Florida Law Review

Volume 41 | Issue 3 Article 2

June 1989

Conceptions of Democracy in American Constitutional Arguments: Voting Rights

Frank I. Michaelman

DUNWODY DISTINGUISHED LECTURE IN LAW

CONCEPTIONS OF DEMOCRACY IN AMERICAN CONSTITUTIONAL ARGUMENT: VOTING RIGHTS

*Frank I. Michelman**

I. INTRODUCTION

How do participants in American constitutional-legal argument envision — whether tacitly or elaborately — the character and point of political activity in the conditions of contemporary American representative democracy? This essay pursues that question using as primary source materials the opinions of United States Supreme Court Justices

---

*Professor of Law, Harvard. This article was delivered as the Dunwody Lecture at the University of Florida College of Law, on March 9, 1989.

in constitutional voting rights cases.[1] I focus on cases of claimed infringements of franchise rights by laws restricting electorates to some subset, such as property owners or area residents, of all those who might imaginably take an interest in a given election.[2] My inquiry proceeds from a thesis concerning the inspirations of legal argument and judicial explanation, especially in fields such as constitutional law in which issues soaked with political interest are salient and focal. That initial premise — certainly not original here[3] — is that legal argument and judicial explanation in such fields unselfconsciously reflect underlying assumptions about actual and potential social relations, and about the institutional arrangements and forms of political life fit for those relations as they are and are capable of becoming. If at one level the judicial opinion is a ratiocination on deliberate social ordering by law, at another level it may record a certain, social common sense regarding people's capacities for leading good lives together, a sense that is common to the judicial author's own era, culture, and professional circle. I am interested in bringing to light some characteristic tensions in the normative conceptions of democratic politics latent in the legal arguments prompted by the cases in my sample.

II. AN ANALYTIC FRAMEWORK

As a way of framing the tensions, we can try to fit our survey of

1. This inquiry belongs to a larger study I have in progress of the ways in which American constitutional lawyers, judges, and academic commentators, in our everyday practice of argument and explanation, actually (if often only tacitly) conceive of the supposedly sovereign people and their democratic processes. *See* Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989) [hereinafter Michelman, *Pornography*]; Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) [hereinafter Michelman, *Law's Republic*]; *see also* Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977). At what moments in our arguments and explanations do we make — or perhaps signally omit to make — justificatory references to popular determinations respecting the laws? How are we, at those moments, conceiving of the people and their politics, both empirically and normatively? In these conceptions, or our argumentative deployments of them, are there inconsistencies or irregularities that need trouble us? Are there divisions among us, patterns of difference in conception and deployment that, if brought to light, would clarify basic issues of constitutionalism or enable advocates to argue more persuasively? Those are among the questions I have in mind. For further discussion of the aims of this investigation, see *infra* part V.

2. In the sequel or sequels, I plan to extend the analytic framework developed here to cases involving disputes over representation schemes. These include districting and apportionment; "dilution" of voting power through gerrymanders and multi-member (at-large) slates; and claims to proportional representation. I also plan to extend the analytic framework to disputes over selective use of direct-democratic procedures for legislation.

3. *See, e.g.*, Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752-54 (1988); R. Parker, Political Vision in Constitutional Argument (Feb. 1979 draft) (unpublished manuscript) (quoted in H. STEINER, MORAL ARGUMENT AND SOCIAL VISION 205-06 (1987)).

judicial imaginings of American politics into a broader contemporary discussion about the normative underpinnings of American constitutionalism. Historians, political theorists, and — belatedly, as usual — constitutional law scholars have for some years been mooting the question whether the American Constitution, along with the surrounding body of constitutional-legal doctrine expounded in its name, belongs strictly to that great tradition in the modern history of political thought we know as liberalism or partakes also of a competing, if more ancient, so-called republican tradition.[4] Obviously, "republican" here does not stand for people who in American electoral politics contest elections against Democrats, any more than "liberal" stands for the L-word — as in "bleeding-heart liberal," or "pointy-headed liberal." Perhaps with some broad strokes I can convey a working sense of the "liberal"/"republican" opposition that the scholars have had in mind, cast in terms useful for sorting out the particular source materials under examination in this essay. With that purpose in view, one might consider differentiating the two positions according to their respective stances regarding any or all of (i) the social bases of human interests or goods and the origins or grounds of legal rights, (ii) the motivational character or *ethos* (actual or ideal) of political activity, and (iii) the value or point of a person's engagement in such activity.

A. *Conceptions of Interests and Rights*

In an interest-centered account the essential difference between republican and liberal constitutional-legal thought is that republicanism affirms, while liberalism denies, the notion of a statewide, substantive common interest or good. Accordingly, the special mark of republican constitutional thought is affirmation of "an autonomous public interest independent of the sum of individual interests,"[5] a common interest existent and determinable not just within the confines of a particular social group (as workers may be said to have a common interest vis-à-vis employers and consumers, or a religious community may be said to have a common interest vis-à-vis secular society) but at the encompassing level of the sovereign or law-making state. In this view, republican social unitarism or solidarism stands opposed to liberal pluralism.[6]

4. *See, e.g.*, M. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); Michelman, *Law's Republic*, *supra* note 1, at 1494-95 nn.3-5.

5. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 67 (1987); *cf.* M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 173-74, 183 (1982) (contrasting "liberalism" with a "constitutive conception of community").

6. Some normative political theories may be described as asserting a statewide, common interest in maintaining certain process-related conditions of political justice and utility for all, while denying any common interest in preferred resolutions of substantive conflicts of interests and values. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW

According to a rights-centered construction of the liberal/republican opposition,[7] the crux of difference lies in the question not of the social basis of interests but of the political basis of rights. For republicans, rights ultimately are nothing but determinations of prevailing political will, while for liberals, some rights are always grounded in a "higher law" of transpolitical reason or revelation. For republicans, the establishment and endurance of a constitutional right is strictly a matter of resolution on the part of the people politically engaged; the right has no grounding beyond actual human determination and therefore can exert no claims against the political resolutions that alone give it existence. In the opposed liberal understanding, the constitutional process (for example) do not so much create rights as institutionalize or "positivize" prepolitical claims of right.[8]

The way in which the interest-centered and rights-centered constructions are usually fit together in a unified account of the liberal/republican opposition seems to be this: In a republican view, a community's objective, common good substantially consists in the success of its political endeavor to define, establish, effectuate, and sustain the set of rights (less tendentiously, laws) best suited to the conditions and *mores* of that community.[9] Whereas in a contrasting liberal view,

---

(1980). Such theories seemingly would count as liberal on the interest-centered account of the republican/liberal distinction. *See* Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81 (1984). But here, as usual, the line between process and product (procedure and substance) is unstable. Consider, for example, a theory that (i) holds that no political system can possibly claim to embody, or hope to deliver, justice and utility for all (or perhaps for any) if it tolerates social conditions of group- or class-based oppression or excessive inequalities of wealth and other forms of social power; and (ii) therefore always strives to keep the avoidance of oppression and maldistribution at the head of the political agenda. *See generally* Young, *Five Faces of Oppression*, 19 PHIL. FORUM 270 (1988) (providing a relevant account of "oppression"). On which side of the substance/procedure line does such an asserted common interest fall?

The difficulty of answering such a question contributes to the difficulty of finally maintaining Edwin Baker's proposed distinction between "liberal republicanism" and "republican liberalism." *See* Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 FLA. L. REV. 491 (1989) [hereinafter Baker, *Republican Liberalism*]. For other factors contributing to this difficulty, see *infra* notes 10, 57.

7. *See, e.g.*, Michelman, *Tutelary Jurisprudence and Constitutional Property*, in 3 ECONOMIC RIGHTS AND THE CONSTITUTION: YESTERDAY, TODAY, AND TOMORROW (E. Paul ed. 1989) [hereinafter Michelman, *Tutelary Jurisprudence*].

8. *See* Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 478, 480-81, 483, 486 (1989). Insomuch as a constitutional right is a *legal* right, legal positivists (meaning the huge preponderance of contemporary American thinkers about law) must find for every such right some mediate basis in the politically enacted Constitution, rather than derive it directly from moral-theoretical reason or natural law.

9. *See, e.g.*, Michelman, *Tutelary Jurisprudence*, *supra* note 7.

the higher-law rights provide the transactional structures and the curbs on power required so that pluralistic pursuit of diverse and conflicting interests may proceed as satisfactorily as possible.[10]

B. *Conceptions of Political* Ethos

1. Deliberative vs. Strategic Interaction

Consider, now, a process-centered account of the liberal/republican opposition, turning on a distinction between deliberative and strategic politics.[11] Deliberative politics connotes an argumentative interchange among persons who recognize each other as equal in authority and entitlement to respect. The participants direct their arguments toward arriving at a reasonable answer to some question of public ordering, meaning an answer that all can accept as a good-faith resolution when circumstances demand *some* social choice.[12] A deliberative style of

---

10. *See, e.g.*, Michelman, *Law's Republic*, *supra* note 1, at 1507-08, 1510-11.

Again, however, our working categorial distinction — this time that between "politics" and "higher law" — proves unstable when hard pressed. On the one hand, dialogically inclined liberalism dilutes the notion of higher law into that of practice justifiable by reasons that can count as "good" from "a public moral standpoint." *See, e.g.*, Macedo, *Liberal Virtues, Constitutional Community*, 50 REV. OF POLITICS 215, 220-23 (1988). On the other hand, republican theory is not so stupid as to hold that "the people" acting "politically" can hope or claim to fashion "suitable" laws regardless of the institutional structures (including the rules of enfranchisement) framing their politics and the social conditions surrounding and motivating those politics. *See, e.g.*, Michelman, *The Supreme Court 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 43-47 (1986) [hereinafter Michelman, *Traces*] (discussing James Harrington's institutional prescriptions). For example, a basic republican tenet holds that the social distribution of wealth is "prior to politics" and "necessarily foundational to politics considered as a moral enterprise." Mensch & Freeman, *A Republican Agenda for Hobbesian America?*, 41 FLA. L. REV. 581 (1989) [hereinafter Mensch & Freeman, *Hobbesian America*]; *see* Horwitz, *supra* note 5, at 71-72; Michelman, *Law's Republic*, *supra* note 1, at 1504-05; Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1320-21, 1324, 1329, 1334-36, 1343-45, 1349-50 (1987) [hereinafter Michelman, *Possession vs. Distribution*]; Michelman, *Traces*, *supra* at 40-41. The posited institutional and social conditions of good or reliable politics have a status in republican constitutional thought that is hard to distinguish from that of higher law, even as republicans hold (circularly) that only politics does or can create and validate the laws on which the conditions of good politics depend. *See* Michelman, *Law's Republic*, *supra* note 1, at 1504-05; Michelman, *Traces*, *supra*, at 43. This ambiguity is a second factor (for the first factor, see *supra* note 6) which, as Baker recognizes, tends to break down the distinction between "liberal republicanism" and "republican liberalism." *See* Baker, *Republican Liberalism*, *supra* note 6, at 491.

11. By offering these as opposed models, I do not mean to deny the possibility of social interaction in which deliberative and strategic elements are combined, or which otherwise mediate between the two models. *See* Michelman, *Law's Republic*, *supra* note 1, at 1510-13.

12. *See* Barber, *The Politics of Judgment*, 5:2 RARITAN 130 (1985).

politics may be confrontational, contestative, and fully compatible with pluralistic political sociology. It is true that notions of deliberative politics *may* be framed as presupposing the existence of objectively discoverable, transcendently right or best answers, or as demanding of participants the submergence of their individualities and conflicts in a collective being or common good. But aspirations to deliberative politics *need* not carry such strongly solidaristic baggage.[13] Deliberation does presuppose a certain kind of civic friendship, an attitude of openness to persuasion by reasons referring to the claims and perspectives of others. The deliberative attitude aims not at dissolution of difference but at conciliation within reason. The deliberative medium is a good-faith exchange of views — including participants' reports of their own understandings of their respective vital interests — in which all remain open to the possibility of persuasion by others.[14]

Strategic interaction, by contrast, seeks coordination rather than cooperation. Ultimately it asks each person to consider no one's interest but her or his own. Its medium is not argument but bargain. Its tools of persuasion are not claims and reasons but conditional offers of service and forbearance.[15]

2. Deliberative Politics and Liberalism

Given my writings of recent years,[16] a reader might suspect that the opposition between "deliberative" and "strategic" politics will serve here as just another variation on the thematic opposition of "republican" versus "liberal" constitutional visions. Intuitively, the idea would be to yoke republican political pursuit of rights expressive of the common good with deliberative politics while yoking liberal political accommodation of pluralistic diversity of self-interested pursuits to strategic

---

13. *See infra* notes 34-38 and accompanying text. Nor need they even presuppose the possibility of "participants discover[ing] in the residue" of their contestation any substantive value or policy preference that "they share in common" (other than maintaining the social conditions prerequisite to "politics considered as a moral enterprise") or of their forging any "common actuality" (beyond their common engagement in the deliberative political process itself). Barber, *supra* note 12, at 136, 140-41. The parenthetical qualifications may, however, be momentous. *See supra* note 6.

14. For a comparable conception of deliberative politics, see Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 256-63 (1989).

15. Strategic conceptions of political process are asserted or presupposed, and their consequences analyzed, by the interest group pluralist and public-choice schools of modern political science. For a handy example, see Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563 (1989) [hereinafter Alexander, *Political Thicket*].

16. *See* Michelman, *Pornography*, *supra* note 1; Michelman, *Law's Republic*, *supra* note 1; Michelman, *Possession vs. Distribution*, *supra* note 10; Michelman, *Traces*, *supra* note 10.

politics framed and bounded by higher-law rules. That idea, however, is more facile than interesting.[17]

Neither the interest-centered[18] nor the rights-centered[19] construction of the liberal/republican opposition warrants excluding deliberative politics from liberal constitutionalism because on neither construction do we confront in "liberalism" a political vision bereft of normative content or justificatory claim. Versions of liberal constitutionalism tend to posit analogues of the republican notion of common good; they tend to posit "common goods" in some extenuated, perhaps procedural sense.[20] On the interest-centered construction, the extenuated-sense, liberal common good might consist just in the "sum" of the individual interests; that is, it might consist in maximizing the total system of the satisfactions of such interests.[21] On the rights-centered construction, liberalism may posit, as an obvious cognate of the republican common good, the vindication of the higher-law rights (or of the optimal system of such rights) of individuals.[22] Thus, insofar as liberal political culture does valorize strategic political action, it may do so on the understanding that such action is conducive to optimization across individual interests, or across individual rights, or across some combination thereof. A liberalism thus normatively fortified, noticing that men and women are not angels,[23] may conclude that the best hope for optimization lies in letting people engage in strategic political interaction, even to the point of contesting over a certain range of governmental spoils, as long as they do so abiding by well-crafted procedural rules and firm substantive limits.[24] But it also might consis-

---

17. For invaluable help in clarifying my thoughts about this matter, I am beholden to the civic friendship of combative students in a 1988 Constitutional Theory class who refused to take evasions for answers. If they read this, they'll know who they are.

18. *See supra* notes 5-6 and accompanying text.

19. *See supra* notes 7-8 and accompanying text.

20. See, for example, the discussion in note 6, *supra*.

21. More precisely expressed, the extenuated-sense "common good" would consist in the optimization of a system of individual satisfactions constituted by the aggregation rules and distributional constraints of some want-regarding "social welfare function." The rules and constraints might correspond to anyone of various normative aims: total-utilitarian, average utilitarian, leveller-egalitarian, Rawlsian maximinitarian, or any other down to and including the bare Hobbesian preference for any regime that offers effective protection against slaughter, rapine, and pillage over any that does not. *See* B. BARRY, POLITICAL ARGUMENT 38-39 (1965); J. RAWLS, A THEORY OF JUSTICE 150-92 (1971) .

22. *See, e.g.*, J. RAWLS, *supra* note 21, at 203, 229-30.

23. *See* THE FEDERALIST No. 51, at 322 (J. Madison).

24. Such a conclusion might reflect an empirical judgment that effective suppression of strategic politics and political spoliation cannot come about without grievous violations of people's rights. Or an underlying judgment might be that such suppression would cause explosive pressure

tently, and perhaps more plausibly, encourage a more cooperative political style of good-faith deliberation toward that same, optimizing objective. Why not, since who can be so omnisciently pessimistic as to know that discursive miracles never happen?

In sum, we cannot convincingly distinguish liberal constitutionalism from a republican counterpart by setting the former in deep, conceptual opposition to deliberative conceptions of communicative action. Trenchant distinctions, if any, between liberal and republican conceptions of political engagement must lie elsewhere.

C. *Conceptions of the Point of Participation in Politics*

1. Dialogic Politics

According to a certain normative conception — call it the "dialogic conception" — of the self in society, a person's identity is partially constituted by that person's social situation, and personal freedom accordingly depends on a capacity for self-critical reconsideration of the socially embedded ends and commitments that partly make one who one is.[25] Dialogic, ethical encounter with others with whom one must share some understandings about the ordering and direction of social life, but who by reason of experience and inspiration bring to the encounter perspectives on human interests and needs different from one's own, would be a medium — perhaps an indispensable one — of personal freedom according to the dialogic conception.[26] A deliberative political process would be such a medium, assuming that participants did not try at all costs to protect their prepolitical understandings of interests and ends against the possibility of change in political conflict or debate and could embrace such changes as exercises of freedom rather than as impairments of integrity.[27] Such an attitude of openness to ethical evolution through political engagement is the dialogic attitude. The subset of deliberative politics imbued with that attitude is dialogic politics.

---

against *all* constitutional limits, leaving no dependable barriers against descent into the Hobbesian maelstrom. *See* J. BUCHANAN, THE LIMITS OF LIBERTY 24-26 (1975).

25. *See, e.g.*, M. SANDEL, *supra* note 5, at 172-73 (rejecting "direct self-knowledge" in favor of "growth and transformation in light of revised self-understanding"); W. SULLIVAN, RECONSTRUCTING PUBLIC PHILOSOPHY 39 (paper ed. 1986) ("Modern individualism is itself a collective achievement."); *cf.* P. RICOEUR, HERMENEUTICS AND THE HUMAN SCIENCES 143-44, 158-59 (J. Thompson ed. 1981) ("As reader, I find myself only . . . by losing myself.").

26. *See, e.g.*, R. RORTY, CONTINGENCY, IRONY AND SOLIDARITY 80 (1989); Michelman, *Law's Republic*, *supra* note 1, at 1528 and nn.141-44.

27. *See* W. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 153-55 (2d ed. 1983).

As a normative conception, dialogic politics can accommodate either solidaristic commitment or pluralistic resistance to the idea of an objectively discoverable, substantive common good. In a solidaristic view, the aim of political dialogue is political truth, discovery issuing in consensus.[28] In a pluralistic view, dialogue is a medium of personal moral freedom.[29] To that extent, the dialogic ideal is available as either "republican" or "liberal" doctrine.[30] Yet the dialogic attitude of receptivity to ethical persuasion through political engagement seems closely allied with a distinctively republican conception of laws and rights as always and unreservedly open to political reconsideration.[31] In that limited sense, pursuit of dialogic politics might be regarded as *the* form of republicanism suitable to a pluralistic political sociology.[32]

2. Franchise Values: Instrumental or Constitutive

A person may value enfranchisement in political affairs — a voice backed by a vote — for either of two types of reasons distinguishable as "instrumental" and "constitutive." Political participation is valued instrumentally as a means to defend or further interests formed and defined outside of politics. In a strictly instrumental valuation of political participation, the experience of the participation itself neither contains any positive value nor affects the content of anyone's or any group's interests and ends.

By contrast, in a constitutive understanding, the point of engagement in politics lies not in any ulterior end but in the ends-affecting — the dialogic — experience of the engagement itself. That experience is valued as a process of formation or field of exertion of self or community. Through political engagement, persons or communities (or both, reciprocally) forge identities, and persons assume freedom in the "positive" sense of social and moral agency.[33] The value of the engagement is thus understood as inseparable from the self-constitutive values of identity and freedom.

Just as with the opposition of deliberative and strategic political milieux, the instrumental/constitutive axis assumes no necessary, block-form alignment with the other oppositions sometimes entering

28. *See, e.g.*, J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 4-6, 24-25 (1983).

29. *See* Michelman, *Law's Republic*, *supra* note 1, at 1526-28.

30. *See supra* notes 5-6 and accompanying text.

31. *See supra* notes 7-8 and accompanying text.

32. *See* Michelman, *Law's Republic*, *supra* note 1, at 1503-07, 1526-28.

33. On the "positive" conception of liberty, see Michelman, *Law's Republic*, *supra* note 1, at 1503-04 and nn.33-37; Michelman, *Traces*, *supra* note 10, at 25-26 and nn.115-22.

into distinctions between liberal and republican constitutional visions. For example, an instrumental conception of participation values can cohabit comfortably with a deliberative conception of political process on either a solidaristic or pluralistic view of interests and ends. In a solidaristic view, the instrumental value of one's participation in political deliberation is one's potential contribution to the ascertainment of political truth.[34] On a pluralistic view, anyone subject to the authority of a deliberative political process[35] would obviously have good instrumental reasons for wanting that process to be fully accessible to the direct influence of both her arguments and her preferences.

Similarly, a constitutive conception of participation values may conceivably accompany either a strategic or a deliberative conception of political process. The constitutive/strategic pairing might arise from a nomative conception of human personality in which the "game's the thing," and in which, accordingly, engagement in strategic politics is an important or essential medium of personal identity, agency, and freedom. Because such a combination lacks salience in American normative constitutional vision, at least as manifested in the sample of judicial argument examined below, it receives no further consideration here.

By contrast, our sample of judicial material does show signs of a constitutive conception of the point of political engagement consorting with a deliberative ideal for political *ethos*, and we shall pursue the implications of that combination. One should note preliminarily that the constitutive/deliberative combination can accommodate either a solidaristic-affirmative or a pluralistic-negative stance on the question of an objectively discoverable, substantive common interest or good.[36] The solidaristic construction accords with proto-totalitarian readings of Rousseau,[37] whereby not only are political deliberations ideally directed toward the discernment and advancement of the community's substantive common good, but persons attain freedom and self-fulfillment through the will to subordinate all particular and partisan ends to this communitarian quest. The alternative, pluralistic construction of the constitutive/deliberative combination accommodates the self-formation and self-liberation of persons whose identities are partially constituted by social situation and whose freedoms depend on their capacities for dialogic self-revision.[38]

34. This point will become important later. *See infra* notes 74, 189-90 and accompanying text.

35. We have already established that pluralistic assumptions can support a preference for a deliberative political *ethos*. *See supra* text accompanying notes 18-24.

36. *See supra* notes 5-6 and accompanying text.

37. *See, e.g.*, Simon, *The New Republicanism: Generosity of Spirit in Search of Something to Say*, 29 WM. & MARY L. REV. 83, 92 (1987).

38. *See supra* notes 25-32 and accompanying text.

III. Historical Excursus: Solidaristic Republicanism, Constitutive Deliberation, and Virtual Representation

Thus neither concept nor circumstance compels any block alignment of our several oppositional axes into stably coherent, diametric "liberal" and "republican" constitutional-visionary formations. Historical contingency is, however, another matter. It may be that several such block constructs have jelled temporarily in American constitutional-visionary history. It will serve our purposes to recollect one such past constructive moment, as preserved in an 1845 case questioning slavery in New Jersey. The exercise suggests how an otherwise puzzling judicial essay may be demystified by studying its author's tacit assumptions about the relations among human interests, rights, politics, and "nature."[39] More pointedly, in the explosive tension latent in this momentary construction, and in the tracing of its remnants, may lie a key to the sense and significance of some of the modern judicial utterances examined below.[40]

State v. Post[41] was an 1845 New Jersey case in which abolitionist lawyers unsuccessfully tried to obtain, by writ of habeas corpus, an order releasing from Post's custody two persons, William and Flora, held by Post as slaves.[42] It was a test case designed, as the court expressly understood, to "present for . . . adjudication the question, whether slavery can exist [in] . . . this state under its present constitution . . . ."[43] From our vantage point, the question might have seemed to answer itself. The relevant state constitutional text declared that "[a]ll men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defend-

---

39. *Cf.* Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989) (explaining by a similar method how it could have made sense for 19th-century American constitutionalists to reject freeholder and other wealth-based tests for enfranchisement while retaining or substituting "pauper" exclusions).

40. *See supra* text accompanying note 3.

41. 20 N.J.L. 368 (1845). I focus here on the *seriatim* opinion of Justice Nevius. *See id.* at 369-78. For an extended historical examination of this case, see Ernst, *Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845*, 4 LAW & HIST. REV. 337 (1986). Ernst, quoting contemporary sources, relates that "Nevius, the second oldest man on the bench, was not generally considered by the bar 'as having a very accurate knowledge of the law,' and the bar did not 'place the fullest confidence in his decisions.'" *Id.* at 356. Those reports will not interfere with the use to which I put his opinion here.

42. *Post*, 20 N.J.L. at 368-69.

43. *Id.* at 369. The "present constitution" had been very recently adopted, in 1844. *See id.* at 368.

ing life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."[44]

Taken at face value, this clause seems irreconcilable with the persistence of legally sanctioned slavery in New Jersey. However, Justice Nevius, writing for the court,[45] denied its abolitionist import. In so doing, he appealed to the intent of the framers.[46] At the time of the recent New Jersey constitutional convention, slavery in New Jersey was both a legally established institution (although economically unimportant) and one headed for extinction under a statutory scheme of gradual emancipation.[47] Justice Nevius reasoned that if the framers had contemplated immediate abolition — a sharp break with the established ordering — they surely would have spoken explicitly to that effect and "not left so important and grave a question . . . to depend upon the doubtful construction of an indefinite abstract political proposition."[48]

But still, as the justice admitted,[49] texts and plain meanings come first. How can one read what the framers wrote — "[a]ll men are by nature free and independent, and have . . . unalienable rights . . . of enjoying liberty . . ."[50] — to leave any room for legally sanctioned slavery? One might (perhaps recollecting subsequent constitutional history[51]) speculate that the justice thought the framers could not have understood "all men" to include the black petitioners before him. Perhaps, if pressed, he would have so contended, but as it happened, he took another way.

---

44. *Id.* at 372 (quoting N.J. CONST. of 1844, art. 1, § 1).

45. Justice Carpenter concurred with Justice Nevius. *See id.* at 386 (Carpenter, J., concurring). Justice Randolph agreed in a separate opinion that the writ ought to be denied. *See id.* at 378 (Randolph, J., concurring). Chief Justice Hornblower dissented. *See id.* at 386 (Hornblower, C.J., dissenting).

46. *See id.* at 378. *Cf.* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 405, 407, 426 (1856) (relying on the intent of the framers for the conclusion that "the class of person who had been imported as slaves [and] their descendants" cannot be "citizens" within the meaning of that term as used in the Constitution).

47. *See* R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 55-56 (1975); Ernst, *supra* note 41, at 339-40.

48. *Post*, 20 N.J.L. at 375. Colloquy recorded in the records of the New Jersey Constitutional Convention provided legislative history upon which Justice Nevius might have rested a holding that the framers had designed the "free and independent" clause as strictly preambular material devoid of legally operative effect. *See* Ernst, *supra* note 41, at 362-63. However, as shown by the excerpt from his opinion quoted in the text accompanying note 50, Nevius was not content to rest his judgment on this ground alone without also explaining how the "free and independent" clause could be reconciled with legally established slavery.

49. *See id.* at 373.

50. N.J. CONST. of 1844, art. 1, § 1.

51. *See supra* note 46.

Surprisingly, the "doubtful" locution turns out to be not "men" but "free and independent." Slavery, it seemed, did not contravene the freedom of the slave:

> [I]n a state of . . . political society [freedom and independence] . . . must be understood in a modified sense according to the nature, the condition and laws of the society to which they belong . . . . Authority and subordination are essential under every form of civil society, and one of its leading principles is that the citizen yields to it a portion of his natural rights, for the better protection of the remainder. In such a state, man's right to freedom and independence . . . [is] ever subject to, and regulated by, laws fundamental or otherwise, which the majority of the people in a republic, have established for their government . . . . [I]n a republican government, those laws which define, limit and regulate the exercise of . . . natural rights[ ] may be esteemed as enacted by the people themselves, and therefore . . . the voluntary assent of every individual is expressly or impliedly given to them; and of consequence . . . men exercise and enjoy these rights, according to their own free will . . . . It was in reference to [this] form of government . . . that . . . I apprehend . . . that this language [of freedom and independence] was used . . . . It is spoken of men in their social state, and is nothing more than the expression of an opinion of their political rights . . . . Had the convention intended to . . . divest the master of his right of property in his slave and the slave of his right to protection and support from the master, . . . it would have adopted some clear and definite provision to effect it . . . .[52]

This passage speaks in a confusion of accents. While not forgoing the liberal rhetoric of natural right and constitutional contract, the justice's argument evinces unmistakably republican influences along all four of our suggested axes of opposition, those respectively centered on conceptions of interests, rights, political *ethos*, and participation values. The argument conceives New Jersey's civil order as both a common interest relative to New Jersey conditions and a social creation, a function or reflex of law made politically, by citizens. It further conceives freedom as "positive," as consisting in political agency: freedom — once given a "state of political society" — resides in the making of laws by "the people . . . for their own government."

---

52. *Post*, 20 N.J.L. at 374-75.

One can hardly fail to notice how easily the "republican" lineup — substantive common good, politically grounded rights, deliberative process, political agency constitutive of personal freedom — coalesces around a solidaristic, and concomitantly hierarchical, sociological vision. Justice Nevius somehow felt able to justify his decision rhetorically not by denying that the petitioners were "men" entitled to civic concern, but rather by insisting that they were. As such, they were duly politically endowed with the rights suited to their proper social positions, the rights of "protection and support" from their masters.[53] Yet how can this be? Bad faith aside, how can the justice presume to advise the petitioners that they, in their legalized subjugation, are yet free by virtue of laws made by a constituency of "people" including their dominators but excluding them? The opinion in *State v. Post* quite fails to address the point, but if the author had answered according to the tradition from which (wittingly or not) he drew his argument, I think he would have said that the petitioners were virtually represented.[54]

Justice Nevius apparently envisioned a world in which laws and rights are (republicanly) the social works of citizens (republicanly) deliberating with the common good sincerely at heart, but that is not all he envisioned. Mixed, confused, transitional as his social imagination may have been, it still recalls an early modern, post-feudal world in which visionary social solidarism could present as equality what we see as hierarchy. It recalls a world in which everyone, equally, lays claim to membership in the social rank accepted as proper to him or her; in which, if only the top rank are deemed fit to the work and self-constitutive experience of direct political engagement issuing in self-given laws, then, everyone accepts *that* arrangement, too. This is a world in which people believe in intrinsic, characteristic differences in merit and capacity among social groups or human types, such that equality can possibly lie in ascription of the social rank proper to one's person along with the rights duly appertaining to such rank. Yet it is also a world in which people can somehow simultaneously believe

53. *Cf.* Steinfeld, *supra* note 39, at 342-47 (describing the nonproblematic standing in pre-nineteenth-century social and legal thought of such relationships of "dependence and governance"). In like vein, counsel for one of the respondents in *State v. Post* argued that to read the "free and independent" clause as "repugnant" to slavery would be to read it (incredibly, he meant) as no less "repugnant to the laws giving husbands control of wives, masters of apprentices, parents of children, and landlords of the fruits of the labor of tenants." *See* Ernst, *supra* note 41, at 352.

54. On virtual representation and civic republicanism, see Michelman, *Traces*, *supra* note 10, at 50-52.

that the top rank of citizen lawmakers is capable of full, empathic insight into the needs and aspirations of others, the disfranchised, from whom they so radically differ. It is the insight required of a virtual representative — of the head of a household (or of a workforce, town, district population, or any group both corporately and hierarchically conceived) who presumes to "represent" the interest of its disfranchised members. Seemingly, only a secure sense of human capacity for social corporate solidarity of hierarchically ordered interests and ends could have held such a vision together.

That seems especially true when we consider another of the vision's latent tensions, arising from its understanding of political or civil liberty as positive — as self-government. Virtual representation of interests may be conceivable. Vicarious self-government is not. Insofar as engagement in political self-government is deemed constitutive of personal freedom, a given person's political disfranchisement is *prima facie* highly suspect, demanding justification. In a normatively hierarchical sociological vision, justification for liberty-denying disfranchisement apparently can be found in attributions of political incapacity to the lower orders.[55] Persistent infiltration into that vision of egalitarian commitments will undermine that form of justification by universalizing the norm of self-government as a *fundamental* value and *human* right.[56] As applied to an aspect of experience conceived as personally constitutive or emancipatory, any conceptual distinction between an interest and a right becomes increasingly hard to maintain as, under liberal egalitarian pressure, access to that experience is increasingly perceived as a universal human value.[57]

---

55. *See* Note, *Political Rights as Political Questions: The Paradox of* Luther v. Borden, 100 HARV. L. REV. 1125 (1987).

> Domination resulting from exclusion from the franchise can be justified from a republican standpoint, but only according to a principled standard: competency to participate in political activity. That is, the exclusion from the franchise of people who are capable of attaining freedom through political participation amounts to an unjustifiable deprivation of their freedom precisely because they are capable of attaining it.

Id.

56. *See* Steinfeld, *supra* note 39, at 348 (discussing "a political dilemma of the first order" arising out of emergent conflict between "the idea that all men were entitled to govern themselves" and "the legitimacy of the links between property, dependence, and governance"); *id.* at 349 (explaining how "the republicanism" of the early modern period "served to reinforce traditional hierarchical relationships of dependence even as it spread values [including that of self-government] which progressively undermined them"); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and the "Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1308-09 (1989) (discussing conflict between "civic republicanism's exclusionary aspect" and "modern state's commitment to equality and inclusion").

57. Here we meet a third conceptual instability — the distinction between interests and

IV. CONTEMPORARY CONSTITUTIONAL-LEGAL DOCTRINE ON SELECTIVE ENFRANCHISEMENT

Although the guarantee of equal protection of the laws has been a part of the Constitution since 1868,[58] judicial invalidation of state-law franchise exclusions as denials of equal protection was virtually unknown to American constitutional law prior to the 1966 decision in *Harper v. Virginia Bd. of Elections*.[59] The Supreme Court had on several occasions rejected equal protection challenges to state franchise exclusions on grounds unmistakably suggesting a judicial conception of states as solidaristically deliberative polities, entitled as such to regulate their membership according to their own notions of civic competence and virtual representation.[60]

But of course the solidaristic-republican world evoked by those past decisions[61] has vanished from respectable American constitutional discourse. As normative social hierarchy loses its ideological grip, what once were regarded as social *ranks* have come to be regarded as social *differences*. Where our predecessors evidently had glimpses of a corporate social solid composed of hierarchically arranged personal statuses, we now profess to see only a contentious plurality of persons and groups having different, and often conflicting, perspectives, interests, and ends. Unsurprisingly, therefore, contemporary American judicial argument in voting rights cases unanimously and liturgically

---

rights. Combined with instabilities in the distinctions between substance and procedure and between politics and higher law, this additional conceptual instability helps to blur the differences between Baker's models of "liberal republicanism" and "republican liberalism." *See also supra* notes 6, 10.

58. *See* U.S. CONST. amend. XIV, § 1.

59. 383 U.S. 663 (1966) (holding poll taxes unconstitutional as denying equal protection with respect to the right to vote). In Guinn v. United States, 238 U.S. 347 (1915), and again in Lane v. Wilson, 307 U.S. 268 (1939), the Court found that Oklahoma's literacy test violated the fifteenth amendment because of the racial discrimination wrought by its grandfather clause. But in Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), the Court found no equal protection objection to North Carolina's literacy test in the absence of proof of its use as a pretext for race-based exclusion. *See also* U.S. CONST. amend. XV (forbidding abridgment of the right to vote on account of race, color, or previous condition of servitude); U.S. CONST. XIX (forbidding abridgment of the right to vote on account of sex).

60. *See, e.g.*, Breedlove v. Suttles, 302 U.S. 277, 283 (1937) (upholding use of poll taxes), (overruled by Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 669 (1966)); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (upholding denial of franchise to women). For a discussion of civic republicanism and the *Minor* case, see Smith, *'One United People': Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J. L. & HUM. 229, 262-63 (1989).

61. *See supra* text accompanying notes 52-57.

rejects both solidaristic constructions of the aims of political deliberation and hierarchical constructions of political capacity. Yet the same material not only continues to affirm deliberative aspirations for political process; it also suggests, although never unanimously and always obliquely, the persistence in judicial intuitions and sensibilities of constitutive valuations of political participation rights. In those oblique suggestions of a dialogic political ideal perhaps lie an aspect or remnant of an older republicanism, a remnant capable of surviving the conquest of American constitutional thought by pluralistic political sociology.[62]

Consider, then, the general contours of prevailing constitutional-legal doctrine on selective enfranchisement.[63] Given a territorially bounded political unit in which popular elections occur, the general rule of constitutional law is that any subjectively interested person is entitled to admission to the electorate[64] with these exceptions: State laws[65] may exclude persons who (i) are not bona fide residents of the political unit in question;[66] (ii) have not attained a minimum age of eighteen years or, at the state's option some lesser age;[67] (iii) have ever been duly convicted of a felony;[68] (iv) cannot satisfy a reasonable

62. *See supra* text accompanying notes 30-32.

63. The Supreme Court has enunciated all of the constitutional-legal doctrine discussed in this essay in the guise of interpretation of the fourteenth amendment's dictate that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *See* U.S. CONST. amend. XIV, § 1. The Court has held that, by force of the equal protection clause, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (citations omitted); *see also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 34 n.74 (1973). The Court has further held that this right is among those it classes as "fundamental," *see, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966), so that any restriction of it "must be carefully and meticulously scrutinized," *id.* (quoting Reynolds v. Sims, 377 U.S. 533, 561-62 (1964)), to determine whether it is "necessary to promote a compelling state interest," *e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969) (citations omitted). Judicial efforts to justify and apply the doctrine of strict scrutiny of laws excluding persons from the franchise have generated the constitutional-legal doctrine described in the text.

64. I speak of entitlement to admission, rather than entitlement to vote, to allow for reasonable registration requirements.

65. I include here local-government enactments authorized by state law.

66. *See* Carrington v. Rash, 380 U.S. 89 (1965); Dunn v. Blumstein, 405 U.S. 330 (1972). Obviously, I could have stated the general rule as one of *prima facie* entitlement of bona fide residents (as opposed to persons subjectively interested) to admission to the electorate, rather than treat bona fide residence requirements as one of the exceptions from a general rule against exclusions. I have chosen the seemingly less natural way of setting things up to make more perspicuous the issue posed by Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978). *See infra* text accompanying notes 152-67.

67. *See* U.S. CONST. amend. XXVI.

68. *See* Richardson v. Ramirez, 418 U.S. 24, 54 (1974); Hunter v. Underwood, 471 U.S. 222, 233 (1985) (dictum) (declining to reconsider *Ramirez*). The Court in *Ramirez* upheld felony

literacy requirement not shown to have a racially discriminatory purpose or to be discriminatorily administered;[69] (v) in cases of certain, businesslike, "special-purpose" units supported by property taxes, own no taxable property within the jurisdiction;[70] and (vi) possibly, "in some circumstances," are otherwise so situated as to lack primary interest in the affairs of the political unit in question.[71] The Court has held specifically that neither lack of property wealth nor failure to pay any fee can constitute or signify the lack of "primary interest" that might warrant exclusion of a resident from the electorate.[72] Is it possible to infer from this general-rule-*cum*-list-of-exceptions a comprehensive judicial conception of the character and point of democratic politics that consistently governs the Court's determinations? In particular, does the doctrinal pattern disclose a consistent judicial commitment to either a strategic or a deliberative conception of the character of political interaction, or to an instrumental or constitutive understanding of the point of political participation?

A. *Enfranchisement on the Basis of Interest*

The cases we consider in this section present a common question arising from facts conforming to the following pattern: Pursuant to

---

exclusions against equal protection challenge on the basis of strictly textual reasoning. Observing that the congressional apportionment provision in section 2 of the fourteenth amendment expressly declines to reduce a state's representation because it disfranchises persons "'for participation in . . . crime,'" the Court reasoned that the equal protection guarantee in section 1 "could not have been intended to prohibit outright . . . [the disfranchisement of criminals] which was expressly exempted from the lesser sanction . . . imposed by sec. 2." *Ramirez*, 418 U.S. at 42 (quoting U.S. CONST. amend. XIV, § 2). This reasoning has been subjected to strong criticism. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 13-16, at 1094 (2d ed. 1988); Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 303 (1976). For critical examination of both "liberal" and "republican" justifications of disfranchisement of convicted felons, see Note, *supra* note 56.

69. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). Current federal legislation forbids the use of literacy tests. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973aa (1982); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding constitutionality of Rights Act of 1965).

70. *See* Ball v. James, 451 U.S. 355 (1981) (upholding Arizona statute restricting suffrage in agricultural improvement and power district to landowners); *cf.* Cipriano v. City of Houma, 395 U.S. 701 (1969) (invalidating exclusion of nontaxpayers from city revenue-bond election); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (invalidating exclusion of nonproperty owners from city general-obligation bond election to finance general city facilities and services).

71. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 631 (expressly leaving this question open).

72. *See Harper*, 383 U.S. 663 (1966). *Cf.* U.S. CONST. amend. XXIV (forbidding exclusion from federal presidential and congressional elections "by reason of failure to pay any poll tax or other tax").

state law, a governmental agency exercises significant coercive authority over aspects of social life occurrent within a specified territorial jurisdiction. The agency's policies and actions are either directly controlled by the votes of a resident popular electorate or are controlled by officers chosen by the votes of such an electorate. Relative to the agency's specific range of authority, it is arguable that some of the *bona fide* residents of the agency's territory stand out from the rest as specially or "primarily" interested in the agency's exercises of power. The question common to our cases is whether a state may constitutionally restrict the agency's electorate to such a specially concerned subset of the otherwise qualified residents of its territorial base, *pro tanto* disfranchising the rest.

Preliminarily, we can sketch the states' most likely explanations for their choices to disfranchise residents whose extra-political situations are such that they apparently have no concrete interests at stake in a particular jurisdiction's political determinations and resultant exercises of authority.[73] These explanations will vary somewhat, depending on whether the prevailing *ethos* of the jurisdiction's political process is imagined as strategic or deliberative.

If the process is imagined as deliberative, the standard argument for preferring an electorate composed of persons with concrete ties to the jurisdiction's business is straightforward: They are the ones who are most likely to grasp sympathetically the concerns of others who stand to be substantially affected by how that business is conducted[74] and who most confidently can be expected to devote the time and energy required for mastering the issues.

If the *ethos* of the political process is imagined as strategic, the most obvious objection to including those who initially lack material stakes in the outcomes is distributional. To empower someone who otherwise would have nothing at stake with a vote in a strategic political arena is to endow that person with wealth — the value of the benefits obtainable in exchange for her or his vote — at the expense of other participants who do have interests inextricably at

---

73. For present purposes, there is no need to delve into the difficult matter of distinguishing between the illegitimate concerns of a mere busybody and the legitimate concerns of an engaged member of society regarding the morality of governmental actions or their effects on other people's concrete interests or on social life at large.

74. This is surely one way to make sense of the argument that persons who "will not bear any responsibility for [their] choices," because the laws to which those choices are directed will not apply to them, "*ought* to be excluded" from a constituency on the ground that they are "*morally* unqualified to participate." Dahl, *Procedural Democracy*, in PHILOSOPHY, POLITICS & SOCIETY, FIFTH SERIES 97, 123 n.20 (1979) (emphasis in original).

stake. A subtler reason for excluding "disinterested" persons is that the correspondence of strategic outcomes to the actual preferences of those affected may be thought to improve as participants increasingly have similar patterns of interests at stake, as, for example, residents of a homogeneous town typically stand to receive comparably valued packages of protective and environmental services at the cost of property taxes paid directly or through landlords. There are grounds for believing that an individualistic, self-serving political process can best achieve outcomes conforming to individual preferences when the constituency is not splintered by sizable fractions of voters whose pre-political stakes in the outcomes are sharply deviant from a typical pattern.[75]

1. *Kramer, Cipriano,* and *Kolodziejski*

The Supreme Court first considered whether a jurisdiction's electorate constitutionally may be restricted to a specially concerned subset of the otherwise qualified residents of its territorial base in *Kramer v. Union Free School District No. 15*.[76] The district was empowered to regulate courses of study, textbook selection, school house locations, salaries, and other expenditures and to fix the annual budgets to be financed by local property taxes.[77] By state law, the district's electoral franchise was confined to otherwise qualified residents who were either owners or lessees (or their spouses) of taxable real property within the district or parents or guardians of children attending district schools.[78] This regime excluded plaintiff Kramer, a childless man residing in his parents' home.[79]

Chief Justice Warren's opinion for the Court concluded that the blanket exclusion from the district's electorate of other subjectively interested residents violated the latters' equal protection rights.[80] The district[81] contended that by limiting its electorate to the "community

75. *See, e.g.*, J. PENNOCK, DEMOCRATIC POLITICAL THEORY 366-67 (1979); W. RIKER & P. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY 101-06 (1973); *cf.* Sterk, Nollan, *Henry George and Exactions*, 88 COLUM. L. REV. 1731, 1744-47 (explaining why strategic politics have better chances of producing socially efficient outcomes when each policy decision in turn presents a bilateral conflict of interests than when decisions involve multilateral conflicts).

76. 395 U.S. 621 (1969).

77. *Id.* at 623-24.

78. *Id.* at 623.

79. *Id.* at 624.

80. *Id.* at 633.

81. The district's argument was supported by the dissenting Justices. *See* 395 U.S. at 634-41 (Stewart, J., dissenting).

of interest" comprised of those residents "'directly affected'" by its actions and in that sense "'primarily interested'" in them, it was protecting the deliberative quality of its politics.[82] Such a limitation was in order, the district argued, because "the ever increasing complexity of the many interacting phases of the school system and structure make it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operation of the school system" and because voters having direct stakes as parents and taxpayers would dependably be motivated "to acquire such information as they may need" for informed political involvement.[83]

The Court apparently accepted *arguendo* the deliberative aspiration for school district politics implicit in the district's contention.[84] However, it found no occasion to decide the question of whether such an aspiration could ever justify a state in restricting a local electorate to a subset of residents deemed "primarily interested" or "primarily affected" in or by the activities of a governmental unit.[85] Finding that the restrictions challenged in *Kramer* would exclude many "seemingly interested and informed residents" while permitting "inclusion of many persons who have, at best, a remote and indirect interest in school affairs,"[86] the Court held that those restrictions were not closely enough tailored to the state's claimed deliberative objective to "meet the exacting standard of precision we require of statutes which selectively distribute the franchise."[87]

The Court thus treated plaintiff Kramer's subjective interest in admission to the district electorate as the kind of constitutionally fundamental personal interest that excites "strict" judicial scrutiny of state laws infringing it. "'[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights,'" explained the Court.[88] Not only do "[s]tatutes grant-

82. *Id.* at 631 (majority opinion).

83. *Id.* The dissent compared the franchise restrictions in *Kramer* to (i) literacy tests, upheld by the Court in Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1949), on "the premise . . . that a State may constitutionally impose upon its citizens voting requirements reasonably designed to promote intelligent use of the ballot,'" *Kramer*, 395 U.S. at 636 (Stewart, J., dissenting) (quoting *Lassiter*, 360 U.S. at 51), and to (ii) residence requirements, consistently upheld because, on the dissent's account, "such requirements [are] designed to help ensure that voters have a substantial stake in the outcome of elections and an opportunity to become familiar with the candidates and issues voted upon." *Id.* (Stewart, J., dissenting).

84. *See id.* at 632-33 & n.14 (majority opinion).

85. *Id.*

86. *Id.* at 632-33.

87. *Id.* at 632.

88. *Id.* at 626 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)).

ing the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives," but "[a]ny unjustified discrimination in determining who may participate in political affairs . . . undermines the legitimacy of representative government."[89]

Read in isolation from the rest of the Court's opinion, these judicial explanations of the constitutionally "fundamental" status of Kramer's interest in admission to "political affairs" to which others in the neighborhood were admitted might most naturally suggest both the Court's instrumental valuation of the franchise and its strategic conception of politics. Yet the Court refused to rule that franchise exclusions cannot be justified by a state's purpose of protecting the deliberative quality of its political affairs.[90] We have seen that instrumental valuations of the worth of political participation are compatible with deliberative conceptions of the character of political practice.[91] That combination of assumptions might best explain the majority's reasoning and rhetoric in *Kramer*, were it not for the haziness of Kramer's imaginable instrumental objectives. The express language of the opinion neither implies nor rejects valuation of participation rights on constitutive grounds.

The *Kramer* Court thus constructed a strict-scrutiny framework for appraising laws selectively excluding "otherwise qualified voters"[92] from certain votes affecting the exercise of governmental authority within a territory containing their residences. Having done so, the Court readily extended that framework to the appraisal of state laws restricting to propertied taxpayers the right to vote on city bonds financing city capital improvements. On the same day it decided *Kramer*, the Court also decided *Cipriano v. City of Houma*,[93] involving a vote on a city's issuance of revenue bonds to finance improvements in the city's gas, water, and electric utility systems.[94] The case was easy after *Kramer* because when bonds, as in this case, "are to be paid only from the operations of the utilities [and] . . . are not financed in any way by property tax revenue," all ratepayers obviously stand to be "substantially affected" by the decision regardless of status as propertied taxpayers.[95] The Court could accept the city's contention

89. *Id.* at 626-27.

90. *See id.* at 632-33 n.14. Compare the Court's swift and confident rejections of attempts by states to justify franchise exclusions by invoking notions of substantive common interest. *See infra* text accompanying notes 135-36, 145-46.

91. *See supra* text accompanying notes 18-24.

92. *See* City of Phoenix v. Kolodziejski, 399 U.S. 204, 205 (1970).

93. 395 U.S. 701 (1969) (per curiam).

94. *See id.* at 702-03.

95. *Id.* at 705.

that property owners as such had some distinctive interest in system improvements because "the efficiency of the utility system directly affects 'property and property values,'"[96] while still finding no state interest compelling enough to justify selective abridgment of fundamental rights of political participation.

City of Phoenix v. Kolodziejski[97] was a little more difficult because it involved general obligation bonds, as opposed to revenue bonds, issued to finance various municipal facilities including nonproducers of revenue such as administration buildings.[98] The Court easily established that a city resident's interest in the quality of city facilities was not strictly tied to real property ownership[99] and that nonpropertied residents likely would share in the cost burden. This would occur both through the effects of real property taxes on prices of rental housing and commercial goods and services and through the city's practice of servicing its debt with revenues from local taxes unrestricted to taxes on real property.[100] Thus, the selective franchise exclusion again fell before strict scrutiny.[101] Again, the Court's rhetoric suggests an instrumental understanding of the individual's constitutionally fundamental interest in voting rights without excluding a constitutive one. And again, the reasoning and rhetoric fully coincide with either a strategic or a deliberative conception of political action.

2. *Ball v. James*

In what it came to treat as a series of cases distinct from the *Kramer* line, the Court eventually resolved in the affirmative the question left open in *Kramer*: Can a state ever justify selective enfranchisement among otherwise qualified residents of a governmental jurisdiction according to the ways or degrees in which the conduct of a given government's affairs affects their interests? *Ball v. James*[102] is the leading example.[103]

---

96. *Id.* at 704.
97. 399 U.S. 204 (1970).
98. *See id.* at 205-06.
99. *Id.* at 210.
100. *See id.* at 210-12.
101. *See id.* at 213.
102. 451 U.S. 355 (1981).
103. *Ball* was anticipated by Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (California statutes did not violate equal protection clause in permitting only landowners to vote in district general elections and by apportioning votes according to land assessments), and Associated Enters. Inc. v. Toltec Dist., 410 U.S. 743 (1973) (per curiam) (Wyoming watershed statute did not violate equal protection clause in allowing districts to be established by referendum in which only landowners had franchise and their votes were weighted

The public entity involved in *Ball* was the Salt River Project Agricultural Improvement and Power District.[104] The district was organized as a political subdivision and municipal corporation of Arizona.[105] It supplied water and electric power to public and private consumers in a territory encompassing a major part of the City of Phoenix and seven other municipalities.[106] As of the time of the litigation, the district's electricity sales to 240,000 consumers accounted for ninety-eight percent of operating income, and revenues from electrical operations secured eighty-eight percent of the district's long-term debt.[107] As a municipal utility, the district was exempt from state and local property taxation, had the power of eminent domain,[108] and could issue tax-exempt debt.[109]

Moreover, and perhaps crucially, the district was exempt from state administrative regulation of its rates and conditions of service, states usually provide such exemptions for municipally owned utilities on the theory that as popularly accountable public agencies they themselves "perform the public function of protecting the public interest" in fair and reasonable rates and other terms of service.[110] In fact, this district's policy had always been to set rates for its electricity with a view to generating surpluses with which to subsidize the district's production and distribution of irrigation water to agricultural landowners.[111] At the same time, landowners and only landowners formed the voting constituency of the district.[112]

To the *Ball* dissenters, the district's scheme of selective enfranchisement obviously denied equal protection to the district's nonpropertied residents. Not only did every resident have an ordinary citizen's interest in the general economic and environmental ramifications of

---

according to acreage owned). In Hill v. Stone, 421 U.S. 289, (1975), which again invalidated special voting rights for property owners in a general-obligation bond election, the Court offered, as its key to distinguishing cases such as *Kramer* and *Hill* (in which it subjected franchise exclusions to strict scrutiny) from cases such as *Salyer* and *Toltec* (in which it did not) the question whether "the election in question is . . . of special [i.e., restricted, as opposed to general] interest." *Id.* at 297. The facts and decision in *Ball* rendered this explanation untenable. *See infra* text accompanying notes 104-26.

104. *See Ball*, 451 U.S. at 357.
105. *See id.* at 357-59.
106. *Id.* at 357.
107. *Id.* at 381-82 (White, J., dissenting).
108. *Id.* at 378 (White, J., dissenting).
109. *Id.* at 360 (majority opinion).
110. *Id.* at 379 (White, J., dissenting).
111. *See id.* at 383 (White, J., dissenting).
112. *Id.* at 357 (majority opinion).

the district's developmental policies, they all, as electric power consumers, had very specific and partisan interests in rate-setting, financing, and related decisions of the district.[113] Those decisions directly affected the distribution of wealth between the franchised class of landowning consumers of subsidized district water and the disfranchised class of nonlandowning consumers of subsidy-supporting district electricity.[114] In the view of the dissenters, determination of a possible public interest in subsidizing agricultural operations with surpluses extracted from electric utility consumers should not be "totally in the hands" of the agricultural operators.[115] If the fundamental nature of the right to vote resides in the instrumental value of that right to the voter, the dissenters' arguments, replete with apt quotations from *Reynolds*,[116] *Kolodziejski*,[117] and *Kramer*,[118] seem unanswerable. This is especially so if the process of politics is envisioned as strategic.

How, then did the Court's majority, speaking through Justice Stewart, distinguish the *Kramer* line of cases? First, said the Court, the district is not a general governmental authority empowered to levy *ad valorem* taxes, enact regulatory laws, or "administer such normal functions of government as the maintenance of streets, the

---

113. *See id.* 381-85 (White, J., dissenting).

114. *See id.* at 384 (White, J., dissenting) ("It is apparent that landowning irrigators are getting a free ride at the expense of users of electricity.").

115. *Id.* (White, J., dissenting). It might be said in response that relief from political oppression at the local level is always, at least *in extremis* or in principle, available from the popularly accountable state legislature. Whatever comfort may lie in that observation, it offers no help in distinguishing *Ball* from the *Kramer* line of cases, even considering that the 240,000 electric power consumers in *Ball* undoubtedly could mobilize more force at the state house than could scattered individuals like Kramer who wanted a school-district vote even though they had neither children nor taxable property at the mercy of a local school district. Presumably, the decision in *Ball* would have been identical had the case involved only a handful of nonlandowning, electricity consumers. Likewise, the *Kramer* court presumably would have invalidated a state law permitting only parents (and not taxpayers at large) to vote in school district elections.

116. "The right to vote is of special importance because the franchise acts to preserve 'other basic civil . . . rights.'" *Id.* at 375 (White, J., dissenting) (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)).

117. "'[W]hen all citizens are affected in important ways by a governmental decision,' the Fourteenth Amendment 'does not permit . . . the exclusion of otherwise qualified citizens from the franchise.'" *Id.* (White, J., dissenting) (quoting City of Phoenix V. Kolodziejski, 399 U.S. 204, 209 (1970).

118. "Any state statute granting the franchise to residents on a selective basis poses the 'danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.'" *Id.* (White, J., dissenting) (quoting Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969)).

operation of schools, or sanitation, health, or welfare services."[119] The Court, however, failed to explain how this observation would distinguish the case from *Cipriano* (in which only revenue bonds and municipal utility operations were involved).[120] Nor does the district's lack of general authority even begin to respond to the plaintiffs' complaint of voiceless subjection to the coercive political power (in the form of control over public utility rate-setting) of those who were their natural economic adversaries.[121] Second, the Court noted that "the primary and originating purpose" of the district was the "relatively narrow" one of conserving and storing water for distribution to agricultural landowners according to an acreage-based entitlement system legally beyond the district's control. Indeed, the district first originated as the private instrumentality of specifically interested landowners and later became a "nominal[ly] public" entity to qualify for financing cost reductions available only to public agencies.[122] Again, the Court failed to explain how these historical observations answered current complaints about irresponsible exercises of power over people's vital interests by a legally privileged government agency.

Finally, the Court offered this observation about the relationship between the district and its electrical utility consumers: "[N]o matter how great the number of nonvoting residents buying electricity from the [d]istrict, the relationship between them and the [d]istrict's power operations is essentially that between consumers and a business enterprise from which they buy."[123] In this sense, "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 [subject] . . . the government provider" to strict scrutiny of selective exclusions from the franchise.[124] Once again, the Court failed to explain how the prescriptive conclusion follows from the descriptive premise. Let us grant that the commercial relationship of buyer and seller often can be distinguished from the political relationship of sovereign and subject. Still, *Ball* involved a setting in which the distinction historically has been questioned by the practice of subjecting privately owned public utilities to consumer-protective oversight by courts of equity or administrative agencies. If ever there were a case for constitutional protection of an instrumentally valued,

119. *Id.* at 366 (majority opinion).
120. *See* Cipriano v. City of Houma, 395 U.S. 701, 702 (1969).
121. *See Ball*, 451 U.S. at 383 (White, J., dissenting).
122. *Id.* at 367-68 (majority opinion).
123. *Id.* at 370.
124. *Id.* at 368 (citations omitted).

self-protective right to vote, *Ball* was it. Thus argued the dissent and answer came there none.

What might begin to explain (if not justify) the majority's conclusion, and its accompanying rhetoric of denial that the Salt River District constituted a government in the full sense, is the thought that instrumental protection of extra-political interests neither exhausts the value of a voting right to its holder nor alone suffices to explain the first-magnitude status of such rights in the constitutional firmament. For insofar as rights of admission to political participation were esteemed on constitutive, perhaps in addition to instrumental grounds,[125] the Salt River District and its ilk — unlike the cities in *Cipriano* and *Kolodziejski* and the school district in *Kramer* — might easily have been perceived as *fora non conveniens* for the realization of the self-constitutive values of citizenship. Apparently required for such realization is participation in the affairs of a "political community."[126] Perhaps the majority Justices doubted — their notions of "political community" remain to be explored — that the Salt River District, given its history and the accompanying understandings about its place in the lives of the people, defined or constituted any such thing.

B. *Enfranchisement on the Basis of Residence*

Always in the immediate background of the Court's consideration of the "selective enfranchisement" question — and, indeed, necessarily so — lies a set of assumptions about the universe of "otherwise qualified voters" composing a governmental unit's presumptive constituency, so that selective denial of the vote to any person in that universe counts as an act of exclusion or disfranchisement calling for justification. Chief among these assumptions is that *bona fide* residence within a governmental unit's territorial base presumptively qualifies the resident as a franchised member of that unit's political constituency. The Court has not often felt compelled to articulate the conceptions of political *ethos* (whether strategic or deliberative) and of the value of voting rights (whether instrumental or constitutive) that might underlie such an assumption. Residence, however, is not itself an unambiguous or self-explanatory category. Cases that test debatable meanings or applications of a residence criterion against constitutional voting-rights norms provide a glimpse of underlying judicial conceptions of political process norms and realities as well as of participation values.

---

125. *See supra* text accompanying notes 33-38.

126. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 344 (1972).

1. *Carrington, Cornman,* and *Blum*

The earliest of the modern series of such cases is *Carrington v. Rash*,[127] in which the Court invalidated a Texas law excluding from the state's electorate residents who had first moved to Texas while on military duty and had thereafter remained members of the armed forces.[128] The plaintiff was a disfranchised serviceman whose good-faith current residence in Texas and intention to make a permanent home there were undisputed.[129]

In defense of its law, Texas claimed "a valid interest in protecting the franchise from infiltration by transients" who had not voluntarily chosen Texas residence.[130] Although the Court's account of the state's argument left it at that, we can fairly infer a premise regarding the aspirationally deliberative character of Texas politics. Texas evidently was professing a concern that transient and involuntary inhabitants would lack commitment to the effort required for political deliberation.

The court rejected the criterion of disfranchisement that Texas purported to derive from this deliberative aspiration.[131] Quite pointedly, however, the Court did not reject the legitimacy of such an aspiration as a premise for state action. Rather, invoking the fundamental status of voting rights, the Court subjected the Texas law to strict scrutiny and found it unacceptably overbroad.[132] If Texas meant to "winnow" transient pseudo-residents from *bona fide* committed residents in compiling its voter lists, the Court held, it would have to do so on a case-by-case basis.[133] Case-by-case inquiry might be administratively costly or cumbersome, but because "[w]e deal here with matters close to the core of our constitutional system," the state could not "deprive a class of individuals of the vote because of some remote administrative benefit to the state."[134] This reasoning presupposes the legitimacy and practicality of Texas's deliberative aspiration for its politics.

Texas had also advanced in defense of its disfranchisement rule a claimed interest in "immunizing its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community."[135] Construing this defense as claiming

---

127. 380 U.S. 89 (1965).
128. *Id.* at 96-97.
129. *See id.* at 90-91.
130. *Id.* at 93.
131. *Id.* at 93-94.
132. *Id.* at 96-97.
133. *Id.* at 95.
134. *Id.* at 96.
135. *Id.* at 93.

a solidaristic interest in protecting the local community's indigenous policies and values against alien disturbance, the Court curtly rejected it as unconstitutional: "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[136]

Apparently, then, the Court regarded the ideal of political deliberation as quite distinct from the solidaristic aim of regulating local politics with an eye to the advancement of some preexistent and distinctive local "public interest" or "common good." The justices must have conceived political deliberation as a "liberal" medium for resolving or accommodating *differences* in perceptions of interest — private or public, individual or social — in ways somehow conducive to the well-being of each participant. On such a pluralistic understanding of political deliberation, the special value of voting rights to individuals claiming them can rest on wholly instrumental grounds. But constitutive grounds, again, are not excluded.

The Court returned to the question of constitutional restrictions on state-law definitions of residence for franchise-distribution purposes in *Dunn v. Blumstein*.[137] *Dunn* involved a so-called durational-residency requirement, demanding, as a prerequisite to voter registration in Tennessee, not just current, *bona fide* residence, but such residence

---

136. *Id.* at 94.

137. 405 U.S. 330 (1972). In Evans v. Cornman, 398 U.S. 419 (1970), the Court reversed a Maryland judicial ruling upholding state disfranchisement of residents of a federal enclave (specifically, the NIH reservation lying within the boundaries of Montgomery County) on the ground that enclave residents were not a "resident[s] of the State" within the meaning of that term as used in the Maryland state constitutional provisions governing voter qualifications. *Id.* at 421-26 (quoting MD. CONST. art. I, § 1). The Supreme Court's decision was straightforward after *Carrington* and *Kramer*. Maryland's asserted justification as rendered by the Court — "to insure that only those citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them," *id.* at 422, might have rested on either a strategic or a deliberative conception of state politics. As in *Carrington* and *Kramer*, the Court accepted the state's asserted interest in the integrity of its political process as a consideration legitimately affecting regulation of the franchise, *id.* at 422, but found the challenged rule of franchise denial too loosely fitting to that interest to pass strict scrutiny. *Id.* at 425-26. NIH reservation residents were subject to many state and local government regulations and taxes, and depended on many state and local government services. *Id.* at 424. That Congress might at some future time preempt any or all of these regulatory, fiscal, and service functions in the enclave could not justify denial of the franchise now. *Id.* at 423-24. Nor could exemptions of enclave property from state and local real property taxes justify denial, especially considering that Maryland did not exclude other persons living on tax-exempt property from its electorate and could not constitutionally have done so in light of *Cipriano v. City of Houma*. *Id.* at 425 (citing Cipriano v. City of Houma, 395 U.S. 701 (1969)). For a synopsis of *Cipriano* and related cases, see *supra* text accompanying notes 93-101.

for the preceding year.[138] As in *Carrington*, the state advanced in defense of its rule both a solidaristic-republican aim for its political outcomes[139] and a deliberative aim for its political process.[140] Also as in *Carrington*, although more cautiously, the Court accepted *arguendo* the legitimacy of the deliberative process aim.[141] Again, however, the Court concluded that the franchise-exclusion rule was not sufficiently tailored to any legitimate, deliberative goal to pass the strict scrutiny,[142] required because the right to vote is "fundamental" and "preservative of all rights"[143] and because laws controlling franchise distribution "constitute the foundation of our representative society."[144]

As in *Carrington*, the Court peremptorily rejected the outcome-oriented, common-interest aim as constitutionally illicit. "[T]he State," said the Court, presumably seeks to "require a period of residence sufficiently lengthy to impress upon its voters the local viewpoint."[145] But *Carrington* had already determined that "Tennessee's hopes for voters with a "'common interest in all matters pertaining to [the community's] government' is impermissible."[146]

2. *Holt Civic Club*

That the Court associates state-solidarism with totalitarian oppression and accordingly regards a state's solidaristic pursuits as antithetical to constitutional liberty seems clear.[147] The Court to this extent plainly aligns the Constitution with liberal pluralism. Less clear is

---

138. *Dunn*, 405 U.S. at 331. The statute allowed registration of only those persons who, at the time of the next election, had been residents of the state for a year and county residents for three months. *Id.*

139. The state defended its rule as designed to "[a]fford some surety that the voter has, in fact, become a member of the community and that as such, he has a common interest in all matters pertaining to its government . . . ." *Id.* at 345 (quoting Brief for Appellants, at 15).

140. As to the deliberative aim, the state claimed an interest in assurance that the voter, by virtue of having become "in fact" a member of the political community "'is, therefore, more likely to exercise his right more intelligently.'" *Id.* (citation omitted).

141. The Court, having "noted" that "the criterion of 'intelligent' voting is an elusive one, and susceptible of abuse," found that it could dispose of this case "without deciding as a general matter the extent to which a State can bar less knowledgeable or intelligent citizens from the franchise, *cf.* Evans v. Cornman . . . ." *Id.* at 356 (citing Evans v. Cornman, 390 U.S. 419 (1970)).

142. *See id.* at 357-59. "If the State seeks to assure intelligent use of the ballot, it may not try to serve this interest only with respect to new arrivals." *Id.* at 359.

143. *Id.* at 336 (quoting Reynolds v. Sims, 377 U.S. 553, 562 (1964)).

144. *Id.* (quoting Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626 (1969)).

145. *Id.* at 354-55.

146. *Id.*

147. For a discussion of "republican solidarism" and "liberal pluralism," see *supra* text accompanying notes 5-8.

how that stance can be reconciled with the Court's first premise in every voting-rights case: that the Constitution permits states to use *bona fide,* current residence within a governmental unit's territorial base as a criterion of enfranchisement in that unit's affairs.

Classing voting rights as "fundamental," the Court has generally demanded, with scant regard for considerations of administrative feasibility, a tight fit between franchise distinctions and some compelling reason for imposing them. The Court grants that states may have good reasons for purging a given jurisdiction's electorate of those who cannot fairly assert a personal interest or stake in that jurisdiction's affairs. Even so, the Court insists that states must draw and apply the "interest" line precisely so as to avoid arbitrary discriminations among those who assert interests. This *schema* leaves residence criteria in obvious constitutional jeopardy.[148]

In its first explicit defense of the general proposition that residence is a constitutionally permissible franchise prerequisite, the Court in *Dunn* explained that while residence requirements are subject to strict scrutiny as are other franchise exclusions, they pass the test of tight fit to a compelling interest.[149] However, the compelling interest contemplated by the Court in *Dunn* was not, and could not reasonably have been, that of purging a jurisdiction's electorate of voters lacking substantial or typical stakes in its affairs. In general, the correlation between residence and interest is no better than roughly approximate. It seems no tighter at all — much less a constitutional order of magnitude tighter — than the correlation between one's parent-or-taxpayer status and one's interest in school district affairs, rejected as too loose by the Supreme Court in *Kramer.*[150] According to the *Dunn* Court, *per* Justice Marshall, the reason why "[a]n appropriately defined and uniformly applied requirement of bona fide residence" can "withstand close constitutional scrutiny" is because such a requirement "may be necessary to preserve the basic concept of a political community."[151] The Court has thus affirmed the preservation of political community as a value so compelling in the Constitution's sight that states may legitimately pursue that value even at the cost of overriding the fundamental rights of would-be voters whose substantial stakes in a jurisdiction's affairs are undeniable.

---

148. *See, e.g.,* Levinson, *Suffrage and Community: Who Should Vote?,* 41 FLA. L. REV. 545 (1989).

149. *See Dunn,* 405 U.S. at 343-44.

150. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 621 (1969).

151. *Dunn,* 405 U.S. at 343-44 (citations omitted).

Now, from *Carrington*, *Cornman*, and *Dunn*, we know what the "compelling" value of "political community" cannot be, according to the Court's understanding: It cannot be the value of cultivating a solidaristic-republican commitment to a local substantive common interest. But then what is this value?

As clearly as any case could, *Holt Civic Club v. City of Tuscaloosa*[152] forced consideration of this question. The case did so by presenting, in highly testing circumstances, the issue of what counts as residence. The plaintiffs' homes were located beyond the corporate city limits of Tuscaloosa, Alabama, but within a three-mile band of territory skirting those limits that fell, according to Alabama law, under the "police jurisdiction" of the city.[153] The plaintiffs' activities in and around their homes were thus made subject to the city's "police and sanitary regulations." Moreover, those who carried on businesses, trades, or professions in the police jurisdiction were subject to the city's licensing powers, although the city could charge them license fees of no more than one half the amount chargeable in respect to similar activities conducted within city limits.[154]

The plaintiffs, supported by Justice Brennan's dissenting opinion,[155] attacked the constitutionality of Alabama's "police jurisdiction" regime by an argument in the alternative. They claimed that by subjecting nonresidents to the coercive governmental powers of the city while refusing them voting rights in city elections, Alabama must either be depriving them of liberty and property without due process of law or else violating their equal protection rights against inadequately justified exclusion from the electoral constituency of a governmental body to whose authority they were subject by reason of residence. These equal protection rights the plaintiffs viewed as well established in *Kramer*, *Cipriano*, *Kolodziejski*, *Carrington*, *Cornman*, and *Dunn*. They recalled the Court's standard arguments for strict scrutiny of franchise exclusions[156] and urged that "[t]he residents of Tuscaloosa's police jurisdiction [were] vastly more affected by Tuscaloosa's decision-

152. 439 U.S. 60 (1978).

153. *See id.* at 61.

154. *See id.* at 61-62.

155. *See id.* at 80 (Brennan, J., dissenting).

156. "Because 'statutes distributing the franchise constitute the foundation of our representative society,' . . . we have subjected such statutes to 'exacting judicial scrutiny' (citing Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626, 628 (1969)). Indeed, 'if a challenged statute grants the right to vote to some citizens and denies the franchise to others, "the Court must determine whether the exclusions are *necessary* to a *compelling* state interest."'" *Holt*, 439 U.S. at 80-81 (Brennan, J., dissenting) (citations omitted).

making processes than were the plaintiffs in either *Kramer* or *Cipriano* affected by the decisionmaking processes from which they had been unconstitutionally excluded."[157]

The Court's majority, speaking through Justice Rehnquist, rejected these claims. Its reasoning was starkly simple: because the plaintiffs were not "physically resident within the geographic boundaries of the governmental entity concerned,"[158] they simply had no entitlement to inclusion in that unit's electorate; "our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders."[159]

An initial apparent weakness in that reasoning, as Justice Brennan's dissent forcefully pointed out, is that the precedents had established only that franchise exclusions resulting from residency requirements would be constitutionally acceptable if those residency requirements were themselves "appropriately defined."[160] "[T]alismanic" invocations and arbitrary, state-law "characterizations of residency," the dissent aptly insisted, had not been regarded as "controlling for purposes of the [f]ourteenth [a]mendment."[161]

Accepting that "'appropriately defined'" residency requirements for enfranchisement are constitutionally permissible, Brennan fairly saw the issue in *Holt* as whether the particular residency requirement under attack, insofar as it excluded inhabitants of Tuscaloosa's police jurisdiction from the city's municipal elections, could be defended as appropriately defined. His conclusion was that "[t]he criterion of geographical residency" as "applied to this case" was not only inappropriately defined but "entirely arbitrary" because no one could explain why "the 'government unit' which may exclude from the franchise those who reside outside of its geographical boundaries should be composed of the city of Tuscaloosa rather than of the city together with its police jurisdiction."[162]

For a residency requirement for enfranchisement to be "'appropriately defined,'" Brennan reasoned, it must be compatible with the high purpose for which such requirements are constitutionally permitted. That purpose, said Brennan (following *Dunn*), is "'to preserve

157. *Id.* at 85 (Brennan, J., dissenting).

158. *Id.* at 68 (majority opinion).

159. *Id.* at 68-69 (citing, *inter alia*, Dunn v. Blumstein, 405 U.S. 330, 343-44 (1972); Evans v. Cornman, 398 U.S. 419, 422 (1970); *Kramer*, 395 U.S. at 625; Carrington v. Rash, 380 U.S. 89, 91 (1965).

160. *Id.* at 82 (Brennan, J., dissenting) (quoting *Dunn*, 405 U.S. at 343).

161. *Id.* at 81-82 (citing *Cornman*, 398 U.S. at 419; *Carrington*, 380 U.S. at 89).

162. *Id.* at 87 (Brennan, J., dissenting).

the basic conception of a political community'"[163] and "at the heart of our basic conception of a 'political community,'" he said,

> [i]s the notion of a reciprocal relationship between the process of government and those who subject themselves to that process by choosing to live within the area of its authoritative application . . . . Statutes . . . which fracture this relationship by severing the connection between the process of government and those who are governed . . . thus undermine the very purposes which have led this Court in the past to approve the application of . . . residency requirements . . . . The residents of Tuscaloosa's police jurisdiction are [greatly] affected by Tuscaloosa's decision-making processes . . . . The Court does not explain why being subjected to . . . such extensive power does not suffice to bring the residents of Tuscaloosa's police jurisdiction within the political community of the city . . . .[164]

The *Holt* majority was not quite silent on this question. The majority's declared position was simply that some line has to be drawn on constitutional entitlements to admission to state and local government electorates, and the line of residence within the formally defined boundaries of the government unit in question is the one our system accepts. Various regulatory and nonregulatory actions of local and state governments can have gravely important extraterritorial impacts: how the city or state develops its economy, where it locates its garbage dumps, how it zones its land. Additionally, actions of local and state governments have significant intraterritorial impacts on commuters and other visitors. No one seriously could maintain that each person exposed to significant effects from governmental actions is thereby constitutionally entitled to vote in the elections of every state and local government producing those effects. Some limiting rule must govern franchise entitlement. To draw the line, as Brennan would, between a claimant's residence-fixed exposure to the "direct effects" of extraterritorial regulatory power and "the indirect though equally dramatic extraterritorial effects of purely internal municipal actions" would make "little sense" as a practical matter; it would just unwarrantably saddle the Constitution with "the Austinian notion of sovereignty."[165] What remains is the criterion of residence within formally declared corporate

---

162. *Id.* at 82 (Brennan, J., dissenting) (quoting from *Dunn*, 405 U.S. at 344).

164. *Id.* at 82-86 (Brennan, J., dissenting) (citations omitted).

165. *Id.* at 69-70 (majority opinion).

limits. This may not be a perfect solution, Justice Rehnquist can be heard as saying, but it is a workable one.[166]

In response to the majority, Justice Brennan simply denied the overwhelming difficulty of drawing the "residence" line on a functional basis corresponding to a defensible, substantive theory of political community. The distinction is "crystal-clear," Brennan wrote,

> Between those [like the appellants] who . . . are . . . subject to [the] city's [direct regulatory authority], and those who reside in neither the city nor its police jurisdiction, and who are thus merely affected by the indirect impact of the city's decisions. This distinction . . . is consistent with, if not mandated by, the very conception of a political community underlying constitutional recognition of bona fide residency requirements.[167]

The debate between the majority and the dissenting justices in *Holt* seems to turn on resolutions of certain variables in the underlying normative conception of "political community." Suppose, to begin with, that one rejects the solidaristic-republican aim of inculcating into the local political process, and promoting through it, a substantively specific notion of the local community's common or public interest. Suppose, further, that one conceives the "fundamental" value of a voting right to its holder to lie in its instrumental utility to that holder in promoting or protecting his or her pre-political interests in a political process (which may be strategic, deliberative, or some mix of the two). Surely, one would then not only find Justice Brennan's account of "political community"[168] congenial, but would also find Brennan having much the better of the argument between him and Justice Rehnquist. For according to the pluralistic and instrumentalist settings of the normative variables I have just mentioned, Rehnquist's *faute de mieux* defense of the formal corporate boundary as the constitutional-legal discriminant of "residence" is untenable.

Rehnquist's doctrine surrenders abjectly to a state's power to manipulate franchise distributions by drawing corporate boundaries arbitrarily vis-à-vis corporate empowerment. As Brennan justifiably insisted, the surrender is contrary in spirit to the teaching of *Cornman*.[169] It is also quite unnecessary, as long as we can find a

166. "The line heretofore marked by this Court's voting qualifications decisions coincides with the geographical boundary of the governmental unit at issue, and we hold that [the] appellants' case, like their homes, falls on the farther side." *Id.*

167. *Id.* at 87 (Brennan, J., dissenting) (citations omitted).

168. *See supra* text accompanying notes 163-64, 167.

169. *See Holt*, 439 U.S. at 86 (Brennan, J., dissenting) (citing Evans v. Cornman, 398 U.S. 419 (1970)).

criterion for distinguishing between "residents" and "nonresidents" of Tuscaloosa that has both the formal characteristics of a justiciable standard and *some* detectible tendency — any is categorically better than none — to discriminate between the two in a way that corresponds functionally with the correct, normative conception of political community. Brennan argues that in the circumstances of the *Holt* case, the criterion of residential anchorage within range of a substantial battery of city regulatory powers plainly has the desired properties, both formal and functional.

In expanded form, the argument rests on two, seemingly indisputable premises. First, while the interests of countless people residing outside the corporate boundaries of a city may be indirectly affected by that city's governmental decisions, only a specific subset of those people are *further* subject by reason of their residential anchorage to some portion of the city's direct regulatory authority. Second, the incremental magnitude of the consequent interests of the members of that subset in that city's political affairs compares fairly with that of successful franchise-exclusion plaintiffs in other constitutional cases. Proceeding from those two premises, Brennan contends that denial of voting rights to members of that subset cannot be justified on the ground that their claim to enfranchisement is just impossible to distinguish legally from that of indirect-spillover victims. Given an instrumental understanding of the constitutionally preferred status of voting rights, Brennan's argument is a hands-down winner.

It seems, then, that any possibility of a conscientious defense of the *Holt* majority's position against Brennan's argument will require a quite different normative conception of political community, one that involves a constitutive understanding of the fundamental value of the voting right.[170] What might serve is a conception in which the commu-

170. The majority's *conclusion*, although not its *opinion*, may conceivably be explained on instrumentalist grounds. The beginnings of such a defense would call attention to the reasons for thinking that inclusion within a voting constituency of "disinterested" persons — those who can vote "irresponsibly" because they will not be subject to the laws their votes may help enact — may well impair either the soundness or sincerity of that constituency's deliberative politics or the allocative efficiency of its strategically driven system of public choice. *See supra* text accompanying notes 74-75. In that sense, residents of Tuscaloosa's police jurisdiction were, obviously, disinterested in some significant fraction of Tuscaloosa's complete political agenda. The Tennessee legislature was thus faced with a choice among (i) accepting the political-process impairments resulting from including the *Holt* residents as full fledged Tuscaloosa voters; (ii) accepting the political-process impairments resulting from excluding them completely from Tuscaloosa politics; (iii) inviting confusion and resentment by assigning them some arbitrary fraction of a full vote; and (iv) forgoing the policy objectives of the police-jurisdiction arrangement itself. We can imagine a court concluding that choice (i) is constitutionally justifiable, even under strict scrutiny, considering the alternatives. Taking his opinion at face value, however, that is not

nity is primarily defined by subjective membership rather than objective interest; in which the community's internal bonds are something more like civic friendship than procedural accountability; in which the essence of community lies more in meaning than in power. "City" would then signify something qualitative about the attitudes of members toward each other or toward their common enterprise of government. This something might be shared apprehension of and commitment to a specific, substantive understanding of the common good. It might be a commitment signified and made by moving into the community's well-defined corporate space. One adopting such a view would be to that extent a solidaristic republican.

Alternatively, one might think that the qualitative attitude definitive of community membership is that of commitment to a process of civic dialogue, or dialogic politics, in a spirit suitably cognizant of the constitutive value of dialogic political engagement to each of its participants taken severally. Again, a person's commitment to such a process would have to be indispensably a matter of choice: one can join if one chooses,[171] but one cannot remain aloof from the process, hover around its edges, and claim the status of a franchised member.[172]

If either a solidaristic or a pluralistic-dialogic conception of political community could possibly begin to make sense of the majority position in *Holt*, which conception is the more appropriate imputation? The Court's denials, in *Carrington*, *Cornman*, and *Dunn*, of the constitutional legitimacy of solidaristic-republican grounds for franchise exclusions seem both heartfelt and shared by members of the *Holt* majority.[173] On the other hand, five of the six justices composing the *Holt*

---

what Justice Rehnquist's *Holt* majority concluded. The opinion does advert to Tennessee's interest in utilizing the police-jurisdiction arrangement in the pursuit of legitimate policy goals. *See Holt*, 439 U.S. at 73-75. It does so, however, only in the course of concluding that the arrangement passes a low-level scrutiny, rational-basis test, after having "stripped" the plaintiffs' claim of the "voting rights attire" that purported to invite *strict* scrutiny. *See id.* at 70. For a discussion of the majority's argument for that first, and crucial, step in its reasoning, see *supra* text accompanying notes 158-66.

171. This is not to say one would necessarily think that *anyone* who chooses *must* be permitted to join, or that membership does not properly remain under the control of the current members. One might favor, or accept, a closed and exclusive form of dialogic republicanism. *But see* Michelman, *Law's Republic*, *supra* note 1, at 1504-05, 1526-30 (arguing that closure and exclusion are inconsistent with basic values of political dialogue).

172. Such an emphasis on an individual's choice as determining her or his membership may be regarded as a "liberal" ingredient in this speculative account of the *Holt* majority's position. *Cf.* Note, *supra* note 56, at 1304-06 (criticizing liberal social-contract rationale for disfranchisement of ex felons).

173. The *Holt* majority included Chief Justice Burger, and Justices Stewart, Blackmun, Powell, Rehnquist, and Stevens. *See Holt*, 439 U.S. 60. Justice Stewart joined the majorities

majority composed the majority in *Ball v. James*. We have already seen how a plausible explanation for a perception of constitutionally significant difference between the *Ball* case, in which an intra-residential franchise exclusion was upheld, and the cases in the *Kramer* line, in which such exclusions were rejected, lies precisely in an attribution of constitutive value to rights of participation in politics conceived as dialogic.[174]

C. *Enfranchisement on the Basis of Competence*

As late as the *Lassiter* decision of 1959,[175] the Supreme Court unanimously upheld a North Carolina reading and writing prerequisite for admission to the vote on the stated ground that "the ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot." The deliberative-politics premise underlying that stance seems evident. Why else would one person's "intelligence" in his or her "use of the ballot" be a legitimate public concern?[176]

Despite repeated opportunity for repudiation,[177] the Court has ever since professed adherence to the stance it took in *Lassiter*. But the Court has not had to face the issue squarely at any time subsequent to its 1966 decision in *Harper v. Virginia State Board of Elections*,[178] holding poll taxes unconstitutional. (Since 1970 it has been spared any possible occasion for doing so by congressional legislation barring the use of literacy tests.[179]) Thus, a fair question remains as to whether

---

in all of *Carrington*, *Cornman*, and *Dunn*. *See* Dunn v. Blumstein, 405 U.S. 330, 330 (1972); Evans v. Cornman, 398 U.S. 419, 419 (1970); Carrington v. Rash, 380 U.S. 89, 89 (1965). Chief Justice Burger joined in *Cornman*. His dissent in *Dunn* rested on grounds suggesting no disagreement with the majority's anti-solidaristic stance. *See Dunn*, 405 U.S. at 363 (Burger, C.J., dissenting). Justice Blackmun, concurring specially in *Dunn*, indicated agreement with the majority's anti-solidarism. *See id.* at 360-61 (Blackmun, J., concurring).

174. *See supra* text accompanying notes 125-26.

175. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51, 53 (1959).

176. A paternalistic account of *Lassiter*, consistent with strategic and perhaps even pluralistic assumptions, may be conceivable. *Cf.* Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 647-49 (1982) (defending paternalistic interventions in certain circumstances). But such an account seems a good deal more farfetched than the deliberative account.

177. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 131-34 (1970) (opinion of Black, J.); *id.* at 144-47 (opinion of Douglas, J.); *id.* at 216-17 (Harlan, J., concurring in part, dissenting in part); *id.* at 231-36 (Brennan, J., concurring in part, dissenting in part); *id.* at 282-84 (Stewart, J., concurring in part, dissenting in part); Katzenback v. Morgan, 384 U.S. 641, 649-50 (1966).

178. 383 U.S. 663 (1966).

179. *See supra* note 69.

the Court's republicanly grounded acceptance of literacy tests survives *Harper*.

Justices Black and Harlan, dissenting in *Harper*,[180] apparently would have accepted a defense of the constitutionality of state poll tax laws based on solidaristic-republican grounds. According to Justice Black, such laws might well reflect a state's "belief that voters who pay a poll tax will be interested in furthering the State's welfare when they vote."[181] According to Justice Harlan:

> [P]roperty qualifications and poll taxes have been a traditional part of our political structure . . . . [I]t is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay $1.50 or thereabouts a year for the exercise of the franchise. It . . . was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens . . . . These viewpoints, to be sure, ring hollow on most contemporary ears . . . . [They] are not in accord with current egalitarian notions of how a modern democracy should be organized . . . . [I]t is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process.[182]

The evidence for Justice Harlan's acceptance of solidarism lies not only in his allusions to stakes in community affairs and good community management, but also in his apparently unselfconscious embrace of virtual representation.[183] That embrace seems implicit in his appeal to "choice by reasonably minded people acting through the political process" as justifying the disfranchisement of a class of persons — "those without means" — whose complaint is precisely that they are excluded from the "people" exercising the "choice."

---

180. *See Harper*, 383 U.S. at 670-86 (Black, J., dissenting).
181. *Id.* at 674 (Black, J., dissenting).
182. *Id.* at 680, 684-86 (Harlan, J., dissenting) (citations omitted).
183. For a discussion of virtual representation, see *supra* text accompanying notes 54-57.

Given dissents rising to the defense of a constitutional vision not only deliberative but solidaristic, it is natural to read the majority's decision in *Harper* as rejecting such a vision in favor of some other more in accord with the modern pluralist temper. On one such reading, *Harper* would finally confirm "the Reconstruction Amendments as the vehicle by which the country . . . abandoned ancient notions of civic solidarity and decisively moved to modern notions of liberal individualism, including a pluralist political premise that differs from republicanism precisely at the point of caring not for citizenly competence."[184]

Justice Douglas's opinion for the Court in *Harper* no doubt encourages such a reading by its pointed explanation that "'the political franchise of voting'" is considered "a 'fundamental political right'" because it is "'preservative of all rights.'"[185] A self-serving, instrumental valuation of the franchise fairly leaps from that formulation. Yet in subsequent cases involving property-based exclusions from political participation, the Supreme Court has not located the special value of political participation rights solely in their utility as instruments of self-protection and self-aggrandizement in political affairs.[186] On the total evidence of his opinion for the Court in *Harper*, neither did Justice Douglas in that case.

---

184. Michelman, *Possession vs. Distribution*, *supra* note 10, at 1331. In *Possession vs. Distribution*, I continued:

> The modern pluralist vision does not care about competence, on this reading, because unlike republicanism, it puts comparatively little stock in dialogic persuasion as a means to assert, clarify, and politically evaluate interests that deserve public respect or support. Instead, modern pluralism relies on the 'pure procedural justice' of arms-length political exchange, subject to a set of guaranteed supra-political rights, for an acceptable distribution of governmental responses to private interests deemed publicly unexaminable.

Id. (citations omitted).

This article proposes a somewhat different view. *See supra* text accompanying notes 18-32; *infra* text accompanying note 191.

185. *See Harper*, 383 U.S. at 667 (quoting from Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

186. Most recently, in Quinn v. Millsap, 109 S. Ct. 2324 (1989), the Court unanimously held that it was unconstitutional "to require land ownership of all appointees to a body authorized to propose [to the voters] reorganization of local government," because the equal protection clause protects *"the 'right to be considered for public service* without the burden of invidiously discriminatory disqualifications.'" *Id.* at 2331-32 (quoting from Turner v. Fouche, 396 U.S. 346, 362 (1970)) (emphasis added). As it had in *Turner*, invalidating a requirement of land ownership for local school board membership, the Court in *Quinn* accepted *arguendo* the legitimacy of laws aimed at ensuring that local governing body members are knowledgeable about local problems and issues and are "attached to their community," but concluded that land ownership requirements lacked rational relationship to these objectives. *Id.* at 2332.

Consider the grounds on which Douglas offered to distinguish poll taxes from the literacy tests upheld in *Lassiter*:

> [The] *Lassiter* case does not govern the result here, because, unlike a poll tax, the "ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. . . . Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax . . . . Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.[187]

That this distinction lacks conviction as applied to an annual $1.50 test of political commitment and awareness[188] — that Douglas preferred a patently weak distinction to simple rejection of *Lassiter*'s deliberative-politics premise — seems only to confirm the apparent strength of his (or his colleagues') attachment to the premise.

How, then, might one understand Justice Douglas's total argument in *Harper*, which views voting rights as fundamental because they are "preservative of all rights" and at the same time finds a voter's "intelligence," or the lack thereof, a matter of legitimate public concern? The most obvious way of combining those two stances seems too fraught with solidarism to be plausibly Douglas's.

That way is suggested by Quentin Skinner's reading of Machiavelli, according to which the Machiavellian republican solidaristic ideology of political participation, common good, and civic virtue springs, paradoxically, from concern about the preservation of individual liberty. In Machiavellian republican thought, writes Skinner,

> [o]nly those who place themselves whole-heartedly in the service of their community are capable of assuring their own liberty . . . . [T]he liberty of individual citizens depends in the first place on their capacity to fight off "servitude arising from outside." But this can be done only if they are willing to undertake the defence of their polity themselves . . . . Personal liberty also depends . . . on preventing the *grandi* from coercing the *popolo* into serving their ends. But the only way to prevent this from happening is to organize the polity in such a way that each and every citizen is equally able to play a part in determining the actions of the body politic as a whole . . . . [T]he price we have to pay for

187. *Harper*, 383 U.S. at 666-68 (quoting from Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53 (1959)).

188. *See* Baker, *Republican Liberalism*, *supra* note 6, at 505-07.

> enjoying any degree of personal freedom with any degree of continuing assurance is voluntary public servitude . . . . [O]nly those who behave virtuously are capable of ensuring their own freedom.[189]

Skinner's argument, paradoxical to ears attuned to the higher-law constitutionalism of trans-political individual rights and liberties, conveys a special republican sense of the idea that enfranchisement, the occupation of citizenship, is "preservative of" those conditions of personal liberty Americans rank foremost among cherished rights:

> [T]o conceive [our personal liberty] as a right, as a species of moral property, and to defend it absolutely against all forms of external interference, [republicans must] maintain, is not merely the epitome of corrupt citizenship, but is also (like all derelictions of social duty) in the highest degree an instance of imprudence. The prudent citizen recognizes that, whatever extent of negative liberty he may enjoy, it can only be the outcome of — and if you like the reward of — a steady recognition and pursuit of the public good at the expense of all purely individual and private ends.[190]

Thus, to the arch-republican Machiavelli, on Skinner's reading, the franchise is both republicanly and instrumentally "preservative of all rights." But the argument seems yet too solidaristic, too Spartan, too statist, for Douglasian sensibilities.

Suppose we try to translate the argument into terms better suited to the modern American context of political pluralism. So translated, the claim is that we all take an interest in each others' enfranchisement because (i) our choice lies between hanging together and hanging separately; (ii) hanging together depends on reciprocal assurances to all of having one's vital interests heeded by the others; and (iii) in the deeply pluralized conditions of contemporary American society, such assurances are not attainable through virtual representation, but only by maintaining at least the semblance of a politics in which everyone is conceded a voice.

Even thus diluted with pluralism, the Machiavellian argument seems disconsonant with the Emersonian individualism we associate with Justice Douglas. Consider, therefore, an alternative account of Douglas's position in *Harper*, according to which one's franchise is one's badge of inclusion in a constitutive political dialogue and thus

---

189. Skinner, *The Idea of Negative Liberty: Philosophical and Historical Preferences*, in PHILOSOPHY IN HISTORY 193, 213-14 (R. Rorty, J. Schneewind, & Q. Skinner eds. 1984); *accord* W. SULLIVAN, *supra* note 25, at 206-07 (citing *Tocqueville* in support of this view).

190. Skinner, *supra* note 189, at 218.

"preservative" of one's liberty in the positive, political sense.[191] We thus imagine the justice assigning constitutive value directly to the individual's experience of involvement in the dialogue, as opposed to regarding that involvement as strictly instrumental to the individual's ulterior ends. That would give Douglas a reason, apart from Machiavellian Spartan-statism, for endorsing *Lassiter*'s affirmation of the interest of all in the "intelligent" participation of each. For the quality of the dialogue, then, is something that matters to each participant individually, as a person supposedly deriving value from the dialogic experience itself.

V. CONCLUSION

According to what I understand to be a republican ideal conception, politics is a field in which persons reciprocally exercise their capacities for changing and becoming by and through communicative relations. It is a dialogic process of persons overcoming, through confrontation with difference, the moral stasis and self-satisfaction of sameness. I have suggested here that signs of such a self-constitutive notion of politics can be found in the official writings of Supreme Court Justices on issues of constitutional protection for voting rights. More broadly, I have suggested that the dialogic notion of participation in politics as a constitutive human good may be a republican remnant in contemporary American constitutional thought.[192]

I have so far said nothing about what one ought to make of this proposition, if it is true, and it is now time to state carefully what lessons I do and do not mean to draw from the sort of analysis I have conducted. Let us use the *Holt* case as an example.[193]

First, despite my obvious sympathy for an ideal conception of politics as dialogic,[194] I do not mean my discussion of the *Holt* opinions to say that the majority judged better than the dissenters did. Visionary ideals are one thing; actual prevailing vision and practice are another. The ideal and the actual may be far apart, and judicial prerogatives of decision and explanation are not always aptly or justly spent on trying to close the gap. It may be that on some occasions they are,[195] but I think it clear that the *Holt* case was not one of those and that the dissenters in *Holt* judged better.

---

191. *See supra* text accompanying note 33.

192. *See supra* text accompanying notes 28-32.

193. Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978).

194. *See* Baker, *Republican Liberalism*, *supra* note 6, at 491.

195. *Cf.* Fisher, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774 (1988) (urging attention to the effects of judicial decisions and explanations on popular political-moral understanding).

Second, I do not claim that the author of the majority opinion in *Holt*, Chief Justice Rehnquist,[196] has ever consciously and focally identified dialogic politics as a weighty principle of American constitutionalism to be consistently given its due in judicial reasoning whenever it is relevant. At most, I claim that the value is sometimes "there" for him. It may be there in the kind of subverted form that I once called "somewhat disguised and twisted."[197] A value (or normative impulse) thus "present" would tend to appear sporadically and inconsistently — perhaps opportunistically — in the course of a given judge's work. The other factors in a case that would catalyze that value's presence to that judge might be such that its manifestations in that judge's work would tend to occur in decisions that by my lights are wrong, not right.[198] Conversely, it might exert no influence for that judge in cases where I would think it ought to have helped produce a decision contrary to his.[199] There is no republican or any other kind of "solace"[200] to be found in this material, and I mean to offer none.

Third, even to speak as I have of "claiming" that the dialogic-politics value is "there" for any judge or group of judges is already to speak too strongly. It is a *hypothesis* I offer rather than a claim: a hypothesis

196. *See Holt*, 439 U.S. at 61.

197. *See* Michelman, *Traces*, *supra* note 10, at 23.

198. For example, see the majority opinions in *Holt*, 439 U.S. at 60 (residents of city's police jurisdiction, but not living within city's corporate city limits, had no right to inclusion in city's electorate), and Ball v. James, 451 U.S. 355 (1981) (Arizona statute providing that voting in elections for agricultural and power district was limited to landowners did not deny equal protection).

199. For examples, see the abortion funding cases. E.g., Harris v. McRae, 448 U.S. 297 (1980) (Hyde Amendment limiting use of federal funds to reimburse costs of abortions under Medicaid did not violate constitutionality protected right of personal privacy); Maher v. Roe, 432 U.S. 464 (1977) (equal protection clause does not require state participating in Medicaid to pay expenses for nontherapeutic abortions for indigents). *See also* Bowers v. Hardwick, 478 U.S. 186 (1986) (Georgia's criminalization of homosexual sodomy did not violate the fundmental personal-privacy rights of homosexuals). *Compare* Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 332-33, 335, 338 (1985) (criticizing the abortion-funding decisions as failing to understand the rights of women to terminate unwanted pregnancies as "inalienable" by virtue of their public value in securing "systemic norms . . . concerned with structuring power relationships to avoid the creation or perpetuation of hierarchy"), *with supra* text accompanying note 191 (construing *Harper* as perceiving the right to vote as fundamental because similarly "relational" in character). For a criticism of *Hardwick* on similar grounds, see Michelman, *Law's Republic*, *supra* note 1, at 1528-35. Moreover, the unanimous and sustained antipathy to antique republican solidarism displayed by the Supreme Court in recent voting-rights cases, *see supra* text accompanying notes 135-36, 145-46, disastrously was missing from the majority's treatment of *Hardwick*. *See supra* note 1, at 1494-95, 1526.

200. *See generally* Mensch & Freeman, *Hobbesian America*, *supra* note 10.

to be tested (on any audience, including any judge) simply by the act of advancing it. Insofar as the hypothesis is valid (and comprehensibly expressed), it may have consequences for the future actions of those for whom it is; those consequences will *be* its validation. To put it another way: Some — not all — ideologies are potentially utopian. The only way to tell, if you care, is to try.

There may be good reason for the democracy-minded to care, now, about the revitalization of whatever remnant of an ideal — or ideology — of self-constitutive, dialogic politics may remain in American constitutional vision. It is possible that the country stands at the brink of a wave of "privatization" that, especially should it occur without sustained resistance, will further and irreversibly depoliticize American life for a long time to come. One arresting example: The Commonwealth of Massachusetts recently adopted a statute authorizing the incumbent governing bodies of the City of Chelsea to execute a contract with Boston University providing for a ten-year takeover by the University of "authority and responsibility for the management, supervision, and oversight" of Chelsea's public primary and secondary education.[201] One result for Chelsea residents will be devotion to Chelsea educational services of a quantity of monetary and other resources available to the University, but not otherwise to Chelsea. Another will be to single out Chelsea from all other Massachusetts school districts for a uniquely depoliticized form of public education governance.[202] By comparison with everyone else in the state, individual

201. Agreement Between Chelsea School Committee and Trustees of Boston University § D [hereinafter "Agreement"] (1989); *see* 1989 MASS. ACTS ch. 133.

202. The agreement is terminable at any time by majority vote of the popularly elected Chelsea School Committee. *Id.* ¶ H(3), at 41. For as long as the agreement remains in force, Boston University will exercise the same broad authority over matters of local public education policy and governance in Chelsea that under laws applicable everywhere else in the state is directly exercised by elected school committees and their appointed superintendents of schools. *See id.* ¶ D; *see also* MASS. CONST. ch. 6 (forbidding use of public money or credit to support schools not "under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority"); MASS. GEN. LAW ANN. ch. 71, §§ 35-67 (1978) (prescribing powers and responsibilities of school committees and superintendents of schools). The Agreement provides that a majority vote of the Chelsea School Committee can require Boston University to "reconsider" certain kinds of actions and decisions. *See* Agreement § E(2), at 16. However, the university retains the option of standing by its initial determinations in all matters except that the Chelsea School Committee may override Boston University's determinations (but only by a two-thirds majority) regarding the adoption of annual budgets, collective bargaining agreements, and "educational policies affecting the school system as a whole, including substantial revisions to the content or timetable for the implementation of the educational program provided for by this agreement." *Id.* ¶ E, at 17. It would seem easy for the university, if so minded, to frame its actions and determinations so as to avoid application of the latter category strictly construed. Moreover, Boston University is a private corporation

Chelsea residents stand to be substantially deprived for a period of ten years (half of a Jeffersonian generation and five-sixths of a normal journey from first grade through high school) of whatever personal "rights" one may think they have to political self-government in a realm of obvious high democratic significance.[203]

Of course it would be foolish for aggrieved Chelsea residents or other opponents of such cutbacks on democracy to regard judicial action as their only or even primary line of resistance. It would seem equally mindless of them to dismiss courts altogether from consideration. A strongly argued judicial invalidation of the Chelsea school takeover, on the ground, say, that the takeover invidiously discriminates against Chelsea voters[204] by exceptionally infringing on their fundamental interests in political self-government, could conceivably pack a normative wallop beyond the confines of the Chelsea controversy itself.[205]

As it happens, the Supreme Court has never held that there is a constitutionally "fundamental" interest simply in political self-government.[206] Every case reviewed in this article has been one involving a claimed fundamental interest in "participat[ing] in elections *on an equal basis with other citizens in the jurisdiction*"[207] — an interest in not being excluded from whatever electoral politics in fact go on around

---

not normally governed by Massachusetts administrative law pertaining to such niceties as open meetings and access to public records, and the contract leaves that status mainly undisturbed. *See id.* ¶ F, at 18-22.

203. *See, e.g.*, A. GUTMANN, DEMOCRATIC EDUCATION 5-15, 36-41, 63-76 (1987). Insofar as we do regard political self-government as a fundamental *personal* "right," we presumably will not regard that right as properly relinquishable by the action of Chelsea's incumbent school committee in authorizing the agreement, or by the committee's forbearance from time to time to terminate the agreement, however representative that committee may be of majority sentiment in Chelsea. *Cf.* Lucas v. General Assembly, 377 U.S. 713, 736 (1964) ("[a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied . . . by a vote of a majority of a State's electorate").

204. And thus denies them equal protection of the laws guaranteed by the fourteenth amendment.

205. Identifying a "fundamental interest" capable of exacting "strict scrutiny" of the takeover law might well be crucial to the argument. The legislative finding of a special educational crisis in Chelsea, *see* 1989 MASS. ACTS ch. 133, § 2, might well satisfy rational-basis scrutiny. Under strict scrutiny, the state would have to justify its failure to try less discriminatory alternatives, such as increasing its funding or improving its supervisory and other policy support for the Chelsea school district.

206. *See generally* Nahmod, *Reflections on Appointive Local Government Bodies and a Right to an Election*, 11 DUQ. L. REV. 119 (1972) (discussing the constitutional arguments that could be made to support the right to an elective as opposed to an appointive body).

207. San Antonio Unified School Dist. v. Rodriguez, 411 U.S. 1, 33-34 n.74 (1973) (quoting Dunn v. Blumstein, 405 U.S. 330, 336 (1972)) (emphasis added).

one. Such an interest is not infringed by the Chelsea school arrangement.

The apparent distinction is that between intra- and inter-jurisdictional discrimination with respect to political enfranchisement. Intra-jurisdictional discrimination gives rise to what we may call an "equal footing" type of voting-equality claim. Inter-jurisdictional discrimination gives rise to what we may call a "right to politics" type of voting-equality claim. Establishing the constitutional-legal fundamentality of any sort of "right to politics," as distinguished from a right to an equal footing in whatever politics there are in one's neighborhood, is work that remains to be done. One way to go about that work is by extending "fundamental" status, already accorded the equal-footing interest, to the right-to-politics interest. That means persuading the relevant audience that the values underlying the fundamentality of the former apply equally to the latter.

It does not take extended reflection to see that the more an audience is gripped by visions of political activity as a strategic (as opposed to deliberative) and instrumental (as opposed to self-constitutive) affair, the more prone it will be to view equal-footing claims as quite different from and much stronger than right-to-politics claims. Anyone advocating the unconstitutionality of the Chelsea school takeover therefore would have reason to excavate and exhibit the traces — however "ideological"[208] — of dialogic political vision, and of its deliberative-*ethos* and constitutive-value components, contained in the country's constitutional "jurisprudence" to date. And so would any of the rest of us in whose eyes the dialogic ideal is a progressive one.[209]

---

208. *See generally* Mensch & Freeman, *Hobbesian America*, *supra* note 10.

209. *Cf.* P. RICOUER, HERMENEUTICS AND THE HUMAN SCIENCES 99 (J. Thompson tr. 1981):

> In the modern capitalist system . . . the ancient Greek question of the 'good life' is abolished in favor of the functioning of a manipulated system. The problems of *praxis* linked to communication — in particular the desire to submit important political questions to public discussion and democratic decision — have not disappeared; they persist, but in a repressed form . . . . [G]ranted that ideology today consists in disguising the difference between the normative order of communicative action and bureaucratic conditioning, . . . how can the interest in emancipation remain anything other than a pious vow, save by embodying it in the reawakening of communicative action itself? And upon what will you concretely support the reawakening of communicative action, if not upon the creative renewal of cultural heritage?

Pace Mensch & Freeman, *Hobbesian America*, *supra* note 10, at 583 n.6, there is nothing in the argument of E. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988), to refute the "renewable" presence in the "cultural heritage" of American constitutionalism of an ideal of self-government through democratic communicative

The aim of the excavation is confrontation. The result of confrontation is unpredictable: it might be incomprehension, denial, or repudiation. Or it might be progress. If you ask me, the odds on progress are not favorable. That, however, is not a reason for not trying if there is nothing much to lose. And what is there to lose?

---

action. Among Morgan's chief, declared purposes in recounting the ideological (fictive, dramaturgical, opportunistic) aspects of the origins and content of the idea of the people self-governing are those of questioning the distinction between (viable) political fiction and political truth, and affirming ideology's utopian potential. Morgan undertakes to show how "the fictional qualities of popular sovereignty sustain rather than threaten the human values associated with it," and how the fiction "has provided the leverage for political and social changes that have brought our institutions into closer proximity" to "the aspirations it fosters." *Id.* at 14-15, 38; *see id.* at 24-25, 37, 63, 90-91, 152, 230, 256, 306.