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From One Person, One Vote to One Acre, One Vote - Another Retrenchment of the Right to Vote in Special District Elections - Ball v. James

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FROM ONE PERSON, ONE VOTE TO ONE ACRE, ONE VOTE—ANOTHER RETRENCHMENT OF THE RIGHT TO VOTE IN SPECIAL DISTRICT ELECTIONS—*BALL V. JAMES*

The equal protection clause of the fourteenth amendment has been an effective instrument in safeguarding the fundamental right to vote.[1] In striking down malapportioned election schemes at national,[2] state,[3] and

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1. The Supreme Court first characterized the right to vote as "fundamental" because it was "preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). The Court reaffirmed that characterization and rationale in Reynolds v. Sims, 377 U.S. 533 (1964). In *Reynolds*, the Court stated that "the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights. . . ." *Id.* at 561-62.

The equal protection clause has been used to invalidate a variety of infringements on the franchise. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (Tennessee durational residence requirement held unconstitutional); Cipriano v. City of Houma, 395 U.S. 701 (1969) (Louisiana statute found unconstitutional because it permitted only property taxpayers to vote in elections called to approve the issuance of public utility revenue bonds); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax declared unconstitutional); Carrington v. Rash, 380 U.S. 89 (1965) (Texas constitutional provision that denied the franchise to bona fide residents simply because they belonged to the armed forces declared unconstitutional).

2. The Supreme Court confronted federal congressional apportionment in Wesberry v. Sanders, 376 U.S. 1 (1964). The plaintiffs in *Wesberry* were residents of a Georgia congressional district which contained 20% of the state's population but elected only 10% of the state's congressional representatives. The Court held that art. I, § 2 of the United States Constitution, which provides that representatives be chosen "by the People of the several States," meant that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8.

3. In Baker v. Carr, 369 U.S. 186 (1962), the Court held that a claim brought under the equal protection clause challenging the constitutionality of a state's apportionment of its legislative seats presented a justiciable controversy subject to federal adjudication. *Id.* at 237. Within nine months of the Court's decision in *Baker*, 34 state legislative apportionment schemes had been challenged in the federal courts. Reynolds v. Sims, 377 U.S. 533, 566 n.30 (1964).

The Court's scrutiny of state voting schemes first involved the elections of statewide executive offices. At issue in Gray v. Sanders, 372 U.S. 368 (1963), was Georgia's county unit method of counting votes in the Democratic party primary elections. Each county was given a number of votes and all the votes allocated to that county were given to the candidate who received a plurality of the county's popular vote. The effect of the system was the gradual dilution of the citizen's vote as the population of the county increased. The Court held that all participants within a geographical unit must have an equal vote. *Id.* at 378-89.

The Court's equal apportionment language for congressional districts in Wesberry v. Sanders, 376 U.S. 1 (1964), proved impossible to curtail. In dealing with reapportionment at the state rather than the federal level, the Court only had to couch its language in equal protection terms rather than basing its holding in terms of art. I, § 2. In Reynolds v. Sims, 377 U.S. 533 (1964), the Court held that equal protection required the seats in both houses of the Alabama state legislature to be apportioned on a population basis. Thus, according to the Court, districts should be of equal population, though mathematical precision was not required. *Id.* at 577. The right to cast an equal vote in federal and state elections was now

local[4] levels as violative of the one person, one vote rule,[5] the United States Supreme Court appeared willing to extend its egalitarian hand to virtually

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secured. The right to cast an equal vote, however, should not be confused with the right to vote in federal and state elections.

> While the right to vote in federal elections is conferred by Art. I, § 2 of the Constitution, the right to vote in state elections is nowhere expressly mentioned. . . . [I]t is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with Equal Protection Clause of the Fourteenth Amendment.

Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) (citations omitted).

4. The application of the one person, one vote standard to local government was not automatic. In Sailors v. Board of Educ., 387 U.S. 105 (1967), the Court upheld the selection of county school board members by representatives of local school boards, even though each board could only cast one vote regardless of the population it represented. A unanimous Court held the one person, one vote standard was inapplicable for two reasons. First, the county board was basically appointive rather than elective, and second, its function was administrative rather than legislative. *Id.* at 109-10.

In Dusch v. Davis, 387 U.S. 112 (1967), the Court allowed a town to choose its city council through an at-large election scheme that required one council member to reside in each of the city's seven boroughs. Each borough varied widely in population, but the Court noted that the boroughs were used as a basis for residence and not for representation. Thus, the Court reasoned that each council member represented the entire city. 387 U.S. at 115-16. *See also* Dallas County v. Reese, 421 U.S. 477 (1975) (Alabama statutory scheme providing for countywide balloting for each of the four members of the Dallas County Commission but requiring that one member be elected from each of the four districts was not unconstitutional despite a large disparity of population in each district).

Eventually, the one person, one vote rule was applied to local government in Avery v. Midland County, 390 U.S. 474 (1968). At issue in *Avery* was the apportionment of four districts which elected the Midland County Commissioners Court. Ninety-five percent of the County's population resided in one of the four districts. The Commissioners Court exercised general governmental powers over the entire county. Prompted by that broad authority, the Court concluded: "[T]he relevant fact is that the powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens, whether they reside inside or outside the city limits of Midland." *Id.* at 484. Thus, the Court would not allow a substantial deviation from equally populated districts for the election of local government officials having general governmental powers over the entire geographic area served by the body. *Id.* at 484-85.

Many commentators were critical of the *Avery* decision and of the Warren Court's application of the one person, one vote standard to local government because it was felt that such a standard would interfere with the ability of local government to solve its regional problems. *See, e.g.*, Grant & McArthur, *"One Man-One Vote" and County Government: Rural, Urban and Metropolitan Implications*, 36 GEO. WASH. L. REV. 760 (1968); Martin, *The Supreme Court and Local Government Reapportionment: The Second Phase*, 21 BAYLOR L. REV. 5 (1969). *See generally Symposium: One Man-One Vote and Local Government*, 36 GEO. WASH. L. REV. 689 (1968). For an exhaustive review of the Burger Court's approach to local government, see Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's*, 21 B.C.L. REV. 763 (1980).

5. The phrase "one person, one vote" ostensibly originated in Gray v. Sanders, 372 U.S. 368 (1963). Justice Douglas, writing for the majority, stated: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Id.* at 381.

every type of governmental election.[6] That willingness came to an abrupt halt in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,[7] where the Court upheld the constitutionality of a statutory scheme that restricted the right to vote to district landowners and weighted the vote according to the value of the land held.[8] Although property ownership as a voting condition had a historical foundation in this country,[9] it is a notion generally considered repugnant to modern constitutional principles.[10] Thus,

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6. The legislative-administrative distinction set forth in Sailors v. Board of Educ., 387 U.S. 105 (1967), was abandoned in Avery v. Midland County, 390 U.S. 474 (1968). The parties before the *Avery* Court urged it to apply a label to the Commissioners Court—either "administrative" or "legislative." The Court refused, however, stating that units of local government could not be pigeonholed into the "neat categories favored by civil texts." *Id.* at 482. The Court has never determined whether a local legislative unit could be appointed rather than elected. One commentator suggests there are situations where elections may be required. *See* Nahmod, *Reflections on Appointive Local Government Bodies and a Right to an Election*, 11 DUQ. L. REV. 119 (1972).

The "general governmental powers" language of *Avery* was soon discarded in Hadley v. Junior College Dist., 397 U.S. 50 (1970). In *Hadley*, the Court struck down a Missouri statute that allowed for the creation of a school district in which one-half of its trustees were elected by 60% of the population of its member districts. Conceding that the trustees did not exercise the general governmental powers of the county commissioners in *Avery*, the Court nonetheless asserted that the trustees performed "important governmental functions" that were general enough and were of sufficient impact throughout the school district to warrant the invocation of the one person, one vote principle. *Id.* at 54-55. The Court held, therefore, that as a general rule, the equal protection clause required each qualified voter to be given an equal opportunity to participate in popular state or local government elections. *Id.* at 56.

7. 410 U.S. 719 (1973).

8. *Id.* at 731, 734.

9. *See generally* D. MCGOVNEY, THE AMERICAN SUFFRAGE MEDLEY (1949); A. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA (1905); K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES (1918). Porter noted that property qualifications on the right to vote were still being imposed by 10 of the original 13 states when the Constitution was adopted.

Restricting the franchise through property ownership was premised on the notion that people with property have a greater stake in the community affairs. Consequently, landowners were presumably "more responsive, more educated, more knowledgeable [and] more worthy of confidence" than those without property. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 685 (1966) (Harlan, J., dissenting).

10. Disenfranchisement through property requirements has been constitutionally disfavored by the Court. *See, e.g.*, Hill v. Stone, 421 U.S. 289 (1975) (election of bond issues for construction of city mass transit and new library held unconstitutional on grounds that limiting class of voters to property owners violated the equal protection clause of the fourteenth amendment); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (Arizona statute that permitted only real property taxpayers to vote in elections called to approve the issuance of general obligation bonds declared unconstitutional); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (New York law held unconstitutional because it restricted the vote in school district elections to those who owned, leased, were married to one who owned or leased taxable property in the district, or had children in the school district); Cipriano v. City of Houma, 395 U.S. 701 (1969) (Louisiana statute that permitted only property taxpayers to vote in elections called to approve the issuance of public utility revenue bonds declared unconstitutional). *But see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (scheme which restricted vote to landowners in proportion to property value, not violative of one per-

Salyer appeared to be a narrow exception confined to its unusual facts.[11]

Recently, however, the Court, in *Ball v. James*,[12] significantly expanded *Salyer* to embrace a system for electing directors of a large water reclamation district that supplied electricity to one-half of Arizona's residents.[13] The district limited voter eligibility to landowners and apportioned voting power according to the amount of acreage owned.[14] By parrotting the rule set forth in *Salyer* and applying it to a substantially dissimilar factual setting, the *Ball* Court severely restricted close judicial scrutiny of voting schemes at a vital unit of local government—the special district.[15]

A thorough understanding of the *Ball* decision requires digression into the Court's reapportionment cases, as well as a discussion of the *Salyer* opinion. The infirmities of the *Ball* decision and its reasoning are discussed, and an alternative analysis is presented. A critical examination of the *Ball* opinion reveals that the effect of this decision will be to deprive a significant number of individuals adequate representation in special district elections.

HISTORICAL DEVELOPMENT: STATE REAPPORTIONMENT AND *SALYER*

The Supreme Court developed the right to equal representation by rejec-

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son, one vote rule); Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973) (limiting vote regarding watershed improvement district to landowners did not violate equal protection).

Because *Salyer* was the first case in the Court's history that upheld property qualifications as a condition to voting, it received a great deal of scholarly attention. *See, e.g.*, Martin, *Local Reapportionment: The Exemption of Water Management Districts*, 14 SANTA CLARA L. REV. 31 (1973); Martin, *The Supreme Court and Local Reapportionment: Voter Inequality in Special-Purpose Units*, 15 WM. & MARY L. REV. 601 (1974); *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 94 (1973). Comment, *Public Officials Represent Acres, Not People*, 7 LOY. L.A.L. REV. 227 (1974); Note, *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist: Opening the Floodgates in Local Special Government Elections*, 72 MICH. L. REV. 868 (1974); Note, *State Water District's Disenfranchisement of Nonlandowners and Weighted Voting Among Landowners Are Not Violations of the Equal Protection Clause*, 22 U. KAN. L. REV. 263 (1974); Note, *Special Purpose Unit Exception to One-Man One-Vote—Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 1974 WIS. L. REV. 253 (1974); Recent Development, *Voting—Property Qualifications for Voting in Special Purpose Districts: Beyond the Scope of "One Man-One Vote"*, 59 CORNELL L. REV. 687 (1974); Recent Case, *Voting System Which Restricts Water Conservation District Electorate to Landowners Only and Apportions Votes in Relation to Land Valuation Does Not Violate Equal Protection Clause—Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 42 U. CIN. L. REV. 773 (1973).

11. *See* note 38 and accompanying text *infra*. One prominent commentator remarked: "*Salyer* plainly rests on the most problematic of foundations and should be treated as a narrowly limited exception to a powerful general principle that interest-based restrictions are constitutionally disfavored." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 765 (1978) [hereinafter cited as TRIBE].

12. 451 U.S. 355 (1981).

13. *Id.* at 371.

14. *Id.*

15. Special districts are a class of organized governmental entities that have a structural form, an official name, perpetual succession, the right to sue and be sued, to make contracts and to dispose of certain property. They possess considerable fiscal and administrative in-

ting, under a strict scrutiny analysis,[16] voting schemes which denied or diluted the vote. Under the strict scrutiny tier of the Court's "two-tier" equal protection analysis,[17] any law infringing upon a "fundamental"[18] right is subjected to strict scrutiny and will be upheld only if the law is necessary to promote a compelling state interest.[19] The right to vote is deemed fundamental because it is preservative of other rights. Consequently, any alleged infringement of that right must be "carefully and meticulously scrutinized."[20] Under the rational basis tier, which is primarily used in considering social and economic regulations,[21] a statute will be upheld if it is rationally related to a legitimate state objective.[22] The level of scrutiny used by the Court is generally dispositive of the constitutionality of a particular statute.[23] That is, statutes subjected to strict scrutiny are invariably held un-

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dependence, and they have a high degree of public accountability. J. BOLLENS, SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES 1 (1957) [hereinafter cited as BOLLENS]. Collectively, special districts perform a wide variety of functions, but individually, they generally provide only one or a few specialized functions. *Id.* at 2.

16. There are two exceptions to the general rule that a strict scrutiny analysis will be applied to voting cases. First, strict scrutiny is not applied to bona fide residence restrictions. *See* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) (bona fide residence alone does not automatically confer the right to vote on all matters). Second, strict scrutiny is not applied to governmental units that have a narrow purpose and disproportionate effect. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

17. For a more thorough explanation of the "two-tier" equal protection approach, see Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as *Model for Equal Protection*].

18. The Court has held that several rights are fundamental. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (right to equal litigation opportunity); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Reynolds v. Sims, 377 U.S. 533 (1964) (right to equal vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate). *See generally* TRIBE, *supra* note 11, at 921-48, 1002-11.

The Court also applies strict scrutiny to classifications based on "suspect" criteria. Suspect criteria create classifications that burden "discrete and insular" minorities. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (dictum). Classifications held to be suspect are national origin and race. *See* Hernandez v. Texas, 347 U.S. 475 (1954); Korematsu v. United States, 323 U.S. 214 (1944). Strict scrutiny is also applied to classifications based on alienage, unless the Court is dealing with matters firmly within a state's constitutional prerogatives. *See* Foley v. Connelie, 435 U.S. 291 (1978) (Court held that New York could bar employment of aliens as state troopers).

19. Legislation triggering the use of strict scrutiny requires an extremely close nexus between the classification and the legislative purpose. Thus, the Court examines the legitimacy of the state's purpose and the relationship between that purpose and the classification. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 671 (10th ed. 1980) [hereinafter cited as GUNTHER].

20. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

21. *See* GUNTHER, *supra* note 19, at 671.

22. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961) (upholding statutory prohibition of selected activities on Sundays); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (upholding constitutionality of Louisiana law conditioning state license as a harbor pilot upon completion of an apprenticeship period, regardless of claims that incumbent pilots selected only friends and relatives to serve as apprentices).

23. The predictable results reached under the two-tier analysis provoked one constitutional

constitutional,[24] whereas statutes subjected to a rational basis test are virtually guaranteed approval.[25] Thus, the Court secured equal representation by subjecting reapportionment cases to strict scrutiny.

The Supreme Court's involvement in state reapportionment began with its landmark decision in *Reynolds v. Sims*.[26] Under the equal protection clause, *Reynolds* applied the one person, one vote principle to the elections of state legislators.[27] Because state legislatures enact laws which affect all citizens of the state, the Court declared that each citizen should have an equally effective voice in the election of state legislators.[28] Subsequently, in *Avery v. Midland County*,[29] the Court expanded *Reynolds* to include the election of county officials because they exercised "general governmental powers over the entire geographic area served by the body."[30] In *Hadley v. Junior College District*,[31] the Court further extended the scope of *Reynolds* to the election of trustees of a community college district because the trustees performed "important governmental functions" that were "general enough" and had sufficient impact throughout the district.[32] The Court provided an exception to the *Reynolds'* rule in both *Avery*[33] and *Hadley*[34] by stating that there may be a governmental unit whose peculiar function or impact does not require the application of *Reynolds*.[35]

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scholar to characterize strict scrutiny as " 'strict' in theory and fatal in fact" and rational basis as "minimal scrutiny in theory and virtually none in fact." *Model for Equal Protection, supra* note 17, at 8.

24. *See* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting). *Contra*, Burns v. Fortson, 410 U.S. 686 (1973) (50-day voter residency requirement upheld under strict scrutiny analysis); Korematsu v. United States, 323 U.S. 214 (1944) (racial classification upheld under strict scrutiny analysis).

25. The Supreme Court has only held one statute concerning economic regulation unconstitutional under the rational basis test. *See* Morey v. Doud, 354 U.S. 457 (1957). *Morey* was overruled less than 20 years later by City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding New Orleans ordinance that prohibited vendors selling foodstuffs from pushcarts except those vendors who had operated the same business within the French Quarter for eight years).

26. 377 U.S. 533 (1964).

27. *Id.* at 568.

28. *Id.* at 565. Since most citizens participate in the political process only by electing legislators to represent them, the *Reynolds* Court stated that political equality required that each citizen have an equally effective voice in the election process. *Id.*

29. 390 U.S. 474 (1968).

30. *Id.* at 485. The County Commissioners Court in *Avery* established courthouses and jails, appointed health and county officials, built roads and bridges, administered welfare services, set the county tax rate, adopted the county budget, and equalized tax assessments. *Id.* at 476.

31. 397 U.S. 50 (1970).

32. *Id.* at 54. The *Hadley* Court maintained that there was no discernible reason why constitutional distinctions should be drawn from the purpose of the election. *Hadley* downplayed the differences between the authority of varying officials and emphasized the right to participate equally in the election process. *Id.* at 54-55.

33. 390 U.S. at 483-84.

34. 397 U.S. at 56.

35. Both *Avery* and *Hadley* indicated that a deviation from *Reynolds* might be allowed

This exception to *Reynolds* was employed in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,[36] where the Court abandoned its uncompromising use of strict scrutiny in the context of special water district in rural California.[37] In *Salyer*, the Tulare Lake Basin Water Storage District was created to acquire, store, and distribute water for farming in the Tulare Lake Basin.[38] Only landowners were qualified to elect the district's directors and the votes were weighted according to land value.[39] The plaintiffs, small landowners, nonlandholding residents, and a lessee, alleged that the election scheme unconstitutionally denied and diluted their votes.[40] The Court rejected the plaintiffs' constitutional challenge because of the narrow purpose of the water storage district and the disproportionate effect of its activities on landowners as a group.[41] This reasoning effectively enabled the Court to remove *Salyer* from the stricture of *Reynolds v. Sims* and its progeny.

Although finding that the water district's purpose was narrow, the *Salyer* Court conceded that the district exercised some typical governmental power.[42] Nevertheless, the Court concluded that the district possessed relatively limited authority.[43] The mere acquisition, storage, and distribution of water, absent other public services ordinarily provided by a municipality, was insufficient to warrant the application of the one person, one vote principle espoused in *Reynolds*.[44] Also contributing to the rejection of the *Reynolds'* principle was the disproportionate effect of the district's activities

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under the proper circumstances. The Court did not state that strict scrutiny would be inapplicable under those circumstances. Thus, it does not necessarily follow that strict scrutiny should be abandoned when a governmental unit is permitted to deviate from the *Reynolds'* one person, one vote rule.

36. 410 U.S. 719 (1973).

37. *Id.*

38. *Id.* at 723. The district was comprised of 193,000 acres of highly fertile land located in the Tulare Lake Basin. Its population consisted of 77 persons, including 18 children. The majority of that population were employees of one of four corporations that farmed 85% of the land in the district. *Id.*

39. *Id.* at 725.

40. *Id.* at 724-25.

41. *Id.* at 728.

42. *Id.* at 728. The district board had the power to employ and discharge persons on the permanent staff and to contract for construction of district projects. CAL. CODE § 43152 (West 1973 & Supp. 1981). It could condemn private property, *id.* §§ 43530-33, and it could cooperate and contract with other state and federal agencies. *Id.* § 43151. The District could authorize both general obligation bonds and interest-bearing warrants. *Id.* §§ 44900-45900. The board could also generate and distribute hydroelectric power, *id.* § 43025, and it could engage in flood control activities. *Id.* § 42000. As far as the *Salyer* Court could discern, the district did not engage in the generation, sale, or distribution of hydroelectric power. 410 U.S. at 724 n.4.

43. 410 U.S. at 728.

44. *Id.* at 728-29. The *Salyer* Court also noted that there were no towns, shops, or other facilities designed to improve the quality of life within the district boundaries. Since the district in *Ball v. James* had facilities designed to improve the quality of life within its boundaries, the inquiry into the character of the facilities within the boundaries of a special district no longer seems relevant.

on the landowners who bore the entire economic burden of the water storage district.[45] The financial benefits and burdens of the district were distributed to, and assessed against, the landowners in proportion to the value of their land.[46] Consequently, apportioning the vote according to land value, thereby disenfranchising the nonlandowners, appeared rational to the *Salyer* Court.[47]

This rational nexus between the voting scheme and land ownership was the linchpin of the *Salyer* decision. By rejecting the application of the one person, one vote rule and the strict scrutiny analysis, the Court cleared the way for upholding voting schemes based on land ownership unless they were "wholly irrelevant to achievement of the regulation's objectives."[48] Predictably, the statute easily withstood the Court's rational basis analysis.[49] Unfortunately, the Court failed to articulate the impact of the districts' activities on the interests of those residents whose votes were diluted or disenfranchised.[50] In short, the opinion rested solely on financial considerations.[51]

The *Salyer* decision marked a significant retreat by the Supreme Court from its willingness to apply the one person, one vote rule to local government. The exception created by *Salyer* was prompted by the narrow purpose of the district and its disproportionate effect on landowners as a group. Eight years later, the Supreme Court delineated the scope of the *Salyer* exception in *Ball v. James*.[52]

THE *BALL* DECISION

Facts and Procedural History

The Salt River Project Agricultural Improvement and Power District (District) stores and delivers untreated water to the owners of 236,000 acres

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45. 410 U.S. at 729.

46. *Id.*

47. *Id.* at 729-30.

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

49. *See* note 25 and accompanying text *supra*.

50. The Court's failure to consider the impact of the board's decisions on the powerless residents was particularly egregious in view of the plight of one nonlandowner. The board, dominated by the largest landowner, J.G. Boswell Co., voted 6-4 to table a motion that would divert floodwaters into the Buena Vista Lake Basin, the result being that 88,000 of the 193,000 acres in the Tulare Lake Basin remained flooded. That inaction left one residence 15-1/2 feet below the water level of the flood crest. Apparently, J.G. Boswell Co. had a long-term agricultural lease in the Buena Vista Lake Basin and flooding it would have interfered with the farming of the crops the following season. 410 U.S. at 737-38 (Douglas, J., dissenting).

Because J.G. Boswell owned the greatest number of acres and the voting power for the district's directors was distributed by land value, the election results were a foregone conclusion. Although the California Water Code provided for elections every other year, the last election was held in 1947. *Id.* at 735.

51. 410 U.S. at 729-31.

52. 451 U.S. 355 (1981).

of land in Arizona.[53] The District subsidizes its water operations by selling electricity to hundreds of thousands of people in an area comprising a large part of Phoenix.[54] During the Depression, the sale of electricity from the Salt River Project Association, the District's predecessor, proved insufficient to meet its financial burdens.[55] In response, the District was formed as a municipal corporation of the state to enable it to issue tax exempt bonds.[56] The District could then raise financing through an acreage-proportionate taxing power or through bonds secured by liens on the real property within the District.[57] Under Arizona law, voting eligibility for the District's directors was limited to landowners,[58] and voting power was apportioned according to the amount of acreage owned.[59] Nonlandholding residents of the District and residents who owned less than one acre complained that the acreage-based scheme violated the equal protection clause of the fourteenth amendment.[60] They alleged that the District's activities had a substantial effect on everyone living within the District, regardless of

53. *Id.* at 357. The Salt River Project was formed by Arizona farmers in an effort to irrigate their arid lands with water from the Salt River. Under the Reclamation Act of 1902, 32 Stat. 388 (1902) (current version at 43 U.S.C. § 371 (1976) (the landowners received interest free loans from the United States to build reclamation projects. The farmers who benefited from the reclamation project had to repay the United States for the construction costs. The Salt River Valley Water Users Association was formed as an Arizona corporation to serve as the contracting agent for the landowners. The landowners who subscribed to the Association received reclamation water and were given the power to vote in Association decisions in proportion to the amount of land they owned. The Association raised income through acreage-proportionate stock assessments and those assessments became a lien on the subscriber's land until paid. 451 U.S. at 357.

54. *Id.* Congress authorized projects created under the Reclamation Act to generate and sell hydroelectric power. 32 Stat. 388 (1902) (current version at 43 U.S.C. § 522 (1976)). The Salt River Project has taken advantage of this revenue tool almost since its inception. 451 U.S. 357.

55. *Id.*

56. *Id.* Many Association members opposed creating the special district, in part, because of the manner in which the state statute would have distributed the voting power. Votes for the election of the District's directors would have been distributed per capita among the landowners and not according to the acreage formula for stock assessments and water rights. In response to the Association's request, the Arizona state legislature amended the statute in 1936. Voting was restricted to landowners and voting power was allocated according to the number of acres owned. The Salt River Project Agricultural Improvement and Power District was subsequently formed in 1937. The Association transferred all of its property to the District and became the District's contracting agent. The District manages the power and water storage of the project and the Association, as the District's agent, manages water delivery. *Id.* at 357-61.

57. *Id.*

58. ARIZ. REV. STAT. ANN. § 45-909 (1956 & Supp. 1980-81).

59. *Id.* at § 45-983. Originally, each landowner was entitled to cast one vote for each acre of land he owned within the district. ARIZ. REV. STAT. § 45-983 (1956). The Agricultural Improvement Act was amended in 1969 to allow owners of less than one acre to cast fractional votes in proportion to their acreage. ARIZ. REV. STAT. § 45-983 (Supp. 1980-81). Before 1976, 10 directors were elected from a designated geographical unit of the District. In 1976, the state legislature enlarged the Board to 14 members. Those four new members are elected at-large and each landowner has one vote in the at-large election. 451 U.S. 359 n.2.

60. The plaintiffs requested declaratory and injunctive relief in an action brought under the

property ownership.[61] Specifically, the residents claimed that they were adversely affected because of the scope of the District's powers, its supply of electricity to one-half of the Arizona population, and its exercise of flood control and environmental management.[62]

The district court granted the Salt River Project's motion for summary judgment.[63] The court of appeals reversed, holding that the District's characteristics did not parallel the narrow circumstances of the *Salyer* exception and thus, the *Reynolds'* principle of one person, one vote controlled.[64]

Holding and Reasoning

The Supreme Court in *Ball v. James*[65] reversed the court of appeals and held that the functions of the Salt River District (District) were sufficiently narrow and specialized to release it from the one person, one vote election requirement enunciated in *Reynolds v. Sims*.[66] The Court asserted that any factual distinctions between the District's situation and that in *Salyer* did not constitute a "constitutional difference" under the principles articulated in the *Avery, Hadley,* and *Salyer* cases.[67] Justice Stewart, writing for the majority,[68] stated that the District did not discharge the type of governmental powers that require the application of *Reynolds*.[69] In support of its position the Court noted that the District did not levy sales taxes or ad valorem property taxes.[70] In addition, the Court pointed out that the District lacked the authority to enact laws governing the conduct of citizens or to perform other governmental functions, such as providing health, education and welfare.[71]

Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976). Joint Appendix at 4-5, Ball v. James, 451 U.S. 355 (1981) [hereinafter cited as Joint Appendix].

61. 451 U.S. at 360.

62. *Id.*

63. *Id.*

64. James v. Ball, 613 F.2d 180, 182-85 (9th Cir. 1980).

65. 451 U.S. 355 (1981).

66. *Id.* at 370.

67. *Id.* at 366.

68. Justice Stewart was joined by Chief Justice Burger, and Justices Powell, Rehnquist, and Stevens. Justice Powell also filed a concurring opinion. Justice White filed a dissenting opinion, which was joined by Justices Brennan, Marshall, and Blackmun.

69. 451 U.S. at 366. The District has the power, among others, to exercise the right of eminent domain and to bring condemnation proceedings, ARIZ. REV. STAT. ANN. § 45-939 (1956); the right of entry upon any land for any reason necessary to carry out the purposes of the District, *id.* § 95-940; the power to raise revenue through the levy of taxes on all real property located within its geographical area, *id.* § 45-1011; the power to sell bonds, *id.* § 45-1041; the power to enter into a wide range of contractual arrangements to secure resources, *id.* § 45-935(B) (Supp. 1980-81); the veto power over all transfers of surface water from one place or type of use to another. *Id.* § 45-172(5).

70. 451 U.S. at 366. The District did have, however, the power to levy taxes on real property located within its geographical area. *See* note 69 *supra.*

71. 451 U.S. at 366. Two other normal governmental functions mentioned by the Court were the maintenance of streets and the operation of sanitation services. *Id.*

The functions of the Salt River District were characterized as being relatively narrow.[72] Refusing to recognize any constitutional significance in the fact that forty percent of the water delivered by the District was used for nonagricultural purposes, the Court stated that the constitutionally relevant fact was that all water was distributed according to land ownership.[73] The Court followed the Arizona state judiciary and concluded that the District was essentially a business enterprise which primarily benefited the landowners who created it.[74] As a result, the majority would not allow the District's nominal public character to bring it within the purview of *Reynolds*.[75]

The *Ball* Court also concluded that the District's power operations were not constitutionally related to its voting scheme.[76] In the Court's view, because the supply of electricity was not traditionally undertaken by the government, it was not a general or important governmental function that would subject the District to the one person, one vote rule.[77] In addition, since the electrical function was stipulated as being incidental to the water function,[78] the Court maintained that the power supply could not alter the

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72. *Id.* The Court noted that the District merely stores water behind its dams, conserves it from loss, and distributes it through canals. In further support of its conclusion, the majority stated that the District and Association do not own, sell, or buy water, nor do they control the use of any water they deliver. *Id.* For additional explanation of the relationship between the District and the Association, see note 55 *supra*.

73. 451 U.S. at 367.

74. *Id.* The Arizona state judiciary has always maintained that the District is a business corporation with attributes of sovereignty which are only incidental to its business and economic purposes. *See, e.g.*, Niedner v. Salt River Project Agricultural Improvement and Power Dist., 121 Ariz. 331, 590 P.2d 447 (1979) (discharge of employee by agricultural improvement district did not constitute state action); Uhlmann v. Wren, 97 Ariz. 366, 401 P.2d 113 (1965) (District is not required to show that the surplus power which it sells is needed in part for irrigation purposes or that such power is developed in relation to its hydrogenerating potential); Local 266, International Bhd. of Electrical Workers v. Salt River Project Agricultural Improvement and Power Dist., 78 Ariz. 30, 275 P.2d 393 (1954) (District's operations are conducted to enable it to accomplish the business and economic purposes for which it was organized).

75. 451 U.S. at 368. The District is a municipal corporation organized under the laws of Arizona. Under the Arizona Constitution, such districts are "political subdivisions of the State, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this Constitution or any law of the State or of the United States." ARIZ. CONST. art. 13, § 7.

The District's property is not subject to state or local property taxation. ARIZ. REV. STAT. ANN. § 45-902 (1956). The District, however, makes voluntary ad valorem contributions to the state according to the same formula by which the state's private utilities pay property taxes. ARIZ. REV. STAT. ANN. §§ 45-2201 to -2202 (Supp. 1980-81).

76. 451 U.S. at 367-68.

77. *Id.*

78. "[T]he United States had constructed as *incident* thereto with government and Association funds, a hydroelectric power system . . . , to produce power to be used by the Association in support of its *primary* irrigation activities." Joint Appendix, *supra* note 60, at 24 (emphasis added).

character of the enterprise.[79] Furthermore, the Court noted that the relationship between the nonvoting buyers of electricity and the District's power plants was essentially the same as that between consumers and a business enterprise.[80] Accordingly, the number of nonvoting consumers of electricity did not justify application of the *Reynolds'* one person, one vote rule to the District.[81]

After concluding that the District's functions were outside the *Reynolds'* stricture, the Court focused on the disproportionate effect the District's functions had on the landowners. The Court determined that the disproportionate effect flowed from three factors: (1) the only residents of the District whose lands were subject to liens securing District bonds were the voting landowners; (2) only the voting landowners were subject to the acreage-based taxing power of the District; and (3) the voting landowners were the only residents who had committed capital to the District.[82]

Given that disproportionate relationship, the Court determined that the voting scheme was constitutional because it bore a reasonable relationship to the state's objectives.[83] According to the Court, the state could rationally limit the vote to landowners because if the landowners were not given an exclusive voice in the District's business, they may not have subjected their land to liens which secured the District bonds. Without the bonds the creation of the District would not have been possible.[84] Additionally, a vote weighted in relation to the acres owned was reasonable because the number of acres represented the proportionate risks the landowner incurred, and it reflected the distribution of the benefits and burdens of the District's water operations.[85]

CRITICISM

Ball v. James established that the production and distribution of electricity was not a general or important governmental function requiring the District, a municipal corporation, to be subject to the one person, one vote principle of *Reynolds*.[86] Rather than follow *Salyer*, which characterized utilities as a "general public service,"[87] the *Ball* Court based its narrow view of electrical utilities on *Jackson v. Metropolitan Edison Co.*[88] In

79. 451 U.S. at 369.
80. *Id.* at 370.
81. *Id.*
82. *Id.*
83. *Id.* at 371.
84. *See* note 56 *supra*.
85. 451 U.S. at 371.
86. *Id.* at 368-69.
87. 410 U.S. 719, 728-29 (1973). In referring to the Water Storage District's limited purpose, the *Salyer* Court stated: "It provides no other *general public services* such as schools, housings, transportation, *utilities*, roads or anything else of the type ordinarily financed by a municipal body." *Id.* (emphasis added).
88. 419 U.S. 345 (1974).

Jackson, the Court held that the actions of a privately-owned utility did not constitute state action for fourteenth amendment purposes.[89] The *Jackson* Court remarked that providing utilities is "not traditionally the exclusive prerogative of the State."[90] That statement, however, does not necessarily mean that providing utilities does not constitute a governmental function when done so by the state. The *Jackson* Court did not consider the issue of whether the state is bound by the fourteenth amendment when the state itself provides utilities. Thus, the *Ball* Court's reliance on *Jackson* was misplaced.[91]

After removing the production and distribution of electricity from the scope of governmental domain, the *Ball* Court characterized the relationship between the nonvoting residents and the District's electrical operations as a consumer-business relationship,[92] thereby subjecting the Court to the burdensome task of distinguishing between proprietary and governmental activity.[93] A simple proprietary, governmental distinction, however, is inadequate for classification of the myriad of governmental functions[94] because a large number of governmental functions could easily be subsumed

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89. *Id.* at 358-59. The petitioner in *Jackson* claimed that under state law she was entitled to reasonably continuous electrical service and that the termination of her electrical service was state action depriving her of her property without due process. *Id.* at 348. The Court denied her relief because the state was not sufficiently connected with the private utility so as to make the utility's conduct state action. *Id.* at 358.

90. *Id.* at 353. *See also* State v. Lincoln County Power Dist., 60 Nev. 401, 111 P.2d 528 (1941) (supply of electrical energy is a legitimate municipal or public purpose); Boyce v. Lancaster County Natural Gas Auth., 266 S.C. 398, 223 S.E.2d 769 (1976) (manufacture and sale of power is public and governmental function).

The *Ball* Court boldly asserted that neither the existence nor size of the District's power business affected the legality of its property-based voting. 451 U.S. at 368. This statement, however, does not comport with the Court's previous language regarding when weighted voting schemes might be permissible. In Hadley v. Junior College Dist., 397 U.S. 50 (1970), the Court stated that the approval of a weighted voting scheme would be predicated on the governmental unit's activities being "*far removed* from normal governmental activities." 397 U.S. at 56 (emphasis added). The supply of electricity, however, does not appear to be far removed from normal governmental activities.

91. Ball v. James, 451 U.S. at 386-87 (1981) (White, J., dissenting).

92. *Id.* at 370.

93. *Id.* at 386. The Court had previously rejected the notion that governmental activity can be neatly divided into wholly proprietary or governmental categories. Specifically, the Court stated "[g]overnment is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it." *Id.* at 387 (White, J., dissenting) (quoting Indiana Towing Co. v. United States, 350 U.S. 61, 67-68 (1955)). *See generally* Recent Development, *Municipal Corporations—Alienability of Property—Rejection of Governmental-Proprietary Test*, 47 TENN. L. REV. 872 (1980).

94. The function of a governmental unit depends upon what type of unit it is. The Bureau of the Census classifies local governments by five major types—counties, municipalities, townships, school districts, and special districts. Special districts perform diverse functions ranging from natural resources to cemeteries and libraries. In early 1977, there were 79,913 governmental units in the United States. BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE, GOVERNMENTAL ORGANIZATIONS 1, 5 (1978).

under a proprietary or consumer-business relationship label.[95] Even assuming the governmental-proprietary label is functional, it is irrelevant in view of the fact that when a state provides services, constitutional safeguards apply through the equal protection clause of the fourteenth amendment.[96]

Further, the Court's literal view of the relationship between the District's water and power businesses enabled it to dismiss the significance of the power business. Originally, the supply of power was stipulated as "incident" to the supply of water.[97] On the basis of that stipulation, the Court stated that the electrical business could not change the character of the District.[98] As the *Ball* dissent noted, however, "incidental" is not synonymous with insignificant.[99] By endorsing the historical characterization of the supply of power, the Court ignored the pervasive effect of the District's power business on the present day residents. The Court's inquiry into the character of a governmental unit should have focused primarily on the services the unit provided and the effect those services had on the public.[100]

The *Ball* Court's, emphasis on the District's motive for supplying electricity further evidenced its inappropriate view of this function. Specifically, the Court found it significant that the electrical service was initiated to defray the cost of water for the landowners rather than to provide electricity to the public.[101] The underlying intention behind that action, however, did not alter its impact upon the public. The Court's misguided focus served only to avoid the articulation of any interest the nonvoting resident had in the operation of the District's utilities.

Moreover, because the District did not exercise general governmental powers, the Court reasoned that two earlier decisions which effectively identified the interests of disenfranchised voters could be disregarded. In *Cipriano v. City of Houma*,[102] the Court held unconstitutional a statute that restricted the vote to "property taxpayers" in elections called to ap-

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95. As the dissenting opinion in *Ball* stated: "[I]t is hard to think of any governmental activity . . . , which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed." 451 U.S. at 387 (White, J., dissenting) (quoting Indiana Towing Co. v. United States, 350 U.S. 61, 68 (1955)).

96. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state may not regulate public education so as to exclude one or more religious sects, but those sects may maintain their own parochial school systems). *See generally* Civil Rights Cases, 109 U.S. 3 (1883).

97. *See* note 78 and accompanying text *supra*.

98. 451 U.S. at 369. *But see* Wingrove v. Public Serv. Comm'n, 74 W. Va. 190, 81 S.E. 734 (1914) (supplying electrical power, incidental to the corporation's primary purpose of mining and selling coal, was of such a public nature so as to subject the corporation to control and regulation by the public service commission).

99. 451 U.S. at 382-83 n.5 (White, J., dissenting).

100. *Cf.* Near v. Minnesota, 283 U.S. 697 (1931) (in determining the constitutionality of a statute, the Court should look to the statute's substance and its operation and effect, not merely its matter of form).

101. 451 U.S. at 369.

102. 395 U.S. 701 (1969).

prove the issuance of revenue bonds by a municipal utility.[103] The Court struck down the statute because both property owners and nonproperty owners used the utilities and paid the rates. In the Court's words, "the operation of the utility systems—gas, water, and electric—affects virtually every resident of the city. . . ."[104] The principles of *Cipriano* were extended further in *City of Phoenix v. Kolodziejski*.[105] In *Kolodziejski*, a statute restricting the vote to real property taxpayers in elections called to approve the issuance of general obligations bonds was held unconstitutional.[106] The Court reasoned that when both property owners and nonproperty owners would be substantially affected by the outcome of the election, both should have the opportunity to vote.[107]

In short, the impact of the election and the interests of the disenfranchised parties in both *Cipriano* and *Kolodziejski* were not altered because the municipalities happened to exercise general governmental powers. Rather, those decisions focused on the interaction between the subject of the election and the interests of the disenfranchised class. The *Ball* Court, however, distinguished *Cipriano* and *Kolodziejski* on the ground that the municipalities exercised a panoply of governmental powers,[108] a factor not relevant to the decision in either case. In so doing, the *Ball* Court failed to consider the decisive factors in those cases—the impact of the elections and the interests of the disenfranchised class. By focusing on the general services those municipalities provided, the *Ball* Court failed to consider any real interest the nonvoter may have had in the performance of only one of those services. Yet by finding the narrow purpose of the District, the *Ball* majority presumed the disenfranchised class had only a minimal interest, if any, in the operations of the District.

In further support of its holding, the Court listed three factors which contributed to the disproportionate effect that the District's activities had on the landowners.[109] First the Court stated that the only residents of the District whose lands were subject to liens securing District bonds were the voting landowners.[110] This statement, however, ignores the fact that only twelve percent of the District's debt was secured by those liens,[111] and that the general obligation bonds contained covenants providing electric rates to

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103. *Id.* at 702. In *Cipriano*, the City of Houma attempted to limit the franchise to those who were "primarily interested" in the election. The Court did not reach the issue of whether a state could, in some circumstances, limit the vote to those who were "primarily interested." *Id.* at 704 n.5.

104. *Id.* at 705.

105. 399 U.S. 204 (1970).

106. *Id.* at 212-13.

107. *Id.* at 212. As in *Cipriano*, the Court in *Kolodziejski* did not reach the question as to whether a state could limit the franchise to those primarily interested.

108. 451 U.S. at 366-67 n.11.

109. *Id.* at 370-71.

110. *Id.*

111. Brief for Appellee at 7, Ball v. James, 451 U.S. 355 (1981) [hereinafter cited as Appellee's Brief].

be set at levels sufficient to pay *all* debt service.[112] Consequently, the risk of forfeiture for the bond holders was minimal at best. The second factor the Court found as contributing to the disproportionate effect was that only the voting landowners were subject to the acreage-based taxing power of the District.[113] Since that tax had not been levied since its inception in 1936,[114] this point is of little consequence. Finally, the Court stated that only the landowners have committed capital to the District through stock assessments charged by the Association.[115] This factor is misleading in that those capital investments were last made in 1951[116] and amount to only a small fraction of the electrical revenues now collected by the District.[117] In essence, the Court found a disproportionate effect by concentrating on the financial factors surrounding the District's creation. This view, however, ignored the fact that the financial burden of the District has shifted from the landowners to the consumers of electricity.[118]

This superficial analysis of the disproportionate effect of the District glossed over the interests of the disenfranchised class. To be sure, the District's operations have had a disproportionate effect on the voting landowner. Nonetheless, the financial factors mentioned by the Court do not amount to a significant difference when compared with the interests the nonvoting residents have in their electrical service or in the environmental decisions made by the District. To illustrate, the nonvoting residents clearly have an active interest in the reliable supply of electricity at a reasonable rate. The District, on the other hand, is intimately involved in the pumping and allocation of water within its service area.[119] Hence, the nonvoting residents' electricity supply is vitally affected by the District's decisions concerning water resources.[120]

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112. *Id.* at 24 n.17 (emphasis added).

113. 451 U.S. at 370.

114. Joint Appendix, *supra* note 60, at 35.

115. 451 U.S. at 370.

116. *Id.* at 366 n.10.

117. *Id.*

118. In 1974, the sale of electricity accounted for 98% of the District's revenues. Joint Appendix, *supra* note 60, at 36. Further, since 1973, all borrowing for capital improvements of the District has been secured by pledges of revenues from the District's power earnings. 451 U.S. at 366 n.10.

119. *See* note 145 *infra*.

120. Additionally, the *Ball* Court stated perfunctorily that the "distinction between agricultural and urban land is of no special constitutional significance in this context." 451 U.S. at 367. That conclusory statement, however, renders questionable some of the reasoning behind *Salyer*. The *Salyer* Court determined that the restrictive voting scheme was understandable because the nonvoting residents did not finance the water operations and the water was limited to agricultural purposes. 410 U.S. at 729-30. Thus, the land, not the residents, received the exclusive benefit of the water. This conclusion is erroneous. Because Phoenix receives the majority of its municipal water from the District, and its financial burden has shifted from the landowners to the users of electricity, the nonvoting residents are affected as well.

Subsequent to the *Salyer* decision, two state courts have reached conclusions contrary to *Ball* where the special districts involved were comprised largely of metropolitan regions and the

Unfortunately, the disproportionate effect analysis of the Court focuses only on the disparity between the voter and nonvoter, and thus, involves no independent evaluation of the interests of the nonvoting group.[121] Under this type of analysis, if the District's operations had a substantial effect on one class, a slightly greater effect on another class would result in the total exclusion of the former group from the franchise.[122] The landowner's total financial support of the district in *Salyer* was essentially nonexistent in *Ball*. Yet, the small financial disparity between the landowners and nonlandowners in *Ball* was deemed sufficient to exclude nonlandowners under the disproportionate effect analysis.

Although the Court used the disproportionate effect of the District to justify disenfranchisement, that analysis does not fully justify the weighted voting scheme applied to the landowners. Although it is true that some landowners incurred a greater financial burden because they owned more land, it is equally true that they received a proportionally larger benefit from the District. A difference in the monetary value of the District's activities between the large landowner and the small landowner does not necessarily reflect a disproportionate effect of those activities among the landowners. A small benefit or burden to the small landowner may be as crucial to him as the larger benefit or burden is to the large landowner.[123]

Finally, whereas the *Salyer* Court identified remedies available to the disenfranchised and diluted voter,[124] the *Ball* Court failed to mention any remedies. The voting scheme in *Ball*, unlike that in *Salyer*,[125] did not permit proxy voting in the general election. The lessees in *Ball* cannot negotiate with the landowners to obtain the right to vote and are therefore left disenfranchised. Further, the utility rate structure of the District was not subject

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nonlandowning residents provided financial support to the districts. *See, e.g.*, Choudhry v. Free, 17 Cal. 3d 660, 552 P.2d 438, 131 Cal. Rptr. 654 (1976); Johnson v. Lewiston Orchards Irrigation Dist., 99 Idaho 501, 584 P.2d 646 (1978).

121. *See* Note, *Salyer Land Co. v. Tulare Lake Basin Water Storage District: Opening the Floodgates in Local Special Government Elections*, 72 MICH. L. REV. 868, 884-85 (1974).

122. The disproportionate effect analysis used in *Salyer* and *Ball*, unlike the analyses used in the Court's previous decisions, does not guarantee the franchise to classifications that are affected by an election. In testing the constitutionality of a restricted voting scheme in Kramer v. Union Free School Dist., 395 U.S. 621 (1969), the Court asked, "whether all those excluded are in fact *substantially less interested or affected* than those the statute includes." *Id.* at 632 (emphasis added). Similarly, the Court found the restrictive voting scheme in City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970), unconstitutional because there was "no basis for concluding that nonproperty owners are *substantially less interested . . . than are property owners.*" *Id.* at 212 (emphasis added). In effect, the disproportionate effect analysis enables the Court to disenfranchise nonlandowners who may only be slightly less affected than landowners.

123. *Cf.* Stewart v. Parish School Bd., 310 F. Supp. 1172 (E.D. La.), *aff'd mem.*, 400 U.S. 884 (1970) (taxpayer with small assessment may be as equally interested in bond issue as taxpayer with large assessment).

124. 410 U.S. at 733, 734 n.10.

125. *See* notes 36-52 and accompanying text *supra*.

to state regulation.[126] The private utilities in Arizona are regulated by the state, but because the District is a municipal corporation, it purported to regulate itself and thereby protect the public interest.[127] The only remedy the Court suggested for grievances against the District was to take action through the state political process.[128] As the *Ball* dissent noted, this short-sighted argument has been specifically rejected by the Court in prior decisions.[129] Thus, the Court's seeming indifference toward the lack of remedies available to the disenfranchised or diluted voter evinced a basic misunderstanding of the impact that a special district has on its residents.

IMPACT

This country has experienced an explosive growth in the number of special districts within a relatively short period of time.[130] That growth has come in part because special districts, unlike municipalities, can provide a wide variety of services.[131] The *Ball* decision encourages a proliferation of special districts,[132] and removes many special districts from the one person, one vote rule.

The Court's willingness to view the supply of water and electricity to

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126. 451 U.S. at 379 (White, J., dissenting). The Salt River Project is an agricultural improvement district and therefore is exempt from regulation. *See* ARIZ. CONST. art. 13, § 7; art. 15, § 2.

127. 451 U.S. at 379. (White, J., dissenting).

128. *See id.* at 371 n.20. Justice Powell, in his concurring opinion, also preferred to defer to the state political process. *Id.* at 372 (Powell, J., concurring). The Court's desire not to invalidate the statutory scheme in *Ball* is predictable given Professor Tribe's cogent explanation of the *Salyer* decision. Tribe maintained that *Salyer* was among a group of decisions which involved people not asking the state to give them something they could not afford, but rather poor people asking rich people to share something the legislature had told the rich they could have. Thus, the Court would be engaging in a form of wealth distribution if it were to invalidate the state statute involved. *See* TRIBE, *supra* note 11, at 1133-34.

This would have seemed to have been the probable result of *Ball*. Although the electrical rates must be set at a level sufficient to pay off the District's bonds, the new District directors elected by the nonlandowners could lower the rates so as to interfere with the District's ability to maintain its current level of operation. This would, in turn, shift part of the financial burden back to the landowner. Though nonproperty owners might want to lower the electrical rates, they should not be denied the right to vote because of the way they may vote. *See* Carrington v. Rash, 380 U.S. 89 (1965) (Texas constitutional provision that effectively disenfranchised military personnel because the state feared a "takeover" from concentrated voting from military bases declared unconstitutional).

129. *See* Avery v. Midland County, 390 U.S. 474, 481 (1968); Kramer v. Union Free School Dist., 395 U.S. 621, 628 n.10 (1968).

130. Within a span of 30 years, 1942-1972, the number of special districts almost tripled. *See* D. STETZER, SPECIAL DISTRICTS IN COOK COUNTY: TOWARD A GEOGRAPHY OF LOCAL GOVERNMENT 15 (1975) [hereinafter cited as STETZER].

131. *See* BOLLENS, *supra* note 15, at 5-15, 21-23.

132. The election of Ronald Reagan to the presidency is also likely to cause a greater increase in the number of special districts. The number of special districts suddenly increased during the Depression because of the drastic reduction in state financial resources. States were

hundreds of thousands of people as a "peculiarly narrow function"[133] is particularly significant, for if the Salt River District can be removed from the *Reynolds'* one person, one vote rule, it is evident that many special districts, in view of their narrow and assorted functions,[134] will also be exempted. Although most special districts provide a single service, cumulatively they provide a great diversity of vital services.[135] In effect, the removal of many special districts from the popular election requirement of *Reynolds* will decrease the public voice of the community in a variety of activities that affect it.

Public accountability is further undermined by the *Ball* Court's attitude toward an "incidental function." The Court's assertion that the "incidental function" of a governmental unit cannot change the character of the entity,[136] may prompt special districts to expand their activities.[137] Moreover, since the breadth of the economic effect of an incidental function will not subject the entity to the *Reynolds'* mandate, those activities

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then forced to create special districts with power to issue bonds to finance revenue-producing improvements. STETZER, *supra* note 130, at 14. Similarly, President Reagan's withdrawal of federal support for state programs is likely to lead to a similar result. Accordingly, the *Ball* decision, coupled with Reagan federalism, will greatly facilitate special district growth.

133. 451 U.S. at 357.

134. The following list is the number of special districts in the United States and the types of activities they are engaged in:

FUNCTION	NUMBER	PERCENT
Total	25,962	100.0
Natural resources	6,595	25.4
Soil conservation	2,431	9.4
Drainage	2,255	8.7
Irrigation, water conservation	934	3.6
Flood control	681	2.6
Other natural resources activity	294	1.1
Fire protection	4,187	16.1
Urban water supply	2,480	9.6
Housing and urban renewal	2,408	9.2
Cemeteries	1,615	6.2
Sewerage	1,610	6.2
School building authorities	1,020	3.9
Parks and recreation	829	3.2
Highways	652	2.5
Hospitals	715	2.8
Libraries	586	2.3
Other single-function districts	1,545	6.0
Multiple function districts	1,720	6.6

BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, GOVERNMENTAL ORGANIZATIONS 5 (1978).

135. BOLLENS, *supra* note 15, at 21.

136. *See* notes 78 & 79 and accompanying text *supra*.

137. For example, the District also has acquired ownership interests in power plants in Arizona and Colorado. Appellee's Brief, *supra* note 109, at 5.

can grow unchecked despite their impact on the community.[138] As in *Ball*, the populace will be left without adequate input in special district operations which concern the surrounding region.

The Court's acceptance of the special district as a vehicle for regional development by private citizens may lead to pernicious effects in regions attempting development similar to that in *Ball*. Although special districts formed solely for economic self-interest can benefit the entire community,[139] they may be too responsive to the special interests of a select group of citizens.[140] In addition, what may be viewed as financially feasible for the special district, may not be consonant with the ideal, long-range planning of the community, thereby leading to haphazard and irregular development of a region.[141] Finally, a greater infusion of private money into special districts may give the private sponsors leverage to press for interest-based restrictions on the franchise.

Although the Court seemed to be drawing the line at special districts, the narrow purpose and disproportionate effect criteria utilized in *Ball* could seemingly be applied to a special election involving a narrow function of municipal government. A tenuous disproportionate effect could be recognized in special assessment elections so as to justify interest-based restrictions. Because special assessments burden the property owner and deal with limited purposes of municipal government, property restrictions could be placed on the franchise.[142] The narrow purpose and disproportionate effect criteria are simply too vulnerable to manipulation and misapplication in local government special elections. Further, the refusal of the *Ball* Court to identify and balance the interests of the disenfranchised or diluted voter

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138. The District in *Ball* is a participant in the Palo Verde Nuclear Generating Station being constructed near Phoenix. If the Palo Verde plant is completed, it will be the largest nuclear power plant in the United States. Brief of Amici Curiae at 2, Ball v. James, 451 U.S. 355 (1981).

139. The assessed valuation of lands within the District and Association is generally twice the assessed valuation of comparable lands outside the District and Association because of the assurance of an indefinite supply of water. Joint Appendix, *supra* note 60, at 39.

140. *See* BOLLENS, *supra* note 15, at 14-15; STETZER, *supra* note 128, at 33-36. For a particularly scathing attack on the undemocratic nature of special districts, see THE INSTITUTE FOR LOCAL SELF GOVERNMENT, SPECIAL DISTRICTS OR SPECIAL DYNASTIES? DEMOCRACY DIMINISHED (1970).

141. *See* Willoughby, *The Quiet Alliance*, 38 S. CAL. L. REV. 72, 78 (1965). Willoughby maintains that the use of special districts for regional development encourages future urban sprawl. Specifically, special district financing permits the development of inexpensive marginal lands rather than the higher priced land which is more directly in the path of urban growth. This leapfrogging tendency leads to irregular and disjointed communities. *Id.*

142. *See* County of Riverside v. Whitlock, 22 Cal. App. 3d 863, 99 Cal. Rptr. 710 (4th Dist. 1972) (exclusion of resident nonlandowners from a majority protest scheme for construction of gas distribution service for domestic service not unconstitutional). *See generally* Gaines, *The Right of Non-Property Owners to Participate in a Special Assessment Majority Protest*, 20 U.C.L.A. L. REV. 201 (1972). *See also* Note, *State Restrictions on Municipal Elections: An Equal Protection Analysis*, 93 HARV. L. REV. 1491 (1980).

creates speculation as to what interests are sufficient to invoke the *Reynolds'* one person, one vote principle in special elections.[143]

Finally, the consideration of only financial factors[144] in assessing the District's disproportionate effect ignores any noneconomic impact. For example, as a result of the *Ball* decision, thousands of Arizona residents are left without any meaningful input concerning two vital natural resources—energy and water.[145] Because many special districts provide services that have profound environmental effects on the community in which it is located, a complete evaluation of a special district's activities requires consideration of environmental factors. By overemphasizing financial factors and ignoring the noneconomic impact the Supreme Court has abrogated its responsibility to the public at large.

AN ALTERNATIVE SCRUTINY

An intermediate level of scrutiny has emerged in recent years in response to the inflexible results reached under the rational basis and strict scrutiny analyses.[146] This alternative standard would balance local governmental flexibility against the fundamental right to vote. Under intermediate level of scrutiny, a classification must serve "important governmental objectives and be substantially related to the achievement of those objectives."[147] Thus, the means to secure the legislative ends need not be as closely related

143. *Compare* Town of Lockport v. Citizens for Community Action at the Local Level, Inc., 430 U.S. 259 (1977) (annexation scheme referendum viewed as a special interest election justifying use of rational basis test) *with* Hill v. Stone, 421 U.S. 289 (1975) (general obligation bond issue, even where debt services will be paid entirely from property taxes, is a matter of general interest justifying use of strict scrutiny).

144. *See* text accompanying note 82 *supra*.

145. Specifically, the Arizona legislature recently endorsed the District's policy of pumping and transporting as much groundwater as is needed with its geographic boundaries. Since groundwater does not respect property boundaries, the District has been withdrawing groundwater from a common source of supply. Thus, the District's groundwater pumping activities have a real impact on the water supply of central Arizona bringing about consequences that vitally affect nonlandowning residents inside and outside of the District's boundaries. *See* Appellee's Brief, *supra* note 111, at 6-7. Moreover, the rate of groundwater being pumped is now more than double nature's ability to recharge the supply. *See* Pontius, *Ground Water Management in Arizona: A New Set of Rules*, 16 ARIZ. B.J. 28, 28 (1980).

146. *See* notes 24 & 25 and accompanying text *supra*.

147. Craig v. Boren, 429 U.S. 190, 197 (1976). This intermediate level of scrutiny is primarily used in two areas, illegitimacy and sex discrimination. *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (denying widower benefits unless he proves dependency on deceased spouse, but granting widow benefits without proof of dependence, is unjustified); Lalli v. Lalli, 439 U.S. 259 (1978) (statute which requires illegitimate children to provide proof of paternity when inheriting from their fathers by intestate succession is substantially related to the important state interest of just and orderly disposition of property at death). For additional explanation on how intermediate scrutiny has affected equal protection analysis, see Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979); Comment, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L. L. REV. 529 (1979).

to that end as strict scrutiny demands, yet the means must be more closely related than the rational basis requires. Ultimately, this intermediate scrutiny permits the Court to consider the facts in each case rather than reach a predetermined conclusion based on the use of strict versus rational scrutiny.

Under the *Salyer* exception, special districts are subjected to a rational basis analysis if a narrow purpose and a disproportionate effect are found.[148] If those two criteria are not present, strict scrutiny is applied. Special districts, by definition, will rarely be subjected to strict scrutiny under the *Ball* Court's expansion of the *Salyer* exception because the narrow purpose criterion is easily satisfied. Special districts frequently perform a single function in response to a peculiar local problem,[149] and thus, do not possess the general governmental powers that would compel application of the one person, one vote principle of *Reynolds*. Additionally, the *Ball* Court's finding of a disproportionate effect, based upon the minimal financial differences between the landowners and nonlandowners,[150] makes it evident that the disproportionate effect criterion is equally easy to satisfy.

Regardless of their function, special districts which restrict or weight the franchise to property owners should trigger an intermediate level of scrutiny. Special districts furnish essential services to a demanding local constituency which many municipalities cannot provide.[151] Therefore, removing special districts from a strict scrutiny analysis preserves autonomy and flexibility at the local governmental level.[152] It does not necessarily follow, however, that voting rights should be sacrificed by subjecting the special district to a rational basis test.[153] Although the rights at stake in *Ball*

148. 410 U.S. at 728.

149. *See* BOLLENS, *supra* note 15, at 5-14.

150. *See* notes 109-18 and accompanying text *supra*.

151. *See* BOLLENS, STETZER, *supra* note 128, at 26-29.

152. A paramount concern of those who opposed the application of the one person, one vote rule to local government was that flexibility and innovation would be stifled. *See* Hadley v. Junior College Dist., 397 U.S. 50, 60-61 (1970) (Harlan, J., dissenting); Avery v. Midland County, 390 U.S. 474, 490-91 (1968) (Harlan, J., dissenting). For a discussion that reapportionment has had a favorable impact on local government, see Herget, *The Impact of the Fourteenth Amendment on the Structure of Metropolitan and Regional Governments*, 23 HASTINGS L.J. 763 (1972); Jones, *Metropolitan Detente: Is It Politically and Constitutionally Possible?*, 36 GEO. WASH. L. REV. 741 (1968).

153. *Cf.* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) (rational basis test used to sustain the constitutionality of "police jurisdiction" statutes that extended municipal police, sanitary, and business-licensing powers over residents living within three miles of Tuscaloosa's corporate boundaries but excluded those residents from voting in municipal elections).

The Court's cavalier attitude toward state structuring of special district voting is mirrored by its increasingly receptive stance toward state districting. In Abate v. Mundt, 403 U.S. 182 (1971), the Court found justification for an 11.9% total deviation from population equality in the apportionment of a county legislature. In a later case, in Mahan v. Howell, 410 U.S. 315 (1973), the Court permitted a variation of 16.4% from population equality in the redistricting of the lower house of the Virginia legislature. That deviation was justified by "the State's policy of maintaining the integrity of political subdivision lines. . . ." *Id.* at 325. Finally, the Court allowed a new category of "minor" deviations in population equality that required no justification whatsoever. A maximum variation among districts of about eight percent was

were not the basic political or civil rights that *Reynolds* was designed to protect,[154] the interests of the disenfranchised class were not so inconsequential as to justify judicial neglect.[155] A closer examination of the circumstances in *Ball*, as would be required if the Court adopted an intermediate scrutiny approach, reveals the infirmities in the present statutory scheme and its application to contemporary Arizona.

Under an intermediate level of scrutiny the Court would have considered whether irrigation was an important state objective and whether the restrictive voting scheme was substantially related to the state's goal of irrigation.[156] Adequate irrigation for agricultural purposes is most assuredly an important governmental objective in the arid state of Arizona.[157] When the District was formed in 1937, more than ninety-four percent of the land was used for agricultural purposes.[158] Today, however, less than half of the land in the District is considered agricultural, and approximately forty percent of the water now distributed is used for nonagricultural purposes.[159] In short, the dramatic demographic shift[160] in the area renders the District's restrictive voting scheme highly suspect as to whether it is substantially related to achieving the state's goal of irrigation. While the *Ball* Court's rational basis analysis looked only to the circumstances surrounding the District's creation,[161] an intermediate scrutiny approach would have further examined the District's current effect on Arizona residents.[162]

The rational basis test provides an inadequate analysis for determining the constitutionality of a restrictive voting scheme.[163] Once the Court has recognized a narrow purpose and a disproportionate effect, an intermediate

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allowed in Gaffney v. Cummings, 412 U.S. 735 (1973), and in White v. Regester, 412 U.S. 755 (1973), a maximum deviation of 9.9% was found to be relatively minor, and thus, permissible.

154. 377 U.S. at 561-62.

155. *See* note 120 and accompanying text *supra*.

156. *See* note 147 and accompanying text *supra*.

157. *See* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 156-57 (1935) (future prosperity of the arid belt states depends upon artificial irrigation); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 151-54 (1896) (future growth and well-being of the desertland states depends upon the agricultural use of the land, which requires artificial irrigation).

158. Joint Appendix, *supra* note 60, at 32.

159. Appellee's Brief, *supra* note 111, at 2-3. In 1979, 56% of the District land was considered urban. *Id.*

160. The rural population in Arizona increased from 286,000 to 362,000 in the forty-year period between 1930 and 1970. During that same period, the urban population grew from 150,000 to 1,409,000. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 24 (1976).

161. *See* text accompanying note 84 *supra*.

162. Because the intermediate level of scrutiny looks to whether the classification was substantially related to the state's objective, that analysis requires examination of how the restrictive voting scheme applies to contemporary Arizona.

163. In Lockport v. Citizens for Community Action, 430 U.S. 259 (1977), the Court maintained that the "classification of voters into 'interested' and 'noninterested' groups must . . . be reasonably precise. . . ." *Id.* at 266. But as the *Ball* decision forcefully demonstrates, the rational basis analysis is inadequate in determining whether the classifications are drawn reasonably precisely.

level of scrutiny should be applied.[164] Only under this type of approach will all interests be given sufficient consideration.

CONCLUSION

Special district voting schemes that deny nonlandowners the right to vote and dilute the vote of small landowners have been sanctioned by the Supreme Court. Following the *Salyer* exception, the Court in *Ball v. James* endorsed the restrictive voting scheme for the Salt River District because its supply of electricity and water to Arizona residents was deemed a narrow purpose and its operations bore disproportionately on landowners. Taken together, these facts precluded the generally required application of the *Reynolds'* one person, one vote principle. The *Ball* Court's constricted perception of the District's purpose and disproportionate effect emasculated any constitutional safeguards the *Salyer* exception possessed. More importantly, the Court's broad reading of *Salyer* signals an increased indifference toward the fundamental right to vote. This indifference may lead to more interest-based restrictions on the franchise, particularly in light of the Court's unwillingness to consider the interests of the disenfranchised or diluted voter, and its refusal to discuss the impact of special district services. Until state legislatures begin to draw voting restrictions with greater precision, important interests will be left without adequate representation.

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164. Two additional alternatives can be gleaned from prior Court decisions. First, in Kramer v. Union Free School Dist., 395 U.S. 621 (1969), Justice Stewart remarked: "Special-purpose governmental authorities such as water, lighting, and sewer districts exist in various sections of the country, and participation in such districts is undoubtedly limited in many instances to those who partake of the agency's services and are assessed for its expenses." *Id.* at 640 n.9 (Stewart, J., dissenting). Thus, a reasonable alternative to property restrictions is simply that anyone receiving and paying for a service should be allowed to participate in the special district election.

The second and broader alternative can be found in the reasoning underlying the Court's decision in Avery v. Midland County, 390 U.S. 474 (1968). In *Avery*, the Court applied the *Reynolds'* one person, one vote principle to the election of the Commissioners Court because that court had the authority "to make a *substantial* number of decisions that affect all citizens. . . ." *Id.* at 484 (emphasis added). Under *Avery*, the focus is on the impact of the decisions made by the governmental unit. Therefore, any time an individual is substantially affected by a governmental unit, that person should be allowed to participate in the election of that unit's officials.