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The First Amendment and Distributional Voting Rights Controversies

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THE FIRST AMENDMENT AND DISTRIBUTIONAL VOTING RIGHTS CONTROVERSIES

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I. INTRODUCTION

Judicial decisions which determine the validity of state systems for distribution of the voting franchise contain a constitutional analysis which is quite perplexing. Distributional questions frequently arise in two contexts. In reapportionment cases, the distributional issue usually pertains to the relative weight given ballots cast by individual voters, although it may also derive from the way in which the boundary of an election district is drawn. In voter qualification cases, the distributional issue derives from the exclusion of some persons from the franchise.[1]

The remarkable aspect of constitutional analysis of distributional controversies pertaining to voting rights is the fact that first amendment principles are not incorporated into or even mentioned in the analysis. Distributional issues are typically perceived as equal protection problems or, increasingly, as problems of institutional structure, representational systems, and group rights.

This Article asks a simple but important question. Why have courts in general, and the Supreme Court in particular, failed to develop a sophisticated first amendment analysis of individual rights in distributional voting rights controversies? That first amendment principles are relevant to these controversies is not a novel proposition. Alexander Bickel,[2] Alexander Miekeljohn,[3]

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1. A distinction should be drawn between those distributions which exclude some persons from voting or consign voters to particular districts, and those which give different weights to votes cast by different groups of voters. *Compare* Gaffney v. Cummings, 412 U.S. 735 (1973) *and* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) *and* Gomillion v. Lightfoot, 364 U.S. 339 (1960) *with* Reynolds v. Sims, 377 U.S. 533 (1964). The former are important because they determine what groups of persons will vote for a given candidate or issue. The latter are important because they create categories of preferred voters.

2. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 59-60 (1978) (The right to vote should be "assimilated" with first amendment rights in order to avoid subjective judicial judgments in voting rights analysis) [hereinafter cited as A. BICKEL].

3. A. MIEKELJOHN, POLITICAL FREEDOM (1960) [hereinafter cited as A. MIEKELJOHN]. Miekeljohn characterizes the "citizen who votes 'Aye' or 'No' on an issue of public policy" as a person who engages in a form of speech entitled to first amendment protection. *Id.* at 40. Miekeljohn's comments are not limited to votes cast in referendum elections but apply equally to the selection of candidates for office. Miekeljohn makes an ambitious argument that "[t]he principle of the freedom of speech ... is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." *Id.* at 27. In his view, the first amendment is a derivative of the right to universal suffrage. *See also* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 9 (1969) [hereinafter cited as C. BLACK]. In contrast, this Article assumes that there is no entitlement to the franchise in state and local elections. It makes the more limited argument that, once the franchise is extended to

and others,[4] have suggested that it would not be inappropriate for courts to analyze voting rights controversies using first amendment principles. Their suggestions have an intuitive appeal. When a voter casts a ballot in a general election, he or she is expressing an opinion on the qualifications of a candidate or on the policies proposed for implementation by government. Qualification as a voter creates the right to express oneself in a unique and special forum.

Although the Supreme Court has begun to develop a first amendment analysis for nondistributional voting rights controversies, it has generally ignored the first amendment in distributional controversies.[5] It has preferred to view distributional controversies as issues of equal protection or, occasionally, as issues of group rather than individual rights. A number of seminal Supreme Court decisions in the area of distributional voting rights have implicated first amendment values, but these values have been obscured by the use of an equal protection rhetoric.

The Court's persistence in this regard is surprising. The equal protection analysis to which the Court adheres is concededly unsatisfactory. It embroils courts and litigants in an irresolvable debate about whether the right to vote is constitutionally fundamental.[6] The equal protection analysis has been further criticized because it is, at heart, meaningless;[7] it neither satisfactorily explains the results in voting rights controversies in which it has been used[8] nor serves as an adequate limiting principle for future controversies.[9] The increasing tendency of equal protection analysis to focus on group rights is equally unsatisfactory.[10]

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individuals, a state cannot differentiate among potential voters because of their opinions, which might influence the way in which they cast their ballots.

4. *See, e.g.*, 1 N. DORSEN, P. BENDER & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 848-49 (1976); Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1-2 ("the right to vote is the First Amendment right par excellence") [hereinafter cited as Casper]; Elder, *Access to the Ballot by Political Candidates*, 83 DICK. L. REV. 387, 402 (1979); Howard & Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, 1639 n.104 (1983); Note, *The Election Ballot as a Forum for the Expression of Ideas*, 32 DEPAUL L. REV. 901 (1983).

5. Occasionally, members of the Court have suggested that the vote is an expression of individual belief. *See, e.g.*, Clements v. Fashing, 457 U.S. 957, 986 n.8 (1982) (Brennan, J., dissenting) (voters assert their views on public issues by casting their ballots for candidates); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

6. *See* notes 18-44 *infra* and accompanying text.

7. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. J. 1063 (1981); Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

8. *See* notes 18-44 & 55-58 *infra* and accompanying text.

9. *See* notes 125-42 *infra* and accompanying text.

10. *See* notes 237-63 *infra* and accompanying text.

The Court's reluctance to develop an alternative, first amendment analysis in distributional voting rights controversies may stem, in part, from an unwillingness to proscribe the use of shared opinion as an organizational criterion for the political communities formed by vote distributions. Application of first amendment principles to distributional controversies would not permit political communities to be formed on the basis of shared voter beliefs or opinions. Political interest groups of persons who share a common ideology could not be the focal point for vote distribution schemes.

This consequence of a first amendment analysis is potentially at odds with judicial assumptions about the inherent nature of political communities.[11] Justice Stevens, who generally appears to be amenable to greater reliance on the first amendment in voting rights controversies,[12] has authored several opinions which are instructive on this point. Justice Stevens' opinions evidence uneasiness about attempts to eliminate shared values as a proper organizational basis for political communities. He has argued that "[i]f the [political] process is to work, it must reflect an awareness of group interests and it must tolerate some attempts to advantage or to disadvantage particular segments of the voting populace."[13] He assumes that state regulation of the franchise is often tied to political viewpoint and legislative predictions of how certain groups are likely to vote.[14] For example, legislative dis-

11. The Supreme Court has stated, for example, that it should not undertake "the impossible task of extirpating politics from ... the essentially political processes of the ... States." Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

12. *See* Clements v. Fashing, 457 U.S. 957 (1982) (Stevens, J., concurring in part). In *Clements* Justice Stevens was willing to examine whether a statute restricting access to the ballot promoted one viewpoint at the expense of others. *Id.* at 973 (Stevens, J., concurring in part). He decided that it did not, and therefore rejected the plaintiffs' first amendment argument. *Id.* at 974-75 (Stevens, J., concurring in part). In Anderson v. Celebrezze, 103 S. Ct. 1564 (1983), the majority opinion authored by Justice Stevens relied directly on the first amendment rather than on the equal protection clause to invalidate an Ohio law regulating third-party candidacies. *Id.* at 1569 n.7. In other cases, he has not hesitated to impose a burden of justification on state distributional schemes which seem to disadvantage economic and political groups as well as racial groups; this indicates that he perceives the rationale for the Court's recent voting rights decisions to be something other than an equal protection prohibition against invidious racial discrimination. *See also* Karcher v. Daggett, 103 S. Ct. 2653, 2667-70 (1983); Rogers v. Lodge, 458 U.S. 613, 650-52 (1982) (Stevens, J., dissenting).

13. Mobile v. Bolden, 446 U.S. 55, 91 (1980) (Stevens, J., concurring); *see also* Rogers v. Lodge, 458 U.S. at 650-52.

14. *See, e.g.*, Karcher v. Daggett, 103 S. Ct. 2653, 2667 (1983) (Stevens, J., concurring); Mobile v. Bolden, 446 U.S. 55, 87-88 (1980) (Stevens, J., concurring); Cousins v. City Council, 466 F.2d 830, 851-52 (7th Cir.) (Stevens, J., dissenting), *cert. denied*, 409 U.S. 893 (1972).

tricting is not always politically neutral.[15] Additionally, when a city eschews at-large elections in favor of single-member districts in order to achieve an approximation of group political strength at the representative level of government, the city government may not have made a decision which is neutral in first amendment terms.[16] Furthermore, Justice Stevens has noted that when groups "identify themselves by a common interest . . ., heritage, . . . *belief* or by their race, that characteristic assumes significance as the bond that gives the group cohesion and political strength."[17] Acceptance of Justice Stevens' assumptions makes it difficult, if not impossible, to apply first amendment principles to distributional voting rights controversies. If the integrity of political communities is tied to beliefs or shared values, first amendment principles cannot be applied to schemes for distribution of the franchise without threatening the community's integrity. The application of first amendment principles to distributional schemes which define political communities is simply inconsistent with a fundamental attribute of those communities.

This Article asserts that application of first amendment principles to distributional voting rights controversies is not inappropriate. Unlike many communities which are defined by, and have cohesion only because of, the shared values or beliefs of individual community members, the political communities formed as a result of franchise distributions are historically and constitutionally unique. They are not mere governmental counterparts to political interest groups. They are, in an appropriate and important sense, communities without values.

Courts are accustomed to applying first amendment principles to nondistributional voting rights controversies to protect the belief-oriented and associational rights of voters. They are also familiar with the historical struggle of minority voting groups to ensure that specific vote distributions provide an effective mechanism for the expression of their shared political beliefs. Therefore, courts initially may be reluctant to accept the proposition that political communities formed by vote distributions must, under the first amendment, be neutral with respect to political beliefs. The proposition is not, however, radical. The argument is in the best tradition of first amendment analysis in non-voting rights controversies affecting the structure of political communities. It is consistent with at least one reading of the intellectual and philosophical underpinnings of the Constitution, and opens the way to a constitutional analysis which is potentially clearer

15. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735 (1973).

16. *See, e.g.*, United Jewish Orgs. of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977).

17. *Rogers v. Lodge*, 458 U.S. at 650 (emphasis added).

and more productive than the equal protection analysis which currently dominates legal debate. This Article explores the proposition that political communities formed through the distribution of voting rights should be protected under the first amendment.

II. CONTEMPORARY EQUAL PROTECTION ANALYSIS OF DISTRIBUTIONAL CONTROVERSIES

Any discussion of how first amendment principles might apply to distributional voting rights controversies must be prefaced by a brief review of the conventional equal protection analysis of those controversies. Although much has been written about reapportionment and voter qualification controversies, no satisfactory discussion of either exists because of a single issue which dominates and confuses the debate. That issue is whether the right to vote is constitutionally fundamental. According to judicial precedent and conventional wisdom, that issue must be decided before a court can proceed with an equal protection analysis. Except in those cases in which distributional schemes are based on racial or other constitutionally suspect classifications, the decision of whether voting rights are fundamental is what determines whether a given distribution will be tested merely for its rationality, or whether it will be subjected to a stricter scrutiny.[18]

Unambiguous guidelines for deciding whether voting is a fundamental right are not to be found in the text of the Constitution, the governmental structures envisioned by it, or the discernible intent of its Framers. On the basis of the same constitutional text and related historical materials, scholars have argued both for and against the proposition that the vote is a fundamental right under the Constitution.[19] Frequently, their arguments are augmented by appeal to political tradition or cultural expectation. Michael Perry, for example, posits that it is "wholly unnecessary for the Court to declare that there is a

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18. Rationality and strict scrutiny are, of course, two levels of judicial scrutiny conventionally applied in equal protection analysis. Strict scrutiny is applied in equal protection cases if a classification either burdens a fundamental right or is suspect. Clements v. Fashing, 457 U.S. 957, 962-63 (1982). *See* Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 26-33 (1977) (application of this principle to voting rights cases) [hereinafter cited as Karst].

19. *See, e.g.*, J.H. ELY, DEMOCRACY AND DISTRUST 118 (1980) [hereinafter cited as J.H. ELY]; A. MIEKELJOHN, *supra* note 3, at 96-97 (1960); Karst, *supra* note 18, at 27-29; Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1079, 1081-83 (1979) [hereinafter cited as Perry]; Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1071 (1980).

constitutional right to vote in state elections, because the existence of the franchise as a political-moral right is unquestioned .... [That right is] constitutive of American government and politics, ... every state recognizes [it] and ... no state would think to deny [it]."[20]

The Supreme Court itself vacillates. It cannot decide how to characterize the right to vote in equal protection analysis. In the same judicial breath, the Court describes the vote as a fundamental right preservative of all rights[21] and a "privilege merely conceded by society according to its will."[22] On one hand, the Court pronounces the vote to be the "guardian of all other rights,"[23] "the foundation of our representative society,"[24] "fundamental,"[25] and "a bedrock of our political system;"[26] it declares that "the constitutional underpinnings of the right to equal treatment in the voting process are no longer doubted."[27] On the other hand, it asserts that the right to vote is not constitutionally guaranteed as a fundamental right[28] and refuses, over the objections of dissenting justices,[29] to apply strict scrutiny to all distributions of the vote. The Court's message is unclear, for the "technically correct" statement that the right to vote has never been recognized as a fundamental right appears to be at odds with the "symbolic significance and implications of the Court's jurisprudence."[30]

Individual members of the Court have on rare occasions directly confronted the basic inconsistency of the application of a rigorous scrutiny to voting rights controversies and simultaneous refusal to designate the vote a fundamental right. For example, Justice Stewart considered strict scrutiny to be inappropriate in the absence of a judicial declaration that voting is a constitutionally fundamental right.[31] More recently, Justices Brennan and

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20. Perry, *supra* note 19, at 1079.
21. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
22. *Id.*
23. Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982).
24. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626 (1969).
25. Harper v. Virginia Bd. of Elect., 383 U.S. 663, 670 (1966).
26. Reynolds v. Sims, 377 U.S. 533, 562 (1964).
27. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 34 n.74 (1973).
28. *Id.* at 35 n.78. *See also* Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982); Downes v. Bidwell, 182 U.S. 244, 282-83 (1901).
29. *See, e.g.*, Ball v. James, 451 U.S. 355, 374 (1981) (White, J., joined by Brennan, J., Marshall, J., & Blackmun, J., dissenting). *See also* Mobile v. Bolden, 446 U.S. 55, 103 (1980) (Marshall, J., dissenting).
30. Casper, *supra* note 4, at 3 n.8.
31. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 639-40 (1969) (Stewart, J., joined by Black, J., & Harlan, J., dissenting).

Blackmun have acknowledged the issue. They argue that despite the Court's refusal to characterize the vote as a fundamental right, a heightened judicial scrutiny is appropriate in voting rights cases either because the franchise is "the guardian of all other rights"[32] or because classifications pertaining to the vote pose a special risk of "allocating rights in a fashion inherently contrary to any notion of 'equality'."[33]

A majority of the Court occasionally attempts to justify strict scrutiny by finessing the question of the constitutional importance of the right to vote. A common argument is that strict scrutiny is appropriate when state political processes are not functioning properly.[34] In *Kramer v. Union Free School District No. 15*,[35] for example, the Court asserted that judicial deference to state legislative classifications is ordinarily appropriate because the Court assumes that state political institutions and processes are responsive to the wishes of the people of the state.[36] A constitutional challenge to legislative classifications for vote distribution, however, is a challenge to the institutions and processes themselves, and deference is inappropriate.[37] The *Kramer* proposition has merit in some instances, as when the apportionment of a state legislature is questioned,[38] but it does not justify the use of strict scrutiny when a properly apportioned and otherwise qualified legislature has distributed the franchise. Nevertheless, the Court has utilized strict scrutiny in the latter situation.[39]

The *Kramer* proposition not only is flawed in its application. It has even been rejected by the Court. In *Avery v. Midland County*,[40] according to Justice White:

> The majority of a State—by constitutional provision, by referendum, or through accurately apportioned representatives—can no more place a minority in oversize districts without depriving that minority of equal protection of the laws than they can deprive the minority of the ballot altogether, or impose upon

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32. Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982).

33. *Id.* at 234 (Blackmun, J., concurring).

34. *Compare* J.H. ELY, *supra* note 19, *with* Tushnet, *Darkness on the Edge of Town: The Contribution of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980) (contrasting views of this argument).

35. 395 U.S. 621 (1969).

36. *Id.* at 627-28.

37. *Id.*; *see* United States v. Carolene Prods. Co., 304 U.S. 144 (1938). The proposition in *Kramer* parallels the argument in footnote 4 to *Carolene Products*. *See* 304 U.S. at 152-53 n.4.

38. *E.g.*, Reynolds v. Sims, 377 U.S. 533, 553 (1964); Baker v. Carr, 369 U.S. 186, 251 (1962) (Clark, J., concurring).

39. *See, e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970).

40. 390 U.S. 474 (1968).

> them a tax rate in excess of that to be paid by equally situated members of the majority. Government—National, State, and local—must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of lawmakers, no matter how large the majority wishing to deprive other citizens of equal treatment or how small the minority who object to their mistreatment.[41]

The Court could not have made this argument without assuming that the right to vote is in an inherent or absolute sense important enough to be protected by the Constitution.[42] The debate in voting rights cases thus inevitably becomes a discussion of whether the right to vote is a fundamental right.[43]

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41. *Id.* at 481 n.6; *cf.* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964) (apportionment plan unconstitutional despite its adoption in a constitutionally valid, popular referendum).

42. *See* 390 U.S. 474 (1968). The decision in *Avery* involved a challenge to an apportionment scheme which was possibly immune from political redress. *Id.* at 481. Therefore, the sentiments expressed by the Court may not have had any direct bearing on the decision in *Avery*. They are, nonetheless, indicative of the prevailing judicial attitude.

Justice Powell continues to urge the Court to adopt the position that choices made by a validly constituted state legislature, even choices affecting voting rights, must be given deference. Ball v. James, 451 U.S. 355, 373-74 (1981) (Powell, J., concurring). The majority in *Ball* did not endorse Justice Powell's argument as a sufficient ground for its decision. The majority of the Court would probably agree only with the position taken by Justice Clark in Baker v. Carr, 369 U.S. 186 (1962), that this factor may give the Court a reason to exercise its equitable discretion in favor of the defendants in a voting rights case. 369 U.S. at 258-59 (Clark, J., concurring). *But cf.* Associated Enters., Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743, 744 (1973) (The Court relied on the fact that the contested election scheme had been authorized by a validly constituted legislature to support its decision).

43. Two other arguments should also be mentioned. In Hadley v. Junior College Dist., 397 U.S. 50 (1970), the Court suggested that strict scrutiny is applied in voting rights cases whenever the state indicates that the decision to be made in an election is important. *Id.* at 55. The *Hadley* argument is unsatisfactory because it suggests that the Court will interfere with state-prescribed voting schemes only if the Court determines that a state legislature believes an important decision is to be made. However, if a state legislature has differentiated among voters, giving some an advantage over others in an election, the Court should logically conclude that the state believes that the decision to be made is not universally but only qualifiedly important. The Court must ignore the state's judgment about the importance of the decision if it interferes with the election scheme. In *Hadley* itself the Court did not in fact adhere to its own admonition that there is judicial deference to state assessments of importance. *See* 397 U.S. at 53-56 (discussion of impact).

On other occasions, the Court has characterized voting schemes as being entirely arbitrary. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568 (1964); Baker v. Carr, 369 U.S. 186, 207-08 (1962). The arbitrariness analysis is also unsatisfactory as an explanation of most voting rights decisions, however, for a lack of arbitrariness frequently can be demonstrated. *See, e.g.*, Baker v. Carr, 369 U.S. at 334-49 (Harlan, J., joined by Frankfurter, J., dissenting).

The argument about whether the right to vote is fundamental and how that issue relates to the form of constitutional analysis has reached a critical evolutionary stage. In past years, the debate has shed light on judicial resolution of voting rights controversies. Additionally, the debate has promoted a careful review of the constitutional texts pertaining to the franchise and an extended discussion of the practical significance of the vote to certain groups. But the argument is no longer helpful. It results not in intellectual enlightenment, but in obscuring all other issues and alternative analyses of voting rights controversies.

The first amendment is a useful alternative to current equal protection analysis of some distributional voting rights controversies. It provides an escape from the irresolvable debate about the nature of the right to vote. It also offers a much-needed justification for the use of strict scrutiny in voting rights cases, for strict scrutiny is warranted by first amendment principles. Additionally, as the following discussion shows, a first amendment analysis has other significant advantages over a conventional equal protection analysis. Most importantly, it does not require courts to resolve complex issues of group voting rights or proportional voting systems.[44]

III. THE FIRST AMENDMENT ROOTS OF STRICT SCRUTINY IN VOTING RIGHTS ANALYSIS

Although an equal protection rhetoric dominates voting rights analysis, earlier Supreme Court voting rights decisions can be explained by first amendment principles. One of the early voting rights cases to implicate first amendment principles is *Kramer v. Union Free School District No. 15*.[45] In *Kramer* the Supreme Court reviewed the constitutionality of property ownership as a voter qualification. The plaintiff in *Kramer* resided within the boundaries of a New York school district, but the New York Education Law in effect at that time denied him the right to vote in school district elections. The law provided that eligible resi-

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44. There have been other attempts to depart from the mire of equal protection, fundamental rights debate pertaining to voting rights controversies. The most notable attempt explains the Supreme Court's voting rights decisions as preemption cases. *See, e.g.*, C. BLACK, *supra* note 3; Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 23 n.119 (1984); Perry, *supra* note 19. Although the preemption analysis is useful in understanding some decisions, *see* Evans v. Cornman, 398 U.S. 419 (1970); Carrington v. Rash, 380 U.S. 89 (1965), it cannot explain others, *see* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

45. 395 U.S. 621 (1969).

dents of school districts could vote in the school district elections only if they either owned or leased taxable real property within the school district, or were parents of children enrolled in the public schools. The plaintiff was a bachelor living with his parents and could not satisfy either of these requirements. However, he argued that as a resident he should have the right to vote in school district elections.

Much of the Supreme Court's opinion dealt with Mr. Kramer's challenge to the property ownership requirement. Because the Court had not clearly designated the vote to be a constitutionally fundamental right, an observer in 1969 might understandably have expected the Court to accord the property requirement a presumption of constitutionality and to uphold it if it were rationally related to a legitimate state objective. Therefore, the State defended its distribution of the franchise by arguing that there was a rational relationship between property ownership and the intelligent use of the ballot. The State asserted that one who is adequately informed about the issues which are the subject of an election is able to vote more intelligently, and then argued that those who own property which may be taxed as a result of an election are the ones most likely to be informed about the issues.[46]

When *Kramer* was decided, the Supreme Court had recognized that the state has a legitimate interest in the intelligent use of the ballot and that an individual's qualifications to vote have a rational relationship to that interest.[47] For example, the Supreme Court had determined that literacy is a constitutional qualification rationally related to the intelligent use of the ballot.[48]

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46. *Id.* at 631.

47. *See, e.g.*, Harper v. Virginia Bd. of Elect., 383 U.S. 663, 666, 668 (1966); Lassiter v. Northampton County Bd. of Elect., 360 U.S. 45, 51 (1059). *Cf.* Dusch v. Davis, 387 U.S. 112, 116 (1967) (candidate's residency qualification intended to ensure knowledgeability). Later decisions also recognize the legitimacy of the interest and its rational relationship to voter qualification. *See* Anderson v. Celebrezze, 103 S. Ct. 1564, 1573-74 (1983); Dunn v. Blumstein, 405 U.S. 330, 354-60 (1972); Oregon v. Mitchell, 400 U.S. 112, 206 (1970) (Harlan, J., concurring in part and dissenting in part); Oregon v. Mitchell, 400 U.S. 112, 242 (Brennan, J., White, J., & Marshall, J., dissenting).

48. *See* Lassiter v. Northampton County Bd. of Elect., 360 U.S. 45, 51-52 (1959). However, the Court also has invalidated literacy tests used to discriminate against racial minorities. *See, e.g.*, Louisiana v. United States, 380 U.S. 145 (1965); Guinn v. United States, 238 U.S. 347 (1915); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949).

The validity of literacy tests usually is not disputed in contemporary voting rights cases. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding 42 U.S.C. § 1973b (1982)). The qualifications most frequently subject to constitutional challenge pertain to property ownership or taxpayer status. *See, e.g.*, Hill v. Stone, 421 U.S. 289 (1975); Salyer Land Co. v. Tulare Lake Basin

Therefore, the state's interest in the intelligent use of the ballot should have justified dissimilar treatment of individual voters.

The Court did not disagree with the State's assumption that property ownership would produce knowledgeable voters in school district elections. Nonetheless, the Court invalidated the property requirements. The court appeared to agree with plaintiff's argument that property ownership was not the only thing that could generate sufficient interest in school district elections to promote an intelligent use of the ballot.[50] Plaintiff asserted that he was both interested in and affected by school district decisions; "[a]ll members of the community have an interest in the quality and structure of public education . . . ."[51] In addition, he argued that the level of property taxation affects *all* residents of the school district because "tax levels affect the price of goods and services in the community."[52] Moreover, the Court noted that the statute permitted some persons to vote despite their relatively remote and indirect interest in school affairs.[53] Given these facts, the Court was unwilling to uphold the property ownership requirements. According to the Court, the State failed to justify the property requirement because it had not shown that "those excluded [from the election] are in fact substantially less interested or affected than those the statute includes."[54]

The decision in *Kramer* conventionally has been interpreted as an equal protection decision. It is fraught with assertions that the right to vote is at the "foundation of our representative

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Water Storage Dist., 410 U.S. 719 (1973); Police Jury v. Hebert, 404 U.S. 807 (1971); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Stewart v. Parish School Bd., 310 F. Supp. 1172 (E.D. La. 1970), *aff'd*, 400 U.S. 884 (1970). Wealth and occupation have also been challenged when used to restrict the right to vote. *See, e.g.*, Harper v. Virginia Bd. of Elect., 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89, 96 (1965); Gray v. Sanders, 372 U.S. 368, 380 (1963). *Cf.* Lubin v. Panish, 415 U.S. 709 (1974) (requiring candidates to pay filing fees as means of selection does not further state's interest in election integrity).

49. 395 U.S. at 632-33. *See* Harper v. Virginia Bd. of Elect., 383 U.S. 663, 684-85 (1966) (Harlan, J., joined by Stewart, J., dissenting) (a discussion of the rationality of the relationship between property ownership and the intelligent exercise of the franchise).

50. 395 U.S. at 632 n.15. By statute, the State had provided that even lessors of taxable real property could vote. *Id.* at 634 (Appendix to the Opinion). The Court also noted that the State had recognized that other residents, *i.e.*, parents of school children, would have an interest in the election. *Id.* at 631.

51. *Id.* at 630.

52. *Id.*

53. *See, e.g., id.* at 632 (an unemployed, single, childless person who rented an apartment could vote).

54. *Id.*

society,"[55] and is "preservative of other basic civil and political rights."[56] Debaters frequently return to the opinion whenever the question of whether the right to vote is fundamental arises.[57] However, if the decision in *Kramer* is simply an equal protection opinion it is an extremely confusing one. The rational basis test usually applied in equal protection cases does not require a state to formulate precise distinctions between residents with conceivably varying degrees of interest in an election. If the state rationally believes that property owners, who are directly taxed by the school district, will be somewhat more interested in the outcome of an election than others more indirectly affected, the voter qualification ought to be upheld as long as it burdens no fundamental right. Given the Court's refusal to declare that voting rights are fundamental, the invalidation of the property qualification is perplexing.

A better interpretation of *Kramer* is as a decision which protects first amendment rights; it does not rest solely on the equal protection clause and the presumed fundamental nature of voting rights. There are two aspects of the *Kramer* decision which support this interpretation.

The first ground of support rests on a somewhat technical point. In *Kramer*, the Supreme Court cited another of its decisions, *Carrington v. Rash*,[58] to justify its refusal to defer to the State's rational explanation for the requirement of property ownership for voter qualification.[59] The plaintiff in *Carrington* was a serviceman stationed in Texas who was refused the right to vote in Texas elections.[60] The State of Texas had argued that it was justified in excluding servicemen from the vote to "prevent the danger of a 'takeover' of the civilian community resulting from concentrated voting by large numbers of military personnel in bases placed near Texas towns and cities."[61] Texas argued that a base commander who opposed local police administration or teaching policies in local schools, might influence his men to vote in conformity with his predilections. Local bond issues might fail,

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55. *Id.* at 626.

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

57. *See, e.g.*, Cousins v. Wigoda, 419 U.S. 477, 489 (1975); Millikan v. Bradley, 418 U.S. 717, 746 n.21 (1974); Richardson v. Ramirez, 418 U.S. 27, 77 (1974) (Marshall, J., joined by Brennan, J., dissenting).

58. 380 U.S. 89 (1965).

59. *Kramer*, 395 U.S. at 627. Reynolds v. Sims, 377 U.S. 533 (1964) was also cited as authority for using strict scrutiny in vote *dilution* cases. *Kramer*, 395 U.S. at 626. However, *Carrington* was the only voter *exclusion* case cited. *Id.* at 627.

60. 380 U.S. at 89-91.

61. *Id.* at 93.

and property taxes stagnate at low levels because military personnel might be unwilling to invest in the future of the area.[62] The Supreme Court responded that, although Texas had the right to require all military personnel to be bona fide residents of the community before giving them the vote, a state had no legitimate interest in excluding persons from an election because of their political opinions or the way in which they might vote.[63] Although the first amendment was not cited in *Carrington*, the Supreme Court was clearly concerned with ensuring that persons with disfavored political opinions were not put at a disadvantage by the state. That concern is usually identified as a first amendment concern.

Second, the arguments in *Kramer* are consistent with the inference, drawn from the Court's citation of *Carrington*, that first amendment principles were at issue in *Kramer*. New York argued that a person with a pecuniary interest in the outcome of an election would be more likely to make intelligent use of the ballot. The argument that a voter will not use the ballot intelligently without adequate knowledge of the issues involved may in reality mask a concern that a voter will not cast the ballot in conformity with favored political beliefs. In *Kramer*, quite probably the Supreme Court was concerned with New York's use of the property requirement to exclude persons with disfavored political opinions rather than to ensure intelligent voting.

This interpretation of *Kramer* as a first amendment decision is supported by *Dunn v. Blumstein*,[64] a subsequent voting rights decision. In *Dunn* the Supreme Court revealed its sensitivity to the first amendment by explicitly warning that qualifications, purportedly relevant to ensuring knowledgeable voters, could be abused if used to ensure that voters possess an acceptable viewpoint. The Court cited *Kramer* in support of its position.[65]

In *Dunn* the State of Tennessee had attempted to justify a one-year residency requirement for voters by arguing that the residency requirement would "afford 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 and is, therefore, more likely to exercise his right [to vote] more intelligently."[66] The Supreme Court rejected the State's argument that it had a legitimate interest in ensuring

62. *Id.*

63. *Carrington*, 380 U.S. at 94. The Court also rejected the proposition that occupation was a permissible basis on which to classify members of a political unit. *Id.* at 96 (citing Gray v. Sanders, 372 U.S. 368, 380 (1963)).

64. 405 U.S. 330 (1972).

65. *Id.* at 336.

66. *Id.* at 345.

that all voters share a common interest with respect to matters of government.[67] The Court indicated that too often the lack of a common interest may mean no more than a different interest, and differences of opinion cannot be the basis for excluding any group or person from voting.[68] The Court suggested that the criterion of "intelligent voting," as defined by the State of Tennessee, was arguably no different from the illegitimate criterion of "common interest."[69] In drawing this comparison, the Court noted that the criterion of "intelligent" voting is "elusive" and "subject to abuse."[70] The Court cited *Kramer* for the proposition that the residency requirement was unconstitutional because Tennessee did not demonstrate that people who have resided in the state for less than one year are any less informed than those whose residence has been of longer duration.[71] Significantly, the citation of *Kramer* was utilized in conjunction with an argument that implicated first amendment values.

Despite the fact that *Kramer* does not contain first amendment rhetoric, a first amendment interpretation of the case is consistent with the Court's analysis. The Court in *Kramer* questioned neither the conceptual legitimacy of the state's asserted interest in knowledgeable voters, nor the assumption that potential voters might be classified into voting and non-voting groups depending on their varying interests.[72] However, the Court did require the state to produce convincing evidence that "those [potential voters] excluded are in fact substantially less interested or affected than those the statute includes."[73] By requiring that evidence, the Court sought assurance that the alleged differences between the interests of property owners and non-property owners created a genuine basis for classification and did not merely serve as a proxy for anticipated differences in viewpoint about

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67. *Id.* at 354-56.

68. *Id.* at 355 (citing Evans v. Cornman, 398 U.S. 419, 423 (1970); Cipriano v. City of Houma, 395 U.S. 701, 705-06 (1969)). In *Dunn* the Court pointed out that even the national legislature distrusts the criterion of knowledgeability. *Id.* at 357 n.29. *Cf.* Oregon v. Mitchell, 400 U.S. 112 (1970); *id.* at 242-46 (Brennan, J., concurring in part & dissenting in part). Justice Brennan argued that Congress could reasonably conclude that voting age qualifications are really unrelated to a legitimate interest in knowledgeability and, in response, could lower the voting age to 18 in state elections.

69. *Dunn*, 405 U.S. at 355.

70. *Id.* at 356. The Court then concluded that durational residence requirements cannot be justified on the basis of knowledgeability, but refrained from ruling on the extent to which a state may bar voting by less knowledgeable or less intelligent citizens. *Id.*

71. *Id.* at 357.

72. *Kramer*, 395 U.S. at 632.

73. *Id.*

the way in which the powers of a school district, including the power to tax real property, ought to be exercised.

Subsequent decisions have interpreted *Kramer* as a decision in which the Court applied a conventional form of equal protection strict scrutiny,[74] but the "substantially less interested or affected" test employed in *Kramer* differs from conventional strict scrutiny. The Court in *Kramer* did not require the State to demonstrate that the method chosen to distribute the franchise was necessary to further the identified and compelling objective of ensuring that votes are cast knowledgeably.[75] Rather, the Court required the State to produce convincing assurances that the property ownership qualification was a legitimate criterion for distributing the franchise.[76] The Court employed the "substantially less interested or affected" test to guard against the risk that the property requirement served as a proxy for political opinion.

Two other Supreme Court decisions rendered after *Kramer* arguably support this interpretation. The opinions in both *Cipriano v. City of Houma*,[77] and *Evans v. Cornman*,[78] discussed *Kramer* in conjunction with *Carrington*. Subsequently, some of the elements of the *Kramer* argument lost significance. Although the *Kramer* analysis focused on interest, effect, voter knowledgeability, and the state's interest in the intelligent use of the ballot, in the Court's most recent constitutional decision on voting rights in a local election,[79] both the Court and the litigants had shortened the analysis to focus on interest and effect alone. The issue, distorted by the force of conventional equal protection debate, had become whether a person's interest in an election, and the election's anticipated effect upon him, were sufficiently significant in and of themselves to require the extension of the franchise.[80] The *Kramer* test did not serve as an evidentiary yardstick for determining whether the franchise had been distributed on the basis of voter opinion. It was used as a constitutional yardstick for measuring fairness. That use obscured *Kramer*'s first amendment roots.

Kramer and its progeny are not the only voting rights decisions with first amendment roots. Other cases also implicate first

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74. *See, e.g.*, O'Brien v. Skinner, 414 U.S. 524, 533 (1974) (Marshall, J., joined by Douglas, J., & Brennan, J., dissenting); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 726 (1973).

75. Kramer v. Union Free School Unit No. 15, at 621 & 632-33 (1969).

76. *Id.* at 633.

77. 395 U.S. 701, 706 (1969).

78. 398 U.S. 419, 423 (1970).

79. Ball v. James, 451 U.S. 355 (1981).

80. *See* text accompanying note 135 *infra*. The *Ball* opinion hinted that the first amendment and *Carrington* analysis might apply in *Ball*. 451 U.S. at 384 n.8. However, none of the Justices argued that point.

amendment principles and concerns, although, as with *Kramer*, those principles and concerns are obscured by conventional equal protection rhetoric and interpretation.

One line of cases is characterized by *Hunter v. Erickson*.[81] In *Hunter* voters in the City of Akron had amended their city charter so that any ordinance intended to prohibit racial discrimination in housing required referendum approval by a majority of voters.[82] All other ordinances could be adopted pursuant to the city's usual, legislative process.[83] The Supreme Court declared the charter amendment unconstitutional in an unusual opinion.[84] After acknowledging that the charter provision drew "no distinction among racial and religious groups,"[85] the Court, nonetheless, objected that the impact of the amendment fell "on the minority"[86] and placed "special burdens on racial minorities within the governmental process."[87] The Court invalidated the charter provision because of the decisions in earlier racial discrimination and equal protection cases.[88]

The charter provision in *Hunter* may have been disadvantageous to racial groups, but it also made it more difficult for opponents of racial discrimination in housing to have that point of view enacted into law. Therefore, the charter embodied a classification based as much on political philosophy as on race. Subsequently, in *Gordon v. Lance*,[89] the Supreme Court itself construed *Hunter* as prohibiting a city from fencing out a certain sector of the population "because of the way they will vote."[90] The Court cited *Carrington* in support of its interpretation.[91] Most subsequent applications of the *Hunter* decision, however, have stressed only the impact of the challenged political processes on racial groups,[92] obscuring the fact that those processes were oriented against a particular point of view as well as against a particular racial group. Notwithstanding these interpretations, *Hunter* and its progeny clearly implicate first amendment concerns.

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81. 393 U.S. 385 (1969).
82. *Id.* at 387.
83. *Id.* at 390.
84. *Id.* at 393.
85. *Id.* at 390.
86. *Id.* at 391.
87. *Id.*
88. *Id.* at 391-92.
89. 403 U.S. 1 (1971).
90. *Id.* at 5.
91. *Id.*
92. *See, e.g.*, Crawford v. Board of Educ., 458 U.S. 527 (1982); Washington v. Seattle School Dist., 458 U.S. 457 (1982); James v. Valtierra, 402 U.S. 137 (1971); Reitman v. Mulkey, 387 U.S. 369 (1967).

Other voting rights decisions, involving racial bloc voting, also implicate first amendment principles. In those decisions, primarily reapportionment cases, the stated issue is usually whether a particular election scheme discriminates on the basis of race. For example, the plaintiffs may argue that multimember election districts are unconstitutional, or unlawful under the Voting Rights Act, because they reduce the chances that a black voting minority will be able to elect the representatives they prefer. Both litigants and courts assume that one can predict how a certain group will vote simply by looking at its racial composition. The plaintiffs' argument is usually framed in terms of vote dilution. The defendants are accused of racial discrimination against black voters. However, the defendants could as easily be accused of having used multimember districting to render ineffective the votes of a particular group because the group would be likely to vote in a particular, disfavored way. If one focuses on the fact that such districting schemes are intended to weaken the voting strength of politically cohesive groups, instead of on the racially discriminatory impact alone, it is clear that first amendment issues are implicit in this type of voting rights controversy.

For example, in *Beer v. United States*,[93] the city of New Orleans sought a declaratory judgment under section five of the Voting Rights Act of 1965 that a reapportionment of councilmanic districts was lawful.[94] The judicial analysis apparently proceeded on the assumption that elections in New Orleans were characterized by bloc voting along racial lines,[95] thereby enabling one to predict how a certain group would vote based on its racial composition. In *United Jewish Organizations of Williamsburg, Inc. v. Carey*,[96] the assumption that persons would vote along racial lines was so important to the analysis that the majority[97] and the dissent[98] disagreed about whether the assumption was valid. In neither case, however, did the Court incorporate first amendment principles into the voting rights analysis, despite the fact that in both cases the primary importance of the pattern of racial bloc voting was as an indication of how certain groups would cast their ballots. The first amendment implications of the cases were obscured by the language of racial discrimination. Although distributional controversies like those in *Beer* and *United Jewish*

93. 425 U.S. 130 (1976).

94. *Id.* at 133 (citing § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(d) (1982)).

95. *Id.* at 137; 425 U.S. 130, 144 (1976) (White, J., dissenting); 425 U.S. 130, 159 (1976) (Marshall, J., joined by Brennan, J., dissenting).

96. 430 U.S. 144 (1977).

97. *Id.* at 166, n.24.

98. *Id.* at 184-85 (Burger, J., dissenting).

Organizations arise because black voters have been discriminated against on the basis of their race,[99] they also arise because race is used to predict how votes will be cast. When a distributional scheme is based on that prediction, it implicates first amendment as well as equal protection principles.[100]

Given the clear presence of first amendment concerns in many of the Supreme Court's voting rights decisions, it is interesting that the Court has not suggested a first amendment rationale as a justification for the use of strict scrutiny in voting rights analysis. There are, of course, situations in which the Court has utilized first amendment principles in voting rights controversies. When candidacy restrictions have an impact on the associational rights of voters,[101] for example, the Court's analysis fits within a first amendment framework. However, the Court has examined neither the proposition—implicit in *Carrington*, *Kramer*, and other voting rights decisions—that a vote is an expression of individual political belief, nor the ramifications of that proposition for state distributions of the franchise.

IV. Preconditions To a First Amendment Analysis

A. Recognition of the Variety of Shared Interests That Lend Integrity to Political Communities

In the introduction to this Article, it was suggested that the Supreme Court's failure to develop a first amendment analysis for distributional voting rights controversies stems from the perceived irreconcilability of first amendment principles with the nature of political communities. Although this perceived irreconcilability is the basis of the problem, it is not the only difficulty. In addition, the Supreme Court must free itself of mistaken assumptions about the nature of political communities which renders its analysis prey to a rhetoric that obscures issues. Although the preceding discussion serves as partial proof of this point, the extent to which mistaken assumptions and rhetoric dominate the analysis of distributional controversies is most

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99. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960).

100. *See* City of Lockhart v. United States, 460 U.S. 125 (1983); Port Arthur v. United States, 459 U.S. 159 (1982); Rogers v. Lodge, 458 U.S. 613 (1982); City of Rome v. United States, 446 U.S. 156 (1980) (cases involving patterns of racial bloc voting).

101. *See, e.g.*, Clements v. Fashing, 457 U.S. 957 (1982); Lubin v. Panish, 415 U.S. 709 (1974); Kusper v. Pontikes, 414 U.S. 51 (1973); Williams v. Rhodes, 393 U.S. 23 (1968). Recently, the Court has declared that a filing deadline for independent candidates was unconstitutional because of its impact on associational rights. Anderson v. Celebrezze, 460 U.S. 780, 786 n.7 (1983).

clearly revealed in another line of voting rights decisions. In these cases, residence played a key role.

Residence within the corporate geographic boundaries of a government unit is the shared attribute which is most frequently identified as giving integrity to a political community of voters. The assumption that residence is uniquely and universally important to the integrity of any political community may stem from conventions associated with our most familiar political communities. For example, when a person moves into a city he or she typically qualifies as a voter in a political community consisting of all residents. As long as the person remains within the corporate geographic boundaries of the community, he or she is qualified to vote. The assumption may also be related to notions of fairness. The legitimate exercise of governmental power is generally restricted to fixed geographic areas.[102] Therefore, as a matter of fairness, the right to vote on how that governmental power will be exercised presumably should be distributed to all persons residing within those fixed geographic boundaries. The assumption that such distributional schemes are equitable lies at the heart of the claim that there should be "no taxation without representation."[103]

A careless reading of judicial pronouncements may reinforce the idea that there is a necessary link between residence and vote distributions that create political communities. For example, in decisions applying the constraints of the interstate privileges and immunities clause[104] to state action, the Supreme Court has used the term "citizen"—which may connote a right to vote—interchangeably with the term "resident."[105] In the interpretation of a constitutional provision intended to preserve interstate harmony and the larger community of the United States against disruptive, parochial interests,[106] interchangeable use of the two

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102. "[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State." Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 9, at 18 (Judgment of Sept. 7). *See also* J. LOCKE, THE SECOND TREATISE OF GOVERNMENT ch. V, § 45, ch. VIII, §§ 120-22 (1690); J.J. ROUSSEAU, THE SOCIAL CONTRACT bk. II, ch. 10 (1762); THE FEDERALIST No. 14, at 83-84 (J. Madison) (ed. J. Cooke 1961); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (1962).

103. *Cf.* text accompanying note 137 *infra.*

104. U.S. CONST., art. IV, § 2.

105. *See, e.g.*, United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 104 S. Ct. 1020, 1026 (1984) (citing Austin v. New Hampshire, 420 U.S. 656, 662 n.8 (1975)). Most laypersons believe that "citizen" means a member of a political community.

106. *Id.* at 1026.

terms may be acceptable; however, the usage might be inappropriate and confusing if employed in a different context. For example, in its discussions of national citizenship, the Court has never suggested that residency alone suffices to make an individual a member of the national political community.[107] Residence in the community may play a role in qualifying an individual for national citizenship,[108] but does not in and of itself give rise to that status.[109]

No reason exists why geographic links among individuals must constitute the shared interest around which a political community of voters will be organized.[110] Distribution of the vote and mem-

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107. *See* Sugarman v. Dougall, 413 U.S. 634, 651-54 (1973) (Rehnquist, J., dissenting).

108. *See, e.g.*, 8 U.S.C. §§ 1401-23, 1427-46 (1982) (acquisition of United States citizenship by birth or naturalization is dependent upon the physical presence within the United States or its outlying possessions (during specified periods of time) of either the petitioner, the petitioner's parents or spouse, or both); 8 U.S.C. § 1451(d) (1982) (naturalized citizenship of an individual may be revoked within five years of naturalization if the individual takes up permanent residence in a foreign country).

109. Moreover, geographic links may relate as much to subordinate political communities as to individuals. For example, the United States is an association of regional political communities. The Constitution gives representation to states as states in the Senate and in the Electoral College. U.S. CONST. art. I, § 3; art. II, § 1; & amend. XII. The Constitution may be ratified only upon the concurrence of three-fourths of the states. U.S. CONST. art. V. In the not too distant past, the Supreme Court attempted to develop an explicit theory that states have rights *qua* states under the Constitution. *See, e.g.*, U.S. CONST. amend. X; National League of Cities v. Usery, 426 U.S. 833 (1976); Garcia v. San Antonio Metro. Transit Auth., 103 S. Ct. 1005, *reh'g denied* 103 S. Ct. 2041 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)). *See also* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L. J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

110. The relevant political community for the purposes of this Article is the community whose membership is created through distribution of the right to vote. Obviously, political communities may be recognized for purposes other than voting. There may, for example, be an effort to secure the right to share equally in benefits distributed by the community. *See, e.g.*, the various purposes recognized in Luria v. United States, 231 U.S. 9, 22 (1913) (protection against the actions of foreign governments); Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (right of access to judicial rather than political forums); H. ARENDT, THE ORIGIN OF TOTALITARIANISM 266-87 (1951); M. WALZER, SPHERES OF JUSTICE 43 (1983) (right of place) [hereinafter cited as WALZER]; Bickel, *Citizenship in the American Constitution*, 15 ARIZ L. REV. 369 (1973) (a discussion focussing on benefits); C. BLACK, *supra* note 3, at 49-66 (access to a judicial forum; protection against governmental or private interference with the enjoyment of certain rights). For a general discussion of the nature of political communities, *see* Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 8-10 (1970) (a description of various forms of membership); WALZER, *supra* (discussion

bership in a community might as easily depend upon personal allegiance as upon territory.[111] The members of Indian Tribes have an important and shared interest in reservation lands, but some tribes tie voting rights to ancestry rather than to residence on the reservation.[112] Shared cultural values may be the primary membership bond for a community.[113] Benefits extended to individuals or obligations imposed on them may collectively constitute a shared interest giving rise to community membership.[114] Consent to be bound by group decisions also may suffice as an organizing principle and a shared interest of a political community.[115] In other words, there is no single shared interest which necessarily defines a political community.[116] Geographic links

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of membership in a political community). Walzer, in turn, compares this type of membership to membership in clubs, neighborhoods, and families. *Id.* at 35. By definition, only neighborhoods extend membership because of geographical location. *Id.*

111. J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 3-4 (1978) [hereinafter cited as J. KETTNER]. Kettner distinguishes between membership based on personal allegiance and membership based on territory or geographical location. *Id.*

112. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 20-23 (1982). The power to determine tribal membership is one of the most basic rights reserved to Indian tribes as sovereign nations. Although specific requirements vary among tribes, some descent from a tribal member appears to be a universal requirement for membership. *Id. See also* Lobsenz, *Dependent Indian Communities: A Search for a Twentieth-Century Definition*, 24 ARIZ. L. REV. 1, 14 n.90 (1982) (examples of tribal membership criteria). This generalization should not suggest that the jurisdiction defined by the reservation is not of importance. Subject to certain federal limitations, tribal governments have exclusive jurisdiction over matters arising within the territory of the reservation. *See* Cohen, *supra*, at 236-42. *But see* Scott v. Sandford, 60 U.S. (19 How.) 393, 403 (1856) (one of the more pernicious discussions of citizenship and ancestry).

113. *See, e.g.*, text accompanying notes 162-67 *infra* (the discussion of the Supreme Court's decisions regarding public employment of aliens, which stress this factor).

114. *See, e.g.*, Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369 (1973) [hereinafter cited as Bickel].

115. *See* Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820); A. BICKEL, THE MORALITY OF CONSENT (1975).

116. *See* Bickel, *supra* note 114, at 387 (citizenship is a simple idea for a simple government).

The fact that one may imagine many different shared interests which could define a political community does not require one to be indiscriminate in the choice of what interests will serve as the foundation of a political community. Different organizing principles have different impacts on society, which may influence the choice of political structure. *See* M. GOODALL & J. SULLIVAN, WATER DISTRICT ORGANIZATIONS: POLITICAL DESIGN SYSTEMS IN CALIFORNIA WATER PLANNING AND POLICY (1979) (discussion of the relationship between certain forms of political organizations and indices of the standard of living for individuals living within the geographic boundaries of the community).

Some political organizations are avoided for historical reasons. In a corpo-

among individuals, such as residency or land ownership, play an important but variable and dispensable role as shared interests which define a political community.

At times, the Supreme Court appears to acknowledge the principle that membership in a voting community is not necessarily linked to geographic location.[117] On other occasions, the Court assumes the existence of a necessary relationship between residence and voting membership in a political community. Three of the Court's equal protection decisions illustrate the way in which the mistakenly presumed link between residence and community membership affects and confuses judicial analysis. These decisions are *Ball v. James*,[118] *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,[119] and *Holt Civic Club v. City of Tuscaloosa*.[120]

In *Ball v. James*,[121] the plaintiffs lived within the geographic boundaries of the Salt River Project Agricultural Improvement and Power District in Arizona. They challenged the constitutionality of the statutory provisions under which directors of the District were elected. The Arizona statute provided that only owners of land lying within the District were eligible to vote for

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rate state, the political community is

> organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered, and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.

Schmitter, *Modes of Interest Intermediation and Models of Societal Change in Western Europe*, 10 COMP. POL. STUD. 7, 9 (1977). Many commentators find corporatism distasteful because it is linked so closely with fascism, *see* AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA (J. Malloy ed. 1977), and even the milder brand of corporatism associated with Western democracies is often criticized. *See, e.g.*, Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (Douglas, J., joined by Brennan, J., and Marshall, J., dissenting). Justice Douglas expressed outrage that the "corporate voter is put in the saddle," and deplored the "corporate political kingdom." *Id.* at 735, 742 (Douglas, J., dissenting).

117. *See, e.g.*, Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874); *see also* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 69-70 (1978); Gordon v. Lance, 403 U.S. 1, 4 (1971); Gray v. Sanders, 372 U.S. 368 (1963) (geographic location bears no necessary relationship to an individual's interest in the subject matter of an election).

118. 451 U.S. 355 (1981).

119. 410 U.S. 719 (1973).

120. 439 U.S. 60 (1978). *See also* Avery v. Midland County, 390 U.S. 474 (1968). The majority assumed the propriety of basing its analysis on a neighborhood model of citizenship. However, in his dissent Justice Fortas questioned this premise. 390 U.S. 474, 508 (1968) (Fortas, J., dissenting).

121. 451 U.S. 355 (1981).

directors.[122] A landowner was not required to be a resident of the District, but only of the state, in order to vote,[123] and votes were weighted according to the amount of acreage owned.[124] Some plaintiffs owned no land; others owned less than one acre. The plaintiffs made two arguments. First, they argued that the exclusion of nonlandowners from the election for District directors violated the Constitution. Additionally, they argued that the weighting of votes violated the Constitution.

The majority of the Court, utilizing previous reapportionment decisions,[125] resolved the first argument by determining whether the functions of the Salt River District directors were traditionally governmental and whether they disproportionately affected different groups of people.[126] The majority concluded that the District's functions were not traditionally governmental, and that different groups were disproportionately affected; therefore, it rejected the excluded plaintiffs' claim.[127]

Implicit in the majority's analysis is the assumption that, under circumstances not present in *Ball*, residence within the geographic boundaries of a political community will entitle an individual to membership in that political community. The dissenting justices in *Ball* were prepared to require the State to restructure its political unit to give residents a right to vote.[128] Therefore, all of the justices concurred in the assumption that residence plays a special role as one of those shared interests which determine vote distributions and define membership in a political community.

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122. ARIZ. REV. STAT. ANN. § 45-909 (Supp. 1984-85).

123. *Id.*; ARIZ. REV. STAT. ANN. § 16-101 (Supp. 1984-85).

124. ARIZ. REV. STAT. ANN. § 45-983 (Supp. 1984-85).

125. *See* Hadley v. Junior College Dist., 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968). In *Avery* the plaintiffs successfully argued that malapportioned election districts for a county commissioners' court diluted the votes of some residents and thereby contravened the one person, one vote principle of Reynolds v. Sims, 377 U.S. 533 (1964). Avery v. Midland County, 390 U.S. 474, 476 (1968). The plaintiffs in *Hadley* prevailed on a vote dilution argument comparable to that made in *Avery*. 397 U.S. at 53-59.

The majority in *Ball* made only passing reference to the Court's previous voter qualification cases, and it did so only for the purpose of distinguishing general from limited governmental functions, 451 U.S. at 366 n.11. *See also id.* at 364-65 n.8. The one person, one vote principle of *Reynolds* seems to have been the focus of the plaintiffs' arguments as well as the judicial analysis in the court of appeals. *See* James v. Ball, 613 F.2d 180 (9th Cir. 1979), *rev'd*, 451 U.S. 355 (1981). The opinion of the trial court does not reveal the nature of the arguments considered. James v. Ball, Civ. No. 75-498 (D. Ariz. March 17, 1976).

126. *Compare* Avery v. Midland County, 390 U.S. 474, 483-84 (1968) *with* Hadley v. Junior College Dist., 397 U.S. 50, 56 (1970) (Different tests were used).

127. *Ball*, 451 U.S. at 366-71.

128. 451 U.S. 355, 375-77 (1981) (White, J., joined by Brennan, J., Marshall, J., & Blackmun, J., dissenting).

In previous voting rights decisions, residence was also linked to vote distribution schemes, but in a critically different way. In the earlier decisions, the states had made individual residence within geographic boundaries the primary qualification for participation in a political community and then had attempted to differentiate among types of residents. The Supreme Court deferred to the states' choice of residence as the shared interest of importance to the political community, but subjected classifications among residents to equal protection scrutiny.[129] The states' chosen basis for vote distribution was the predicate for an equal protection analysis, but the Court did not interpose its own assumptions as to the importance of a shared residence to vote distributions.[130]

In an earlier voting rights decision, the Court explicitly acknowledged the importance of this distinction. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*[131] involved a membership controversy affecting a local political unit similar to Arizona's Salt River District. The Court distinguished between the membership issue raised by the *Salyer* plaintiffs and the equal protection issue in conventional voter qualification cases. The Court explained that *Salyer* differed from other voter qualification cases because the State of California had not extended the franchise to all residents of the water district.[132] Rather, "[t]he franchise is extended to landowners, whether they reside in the district or out of it, and indeed whether or not they are natural persons . . . ."[133] The Court noted that, in order to grant relief to the plaintiffs, it would not simply have to strike down an exclusion from an otherwise delineated class but would be required to engraft onto the statutory scheme an entirely new

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129. *See, e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 629-30 (1969).

130. The equal protection decisions embody a relatively limited constitutional principle. When applied to specific controversies, the principle may have a significant impact on political institutions, but the impact is secondary. For example, several states initiated legislative apportionment reforms immediately following the decision in Baker v. Carr, 369 U.S. 186 (1962), and challenges were raised in at least 34 states seeking judicial invalidation of existing legislative districting. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 645-46, 706-10 (1963). *See also* Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711 (1963); Note, *State Apportionment—The Wake of Reynolds v. Sims*, 45 B.U.L. REV. 88, 92-107 (1965). The Alabama attempt to comply with the decision in *Baker* resulted in further litigation culminating in the Court's decision in Reynolds v. Sims, 377 U.S. 533 (1964).

131. 410 U.S. 719 (1973). *See also* Associated Enters., Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973).

132. *Salyer*, 410 U.S. at 729-30.

133. *Id.* at 730.

class of voters.[134] Based on an assumption about the importance of a shared residence to membership in the political community, the plaintiffs had asked the Court to alter a fundamental membership requirement of that community. The Court accepted neither the argument nor the underlying assumption. The Court's inexplicable abandonment of this line of reasoning in *Ball* is evidence of its confusion about the nature of vote distributions and political communities.

More important, the plaintiffs in *Ball* were clearly using residence as a proxy for impact. They argued that, because of residence, they suffered impacts which should, as a matter of fairness, entitle them to vote.[135] The Court responded, by implication, that in some circumstances an impact argument would be successful. Thus, the Court implicitly asserted power to require a state to adhere to or avoid certain types of memberships in political communities on principles of fairness, a power it has consistently rejected even when the consequences of a particular membership controversy have had grave significance for individuals. For example, in the guaranty clause cases the Court has refused to resolve what are, at heart, membership controversies; the issue has been held to be non-justiciable.[136] The Court also has refused to transmute the Revolutionary slogan "no taxation without representation" into a constitutional principle.[137] Furthermore, the Court has not utilized the due process clause to mandate an extension of the franchise to individuals simply because they are affected by governmental operations in certain ways and principles of fairness argue in favor of extension.[138]

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134. *Id.*

135. 451 U.S. at 360.

136. *See* Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74 (1930); Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962); Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681 (1981).

137. *E.g.*, Heald v. District of Columbia, 259 U.S. 114 (1922); Thomas v. Gay, 169 U.S. 264, 276-77 (1898); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 325 (1820) (Uniformity of taxation rather than voting membership in the community is the individual's safeguard against oppression.). *But see* Downes v. Bidwell, 182 U.S. 244 (1901).

138. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 69-70, 75 (1978); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30-35 (1973). *See also* Comment, 45 U. CHI. L. REV. 151, 157-59 (1977) (a discussion of the historical refusal of courts to recognize any inherent constitutional right to self government). *But see* Durchslag, *Salyee, Ball & Holt: Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 CASE W. RES. L. REV. 1, 32 n.138 (1983) [hereinafter cited as Durchslag].

There are even cases in which plaintiffs have argued that certain persons should be *excluded* from an election because they do not suffer certain impacts. *See* Police Jury v. Hebert, 404 U.S. 807 (1971) (property owner argued that only

Ball was apparently decided as it was both because the plaintiffs did not make a direct appeal to fairness but rather used equal protection rhetoric, and also because the Court assumed that residence was uniquely important to vote distributions. Direct fairness arguments that distributional rules should be altered drastically so as to redefine the political community in a fundamental way have been easy for the Court to reject. The Constitution makes no clear choices among the types of political communities which theoretically are available for use by states.[139] It gives the states a certain membership status within the national political community and ties that status to a right to participate in decisions made at the national level.[140] However, it does not prescribe the qualifications for individual membership in any given state or national community. Citizenship is mentioned, but is not a status which is clearly associated with the right to vote.[141] As far as local governmental units are concerned,

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property owners should be permitted to vote in a Road District bond election); Cantwell v. Hudnut, 566 F.2d 30, 37-38 (7th Cir. 1977), *cert. denied*, 439 U.S. 1114 (1979) (plaintiffs argued that, since they were most burdened by the operation of the unit, they should be the only persons allowed to vote; the court rejected the argument), Collins v. Brenna, 116 Misc. 2d 985, 456 N.Y.S.2d 931 (N.Y. Sup. Ct. 1982).

139. *See* Bickel, *supra* note 114; J. KETTNER, *supra* note 111, at 231-32.

140. *See* note 109 *supra*.

141. *See* Casper, *supra* note 4, at 4-5 (a short summary of the constitutional provisions dealing with the right to vote). There is no constitutional provision which explicitly guarantees a right to vote. The Constitution defers to state choice in elector qualifications for the United States Senate. U.S. CONST. art. I, § 2, cl. 1; *see also* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (This section of the Constitution "gives persons *qualified* to vote a constitutional right to vote and to have their votes counted.") (emphasis added). The guaranty clause of the United States Constitution assures every state a republican form of government. U.S. CONST., art. IV, § 4. It can be assumed that the framers of the Constitution had in mind a necessary relationship between individuals and the vote. *See, e.g.*, J.H. ELY, *supra* note 19, at 116-25. However, they did not explain what that relationship should be. The vote is not a privilege accorded citizens of the United States by the fourteenth amendment. *See* The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 76-80 (1873). Although the fifteenth, nineteenth, and twenty-sixth amendments explicitly refer to a right to vote, they only prohibit certain forms of discrimination once the decision to grant the franchise has been made. U.S. CONST. amends. 15, 19, & 26. There are plausible arguments that a right to vote is implicit in the governmental relationships structured by the Constitution. *Compare* Karst, *supra* note 18, at 27-29 *and* Perry, *supra* note 19, at 1079, 1081-83 *with* A. MIEKELJOHN, *supra* note 3, at 96-97 (the right to vote is an essential aspect of the people's right to govern themselves which is implicit in the first, tenth and seventeenth amendments and art. I., § 2 of the Constitution). Only one provision of the Constitution may be interpreted as tying membership in a political community to the right to vote as well as to individual geographical location. Section 2 of the fourteenth amendment pressures states to permit all male residents over the age of twenty-one to vote in national elections. U.S. CONST. amend. 14, § 2.

the Constitution does not even hint at membership rules. The decision in *Ball*, however, indicates that if a distributional controversy is tied to residence and is accompanied by equal protection rhetoric the Court may recognize neither the implicit appeal to fairness nor the potential complexity of the issue.[142]

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142. The Court's decision in *Ball* has generated a considerable amount of comment, but most of that comment has been misdirected and routine. *See* Durchslag, *supra* note 138; Young, *Governing Special Districts: The Conflict Between Voting Rights and Property Privileges*, 1981 ARIZ. ST. L. J. 419; Young, *Supreme Court Report*, 67 A.B.A.J. 910 (1981); Comment, *From One Person, One Vote to One Acre, One Vote*, 31 DEPAUL L. REV. 177 (1981); Comment, *State Water District Voting System Based on One Acre-One Vote Does Not Violate Equal Protection Clause Despite District's Extensive Utility Operations*, 86 DICK. L. REV. 591 (1982); Note, *Ball v. James and the Rational Basis Test: An Exception to the One Person-One Vote Rule*, 31 AM. U. L. REV. 721 (1982); Note, *Expanding the Special District Exception to "One Person, One Vote" Requirement: Ball v. James*, 35 ARK. L. REV. 702 (1982); *The Supreme Court 1980 Term*, 95 HARV. L. REV. 93, 181-91 (1981); 31 EMORY L.J. 201 (1982).

The commentators describe *Ball* as a traditional voting rights case in which the Court resolved an equal protection issue utilizing the rational basis test instead of strict scrutiny. There is disagreement only as to whether the Court's use of this rational basis test was justifiable, or deplorable. The commentators, with a single exception, have not perceived the relationship between the Court's analysis and its assumptions regarding the nature of political communities. A test of rationality might be appropriate because, for example, the case did not implicate an interest in representative democracy. Note, *Ball v. James and the Rational Basis Test: An Exception to the One-Person-One Vote Rule*, 31 AM. U. L. REV. 721, 751 (1982). Strict scrutiny might be necessary because a rationality test is inconsistent with the allegedly fundamental nature of the right to vote. *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 93, 186 (1981). *See* Durchslag, *supra* note 138, at 30-38.

Durchslag is somewhat of an exception, in that he addresses several critical points made in this Article. He moves beyond the conventional debate regarding strict scrutiny and rational basis analysis under the equal protection clause of the fourteenth amendment. Durchslag, *supra* note 138, at 5-6. He also recognizes that the constitutional claim made in *Ball* implicated membership rules for political communities. *Id.* at 30-38. His article is a useful contribution to clarifying the *Ball* opinion. His conclusions, however, differ substantially from those set forth in this Article.

The rhetoric in the *Ball* opinion so successfully cloaks its novel implications for constitutional analysis of the structure of political communities that courts misuse the opinion. The courts view the decision in *Ball* as authority for a judicial retreat from strict scrutiny and the one person, one vote standard in all voting rights controversies. *See, e.g.*, Provance v. Shawnee Mission Unified School Dist., 231 Kan. 636, 648 P.2d 710 (1982); Esler v. Walters, 56 N.Y.2d 306, 437 N.E.2d 1090, 452 N.Y.S.2d 333 (1982); City of Humble v. Metropolitan Transit. Auth., 636 S.W.2d 484 (Tex. Civ. App. 1982). Even those courts that distinguish the decision in *Ball* assume that it represents a retreat from the stringent scrutiny of the equal protection analysis formerly applied in conventional voting rights cases. *See, e.g.*, Lower Valley Water & Sanitation Dist. v. Public Service Co., 96 N.M. 532, 632 P.2d 1170 (1981); Flynn v. King, 433 A.2d 172 (R.I. 1981).

In *Holt Civic Club v. City of Tuscaloosa*,[143] the Supreme Court attempted to move beyond the rhetoric conventionally associated with voting rights controversies. Once again, however, false assumptions regarding the relationship between residence and vote distributions produced a less than satisfactory opinion. In *Holt* persons living outside the municipal boundaries of the City of Tuscaloosa, who were subject to the City's extraterritorial police jurisdiction, argued that they were denied equal protection of the laws because they did not have the same voting rights enjoyed by city residents. In rejecting this argument, the majority distinguished the facts in *Holt* from those in its other voter qualification cases by noting that "[t]he line heretofore marked by this Court's voting qualification decisions coincides with the geographic boundary of the governmental unit at issue . . . ."[144] The majority did not state that residence within corporate geographic boundaries had been identified as the shared interest which defined and gave integrity to the political communities in the previous voter qualifications decisions. Additionally, the Court did not identify residence as the shared interest which had been chosen to define the political community in *Holt*. Rather, the Court generalized about the importance of corporate geographic boundaries to all political communities, then rejected the plaintiffs' claim because they lived outside the corporate boundaries of the City of Tuscaloosa.[145] No attempt was made to identify the shared interests which were most important to the community of individuals given the power to affect, through elections, the exercise of the City's extraterritorial jurisdiction. Had such an attempt been made, with full appreciation of the complexity of the distribution question, the Court might have concluded that some other shared interest was as important to the integrity of the community as corporate geographic boundaries. If that shared interest had been identified as the impact resulting from the exercise of extraterritorial jurisdiction, the plaintiffs' claim would have assumed a different dimension.

The dissenting justices in *Holt* argued that the shared interest of the voting community pertained to functional geographic jurisdiction and actual impacts of the unit rather than to artificially defined corporate boundaries. In their view,

> [a]t the heart of our basic conception of a "political community" . . . is the notion of a reciprocal relationship between the process of government and those who subject themselves to that process by choosing to live within the area of its authoritative applica-

143. 439 U.S. 60 (1978).
144. *Id.* at 70.
145. *Id.* at 68-70.

> tion .... [The extraterritorial jurisdiction of the City of Tuscaloosa] fracture[s] this relationship by severing the connection between the process of government and those who are governed in the places of their residency ....[146]

Interestingly, the dissenters also did not attempt to identify the shared interest that defined the political community in *Holt*; they offered only generalizations about the importance of the impact of governmental authority to the definition of political communities.[147] If the dissenters had attempted to identify the shared interests essential to the integrity of the community in *Holt*, they would have been forced to confront the complexities of distribution controversies which arise out of the exercise of extraterritorial jurisdiction. They might not have concluded that the shared interest of importance to the community is any impact resulting from the exercise of governmental authority, regardless of how extensive its geographic reach.

The Supreme Court is apparently confused about the relationship of residence to vote distributions and the nature of political communities.[148] The Court has shown little appreciation of the variety of shared interests which the state might recognize as appropriate links among members of a political community. The result is a constitutional analysis dictated by labels, rhetoric,[149]

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146. 439 U.S. 60, 82 (1978) (Brennan, J., joined by White, J., & Marshall, J., dissenting).

147. *Id.* (Brennan, J., joined by White, J., & Marshall, J., dissenting).

148. *See, e.g.*, Avery v. Midland County, 390 U.S. 474, 485 (1968). Consider a state legislature that has chosen to form a local governmental unit and to permit the governor to appoint directors who have authority to levy taxes and to initiate public projects within the geographic boundaries of the unit. Persons living outside the geographic boundaries of the unit but within the boundaries of the state have as much influence over decisions made by unit officials as do residents of the unit. All state residents would exert equal and indirect influence through the election of the governor and state legislators. In other words, membership in that political community which makes decisions having an immediate impact only on persons living within a limited geographic area is not tied to residence within that area. There are numerous situations in which a state chooses to give persons living outside the geographic jurisdiction of a political unit a voice in how that unit will exercise its jurisdiction. *See, e.g.*, Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907). *See also* Comment, 45 U. CHI. L. REV. 151, 174-75 (1977) (the discussion of the power of persons outside a geographic jurisdiction to appoint officers who would exercise authority only within that geographic area). The Supreme Court does not appear to appreciate the importance of the membership issue in controversies involving appointive office. *Cf.* Sailors v. Board of Educ., 387 U.S. 105, 109-11 (1967) (The Court's repeated refusal to require a state to elect the officers of a local political community instead of appointing those officers). *But see* Fortson v. Morris, 385 U.S. 231 (1966).

149. That the Court responds as much to the rhetoric as to the substance of voting rights controversies is neither novel nor especially surprising. In

and conventional but false assumptions. Because of this analytic environment, the Court's failure to utilize first amendment principles to resolve distributional controversies is not surprising. If the Court does not acknowledge the existence of the variety of shared interests which may form the basis of political communities, it will not make shared interests the focal point of its analysis of distributional controversies, and it will not endeavor to differentiate among those interests or to identify situations in which shared opinion is the organizing principle for a particular community.

B. Recognition of the Traditionally Limited Role of Shared Opinions as a Criterion for Vote Distributions.

Even if courts come to recognize the variety and significance of the shared interests which affect vote distributions, there will be no first amendment analysis of distributions of the franchise—no requirement that the state maintain neutrality with respect to the opinions of those to whom it extends the vote—until another important but mistaken assumption is dispelled. That assumption is that political communities in the United States are frequently or even necessarily organized with reference to shared opinions. If this assumption were true, courts could not apply a first amendment analysis to voting rights controversies without undermining the essential nature of the nation's political communities. Opinion, however, is neither commonly nor necessarily the organizing principle of political communities in the United States.

As the previous discussion of residence demonstrates, political communities are not necessarily comprised of individuals who share beliefs or opinions. Consent, geographic location, shared impact, or shared interests in specific issues may define the community and give it integrity. These criteria are neutral with respect to opinion. Although some criteria, such as impacts or

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Baker v. Carr, 369 U.S. 186, 296-330 (1962) (Frankfurter, J., joined by Harlan, J., dissenting), Justice Frankfurter complained that whether the claim is phrased in terms of due process fairness or equality, an individual's claim to certain voting rights is a claim to membership in a political community and that mere constitutional rhetoric ought not to alter the Court's treatment of the claim. However, as the judiciary and the public accepted the propriety of judicial intervention in reapportionment controversies, the perceived importance of Justice Frankfurter's argument diminished. The ramifications of the Court's continued failure to move beyond rhetoric to confront the complexity of the distributional issue are not confined to reapportionment cases. Unless the Court begins to evaluate distributional controversies with reference to shared interests rather than on the basis of equal protection or due process rhetoric, its voting rights decisions will continue to be confusing and unproductive.

interests, may occasionally generate or reflect opinion, the criteria are themselves neutral.

As an illustration, the criterion of shared impacts should be considered. As an organizing principle for a political community and as a basis for vote distribution, it is facially neutral. The way in which an individual will vote, is, of course, influenced by how these shared impacts are felt. There may be a tendency for similarly affected persons to vote similarly on any given issue. Such similar voting behavior is most likely when the shared impacts which determine membership in the political community are precisely defined. Therefore, an observer may suspect that the more precisely defined the impact, the more likely it is that the criterion of shared impact serves as a proxy for the criterion of shared opinion. The criterion of a shared interest in a particular issue may also implicate opinion. Such a shared interest may exist only because individuals experience comparable impacts; therefore, similar voting behavior may result. Like precisely defined shared impacts, then, precisely defined shared interests also may be closely associated with the way in which individuals will vote and even may serve as a proxy for the criterion of opinion. In first amendment analysis, the possibility that shared impacts or interests might be used as a proxy for shared opinion presents an evidentiary problem for litigants and courts. A shared impact or interest *per se*, however, is a neutral organizing principle.[150]

If the record of judicial decision is any indication, there must be few instances in which opinion or belief is openly adopted by a state as a distributional principle for political communities.[151]

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150. In some circumstances, it could be argued that a shared interest in an issue is equivalent to a shared belief in the importance of the issue. For example, if the vote is given to all persons who have a shared interest in the development of water resources, the resulting political community arguably includes only those persons who believe in the importance of water resource development and excludes those person who believe that water development is unimportant. If shared interests are defined in this way, opinion is obviously the organizational criterion for the community. However, the criterion of shared interests can be interpreted to include all those who believe that water resource development is unimportant as well as those who believe it to be important. Therefore, the criterion of shared interests is neutral with respect to opinion. *Cf.* Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981) (the distinction between viewpoint and subject-matter orientation) [hereinafter cited as Redish]. A court may have difficulty determining as a factual matter when shared interests serve as a proxy for shared opinion. However, conceptually, one need not assume that shared interests always implicate opinion.

151. *But see* United Jewish Orgs. of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977); Gaffney v. Cummings, 412 U.S. 735 (1973) (notable exceptions). *See* text accompanying notes 169-76 *infra*.

Moreover, one might reasonably conclude that opinion, as a criterion for distributing the vote, is suspect in the context of the institutional history of the United States. As an historical matter, proponents of the Constitution attempted to minimize the influence on the new national government of what they referred to as factions.[152] Groups of individuals who share a common viewpoint or opinion are surely factions, as Madison, Hamilton, and Jay understood them. Gary Wills, a constitutional historian, has a thoughtful and convincing argument that each of these individuals, in the spirit of contemporary political philosophy, aspired to create a representative government in which elections would select "nonfactious" candidates.[153] They desired candidates who would "look to the rights of all citizens and the aggregate interests of the community."[154] Because of the constitutional stratagems and structures intended to minimize the influence of factions within government,[155] and the distrust of political parties,[156] it is difficult to believe that the framers would have viewed a distribution of votes on the basis of shared opinion with anything but dismay.

Of course, as Wills notes, the aspirations of Hamilton, Jay, and Madison may "sound like a fairy-tale approach to politics when we consider what actually happens in the republic .... We do have candidates now, who openly profess this or that interest; are expected to do so, and punished if they do not; who belong to parties, and run as members of them."[157] Current constitutional advocacy pertaining to the rights of voters and candidates reflects this state of affairs.[158] For example, there are advocates of proportional systems of representation[159] and defenders of the right

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152. THE FEDERALIST No. 10 (J. Madison).

153. G. WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981) [hereinafter cited as G. WILLS].

154. *Id.* at 224. *See also* Burns v. Richardson, 384 U.S. 73, 89 n.15 (1966) (the state legislature's proffered justifications for multi-member districts). *But see* Whitcomb v. Chavis, 403 U.S. 124, 156-60 (1971).

155. G. WILLS, *supra* note 153, at 193-221.

156. *Id.* at 210, 213.

157. *Id.* at 234.

158. *See* Note, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence*, 41 U. CHI. L. REV. 398 (1974) (A notable exception which reaffirms the importance of the Madisonian ideal and proposes a way of achieving "politically competitive" rather than interest group oriented districts).

159. *See, e.g.*, Mobile v. Bolden, 446 U.S. 55, 112 (1980) (Marshall, J., dissenting). Plaintiffs advocating proportional systems have likewise been rebuffed by a majority of the Court. *See* Whitcomb v. Chavis, 403 U.S. 124, 156 n.35 (1971); Wright v. Rockefeller, 376 U.S. 52, 57-58 (1964). *Cf.* Mississippi Republican Executive Committee v. Brooks, 105 S.Ct. 416 (1985) (Stevens, J., concurring; Rehnquist, J., dissenting).

of individuals with shared opinions to join together to spend as much money as they wish on behalf of a given candidate.[160]

In constitutional analysis, however, the Supreme Court has not significantly yielded to political demand.[161] A review of a few examples of different vote distributions or political communities in which opinion arguably has significance for the Supreme Court's analysis attests to that fact.

Consider, first, the political community of policy-makers. The community of policy-makers consists of individuals who make decisions for the community by formulating policy through positions of public employment rather than through their individual votes in an election. The community of policy-makers is analogous to a community of voters, however, because each consists of individuals entitled to make decisions for the community; exclusion from a community which makes decisions by making policy is analogous to exclusion from a community which makes decisions by voting.

The most common statutory exclusion from the community of policy-makers is based on citizenship.[162] In analyzing the constitutionality of these exclusions, some justices speak of the legitimacy of attempts to ensure that policy-making public employees are closely identified with "the norms of social order,"[163] capable

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160. Federal Election Comm'n v. National Conserv. Pol. Action Comm., 53 U.S.L.W. 4293 (1985).

161. *See* Anderson v. Celebrezze, 460 U.S. 780 (1983); Clements v. Fashing, 457 U.S. 957 (1982); Lubin v. Panish, 415 U.S. 709 (1974); Kusper v. Pontikes, 414 U.S. 51 (1973); Williams v. Rhodes, 393 U.S 23 (1968).

162. The Supreme Court has upheld the exclusion of aliens from the community of individuals who formulate public policy because of the asserted state interest in requiring public employees to commit to both aspects of the political community's decision-making process. *See* Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (exclusion from employment as a probation officer); Ambach v. Norwick, 441 U.S. 68 (1979) (teacher); Foley v. Connelie, 435 U..S 291 (1978) (police officer). All exclusions were upheld by the Supreme Court. *Cf.* Bernal v. Fainter, 104 S. Ct. 2312 (1984) (interpreting *Cabell*).

The Court's assumption that acquisition of citizenship automatically entitles an individual to vote should be noted. *See, e.g.*, Foley v. Connelie, 435 U.S. 291, 295 (1978); Nyquist v. Mauclet, 432 U.S. 1, 11 (1977); Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (confusion of national citizenship and the right to vote, two separate membership questions, and the embodiment of an almost cultural criterion for certain forms of membership). The Court dismissed, for failure to present a substantial federal question, an appeal involving an alien's right to vote, Skafte v. Rorex, 191 Colo. 399, 553 P.2d 830 (1976), *appeal dismissed*, 430 U.S. 961 (1977). *Cf.* Cervantes v. Guerra, 651 F.2d 974 (5th Cir. 1981) (a community action organization could permissibly exclude aliens from voting for or sitting on its board of directors). *See generally* Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote*, 75 MICH. L. REV. 1092, 1093-1100 (1977) (citizenship and aliens generally).

163. *Cabell*, 454 U.S. at 447.

and ready to preserve the "values on which our society rests,"[164] familiar with the traditions and institutions of our society,[165] or capable of being integrated into our society.[166] The idea that exclusion of aliens may be necessary to avoid a dilution of values important to our society is one theme of the Court's public employment decisions.[167] Values are beliefs or opinions about fundamental issues; thus, the Supreme Court hints that the integrity of a community of political decision-makers is legitimately tied to opinion.

However, a theme differs from a holding. Although the Court has attached a certain significance to shared values in decisions pertaining to aliens, it has not held that persons may be excluded from the political community because they do not believe in those values. The Court permits states to require individuals to commit to the state's electoral process of decision-making as a prerequisite to their entitlement to formulate policy for the community; it does not sanction a requirement that individuals profess belief in those processes. The principle of the alien-exclusion cases is analogous to that of the Court's loyalty oath decisions, in which the Court permits a state to require a public employee to swear to uphold the Constitution but does not permit the state to impose an oath which binds an individual to a certain belief.[168] Shared values thus form an important backdrop to the Court's decisions, but they have not been given judicial sanction as a criterion for membership in the political community of policy-makers.

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164. *Ambach*, 441 U.S. at 76.

165. *Sugarman*, 413 U.S. at 659 (Rehnquist, J., dissenting).

166. *Id.* at 660-61.

167. That theme is also discernible in other decisions pertaining to aliens. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982). In *Plyler* the Court's desire to avoid diluting important shared values arguably prompted the Court to recognize a right to public education for alien children. According to the *Plyler* Court, education is the means by which individuals "absord the values and skills upon which our social order rests." *Id.* at 221. A plausible interpretation of the controversial *Plyler* decision is that knowing that Congress has failed to devise an adequate means of curtailing illegal immigration, the Court feared that significant numbers of illegal aliens will dilute the shared values of the polity, and therefore decided to avoid the consequences of the threatened dilution of values by ensuring that society's primary vehicle for inculcation of those values is not closed.

168. *See, e.g.*, Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) (loyalty oath case invalidating a requirement that political parties sign an oath that they do not advocate an overthrow of government by force as a condition to securing a place on the ballot, because the oath required a commitment to belief); Branti v. Finkel, 445 U.S. 507 (1980) (a patronage case prohibiting the firing of public employees because of their beliefs, unless their beliefs would interfere with the discharge of duties).

Two other political communities are more troublesome.[169] They are formed by vote distributions identical to those with which this Article is concerned. In analyzing the constitutionality of these vote distributions, the Court has come close to conceding

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169. Another unique community formed with apparent reference to opinion is represented by national political parties. Although their integrity is frequently assumed to depend on the exclusion of individuals with nonconforming opinions, the proposition that these parties are organized on the basis of ideological principle is open to debate. For example, Justice Powell argues that open primaries can be required of national political parties without jeopardy to first amendment rights of association precisely because membership in those parties is not necessarily ideological. National Democ. Party v. Wisconsin, *ex rel.* La Follette, 450 U.S. 107, 131-32 (1981) (Powell, J., joined by Blackmun, J., & Rehnquist, J., dissenting). One can usually become a voting member of a political party simply by a unilateral declaration of party affiliation. Political parties tend not to purge or exclude individuals for ideological differences. *Cf.* Schmidt & Whalen, *Credentials Contests at the 1968—and 1972—Democratic National Convention*, 82 HARV. L. REV. 1438 (1969); Note, *Freedom of Association and State Regulation of Delegate Selection: Potential for Conflict at the 1984 Democratic National Convention*, 36 VAND. L. REV. 105 (1983); Note, *"It's My Party and I'll Cry if I Want To": State Intrusions Upon the Associational Freedoms of Political Parties*, 1983 WIS. L. REV. 211 (the history of the National Democratic Party disputes involving exclusion of delegates). The disaffected generally voluntarily leave the party.

State laws, *see, e.g.*, American Party of Texas v. White, 415 U.S. 767 (1974); Kusper v. Pontikes, 414 U.S. 51 (1973), and party rules, *see, e.g.*, National Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981), intended to prevent raiding of primaries or other processes of decision-making arguably suggest that the exclusion of those who disagree with party ideology is important to party integrity, but these laws or party rules may just as rationally be viewed as requiring a commitment to a process rather than to an ideology. For example, in Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981), the national party objected to the convention participation of persons who had not publicly and voluntarily declared themselves to be affiliated with the party as an organization. In Cousins v. Wigoda, 419 U.S. 477 (1975), the party objected to convention participation of persons who had been selected as party representatives through a process which did not comply with party rules. Neither party rule, both of which were upheld by the Court, sanctioned the exclusion of a specific individual for differing views.

However, the most important aspect of political parties is that they are unlike the political communities which function as governmental units. Although their activities may at times be construed to be state action for purposes of constitutional analysis, they are fundamentally private organizations. Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on the Protections of Party Nominating Methods*, 57 S. CAL. L. REV. 213 (1984). The first amendment does not necessarily apply to party decisions to exclude some persons from membership. *Id.* Compare the obvious applicability of a first amendment analysis if a state statute rather than a party rule precludes an individual from voluntarily associating with the party of his or her choice. *See, e.g.*, American Party of Texas v. White, 415 U.S. 767 (1974); Kusper v. Pontikes, 414 U.S. 51 (1973). Because of the unique status of political parties, an ideological orientation, if it in fact exists, is acceptable for them.

the legitimacy of distributing the franchise with reference to shared opinion.

For example, in *Gaffney v. Cummings*,[170] the Court rejected a constitutional challenge to a state legislative apportionment. The plaintiffs argued that the population disparity among districts violated one person, one vote strictures.[171] The defendants responded that the disparities were not so great as to be unconstitutional and that, in any event, they were justified to ensure the election of district representatives whose party affiliation would reflect, proportionately, the party affiliations of voters in the state.[172] In other words, district lines were drawn in explicit accordance with the political affiliation of voters. To the extent that political affiliation as expressed in prior elections reflects a political viewpoint, the *Gaffney* districting scheme distributed the vote on the basis of opinion. In *Gaffney*, the Court stated that the political ramifications of districting are inevitable[173] and opined that judicial power ought to be at "its lowest ebb" when a state has attempted to achieve proportional representation.[174]

In *United Jewish Organizations of Williamsburg, Inc. v. Carey*,[175] the Court confronted a slightly different vote distribution. New York had adopted a districting plan with the explicit objective of ensuring that the political strength of a black racial minority was not diluted. The plaintiffs, Hasidic Jews, whose previous election district was split in order to preserve the political strength of the racial minority, objected that the use of racial criteria in vote distributions was unconstitutional. The Court, seemingly assuming that the racial minority tended to vote as a bloc,[176] held that the districting plan was not unconstitutional.[177] To the extent that New York devised districts to preserve the political strength of a group with an assumed shared viewpoint, generally expressed in a bloc vote, the Court apparently approved a vote distribution based on opinion.

These decisions are troublesome precedents for the first amendment analysis proposed in this Article. At first glance, they suggest that states may use opinion as a basis for vote distributions and that the Supreme Court is willing to condone

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170. 412 U.S. 735 (1973).
171. *Id.* at 738-39.
172. *Id.* at 743.
173. *Id.* at 753.
174. *Id.* at 754.
175. 430 U.S. 144 (1977).
176. Only Chief Justice Burger objected to this assumption. 430 U.S. 144, 185 (1977) (Burger, C. J., dissenting).
177. *Id.* at 168; 430 U.S. 144, 179 (1977) (Stewart, J., joined by Powell, J., concurring).

the practice. A closer look, however, reveals that one should not quickly conclude that a state may freely and constitutionally take opinion into account in distributing the vote.

Notwithstanding *Gaffney* and *United Jewish Organizations*, all justices of the Supreme Court probably would agree with the principle that vote distributions resulting in the *exclusion* of voters because of their opinions are unconstitutional. The principle of non-exclusion arises out of[178] and is generally applied to[179] situations in which the voting strength of racial groups is adversely affected. However, if one accepts the proposition that the political strength of those groups is related to their shared beliefs and bloc voting behavior, this principle of non-exclusion logically pertains to all groups with shared beliefs.[180] By definition, voter property ownership requirements like those considered in *Kramer v. Union Free School District No. 15*[181] are exclusive, as are geographical boundaries of political communities like those considered in *Gomillion v. Lightfoot*.[182] Therefore, vote distributions accomplished through those devices and based on opinion would probably be viewed with disfavor by the Supreme Court.

Vote distributions which arise out of districting choices, for example, between single and multimember districts, do not by definition exclude individuals from voting. They may, however, have some exclusive effect.[183] If they do have that effect, the Supreme Court might also treat those vote distributions, if based on opinion, as constitutionally suspect under the non-exclusion principle.[184] In *United Jewish Organizations*, for example, the disagreement between Justices White, Stevens, Rehnquist and Powell on one hand and Justice Burger on the other was a disagreement about whether New York's districting plan resembled that in *Gaffney*, in which the Court perceived no exclusion, or was more like that in *Gomillion v. Lightfoot*, in which voters

178. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

179. *E.g.*, Rogers v. Lodge, 458 U.S. 613 (1982); White v. Register, 412 U.S. 755 (1973).

180. *See, e.g.*, Karcher v. Daggett, 103 S. Ct. 2669 (Stevens, J., concurring); Rogers v. Lodge, 458 U.S. 613, 652 (Stevens, J., dissenting).

181. 395 U.S. 621 (1969).

182. 364 U.S. 339 (1960).

183. If an individual is placed in a single-member district which is objectionable because organized on racial or party lines, the individual does have a right to vote. *See, e.g.*, United Jewish Orgs. of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977); Gaffney v. Cummings, 412 U.S. 735 (1973). An individual placed in a multi-member district in which racial groups are in the minority also has a right to vote. *E.g.*, Rogers v. Lodge, 458 U.S. 613 (1982). However, that right is not necessarily meaningful, depending on the circumstances.

184. *But see* Rogers v. Lodge, 458 U.S. 613 (1982); White v. Register, 412 U.S. 755 (1973).

were excluded.[185] Thus, all the justices apparently would adhere to a principle of non-exclusion.

As to the broader issue of distributing the vote in accordance with opinion in a non-exclusive way, consider the stances taken by various groupings of justices in recent cases. All the justices appear to concede that, in districting decisions, political considerations inevitably come into play. In *Gaffney v. Cummings*,[186] this fact was apparently important to Justices White, Burger, Blackmun, Powell and Rehnquist, who upheld the challenged districting scheme.[187] Of these five justices, all but Justice Blackmun cited *Gaffney* with approval in their recent dissent in *Karcher v. Daggett*.[188] On the other hand, Justice Stevens and Justice Powell have insisted that a state must remain neutral with respect to political groups.[189] Both, however, appear to believe that the principle of neutrality is not violated if the state relies on racial criteria in order to enhance the voting strength of minority groups.[190] The issues are further confused since Justices Rehnquist and Burger, in one opinion,[191] and Justices Powell and Rehnquist have argued that systems of proportional representation are antithetical to principles of democracy.[192] Justices Brennan, Marshall and Blackmun have, in recent opinions, avoided the constitutional question.[193]

The conclusion that the Supreme Court is ready to approve, as a general proposition, vote distributions which are based on opinion is unwarranted. Surely, given the opinions expressed in recent decisions, the converse proposition has equal merit. At the least, if such vote distributions exclude, they are in all probability constitutionally suspect. The Court's decisions are

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185. *Compare* 430 U.S. at 165 (plurality opinion of White, J.) *with* 430 U.S. at 181-82 (Burger, C.J., dissenting). The perceived exclusion of a minority group from the political process was also what was constitutionally objectionable in Burke County, Georgia's, at-large election system. *See* Rogers v. Lodge, 458 U.S. 613 (1982).

186. 412 U.S. 735 (1973).

187. *See* text accompanying notes 170-74 *supra*.

188. 103 S. Ct. at 2681 (White, J., joined by Burger, C.J., Powell, J., and Rehnquist, J., dissenting), 2688 (Powell, J., dissenting).

189. *Id.* at 2669, 2689.

190. United Jewish Orgs. of Williamsburg, Inc. v. Carey, 430 U.S. 144, 165, 167 (1977); 430 U.S. 144, 179-80 (1977) (Stewart, J., joined by Powell, J. concurring).

191. Mississippi Republican Executive Committee v. Brooks, 105 S. Ct. 416, 418 (1985) (Rehnquist, J., dissenting).

192. Rogers v. Lodge, 458 U.S. 613, 630 (1982) (Powell, J., joined by Rehnquist, J., dissenting).

193. *E.g.*, United Jewish Orgs. of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977).

not, however, without an ambiguity which necessarily results from its studious avoidance of a first amendment analysis.

V. A First Amendment Analysis of Distributional Voting Rights Controversies

A limited first amendment analysis for distributional voting rights controversies is proposed. This analysis requires a court to determine whether the illegitimate criterion of opinion has been utilized as the basis for any given vote distribution.[194] If it has, then first amendment principles would require the state to justify its use of the criterion by demonstrating a compelling interest to which the criterion is necessarily related.[195]

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194. The first amendment analysis proposed here is not necessarily applicable to those situations in which a legislature has distributed the vote either with the subjective intent of excluding or disadvantaging persons with disfavored opinions or in which a facially neutral distributional criterion has an adverse impact on those persons.

The difficulties associated with an inquiry into subjective legislative motivation have been extensively discussed. United States v. O'Brien, 391 U.S. 367 (1968); Brest, *Palmer v. Thompson: An Approach to the Problems of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95 [hereinafter cited as Brest]; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L. J. 1205 (1970) [hereinafter cited as Ely]; Redish, *supra* note 150. However, the inquiry appears to have an inevitable and legitimate place in first amendment analysis. Board of Educ. v. Pico, 457 U.S. 853 (1982). *Cf.*, United States v. O'Brien, 391 U.S. 367, 383 (1968) (motive may be reviewed for purposes of statutory interpretation); *id.* at 383 n.30 (the very nature of a constitutional inquiry may require a review of motive); Ely, *supra*, at 1275-76 (discussion of voting rights cases).

An adverse impacts analysis may not be conceptually appropriate for distributional voting rights controversies. *Compare* Ely, *supra*, at 1260, 1329 *with* Redish, *supra*. In analyzing some vote distributions, it is clear that an adverse impacts test of constitutionality would cause difficulties. For example, groups which are likely to share opinions about certain issues or candidates may tend to live in the same geographic area. In this situation, a disparate impacts test would be at odds with the legitimate state objective of establishing geographically compact districts. In fact, some commentators have argued that the Supreme Court ought to adopt an objective standard like compactness as the constitutional standard for voting rights controversies. *See, e.g.*, Edwards, *The Gerrymander and "One Man, One Vote,"* 46 N.Y.U. L. Rev. 379 (1971); Note, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence*, 41 U. Chi. L. Rev. 398 (1974). In any event, adverse impacts are not the focus of the first amendment inquiry in this Article. *See* text accompanying notes 237-63 *infra*. If it is established that the criterion for a given vote distribution is opinion, adverse impacts ought to be irrelevant. *But see* Whitcomb v. Chavis, 403 U.S. 124, 180 (1971) (Douglas, J., joined by Brennan, J., & Marshall, J., dissenting in part and concurring in part).

195. Members of City Council v. Taxpayers for Vincent, 104 S. Ct. 2118, 2128-29 (1984); Widmar v. Vincent, 454 U.S. 263, 269-70 (1981); 1 N. Dorsen, P. Bender & B. Neuborne, Political and Civil Rights in the United States

The proposed first amendment analysis is straightforward. It may become complex in only two situations. First, if a state has not openly distributed the franchise on the basis of opinion, but has instead utilized a facially neutral criterion, a first amendment analysis will require a plaintiff to show that the neutral criterion serves as a proxy for opinion. This requirement may present difficult problems of proof. Second, in some cases a state may argue that a challenged vote distribution provides effective access to the state's political processes for particular belief-oriented groups of voters. In that event, a court will be required to confront the conceptually troubling question of the constitutional legitimacy of the state's justification.

A. Proving that the State has Distributed the Vote on the Basis of Opinion

As in *Gaffney v. Cummings*[196] or arguably in *United Jewish Organizations of Williamsburg, Inc. v. Carey*,[197] a state may openly rely on opinion as the basis for a vote distribution. If reliance on opinion is unquestionable, a first amendment analysis presents only the conceptual difficulty discussed below. In other cases, however, a facially neutral criterion may serve as a proxy for opinion. In the latter situation, a first amendment analysis is appropriate only if the plaintiff can prove that the neutral criterion does in fact serve as a proxy for opinion.

When a state is pressed for an explanation of why a particular shared interest or impact was chosen as the basis for a vote distribution, the state may find that it can articulate its reasons only by reference to opinion. For example, in litigation challenging a statute which gave owners of irrigated lands a voting advantage in the process by which Colorado water conservancy districts were formed,[198] the defendants and the State of Colorado argued that irrigators have a different interest than non-irrigators in the district formation process.[199] Elaborating on the ar-

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43-75 (1976); M. NIMMER, NIMMER ON FREEDOM OF SPEECH 2-29 (1984); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 576-736 (1978) [hereinafter cited as L. TRIBE].

196. 412 U.S. 735 (1973).

197. 430 U.S. 144 (1977).

198. Taxpayers for Animas-La Plata Refer'm v. Animas-La Plata Water Conserv. Dist., Civ. No. 82-2-448 (D. Colo. March 22, 1982).

199. *See* Brief of Defendants in Support of Motion to Deny Plaintiffs' Motion for Summary Judgment and to Grant Summary Judgment in Favor of Defendants, 12-14, Taxpayers for Animas-La Plata Refer'm v. Animas-La Plata Water Conserv. Dist., Civ. No. 82-2-448 (D. Colo. August 29, 1982); Brief of the Attorney General in Response to Plaintiffs' Cross-Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment, 20-21, Taxpayers for Animas-La Plata Refer'm v. Animas-La Plata Water Conserv.

gument, the defendants appeared to assert that irrigators were more likely than non-irrigators to believe in the wisdom of creating water conservancy districts "because water is critical to the future of agriculture and agriculture is critical to the future of Colorado."[200] However, in other instances a state will not acknowledge that predicted voter opinion regarding the outcome of an issue was the real criterion which the state used in distributing the franchise. In those instances, circumstantial evidence showing that the state has distributed the franchise on the basis of opinion will be important.

Circumstantial evidence that opinion was used as a criterion for a vote distribution may derive from conduct "viewed in the context of antecedent and concurrent events and situations."[201] Inquiry into the statutory and historical foundations of a community may generate inferences about the distributional criteria utilized by the state. The same is true of state judicial or legislative characterizations of the community. However, these characterizations are not dispositive. They may simply be "after-the-fact rationalization[s][202]" or pretexts for an illegitimate criterion.[203]

Other factors which may generate inferences that the illegitimate criterion of opinion has been used are the attitude of the community[204] the processes through which the decision to distribute the vote were made,[205] and the effect of the facially neutral

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Dist., Civ. No. 82-2-448 (D. Colo. September 30, 1982) [hereinafter cited as Brief of the Attorney General].

200. Brief of the Attorney General, *supra* note 199, at 21.

201. *See generally* Brest, *supra* note 194, at 120-21 (discussing circumstantial evidence as proof of motive).

202. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964). In *Reynolds* the Court acknowledged that a state has an interest in preserving the integrity of its subdivisions, and may wish to give a vote to political subdivisions as subdivisions. *Id.* at 578, 580. However, the Court held that Alabama's reliance on the federal analogy was an "after-the-fact rationalization." *Id.* at 573.

203. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978). In *Holt* the majority chose to emphasize geographic boundaries as the criterion which gave integrity to the political community, but cautioned that it would not bind its analysis irrevocably to geographic boundaries. It warned that if "a city has annexed outlying territory in all but name, and is exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits", its analysis might differ. *Id.* at 73 n.8 (citing Little Thunder v. South Dakota, 518 F.2d 1253 (8th Cir. 1975)). *See also*, Evans v. Cornman, 398 U.S. 419 (1970). In *Evans* the Court ignored the geographic boundary distinctions between state territory and federal enclave because the state treated residents of the enclave as state residents for almost all purposes. *Id.* at 424-26.

204. *See* Brest, *supra* note 194, at 120-21.

205. *See, e.g.*, Karcher v. Daggett, 103 S. Ct. 2653, 2674-75 (1983) (Stevens, J., concurring).

criterion as either arbitrary[206] or undesirable with reference to conventional legislative concerns like cost.[207] Any deviation from established political boundaries in a districting case may suggest that there was use of an improper criterion.[208] One of the most telling factors may be the effect of the facially neutral distributional criterion chosen by the state. The adverse, differentiated impact of a vote distribution on persons holding disfavored political views may have to be substantial or inevitable in order to give rise to an inference that opinion was the distributional criterion,[209] but impact is a factor which cannot be ignored.

An unconventional interpretation of legislative reapportionment decisions provides an example of how a plaintiff might construct a convincing argument that a state has distributed the franchise on the basis of opinion. In most reapportionment controversies, no one disputes that the plaintiffs are legitimate members of a voting political community—the state. The plaintiffs live within the geographic boundaries of the state and residency is unquestionably the criterion which determines who will be given the vote.[210] The dispute in a reapportionment case

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206. *See*, Ely, *supra* note 194, at 1230-49 (commenting on the "zigs and zags" of the boundaries in Gomillion v. Lightfoot, 364 U.S. 339 (1960)); Redish, *supra* note 150, at 145. *See also*, Karcher v. Daggett, 103 S. Ct. 2653, 2672-73 (1983) (Stevens, J., concurring); Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982); Mobile v. Bolden, 446 U.S. 55, 90 (1980) (Stevens, J., concurring); Cousins v. City Council, 466 F.2d 830, 859 (7th Cir. 1972) (Stevens, J., dissenting), *cert. denied*, 409 U.S. 893 (1972).

207. *See* Brest, *supra* note 194, at 120-21.

208. *See* Karcher v. Daggett, 103 S. Ct. 2653, 2674 (1983) (Stevens, J., concurring).

209. *Cf.* United States v. O'Brien, 391 U.S. 367, 384-85 (1968) (interpreting Grosjean v. American Press Co., 297 U.S. 233 (1936) and Gomillion v. Lightfoot, 364 U.S. 339 (1960). The *O'Brien* Court held that *Grosjean* and *Gomillion* stood for the proposition that the "necessary scope and operation," or inevitable effect of a statute could give rise to a constitutional violation. 319 U.S. 384-85 (quoting McCray v. United States, 195 U.S. 29, 59 (1904). The Court in *O'Brien* argued that "inevitable effect" was not an item of circumstantial evidence to be weighed in considering motive, but, rather, constituted a *per se* principle for invalidation of state action. 391 U.S. at 385. *Compare* Ely, *supra* note 194, *with* Brest, *supra* note 194 (arguing that *Grosjean* and *Gomillion* in fact entail an inquiry into motive).

210. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); *see also* text accompanying notes 129-34 *supra*. Most of the Supreme Court's voting rights decisions, including the reapportionment decisions, stand only for the proposition that a state which has chosen to adopt a particular criterion for membership in a political community cannot discriminate among members according to the way in which they might vote. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627-29 (1969). *Accord* City of Mobile v. Bolden, 446 U.S. 55, 77-78 n.25 (1980); Dunn v. Blumstein, 405 U.S. 330, 336-37 (1972); Evans v. Cornman, 398 U.S. 419, 422 (1970); Cipriano v. City of Houma, 395 U.S. 701, 704 (1969).

is whether the plaintiffs, as legitimate members of the community, have been deprived of an equal vote. The voter does not allege that residency, impact, interest, or any other criterion should be used as a basis for distributing the franchise in that community. The voter simply argues that there should be equality of influence of individual opinion when ballots are cast.[211]

Under a first amendment analysis, the judiciary in a reapportionment case must decide whether the vote has been distributed to individuals within the greater political community on the basis of opinion. If voting districts have disparate populations and district boundaries are not based on any readily discernible shared interest or other criterion perceived to be necessary to the integrity of the greater political community, then a court may legitimately surmise that districting was based on the criterion of opinion in order to disadvantage individual voters with disfavored political opinions. If a state cannot refute the inference that political beliefs were taken into account, the one person, one vote standard is a logical remedy. That standard treats the individual opinions of all conceded members of the community equally.[212]

As an aside, it should be noted that the reapportionment decisions may be the source of judicial confusion concerning the importance of residency to membership in political communities. If the Court relies on a constitutional analysis developed in reapportionment decisions for the analysis of all voting rights controversies, assumptions about residency which may be warranted in reapportionment decisions may inadvertently and inappropriately appear in the analysis of other controversies. For example, the effect of the Supreme Court's reliance on *Avery* and *Hadley*, both reapportionment decisions, in the analysis in *Ball v. James*, 451 U.S. 355 (1981), a voter qualification case should be considered. *See* note 125 *supra.*

211. Under a first amendment analysis, a vote is an expression of political opinion. The political opinion of a voter in a district of 10,000 voters has less weight or influence than the political opinion of a voter in a district of 100. In Reynolds v. Sims, 377 U.S. 533 (1964) the Court stated:

> If a state should provide that the votes of citizens in one part of the State should be given two times or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted .... Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there.... Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor.

Id. at 562-63.

212. Compare the Court's analysis of the *Ball v. James* analogue to the reapportionment issue. In Ball v. James, 451 U.S. 355 (1981), votes were allocated and weighted according to acreage. When membership is extended to individuals, the one person, one vote standard cannot be fractionalized. The first amendment standard requires that individual political beliefs be treated equally. However, if membership is effectively extended to property, as in *Ball*, frac-

An unconventional interpretation of cases involving single-issue referenda illustrates how a circumstantial case may be refuted. Consider the Supreme Court's decision in *Town of Lockport v. Citizens for Community Action*.[213] The plaintiff in *Lockport* challenged the constitutionality of a statute which required a favorable vote of separate majorities of city and non-city voters to approve a new county charter. An election was held in Niagara County, New York, in which a majority of non-city voters disapproved and a majority of city voters approved a new charter. Because of the separate majority requirement, the charter was not adopted. A group of disappointed voters argued that they had been denied equal protection because each individual vote had not been weighted equally in the election.[214]

In the prototypical reapportionment case, there is no justification which dispels the inference that a weighted voting scheme is the result of a vote distribution based on opinion. However, in *Lockport* an explanation was offered. The Supreme Court observed that states have "wide discretion ... in forming and allocating governmental tasks to local subdivisions"[215] and that those local government units may have "discrete interests ... *qua* units."[216] Because a new county charter would frequently transfer authority from one governmental unit to another, or even abolish a unit and thereby "effectively shift any pre-existing balance of power between town and county governments toward county predominance,"[217] the Court deferred to the state's deci-

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tionalization of votes may be permissible, provided acreage or property does not serve as a proxy for opinion.

213. 430 U.S. 259 (1977).

214. *Id.* at 262-63. The Court held that equal protection principles utilized in the one person, one vote decisions were "of limited relevance" to the controversy. *Id.* at 266. In a single-issue election,

> the expression of voter will is direct, and there is no need to assure that the voters' views will be adequately represented through their representatives in the legislature. The policy impact of a referendum is also different in kind from the impact of choosing representatives—instead of sending legislators off to the state capitol to vote on a multitude of issues, the referendum puts one discrete issue to the voters.

Id. Because of this language, courts have assumed that single-issue referenda should not be governed by the same constitutional principles applicable to conventional voting rights controversies. The courts have relied on *Lockport* to begin developing a unique analytical framework for single-issue referenda. *See, e.g.*, Provance v. Shawnee Mission Unified School Dist., 231 Kan. 636, 648 P.2d 710 (1982); City of Humble v. Metropolitan Transit. Auth., 636 S.W.2d 484 (Tex. Civ. App. 1982). *See also* Fullerton Joint Union High School Dist. v. State Bd. of Educ., 32 Cal.3d 779, 654 P.2d 168, 187 Cal. Rptr. 398 (1982).

215. 430 U.S. at 269.

216. *Id.*

217. *Id.* at 270.

sion to give the political units *qua* units an equal voice in its adoption. The separate majority election process was

> based on the perception that the real and long-term impact of a restructuring of local government is felt quite differently by the different county constituent units that in a sense compete to provide similar governmental services. Voters in these constituent units are directly and differentially affected by the restructuring of county government . . . .[218]

In *Lockport* preservation of the integrity of county government depended on recognition of the shared interests of constituent political units and not solely on the shared beliefs of individual voters. The Court's decision in *Hill v. Stone*,[219] should be contrasted. In *Hill* the Court invalidated an election process which was similar to the process that was upheld in *Lockport*. The process required the approval of separate majorities of voting taxpayers and all voters in local bond elections. The decision in *Hill* is distinguishable from that in *Lockport* since, in *Hill*, the separate majority requirement was not related to the need to preserve the integrity of a community of shared interests represented by constituent political units. The *Hill* separate majority requirement, having no justification related to a legitimate organizing criterion for political communities, was properly held unconstitutional. The state had offered no explanation for the separate majority requirement that would dispel a reasonable suspicion that the franchise had been distributed on the basis of political opinion.

A court may have difficulty discerning when a state has utilized an illegitimate criterion for distributing the vote, but the discovery is not an impossible task. In *Dunn v. Blumstein*,[220] the state's illegitimate focus on voter preference and a particular point of view was easily discovered because the state couched its defense of durational residence requirement in suspect terms.[221] The State had acted in a way that was inconsistent with the protection of the interest given as the ostensible basis for the distribution of the franchise.[222] In *Oregon v. Mitchell*,[223] Justice Brennan found an illegitimate focus on voter preference because there were "strong indications that the states themselves do not credit the factual propositions [of maturity, experience, and cor-

218. *Id.* at 271-72.
219. 421 U.S. 289 (1975).
220. 405 U.S. 330 (1972).
221. *Id.* at 356 n.28.
222. *Id.* at 358-59.
223. 400 U.S. 112 (1970).

relative intelligent and responsible exercise of the elective franchise] upon which the restriction [of the vote on the basis of age] is asserted to rest."[224]

Moreover, under a first amendment analysis, the state may carry a special burden of proof regarding this issue. The previous discussion shows how either shared interests or shared impacts can be used as a proxy for opinion.[225] Therefore, if a state has distributed the franchise on the basis of the allegedly neutral criterion of either shared impacts or shared interest in a given issue, a court should scrutinize the criterion with care because these neutral criteria can so easily be used as a proxy or pretext for shared opinion. The Supreme Court engaged in this careful review in *Kramer v. Union Free School District No. 15* to assist it in the difficult task of differentiating between voter preference and voter knowledgeability.[226] Thus, under *Kramer*, a state may bear a substantial evidentiary burden. Careful scrutiny like that found in *Kramer* is premised on the recognition that a state may legitimately choose from a variety of criteria which may be used to distribute the franchise. However, the scrutiny takes into account the ease with which some facially neutral criteria might serve as a proxy or pretext for voter opinion.[227]

B. The State's Asserted Interest in Ensuring that Certain Voter Groups Have Access to the Political Process

Under a first amendment analysis, a state may argue that vote distributions based on opinion are necessitated by a compelling state interest. If a state can persuade the court of the merits of its argument, then even vote distributions based on opinion may not be unconstitutional.

States have attempted to justify challenged districting schemes by arguing that they wanted to ensure that certain interest

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224. *Id.* at 246.

225. *See* note 150 *supra* and accompanying text. *See also* Fullerton Joint Union High School Dist. v. State Bd. of Educ., 32 Cal.3d 779, 654 P.2d 168, 187 Cal. Rptr. 398 (1982). In *Fullerton* the court noted the difficulty of distinguishing between different voter interests, a permissible state objective, and different voter preferences, an impermissible one. *Id.* at 805-06, 654 P.2d at 186, 187 Cal. Rptr. at 416.

226. *See* text accompanying notes 72-76 *supra.*

227. In addition, if a plaintiff establishes that opinion was one of several criteria used to distribute the vote, and the state does not show that it would have used the same distribution scheme even had it not taken opinion into account, the state should be required to justify the distribution. Board of Educ. v. Pico, 457 U.S. 853, 871 n.22 (1982); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286-87 (1977).

groups were proportionately represented within a given legislative body. For example, in *Wells v. Rockefeller*[228] and *Kirkpatrick v. Preisler*,[229] the defendants argued that population variations among districts resulted from a legitimate attempt to "keep regions with distinct interests intact"[230] or to ensure "representation of distinct interest groups."[231] In each of these cases, the Supreme Court rejected the argument. Population variations otherwise invalid under the one person, one vote standard could not be validated through an asserted objective of securing representation of distinct interest groups. However, in *Gaffney v. Cummings*, the Court seemed to accept such a justification for districting decisions which do not result in unconstitutional population variations.[232] When a state offers this justification for a particular vote distribution, the state introduces into the first amendment analysis either the propriety of proportional schemes of representation or an issue like that addressed in affirmative action controversies. Either question is, at heart, a question of group rights.

Under the first amendment analysis proposed in this Article, the question of the propriety of proportional schemes of representation is easily answered. Even when a franchise distribution based on opinion produces districts of equal population, those districts are impermissible because they are inherently in conflict with first amendment principles. The one person, one vote standard is simply one means for ensuring that individuals are not treated differently in vote distributions on the basis of their political opinion. Adherence to one person, one vote standards does not legitimate proportional representation schemes that by definition contravene constitutional standards.[233]

Proportional schemes of representation or other vote distribution schemes which take into account the bloc voting behavior of racial groups in an attempt to remedy past or continuing exclusions from the political process cannot be dispensed with so easily. When a state acts according to principles of affirmative action in distributing the vote, an additional state interest is introduced. In such a situation, the state does not distribute the

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228. 394 U.S. 542 (1969).
229. 394 U.S. 526 (1969).
230. *Wells*, 394 U.S. at 546.
231. *Kirkpatrick*, 394 U.S. at 530.
232. *See* notes 170-74 and accompanying text *supra*.
233. Those commentators who have expressed the belief that a state may adopt a system of proportional representation have not premised those assertions on a careful analysis of first amendment principles. *E.g.*, L. TRIBE, *supra* note 195, 759 (1978); Edwards, *The Gerrymander and "One Man, One Vote,"* 46 N.Y.U.L. REV. 379, 397 (1971).

vote on the basis of opinion solely for opinion's sake but also because it believes, perhaps, that such a distribution is the only way of ensuring that individual voters of a particular race will not be excluded from effective participation in the political process. Typically, courts will be required to reconcile a first amendment proscription on vote distributions made according to individual opinion with a state's good faith effort to remedy an arguably unconstitutional exclusion of a racial group from effective participation in the state's political processes.

The task of evaluating state efforts to provide effective political participation for racial groups previously excluded from the political process is not inevitably or necessarily confounding. It might be significantly eased were the Supreme Court to take the position espoused by Justice Powell in affirmative action, equal protection litigation. Justice Powell argues that the validity of affirmative action should turn on the nature of the entity which adopts the standards for affirmative action.[234] If, for example, Congress has prescribed standards in response to an identified problem of racial discrimination, congressional choice may be accorded deference, and state action taken in accordance with the congressional mandate would not be unconstitutional. However, entities which neither share Congress' authority to implement the fourteenth amendment nor have a comparable constitutional authority might be precluded from voluntarily adopting their own affirmative action remedies.

Through the Voting Rights Act, Congress has set forth standards which govern changes in elections and election procedures for those areas of the country with a demonstrated history of racial discrimination.[235] These standards may or may not be sufficient to accommodate legitimate state attempts to remedy past voting discrimination.[236] If they are not, perhaps the provi-

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234. *Compare* Fullilove v. Klutznik, 448 U.S. 448, 510-11 (1980) (Powell, J., concurring) *with* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

235. 42 U.S.C. §§ 1971-1974(e) (1982).

236. Bandemer v. Davis, 603 F. Supp. 1479, 1496 (S.D. Ind. 1984) (Pell, J., concurring in part and dissenting in part). *Cf.* Mississippi Republican Executive Committee, 105 S. Ct. 416 (1985) (Stevens, J., concurring; Rehnquist, J., dissenting).

Justice Brennan has suggested that questions of group rights in the voting rights area might properly be addressed under the Voting Rights Act rather than the Constitution. United Jewish Orgs. of Williamsburg, Inc. v. Carey, 430 U.S. 144, 171 n.1 (1977) (Brennan, J., concurring in part). Justice Stevens has also suggested that it might be proper for Congress to amend the Voting Rights Act so as to take care of the problem of racial group participation in the political process and multi-member districts. Rogers v. Lodge, 458 U.S. 613, 632 (1982) (Stevens, J., dissenting). *But see* United Jewish Orgs. of Williamsburg, Inc. v. Carey, 430 U.S. 144, 166 (1977) (plurality opinion) (Justices White, Stevens,

sions of the Voting Rights Act should be changed, but this Article is not intended to identify deficiencies in the coverage of the Voting Rights Act or even to articulate a general theory of affirmative action for voting rights cases. The important point is that if states are permitted to take affirmative action to remedy past racial discrimination in voting only under standards prescribed by Congress, courts will not be required to develop their own standards. The relative simplicity of the first amendment analysis concerning individual voting rights will not be placed in jeopardy, but the state will be accorded appropriate authority to remedy voting discrimination.

C. The Advantages of a First Amendment Analysis.

Most of the advantages of applying a first amendment analysis to distributional voting rights controversies should be apparent from the previous discussion. The first amendment analysis offers an escape from the irresolvable and seemingly endless debate over whether the right to vote is fundamental. It is premised on a principle of political neutrality to which the Court adheres in other disputes pertaining to the structure of government. It gives deference to state choice in distributional schemes where deference is appropriate, but it does not permit governmental subterfuge to avoid constitutional constraints on the use of impermissible criteria. The most important advantages of a first amendment analysis are apparent, however, only if one compares it to an alternative equal protection analysis which is being developed in the context of gerrymandering disputes.

This discussion should begin with a careful review of Justice Stevens' concurring opinion in *Karcher v. Daggett*,[237] in which Justice Stevens broke, partially, from the analysis conventionally applied to distributional controversies. Justice Stevens was dissatisfied with the logic that would restrict conventional analysis to cases involving racial minorities and sought judicially manageable standards for resolving controversies involving racial minorities.[238] His analysis is based on two propositions. Initially, he

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and Rehnquist concur in addressing the constitutional issue; the state may remedy without any necessary reliance on the Voting Rights Act). *See* Clinton, *Further Explorations in the Political Thicket: The Gerrymander and the Constitution*, 59 IOWA L. REV. 1, 44-46 (1973) (Congress has the power to adopt affirmative action standards for excluded voting groups) [hereinafter cited as Clinton].

237. 103 S. Ct. 2653, 2667-78 (1983) (Stevens, J., concurring).

238. *See* Rogers v. Lodge, 102 S. Ct. 3272, 3284-86 (Stevens, J., dissenting). *See also* Clinton, *supra* note 236. Clinton also recommends a partial break from conventional equal analysis and even stresses reliance on Hunter v. Erickson,

argues that the equal protection clause of the fourteenth amendment prohibits political gerrymandering and requires states "to govern impartially."[239] He asserts that election rules "must serve the interest of the entire community .... If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community,"[240] they are unconstitutional. Second, he states that the interests protected by the equal protection clause in political gerrymandering cases are group interests.[241] Constitutional standards derived from *Reynolds v. Sims*, such as the numerical equality standards applied in reapportionment cases, protect individual rather than group rights. In fact, those standards may even undermine group interests.[242]

Justice Stevens would evaluate the constitutionality of alleged political gerrymanders by addressing three questions: (1) whether the districting plan has a significant adverse impact on an identifiable political group; (2) whether the plan has objective indicia of irregularity; and (3) whether the state is able to produce convincing evidence that the plan nevertheless serves neutral, legitimate interests of the community as a whole.[243] Justice Stevens' test accomplishes some of what a first amendment analysis would accomplish. Constitutional protection is not limited to those instances in which political beliefs are shared by racial minorities. Additionally, constitutional prohibitions are not absolute; a state may justify a chosen vote distribution by demonstrating the existence of a legitimate, compelling state interest. Finally, Justice Stevens' equal protection test eliminates subjective motive as a critical factor in the analysis.[244]

The first amendment analysis proposed in this Article is consistent with the foregoing aspects of Justice Stevens' equal protection test, but it differs in one important respect. Under the equal protection test, a court must decide whether a vote distribution has a significant adverse impact on an identifiable political group.[245] Under the proposed first amendment analysis, adverse

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393 U.S. 385 (1969), and its progeny as a rationale for the new analysis. The author does not, however, emphasize the first amendment roots of *Hunter* and therefore recommends an equal protection analysis which has many of the same deficiencies as that recommended by Justice Stevens.

239. *Karcher*, 103 S.Ct. at 2668 (Stevens, J., concurring).

240. *Id.* at 2669 (Stevens, J., concurring).

241. *Id.* at 2670 (Stevens, J., concurring).

242. *Id.* at 2671 (Stevens, J., concurring).

243. *Id.* at 2670 (Stevens, J., concurring).

244. *Id.* at 2671-72 (Stevens, J., concurring).

245. According to Justice Stevens, a plaintiff's *prima facie* case of adverse impact can be made circumstantially. Facts tending to suggest a vote-diluting

impacts may be important circumstantial evidence of whether opinion has been utilized as the basis for a vote distribution, but adverse group impacts are not the focus of the analysis.

A disparate impacts test does not provide judicially manageable standards for the resolution of distributional voting rights controversies. Justice Stevens proposes to use a disparate impacts test in equal protection analysis to avoid the difficulties which he perceives to be inherent in any judicial inquiry into subjective motivation for given vote distributions. However, the impacts test is as judicially unmanageable as the inquiry into subjective intent. Under Justice Stevens' analysis, a court must determine whether a particular vote distribution has a "significant adverse impact on an identifiable political group."[246] Not only must a court be able to determine whether an identifiable political group exists and whether the adverse impact is significant, but it must also prescribe an appropriate remedy for the group. Each phase of this judicial inquiry leads into an analytical quagmire.

In the context of districting decisions, Justice Stevens suggests that an identifiable political group would be "one whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing district boundaries."[247] Although he states that these groups "will generally be based on political affiliation, race, ethnic group, national origin, religion, or economic status, but other characteristics may become politically significant in a particular context,"[248] he does not provide any definitional standards.

He also provides no clear standards for determining when an impact on a political group is sufficiently adverse to warrant judicial intervention, although he discusses some of the difficulties associated with this inquiry. One difficulty "stems from the existence of alternate strategies of vote dilution."[249] With respect to political parties, the showing "may be more difficult ... than for members of a racial group ... because there are a number of possible base line measures for a party's strength ..."[250] Further-

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gerrymander include the excessive fragmentation or concentration of an identifiable group, extreme irregularity or non-compactness of a district, deviation of district lines from established political boundaries, or a closed or partisan process for determining where district lines are to be drawn. *Id.* (Stevens, J., concurring). Justice Powell substantially agrees with this use of circumstantial evidence although he is in search of evidence of a gerrymandering intent. *Id.* at 2689-90 (Powell, J., dissenting).

246. *Karcher*, 103 S. Ct. at 2670 (Stevens, J., concurring).

247. *Id.* at 2672 (Stevens, J., concurring).

248. *Id.* at 2672 n.12 (Stevens, J., concurring).

249. *Id.* at 2672 n.13 (Stevens, J., concurring).

250. *Id.* (Stevens, J., concurring).

more, under an impacts analysis, a state apparently may defend a vote distribution by showing that a "group's voting strength is not diluted in the State as a whole."[251] In *United Jewish Organizations of Williamsburg v. Carey, Inc.*, Justice White suggested that those Hasidic Jews who complained that New York's districting scheme was unconstitutional had no legitimate grievance if their interests would be represented by voters in other districts.[252] The argument is a variant of the "bottom line" defense, rejected in Title VII litigation, in which the employer argues that the discriminatory impact of a particular hiring criterion ought not to be illegal under Title VII as long as the final results of the entire hiring process show no discriminatory impact.[253] The majority of the Supreme Court refused to accept this defense in Title VII litigation because it substitutes group interests for individual rights.[254] Justice Brennan has recognized that this shift in emphasis presents the same barrier to incorporating the argument into voting rights controversies.[255]

Finally, any satisfactory judicial response to a perceived group discriminatory impact would have to propose an alternate vote distribution. There are several problems created by this remedial question. In *Rogers v. Lodge*, the judicial remedy amounted to a simple declaration that a multi-member election district would have to be replaced with single-member districts,[256] but the decision was unclear as to why or how the Court decided that those district lines would protect group interests. Had the Court ordered race to be taken into account to achieve proportional representation, it might have acted improperly.[257] As a conceptual matter, the remedial issue embodies the same difficulty that has prompted the Supreme Court to adhere to the proposition that there is no constitutional right to proportionate, i.e. group interest, representation.[258] As a practical matter, judicial remedies like

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251. *Id.* at 2675 n.25 (Stevens, J., concurring). Even if the group's voting strength has in fact been reduced, the previous plan may have been gerrymandered in its favor.

252. 430 U.S. at 166, n.24.

253. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982).

254. *Id.* at 453-54.

255. 430 U.S. at 171, n.1.

256. Lodge v. Buxton, 639 F.2d 1358, 1381 (5th Cir. 1981), *aff'd*, Rogers v. Lodge, 458 U.S. 613, 627-28 (1982).

257. Taylor v. McKeithen, 407 U.S. 191 (1972), *on remand*, 499 F.2d 893 (5th Cir. 1974); Marshall v. Edwards, 582 F.2d 927 (5th Cir. 1978).

258. White v. Register, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971). *Cf.*, Rogers v. Lodge, 458 U.S. 613, 630 (1982) (Powell, J., dissenting) (any system of group representation is "antithetical to the principles of our democracy.")

that proposed in *Rogers* may not even have the intended, beneficial effect. As Justice Stevens noted in *Rogers*, the use of single-member districts might in some cases actually operate to the detriment of minority racial groups.[259]

The equal protection, disparate impacts test, with its focus on group interests and rights, is guaranteed to lead courts into political thickets and "a vast wonderland of judicial review of political activity."[260] The test will undoubtedly provoke the same criticisms that have been leveled in the past at the reapportionment decisions which were frequently criticized as exceeding the legitimate scope of judicial review.[261] The reapportionment decisions, however, can be explained in terms of a traditional analysis that focuses on individual rather than group rights.[262] By definition, the impacts analysis precludes this explanation. As a result, the impacts analysis will be open to legitimate objections that it involves courts in Alexander Bickel's "web of subjectivity."[263] In contrast, a first amendment analysis would provide a judicially manageable framework for the resolution of distributional voting rights controversies, because the focus of the analysis remains on the individual and on whether opinion was utilized as a distributional criteria.

VI. CONCLUSION

Courts attempt, continually, to resolve distributional voting rights controversies that clearly implicate first amendment inter-

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259. 458 U.S. at 643-44) 651-52. *See also*, Wright v. Rockefeller, 376 U.S. 52, 59 (1964) (Douglas, J., joined by Goldman, J., dissenting); L. TRIBE, *supra* note 195, 758 (It is an oversimplification to speak of a group electing *its* representatives. Fencing a group into one district may actually minimize its influence, especially if there are no "clearly dichotomized" minorities.)

260. *Rogers*, 458 U.S. at 649. *See also*, United Jewish Orgs. of Williamsburg, Inc. v. Carey, 430 U.S. 144, 171 n.1 (1977) (Brennan, J., concurring in part) (Justice Brennan refused to address the sticky problem of group rights).

261. *See, e.g.*, Justice Frankfurter's protest that the Court chose, in the reapportionment cases, "among competing bases of representation—ultimately, really, among competing theories of political philosophy . . . ." Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting); *see also* A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT 141-43 (1982). Alexander Bickel, for example, viewed the decisions as evidence of "intellectual incoherence"—as part of a "web of subjectivity," A. BICKEL, *supra* note 2, at 45. He believed that they resulted form an unleashed tide of "populist majoritariansim." *Id.* at 110. Even those who generally approve of the results in the reapportionment cases sometimes argue that the decisions implement judicially created principles of fairness rather than constitutional rights. *See, e.g.*, M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 91-145 (1982); Wright, *The Role of the Supreme Court in a Democratic Society-Judicial Activism or Restraint?* 54 CORN. L. REV. 1, 2, 19 (1968).

262. *See* notes 210-12 *supra*.

263. *See* note 261 *supra*.

ests through an equal protection analysis. For example, in *Bandemer v. Davis*,[264] in which the Supreme Court has noted probable jurisdiction,[265] the district court determined that the challenged apportionment scheme was adopted for explicitly political reasons—to save as many incumbent Republican seats in the state legislature as possible. Despite the clear indication that voter opinion was utilized as the criterion for the challenged vote distribution, the district court embarked on an equal protection analysis of the sort prescribed by Justice Stevens in *Karcher v. Daggett*.[266] Thus, the district court addressed the question of group rights and adverse impacts. The dissenting opinion also applied equal protection, adverse impact principles.[267] The majority found that the districting plan had a disparate impact on a politically salient group.[268] The dissent argued that no adverse impact had been shown.[269]

Perhaps the Supreme Court will turn to the first amendment when it reviews the *Bandemer* decision or, if not then, when an appropriate case is before the Court. A first amendment analysis avoids the difficult inquiry into adverse impact and the inevitable focus on group rights. One cannot guarantee, of course, that a first amendment analysis will result in the easy resolution of distributional voting rights controversies. The analysis is worth exploring, however, if only because it asks new questions in new terms. It is not constrained by the rhetoric of conventional equal protection debate. Therefore, it may lead the way to a more meaningful resolution of distributional voting rights controversies.

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264. 603 F. Supp. 1479 (S.D. Ind. 1984).
265. 105 S. Ct. 1840 (1985).
266. 103 S. Ct. 2653, 2670-76 (Stevens, J., concurring).
267. 603 F. Supp. 1479, 1500-04 (S.D. Ind. 1984) (Pell, J., concurring in part & dissenting in part).
268. 603 F. Supp. at 1494-95.
269. 603 F. Supp. at 1504 (Pell, J., concurring in part & dissenting in part).