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The Supreme Court of California 1970-1971: Constitutional Law

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Boddie dealt with the "adjustment of a fundamental human relationship," Justice Douglas commented:

The Court puts 'flesh' upon the Due Process Clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge. Fishing may be equally important to some communities. May an indigent be excused if he does not obtain a license which requires the payment of money that he does not have? How about a requirement of an onerous bond to prevent summary eviction from rented property? Is housing less important to the mucilage holding society together than marriage?45

Justice Douglas is clearly correct in attempting to require courts to examine in forma pauperis relief in terms of equal protection standards. Unfortunately, it is conceivable that many state courts will not begin to do so until the Supreme Court agrees to view equal access to the courts in such a way, and this seems unlikely.

For the present, the poor person attempting to enforce or defend rights in a civil proceeding in California must satisfy himself with the removal of minor financial barriers such as the appellate filing fee in Ferguson. The more sanguine citizen, however, could interpret the court's decision to extend the possibility of in forma pauperis relief to the appellate level as part of a continuing trend towards increasing equal access to the courts. This interpretation may be useful to legal aid attorneys, some of whom have cited Ferguson to support the waiver of fees at both the trial and appeal levels.46

Stephen Zamora

IV

CONSTITUTIONAL LAW

A. Equal Apportionment Standards

Calderon v. City of Los Angeles.1 The court held that one-man-one-vote, not one-voter-one-vote, is the apportionment standard required by the equal protection clause. While the court did not state that councilmanic districts based on voter registration are unconstitu-

45. Id. at 385 (Douglas, J., concurring) (citation omitted).

1. 4 Cal. 3d 251, 481 P.2d 489, 93 Cal. Rptr. 361 (1971) (Sullivan, J.) (unanimous decision).
tional per se, it held that equal protection is violated when a voter-based apportionment standard produces a distribution of legislators markedly different from that which would result from a population-based standard. The court also invalidated a statutory provision authorizing a 10 percent variance in size from the ideal councilmanic district.

At issue was a provision of the Los Angeles City Charter that divided the city into 15 councilmanic districts and required that the number of voters in each district be within 10 percent of strict numerical equality. Plaintiffs, Los Angeles residents and voters, brought a class action alleging that the use of voters as an apportionment standard contravened the equal protection requirements set forth in Reynolds v. Sims and applied to local governments in Avery v. Midland County. They also asserted that a registered-voter standard discriminated against districts populated by large racial and ethnic minorities because voter registration rates were lower within those groups than in the community at large. Plaintiffs requested a declaration that the statute was unconstitutional and a writ of mandate commanding the city to cease using voter registration and substitute population as the apportionment standard. The city moved for judgment on the pleadings, asserting that the complaint failed to state a cause of action since voter registration was per se a constitutionally permissible standard. The trial court granted this motion, but the supreme court reversed.

The United State Supreme Court has stated that the two goals of equal apportionment are first, that one person's vote will be weighted

2. Id. at 262, 481 P.2d at 496, 93 Cal. Rptr. at 368.
3. Id. at 271, 481 P.2d at 503, 93 Cal. Rptr. at 375.
4. Between the dates of July 1 and September 15 of each fourth year, commencing with the year 1964, the Council shall . . . redistrict the City into fifteen (15) districts and such districts shall be used for all elections of councilmen. . . . Districts so formed shall not deviate in the number of voters by more than ten percent above or below one-fifteenth of the total number of registered voters in the City of Los Angeles at the close of registration for the direct primary state elections held during the year in which such districts are to be established, and as nearly as practicable such districts shall be bounded by natural boundaries or street lines.

7. 4 Cal. 3d at 254-56, 481 P.2d at 490, 93 Cal. Rptr. at 362.
8. Id. See note 60 infra, for a discussion of the method plaintiffs used to compute the current population from the previous federal census.
9. Id. The city did not argue that voter registration approximated the distribution of legislators that would have resulted from the use of citizen population or another permissible standard; rather, it argued that voter registration was itself permissible under the authority of Burns v. Richardson, 384 U.S. 73, 94-95 (1966).
10. 4 Cal. 3d at 254-55, 481 P.2d at 490, 93 Cal. Rptr. at 362.
The question as to the correct apportionment standard derives from the Court's treatment of these two goals as congruent. Both goals are to be achieved by establishing electoral districts of equal population, but the Court's early decisions did not clarify whether "population" meant voters, citizens, residents, or inhabitants. When there is a disparity between the number of voters and the number of citizens, residents, or inhabitants in electoral districts, the two goals of equal apportionment conflict: a voter standard will result in districts of equal votes but unequal representation, while a citizen, resident, or inhabitant standard will result in the reverse.

Calderon illustrates the former situation: In Los Angeles, District 9 had 74,264 voters and 260,503 inhabitants, while District 4 had 75,063 voters and 153,462 inhabitants. District 9's representative thus cast his vote for 106,041 more people than District 4's representative, though the voting strength of the two districts was almost equal. The second situation would exist if District 9 had 200,000 inhabitants and 50,000 voters, while District 4 had 200,000 inhabitants and 100,000 voters. A District 9 vote would then be worth half as much as a District 4 vote, though representation would be equal.

Calderon, dealing with the first situation, rejects the per se validity of a registered-voter standard but does not discuss the implications of this rejection for the goals of equal apportionment. Calderon's effect, in fact, is to switch the focus of apportionment from votes to representation. This Note analyzes the effects of Calderon's refocusing, particularly in regard to claims that a voter-based apportionment standard inherently discriminates against racial and ethnic groups and the poor. It also briefly examines the implications of Calderon's invalidation of Los Angeles' 10 percent statutory leeway.
I. THE SHIFT FROM VOTES TO REPRESENTATION

The Calderon issue was present, though dormant, in the seminal case of Baker v. Carr.\textsuperscript{17} Although the United States Supreme Court did not comment on that part of the challenged Tennessee constitutional provision providing for a qualified-voter standard for apportionment,\textsuperscript{18} the opinion did begin the process of entwining the suffrage and representation goals. On the one hand, the Court stated that malapportioned districts violated equal protection by diluting voting rights. On the other, Justice Frankfurter's dissent pointed out that the majority apportioned representation to population.\textsuperscript{19} This pattern continued in Gray v. Sanders\textsuperscript{20} and Wesberry v. Sanders.\textsuperscript{21} Indeed, in Wesberry, which dealt with congressional districts, the majority viewed the two goals as identical:

> It would defeat . . . equal representation . . . for equal numbers of people for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.\textsuperscript{22}

The first direct mention of the apportionment standard problem appeared in Justice Harlan's Wesberry dissent, where he used it as an example of a question raised but not answered by the majority's opinion.\textsuperscript{23}

\textsuperscript{17} 369 U.S. 186 (1962) (attacks on state legislative apportionment are justiciable under the equal protection clause). \textit{See Developments, supra} note 11, at 1249.
\textsuperscript{18} 369 U.S. at 188-89; \textit{see} Ellis v. Mayor & City Council, 352 F.2d 123, 127-28 (4th Cir. 1965). Actual practice expanded this standard. 369 U.S. at 189 n.4.
\textsuperscript{19} 369 U.S. 186, 301-24 (Frankfurter, J., dissenting). Frankfurter's argument, however, was not in terms of the proper apportionment standard but rather in terms of the political nature of the representation question. For further discussion of the "political thicket" of apportionment, \textit{see generally} Colegrove v. Green, 328 U.S. 549 (1946); Bickel, \textit{The Durability of Colegrove v. Green}, 72 YALE L.J. 39 (1964).
\textsuperscript{20} 372 U.S. 368 (1963) (striking down the county unit system as used by Georgia's Democratic Party to select candidates and statewide officers). \textit{See Developments, supra} note 11, at 1228. In Gray, Justice Douglas insisted that equal protection means one person, one vote [372 U.S. at 381], while Justices Stewart and Clark stated that equal protection means one voter, one vote. \textit{id.} at 382.
\textsuperscript{21} 376 U.S. 1 (1963) (relying on art. I, § 2 of the United States Constitution, the Court held that challenges to congressional districts were justiciable and that districts must be substantially equal in population). \textit{See Developments, supra} note 11, at 1228-29.
\textsuperscript{22} 376 U.S. at 14; \textit{see also} \textit{id.} at 10-11.
\textsuperscript{23} \textit{id.} at 21 n.4. In the context of article I, section 2, Justice Harlan distinguished the direct election of representatives within the state from apportionment of representatives among the states to show that, while "population" loosely controlled the latter (subject to the three-fifths compromise and the requirement of one representative per state regardless of population), it did not control the former. \textit{id.} at 27 & n.8, 28. Though he did show that voting population did not control apportionment (since disfranchised slaves were counted, thus weighting the slave states' votes), his purpose was to show that the federal government cannot prescribe districting within a state rather than to discuss apportionment bases. In any case this federal argument
Unfortunately, the landmark case of Reynolds v. Sims also failed to respond to this question. Indeed, Reynolds vacillated between the two goals in justifying its requirement of equal population in electoral districts. The Court first stated that the right to vote is personal and that dilution of that right by residence was as invidious as discrimination by race or economic status; however, it later noted that equal protection demands substantially equal state legislative representation for all citizens. One of Reynolds' companion cases, Davis v. Mann, implicitly approved resident population as an apportionment standard, while another, Y.M.C.A., Inc. v. Lomenzo, implicitly approved citizen population. Yet none of these cases dealt with the more significant dichotomy raised in Calderon between voters and population as apportionment standards, and none recognized a possible conflict between the goals of equal apportionment.

Burns v. Richardson is the Supreme Court case that comes closest to dealing with these issues. In Burns, the Supreme Court allowed Hawaii to apportion on the basis of voter registration, but the holding was carefully limited to the particular facts: First, Hawaii's apportionment plan was an interim measure designed to meet an imminent election; and second, Hawaii has a large transient and non-citizen population. The Court concluded that the population equivalency required by Reynolds is to be determined by citizen population, not by total population; states are therefore not required to include
aliens, transients, temporary residents, or felons denied the right to vote in their apportionment base. But to slip from a citizen population base to a voter population base, the Court continued, is more questionable. Voting is a political activity open to influence by those in political power; it may perpetuate prior malapportionment, and it depends in part on fortuitous factors, such as the importance of the particular election, the vigor of the campaigns, and the weather. However, these drawbacks are mitigated in Hawaii because there, as the district court concluded, apportionment by use of registered voters substantially approximated that which would have resulted if citizen population were the guide. The Court concluded by warning that a registered voter base is not valid for all times and circumstances, in Hawaii or elsewhere, it may be used only if it produces a distribution of legislators not substantially different from that which would result

Bums v. Gill, 316 F. Supp. 1285, 1294 (D. Hawái 1970) (discussing new legislation making it easier for military and other prospective voters to participate in the electoral process) with Carrington v. Rash, 380 U.S. 89 (1965) (striking down a provision of the state constitution allowing a serviceman to vote only in the county where he was residing at the time of entering the service, as applied to a soldier who moved to Texas, was concededly domiciled there, and planned to make his permanent home there).

35. 384 U.S. at 92 n.21. See Kirkpatrick v. Priesler, 394 U.S. 526, 537 n.1 (1969) (Fortas, J., concurring) (approving use of resident population); Reapportionment, supra note 11, at 123 (stating that an actual voters standard would probably be disapproved). The Supreme Court has not, however, considered the inclusion or exclusion of other groups in the apportionment standard, whether that standard be voters or inhabitants. One state court has held that patients in a state mental hospital cannot be excluded without investigation of “relevant factors,” such as where the patients previously lived and if they are entitled to vote. Seaman v. Fedourich, 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965). It has been suggested that this logic should be extended to other groups, such as prisoners. See Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 COLUM. L. REV. 21, 24 n.12 (1965) [hereinafter cited as Weinstein].

36. 384 U.S. at 93, 96-97; see Calderon v. City of Los Angeles, 4 Cal. 3d at 265, 481 F.2d at 498, 93 Cal. Rptr. at 370. Compare the 10-year period for using voter registration lists in Hawaii [384 U.S. at 96] with the 4-year period in Los Angeles [LOS ANGELES, CAL., CHARTER ART. II, § 6(2)(a)]. However, neither Los Angeles nor Hawaii follows Justice Brennan’s injunction in Burns, to use presidential years in order to decrease the effect of chance, although Hawaii does pursue successful registration drives on a year-round basis. Burns v. Gill, 316 F. Supp. 1285, 1294 (D. Hawái 1970). For further discussion of the fortuitous factors mentioned by Justice Brennan, see Ellis v. Mayor & City Council, 352 F.2d 123, 130 (4th Cir. 1965); Weinstein, supra note 35, at 24 n.12.

37. The Court cited the following factors as contributing to this result: Difficulty of obtaining state citizenship figures, high registration percentage (80%), high-voting percentage (88-93.6% in the 1958-1962 elections), and laws facilitating voter registration. 384 U.S. at 94, 96 & n.26. The Court also noted that there was not an adequate showing that voter registration was lower among lower-income groups. Id. at 97 n.27. Thus, the Court did not face the discrimination issue raised in Calderon.

38. Id. at 96-97.
from use of a permissible population base.\textsuperscript{39} Burns, therefore, decisively rejected voter registration as a valid population standard per se, but it failed to consider the effects of such rejection on the goals of equal apportionment.

This failure became more significant with \textit{Avery v. Midland County},\textsuperscript{40} which extended \textit{Reynolds} to local governmental units having general governmental powers. The prior cases focused on state legislative or congressional districts, where there was little practical difference between apportionment by a registered-voter standard and apportionment by a citizen standard; the districts' large size made probable a direct and stable ratio between the two groups, and therefore both goals of equal apportionment could be fulfilled.\textsuperscript{41} Yet as population decreases, as in local councilmanic districts, the deviation between voters and citizens becomes more significant.\textsuperscript{42} Therefore, \textit{Avery}'s extension of the one-man-one-vote principle to local governments should expose the inherent incompatibility of the equal-vote and equal-rep-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{39} Id. at 92-93.
\item \textsuperscript{40} 390 U.S. 474 (1968). Previous California decisions had reached the \textit{Avery} result (applying one-man, one-vote to local governments). \textit{E.g.}, Wiltsie v. Board of Supervisors, 65 Cal. 2d 314, 419 P.2d 440, 54 Cal. Rptr. 320 (1966). The Los Angeles City Council qualifies as such a local governmental unit exercising general governmental powers, even under Justice Fortas' strict test. 390 U.S. at 500 n.5 (concurring opinion). \textit{See} 4 Cal. 3d at 257, 481 P.2d at 492, 93 Cal. Rptr at 364.
\item \textsuperscript{41} \textit{See Reapportionment, supra note 11, at 243; Developments, supra note 11, at 1275.}
\item \textsuperscript{42} This phenomenon can be explained by the central limit theorem, as follows:

\begin{itemize}
\item Given a population with mean $\mu$ and standard deviation $\sigma$, the central limit theorem states that the distribution of the sample means, $X$, for a given sample size of $N$ approaches normality (mean $\mu$ and standard deviation or error $\frac{\sigma}{\sqrt{N}}$) as the size $N$ increases. \textit{See, e.g.}, J. \textit{Freund, Modern Elementary Statistics} 211 (1967).

\item For example, for a given population before districting, it is estimated that in a given election the mean percentage of voters is $\mu$ with a percentage standard deviation of $\sigma$. For a district of 400,000 people $N$ drawn from the total population, the standard error would equal $\frac{\sigma}{\sqrt{N}} = \frac{\sigma}{\sqrt{400,000}} \approx \frac{1}{632} (\sigma)$. For a district of 500 people, the standard error would equal $\frac{\sigma}{\sqrt{500}} \approx \frac{1}{22} (\sigma)$. Thus, the standard error for the population of 500 would be approximately 29 times greater than the standard error for the population of 400,000. Depending upon the standard deviation $\sigma$ initially chosen and the range of percentages of voters that would be acceptable or tolerated, such a difference in standard error could indeed become significant. \textit{Reapportionment, supra note 11, at 244 nn.65 & 66.}
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presentation goals. The Court's two most recent apportionment cases do not expose this incompatibility since neither dealt with local governments.

Calderon, applying Burns in the Avery context, directly confronted this issue. Since Burns established population as the controlling criterion, Calderon held that plaintiffs make a case merely by showing a marked variance between apportionment based on voters and apportionment based on total population. Yet, like Burns, Calderon did not explicitly recognize that acceptance of a nonvoter standard as predominant shifts the focus of apportionment from equal suffrage to equal representation. Recognizing this shift would have enabled the court to more clearly identify the voter standard's discriminatory impact: it dilutes not suffrage, but representation.

Calderon discussed discrimination primarily in terms of voting

43. This is especially true in view of the Court's decreasing tolerance for even minor population variances between districts. See note 72 infra.

44. In Kirkpatrick v. Priesler, 394 U.S. 526 (1969), Missouri argued that voter registration was one of the "valid parameters" to be considered in apportioning. The Court rejected this argument, relying on the fact that, even if voter registration was such a parameter, it had been applied neither systematically nor precisely by Missouri. Id. at 534-35. The majority questioned whether any standard other than total population was permissible under article 1, section 2, though Justice Fortas felt that a resident base was permissible in order to exclude certain servicemen and students from the population base. Id. at 537 n.1 (concurring opinion). Calderon cited Kirkpatrick for the proposition that creating districts of equal population secures equal access to representatives. 4 Cal. 3d at 259, 481 P.2d at 494, 93 Cal. Rptr. at 366.

In Ely v. Klahr, 403 U.S. 108 (1971), Arizona's voter-based apportionment plan was held invalid, but the Court relied on the plan's inherent defects. Id. at 116 (Douglas & Black, JJ., concurring). In effect, the Court merely affirmed a time limit given to the Arizona Legislature to formulate a new plan. The Court evaded plaintiffs' argument that a registered voter base discriminated against minorities by presuming the new plan would accord with Burns. Id. at 115-16 n.7. For a discussion of the plan's discriminatory effects, see id. at 116 (Douglas & Black, JJ., concurring).

45. It is not the first case to do so, however. Other cases holding that a registered-voter standard is not necessarily permissible in local government apportionment are: Bowden v. Stacey, 309 F. Supp. 510 (S.D. Ala. 1970); Priesler v. Mayor, 303 F. Supp. 1071 (E.D. Mo. 1969); Kapral v. Jepson, 271 F. Supp. 74 (D. Conn. 1967) (see especially the report of the special master, which accepts the use of registered voters on the Burns rationale [id. at 86 et seq.]); Ellis v. Mayor & City Council, 234 F. Supp. 945 (D. Md. 1964); In re Penn Hills Township Redivision, 216 Pa. 327, 264 A.2d 429 (Super. Ct. 1970); In re Lower Merion Township, 215 Pa. 363, 257 A.2d 264 (Super. Ct. 1969). See also Jones v. Branigan, 433 F.2d 576 (6th Cir. 1970), which rejects plaintiff's plea to replace a population-based plan with a registered-voter plan, even presuming the registered-voter plan is consistent with Burns. But see Reynolds v. Gallion, 308 F. Supp. 803 (E.D. Ala. 1969), where the court in dictum approved the use of a registered-voter standard on the Burns rationale but did not make the detailed voter-population comparison required by Burns. None of the cases, however, discuss the effect of apportionment standards on apportionment goals.
strength. The court cited a dictum in Fortson v. Dorsey for the proposition that a plan which operates, designedly or otherwise, to minimize or cancel out the voting strength of particular racial or political group must fall. Presumably, the Calderon plaintiffs would come under this dictum by proving the following: First, that minorities have lower registration rates; second, that minorities tend to congregate in certain areas; third, that these areas are large enough to comprise districts or significant portions thereof; and fourth, that therefore a voter base will result in minority districts that contain a greater number of people than nonminority districts. Yet, in fact, this proves dilution of representation, not of voting strength. Since there are an equal number of voters in each district, all votes are weighted equally; however, unequal numbers of people are represented. Were the predominant goal of equal apportionment the assurance of equal voting strength, the Calderon plaintiffs would fail. Their success necessitates recognizing representation as the primary goal of equal apportionment. In this sense, apportionment is not so much a voting scheme as a representation scheme.

Furthermore, Calderon emphasizes that the question of the correct apportionment standard is solely a numerical one. In arguing against voter registration as an apportionment standard plaintiffs need present proof only of numerical inequality between the apportionment resulting from use of the voter standard and the apportionment that would result from use of a permissible population standard. Arguments that a registered-voter standard discriminates racially, ethnically, or economically are beside the point if the standard discriminates numerically. However, if the city can show that a registered-voter standard substantially approximates the distribution of legislators that would result from use of a permissible population standard, plaintiffs should be allowed to show that the resulting "insubstantial" discrimination cuts predominantly against racial and ethnic minorities and the poor.

46. 4 Cal. 3d at 260, 481 P.2d at 494-95, 93 Cal. Rptr. at 366-67.
47. 379 U.S. 433 (1964) (reversing a district court decision that multimember districts are per se unconstitutional and reserving the question of whether proof of the discriminatory effects of such a system would render it unconstitutional). See Whitcomb v. Chavis, 403 U.S. 124 (1971).
49. This recognition preempts those who live in a high voter registration district from claiming that an apportionment scheme based on population discriminates against them because their votes are weighted less than others. When the representation and suffrage goals conflict, Burns and Calderon necessarily imply that the representation goal predominates.
50. See note 9 supra.
51. But see Ely v. Klahr, 403 U.S. 108, 115-16 n.7 (1971), discussed in note
Though these arguments must be phrased in terms of the right to representation, that right must, again, be measured solely in numerical terms. The court has neither the authority nor the competence to decide the question of which interests deserve representation, and how much. It cannot enforce a particular theory of representation, and it cannot decide whether a particular representative adequately represents his constituents. Instead, assuming the governmental body equally affects all whom it governs, the court can require only that each representative in that body speak for the same number of people. Yet a numerical measure, while sufficient to ensure equal suffrage, is not sufficient to ensure equal representation. Unlike voting, representation is a complex relationship.

The representative is influenced by many factors other than the electorate, such as the committee system, seniority, specialization, other governmental figures, and private interest groups. Therefore, ensuring that each representative will cast his vote for an equal number of people will not necessarily ensure equal representation.

In view of this limitation, it might be argued that the Court in Burns should have opted for voters as the controlling standard which would have established suffrage as the controlling goal. Proponents of this view contend that voter-registration figures are more frequent, and hence more accurate and convenient, than federal census figures; especially at the local level, federal census figures may become very misleading before the end of a decade. Also, a voter standard might give added impetus to voter-registration drives. Yet, in fact, the administrative utility of voter-registration figures is not significantly greater than that of population figures; rational extrapolations can be

44 supra, where the Supreme Court implied that an apportionment plan in accord with Burns will be tolerated even though the plan is based on a registered-voter standard.

52. But see Whitcomb v. Chavis, 403 U.S. 124 (1971), which discusses the quality of representation, though in regard to multimember districts rather than apportionment standards.


56. Irwin, supra note 53, at 742 n.35, 745-47.

57. 4 Cal. 3d at 264, 481 P.2d at 497, 93 Cal. Rptr. at 369; Burns v. Gill, 316 F. Supp. 1285 (D. Hawaii 1970).

58. This is especially important since the Supreme Court has stated that redistricting more often than every ten years is desirable. 4 Cal. 3d at 264, 481 P.2d at 497, 93 Cal. Rptr. at 369.

made from federal census figures.\textsuperscript{60} Furthermore, even given accurate registration figures, equally weighted votes would not necessarily be achieved because unless equal percentages of registered voters actually vote, there would still be disparity in voting strength among districts.\textsuperscript{61} Finally, voter registration as an apportionment standard that is valid per se would be discriminatory in providing access to political power. Studies have shown that voter registration is significantly lower among certain minority groups and that there "is almost a linear relationship between income and voter registration."\textsuperscript{62} A citizen or resident population standard serves to separate the voting and representation rights; it may impair strictly equal voting strength, but it increases the opportunity for equal representation and thus encourages political activity by the underrepresented minorities.

II. LEEWAY IN THE NUMERICAL STANDARD

Having rejected the per se validity of Los Angeles' voter standard, the Calderon court also foresaw the necessity of rejecting Los Angeles' authorized 10 percent deviation.\textsuperscript{63} Such a deviation is invalid not merely because it is too large, as the Calderon plaintiffs contended,\textsuperscript{64} but also because the Supreme Court has refused to sanction any statutorily permitted deviation.\textsuperscript{65} The Court has stated that establishment

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  \item 60. In Calderon, plaintiffs relied on Los Angeles Planning Commission figures, computed as follows:
    
    In making these estimates, the Planning Commission apparently uses the most recent federal census as a starting point, and then computes subsequent changes based on such current criteria as residential electric meter installations, active residential electric meters, building permits, and school enrollment.

  \item 4 Cal. 3d at 263 n.15, 481 P.2d at 497 n.15, 93 Cal. Rptr. at 369 n.15. The court rejected defendant's argument that these figures were inadequate without proof of accuracy because, by moving for judgment on the pleadings, defendants must admit the truth of plaintiff's pleading. \textit{Id.} at 263 n.16, 481 P.2d at 497 n.16, 93 Cal. Rptr. at 369 n.16. The court also noted that it would be incongruous for Los Angeles to question the accuracy of its own figures. \textit{Id.} at 263, 481 P.2d at 497, 93 Cal. Rptr. at 369.

  \item 61. \textit{Reapportionment}, supra note 11, at 245-46.


  \item 63. See note 4 \textit{supra}.

  \item 64. 4 Cal. 3d at 266, 481 P.2d at 499, 93 Cal. Rptr. at 371.

  \item 65. Roman v. Sincock, 377 U.S. 695, 710 & n.21 (1964) (rejecting a district court suggestion that a 1-1-\% population variance ratio would presumably comport with minimal constitutional requirements, while a ratio in excess thereof would not be constitutionally sustainable); see also Kirkpatrick v. Priesler, 394 U.S. 526, 530-31 (1969); Kilgarlin v. Hill, 386 U.S. 120, 122 (1967); Swann v. Adams, 385 U.S. 440, 443-44 (1967).

  There are basically three methods for measuring the scope of deviation: 1. population variance ratio—the ratio of the most underrepresented to the most overrepresented district; 2. maximum deviation from average—percentage above or below the
of de minimis points would be arbitrary and would encourage drafters to strive for those points rather than for equality. Instead, the proper approach in evaluating deviations is to determine if there has been faithful adherence to population, with such minor deviations only as may occur in recognizing factors "free from any taint of arbitrariness or discrimination." The Court has defined such factors as integrity of political subdivisions, compactness, contiguity, and recognition of natural or historical boundaries. Invalid factors include area, economic, and other group interests. Furthermore, the state must justify every variance, no matter how small, and so cannot merely cite a statutory leeway.

Yet, despite its refusal to establish de minimis points, the Court has frequently stated that it does not require mathematical exactness. Its recent decisions, though, display a decreasing tolerance of disparity. At the local level, this strictness may have the paradoxical effect,
for apportionment decisions, of removing segments of local government from the electoral process.\(^7\) For instance, cities recently have attempted to solve common problems by creating regional governments from federations of incorporated municipalities.\(^7\) These governments depend on a new “Connecticut Compromise,” mixing direct and local unit representation,\(^7\) since smaller cities would refuse to join unless assured a vote. A strict application of *Avery*, however, would invalidate such compromises. Consequently, cities may attempt to avoid *Avery* by molding regional governments on models such as those suggested by *Hadley v. Junior College District*\(^7\) and *Sailors v. Board of Education*.\(^7\) A dictum in *Hadley* exempts from *Avery* special purpose governmental units,\(^7\) and *Sailors* exempts appointed nonlegislative offices.\(^7\) Both decisions inject flexibility into local governmental arrangements but at the cost of removing such arrangements from the electoral process. Therefore, in deciding how strictly to apply *Avery*, courts might consider the applicability of the federal analogy to regional governments\(^8\) and give cities some measure of flexibility within an electoral framework. Yet even if more flexibility is required, it should not be established by Los Angeles’ method of statutory fiat; that method is too blunt, and it displaces the city’s burden of justifying each deviation.

*Calderon’s* main effect will be to emphasize the representation goal of equal apportionment, especially at the local level. After *Calderon*, most claims that a registered-voter standard results in discriminatory apportionment should be based on a strictly numerical showing.

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371-72. Local apportionment is guided by “substantial equality,” and the same standard seems to apply. *But see Abate v. Mundt*, 403 U.S. 182 (1971) (approving an 11.9 percent deviation in a local governmental district, which is much greater than that usually tolerated in congressional or state legislative districts). The unique facts of the case, however, limit its precedential value. *Id.* at 187 (Brennan & Douglas, J.J., dissenting).


75. *Jones*, supra note 74, at 743.

76. 397 U.S. 50 (1970) (applying *Avery’s* one-man, one-vote standard to election of school board). For another case demonstrating the expansiveness of *Avery’s* reach, see *Burrey v. Embarcadero Mun. Improvement Dist.*, 5 Cal. 3d 671, 488 P.2d 395, 97 Cal. Rptr. 203 (1971) (applying *Avery* to an improvement district).


78. 397 U.S. at 56.

79. 387 U.S. at 111. The Association of Bay Area Governments, for example, is organized on the *Sailors* model. *See generally Jones, supra note 74.*

80. The Supreme Court has, however, rejected this analogy in relation to state legislatures. 377 U.S. at 575.
By not declaring a registered-voter standard invalid per se, however, the court left open the possibility that local governments may adopt a registered-voter standard that produces a distribution of legislators not substantially different from that of a permissible standard but that results in some degree of discrimination against certain racial and ethnic groups and the poor. Though the likelihood that such a case will arise is doubtful, the advantage of using registered voters as an apportionment standard is likewise doubtful. However, since the city has the burden of proving that the distribution of legislators produced by a registered voter standard is not markedly different from that which would have resulted from use of a permissible population standard, the effect of Calderon should be to severely limit the use of registered voters as an apportionment standard. Finally, Calderon points toward a possible paradox in the expansive and precise application of the one-man-one-vote principle; instead of increasing electoral control, its strictures may induce cities to remove certain segments of local government from electoral control.

James C. Fowler

B. Minors’ Voting Residence

Jolicoeur v. Mihaly.\(^1\) Nine unmarried, nonstudent minors, qualified to vote under the twenty-sixth amendment of the United States Constitution,\(^2\) sought writs of mandate from the California supreme court, in exercise of that court’s original jurisdiction,\(^3\) to compel several respondent registrars to register petitioners as electors according to the same residency rules applied to adult registrants. The respondent registrars had refused to register petitioners except at their parents’ residences, pursuant to a California Attorney General’s opinion that, for voting purposes, the residence of an unmarried minor “would normally be his parents’ home.”\(^4\) The Attorney General’s reasons were that under California law a minor’s residence is that of his parents and that a minor cannot change his residence regardless of his present or intended future habitation.\(^5\) The practical effect of this opinion on one peti-
tioner was that he would be completely disenfranchised, because his parents were not United States residents; two petitioners would have to register in other states in order to vote; and six petitioners would have to register in other California jurisdictions. The court held that treating minors differently from adults for purposes of determining voter residency violated both the twenty-sixth amendment and California law.

Because the twenty-sixth amendment holding is sufficient for disposition of the precise issue presented, the court's discussion of California law is open to several interpretations and raises many issues. The court attempted to correct and clarify the Attorney General's interpretation of California's law of minor and student residence, arguing, in short, that both student and nonstudent minors who live apart from their parents gain their own residence under California law and that such an interpretation of California law is incidentally consistent with what the fourteenth amendment would require. This Note suggests that reliance solely on the twenty-sixth amendment would have been a less strained approach to the issue of nonstudent minor voting and that if the court felt compelled to decide the student issue, which was not before it, it should have rested its holding on constitutional law instead of on its doubtful interpretation of California law.

I. THE TWENTY-SIXTH AMENDMENT

The Attorney General's opinion was written prior to passage of the twenty-sixth amendment and discusses only California law, neglecting to mention even fourteenth amendment issues. Therefore, the narrowest holding of Mihaly is that to prevent an unmarried, nonstudent minor otherwise qualified to vote from claiming a voting residence apart from that of his parents constitutes an abridgment of the right to vote on account of age. The abridgment consists in compelling these minors to travel to their parents' precincts to vote or to vote by absentee

6. 5 Cal. 3d at 569, 488 P.2d at 3, 96 Cal. Rptr. at 698-99.
7. Id. The concurring opinion by Chief Justice Wright, joined by Justices McComb and Burke, stated that the alternative holding under California law was unnecessary because the twenty-sixth amendment was "manifestly dispositive of the single issue." Id. at 583, 488 P.2d at 12, 96 Cal. Rptr. at 708. See text accompanying notes 8-19 infra.
8. There are no other reported cases construing or applying the twenty-sixth amendment.
10. See text accompanying notes 68-110 infra.
11. The court implied that only in the case of the petitioner whose parents were not United States residents was there flat "denial" as well as an "abridgment" of the right to vote. 5 Cal. 3d at 576, 488 P.2d at 7-8, 96 Cal. Rptr. at 703-04.
ballot, thereby isolating them "from local political activity, with a concomitant reduction in their political influence and information."12

There is authority for such an interpretation of the word "abridged" in the voting context. Courts have interpreted the same word in the twenty-fourth amendment prohibition against poll taxes and held unconstitutional a requirement to present certificates, as a prerequisite to voting, in lieu of paying a poll tax.13 In these cases the courts held that abridgment includes any requirement that circumscribes the right to vote,14 however "sophisticated" or "simple minded" the requirement is.15 To compel a voter to secure an absentee ballot and learn from a distance local issues in which he may have no interest is as much an impairment as when he is required to secure and present a certificate in lieu of payment of a poll tax. Furthermore, the court in Mihaly quoted extensively from congressional hearings on the Voting Rights Act of 197016 and the Senate Report accompanying Senate Joint Resolution 717 that eventually became the twenty-sixth amendment to show that Congress intended both the act and the amendment to allow youths to participate responsibly in the activities of their local communities;18 the registrars had therefore violated both "the letter and spirit of the Twenty-Sixth Amendment."19

II. CALIFORNIA LAW ON MINORS' RESIDENCE

At the time of the Mihaly decision minors were defined by the California Civil Code as all persons under 21, or married and under 18.20 A minor's residence is the same as his parents' residence, and he may not change it by his own act.21 A voter must be a resident of

12. Id. at 571, 488 P.2d at 4, 96 Cal. Rptr. at 700.
18. 5 Cal. 3d at 572-75, 488 P.2d at 5-7, 96 Cal. Rptr. at 701-03.
19. Id. at 575, 488 P.2d at 7, 96 Cal. Rptr. at 703.
21. In determining the place of residence the following rules are to be observed.

... (d) The residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child, provided that when the parents are separated, the residence of the parent with whom an unmarried minor child maintains his place of abode is the residence of such unmarried minor child.

... (f) The residence of an unmarried minor who has a parent living cannot be changed by his own act.

CAL. GOV'T CODE ANN. § 244 (West 1966).
the precinct, county, and state in which he votes, and residence means domicile in the general statutes, the California constitution, and the Elections Code. In determining residence for voting purposes, provisions of the Government and Elections Codes are to be interpreted as one statute. The Attorney General concluded that a minor's voting residence therefore must be, "in the normal situation," his parents' residence.

In Mihaly, the court stated that in fact the normal situation is the opposite and that, given the Elections Code and other state policies, unmarried minors are capable of having their own domicile. This conclusion, the court argued, follows from the law of emancipation, which is the major exception to the absolute terms of the Government Code. When a minor is abandoned by his parents, his residence is that of whoever gains custody or control of him. A minor's emancipation other

22. CAL. CONST. art. II, § 1.
25. See, e.g., Estate of Weed, 120 Cal. 634, 639, 53 P. 30, 31 (1898) (holding that former Political Code sections 1239 and 1252 [now CAL. ELECTIONS CODE ANN. § 14282 (West 1961) and CAL. GOV'T CODE ANN. § 244 (West 1966), both reproduced in note 48 infra] are "to be construed together as parts of the same statute").
26. 54 Op. CAL. ATT'T GEN. 7, 12 (1971). The Attorney General relied upon the language in Kirk v. Regents of the University of California, 273 Cal. App. 2d 430, 436, 78 Cal. Rptr. 260, 263 (1st Dist. 1969), that "a minor is not capable of establishing his residence and his residence at all times is derived from that of his parent, guardian or person with whom he resides" (emphasis added). This statement is dictum since Kirk deals with a married student's residence for purposes of tuition; in any event, it is not an accurate statement of California or common law. See text accompanying notes 29-32 infra.
27. 5 Cal. 3d at 579-80, 488 P.2d at 9-10, 96 Cal. Rptr. at 705-06.
28. Id. at 579, 488 P.2d at 10, 96 Cal. Rptr. at 706.
29. Harlan v. Industrial Accident Comm'n, 194 Cal. 352, 228 P. 654 (1924) (minor's intent or that of his aunt, with whom he was left at birth by his mother, determines his residence without regard to the residence of his abandoning mother); In re Hawkins, 183 Cal. 568, 575, 192 P. 30, 33 (1920) (grandfather's residence held determinative because "a minor cannot form such intention for himself" and therefore "his residence . . . is where he is removed by those who intend to give him a permanent home elsewhere"); In re Vance, 92 Cal. 195, 198, 28 P. 229, 230 (1891) (grandmother's residence); Guardianship of Brazeal, 117 Cal. App. 2d 59, 61, 254 P.2d 886, 888 (1st Dist. 1953) (residence of nonrelative who has custody).

The Mihaly court also cited Lowe v. Ruhlman, 67 Cal. App. 2d 828, 833, 155 P.2d 671, 674 (1st Dist. 1945) for the proposition that the Government Code, which states that the "residence of the husband is the residence of the wife" [CAL. GOV'T CODE § 244(e) (West 1966)], likewise is subject to exceptions in that the wife was held to have a separate domicile even though happily married. 5 Cal. 3d at 580, 488 P.2d at 10, 96 Cal. Rptr. at 706. Actually Lowe simply held that "residence" in a conditional life estate should be interpreted to mean place of habitation and therefore the wife did not have the same "residence" as her husband for purposes of defeating his life estate conditioned on his being the sole resident.
than by age or marriage is accomplished by his parents' relinquishment to him of the right to control himself\textsuperscript{30} and may be express or implied, complete or partial, conditional or absolute.\textsuperscript{31} Once emancipated, the minor may obtain his own domicile.\textsuperscript{32}

On the other hand, a minor may be emancipated for specific purposes,\textsuperscript{33} but the question is one of fact,\textsuperscript{34} is never presumed,\textsuperscript{35} and the party relying on emancipation has the burden of proving it.\textsuperscript{36} Furthermore, even if the court is correct that a presumption of emancipation of the 18-year-old minor living apart from his parents is more reasonable than a presumption that the minor does so subject to his parents' wishes,\textsuperscript{37} the implied emancipation cases do not go nearly so far in reading such an exception into the statute. Finally, the peremptory language of the Government Code provision\textsuperscript{38} is strongly contrary to the court's presumption of residential emancipation. There is little doubt that this reading of the emancipation statutes and cases is necessary in light of the twenty-sixth amendment,\textsuperscript{39} and it arguably follows from fourteenth amendment principles announced in other voting rights cases,\textsuperscript{40} but the court should not pretend that authority rests in the statutes and cases themselves.

\textsuperscript{30} The parent, whether solvent or insolvent, may relinquish to the child the right of controlling him and receiving his earnings. Abandonment by the parent is presumptive evidence of such relinquishment. \textsc{Cal. Civ. Code} § 211 (West 1970).


\textsuperscript{32} Spurgeon v. Mission State Bank, 151 F.2d 702, 705 (8th Cir. 1945); Harlan v. Industrial Accident Comm'n, 194 Cal. 352, 360, 228 P. 654, 657 (1924).

\textsuperscript{33} E.g., Martinez v. Southern Pac. Co., 45 Cal. 2d 244, 253-54, 288 P.2d 868, 873 (1955) (emancipation for purpose of suing parent for tort). Other cases cited by the \textit{Mihaly} court [5 Cal. 3d at 580-81, 488 P.2d 10-11, 96 Cal. Rptr. at 706-07] are not on point: Slater v. California State Auto. Ass'n, 200 Cal. App. 2d 375, 377, 19 Cal. Rptr. 290, 291 (1st Dist. 1962), found complete emancipation; Perkins v. Robertson, 140 Cal. App. 2d 536, 541, 295 P.2d 972, 976 (4th Dist. 1956), expressly found no emancipation; Cole v. Superior Court, 28 Cal. App. 1, 151 P. 169 (3d Dist. 1915), is not an emancipation case but rather involved whether the father's or mother's residence was the proper place for custody litigation.

\textsuperscript{34} Martinez v. Southern Pac. Co., 45 Cal. 2d 244, 253, 288 P.2d 868, 873 (1955).

\textsuperscript{35} Spurgeon v. Mission State Bank, 151 F.2d 702, 703 (8th Cir. 1945).

\textsuperscript{36} \textit{Id.} at 703-04.

\textsuperscript{37} The court states that such emancipation is "substantially probable" [5 Cal. 3d at 579, 488 P.2d at 10, 96 Cal. Rptr. at 706], that it is consistent with "common sense," is a "substantial likelihood" [\textit{id.} at 581, 488 P.2d at 11, 96 Cal. Rptr. at 707], and is a "strong likelihood" [\textit{id.} at 582, 488 P.2d at 11-12, 96 Cal. Rptr. at 707-08].

\textsuperscript{38} \textsc{Cal. Gov't Code Ann.} §§ 244(d), 244(f) (West 1966), reproduced in note 21 supra.

\textsuperscript{39} See text accompanying notes 14-19 supra.

\textsuperscript{40} See text accompanying notes 99-100 infra.
III. STUDENT VOTING RIGHTS

The opinion requested from the Attorney General related only to the proper place for “an unmarried student” to register to vote, although the opinion was ostensibly addressed more broadly to the proper place of registration for 18- to 21-year-old minors, probably to avoid focusing solely on the student issue. Ironically, although the issue before the Mihaly court was the proper place for nonstudent minors to register, that court went out of its way to purport to rule on the proper place of registration for unmarried students as well. In practical political terms, of course, this was the real issue confronting both the reluctant Attorney General and the eager court. Although the question of minor domicile arises in several areas of law and most states have at times faced student voting residence issues, both now take on a new urgency since most students are minors and are often highly concentrated in certain communities.

California provides by constitutional and statutory provisions that, for purposes of voting, a student does not “gain or lose residence solely by reason of his presence at or absence from a place” while a student. No California court has clearly interpreted this language for purposes of student voting. The general American rule on acquiring a new resi-

42. E.g., Harlan v. Industrial Accident Comm’n, 194 Cal. 352, 228 P. 654 (1924) (residence to determine members of minor’s household entitled to workman’s compensation benefits); Guardianship of Brazeal, 117 Cal. App. 2d 59, 254 P.2d 886 (1st Dist. 1953) (venue for custody proceedings).
45. For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this State or of the United States, or of the high seas; nor while a student at any seminary of learning; nor while kept in an almshouse, asylum or prison. This section shall not be construed to prevent a student at an institution of learning from qualifying as an elector in the locality where he resides while attending that institution, when in fact the student has abandoned his former residence.
46. In Stewart v. Kyser, 105 Cal. 459, 39 P. 19 (1895), a losing candidate contested an election on the ground that certain veterans home inmates and college students who voted were not residents. The court held that all contested votes were proper. However, it discussed only the issue of veterans home inmates on the trial record relating to a single veteran. Id. at 461-62, 39 P. at 19-20. It argued that since the veteran expected to live out his life at the home, there was the requisite intention to
dence or domicile is physical presence in the new locality and intent both to abandon the old domicile and to adopt the new one, and this is the recognized rule in California. When a person goes to a new locality intending to remain there for an indefinite time, that becomes his domicile, a general intention to return being insufficient to retain the old domicile. Yet if he is in the new locality "for temporary purposes only" there is no change of residence, even though "he retains no particular living quarters in the old locality." The intention required has been phrased as an intention "to remain," or the lack of "any present intention of removing," but it is not clear whether a student or any person who normally expects to leave a locality some time in the near future has an "intent to remain" or whether his expectation of leaving upon graduation or completion of his particular business qualifies as a "present intention of removing."

However, the law recognizes special categories of domiciliaries who reside in a locality for a particular purpose and a limited period of time, intending at the time the residence commences to leave when that purpose is accomplished. California has liberally interpreted its constitutional and statutory provisions relating to the establishment of domicile by these temporary residents. Thus, the courts have held that a soldier can acquire domicile in California for purposes of voting, and, for

48. In determining the place of residence the following rules are to be observed:
(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.

(g) The residence can be changed only by the union of act and intent.

53. See note 45 supra.
54. Dunn v. Ketchum, 38 Cal. 93 (1869); Arapajolu v. McMenamin, 113 Cal.
purposes of substituted service, one court has stated that a simple declaration of intent to remain plus physical presence is sufficient to create a domicile.\textsuperscript{55}

The Attorney General argued that the constitutional and statutory voting residence provisions, which state that a person neither gains nor loses residence because of his presence or absence in a place as a student,\textsuperscript{56} mean that the student's presence at school "proves nothing as to residence for voting, and that other relevant factors are determinative."\textsuperscript{57} This construction is generally adopted by other state courts interpreting similar statutory or constitutional language; a student's physical presence is usually treated as neutral.\textsuperscript{58} However, there are inconsistencies of application in some states. In New York, where the question has arisen most frequently, the courts sometimes find that presence, declared intent, and a minimal showing of permanence is sufficient to create domicile,\textsuperscript{59} but more often they require an affirmative showing of "indicia of a bona fide residence."\textsuperscript{60} Other states' courts have tended to adopt the latter position.\textsuperscript{61}

The \textit{Mihaly} court recognized the fear that college students may "take over" a town if allowed to vote, and that in response special rules are applied to them in many states.\textsuperscript{62} However, it relied on the language

\begin{footnotesize}
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\item 56. \textit{CAL. CONST.} art. II, \$ 4; \textit{CAL. ELECTIONS CODE ANN.} \$ 14283 (West 1961); see note 43 \textit{supra.}
\item 57. 54 Op. \textit{CAL. ATT'Y GEN.} 7, 9 (1971).
\item 58. Annot., 98 A.L.R.2d 488, 490 (1964); \textit{e.g.}, Whittington \textit{v. Board of Educ.}, 320 F. Supp. 889, 891 (N.D.N.Y. 1970) ("[T]he statute is neutral—presence . . . is neither a positive nor a negative factor.").
\item 62. 5 Cal. 3d at 576-77, 488 P.2d at 8, 96 Cal. Rptr. at 704.
\end{itemize}
\end{footnotesize}
of the Elections Code, that the law
shall not be construed to prevent a student at an institution of learning from qualifying as an elector in the locality where he resides while attending that institution, when in fact the student has abandoned his former residence,63 to conclude that “[s]tudent status is therefore a neutral fact in determining residence for voting purposes” and that “differential treatment of students for voting purposes may not be condoned as a legitimate governmental policy.”64 While other courts have found physical presence to be neutral, Mihaly declares neutral the fact of being a student.65 However, it is probable that in adopting this section of the Elections Code the legislature intended merely to create a means for students to establish domicile by proving abandonment of a former residence and did not intend to create a rule that students should be treated the same as other voters, because the latter interpretation would change the command of the preceding sentence of the same section and override article II, section 4 of the California constitution.66

IV. THE FOURTEENTH AMENDMENT EQUAL PROTECTION ARGUMENT

The most straightforward argument to protect the right of students to vote where they actually live is based on the equal protection clause of the fourteenth amendment and recent cases applying this clause to voting rights. Yet, the Attorney General did not once mention this clause or these cases; and although parts of this argument were expressed in Mihaly, they were never squarely faced or expressly made an integral element of the court’s opinion.

The court argued that fear of the way certain voters may vote cannot justify any presumptions that they are not bona fide residents.67 It recognized that students may meaningfully and responsibly participate in the established political process only if they are allowed to participate where they actually live.68 The court cited its own decision hold-

63. CAL. ELECTIONS CODE ANN. § 14283 (West 1961).
64. 5 Cal. 3d at 577, 488 P.2d at 8, 96 Cal. Rptr. at 704.
65. Other states’ constitutional and statutory provisions do not contain this “shall not be construed to prevent” language. See generally Annot., 98 A.L.R.2d 488 (1964).
66. Article II, section 4 and Elections Code section 14283 are reproduced in note 45 supra.
67. 5 Cal. 3d at 571-72, 488 P.2d at 4, 96 Cal. Rptr. at 700, citing Carrington v. Rash, 380 U.S. 89 (1965).
68. Id. at 574-75, 488 P.2d at 6-7, 96 Cal. Rptr. at 702-03 (citing a passage from the Senate Report accompanying the proposed twenty-sixth amendment, stating that such treatment of the young “might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise” [1971 U.S. CODE CONG. & AD. NEWS 362, 375]).
ing California's literacy requirement violative of equal protection and a United States Supreme Court case holding property conditions to the right to vote likewise unconstitutional, as authority for the proposition that students have a right to participate in local elections because "basic democratic principles require that citizens be able to participate in making decisions that intimately affect their lives." Another reason the court gave for having students vote at their actual residence is that, otherwise, "voters of other districts have inflicted upon them a voter with no stake or interest in the outcome of the election." But the court veered away from the constitutional argument for local voting and discussed instead "further legislative policies" that express an intent "to promote and encourage voter registrations" and provide that great weight be given the voter's representation of his domicile.

Kramer v. Free Union School District succinctly states the attitude of the United States Supreme Court toward state statutes governing voting rights:

[A] careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

The Court has always recognized that "[t]he States have . . . broad powers to determine the conditions under which the right of suffrage may be exercised," but that power is limited by the requirement that only "reasonable residence restrictions" may be imposed. The Court first applied the equal protection clause to state voter qualifications in Carrington v. Rash and now requires that laws that discriminate among voters and restrict their voting rights "be carefully and meticu-

71. 5 Cal. 3d at 576, 488 P.2d at 7, 96 Cal. Rptr. at 703.
72. Id. at 577, 488 P.2d at 8, 96 Cal. Rptr. at 704.
73. Id. at 577-78, 488 P.2d at 8-9, 96 Cal. Rptr. at 704-05, quoting CAL. ELECTIONS CODE ANN. § 201 (West 1961).
74. 5 Cal. 3d at 578, 488 P.2d at 9, 96 Cal. Rptr. 705, citing CAL. ELECTIONS CODE ANN. §§ 14243-14244.5 (West 1961), which provide for challenge of voters at the polls, and quoting id. § 14255 (West 1961) ("Any doubt in the interpretation of the law shall be resolved in favor of the challenged voter").
78. 380 U.S. 89 (1965); see id. at 97-99 (Harlan, J., dissenting); Castro v. State, 2 Cal. 3d 223, 234, 466 P.2d 244, 252, 85 Cal. Rptr. 20, 28 (1970).
lously scrutinized.\textsuperscript{79} The state is required to show some compelling interest in the discriminatory restrictions,\textsuperscript{80} and it has the burden of establishing that interest.\textsuperscript{81} The state must further show that this interest justifies the method used to realize it\textsuperscript{82} and that the method chosen is the least burdensome and restrictive\textsuperscript{83} and the most precise.\textsuperscript{84}

Imposing residence requirements promotes at least four state interests: First, the state wants to ensure that the voter has enough information to vote intelligently.\textsuperscript{85} Although this interest is particularly important in the case of local elections,\textsuperscript{86} the normal waiting period between registration and voting is usually sufficient time for the voter to become informed.\textsuperscript{87} Second, the states must be able to prevent fraud, but residence declarations and lists are rarely checked for their truth, and the very act of registration and declaration fulfills this interest.\textsuperscript{88} Third, the state must have some way to identify the voter.\textsuperscript{89} However, while a voter may be more easily identified if he is a long-time resident, length of residence is certainly not the sole or even a very common identifica-


\textsuperscript{82.} Carrington v. Rash, 380 U.S. 89, 93 (1965); Zeilenga v. Nelson, 4 Cal. 3d 716, 723, 484 P.2d 578, 582, 94 Cal. Rptr. 602, 606 (1971); Castro v. State, 3 Cal. 3d 223, 237, 466 P.2d 244, 253-54, 85 Cal. Rptr. 20, 29-30 (1970). This requirement was expressed long ago when the court stated that in order for discriminations to meet the equal protection standard they must "rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." Gulf, C. & S.F.R.R. v. Ellis, 165 U.S. 150, 155 (1897).


\textsuperscript{87.} Keane v. Mihaly, 11 Cal. App. 3d 1037, 1043-44, 90 Cal. Rptr. 263, 266-67 (1st Dist. 1970), points out that "formal channels of voters' . . . information are immeasurably wider and more numerous" than they were when most provisions relating to voter information were enacted, and that even ballot pamphlets sent to voters by the county clerk are not to be mailed more than 40 days before election [Cal. Elections Code Ann. § 3573 (West 1961)]. See also Singer, supra note 83, at 707, 716.

\textsuperscript{88.} See Keane v. Mihaly, 11 Cal. App. 3d 1037, 1044-45, 90 Cal. Rptr. 263, 267-68 (1st Dist. 1970); MacLeod & Wilberding, supra note 86, at 113.

\textsuperscript{89.} MacLeod & Wilberding, supra note 86, at 95.
tion method used today. Finally, the state has an interest in ensuring that voters have a stake in the community to avoid participation by voters who risk no injury as a result of their vote. This is probably the single most important interest served by residence requirements. It also forms the basis of the Mihaly court’s rationale for allowing students to vote in the school community.

This fourth state interest is actually frustrated by a rule that would bar students from voting in the student community. And, in any event, the United States has become a nation of mobile people; many other groups are more mobile than students, yet no attempt has been made to apply special rules to them. Furthermore, “that old concept of semicloistered college life” may no longer be valid. It is questionable, then, whether the special rule applied to students by most states and argued for by the Attorney General would even pass a rational interest test. 

When a student is profoundly affected by his community’s decisions, “a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those permitted to vote . . . does not meet the ‘exacting standards of precision we require of statutes which selectively distribute the franchise.’”

It may be argued that Carrington v. Rash, which found unconstitutional a state law establishing a conclusive presumption that no soldier could be a voting resident, specifically endorsed reasonable nonconclusive presumptions for certain groups of voters: “The declarations of voters concerning their intent to reside in the State and in a particular county is [sic] often not conclusive; the election officials may look to the

90. Id. at 113.
92. Singer, supra note 83, at 707.
93. 5 Cal. 3d at 576, 488 P.2d at 7, 96 Cal. Rptr. at 703.
94. Such a rule would force the nonresident student’s hometown to suffer a disinterested vote. 5 Cal. 3d at 577, 488 P.2d at 8, 96 Cal. Rptr. at 704. See Singer, supra note 83, at 712.
95. Schmidhauser, Residency Requirements for Voting and the Tensions of a Mobile Society, 61 Mich. L. Rev. 823 (1963). It has been estimated that nearly one-half of urban and rural nonfarm people move to a different house, and 17 percent to a new county, every five years. Id. at 824. The courts are beginning to recognize the effect of this new mobility on laws passed at a time of relative immobility. E.g., Zeilenga v. Nelson, 4 Cal. 3d 716, 722, 484 P.2d 578, 581, 94 Cal. Rptr. 602, 605 (1971); see MacLeod & Wilberding, supra note 86, at 94.
96. Singer, supra note 83, at 712.
98. Singer, supra note 83, at 712.
100. 380 U.S. 89 (1965).
The Court emphasized that the state could take reasonable steps to see that applicants actually fulfill the requirements of bona fide residence. In support of this statement the Court listed various state constitutional and statutory provisions similar to California's, and it seemingly approved them because they did not absolutely prevent an applicant from proving residence.

However, this dictum from Carrington has been cast into considerable doubt by subsequent decisions. More recent cases have required that a state's efforts to regulate suffrage be based on a compelling state interest, and it is now required that residents having an interest in an election be allowed to vote unless there are compelling reasons to the contrary. Furthermore, in Harmon v. Forssenius the Court in effect qualified Carrington's endorsement of nonconclusive presumptions by citing Carrington for the proposition that "constitutional deprivations may not be justified by some remote administrative benefit to the State." The Court then listed several methods for determining residence, including registration, criminal laws, challenges, and oaths, none of which involve the substantial burdens placed on the student by many states.

Placing special residence requirements on students may also be unconstitutional for other reasons. For census purposes the United States Census Bureau counts students as residents of the school community. To deny those students the right to vote in that community may violate the one man, one vote rule of Reynolds v. Sims. Moreover, requiring affirmative indicia of residence (other than physical presence and declared intent), such as ownership of property or payment of taxes, may itself involve unconstitutional conditions.

101. Id. at 95.
102. Id. at 96 (footnote omitted). The case cited for the inconclusiveness of a declaration was one in which the elector did not even inhabit the county in which he sought to register. Stratton v. Hall, 90 S.W.2d 865, 866 (Tex. Civ. App. 1936).
103. 380 U.S. at 91-93 n.3.
104. See notes 80-84 supra.
107. Id. at 542-43.
CONCLUSION

_Jolicoeur v. Mihaly_ correctly decides the twenty-sixth amendment question as to the proper place for a minor to register to vote. There is no way to forecast the result of its elaboration of the law of minor domicile in other areas, an elaboration not required for disposition of the controversy. Although it may also have reached the correct constitutional result on the issue not formally before it—student voting residence—it did so by making a novel and unconvincing interpretation of California law instead of making the stronger constitutional argument. Nevertheless, its language on this latter issue contains an unmistakable message:

> [T]he middle-aged person who obtains a job and moves to San Francisco from San Diego, and the youth who moves from his family home in Grass Valley to Turlock to attend college must be treated equally. . . . We hold only that registrars may not specially question the validity of an affiant's claim of domicile on account of his age or occupational status.¹¹⁰

The issue of student voting residence is dead, at least so far as this court is concerned.

*Thomas D. Clark*

C. Residence Requirements for Local Office

_Zeilenga v. Nelson;¹ Camara v. Mellon.²_ In _Zeilenga v. Nelson_ and its companion case, _Camara v. Mellon_, the supreme court invalidated durational residence requirements of 5 and 3 years for local candidates,³ overruling one old case⁴ and casting doubt on the community:

The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote. . . . Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.

*Id.* at 668 (emphasis added).

¹ 4 Cal. 3d at 582, 488 P.2d at 12, 96 Cal. Rptr. at 708 (emphasis added).

² 4 Cal. 3d at 715, 484 P.2d 577, 94 Cal. Rptr. 601 (1971) (per curiam) (4-3 decision).

³ In _Zeilenga_ the office was county supervisor; in _Camara_ the office was city council member.


validity of another. Although the court could have struck down the required time periods as arbitrary and unreasonable legislation, instead it adopted the court of appeal’s opinion in Zeilenga and delivered a wide-ranging but mechanical equal protection opinion. Thus, the standard formula—fundamental rights, standard of review, and governmental interests—was employed but with a lack of rigorous analysis. The decisions accomplish three things: they reach the right result on their facts; they indicate the approach the court is likely to take in future cases; and they extend the opportunities for participation in representative democracy. After examination of the mootness question, this Note analyzes the equal protection issues.

I. MOOTNESS

Typically, by the time a candidate-petitioner’s suit is ready for decision, the election has been held and the candidate has been defeated or disqualified. Where an action should be dismissed under strict mootness standards, the courts are still willing to grant relief in cases “capable of repetition, yet evading review.” To avoid a dismissal for mootness the candidate should allege that a future attempt to gain office will be made under like circumstances. It is helpful if other putative candidates or voters join the candidate in a class action, and the requested relief should include a declaratory judgment. One fruitful technique is to get an injunction placing the candidate’s name on the ballot with the proviso that if, at a later hearing, the court rejects the challenge the candidate’s name will be removed. Thus, the judicial process begins before the election. In rare cases, as in Camara v. Mellon, an original mandamus proceeding can be brought in the state supreme court to require the candidate’s name be placed on the ballot.

In Zeilenga, a class action suit, the trial court refused to place the

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15. 4 Cal. 3d at 715, 484 P.2d at 577, 94 Cal. Rptr. at 601.
candidate's name on the ballot, and by the time the case reached the first appellate level, the requested relief was no longer available. In addition, Zeilenga did not allege his determination to run again; by the time of the next election for the same seat, he would satisfy the challenged requirements. Nevertheless, although it noted that its decision might no longer be of immediate concern to the candidate, the California court did not dismiss the case, reasoning that the issue was vital to the people of the county involved and of general public interest.

II. THE RIGHT TO BE A CANDIDATE

Initially the court had to find a constitutional basis for the right to run for office, since the nature of this right determines the standard of judicial review. If the right is "fundamental," the challenged state law must meet the new compelling interest standard of review, a test more favorable to the equal protection petitioner than the traditional rational basis standard. Zeilenga quickly ran through the gamut of possible constitutional bases and accepted them all. The right to be a candidate, the court held, is a right of citizenship, a fundamental right, a first amendment right, a "federal constitutional right," and a right evolving from the fundamental right to vote.

a. Citizenship and the privileges and immunities clause

The Federal Constitution does not explicitly grant a right to vote in state elections, and in 1904 the Supreme Court held that this right is not a privilege or immunity of national citizenship. Instead, states regulate the availability of the ballot and the manner in which elections are held. The Court has also rejected a similar claim by a can-
didate, holding that the right to run for state office is "a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause."24 Thus, if Zeilenga's declaration that the right to run for office is a "valuable right of citizenship"25 is based on national citizenship, it is plainly wrong; if based on state citizenship, it is not a right cognizable under the Federal Constitution.

b. Relationship to the right to vote

Constructing the candidate's right from the perspective of potential electors26 has the advantage that the right to vote is securely established as a fundamental right.27 Theoretically, the right to be a candidate is a corollary of the right to vote.28 Thus, the argument goes, any limitation upon the former is a restriction upon the latter.29 Elevating this interrelationship into a constitutional right to be a candidate, however, obscures the analytical and legal distinction between the rights.

The right to vote does not itself determine the qualifications for officeholding; rather the right is to vote for eligible candidates.30 Given that limiting the field of candidates impinges on the effectiveness of the individual's right to vote,31 the national and local governments accommodate less than full effectiveness by permitting, for example, indirectly elected and appointive officers.32 Moreover, linking the two

25. 4 Cal. 3d at 720, 484 P.2d at 580, 94 Cal. Rptr. at 604.
32. As examples of the former include United States Presidents [see U.S. Const. art. II, § 1, cl. 3] and school board officials [see Turner v. Fouche, 396 U.S. 346 (1970)]. Examples of the latter include judges [see U.S. Const. art. III, § 1] and school board officials [cf. Kramer v. Union Free School Dist., 395 U.S. 621, 629 (1969)].
rights does not assist in the delineation of the different state interests involved. The equal protection standard of review applicable to the two is not necessarily the same, and a state may properly have a longer residential requirement for a candidate than a voter.

c. Relationship to the first amendment

Analyzing the right to vote under the equal protection clause has restricted the Supreme Court's exploration of the relationship between exercise of the franchise and political expression. Recently, however, in *Williams v. Rhodes* the Court applied the first amendment "compelling interest" test to state regulation of a political party's access to the ballot that restricted both rights of association and voting rights. Zeilenga, relying solely on cases where public employees challenged restrictions on their political activity, also discerned a first amendment right to run for office.

First amendment analysis is useful when the discrimination is based on the content of the prospective candidate's political ideas. But where the basis of the statutory distinction is unrelated to the candidate's ideas or to the ideas of a political party, equal protection is the logical starting point. If looking "behind the law to the facts and circumstances" reveals "fencing out" of possible political opponents because of their politics, first amendment values can be used as a supplement to the equal protection analysis.

d. The right to travel


41. *See Williams v. Rhodes, 393 U.S. at 30.*

42. Petition for Writ of Mandate with Points and Authorities at 11-12; Brief
which struck down durational residence requirements for welfare assistance applicants, predicted a right-to-travel challenge to voter residency laws and suggested that either the compelling interest test may sustain such regulations or that the laws are not a penalty on the exercise of the right.\textsuperscript{44} In the recent case of \textit{Dunn v. Blumstein},\textsuperscript{46} however, the Supreme Court overruled a 1-year state and a 3-month county voter residence requirement, finding that the asserted state interests did not meet the compelling interest test and violated the voter’s right to travel. But the Supreme Court has sustained a requirement that a candidate be a bona fide resident of his district,\textsuperscript{46} and the rationale—the state’s interest in having a candidate knowledgeable about his constituency—could support some durational requirement.\textsuperscript{47}

The validity of the remaining argument—the regulation is a penalty on the exercise of the right to travel—depends on the definition of “penalty.” In \textit{Hadnott v. Amos},\textsuperscript{48} a district court ignored the penalty aspect and declared that, although free movement was a primary consideration for the voter, the need to expose the candidate to the people sustained a durational residence restriction on the office seeker. However, in \textit{Dunn} the Supreme Court characterized an infringement on the right to travel as a “penalty.”\textsuperscript{49} The right-to-travel theory also raises questions about the source of the right\textsuperscript{50} and its basis in intrastate travel.\textsuperscript{61}

e. A “federal constitutional right”

In a 1970 Supreme Court case, \textit{Turner v. Fouche},\textsuperscript{52} the Court struck down a requirement that local school board candidates be freeholders. It unanimously declared that while “[w]e may assume that the petitioners have no right to be appointed to the . . . board of education . . . they do have a federal constitutional right to be considered for public service without the burden of invidiously discrimina-

\begin{footnotesize}
\begin{itemize}
\item for A.C.L.U. as Amicus Curiae at 8-10. The court of appeal considered and rejected the argument. 90 Cal. Rptr. at 924.
\item 394 U.S. 618 (1969).
\item Id. at 638 n.21.
\item See part IV infra.
\item 40 U.S.L.W. at 4272-73.
\item 396 U.S. 346 (1970). \textit{Turner} was a companion case to Carter v. Jury Comm’n, 396 U.S. 320 (1970), and involved a challenge to the constitutionality of the system used to select both juries and school boards.
\end{itemize}
\end{footnotesize}
tory disqualifications.” The “invidious discrimination” language, however, should not be given undue prominence since the Court specifically based its analysis on the traditional reasonableness test. By not elaborating upon the claimed right’s fundamentality, the Court was freed from the mechanical formula that makes the standard of review depend on the nature of the right asserted, thus allowing it to concentrate on the state interests and individual “burdens” involved.

f. Fundamental right to be a candidate

Zeilenga is the first state court decision to conclude that, in the context of a durational residence requirement challenge, the opportunity to run for office is an independent fundamental right. This approach has the merit of forthrightness. However, the paucity of precedent and lack of explicit directive in either the United States or California constitutions subject it to the criticism of decisionmaking through “natural justice.” Moreover, this approach commits the court to evaluate other challenges—to nominating petition and filing fee requirements, for example—by a predetermined “compelling

54. 396 U.S. at 362.
55. 4 Cal. 3d at 721, 484 P.2d at 581, 94 Cal. Rptr. at 605. Other state courts that have heard candidates’ challenges to durational residence requirements have not found the right fundamental: Hayes v. Gill, Hawaii, 475 P.2d 872, 879 (1970); De Hond v. Nyquist, 63 Misc. 2d 526, 318 N.Y.S.2d 650 (Sup. Ct. 1971). In Hadnott v. Amos, 320 F. Supp. 107, 119 (M.D. Ala. 1970), aff’d per curiam, 401 U.S. 968 (1971), a federal district court employed the compelling interest test to the candidate’s challenge to a durational residence law. This may imply that the court considered the right fundamental, but the entire discussion is dictum since the court earlier found that the candidate was not a bona fide resident of the county from which he had attempted to be elected. 320 F. Supp. at 114-19. See note 56 infra.
58. In the recent case of Jenness v. Fortson, 403 U.S. 431, 440-42 (1971), the Supreme Court rejected a challenge to a state nominating petition requirement in an opinion that closely examines the statutory provisions involved and largely ignores, in the section devoted to equal protection analysis, the basis of a right to be a candidate and the appropriate standard of review. Lower federal courts, however, have decided like challenges according to the standard of review selected. Compare Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970); Jackson v. Ogilvie, 325 F. Supp. 864 (N.D. Ill.), aff’d, 403 U.S. 925 (1971) with Moore v. Board of Elections, 319 F. Supp. 437 (D.D.C. 1970).
59. A three-judge district court recently invalidated a California filing fee re-
III. STANDARDS OF REVIEW

Having decided that the right to be a candidate is fundamental, the Zeilenga court analyzed the durational residency requirement under the compelling interest standard. Its earnest search for an appropriate source of the right results from an appreciation of the two levels of review recognized under the equal protection clause. If the legislative classification impinges on a fundamental right, the compelling interest standard applies; the state must show that its asserted interest is "compelling," "necessary," or even "overriding." For classifications involving nonfundamental rights, the challenger must overcome a presumption of legislative constitutionality by showing that the statute is unreasonable or irrational.


60. See part III infra.

61. 4 Cal. 3d at 722-23, 484 P.2d at 581-82, 94 Cal. Rptr. at 605-06.


63. E.g., Kramer v. Union Free School Dist., 395 U.S. at 626; Shapiro v. Thompson, 394 U.S. at 634, 638.


Justice Stewart offers a third analysis in which the standard of review is similar to the traditional reasonableness test but there is no presumption of constitutionality and the justification demanded of the state is more than mere rationality. See, e.g.,
The different degrees of judicial scrutiny available have meant that the choice of the appropriate standard determines the result. Thus, the two other state cases that considered durational residence requirements for candidates both employed the reasonableness test and concluded that the 3-year requirements involved were constitutional.67 United States Supreme Court cases in the voting rights area similarly line up according to a compelling interest test, state loses, reasonableness test, state wins, formula.68 In Dunn the Court adopted the compelling interest standard for state voter durational residence laws and invalidated a 1-year state and a 3-month county requirement.69 The decision overrules earlier Supreme Court cases that had sustained voter durational residency requirements as reasonable legislation.70 The district courts have depended almost exclusively on the standard of review chosen.71


70. Pope v. Williams, 193 U.S. 621, 632-33 (1904), relied on the broad powers left to the states to regulate elections and rejected a challenge to a state requirement that 1 year before registering to vote a prospective elector must file a letter of intent to become a resident. The equal protection implications were summarily dismissed. Id. at 633-34.


In Keane v. Mihaly, 1 Cal. App. 3d 1037, 90 Cal. Rptr. 263 (1st Dist. 1970), a California court of appeal struck down the 1-year state residence requirement using the compelling interest test.

The important questions of why the Court has chosen to construct alternate tests for equal protection analysis, and what separate benefits are achieved under the new standard may never be completely answered. It has been suggested that the traditional test is only appropriate when the legislature's economic or financial judgment is at issue, and that where civil liberties are involved the Court has responded to their preferred position in the constitutional scheme by employing a higher standard of review. An important result of choosing the higher standard of review rather than the rational relationship test is that the presumption of constitutionality of legislation no longer applies. In *Kramer v. Union Free School District*, the Court explained that the presumption will be disregarded when the challenge to the legislation also challenges the "assumption that the institutions of state government are structured so as to represent fairly all the people." This implies that disregard of the presumption can take place only in

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73. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 463 (1958); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). But, for example, in *Truax v. Raich*, 239 U.S. 33, 42 (1915), the Court emphasized that aspect of the case relating to a right of employment, applying a strict standard of review, while in *McGowan v. Maryland*, 362 U.S. 420 (1961), the Court downplayed the claims based on religion and made a classic statement of the traditional reasonableness test.


75. 395 U.S. 621, 628 (footnote omitted).

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In *Hadnott v. Amos*, 320 F. Supp. 107 (M.D. Ala. 1970), aff'd per curiam, 401 U.S. 968 (1971), the court seems to have held that voter durational residency requirements must fall under the compelling interest test. One judge expressly so stated [320 F. Supp. at 112-14]; one judge concurred specially in that part of the court's opinion, finding that the state had employed its durational requirement as an invidious discrimination [320 F. Supp. at 124-25]; and one judge dissented to another part of the multi-issued opinion without indicating the grounds of his concurrence on 'the voter residency requirement point, although his opinion strongly suggests that his view on that issue is that the compelling interest test applies. 320 F. Supp. at 127-30.


For district court nominating petition cases see note 58 supra.
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election and voting cases, but it has not been limited in this way. 

Shapiro v. Thompson and Carrington v. Rash offer another explanation for eliminating the presumption: they found the presumption was "nonrebuttable" in practice. But this is difficult to understand since under the traditional equal protection test every successful claimant overcame the presumption. And in the recent case of Turner v. Fouche, the Court rejected the presumption when it works to exclude candidates, unless the presumption is rational for every person so excluded.

One important by-product of eliminating the presumption of constitutionality has been that the Court is no longer precluded from examining legislative motive. Consequently, in the right-to-travel area an intention to deter in-migration, and in the right-to-vote area an intention to "fence out" certain potential voters because of the way in which they might exercise the franchise, have contributed significantly to the results of the cases. In addition, under the higher standard of review the Court has not restricted itself to examination of the state's proffered interest as justification. It refused to accept one particular state interest, that of relieving a "remote" administrative burden, and it has borrowed from first amendment cases to demand

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76. See id. at 627.
77. See Shapiro v. Thompson, 394 U.S. 618, 631 (1969). Moreover, the statement does not offer to prove that an assumption had been made that the institution was fairly structured, nor does it explain why this particular challenge was a challenge to the basic assumption.
78. Id.
79. 380 U.S. 89, 96 (1965). Justice Stewart reasons that what is in effect a non-rebuttable presumption is an invidious discrimination. Although Carrington purports to be a rational relationship decision, its departure from the presumption of constitutionality is best viewed alongside the compelling interest cases.
80. 396 U.S. at 364. This is another case of the special Justice Stewart test. See note 79 supra.
81. The Court cited its decision in Leary v. United States, 395 U.S. 6 (1970), where it held that a federal criminal statutory presumption could not be sustained if there was no "rational connection between the fact proved and the ultimate fact presumed. . . ." Id. at 33, citing Tot v. United States, 319 U.S. 463, 467 (1943). Moreover, the presumed fact must be "more likely than not. . . ." 395 U.S. at 36. Aside from the formal deference to the legislative judgment [id. at 35], the Court relied on "common experience" [id. at 33]—that is, on its own assessment of the strength of the legislative record [id. at 38] and on its own reading of the statistical and other material produced [id. at 46-47, 52].
82. The prior restriction was expressed typically in McGowan: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961).
83. Shapiro v. Thompson, 394 U.S. at 631.
85. Shapiro v. Thompson, 394 U.S. at 636; Carrington v. Rash, 380 U.S. at 96.
that states use more narrowly constructed alternative means.\textsuperscript{87}

The Court's requirement that narrowly constructed means be employed is closely related to its examination of the classifications made in the challenged statutes. Thus, in \textit{Kramer}\textsuperscript{88} and \textit{Cipriano v. City of Houma}\textsuperscript{89} the Court did not reach the question of whether the states had shown compelling interests, because it found that the classifications lacked "sufficient precision."\textsuperscript{90} This poses a perplexing question: What legislative margin of error in classifying is permissible? If the classification must be correct for every person it affects, as \textit{Kramer} suggests,\textsuperscript{91} the legislature must meet an impossible burden. An alternative interpretation of \textit{Kramer} suggests that the higher standard of review applies only to \textit{additional} restrictions on the exercise of the franchise.\textsuperscript{92} Relying on this interpretation, in \textit{Howe v. Brown}\textsuperscript{93} a district court held that a challenge to the durational residency requirements for voters was not subject to the higher standard, since that test was reserved for the "subclasses" of the legislature's voter classification, while the "basic conditions" of receiving the ballot such as "reasonable residency" were subject to the reasonable relationship test.\textsuperscript{94} This analysis implicitly equates the \textit{length} of residency with the condition of being a \textit{bona fide} resident, although duration itself may be a "subclass."\textsuperscript{95} But restricting the higher standard to extraneous factors and using the lower standard for the central and toughest questions is anomalous and the Supreme Court's recent pronouncement—applying the compelling interest test to a voter residency requirement law—rejects it.\textsuperscript{96}

The compelling interest test, with its abolition of the presumption of constitutionality, its inquest into legislative intention, and its preference for the most narrowly constructed means, will inexorably swallow up the traditional rule except where the Court has already concluded that the right asserted does not deserve close protection.\textsuperscript{97}

\textsuperscript{87.} Turner v. Fouche, 396 U.S. at 364.
\textsuperscript{88.} 395 U.S. at 632.
\textsuperscript{89.} 395 U.S. 701, 704, 706 (1969).
\textsuperscript{90.} \textit{See also} Bolanowski v. Raich, 330 F. Supp. 724, 731 (E.D. Mich. 1971).
\textsuperscript{91.} \textit{See id.} at 625.
\textsuperscript{93.} \textit{Id.} at 866-69.
\textsuperscript{95.} \textit{See Dunn v. Blumstein, 40 U.S.L.W. 4269} (March 21, 1972).
Consequently, there is increasing pressure on plaintiffs to gain the fundamental-right entry into compelling interest analysis. Once there, the case may be summarily resolved, without any discussion of the competing interests.\footnote{98}

IV. COMPELLING STATE INTERESTS

Although Zeillenga only discussed one articulated state goal,\footnote{99} other possible state objectives should be examined in order to determine whether a candidate durational residency requirement can promote a compelling state interest. The interest that could most easily meet the test is that the candidate be a bona fide resident.\footnote{100} For voters, if the durational period is short enough, it can be justified as a rough substitute for a more individualized test of bona fides.\footnote{101} In the candidate situation, however, only a small number of persons need to be examined, and the length of the requirement, such as 5 years in Zeillenga,\footnote{102} may make that justification absurd.

Another state interest, proposed in Hadnott v. Amos,\footnote{103} is the need for a sufficient length of time to expose the candidate to the voters. This perspective contains an implicit assumption that candidate residency requirements are an aspect of the right to vote. Furthermore, even if an “exposure” interest is recognized, it does not require a lengthy durational period since the voter ordinarily has massive exposure to the candidate through the news media.\footnote{104}

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\footnote{98}{The Supreme Court’s recent opinion in Dunn v. Blumstein, 40 U.S.L.W. 4269, 4274-79 (March 21, 1972), may reverse that trend.}

\footnote{99}{4 Cal. 3d at 722-23, 484 P.2d at 581-82, 94 Cal. Rptr. at 605-06. See notes 105, 112-13 infra and accompanying text.}


\footnote{101}{The United States Constitution only requires that members of the House of Representatives and Senators be “inhabitants” of the states from which they were selected. U.S. CONSTR. art. I, § 2. However, the Constitution also requires that the President have “resided” within the United States for 14 years. U.S. CONSTR. art. II, § 1, cl. 5.}


\footnote{103}{320 F. Supp. 107, 119-22 (M.D. Ala. 1970).}

\footnote{104}{See Hadnott v. Amos, 320 F. Supp. 107, 121 (M.D. Ala. 1970) (stressing...
Some overlap between the state's regulation of the candidate and its concern to protect the voter is inevitable and proper. But the state cannot employ the durational requirement as a device to "fence out" or prevent competition from political "outs."105 Another overlap develops from the interest that Zeilenga does discuss—that a candidate should have a reasonable knowledge of the conditions in his district.106 "Knowledge" itself has two separate components that may warrant different treatment: competence and familiarity. In Lassiter v. Northampton County Board of Elections,107 sustaining a literacy requirement, the Supreme Court indicated that some degree of competence and intelligence in the exercise of the franchise could be demanded. But as the California supreme court pointed out in Castro v. State,108 that interest can be satisfied in alternate ways—for example, literacy in Spanish. Moreover, the California court cast doubt on the state's legitimate ability to require elaborate educational qualifications.109 In any event, a durational residency requirement is irrelevant to competence; thus, it is an example of a legislative classification unrelated to purpose.110

However, a durational residency requirement may be relevant to the state's interest in having a candidate be familiar with local problems.111 Posed in this way the issue degenerates into an argument over the exact amount of time necessary to learn about one particular area, and a candidate can argue that mere presence does not guarantee this.

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105. 4 Cal. 3d at 722, 484 P.2d at 581, 94 Cal. Rptr. at 605. See also Williams v. Rhodes, 393 U.S. 23, 32 (1968); cf. Carrington v. Rash, 380 U.S. at 94.
110. See notes 88-90 supra and accompanying text.
interest. In Zeilenga the answer was plain: 5 years is too long, especially when compared to other counties' requirements. A practical solution in close cases is simply to let the voters decide; they can assess both the candidate's competence and local knowledge.

Despite its sweeping language, Zeilenga's holding is limited to the determination that a 5-year durational residency requirement is too long for a rural county supervisor. Also decided was that 3 years is too long a requirement for membership on the city council of a small city. The court avoided overruling Lindsey v. Dominguez, which had sustained a 2-year requirement for a city council candidate in a larger city, stating that it could not give an advisory opinion. A future case-by-case decision process may be painful, but if it is based on the court's honest inquiry into the varying interests involved it is preferable to decision by sloganeering.

_D. Sex Discrimination in Employment_

Sail'er Inn, Inc. v. Kirby. Business and Professions Code section 25656 provided that, except under certain circumstances, a woman could not be employed as a bartender. Petitioners violated this section by hiring female bartenders and were threatened with suspension of their on-sale liquor licenses by the Department of Alcoholic Beverage Control. The supreme court issued a writ of mandate compelling the department to stop the revocation proceedings and to cease enforcement of the Code section. The court based its decision on three grounds: article xx, section 18 of the California constitution;
Article xx, section 18 of the California constitution provides that no person shall be disqualified on account of sex from entering or pursuing any occupation. The attorney general argued that women lack the physical strength required to maintain order in a bar, and therefore female bartenders would risk injury both to themselves and their customers. Furthermore, he argued, the statute was designed to prevent "improprieties and immoral acts" that were bound to occur if women other than those specified in the statute were permitted to work as bartenders.

The court rejected these arguments, reasoning that while such concerns may have been appropriate in the frontier saloon of yesteryear, they were inapplicable now that bars were relatively quiet and respectable establishments patronized by both sexes. Moreover, the risk to female bartenders could hardly be greater than the risk to cocktail waitresses, who are not prohibited from working in bars. The court also dismissed the argument that the statute served to prevent "immoral acts" on the grounds that such ends should be met by directing legislation to the acts themselves, not to women as a class. Most importantly, the court emphasized that the desire to protect women from physical hazards is not a valid justification for denying women the freedom to engage in a chosen occupation. The legislature has other means of preventing such evils that would affect both sexes equally.

   It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin . . .

   It shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of (their) religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . .

5. In Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 483, the supreme court held that article I, § 11 of the California constitution providing that general laws shall be given "uniform application" and article I, § 21 providing that no "privileges or immunities" shall be granted to one group of citizens and not others was equivalent to an equal protection provision similar to that of the United States Constitution.

6. CAL. CONST. art. XX, § 18: "A person may not be disqualified because of sex, from entering or pursuing a lawful business, vocation, or profession."

7. 5 Cal. 3d at 9, 485 P.2d at 534, 95 Cal. Rptr. at 334. The court referred to the experience of other states whose laws permitted women to be bartenders and noted that no serious moral or social ills had resulted from the practice.

8. Id. at 9-10, 485 P.2d at 534, 95 Cal. Rptr. at 334. See also In re Maguire, 57 Cal. 604 (1881). Maguire dealt with a San Francisco ordinance that prohibited women from waiting on customers from 6 p.m. to 6 a.m. in a place where liquor was
The second basis for the court's decision was that the statute conflicted with section 2000e-2 of the 1964 Civil Rights Act, which prohibits hiring on the basis of sex absent a bona fide occupational qualification; the statute was therefore void under the supremacy clause of the United States Constitution. The attorney general urged that sex is a bona fide occupational qualification since bartending is a dangerous occupation requiring physical strength to deal effectively with inebriated customers. The court found that the state made no showing either that tending bar is a dangerous occupation or that all or most women are incapable of performing the job. In the absence of such a showing, a wholesale prohibition would amount to classifying on the basis of stereotyped characterizations forbidden by the Act.

Finally, the court held that the statute violates the equal protection clauses of the California and United States constitutions by limiting the right of a woman to tend bar while placing no such limitation on a man. The court found that the statute limits a fundamental interest—the right to pursue a lawful occupation—and that classifications on the basis of sex are "suspect." This holding represents a ma-

9. See note 4 supra.

10. The court also rejected the argument that the supremacy clause did not apply because section 2 of the twenty-first amendment gave the states power to regulate alcoholic beverages and that this power was unfettered by Congress' power under the commerce clause to enact civil rights legislation. Section 2 provides that "transportation or importation into any State for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The court reasoned that the clause was designed merely to permit states that wanted to retain prohibition to keep intoxicating beverages out of their state. See also Phillips v. Martin Marietta, 400 U.S. 542 (1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (the test for a bona fide occupational qualification is whether "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."). See also Brief for Prof. Herma Hill Kay as Amicus Curiae at 21, Sail'er Inn v. Kirby, 5 Cal. 3d at 14, 485 P.2d at 537, 95 Cal. Rptr. at 337. See also 29 C.F.R. § 1604.1(a)(1)(ii) (1971) (Equal Employment Opportunity Commission guidelines)

11. 5 Cal. 3d at 14, 485 P.2d at 537, 95 Cal. Rptr. at 337.

12. Id. See also 5 Cal. 3d at 14, 485 P.2d at 537, 95 Cal. Rptr. at 337. See 29 C.F.R. § 1604.1(a)(1)(ii) (1971) (Equal Employment Opportunity Commission guidelines)
ajor departure from established constitutional law. Courts have previously treated as suspect only classifications based on race, lineage, and wealth;\textsuperscript{15} statutes employing such classifications are subject to the court's active review, which requires the state to show that the statute is necessary to protect a compelling state interest.\textsuperscript{18} Sex classifications, on the other hand, have been upheld by the courts as long as the classification has borne a reasonable relationship to a legitimate state policy.\textsuperscript{17} This standard is known as permissive review and is most often associated with economic regulation.\textsuperscript{18}

Although the Supreme Court has established no guidelines to determine when active or permissive review is appropriate, the California supreme court isolated two characteristics that sex classifications share with suspect classifications subject to active review: First, sex is an immutable trait, and, second, sex classifications are often associated with an underlying stigma of inferiority. The danger of classifying on the basis of immutable traits is that individual members of the class may be relegated to an inferior status on the basis of arbitrary stereotypes.\textsuperscript{19} While not all immutable traits are suspect,\textsuperscript{20} those traits that do not limit an individual's ability to perform a task may not be the basis for a prohibition to perform that task unless necessary to further a compelling state interest.

The court found that numerous legal and social disabilities imposed upon women stigmatize them as inferior persons.\textsuperscript{21} For example, the right to vote and to serve on juries had long been denied to


\textsuperscript{16} 5 Cal. 3d at 16, 485 P.2d at 539, 95 Cal. Rptr. at 339.

\textsuperscript{17} See, e.g., Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908). For a discussion of these cases see text accompanying notes 43-46 infra.

\textsuperscript{18} For a discussion of the two levels of review see Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1076-77, 1088 (1969). While the Supreme Court has established no guidelines to determine when active or passive review is appropriate, commentators have attempted to interpret and classify the use of the two standards. See, e.g., Cox, The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91 (1966); Developments in the Law—Equal Protection, supra note 14, at 1076-77, 1088. Cf. Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 426-27 (1960).

\textsuperscript{19} 5 Cal. 3d at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.

\textsuperscript{20} For example, intelligence or physical disability might be a reasonable classification for some purposes. Id.

\textsuperscript{21} 5 Cal. 3d at 19, 485 P.2d at 541, 95 Cal. Rptr. at 341.
women,\textsuperscript{22} and discrimination against women in employment and education persists.\textsuperscript{23} Furthermore, married women are treated as inferior by laws restricting their property and business ownership and their right to contract.\textsuperscript{24} The court rejected the notion that many of these laws were protective and beneficial to women since the same laws would be clearly unconstitutional if applied to racial and ethnic minorities. As the court put it, "The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."\textsuperscript{25}

This aspect of the court's opinion will undoubtedly be the most controversial. Most commentators have rejected the notion that women are treated as an inferior class in society,\textsuperscript{26} and the notion goes against the veneer of chivalry that dominates many relationships between the sexes. Women as a group have never been subjected to slavery as blacks and Chinese have been, and men live in close association with women in family and professional life. It would be difficult for most men to accept the proposition that persons with whom they associate are treated as inferior. Nevertheless, the relegation of women to inferior positions, both through statutes and "unwritten laws,"\textsuperscript{27} belie such protestations, as to do the alarming effects such relegation has had on women's self-esteem.\textsuperscript{28}

\textsuperscript{22} The right to vote was extended to women in 1920 by the 19th Amendment. The United States Supreme Court has never ruled on the constitutionality of laws excluding women from jury service. However, a three-judge federal district court held such exclusion unconstitutional in White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966). The Supreme Court has upheld laws allowing women to serve on juries only when they have voluntarily requested to be placed on jury lists. Hoyt v. Florida, 368 U.S. 57 (1961).

\textsuperscript{23} See authorities cited 5 Cal. 3d at 19 n.19, 485 P.2d at 541 n.19, 95 Cal. Rptr. at 341 n.19.

\textsuperscript{24} See authorities cited 5 Cal. 3d at 19 n.20, 485 P.2d at 541 n.20, 95 Cal. Rptr. at 341 n.20.

\textsuperscript{25} Id. at 20, 485 P.2d at 541, 95 Cal. Rptr. at 341.


\textsuperscript{27} For a discussion of the written and unwritten laws that justify designating race as a suspect classification see Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 424-26 (1960). Women suffer from such unwritten laws as "women mustn't be aggressive or competitive with men," "a woman's place is in the home," or being called by her first name while she calls her boss "Mr." These "laws" are analogous to those unwritten laws referred to by Black.

\textsuperscript{28} "Discrimination in education is one of the most damaging injustices women suffer. It denies them equal education and equal employment opportunity, contributing to a second class self image." A Matter of Simple Justice: The Report of the President's Task Force on Women's Rights 7 (1970) (emphasis added). See also the discussion of the anxiety women feel after succeeding where the traditionally feminine woman is supposed to fail in Gornick, Why Women Fear Success, Ms. Spring 1972, at 50.
Court decisions prior to *Sail'er Inn* have justified permissive review of sex classifications on the grounds that women are weak, timid creatures who depend upon men for their physical and legal protection and are naturally suited to center their lives on the home and family rather than on business or civic affairs. Because of these stereotypes courts have upheld laws prohibiting women from being bartenders and lawyers, limiting their right to contract; denying them the right to vote; and sentencing women to longer terms than men for the same crime.

29. The classic example of this view of women was expressed by the Supreme Court in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872). In that case the court upheld the constitutionality of a statute denying women the right to practice law. Justice Bradley wrote for the court:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are [sic] to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

*Id.* at 141-42. Similar statements may be found in *Muller v. Oregon*, 208 U.S. 412, 422 (1908); and *State v. Heitman*, 181 P. 630, 633 (Kan. 1919).

While the Supreme Court has begun to acknowledge the fallacy of these assumptions about the inferiority of women, this recognition has not resulted in equal treatment for women; rather, the decisions still rely on old stereotypes, dressed up in less degrading language. For example, in *Hoyt v. Florida*, 368 U.S. 57 (1961), the Court upheld a Florida law requiring women to request to be placed on jury lists, while men were subject to no such requirement. The court reasoned that "[d]espite the enlightened emancipation of women from restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life." *Id.* at 61-62. And in *Goesaert v. Cleary*, 335 U.S. 464 (1948), the Supreme Court upheld a statute similar to California's bartending statute. Justice Frankfurter reasoned that

> The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.

*Id.* at 466. The last clause is certainly of doubtful validity considering the use made of sociological data in the Court's later decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). For an exception to this evaluation of women's role in society see Justice Marshall's concurring opinion in *Phillips v. Martin Marietta*, 400 U.S. 542, 544 (1971).

34. See, e.g., *State v. Heitman*, 181 P. 630 (Kan. 1919); *Ex parte Gosselin*, 141 Me. 412, 44 A.2d 882 (1945).
Many of these injustices have been remedied by legislative action,\textsuperscript{35} constitutional amendment,\textsuperscript{36} and occasionally by judicial decision.\textsuperscript{37} The most far-reaching legislative action has been the prohibition found in the 1964 Civil Rights Act against sex discrimination in employment.\textsuperscript{38} In this legislation and in the Equal Pay Act\textsuperscript{39} Congress recognized that women represent nearly 40 percent of the labor force\textsuperscript{40} and that they are unjustly denied equal pay and equal access to jobs. Most important, by strictly interpreting the bona fide occupational qualification provision of the Act courts have moved away from the image of woman as weak and in need of protection. They have consistently struck down employment policies and legislation that limit women to certain jobs.\textsuperscript{41} These courts have recognized that Title VII guarantees to every woman the right to stand or fall on her own merits in the job she chooses.\textsuperscript{42} Joining this movement for equal rights, the California supreme court in \textit{Sail'er Inn} has taken a decisive step toward rejecting the traditional rationale for discrimination against women by recognizing that ancient concerns about women's needs and capabilities are no long appropriate, if they ever were, and that statutes that force women to conform to their former image and station in the world are invidiously discriminatory.

The supreme court had little judicial authority upon which to base its decision that sex is a suspect classification. Indeed, the only United States Supreme Court authority was directly to the contrary. In \textit{Goesaert v. Cleary}\textsuperscript{43} the Court upheld a bartending statute similar to California's on the basis that the legislature could reasonably conclude

\textsuperscript{35} For example, most states have abolished many of the restrictions on married women's rights. But California, Florida, Nevada, Pennsylvania, and Texas require court approval before a woman may engage in an independent business. L. Kanowitz, \textit{Women and the Law} 56 (1969). Also, Title VII of the 1964 Civil Rights Act has eliminated many occupation prohibitions. See discussion in text accompanying notes \textsuperscript{41}-\textsuperscript{42} infra.

\textsuperscript{36} The nineteenth amendment extended suffrage to women.

\textsuperscript{37} \textit{See}, e.g., \textit{White v. Crook}, 251 F. Supp. 401 (M.D. Ala. 1966) (striking down an Alabama statute denying women the right to sit on juries).


\textsuperscript{40} \textit{Hearings on § 805 of H.R. 16098 Before the Special Subcomm. on Education and Labor}, 91st Cong., 2d Sess., pt. 1, at 7 (1970).

\textsuperscript{41} \textit{See}, e.g., \textit{Weeks v. Southern Bell Tel. & Tel. Co.}, 408 F.2d 228 (5th Cir. 1969) (practice of not employing women as switchmen because of occasional heavy lifting and late hour calls violates Title VII); \textit{Bowe v. Colgate-Palmolive Co.}, 416 F.2d 711 (7th Cir. 1969) (practice of not allowing women to work in jobs requiring the lifting of more than 35 pounds violates Title VII); \textit{Rosenfeld v. Southern Pac. Co.}, 293 F. Supp. 1219 (C.D. Cal. 1968) (state protective weights and hours laws struck down as conflicting with Title VII).

\textsuperscript{42} E.g., \textit{Weeks v. Southern Bell Tel. & Tel. Co.}, 408 F.2d 228, 236 (5th Cir. 1969).

\textsuperscript{43} 335 U.S. 464 (1948). See note 29 supra.
that women bartenders could pose moral and social problems. Similarly, in *Muller v. Oregon* the Supreme Court upheld protective hour laws applicable only to women on the ground that women were naturally reluctant to assert their rights and were dependent upon men both for moral and legal protection.

While the court in *Sail'er Inn* acknowledged these countervailing authorities, it did not believe they would hold today in the wake of heightened consciousness of the debilitating effects of sex discrimination. The court also pointed to recent decisions that appear to abandon permissive review for sex classifications. In *United States ex rel. Robinson v. York,* a federal district court struck down a Connecticut statute permitting longer prison sentences for women than for men convicted of the same or comparable crimes. Finding that the statute denied women equal protection of the laws, the court held that adult women convicted of misdemeanors should have the same measure of protection as racial groups, including a strict standard of review. However, the impact of the case is limited because the court found longer sentences to be distinguishable from hours and occupation limitations for women. The strict standard of review rested as much on the importance of the interest involved as it did on the use of a sexual classification. Because of this ambiguity in the court’s attitude toward the degree of scrutiny required in the case of sex classifications, it was of dubious value as precedent for *Sail'er Inn.*

Whether the United States Supreme Court will follow the lead of *Sail'er Inn* is not certain. In *Reed v. Reed,* decided after *Sail'er Inn,* the Supreme Court held unconstitutional an Idaho statute that preferred men over women of equal entitlement in administering estates. In so holding, however, the court framed the question to be

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44. Id. at 466.
45. 208 U.S. 412 (1912).
46. Id. at 421-22. The *Sail'er Inn* court referred to this opinion as "openly biased and wholly chauvinistic." 5 Cal. 3d at 17, n.15, 485 P.2d at 539, n.15, 95 Cal. Rptr. at 339, n.15.
47. 5 Cal. 3d at 17 n.15, 485 P.2d at 539 n.15, 95 Cal. Rptr. at 339 n.15. See note 46 supra.
48. 281 F. Snpp. 8 (D. Conn. 1968).
49. Id. at 11.
50. Id. at 14.
51. Id. at 13-14. The court cited *Muller* and *Goesaert* for the proposition that sex classifications may be justifiable under certain circumstances.
52. The *York* court remarked that "In our society any discrimination in the treatment of women is benignly in their favor." Id. at 16. This is not consistent with the spirit of *Sail'er Inn*.
54. IDAHO CODE ANN. § 15-314 (1948) provides:
[off several persons claiming and equally entitled [under § 15-312] to ad-
whether the classification bore a "rational relationship to a state objective," which indicates that it deemed permissive review appropriate. The state objective—to avoid controversy when more than one eligible person petitions to administer an estate—was legitimate, but achieving this objective by means of classification based on sex was arbitrary and therefore forbidden by the equal protection clause.

By using the permissive review approach traditionally used to assess the constitutionality of sex classifications, the Supreme Court may have been implicitly rejecting the approach taken in *Sail'er Inn*, particularly since both petitioner and amicus curiae strongly urged that sex should be found to be a suspect classification. On the other hand, the Court also failed to draw the same conclusions about sex classifications that it has drawn in the past: that is, that a classification is rational when based on an assessment of woman's place in society as wife and mother. The Idaho supreme court upheld the statute's classification on the ground that men are generally more qualified to serve as administrators than women, and in the past the Supreme Court has upheld statutes on similar reasoning. But in *Reed* the Supreme Court ignored the argument that the classification was reasonable because women are less involved in the business world and instead concentrated on the convenience rationale also proposed by the Idaho court, which held that the need to reduce conflict over estate administration justifies any arbitrary classification, including one based on sex. While the Supreme Court may have been unwilling to undertake a major departure from its previous reasoning, its analysis suggests that sex classification must meet a stiffer test than it has in the past, even when permissive review is used. By ignoring the Idaho court's argument that women as a class are probably unable to do as good a job as men as estate administrators, the Court may have taken a step toward abandoning traditional stereotypes. This would be consistent with the Court's growing judicial restraint in the civil liberties area: that is, it declined to reach an issue importing major change—declaring sex a suspect classification—by deciding the case on the narrower ground of arbitrariness, although with a broader interpretation of that term.

A major departure by the Supreme Court from the permissive

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minister, males must be preferred to females, and relatives of the whole to those of the half blood.

This section was repealed as of July, 1972.

55. 404 U.S. at 74.
56. *Id.*
58. See cases discussed in note 29 supra.
59. 93 Idaho at 516, 465 P.2d at 639.
review approach is still needed, however. By including sex with race, lineage, and wealth as a suspect classification, the Supreme Court would assure that stereotyped characteristics would not be used by state and lower federal courts to justify sex classification. Of course, such a standard would not require that every classification based on sex be held unconstitutional, only that the state has the burden of proving that the classification is not implicitly or explicitly grounded upon unwarranted assumptions about the relative capabilities and needs of women and men. For example, the state may have a compelling interest in protecting personal bodily privacy and therefore be able to require separate toilet facilities. However, personal preference for the services of one sex based on stereotyped assumptions would not meet the standard.

Whether or not the Supreme Court follows the lead of *Sail'er Inn*, the case has broad implications for women's rights in California. One of the most important effects of the case is that it provides a cause of action based on the fourteenth amendment against state and educational institutions for employment discrimination. This bridges a gap in Title VII of the 1964 Civil Rights Act, which does not extend its prohibition against discrimination to state governments and educational institutions. Similarly, litigation challenging sex discrimination in government benefits to the disabled and unemployed may also be more promising now. For example, the California disability guidelines provide that a person who has acted both as a homemaker and as a worker will not be considered disabled if that person does not live alone and can continue to perform homemaking activities, even though unable to work at a paying job. In effect this regulation permits disabled men who do not live alone to receive aid, but women in the same situation may not. The assumption is that women are being

60. See note 15 *supra* and accompanying text.
61. See Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1509-10 (1971).
63. Section 2000e-701(b)(1) [42 U.S.C. § 2000e-701(b)(1) (1970)] provides that "employer" does not include the United States or a state or political subdivision thereof. Section 2000e-702 [*id.* § 2000e-702] exempts educational institutions from application of the act. The League of Academic Women at the University of California, Berkeley, taking advantage of this opportunity, has recently filed suit against the university for discriminatory hiring policies applied to both academic and nonacademic personnel. *League of Academic Women v. The Regents*, Civ. No. 263 (N.D. Cal., filed Feb. 15, 1972).
supported by the person with whom they are living, presumably their husband; this assumption is often false, since the husband or companion may also be disabled. 65

The addition of sex as a suspect classification for purposes of the equal protection clause also raises questions regarding tax benefits and other state action supporting clubs and organizations discriminating on the basis of sex. A recent three-judge district court opinion struck down federal tax benefits given the Elks Club on the grounds that favorable tax treatment to a racially discriminatory organization indicated approval of that practice and therefore violated the fourteenth amendment. 66 Similar actions might be brought against men's eating clubs that discriminate against women and also receive some benefit from the state, such as status as a nonprofit corporation or renting state-owned buildings to such groups. These clubs are often desirable luncheon spots for professional people; service is fast, and the wait for a table is short. Professional women are denied these amenities and are often humiliated by being forced to eat in a separate room from their male colleagues.

Other causes of action that show promise of success as a result of Sail'er Inn are suits challenging statutes providing that a woman acquires the domicile and residence of her husband upon marriage, 67 criminal statutes that provide for punishment of prostitutes but not their customers, 68 and laws requiring a woman to change her last name upon marriage. 69

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65. In Doffer v. Martin, Civ. No. 70-919 (N.D. Cal., filed Apr. 30, 1970), one plaintiff, a 47-year-old woman living with her disabled husband, was unable to continue working as a domestic. She was denied Aid to the Totally disabled because of the California homemaker guidelines. Her husband, however, receives ATD. These funds are available to complement state financing to persons over 18 years who are totally and permanently disabled. 42 U.S.C. §§ 1351-55 (1964), as amended (Supp. V, 1970). The other plaintiff in the suit lives with her adult, mentally retarded daughter. Both women are disabled, but neither receives aid because of the guidelines.


67. For example, California requires that a wife's residence is deemed to be that of her husband. Cal. Gov't Code § 244 (West Supp. 1971). One result of this is that a female California resident who marries a nonresident must pay nonresident tuition fees, although a male California resident who marries a nonresident may pay resident tuition fees. Cal. Educ. Code § 23054 (West Supp. 1971). Female California residents who marry servicemen stationed outside the state are excepted from this, however, and may pay resident tuition fees. Id. § 23059.

68. California has no statute prohibiting men from using the services of a prostitute. While men are occasionally arrested on collateral charges, it is almost always for the purpose of coercing the men to cooperate with those prosecuting the women for prostitution. See L. Kanowitz, supra note 35, at 15-17. See generally G. MueLLER, LEGAL REGULATION OF SEXUAL CONDUCT (1961).

69. The requirement that a woman adopt her husband's name upon marriage is
One of the questions unanswered by *Sail'er Inn* is whether the equal protection clause ever permits preferential hiring on the basis of sex. Preferential treatment for racial minorities in admissions to public universities and in employment is currently being challenged as a denial of equal protection to whites. If state institutions such as universities begin a preferential hiring program for women, men may raise similar claims. A partial answer may be found by distinguishing preferential hiring of women to remedy past discrimination from preferential hiring of women because of stereotyped characteristics, such as a policy of employing only women as secretaries, stewardesses, or nurses. The latter must fall, since it is the abandonment of such policies that *Sail'er Inn* seeks to achieve. The question remains, however, whether *Sail'er Inn* permits or compels remedial preferential hiring, of either men or women.

Preferential hiring of women in order to remedy the effects of past discrimination should be consistent with the fourteenth amendment. The state has a legitimate interest in promoting the equality of women even if men are temporarily disadvantaged. Furthermore, a program of remedial preferential hiring does not stigmatize men as inferior; therefore, such a policy would not invidiously discriminate against them.

Whether preferential hiring of men for positions traditionally occupied by women is also consistent with the fourteenth amendment is a more difficult question. The effect of such preferential hiring may be a net loss in employment for women, since preferential hiring of men may proceed more rapidly than preferential hiring of women. For example, schools may seek and preferentially hire men teachers in order to give their students a male image instead of the traditional female one. This question has not arisen in the context of racial discrimination because there are few jobs occupied solely by racial minorities that whites are seeking to enter.

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deployed in the common law. It served to notify the world that her legal existence was "incorporated and consolidated into that of her husband." 1 W. Blackstone, Commentaries *442. See Hughes, And Then There Were Two, 23 Hastings L.J. 233 (1971). See generally L. Kanowitz, supra note 35, at 41-46. A bill has been introduced in the California Assembly to permit a woman to determine at the time of her marriage whether to adopt her husband's name or retain her mother's maiden name. Cal. Assembly Bill No. 729 (1971 Reg. Sess.).

70. A Washington superior court recently ordered that an applicant to Washington State University Law School be admitted since his grades and LSAT scores were higher than those admitted under the minority admissions program. Defunis v. Odegard, Civil No. 741727 (Wash., filed Sept. 22, 1971). Also, the Fifth Circuit held constitutional a limited use of quotas for minority employment. Carter v. Gallagher, 452 F.2d 315 (5th Cir. 1972).