town of Ramapo, New York, sought to incorporate in order to get out from under the town's growth control zoning ordinances; the town stood in a similar relation to the village as a county to a municipality); *City of Town & Country v St. Louis*, 657 SW2d 598, 612 (Mo 1983) (en banc) (city's annexation of unincorporated area would result in county's loss of tax revenues and loss of control and planning of developable land). Note that in these cases, despite the shift of certain powers upon incorporation, newly incorporated areas are still formally considered within the larger jurisdiction of which they had been a part.

²¹⁹ See, for example, *Village of Beechwood v Board of Elections of Cuyahoga County*, 148 NE2d 921, 923 (Ohio 1958).

²²⁰ See, for example, *Moorman*, 504 F Supp at 476-77; *West Point Island Civic Ass'n v Township Committee of Dover*, 255 A2d 237, 239-40 (NJ 1969).

²²¹ See, for example, *Hunter*, 207 US 161.

²²² See, for example, *Citizens Against Forced Annexation v Local Agency Formation Commission of Los Angeles County*, 32 Cal 3d 816, 187 Cal Rptr 423, 654 P2d 193 (1982) (residents of City of Rancho Palos Verdes seeking to resist forced annexation of unincorporated territory of Eastview).

²²³ See *id.* (applying strict scrutiny to an annexation election and sustaining state statute limiting the franchise to those in the area proposed for annexation on the theory that the state has a compelling interest in promoting annexation).

tional protection from the loss of territory but not from the unwanted addition of territory or from merger into another municipality.²²⁴

Although *Lockport* appears to permit a different rule for secessions, the sense of both *Lockport* and *Holt*, and the significance of the citation to *Hunter*²²⁵ in both cases, is that the issue of which territorial groups are to vote on local boundaries is for the political judgment of state legislatures. Indeed, the California Supreme Court recently overturned its previous requirement of strict scrutiny of limitations on the franchise in a secession election, concluding that the rational basis test applies and that the state's interest in the "logical formation and modification of the boundaries of local agencies" would support restriction of the franchise to the residents of some but not all of the territory affected by a boundary change.²²⁶

The United States Supreme Court's reliance on the traditional model of state-local relations to resolve the issues concerning voting rights in boundary change decisions may follow from the problematic nature of local boundaries. As *Avery* indicates, the protection of the local franchise is built on a notion of local government as democratic self-government, but the concept of self-government does not dictate who is the "self" that does the governing.²²⁷ Indeed, *Avery* relies on the states to create local governments and to give them their powers and territory. To apply strict scrutiny to the distribution of the vote concerning boundary changes would inevitably entail a constitutional review of the states' municipal formation and boundary change policies. But there are no generally accepted principles for determining whether a particular local government ought to exist, what that unit's geographic dimensions ought to be, or whether a particular territory ought to be in that or another local unit. Thus, deference to the states is consistent with both the lack of a constitutional vantage point for examining state

²²⁴ The application of strict scrutiny in secession voting cases would provide the municipality with only limited protection because, as noted, there is no constitutional requirement that the state hold any election concerning the boundary change or that the state obtain the municipality's consent to the secession or detachment. *Hunter*, 207 US at 179.

²²⁵ *Hunter* discusses the power of the state with respect to municipalities to "expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation . . . with or without the consent of the citizens or even against their protest." *Id.* at 178-79.

²²⁶ *Board of Supervisors of Sacramento County*, 838 P2d at 1211 (quoting Cal Govt Code § 56001).

²²⁷ Briffault, 92 Colum L Rev at 800 (cited in note 193).

municipal formation and boundary change policies²²⁸ and the traditional jurisprudence of federalism that treats local governments as state instrumentalities and leaves the creation and structure of local governments to the states.

C. Expanded Electorates

The continued power of the state instrumentality model is also illustrated by cases involving claims that a state improperly extended the local franchise to people who are so much less affected by a local government than other voters that their participation unconstitutionally dilutes the votes of those primarily affected. The assertion of unconstitutional overextension of the electorate has arisen in two settings: overlapping jurisdictions²²⁹ and the enfranchisement of nonresident property owners.²³⁰ The overlapping jurisdiction problem is best exemplified by a series of cases concerning city and county boards of education in Alabama and North Carolina, where one school system operates in a city and a second system operates in the county in which the city is located. The city residents are primarily served by the city school system, and they are authorized to vote for the city school board. In several instances the city residents have been enfranchised in county school board elections as well. The non-city residents of the county claimed that the city resident voting in the county school board elections unconstitutionally dilutes the non-city vote and thereby threatens to undermine the non-city residents' ability to

²²⁸ The constitutional ban on racial discrimination does provide a basis for invalidating racially invidious boundary determinations. See, for example, *Gomillion v Lightfoot*, 364 US 339 (1960). See also *City of Pleasant Grove v United States*, 479 US 462 (1987) (applying Voting Rights Act of 1965 to boundary change); *Perkins v Matthews*, 400 US 379 (1971) (same).

²²⁹ See, for example, *Davis v Linville*, 864 F2d 127 (11th Cir 1989); *Sutton v Escambia County Bd. of Ed.*, 809 F2d 770 (11th Cir 1987); *Hogencamp v Lee County Bd. of Ed.*, 722 F2d 720 (11th Cir 1984); *Phillips v Andress*, 634 F2d 947 (5th Cir 1981); *Creel v Freeman*, 531 F2d 286 (5th Cir 1976); *Locklear v North Carolina State Bd. of Elections*, 514 F2d 1152 (4th Cir 1975). See also *McMichael v County of Napa*, 709 F2d 1268 (9th Cir 1983) (challenge by resident of unincorporated area to county-wide vote on a slow growth ordinance that applied only to the unincorporated area); *Collins v Town of Goshen*, 635 F2d 954 (2d Cir 1980) (challenge by residents of water district to town-wide vote on management of water district, including participation by residents not served by the district); *Clark v Town of Greenburgh*, 436 F2d 770 (2d Cir 1971) (challenge to right of residents of incorporated area within town to vote in election for town officers when incorporated area had its own village government and town primarily served the unincorporated area).

²³⁰ See, for example, *Bjornestad*, 281 Cal Rptr at 558-65; *Brown v Board of Commissioners of City of Chattanooga*, 722 F Supp 380, 397-98 (E D Tenn 1989); *Glisson v Mayor & Councilmen of Town of Savannah Beach*, 346 F2d 135 (5th Cir 1965).

govern their own local educational institutions. In the nonresident property owner cases, local adult resident citizens were enfranchised regardless of whether they owned property, but the states also extended the franchise to some nonresidents who owned taxable real property within the community.²³¹

The overinclusion claim presents the issue, latent in *Avery* and *Kramer*, of whether those primarily interested in a local government action have a right to reduce or exclude the representation of others who may be significantly less interested. In so doing, they underscore the uncertain theoretical foundation of the jurisprudence of local voting. A consistent theme in the local election cases has been the linkage of franchise and impact. The Supreme Court's basic premise is that residents of a jurisdiction have an equal right to participate in the election of their local government so long as they are comparably affected by that government. The doctrine breaks down, however, when the local government has different degrees of impact on different residents. In the local democracy cases, the Supreme Court presumed that the local government had some roughly comparable impact on all residents and therefore mandated the enfranchisement of all otherwise qualified voters. In the overlapping school district cases, however, because of the existence of two local systems serving different parts of the community, there was substantial evidence of a significant difference in the impact the county school district had on city and non-city residents.

If the touchstone for representation is some degree of local impact, and the county school board has some modest impact on city residents, then all residents of the county school district have an equal claim to the local franchise. But if equality of participatory rights is based on equality of impact, then giving an equal franchise to those who are less affected by local action, albeit still somewhat affected, can be seen as diluting the rights of those

²³¹ Some of the situations in which nonresident voting has been authorized include: a seaside resort town in which residents of the surrounding county who owned second homes in the municipality were enfranchised, *Glisson v Mayor & Councilmen of Town of Savannah Beach*, 346 F 2d 135 (5th Cir 1965); a special district in which the franchise was granted to both residents and nonresident landowners, *Bjornestad v Hulse*, 229 Cal App 3d 1568, 281 Cal Rptr 548 (1991); a Tennessee statute that authorized landowner voting in addition to resident voting in a city that so provided, *Brown v Board of Commissioners of Chattanooga*, 722 F Supp 380, 397 (E D Tenn 1989); and a provision of the New Mexico constitution that extends the vote in municipal bond referenda to any person who owns and pays taxes on property within the municipality and who is otherwise qualified to vote in the county in which the municipality is situated, *Snead v City of Albuquerque*, 663 F Supp 1084 (D NM 1987).

much more affected. Moreover, if all voting rules within general purpose local governments are subject to strict scrutiny and the state is required to provide a compelling state interest for all deviations from the tight fit of franchise and impact, then the state may be unable to justify either the disenfranchisement or the equal representation of the less affected residents.

The courts that considered the overlapping school districts resolved this dilemma by, for the most part,²³² exempting the enfranchisement of the less affected residents from strict scrutiny. But, while professing to apply a rational basis test and to place the burden on the non-city residents to demonstrate the irrationality of the state's enfranchisement of the less affected city residents in elections for the county-wide school board,²³³ these courts in practice also required the states to prove that the overlying jurisdiction has some impact on the residents of the underlying included jurisdiction. This requirement of some objective interest of city residents in the operation of county schools has been satisfied when the city contributes to the financing of county schools, there are student cross-overs between the two systems, or the two systems share some facilities.²³⁴ As a result, many but not all extensions of the franchise in county school board elections to city residents have been sustained. The overlapping school district disputes have generated an unusual series of local voting cases in which both the state's interest in structuring local governments and the primary local constituency's interest in avoiding dilution have been weighed and the disputes have been resolved through a fact-sensitive consideration of the extent of city involvement in county schools.

In the overlapping jurisdiction cases, the city residents were also residents of the county and, as a result, would have had at least a *prima facie* case to challenge their exclusion from county school board elections. In the nonresident property owner cases, the challenged voters would have had no constitutional entitlement to vote where they did not reside.²³⁵ Thus, the need to avoid strict scrutiny, lest neither the expanded nor the narrower definitions of the electorate satisfy a compelling state interest, was absent. None-

²³² *Locklear*, which applied strict scrutiny, is the exception. 514 F2d at 1154.

²³³ See, for example, *Sutton*, 809 F2d at 772; *Creel*, 531 F2d at 288.

²³⁴ The judges that have heard these cases have disagreed over how much of a financial contribution or how large a cross-over is required to give city residents a significant enough interest in the county school system to justify their enfranchisement. *Sutton*, 809 F2d at 773-74; *Hogencamp*, 722 F2d at 722.

²³⁵ Instances of nonresident landowner voting that resulted in litigation are described in note 231.

theless, in these cases, too, the courts declined to subject the expanded franchise to strict scrutiny, applied a nominal rational basis test, and looked for some objective indicia of the added voter's interest in the operations of the local government. Generally, the courts found that a state could reasonably conclude that property owners have "an interest in the operation" of the local government.²³⁶ But not all such enfranchisements have been approved. Unlike residents, who are either in a jurisdiction or not, nonresidents can have fractional interests or tiny holdings of municipal land. Thus, in one case, the court held that residents could have their vote unconstitutionally diluted by the enfranchisement of nonresidents who own "trivial" amounts of property within the local jurisdiction.²³⁷

The expanded electorate cases may be explained in terms of a bias in favor of the expansion of the franchise,²³⁸ but this fails to give adequate recognition to the vote dilution claim. The enfranchisement of those without some stake in the community would reduce the voice of community members in their own local affairs, interfere with their efforts to assure that their local government is responsive and accountable to their interests, and, ultimately, erode their ability to govern themselves. If democratic norms apply, the franchise can be extended only to those with some recognized stake in the community.²³⁹

²³⁶ *Glisson*, 346 F2d at 137. See also, *Brown*, 722 F Supp at 399 ("There is no question that city property owners, including nonresident property owners, have an interest in the conduct of municipal affairs, including property taxes, zoning, public services such as sewage and garbage disposal, and other matters that may affect their property.").

²³⁷ *Brown*, 722 F Supp at 399. In *Brown* the court noted that "as many as 23 nonresidents have been registered to vote on a single piece of property in the city," and that in one instance fifteen nonresidents were registered as co-owners of a parcel of property assessed at \$100. *Id.* As a result, it found that the nonresident landowner enfranchisement provision of the Chattanooga city charter did not further any rational government interest and, therefore, fell afoul of the Equal Protection Clause. The court indicated that a property owner franchise with a minimum property value provision and a limit on the number of people who could vote from a parcel would have been sustained. *Id.*

²³⁸ *Id.* at 398 ("*Over* inclusiveness is a lesser constitutional evil than *under* inclusiveness."), citing *Sutton*, 809 F2d at 775.

²³⁹ In reviewing these and other cases concerning expanded electorates, my colleague Gerald Neuman found a rejection of the notion that the constitution provides a "single conception of a political community that uniquely determines the electorate of each governmental unit." Gerald L. Neuman, "*We Are The People*": *Alien Suffrage in German and American Perspective*, 13 Mich J Intl L 259, 320. Rather, once the "core electorate" composed of "a constitutionally privileged category of citizens" (adult, resident, nonfelonious citizens) has been enfranchised, *id.* at 313, "government [has] some discretion to supplement [it] . . . with a variety of noninvidiously defined optional electorates, consisting of categories of persons who have interests implicated in the community's political process," *id.* at 320. My reading of these cases is fairly close to his, with two slight differences. First, I think I

The question, then, is who decides who has the necessary interest to support an extension of the franchise? The expanded electorate cases indicate that the states will be given considerable discretion to extend the franchise to groups affected by a local government but not constitutionally entitled to vote in local elections. Such state decisions will be subject, however, to judicial review to protect the interest in local self-government of those residents most affected by the dilution that would result from the enfranchisement of those with a much smaller local stake. The principal instances of the expanded electorates grow out of two distinctive features of American local government: the states' practice of creating multiple local governments with overlapping powers over the same territory, and the historic close connection between local government and property ownership.

With overlapping governments, one local government may have a differential impact on different groups of residents within its own jurisdictional borders depending on the jurisdiction and authority of other local governments. Requiring a tight fit between voting rights and local government impact would impose on local government a model of jurisdictional separation and electoral distinctiveness that is simply not consistent with current local government arrangements. The overlapping government cases may be seen as an adaptation of the model of local democracy to the messy reality of multiple local governments as well as to the traditional role of the states in structuring these governments.

The nonresident property owner cases are more troublesome, with their hint of the proprietary model and their evident ancestry in the preferred position of property in determining political

may be taking the "dilution" claim of the core electorate more seriously. There has to be some limit on the state's ability to expand the local electorate lest the opportunity for local self-government be denied to those who are most affected by local operations and who are likely to lack an alternative jurisdiction to receive services or govern themselves. A similar concern may explain the courts' willingness to put some bite into their rational basis review. Second, I see these cases as particularly embedded in the history and jurisdictional context of American local governments. The longstanding state practice of providing for local finance through the property tax provides some justification for the extension of the franchise to property owners. Similarly, the state practice of creating overlapping local units without a sharp separation of powers or functions or a clear congruence of jurisdiction and impact permits the extension of the franchise to those only modestly affected by a government with technical jurisdiction over them. History and jurisdictional structure may provide some guidance in determining when extending the franchise does not improperly dilute the "core electorate's" interest in local self-government—although this is certainly not to reject the enfranchisement of new "optional" electorates with a stake in local government activities. See *id.* at 322-30 (considering the enfranchisement of resident aliens in state and local elections).

rights.²⁴⁰ Nevertheless, given the current constitutional protection of the franchise for residents without property, the extended franchise may be a permissible recognition of the extent to which the owners of property in a jurisdiction bear much of the economic burdens of local government and, thus, have a cognizable stake in the local political process.

IV. THE MISSING MODEL OF FEDERATIVE LOCAL GOVERNMENTS

The one person/one vote doctrine requires that representation in governing bodies be based on population rather than on the political subdivisions of the government in question. Accommodating state and local district lines to subdivision boundaries can justify relatively minor deviations from population equality,²⁴¹ but the one person/one vote principle effectively dominates the representation of political subdivisions in state and local governing bodies.

The priority of population equality over the representation of political subunits was dramatically confirmed by the recent decision in *Board of Estimate of New York City v Morris*,²⁴² in which the Supreme Court unanimously invalidated the one borough/one vote rule of New York City's Board of Estimate. For most of the city's twentieth-century history, the Board wielded broad authority over land use and zoning, the disposition of city-owned property,

²⁴⁰ See, for example, *Snead*, 663 F Supp at 1085 (tracing the enfranchisement of nonresident taxpayers in municipal bond referenda to earlier state constitutional provisions that limited the right to vote to taxpayers). As my colleague Gerald Neuman has put it, the enfranchisement of both residents, regardless of whether they own property, and nonresident property owners reflects "a melding of an earlier republican system in which traditional property qualifications defined the core electorate with the class-egalitarian conception of democracy" embodied in the rejection of property ownership as a qualification for resident voting in *Kramer* and *Cipriano*. Neuman, 13 Mich J Intl L at 317 (cited in note 239).

Nonresident landowner voting may also be racially discriminatory. Fern Shen, *Maryland Town Defends Another Era's Idea of Voting Rights*, Washington Post A1 (Mar 29, 1993) (51% of residents of town of Princess Anne are black; nonresident property owners "who are primarily white" account for 11% of the town's registered voters). The general constitutional considerations that support state discretion to extend the franchise to nonresidents with a considerable property-based stake in the community might not be sufficient to preserve such an arrangement if the enfranchisement of property owners is racially discriminatory in violation of the Voting Rights Act.

²⁴¹ See, for example, *Abate v Mundt*, 403 US 182 (total deviation from population equality of 11.9% constitutionally acceptable for county legislature in order to permit legislative district lines to correspond to the boundaries of towns within the county); *Mahan v Howell*, 410 US 315 (1973) (total deviation from population equality of 16.4% in reapportionment of Virginia House of Delegates justified by the plan's advancement of state policy of respecting the boundaries of political subdivisions).

²⁴² 489 US 688 (1989).

and city contracts and franchises, while sharing power with the City Council over the budget. The Board consisted of eight members: three officials elected on a city-wide basis, who cast two votes apiece, and New York City's five Borough Presidents, who each cast one vote.²⁴³ Given the wide disparity in population among the five boroughs—with the largest borough having more than six times the population of the smallest—the Board was an inviting target for a one person/one vote challenge.²⁴⁴ New York City presented a long list of arguments to justify borough-based representation on the Board, notwithstanding the considerable deviation from one person/one vote that resulted. Some form of borough-based representation had been virtually a constant in the governance of the city since the consolidation of New York City from the various pre-existing cities and unincorporated areas around New York harbor in the late nineteenth century; borough borders reflected natural topographical boundaries²⁴⁵ and historic political subdivision lines,²⁴⁶ and were not the product of gerrymandering or manipulation; borough identity gave city residents a sense of community hard to attain in a large metropolis, and borough equality on the Board contributed to the sense of borough identity; and in a city of New York's size borough-based voting provided desirable representation of subcity interests.²⁴⁷

There was certainly little evidence that equal representation of the boroughs on the Board did much harm to the interests of the residents of the larger boroughs. Unlike the rural-dominated county legislature in *Avery* or the junior college district board in *Hadley*, a majority of the city's population was able to elect a majority of the votes on the Board. There was no claim that the smaller boroughs dominated the City, received more than their fair

²⁴³ Id at 694.

²⁴⁴ Earlier efforts failed when the New York Court of Appeals found that the Board lacked general legislative authority, *Bergerman v Lindsay*, 25 NY2d 405, 306 NYS2d 898, 255 NE2d 142, 146 (1969), and a federal district court ruled that the Board was not an elective body but rather that its members were elected to other posts and served on the Board ex officio. *Morris v Board of Estimate*, 551 F Supp 652, 656 (E D NY 1982). The Supreme Court, however, concluded that the Board was elective because all eight officials became members automatically upon their elections to their other offices, and that consistent with *Hadley* the Board's powers were "'general enough and have sufficient impact throughout'" the City to require compliance with one person/one vote. *Morris*, 489 US at 694-96, quoting *Hadley*, 397 US at 54.

²⁴⁵ All but one of the borough borders is either a body of water or one of New York City's external boundaries.

²⁴⁶ Each New York City borough corresponds to a county of New York State.

²⁴⁷ See *Morris v Board of Estimate of New York City*, 647 F Supp 1463, 1467-75 (E D NY 1986).

share of benefits, or bore less than their fair share of costs. If there was ever a case for tempering the principle of population equality with a sensitivity to local conditions and a willingness to allow a locality to provide a minority with the greater representation it may need to have its interests heard without seriously interfering with majoritarian control, the Board of Estimate was the case. The Supreme Court, however, rejected all considerations deriving from the size and history of New York City or the political reasonableness of borough equality, finding that neither the Board's accommodation of "natural and political boundaries as well as local interests" nor the City's claim that borough representation is "essential to the successful government of a regional entity, the city of New York" could offset the "substantial departure from the one-person, one-vote ideal."²⁴⁸

The unwillingness to compromise the equal population ideal to permit the representation of public subdivisions may have two consequences for local governments. First, it may impair the prospects for decentralization of power within an existing city. Neighborhoods or communities would have a stronger sense of identity, and neighborhood or community governments could be more powerful, if they were represented directly in city governing bodies.²⁴⁹ As one commentator has observed, New York City's system of community boards with advisory and consultative powers concerning budgets, land use, and service provision is weakened because the boundaries of community districts are not coterminous with city council districts. The community boards are, thus, less able "to provide a channel through which neighborhood activists make their needs known to decision makers."²⁵⁰ With rigid adherence to the one person/one vote doctrine, council districts cannot be mapped onto community board lines, even though there are nearly the same number of council districts and community districts,²⁵¹

²⁴⁸ *Morris*, 489 US at 702-03.

²⁴⁹ Compare Nancy Maveety, *Representation Rights and the Burger Years* 42 (Michigan, 1991) (discussing proposal to make districts in the House of Representatives coincide with county or town boundaries within states to preserve representatives' "loyalty to their state and its local communities").

²⁵⁰ Viteritti, *The New Charter* at 426 (cited in note 14).

²⁵¹ There are 51 city council districts and 59 community boards. See Frank J. Mauro, *Voting Rights and the Board of Estimate: The Emergence of an Issue*, in Frank J. Mauro and Gerald Benjamin, eds, *Restructuring the New York City Government: The Reemergence of Municipal Reform* 62, 67 (Capital City Press, 1989) (37 Proceedings of the Academy of Political Science No.3); Robert F. Pecorella, *Community Governance: A Decade of Experience*, in Mauro and Benjamin, *Restructuring the New York City Government* 97, 97; NYC Charter §§ 22, 2702 (1988).

because the principle of equal population representation requires decennial reapportionment of council districts in light of population changes.²⁵² Council-community coterminality would, therefore, force the reshaping of community districts, but community districts are based on traditional neighborhoods or the city's service delivery patterns²⁵³ that do not ordinarily change with population fluctuations. Neighborhood government requires stable borders that correspond to residents' understanding of the territorial dimensions of their communities. That would be disrupted if community districts were made coterminous with city council districts. Equal population representation at the city level is thus inconsistent with council district/community board coterminality, and that, in turn, may weaken the effectiveness of those community governments.

Second, equal population representation may impede city-county consolidations, regional governments, or similar efforts to create governance structures capable of addressing metropolitan area-wide problems. This was a central concern of the dissenting Supreme Court justices in *Avery* and *Hadley*²⁵⁴ and of commentators at the time of those two decisions.²⁵⁵ For political reasons, the creation of a regional government or the consolidation of a city with the surrounding county may require the consent of the affected units. Residents of smaller units may fear that their voices and their interests will be lost in a regional entity unless they are given extra representation. Cities with traditions of home rule may want additional representation in overlying regional units that may limit municipal powers.²⁵⁶ All participants may view the pre-existing local government as the primary focus of their interest in local government and thus may seek to provide for representation of the constituent local units in the regional entity. The inability to create a federal structure in which the principle of population equality is tempered by a concern for some parity among the pre-existing units may render the regional unit politically impossible. If, as is typically the case, the regional unit is less than a fully consolidated metropolitan government, but simply the top layer of

²⁵² See NYC Charter § 2703 (1988).

²⁵³ See, for example, NYC Charter § 2704 (1988).

²⁵⁴ *Avery*, 390 US at 486, 495, 509 (Harlan, Fortas, Stewart dissenting); *Hadley*, 397 US at 59, 70 (Harlan, Fortas, Stewart dissenting).

²⁵⁵ See, for example, Dixon, 58 Georgetown L J at 971-85 (cited in note 13).

²⁵⁶ See, for example, *Cunningham v Municipality of Metropolitan Seattle*, 751 F Supp 885 (overrepresentation of City of Seattle and large cities with mayor-council form of government on the governing council of metropolitan area multi-purpose special district).

a two-tier federation or a multi-purpose special district that leaves many other local powers in the hands of the pre-existing local governments,²⁵⁷ it may, indeed, make more sense to think of the new government in federal terms and provide for some representation of the local units as local units. In addition, apart from the problems posed by the desire to provide extra representation to local units or to adhere to some goal of parity for pre-existing governments, the one person/one vote principle may make it difficult to use component localities as districts for election to the regional body because the local units are likely to have substantially different populations and reliance on political unit boundaries will often create substantial deviations from population equality.

There were so few successful efforts toward elective regional government in the decades immediately preceding the application of the one person/one vote principle to local governments that it is difficult to determine whether the inability to offer subunit-based representation with deviations from population equality has contributed to the lack of movement toward regional government in the past quarter-century. The Supreme Court's invalidation of the one borough/one vote principle on the New York City Board of Estimate and a federal district court's recent invalidation of the overrepresentation of Seattle and certain other cities on the governing council of the Seattle metropolitan area multi-purpose special district,²⁵⁸ however, confirm the potential for the one person/one vote doctrine to disrupt the creation of constituent units-based elective regional structures.

There have been two structural efforts to reconcile the representation of constituent local units in regional governments with the strictures of one person/one vote: appointive bodies and weighted voting. Both approaches permit the creation of regional governments based on subunits, but both also raise questions concerning the nature of the representation provided.

A. Appointive Bodies

The appointive solution is predicated on the exemption of appointive bodies from equal population representation. The courts have treated the exemption as virtually tautological: The principle of equal population representation is based on the constitutional

²⁵⁷ See, for example, Harrigan, *Political Change in the Metropolis* at 265-69, 311-21 (cited in note 79).

²⁵⁸ *Cunningham*, 751 F Supp 885.

requirement of equal protection of voters; equal protection, in turn, mandates equally weighted votes for all voters within a jurisdiction. If an office is not filled by popular vote, then the constitutional protection of the franchise does not apply,²⁵⁹ and any challenge to a state scheme of subunit representation on an appointive body would be subject only to a rational basis test and likely sustained under *Hunter's* principle of deference to state power to structure local relations.²⁶⁰ Although there may be some outer limit on the state's power to provide for appointive local governments,²⁶¹ the courts have consistently treated appointive bodies with members selected from component units of unequal population as exempt from the equal population representation principle.²⁶²

Two problems arise with the use of the appointive exemption to create federative regional governments. First, as a descriptive matter, it may at times be uncertain whether a body ought to be treated as elective or appointive. This ambiguity may occur when

²⁵⁹ See, for example, *Sailors v Board of Education of Kent County*, 387 US 105, 110-11 (1967). *Sailors* involved the Michigan system for selecting county school boards, which involved local voters electing local boards, then the local boards sending delegates to a biennial meeting at which they voted, on a one local school board/one vote basis, for members of the county board. The Court exempted the county school board members from the equal population representation principle for a combination of reasons—the administrative nature of the board, and the lack of a direct popular election for board members. “Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of ‘one man, one vote’ has no relevancy.” Id at 111. The Court’s subsequent rejection of the constitutional relevance of the administrative/legislative distinction in *Avery*, 390 US at 482-83, and *Hadley*, 397 US at 55-56, suggests that the crucial feature in *Sailors* was the absence of a direct popular election.

²⁶⁰ Compare *Presley v Etowah County Commission*, 112 S Ct 820 (1992) (Voting Rights Act’s requirement of preclearance of changes affecting voting does not extend to transfer of powers from elected officials to appointed official) with *Quinn v Millsap*, 491 US 95 (1989) (finding no rational basis for Missouri requirement that appointees to a board authorized to draft a plan of reorganization for the city and county of St. Louis be landowners).

²⁶¹ See, for example, Sheldon H. Nahmod, *Reflections on Appointive Local Government Bodies and a Right to an Election*, 11 Duquesne L Rev 119 (1972). But see *Van Zanen v Keydel*, 280 NW2d 535, 539 (Mich App 1979) (evaluating the powers of the Huron-Clinton Metropolitan Authority and finding that state could provide for the appointment of the Authority’s commissioners).

²⁶² Compare *Burton v Whittier Regional Vocational Technical School District*, 587 F2d 66 (1st Cir 1978) (regional school district board based on modified one municipality/one vote system in which city with 41% of population had only 2 of 13 seats sustained because board members were appointed by the constituent municipalities) with *Kelleher v Southeastern Regional Vocational High School District*, 806 F2d 9 (1st Cir 1986) (elective regional school board in which town with 46% of district’s population had only 20% of the seats held unconstitutional). See also *Oliver v Board of Education of City of New York*, 306 F Supp 1286 (S D NY 1969) (invalidating plan for New York City board of education in which five of seven members would be elected from the boroughs on a one borough/one vote basis, while sustaining interim plan in which each borough president would appoint one borough representative).

an important function of locally elected officials is to make appointments to the regional body and when the locally elected officials themselves may be selected to serve on the regional body.²⁶³ The closer the connection between local election and regional appointment, the more the appointments from local units of differing populations may be seen as an infringement of the right to an equally weighted vote of the residents of the more populous local unit.²⁶⁴ On the other hand, some close connection between local election and regional appointments may be desirable to promote the accountability of the regional officials and to enhance the public's participation in the affairs of the regional government.

This suggests the second, more normative, problem with appointive regional governments—the lack of a direct popular connection between the government and the region served. The desire for some locally elective tie for regional officeholders may explain the instances of elected local officials making appointments, or being eligible for appointment, to a regional board.²⁶⁵ In general, appointive officials will not be directly accountable to the public and the public is likely to be less able to participate in the decision-making of an appointive body and less aware of its deliberations and activities. An appointive body is probably less capable than an elected body of building a sense of regional community among area residents, of creating a consciousness of the region as an area with shared interests and concerns, or of treating a region as a local unit appropriate for self-government.²⁶⁶ Moreover, an appointive regional body may have less power over the component local governments than an elective body would. The appointive body would

²⁶³ See, for example, *Rosenthal v Board of Education of Central High School District No. 3 of Town of Hempstead*, 385 F Supp 223 (E D NY 1974) (upholding constitutionality of system wherein voters elected members of boards of union free school districts and each district board then selected two of its members to sit on the central board).

²⁶⁴ When New York City revised its charter to replace the Board of Estimate, it restructured its City Planning Commission to assure borough representation by authorizing each borough president to make one appointment to the Commission. The charter sought to attenuate the connection between the borough-elected presidents and the appointed Commission members and avoid the charge that the members were mere alter egos of the borough presidents by giving the members terms rather than have them serve at the pleasure of the borough presidents. NYC Charter § 192 (1988).

²⁶⁵ See, for example, *Moore v Wilson*, 372 SE2d 357 (SC 1988) (district highway commissioner elected by county legislative delegations); *Rosenthal*, 385 F Supp at 225; *Oliver*, 306 F Supp at 1287.

²⁶⁶ But see John J. Harrigan and William C. Johnson, *Governing the Twin Cities Region: The Metropolitan Council in Comparative Perspective* 135-37 (Minn 1978) (defending the appointive nature of the Twin Cities Metropolitan Council and criticizing proposals to make the council elective).

lack the legitimacy that comes from election, and, if the regional members are selected by elected local officials, they may have less stomach for a political confrontation with those to whom they are beholden for their positions. Thus, appointive bodies provide a way around the Supreme Court's restriction on the representation of localities in federative regional governments, but at the price of either weakening the effectiveness and legitimacy of those governments or of creating selection mechanisms that try to minimize the appointment/election distinction that is the basis for the constitutional exemption of appointive governments from the equal population representation requirement.

B. Weighted Voting

The other governance structure that may be able to reconcile equal population representation with the election of representatives from political subunits is weighted voting. The Supreme Court has indicated that the one person/one vote requirement does not mandate election districts of equal population but can be satisfied by districts of different population as long as representation is proportionate to population.²⁶⁷ There are, however, several arguments that weighted voting is inconsistent with equal population representation.

On the one hand, weighted voting may underrepresent voters in the more populous districts. Legislators do more than cast votes. They negotiate legislation, participate in committee activities, oversee agencies, and perform constituent service. A legislator from a large district may be given proportionately more votes than a legislator from a small district, but she cannot engage in proportionately more activities, devote herself to the negotiation of proportionately more bills, or be in proportionately more places at the same time. Even with weighted voting, constituents in large districts may not obtain representation proportional to their numbers.²⁶⁸

²⁶⁷ See, for example, *Abate*, 403 US 182; *Whitcomb v Chavis*, 403 US 124, 141-48 (1971); *Kilgarlin v Hill*, 386 US 120 (1967); *Burns v Richardson*, 384 US 73 (1966); *Fortson v Dorsey*, 379 US 433 (1965).

²⁶⁸ This problem could be ameliorated by the election at-large of a proportionate number of representatives from each local component of a regional jurisdiction. This solution is also fraught with difficulty. First, like weighted voting, it raises the prospect of submerging the interests of minorities. See text at note 277. Second, it may be difficult to make differences in representation as precisely proportionate to differences in population as one person/one vote requires when representatives are elected at large. With component units of varying populations, interdistrict ratios may not be whole integers but, rather, fractions.

On the other hand, weighted voting may overrepresent voters in the more populous districts. This may occur because a district represented by a single legislator entitled to cast a multiple vote will have more voting power than a second district represented by a number of legislators, each having one vote, who together can cast the same number of votes as the representative from the first district. The multiple representatives from the second district may disagree and cast conflicting votes; but the single legislator with multiple votes will cast all her votes in a bloc, thereby assuring the first district greater voting power in the legislature than the second district with the same number of votes.²⁶⁹ An example of how weighted voting based purely on population can overrepresent larger political subdivisions may be instructive. In nearly half the governing bodies of New York State's counties, the town is the unit of election, with town representatives given weighted votes.²⁷⁰ Nassau County has five towns. Hempstead, the largest town, has fifty-seven percent of the county's population. If the Hempstead representative were given fifty-seven percent of the total votes, then for any matter subject to majority decision the other representatives might as well stay home because fifty-seven percent of the votes is equivalent to one hundred percent of the voting power.²⁷¹

Consider a three-district jurisdiction with population ratios of 2.3 to 1.7 to 1.0. To comply with one person/one vote, at-large elections would require either (a) electing some representatives who cast fractional votes (for example, giving the first district two representatives who cast 1.15 votes apiece or three who cast 0.77 votes apiece) or (b) moving the decimal point and electing a very large number of representatives at-large from each district, (for example, 23 from the first district, 17 from the second, and 10 from the third.) The first solution, however, recreates the possible under- or over-representation in the nonvoting aspects of representation which is the flaw in weighted voting since the individuals elected would, of course, be integers even if they cast fractional votes: If the first district has two seats on a five-member body its residents may be underrepresented in nonvoting matters but if it has three seats on a six-member body its residents may be overrepresented. The second solution would achieve proportionality in both the voting and nonvoting aspects of representation, but such a large legislative body may be unwieldy at the local level.

²⁶⁹ See generally William H. Riker and Lloyd S. Shapley, *Weighted Voting: A Mathematical Analysis for Instrumental Judgments*, in J. Roland Pennock and John W. Chapman, eds, *Nomos X: Representation* 199 (Atherton, 1968).

²⁷⁰ See, for example, *League of Women Voters of Nassau County v Nassau County Bd. of Supervisors*, 737 F2d 155, 166 n 10 (2d Cir 1984) ("Of New York State's 57 counties (outside of New York City), 24 employ weighted voting systems."). See generally Ronald E. Johnson, *An Analysis of Weighted Voting as Used in Reapportionment of County Governments in New York State*, 34 Albany L Rev 1 (1969).

²⁷¹ See, for example, *Franklin v Krause*, 32 NY2d 234, 344 NYS2d 885, 298 NE2d 68, 68-69 (1973). See also *League of Women Voters*, 737 F2d 155. Nassau County dealt with this problem by giving Hempstead less than its population-based proportionate share of votes on the governing board and by requiring a supermajority for the passage of all legisla-

To deal with the bloc consequences of weighted voting, the New York State Court of Appeals has required that weighted votes be based not on population but on voting power. A legislator's voting power has been defined as "the mathematical possibility of his casting a decisive vote."²⁷² The Court thus requires a tabulation of all the possible voting combinations on a county legislature and the percentage of combinations in which any given legislator would cast the decisive vote. The percentage of instances in which the legislator casts the decisive vote must then be proportional to the share of the population that legislator represents.²⁷³ This may mean that representatives of larger districts get fewer votes than population alone might dictate.²⁷⁴

Adjusting weighted voting to achieve proportional voting power has, in turn, been subject to criticism for elevating a mathematical model over the realities of political life. Voting power models assume that all possible voting combinations are equally likely to occur. That, of course, ignores the likelihood of other forms of bloc voting—based on partisanship, race, issue cleavages, or other factors—that may render the calculations of voting power highly unrealistic.²⁷⁵ In other words, without some consideration of voting

tion. *Franklin*, 298 NE2d at 68-69; *League of Women Voters*, 737 F2d at 157-58. A federal district court has recently invalidated the apportionment of the Nassau County Board of Supervisors, noting that because of the supermajority requirement "the residents of Hempstead will forever be underrepresented on the basis of population in any vote taken." *Jackson v Nassau County Board of Supervisors*, 818 F Supp 509 (E D NY 1993).

²⁷² *Iannucci v Board of Supervisors of County of Washington*, 20 NY2d 244, 282 NYS2d 502, 229 NE2d 195, 199 (1967). *Iannucci* builds on John F. Banzhaf III, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 Rutgers L Rev 317 (1965).

²⁷³ *Iannucci*, 229 NE2d at 199. See also *Greenwald v Board of Supervisors of Sullivan County*, 567 F Supp 200, 203 n 15 (S D NY 1983).

²⁷⁴ To deal with a subunit that has a majority of the population of the entire larger community, there may be a need for a supermajority vote to pass legislation. See note 271.

²⁷⁵ In the Board of Estimate case New York City sought to use the voting power model to defend the one borough/one vote rule because, in the City's calculations, the voting power model suggested a lower degree of malapportionment than the pure comparison of borough votes to population. The Supreme Court, however, treated voting power as "a mathematical calculation that itself stops short of examining the actual day-to-day operations of the legislative body" and was sharply critical of the model's "unrealistic approach." 489 US at 698-99. Some commentators have treated *Morris*'s comments as the death knell of voting power analysis and, ultimately, of weighted voting. See, for example, Richard David Emery, *Weighted Voting*, 6 Touro L Rev 159 (1989); M. David Gelfand and Terry Allbritton, *Conflict and Congruence in One-Person, One-Vote and Racial Vote Dilution Litigation: Issues Resolved and Unresolved by Board of Estimate v. Morris*, 6 J L & Pol 93, 111-13 (1989).

The New York courts continue to require that weighted voting plans be subject to a voting power analysis and to treat weighted voting as a viable option for county government. See *Matter of Curcio v Boyle*, 147 AD2d 194, 542 NYS2d 1009 (1989). A federal district court recently concluded that "a weighted voting plan as it is presently utilized by the Nassau County Board of Supervisors" violates one person/one vote. *Jackson*, 818 F Supp at 531.

power, weighted voting may overrepresent larger jurisdictions; but mathematical analysis alone, without an examination of "the actual day-to-day operations of the legislative body,"²⁷⁶ may be unable to measure voting power.

Even if weighted voting could properly assure that subunit representation is based on population, weighted voting raises the prospect of submerging the interests of minorities within a weighted voting jurisdiction. This is a concomitant of weighted voting's single representative-bloc voting feature. Weighted voting not only empowers larger blocs relative to smaller ones, it also means that in larger districts one representative will be elected instead of many. In those jurisdictions, one jurisdiction-wide plurality will elect the single person who will represent the entire jurisdiction. As a result, geographically concentrated minorities who might have been able to elect representatives from districts within the jurisdiction will win none of the jurisdiction's vote when it selects one representative on a jurisdiction-wide basis. When the representation of racial and language minorities is so diluted, weighted voting will be subject to challenge under the Voting Rights Act.²⁷⁷

C. Rethinking One Person/One Vote and Regional Governments

Appointment is unlikely to secure the accountability and legitimacy desirable for regional bodies, and weighted voting for elected representatives may not satisfy the requirements of equal population representation. Should the demands of one person/one vote be relaxed to accommodate the representation of subunits in regional governments? This requires consideration of the value of regional governments and the nature of the one person/one vote doctrine.

There is certainly considerable theoretical support for the creation of regional units to deal with problems of regional scope.

The court determined that in *Morris* "the Supreme Court firmly rejected weighted voting, not only because of the mathematical quagmire such a system engenders, but just as importantly because the methodology fails to take into account other critical factors related to the actual daily operations of a governing body." *Id.* The court's opinion, however, also criticized the specific allocation of the votes on the Board of Supervisors and indicated that even under a weighted voting/voting power analysis "the present configuration of the Board of Supervisors violates the one person, one vote principle." *Id.* at *29.

²⁷⁶ *Morris*, 489 US at 699.

²⁷⁷ Concern about the minority dilution features of weighted voting, and the consequent likelihood of a Voting Rights challenge, led New York City's Charter Revision Commission to scrap the Board of Estimate outright rather than maintain borough representation with weighted votes. See Mauro, *Voting Rights and the Board of Estimate* (cited in note 251).

Most metropolitan areas are fragmented into dozens, if not hundreds, of localities, while many of the problems that local governments address transcend today's local boundaries. Regional governments are more likely to have the institutional capacity, public resources, and metropolitan perspective to provide those services—such as water supply, sewage disposal, pollution control, and transportation—that need to be handled on an area-wide basis. Similarly, regional units could engage in the comprehensive area-wide planning necessary to permit coordinated regional development, match physical infrastructure to population growth, and determine the siting of regionally necessary but locally undesirable facilities, as well as the location of amenities likely to be used on a regional basis.²⁷⁸ Election of the holders of regional offices could enhance their accountability and mitigate the sense of loss of control that people might feel if regulatory power and responsibility for the provision of services is vested in a unit more distant from the local community.

Although at one time urban reformers pressed for the full consolidation of pre-existing localities into governments of metropolitan scope, these proposals drew little popular support and, indeed, considerable resistance from local residents who feared loss of autonomy through absorption into a larger unit.²⁷⁹ As a result, advocates of regional units have generally abandoned the goal of full consolidation and have instead developed proposals for “two-tier” or “federative” plans that would move certain governmental functions to the regional level while reserving others to pre-existing local governments.²⁸⁰ Further along the continuum from full consolidation are multi-purpose regional councils or special districts, like

²⁷⁸ See, for example, Note, *It's Time to Create a Bay Area Regional Government*, 42 Hastings L J 1103 (1991).

²⁷⁹ Most consolidation proposals require voter approval for adoption, and voters have generally been resistant, particularly where there are significant economic or social differences among the communities proposed for consolidation. See generally W.E. Lyons, *The Politics of City-County Merger* chs 1-3 (Kentucky, 1977); John E. Filer and Lawrence W. Kenny, *Voter Reaction to City-County Consolidation Referenda*, 23 J L & Econ 179 (1980); Vincent L. Marando, *City-County Consolidation: Reform, Regionalism, Referenda and Requiem*, 32 W Pol Q 409, 411 (1979).

²⁸⁰ See Committee for Economic Development, *Reshaping Government in Metropolitan Areas* 19-20 (CED, 1970). The “two closest approximations” to the Committee for Economic Development's two-tier model are Miami-Dade County, Florida, which utilizes the existing county as the basis for a metropolitan-level government, and Toronto, Canada, which is a “true federative government.” Harrigan, *Political Change in the Metropolis* at 318-21 (cited in note 79).

the Twin Cities Metropolitan Council,²⁸¹ which oversees transit, sewers, and regional park development in the Minneapolis-St. Paul area, or the Municipality of Metropolitan Seattle, which was created to provide sewage disposal and transit services for the Seattle metropolitan area.²⁸² The unifying theme in these various structures is the shift of responsibility for some services and some regulatory authority to the regional level, while preserving pre-existing, smaller local governments and assuring them continuing autonomy over a range of other functions.

The value of regional governance structures is certainly debatable, and many scholars question whether there would be improvements of service quality or cost. But even those scholars who find the interests in efficiency and accountability better served by the fragmentation of metropolitan areas into a multiplicity of small units have primarily opposed full consolidation, not special districts of regional scope.²⁸³ Resistance to regionalization based on the view that local governments ought to be scaled to the economic and institutional needs of the services provided, and that most services can be effectively provided by relatively small units,²⁸⁴ is consistent with the creation of multipurpose regional structures for water, sanitation, pollution control, transportation, and other problems that are best addressed on an area-wide basis.

Ultimately, the benefits of regional structures cannot be proven—at least not with the level of certainty necessary to be a compelling state interest—just as it cannot be demonstrated that the election of regional officials on a constituent local government basis is necessary to the creation of regional structure. The creation and design of regional bodies is a political process, based on a state's policy preferences and its determination whether effective and efficient service delivery and planning are better achieved through regional institutions; whether such service delivery and

²⁸¹ See generally Harrigan and Johnson, *Governing the Twin Cities Region* 41 (cited in note 266).

²⁸² See *Cunningham*, 751 F Supp at 889-90. Currently, most metropolitan multipurpose districts are appointive rather than elective bodies. The principal exception was the Municipality of Metropolitan Seattle, and its representation structure was held to have violated the one person/one vote requirement. *Id.* at 893.

²⁸³ See, for example, Vincent Ostrom, Robert Bish, and Elinor Ostrom, *Local Government in the United States* ch 4 (ICS, 1988); Robert Bish, *The Public Economy of Metropolitan Areas* ch 5 (Markham, 1971).

²⁸⁴ The assumption is that the population needed for scale economies for most government services ranges from 40,000 to 200,000, or much smaller than most metropolitan regions. See, for example, Howard W. Hallman, *Small and Large Together: Governing the Metropolis* 192-93 (Sage, 1977).

planning ought to accommodate the values of public participation and accountability by making regional posts elective; and whether the relationship between the regional and local governments would be enhanced by basing representation in the regional government on pre-existing local units.

Hadley and Board of Estimate indicate that the policy and political concerns that might lead to an elective, federative regional government would not be sufficient to overcome the one person/one vote requirement as it now stands. But both the uncertain theory of representation underlying one person/one vote and the unevenness of that doctrine's application to local governments suggest the possibility of new flexibility when regional local governments are at issue. In terms of the theory of representation, the issue requires a return to the debate between Chief Justice Warren and Justice Stewart at the time the rule of equal population representation was adopted. Chief Justice Warren found that the basic premise of representative government is majority rule and that majority rule, in turn, mandates the equal weighting of votes, otherwise the overrepresentation of some groups might reduce a popular majority into a legislative minority. A clear, quantitative rule—one person/one vote—was intended to prevent minority control.²⁸⁵ Moreover, Chief Justice Warren dismissed the significance of all interests other than population in measuring the fairness of representation, writing that “[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”²⁸⁶

By contrast, Justice Stewart and the dissenters took a more qualitative approach. They looked to the efficacy of different representation schemes under different circumstances, rather than to the formal equality of voters. According to Justice Stewart,

legislators do not represent faceless numbers. They represent people, or, more accurately, a majority of the voters in their districts—people with identifiable needs and interests which require legislative representation, and which can often be related to the geographical areas in which these people live. The very fact of geographical districting . . . carries with it an acceptance of the idea of legislative representation of regional needs and interests.²⁸⁷

²⁸⁵ *Reynolds*, 377 US at 565-66.

²⁸⁶ *Id.* at 562.

²⁸⁷ *Lucas v Forty-fourth General Assembly of Colorado*, 377 US 713, 750 (1964) (Stewart dissenting).

Moreover, the numerical equality of voters is not the only factor to be considered in reviewing a representation scheme:

Representative government is a process of accommodating group interests

. . .

[P]opulation factors must often to some degree be subordinated in devising a legislative apportionment plan which is to achieve the important goal of ensuring a fair, effective, and balanced representation of [] regional, social and economic interests.²⁸⁸

The variety of demographic, topographic, historic, economic, and social interests in each jurisdiction suggests that a wide variety of apportionment schemes be permitted. The only restrictions Justice Stewart would have imposed are that a legislative apportionment plan must not be irrational and must not “permit the systematic frustration of the will of a majority of the electorate.”²⁸⁹

Justice Stewart’s position failed in the reapportionment cases. Indeed, at a time when the focus of reapportionment litigation was on the severely malapportioned, rural-dominated state legislatures, his effort to combine some attention to population with group interests, qualitative factors, and local circumstances, and to require courts to undertake a lengthy, multi-factored inquiry into the operations of the political process in each districting case, could have been seen as an apologia for the perpetuation of malapportionment. The very specific “code”-like quality of one person/one vote undoubtedly facilitated the process of uprooting past abuses and preventing sharp deviations from population equality in the future by giving lower courts and legislatures a relatively determinate standard to apply.²⁸⁹ It may have also enhanced the legitimacy of judicial intervention in the determination of political structures by indicating that questions of representation could be resolved by a relatively simple formal rule, rather than a complex analysis of the variety of political, economic, social and cultural factors that go into a determination of the fundamental fairness of a plan of representation. But the insight in Justice Stewart’s analysis has been borne out by the Supreme Court’s and Congress’s subsequent real-

²⁸⁸ Id at 749, 751.

²⁸⁹ Id at 753-54.

²⁸⁹ See, for example, David A. Strauss, *The Role of a Bill of Rights*, 59 U Chi L Rev 539, 540-48 (1992) (discussing the use of “a bill of rights . . . as a code that facilitates reform—a specific list of requirements or prohibitions to help break up traditional practices that are in need of change”).

ization that numerical equality of voters and majority rule alone do not guarantee fair representation. Indeed, one person/one vote is quite consistent with districting that “fences out” or “dilutes” the representation of minority groups, particularly racial and language minorities²⁹¹ and weaker political parties.²⁹² Population alone is not the sole determinant of fair representation; the Constitution and the Voting Rights Act also mandate attention to the representation of politically salient groups.

Of course, to say that population equality is not sufficient for fair representation does not mean that it is not necessary to the definition of fair representation. As Justice Stewart noted, surely any constitutional representation scheme must prevent “systematic frustration of the will of a majority.”²⁹³ Population equality and majority rule are essential components of representation, but they need not completely displace other factors that have traditionally been considered in representation schemes. Indeed, the local government franchise and representation cases indicate some willingness to subordinate population equality to other political values. The proprietary government, boundary change, and extra-territoriality cases all suggest that interests other than population can be represented in local decisionmaking—economic interests in the proprietary setting, and deference to state-created territorial communities in the other cases. The Supreme Court has sought to avoid balancing the values of equal participation and community definition and preservation when they come into conflict by categorizing a case as presenting either an equal participation or a community definition question (but not both at the same time), but the overlapping jurisdiction and extended franchise cases in the lower courts suggest the possibility of reconciling the two values without having one totally dominate the other.

A federative regional government differs from the other local arrangements exempted from one person/one vote. Because it is unlikely that the burdens of the government would be borne by different subunits differently, the proprietary model is unavailable. Residents of subunits subject to the regional government would also, by definition, be residents of the region and, thus, the region would be the jurisdiction for the application of strict scrutiny to deviations from population equality. For regional governments with less than the full powers of a traditional municipality where

²⁹¹ See, for example, *Thornburg v Gingles*, 478 US 30 (1986).

²⁹² See *Davis v Bandemer*, 478 US 109 (1986).

²⁹³ *Lucas*, 377 US at 753.

the other powers are exercised by the pre-existing local governments, there might be some analogy to extraterritoriality and some claim to viewing the regional government as a state instrumentality rather than as a local government. Indeed, even residents of subunits getting less than their population's share of representation in the regional government would be doing better than the residents of an extraterritorial zone because at least they would be getting some representation. Ultimately, however, the analogy fails because residents of the underrepresented subunits would be definitionally residents of the region in the way that fringe area residents were not residents of the core city.

What is needed, then, is a new model of federative regional governments. Like the local self-government, proprietary, and state instrumentality models, the model of federative regional government would reflect some of the basic descriptive features and institutional purposes of contemporary local governments. This model would be based on a recognition that increasingly metropolitan areas are economically and ecologically intertwined and that many local regulatory and service delivery problems are regional in scope and cannot be adequately addressed by smaller political subdivisions. This model would also reflect the changes in the nature of proposals for regional structures away from fully consolidated municipalities of metropolitan scope, which would be difficult to distinguish from other municipalities other than by size, toward multi-functional special districts designed to address those problems that require a regional focus while leaving pre-existing localities in place and in possession of many of their traditional powers. Moderating the stringency of one person/one vote for regional governments is less of a deviation from democratic norms if the regional entity does not have plenary local authority but simply overlaps other local units. Limiting the model to entities of limited powers overlapping pre-existing autonomous local governments would also be necessary in order to make a determinate distinction between federative governments and the general purpose local governments subject to the full rigors of one person/one vote. Finally, the model would recognize that states could reasonably determine that regional governments might be politically less objectionable to local constituents and that the accountability of regional governments and the continuing efficacy of pre-existing local governments could be enhanced by basing representation at the regional level on local subunits.

Unlike the other models of local government that have shaped federal constitutional protection of the local vote, the model of fed-

erative government would seek to reconcile population equality with the political and policy values of constituent local government representation, rather than subordinate one concern to the other. Smaller areas or incorporated subunits could be allowed to receive greater representation than population alone might warrant as an inducement to joining the regional entity. Similarly, greater deviations from population equality might be permitted than are currently allowed in order to use local government borders as districts for election to the regional body. Bicameral regional institutions might be able to combine some modes of representation based on population with others based on local governments. The federative model might make it easier to use weighted voting because the claim that weighted voting fails to provide different districts with representation exactly proportional to population would be less compelling if population equality were not strictly required, although the difficulties inherent in assuring that weighted voting provides fair representation would remain.²⁹⁴

Population would have to remain the baseline for evaluating the fairness of representation. Certainly the "systematic frustration" of the interests of the regional majority would be inconsistent with any view of a regional government as a democratically self-governing community. But rather than assuring mathematical exactitude and a precise matching of population to voting power on the regional body, there should be greater deference to the state's accommodation of the conflict between population and the representation of constituent communities. By analogy to the overlapping jurisdiction and extended electorate cases, deviations from mathematical equality should be supported if they are justified by some substantial interest related to the creation or operation of the regional government and if neither a particular component locality nor the regional majority is denied the opportunity to play a significant role in shaping the policies of the regional body.²⁹⁵

A legal standard that seeks to reconcile the representation of local communities with the representation of population would undoubtedly be more difficult to apply than one that gives primacy to either value. Certainly, one of the strengths of the one person/one vote test is its precision: for an elected body subject to one person/one vote it is easy to tell whether the representation scheme passes

²⁹⁴ A "federative defense" sufficient to repel a constitutional one person/one vote challenge might be inadequate to defend a weighted voting system against the claim that it dilutes the representation of minorities protected by the Voting Rights Act.

²⁹⁵ See Section III.C.

muster. And precision, in turn, promotes ease of implementation and enforcement by lowering costs. But precision is achieved at the cost of accuracy. Population equality is not the only factor relevant to assessing the fairness of a representative scheme. As the local government voting jurisprudence indicates, the special purpose of the government, the policy judgment of the state, and the distinctive interests of autonomous political communities also contribute to the determination of the appropriate representative scheme for a particular locality. A model of federative government in which population and local communities both have a place could be doubly beneficial. As a practical matter it could facilitate the creation of elective regional governments. And as a theoretical matter it could lead courts to deal more explicitly with the mix of concerns that go into measuring the fairness of representation.

CONCLUSION

The study of the one person/one vote doctrine at the local level consists of two interrelated projects: the examination of local government from the perspective of one person/one vote and, conversely, the examination of one person/one vote from the perspective of local government law. The first enterprise underscores the multiple roles and conceptions of local government in our legal and political structure while the second advances our understanding of the uncertainties in the conceptual underpinnings of our dominant theory of representation.

To study local government through the prism of the one person/one vote doctrine is to find clearly displayed the three principal models of local government extant in our legal culture—the “polis,” the “firm” and the administrative arm of the state.²⁹⁶ Much of the best contemporary legal scholarship concerning local governments has emphasized the view of local governments as “little republics”²⁹⁷ which can serve as fora for citizen deliberation and participation in public decisionmaking over a broad range of issues of community concern.²⁹⁸ Indeed, the initial application of the one person/one vote doctrine at the local level in the cases from *Avery*

²⁹⁶ I have previously discussed the concepts of the “polis” and the “firm” in local government law in Richard Briffault, *Our Localism—Part II: Localism and Legal Theory*, 90 Colum L Rev 346, 392-435 (1990).

²⁹⁷ The phrase is Thomas Jefferson’s. See Letter from Thomas Jefferson to John Adams (Oct 28, 1813), reprinted in L. Cappon, ed, II *The Adams-Jefferson Letters* 387, 390 (North Carolina, 1959).

²⁹⁸ See, for example, Frug, 93 Harv L Rev 1057 (cited in note 3); Gillette, 86 Mich L Rev 930 (cited in note 174).

through *Hadley* relied upon and advanced the idea of local government as a miniature democratic polity. The Supreme Court's determination that the franchise and apportionment rules constitutive of democratic representative governments must also apply to local governments was premised on a view of localities as locally representative governments.

Yet the Court's subsequent decisions comparably underscored the importance of the other roles, and other models, of local government. The special purpose district cases articulate a view of local governments as quasi-proprietary entities—landowner-controlled vehicles for financing the development and operation of infrastructure that enhances the value of property. These cases point to the historic economic functions, and economic constituencies, of local governments. They also remind us that many—indeed, most—local governments in the United States are not states-in-miniature, possessing broad decisionmaking authority over an array of public services and issues, but are instead highly specialized bodies, with powers narrowly limited to one or a few service delivery functions. In that sense, the special district cases can also be seen as a special instance of the continuing power of the traditional state instrumentality model. Local governments are not simply representatives of local constituencies but also function as agents of the states, charged with delivering public services and discharging state police power responsibilities locally. In shaping one person/one vote to protect the state's decisions concerning local extraterritorial authority, the allocation of the franchise and the aggregation of votes in local government boundary change elections, and the extension of the franchise beyond the core local electorate, the case law reflects the continuing power of the state instrumentality model.

Ironically, although the one person/one vote cases reveal the multiple functions and conceptions of local government, doctrine in this area tends to obscure the fact that the same governments may combine two or all three of these roles. Infrastructure financing districts have political effects and serve proprietary functions, much as extraterritoriality involves both local representation and state administration. Yet the case law has denied this simultaneity of function and, instead, has sought to categorize a particular local institution or election as involving just one model of local government, without acknowledging the implications for other aspects of local government that do not fall within that model.

The tendency toward categorization is understandable, however, given the absolutist nature of the one person/one vote doc-

trine. As cases like *Kramer* and *Hadley* indicate, once an election or an institution is deemed political, strict scrutiny of departures from the one person/one vote rule follows. In the local democracy setting, the proprietary or state administrative elements of general purpose governments are also largely ignored. It would have been difficult to preserve longstanding local arrangements like special purpose districts and extraterritoriality if their local political aspects had been acknowledged, as the departures from one person/one vote could hardly have survived strict scrutiny. The preservation of these traditional local institutions would require either that one person/one vote be tempered by concerns in addition to population equality, or that categorical exemptions from the rigors of the strict doctrine be created. The Court took the latter approach. These local arrangements were, in effect, depoliticized, and their voting and apportionment rules were held to have no implications for local popular representation in local governance.

As the preceding discussion illustrates, this Article's second project, the examination of the one person/one vote doctrine through the prism of local government, is closely related to the first. The local government cases highlight the uncertainties in the theory of representation that undergirds the Court's doctrine in the area of voting and apportionment. The extension of the local vote to all otherwise eligible voters and the requirement of equally weighted votes grow out of the presumption that all members of the community interested in or affected by an election or a government have an equal right to participation in the election or the selection of representatives in that government.

The unstated premise in the argument that interest or impact implies participation is that all those interested or affected are interested or affected to a comparable degree. But what if a government has disparate degrees of impact on different members of the community? The question may be sidestepped at the national or state level; the extensive legislative, regulatory, and fiscal powers of these governments support the inference that government action has pervasive effects for all constituents throughout the jurisdiction. The significance of disparities in government impact is more sharply presented at the local level where overlapping jurisdictions and special purpose governments create situations in which different members of a community are, indeed, differently affected by a particular local government's action.

The courts have dealt with disparities in local government impact by, for the most part, giving enormous weight to territorial boundary lines and the categorical distinction between general and

special limited purpose governments. The judicial approach has been dichotomous, assuming, often somewhat disingenuously, that either all constituents are comparably affected by a local government or that those less affected by the government are actually not affected at all. Thus, the relationship so central to the theory of representation between difference in impact and the provision of representation was never directly addressed.

The interplay of one person/one vote and the dominant models of local government also contributes to an understanding of the place, or, rather, the absence of a place, for federative regional governments in current local government law, while raising anew the issue of the role of population equality in measuring fair representation. The lack of an exemption from the rigors of one person/one vote for regional governments points up both the lack of a model of federative regional governments in the traditional thinking about local governments and the displacement of territorial factors by population in the contemporary definition of representation. "Political" local governments—that is, those with some general governmental powers and designed to be accountable to local electorates—are generally considered to be unitary, rather than federations of other, smaller localities. Local governments have long been of regional scope, due to initial incorporation, annexation, or consolidation of pre-existing local units, but our legal system's experience with federative regional units, is relatively limited and generally recent. Yet surely there is a growing need to develop new models of regional government which would preserve autonomy for existing smaller units and also create larger political structures capable of addressing metropolitan land use, transportation, housing, and environmental needs and remedying the damaging consequences of worsening city-suburb economic inequalities and social disparities.²⁹⁹ Federative local governments may be necessary to meet that need.

A federative model of local government would also force further examination of our current basic assumption that fair representation means equal population representation. Federative governments give distinct representation to pre-existing component governments, but the one person/one vote doctrine makes population equality the touchstone of representation and relegates the representation of political subdivisions to no more than marginal

²⁹⁹ See generally David Rusk, *Cities Without Suburbs* (Johns Hopkins, 1993) (attributing contemporary urban woes to the loss of middle class residents and tax base to suburbs and urging, *inter alia*, measures that would create metropolitan jurisdictions).

status. As cases like *Hadley* and *Board of Estimate* suggest, federative governments with more than minimal departures from population equality could not survive the current one person/one vote rule. One person/one vote would, thus, appear to doom the federative model. However, as I suggested at the end of Part IV, federal regional governments might actually provide the opportunity for reconsidering Justice Stewart's contention three decades ago that fair representation can encompass other political factors at odds with strict population equality.

The equation of fair representation and population equality is an artifact of our constitutional history. The Supreme Court addressed the respective roles of population equality and the representation of political subdivisions in litigation concerning the massive and longstanding overrepresentation of rural areas. In the one person/one vote cases of the 1960s, representation of territory seemed no more than a guise for the preservation of the political power of a particular group. The strict formulation of one person/one vote was instrumentally necessary to break the anachronistic hold of rural interests on the government of an increasingly urban nation.³⁰⁰

The issue might be resolved differently if posed in the setting of new forms of metropolitan government created expressly to deal with contemporary economic problems and social conflicts of regional scope. Governance structures that combine representation of regional population majorities with extra attention to the interests of component local governments—and, concomitantly depart from pure equal population representation—might not be seen as inherently negating fair representation but rather as part of the complex process of reconciling the competing roles of population, pre-existing communities, economic and social interests, and state political and policy preferences.

The application of the one person/one vote requirement to the political, proprietary, and administrative conceptions of local government raised questions concerning the relationship between the impact of or interest in government action and the right to equal representation in that government. So, too, the development of federative regional governments would provide an occasion for testing whether the one person/one vote rule is itself an essential requisite of fair representation or, rather, whether states may be allowed to modify the role of population equality to “achieve the

³⁰⁰ See, for example, Bernard Grofman, *Voting Rights, Voting Wrongs: The Legacy of Baker v. Carr* 3-4 (Twentieth Century Fund, 1990).

important goal of ensuring a fair, effective, and balanced representation of [] regional, social and economic interests.”³⁰¹

³⁰¹ *Lucas v Forty-fourth General Assembly of Colorado*, 377 US 713, 751 (Stewart dissenting).