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Constitutional Law—Equal Protection: Supermajority Voting Requirements—Gordon v. Lance, 403 U.S. 1 (1971)

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CONSTITUTIONAL LAW—EQUAL PROTECTION: SUPERMAJORITY VOTING REQUIREMENTS—*Gordon v. Lance*, 403 U.S. 1 (1971).

On April 29, 1968, the Board of Education of Roane County, West Virginia, submitted to its electorate a proposal calling for the issuance of general obligation bonds, the proceeds of which were to be used for the construction of new school buildings and the improvement of existing educational facilities. At the same election, by separate ballot, the voters were asked to authorize the Board to levy additional taxes to support current expenditures and capital improvements. Both proposals failed to receive the requisite sixty percent affirmative vote[1] and were defeated.

Following the election, respondents, a group of concerned parents, appeared before the Board on behalf of themselves and other persons who had voted in favor of the proposals. They demanded that the Board authorize the bonds and the additional taxes. The Board refused and respondents brought suit seeking a declaratory judgment that West Virginia's constitutional and statutory supermajority re-

1. West Virginia, like many other states, requires extraordinary majority approval in "direct elections." The relevant constitutional provisions for general levies include a debt limitation of five percent of the value of taxable property, as well as time limitations and supermajority requirements. W. VA. CONST. art. 10, § 8 (1950). There is a companion statutory requirement that bond issues for the improvement of educational facilities receive sixty percent voter approval. W. VA. CODE ANN. §§ 13-1-4, 13-1-14, (1966). In *Gordon*, 51.50 percent of the voters favored the bond issue; 51.51 percent favored the tax levy. 403 U.S. 1 (1971).

Washington has a similar constitutional provision which provides that the aggregate of tax levies upon real property in any taxing district may not exceed forty mills on the dollar of assessed valuation in any year. WASH. CONST. art. 7, § 2, amendment 17 (1944). The forty mill limit may be exceeded only when three-fifths of the electors voting authorize an excess levy. The amendment further provides that the election is not valid unless the number of persons voting constitutes not less than forty percent of the total number of votes cast in the taxing district in the last general election. The Washington Supreme Court has held that the sixty percent requirement does not violate equal protection. Thurston v. Greco, 78 Wn.2d 424, 474 P.2d 881 (1970). The *Thurston* court did not decide the validity of the forty percent requirement. *Id.* at 423 n.2, 474 P.2d at 882 n.2.

Other Washington extraordinary provisions include: WASH. REV. CODE § 84.52.052 (1961) (authorizing excess levies); WASH. REV. CODE § 84.52.056 (1961) (excess levies for capital purposes); WASH. REV. CODE § 39.36.020 (1959) (limiting municipal indebtedness); WASH. REV. CODE § 28A.51.020 (1970) (bond elections); WASH. CONST., amendment 27 (1952) (limitation on municipal indebtedness).

For a survey of supermajority schemes in other states see *League of Women Voters of Washington: The 40%-60% Voting Requirement*, Pub. No. EI-5 (1966). *See generally* ADVISORY COMMISSION ON INTER-GOVERNMENTAL RELATIONS, UNITED STATES CONGRESS, STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS ON LOCAL TAXING POWER (1962).

quirements violated the equal protection clause of the fourteenth amendment to the United States Constitution. After a dismissal by the trial court, the West Virginia Supreme Court of Appeals held that the requirements did violate the equal protection guarantee.[2] On appeal, the United States Supreme Court reversed. *Held:* The West Virginia provisions do not discriminate against any identifiable class and, therefore, do not violate the equal protection clause. *Gordon v. Lance,* 403 U.S. 1 (1971).

Since its entry into the "political thicket"[3] in the early 1960's, the Supreme Court has sought to ensure equal protection with regard to voting rights in three different settings: (1) cases in which state laws excluded groups from voting in some or all elections;[4] (2) cases involving state geographical districting systems or representative allocation systems which diluted the effectiveness or "weight" of votes;[5] and (3) cases concerning the extent to which a state may utilize the polit-

2. Lance v. Board of Education, 170 S.E.2d 783 (W. Va. 1969).

3. This term was first employed by the Supreme Court in Colegrove v. Green, 328 U.S. 549, 556 (1946).

4. *See, e.g.,* Carrington v. Rash, 380 U.S. 89 (1965) (residency requirements for servicemen held invalid); Oregon v. Mitchell, 400 U.S. 112 (1970) (all residency requirements held unconstitutional); Louisiana v. United States, 380 U.S. 145 (1965) (qualifying examinations excluding racial minorities held unconstitutional); Harper v. Virginia State Board of Electors, 383 U.S. 663 (1965) (poll taxes excluding the poor held unconstitutional); Katzenbach v. Morgan, 384 U.S. 641 (1966) (literacy tests held invalid); Kramer v. Union Free School District, 395 U.S. 621 (1969) (voting qualifications based on property ownership held unconstitutional); Cipriano v. City of Houma, 395 U.S. 701 (1969) (voting qualifications based on property ownership held unconstitutional).

With respect to *denial* based on race, the fifteenth amendment also applies. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

5. The Court held that an allegation that legislative apportionment denied equal protection "present[ed] a justiciable constitutional cause of action" in Baker v. Carr, 369 U.S. 186, 237 (1962). The proper test for equal protection in the election of legislative representatives was decided later, the Court holding that "once the geographic unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote." Gray v. Sanders, 372 U.S. 368, 380-81 (1962). Applying the "one man, one vote" principle in later cases, the Court held that the districting of federal congressional seats must also be based upon "substantial" population equality among geographic units. Wesberry v. Sanders, 376 U.S. 1 (1963). A similar conclusion was reached with respect to the apportionment of both houses of state legislatures. Reynolds v. Sims, 377 U.S. 533 (1964). Subsequent decisions have insisted upon a rule of "absolute" equality of population. Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Wells v. Rockefeller, 394 U.S. 542 (1969). However, the Court recently permitted an 11.9 percent deviation among local legislative districts where the cause of the deviation was not a "built-in" group bias. Abate v. Mundt, 403 U.S. 182 (1971). The "one man, one vote" principle has also been extended to many units of local government. Hadley v. Junior College District, 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 663 (1968). *But see* Sailors v. Board of Education, 387 U.S. 105 (1967). Both *Hadley* and *Sailors* involved school board officials. However, *Sailors* involved appointed officials and the

ical process to impose greater burdens on one group than it imposes on other groups.[6] The initial question in each case is whether the voting scheme employed by the state classifies at all. A conclusion that the particular scheme does not classify will preclude consideration of the equal protection question because no classes are created to which the law might be unequally applied. The *Gordon* Court did not directly decide the classification issue. However, the Court did reach the ultimate equal protection question and thus impliedly acknowledged that supermajority schemes do classify. This conclusion seems correct because supermajority requirements create two groups of voters with disparate influence, those voting for the proposal and those voting against it.[7]

Court distinguished *Gray* and *Reynolds* on that basis. *Sailors*, 387 U.S. at 109. The question of whether "a State may constitute a local legislative body through the appointive rather than the elective process" was not decided. *Id.* at 109-110. In *Hadley* the officials were elected.

6. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1969) (holding certain Ohio election laws, which gave established political parties a decided advantage in obtaining positions on the ballot, unconstitutional as violative of the equal protection clause); Hunter v. Erickson, 393 U.S. 385 (1969) (city charter provision requiring that any fair housing ordinance passed by the city council which regulates on a racial or ethnic basis be submitted to the voters in a citywide referendum was a violation of the equal protection clause).

7. The effect of supermajority voting requirements has been explained as follows:

> Unlike the situation in which a simple majority is required and each vote is given the same weight, the 60 per cent requirement gives a negative vote a weight one and one-half times as great as that of a favorable vote. One negative vote is 50 per cent more effective in defeating a proposed bond issue or excess tax levy than a favorable vote approving it.

Thurston v. Greco, 78 Wn.2d 424, 437, 474 P.2d 881, 888-89 (1970) (dissenting opinion). For example, in an election in which 100 votes were cast, it would only take 41 negative votes to defeat the proposal, but it would take 60 affirmative votes to pass it, thus giving a negative vote *potentially* one and one-half times the weight of an affirmative vote.

The conclusion that supermajority schemes do classify has some support in the federal courts. *See, e.g.*, Rimarcik v. Johansen, 310 F. Supp. 61 (D. Minn. 1970). *But see* Brenner v. School District of Kansas City, 315 F. Supp. 627 (W.D. Mo. 1970). The conclusion that such schemes classify is the majority rule among state courts which have passed on the validity of supermajority schemes. Westbrook v. Mihaly, 2 Cal.3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970), *cert. granted*, 403 U.S. 922 (1971). The *Westbrook* case, which was remanded in light of *Gordon*, had held that the two-thirds majority for municipal bond issues required by the California constitution violated the equal protection clause. *See also* Bogert v. Kinzer, 93 Idaho 515, 465 P.2d 639 (1970), *appeal dismissed*, 403 U.S. 914 (1971) (the one man, one vote rule does not invalidate Idaho's constitutional and statutory requirement that a two-thirds majority approve a local government issuance of general obligation bonds); Alhambra City School District v. Mize, 2 Cal.3d 806, 471 P.2d 515, 87 Cal. Rptr. 867 (1970), *appeal dismissed*, 403 U.S. 925 (1971) (California statutory and constitutional provisions requiring a two-thirds affirmative vote to approve the issuance of school district general obligation bonds violated the equal protection clause, but decision limited to prospective application). These cases are

In dealing with the three types of voting cases noted above, the Court has proceeded from the initial finding of a classification to a second issue: what is the proper equal protection test to apply in judging the validity of the classification? The choice, as in all equal protection cases, is between a stringent test and a more flexible rational basis test.[8] The two primary limitations on state action under the rational basis test are, first, that the state cannot create arbitrary classifications[9] and, second, that any classification created must bear a reasonable relation to the achievement of some legitimate state end.[10] Absent a clear showing that the legislation attacked constitutes an arbitrary classification or that it promotes no legitimate governmental interest, state laws are presumed to be constitutional.[11] On the other hand, where a "fundamental right" or "suspect classification" is involved, the stringent test applies.[12] The burden is then on the state to overcome a presumption of unconstitutionality.[13] The state is required to prove that the classification it has chosen is not only non-arbitrary

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discussed in Note, *Extraordinary Majority Voting Requirements,* 58 GEO. L.J. 411 (1969); Note, *The Extraordinary Majority Rule in Municipal Bonding,* 4 LOYOLA (L.A.) L. REV. 423 (1970); Comment, *Equal Protection Standards and State "Extra Majority" Vote Requirements,* 3 CREIGHTON L. REV. 324 (1970).

The only dissent to the conclusion that supermajority schemes classify, as well as the only decision to face squarely the particular issue, is Thurston v. Greco, 78 Wn.2d 424, 474 P.2d 881 (1970). The *Thurston* court concluded that the Washington supermajority requirements did not classify or, if they did, the classification was due to the choice of the voter and was, therefore, not prospective, but rather "after the fact." *Id.* at 427, 474 P.2d at 884. No authority was cited for the proposition that prospective classification would mean no classification. An examination of the authority in the three classes of voting cases previously noted reveals that the classifications there did operate prospectively. *See* notes 4-6 and accompanying text, *supra.*

8. McDonald v. Board of Election, 394 U.S. 802, 806-09 (1969). *See generally* Comment, *Equal Protection Standards and State "Extra Majority" Vote Requirements,* 3 CREIGHTON L. REV. 324, 326 (1970); Tussman and ten Broeck, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

The rational basis test is justified on the ground that unless a fundamental right is involved, proper respect for the legislature as a coordinate branch of government, as well as judicial restraint, require a presumption of constitutionality of legislative activity. *Cf.* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 420 (1920).

9. Madden v. Kentucky, 309 U.S. 83 (1940).

10. Barbier v. Connolly, 113 U.S. 27 (1885).

11. *See Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969). *See also* International Harvester Co. v. Missouri, 234 U.S. 199 (1914).

12. *See, e.g.,* Skinner v. Oklahoma, 316 U.S. 535 (1942) (the right to have offspring is a fundamental right); Brown v. Board of Education, 347 U.S. 483 (1954) (one "suspect classification" to which equal protection standards are strictly applied is one based on race); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (nationality is a "suspect classification"); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (nationality).

13. Kramer v. Union Free School District, 395 U.S. 621 (1969).

but necessary[14] and that the interest sought to be furthered is not only legitimate but compelling.[15]

Prior to its decision in *Gordon,* the United States Supreme Court had consistently applied the stringent test in judging the constitutionality of statutory schemes which denied the right to vote, which weighted votes (malapportionment) or which imposed greater burdens on the interests of one group than on the interests of others.[16] Such an application resulted from the conclusion that the right to vote, because of its role in preserving "all other basic rights," is a fundamental right.[17] The *Gordon* Court distinguished the malapportionment and denial cases, stating that:[18]

> The defect . . . in those cases lay in the denial or dilution of voting power because of *group characteristics . . . that bore no valid relation to the interest of these groups in the subject matter of the election;* moreover, the dilution or denial was imposed irrespective of how members of those groups actually voted.

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14. *Id. See also* Korematsu v. United States, 323 U.S. 214 (1944).

15. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

16. *See, e.g.,* Hunter v. Erickson, 393 U.S. 385 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1962). In *Gray* the Court expressed particular concern with respect to apportionment schemes which weighted the effectiveness of the right to vote, and held:

> The only weighting of votes sanctioned by the Constitution concerns matters of representation such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President . . . *But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting may be evaded.*

Gray, 372 U.S. at 380-81 (emphasis added). With respect to burdening the interests of one group through the electoral process, the Court in *Hunter* stated: "[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter,* 393 U.S. at 393.

17. *See* Reynolds v. Sims, 377 U.S. 533 (1964). In *Reynolds* the Court stated:

> [S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Id. at 562. In Wesberry v. Sanders, 376 U.S. 1, 17 (1964), the Court decided that "[n]o right is more precious in a free country [than the right to vote]. Other rights, even the most basic, are illusory if the right to vote is undermined." Both *Reynolds* and *Wesberry* concerned malapportionment. The Court has also concluded that the right to vote is fundamental in those cases dealing with the outright denial of the right to vote and in the burdening cases. *See, e.g.,* Kramer v. Union Free School District, 395 U.S. 621 (1969) (denial of the right to vote); Williams v. Rhodes, 393 U.S. 23 (1968) (burdening the interests of one group of voters). The conclusion that the right to vote is a fundamental right has long historical acceptance. *See, e.g.,* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

18. *Gordon,* 403 U.S. at 4 (emphasis added). The West Virginia Supreme Court of Appeals had noted the weighting effect of the extraordinary majority requirement to con-

The West Virginia requirements, the Court reasoned, did not deny the franchise to any person and, unlike the malapportionment cases, did not weight the votes of some ascertainable class because of geography, property, race or other extraneous qualification not related to the subject matter of the election.[19]

The distinction from the malapportionment and denial cases was vital to the Court's decision. Viewing the factual situation in *Gordon* as distinguishable from that of the voting cases which apply the stringent equal protection test, with its strong presumption of unconstitutionality, the Court was able to apply the rational basis test with its converse presumption of validity. The Court then noted "that in voting to issue bonds voters are committing, in part, the credit of infants and generations yet unborn"[20] and held that extraordinary majority requirements, by making it more difficult to enact projects imposing bonded indebtedness, reasonably could achieve the end of protecting

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clude that the malapportionment cases were controlling. Lance v. Board of Education, 170 S.E.2d 783, 788-89 (W. Va. 1969). Particular reliance was placed on Gray v. Sanders, 372 U.S. 368 (1962). In *Gray*, the Court applied the stringent equal protection test and the one man, one vote principle to invalidate Georgia's county unit primary election system. The county unit system was much like the electoral college system used in electing the President of the United States. The West Virginia court recognized that the one man, one vote principle applied in the malapportionment cases involved the right to vote in elections for public officials and the possibility of distinguishing those cases based on the object of the vote, a municipal bond election in *Gordon*. However, the court used Cipriano v. City of Houma, 395 U.S. 701 (1969), to apply the one man, one vote principle to the West Virginia requirements. In *Cipriano*, the United States Supreme Court held that the equal protection guarantee prohibited a state from limiting the franchise in a local bond election to property taxpayers. The West Virginia court reasoned that the *Cipriano* result demanded a strict application of equal protection standards, regardless of the object of the vote. Lance v. Board of Education, 170 S.E.2d 783, 789 (W.Va. 1969).

19. *Gordon*, 403 U.S. at 5.

20. *Id.* at 6-7. The conclusion that the protection of future taxpayers from presently incurred capital debts is a reasonable state interest is undoubtedly correct. However, the protective functions of supermajority schemes may illustrate the embracing of a lesser good to the exclusion of a greater good. Authority exists for the proposition that the salient need in local bond financing is flexibility which provides better organization in the financing process, better planning and, ultimately, more fiscal responsibility to and protection of the taxpayer. INSTITUTE OF GOVERNMENTAL STUDIES, UNIVERSITY OF CALIFORNIA AT BERKELEY, PUBLIC AFFAIRS REPORT (August, 1969).

It can be said that the only reason for supermajority requirements in local bond elections is the protection of property taxpayers from high tax indebtedness placed on them by non-property owners. The protection of property owners would seem to be unconstitutional under Cipriano v. City of Houma, 395 U.S. 701 (1969), although a distinction might be made because *Cipriano* involved the outright denial of the franchise to non-property owners. The Court's avoidance of attributing an impermissible purpose to a legislature in order to uphold a statute is in accord with general Court precedent. In Goesaert v. Cleary, 335 U.S. 464 (1948), for example, the Court was confronted with a Michigan statute which denied bartender's licenses to all women except the wives or

the credit of future generations. Consequently, both elements of the rational basis test were satisfied; there was a legitimate state interest and non-arbitrary classification reasonably related to that end.

In distinguishing the West Virginia requirements from the cases involving the denial of the right to vote, the *Gordon* Court was on firm ground. Clearly supermajority schemes cannot be equated with outright denial.[21] Distinguishing supermajority requirements from the malapportionment and burdening cases is more questionable and raises three significant points for consideration: the Court's present view of requirements diluting or burdening the vote and the implications of this view; the significance of the subject of the vote; and the propriety of any distinction resulting in less than stringent protection of voting equality.

The *Gordon* Court suggested that some clear, ascertainable characteristic—namely, geography—caused the weighting of the vote in the malapportionment cases and weighting was imposed on a discrete and insular minority (a specially affected group) without regard to the way the group actually voted. Supermajority requirements are not of this character and are clearly distinguishable by this categorization.[22] However, language in the early malapportionment cases indicates that the Court has been more concerned with the weighting of votes per se

daughters of male bar owners. One might well have argued that the probable purpose of the statute was monopolizing jobs for men and that such a purpose was impermissible. Yet, exercising considerable restraint and according a strong presumption of constitutionality to the action of the legislature, the Court refused to inquire into that discriminatory purpose. Instead, the Court attributed to the legislature the conceivable, though less probable, purpose of avoiding social and moral problems which might accompany the employment of women in bars.

21. The West Virginia court equated a debasement of the right to vote with outright denial. Lance v. Board of Education, 170 S.E.2d 783, 789 (W.Va. 1969). This was done on the basis of the following unexplained dictum in Reynolds v. Sims, 377 U.S. 533, 555 (1964): "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Even such an equation may not be sufficient to support a conclusion that supermajority requirements are unconstitutional. In McDonald v. Board of Election, 394 U.S. 802 (1969), the Court held that only total denials of the vote because of impermissible reasons, for example, race or wealth, would clearly call for an application of the stringent equal protection test. *McDonald* involved a challenge to an Illinois statute which did not provide for absentee ballots for persons awaiting trial in county jails. The Court held the failure to provide absentee ballots was not a denial of equal protection.

22. This is because the classification of voters in local bond elections into groups having more, or less, influence is accomplished by the voter himself in exercising his vote. The classification is thus internalized with the act of voting itself, not because of some external standard imposed before the vote is cast. The factor causing the classification in the bond election is also related to the purpose of that election; the purpose of the election is to test for greater than majority support for a given proposal and classifying

than with the question of whether the group affected was necessarily clearly ascertainable. The Court has stated: "But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded."[23] Furthermore, the Court was not unanimous in the malapportionment cases in holding that geography is unrelated to the way votes were cast,[24] thus indicating difficulty in using this standard as a basis from which a distinction can be made. Nevertheless, the Court has followed the requirement of a specially affected group in judging the validity of dilution allegations in later cases. In *Abate v. Mundt*[25] the Court upheld a population deviation of 11.9 percent between local voting districts, reasoning that the deviation contained no "built-in bias tending to favor particular geographic areas or political interests . . . or designed to favor particular groups."[26]

The Court has previously applied the same test in burdening cases. *Hunter v. Erickson*,[27] one of the burdening cases, was distinguished in *Gordon* on the grounds that *Hunter* involved a clear, specially affected group of blacks favoring open-housing legislation and that the group's ability to pass such legislation was hampered solely because of race. The built-in group bias reading of *Hunter* has since been followed in *James v. Valtierra*.[28]

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affirmative or negative voters by influence achieves that purpose. Finally, the group singled out for special treatment, those favoring or not favoring the bond issue, are specially treated because of the way they vote and, as noted, this treatment has a rational relation to the purpose of the election.

23. Gray v. Sanders, 372 U.S. 368, 381 (1962). *See also* Reynolds v. Sims, 377 U.S. 533, 565 (1964), where the Court indicated that a dilution of the vote impairs a republican form of government.

24. Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

25. 403 U.S. 182 (1971).

26. *Id.* at 185-86. There is some language indicating a built-in group bias view of vote dilution in Hadley v. Junior College District, 397 U.S. 50 (1970). The *Hadley* Court spoke of a system evidencing a "built-in bias in favor of small districts." *Id.* at 57-58.

27. 393 U.S. 385 (1969). *Hunter* established the proposition that laws which make it more difficult for special groups to enact their views into law violated equal protection. *Hunter* involved the enactment of fair housing legislation. Provision for fair housing had originally been made by city ordinance, but a later amendment to the city charter prevented the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the voters of the town. The change in law was clearly intended to make minority groups favoring open housing surmount a larger body of resentment.

The *Hunter* proposition appears relevant in judging the validity of bond supermajority requirements. Such requirements, by giving voters not favoring the particular levy a greater influence than that of the voter favoring the levy, make the enactment of the levy more difficult for those favoring it.

28. 402 U.S. 137 (1971). *James* concerned the validity of a California constitutional

The implication of the built-in bias test for judging the validity of future dilutions of the vote is made clear by *Abate:* the burden is first on the claimant to show the existence of a built-in bias toward a particular group; if unsuccessful, the state need only show a rational basis for the voting scheme to have it upheld. The *Abate* Court found the existence of a long tradition of overlapping county-city functions and dual representation to be an adequate state need.[29] No showing that the overlapping be an essential government need was required, thus illustrating a break from past reluctance to accept any dilution of the right to vote without strong justification.[30] In sum, the built-in bias test employed in *Gordon* and *Abate* to distinguish the malapportionment cases appears to be an effective way to restrict the one man, one vote principle enunciated by the Warren Court. Past precedents would be limited to their facts.[31]

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amendment prohibiting the development, construction or acquisition of low-rent housing without the prior approval of a majority of the voters in the community affected. The Court upheld the amendment under the equal protection clause, distinguishing *Hunter* on the basis that no clear group was singled out for discriminatory treatment by reason of race. *James* would seem to indicate that *Hunter* has been limited solely to its facts: burdening which is clearly based on reasons of race and which generally affects only members of a single race.

Not mentioned in *Gordon* was Williams v. Rhodes, 393 U.S. 23 (1968). *Williams* involved the validity of various Ohio election laws making it more difficult for third party candidates and parties to be placed on official state ballots. The Court applied the stringent equal protection test in affirming an allegation that the Ohio law, by making it more difficult for voters favoring third parties and their platforms to enact their philosophy into law, violated the equal protection clause. The Court noted that the group affected by the Ohio laws would "rarely if ever be a cohesive or identifiable group" until shortly before the election, but found the Ohio laws to be most egregious because of their application before the possibly identifiable group was formed. *Id.* at 33. Although this reasoning directly conflicts with the built-in group bias standard developed in *Hunter* and *James*, and although supermajority requirements for bond elections, by creating no clear group except a loose number of persons favoring a levy, would seem to come within the *Williams* rationale, the case is easily distinguishable from the bond supermajority area. First, *Williams* involved the voting for representatives. Second, the right protected in *Williams* was more clearly a right of association than a right to vote.

29. *Abate,* 403 U.S. 182, 186 (1971).

30. *See, e.g.,* Kirkpatrick v. Preisler, 394 U.S. 526, 532-36 (1969); Wells v. Rockefeller, 394 U.S. 542, 546 (1969).

31. The implication is that now there is a possibilty that states will be able to argue successfully that districting resulting in vote dilution is defensible because of tradition, or because of the need for flexibility and experimentation in new forms of representation and government. Critics of the majority position in the malapportionment cases have claimed that these ends have been devalued and made unobtainable by prior decisions. *See* Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); Avery v. Midland County, Texas, 390 U.S. 474 (1967) (dissenting opinions). The achievement of these ends, however, may be at the expense of categorizing the vote in a way that will be undesirable. *See* text accompanying notes 41, 42, *infra.*

Unlike the *Gordon* Court, other courts have more directly distinguished the malapportionment cases from bond supermajority questions by using a subject matter distinction rather than the built-in group bias method.[32] These courts have emphasized that the vote in the malapportionment cases was exercised to choose representatives, while the vote in the extraordinary majority cases was cast for or against ballot issues. Two special circumstances in the malapportionment cases suggest that the equal protection safeguards afforded are directed solely to the evils of *legislative* malapportionment. First, the election of representatives is arguably more important than an election involving capital financing. Second, when a legislature is malapportioned there is no incentive for those representatives of the minority of the electorate who have control of the legislature to cure the imbalance. The situation becomes chronic and only the courts can cure the defect. This is not the situation in the supermajority cases. Most probably, legislatures will not be reluctant to change the supermajority requirement if the electors so desire. In addition, if the legislature does not act the electorate can achieve the desired result through the election of new representatives or by initiative. The latter reasoning may not be successful, however, since the conclusion that an unequal vote is proper because it can be cured by casting an equal vote in an election designed to remedy the inequality was rejected in the malapportionment cases.[33]

It can be argued that the *Gordon* decision has in fact developed a subject matter distinction for future application in voting cases, although this distinction may only be a concomitant to the enunciated group bias standard. Prior to *Gordon,* every United States Supreme Court decision involving an allegation of the dilution of the right to vote concerned the selection of representatives for various "legislative" bodies. All the cases, with the exception of *Sailors v. Board of Education,*[34] applied stringent standards of equal protection in finding

32. This distinction was suggested in Thurston v. Greco, 78 Wn.2d 424, 428, 474 P.2d 881, 883-84 (1970). The *Thurston* court relied on Bogert v. Kinzer, 93 Idaho 515, 523, 465 P.2d 639, 645 (1970).

33. Lucas v. Forty-Fourth Colorado General Assembly, 377 U.S. 713, 736-37 (1964).

34. 387 U.S. 105 (1966). *Sailors* has lost part, if not all, of its vitality. *See* Hadley v. Junior College District, 397 U.S. 50 (1970). *See also* note 5, *supra.*

the dilution unconstitutional. By comparing *Gordon* with past precedent, a clear subject matter distinction is found.[35]

A subject matter distinction has obvious difficulties. First, it ignores language in past malapportionment decisions clearly rejecting such a distinction. In *Hadley v. Junior College District*[36] the Court stated: "When a Court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election."[37] Second, by encompassing the object of the exercise of the vote, the distinction indicates a failure to understand that that which was protected in the malapportionment cases was the *exercise* of the vote, the object of the exercise being merely incidental.[38] If a vote is "preservative of other basic civil rights,"[39] then logically those rights are only preserved when the vote, in any context, is exercised in a pure, unfettered fashion. The object of the vote did not deter the Court from applying stringent equal protection standards in another bond election case, *Cipriano v. City of Houma*.[40] These problems may have influenced the *Gordon* Court in its avoiding specific reference to a subject matter distinction and in choosing the group characteristics basis.

A final criticism of the *Gordon* decision transcends the mechanical application of precedents and goes to the propriety of making any distinction which, in effect, catagorizes the cases in which the vote will be given full protection. The *Gordon* Court has classified the protection in one, or both, of two ways. First, the Court has concluded that the weight of one's vote will not be given stringent protection unless there is some extraneous qualification, unrelated to the subject matter of the election, which dilutes or burdens the vote of an ascertainable group by reason of a "built-in bias" toward that group. Second, al-

35. "Nor do we decide whether a State may, consistent with the Constitution, require extraordinary majorities for the election of public officers." *Gordon*, 403 U.S. at 8 n.6. This suggests the recognition of an implicit subject matter distinction resulting from *Gordon*.

36. 397 U.S. 50 (1970).

37. *Id.* at 54.

38. Language in many cases supports an inference that what is protected in the right to vote is its exercise. For example, in Kramer v. Union Free School District, 395 U.S. 621, 629 (1969), the Court stated: "Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not."

39. Reynolds v. Sims, 377 U.S. 553, 562 (1964).

40. 395 U.S. 701 (1969).

though not expressly stated by the Court, *Gordon* may be precedent for a future holding that the vote will only be strictly protected against dilution where voting for representatives is involved, as opposed to voting for ballot issues.

The irony of categorizing the right to vote in this manner becomes clear upon recognizing, for example, that now a statutory requirement of supermajority authorization for statewide financing is constitutional,[41] while mere de facto geographical weighting of votes in the election of local officials is impermissible.[42] If voting for or against a proposition does not put one into the proper category for constitutional protection, then there simply is no protection of the right to vote for important issues until outright denial of the franchise is accomplished.[43]

Gordon v. Lance is disappointing to any theorist viewing the exercise of the vote as a fundamental right, incapable of infringement. *Gordon* has clearly classified the constitutional protection of the vote and this categorization has unsettling implications for protecting that right in cases involving anything short of actual disenfranchisement. The case is disappointing, but significant, for its break from the malapportionment cases, and its requirement of a clear built-in bias toward an ascertainable group before stringent equal protection standards will be applied. *Gordon* appears, then, to have developed a basis for limiting the Warren Court's protection of the vote to past precedent, opting to extend only the letter, and not the principle, of past voting cases to new situations. Independent of any legal considerations, the Burger Court in *Gordon* has approved a system of local finance which ignores the basic contemporary need of municipal government, the need for flexibility rather than extraordinary reflection.

41. The question of how small a minority of voters may control the decision on extremely important issues may still be open. The *Gordon* Court stated: "We initimate no view on the constitutionality of a provision requiring unanimity or giving a veto power to a very small group." *Gordon,* 403 U.S. at 8 n.6.

42. This conclusion is supported by the *Gordon* Court's reading of past malapportionment cases and by the decision in Hadley v. Junior College District, 397 U.S. 50 (1970).

43. *See* McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969). *See also* note 21, *supra.*