Loyola of Los Angeles Law Review

Volume 6 | Number 1 Article 9

1-1-1973

Constitutional Law-Municipal Corporations-A Statutory Scheme Whereby Power to Determine the Issue of Municipal Incorporation is Allocated to Landowners in Proportion to the Assesed Value of Their Land and to the Exclusion of Non-Landowning Voters is an Unconstitutional Denial of Equal Protection Unless the Classification Can be Shown to be Necessary to Fulfill a Compelling State Interest

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—A STATUTORY SCHEME WHEREBY POWER TO DETERMINE THE ISSUE OF MUNICIPAL INCORPORATION IS ALLOCATED TO LANDOWNERS IN PROPORTION TO THE ASSESSED VALUE OF THEIR LAND AND TO THE EXCLUSION OF NON-LANDOWNING VOTERS IS AN UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTON UNLESS THE CLASSIFICATION CAN BE SHOWN TO BE NECESSARY TO FULFILL A COMPELLING STATE INTEREST—*Curtis v. Board of Supervisors*, 7 Cal. 3d 942, 501 P.2d 537, 104 Cal. Rptr. 297 (1972).

In 1970 the Los Angeles Board of Supervisors refused to call an incorporation election for the proposed city of Rancho Palos Verdes, despite the fact that approximately 63.6 percent of the landowners, representing 42.8 percent of the assessed valuation of land in the proposed city's boundaries, favored incorporation.[1] The board's refusal was required by section 34311 of the California Government Code,[2] since protests opposing the incorporation had been filed by persons owning a majority of the assessed valuation of the land.[3] In order to compel the Board of Supervisors to resume the incorporation proceedings, the proponents of incorporation petitioned the California Supreme Court for a writ of mandate[4] on the ground that section 34311 was unconstitutional

1. Curtis v. Board of Supervisors, 7 Cal. 3d 942, 950, 501 P.2d 537, 542, 104 Cal. Rptr. 297, 302 (1972).

2. CAL. GOV'T CODE ANN. § 34311 (West 1968) provides in relevant part:

> The Board shall hold a hearing at the time fixed, and may adjourn the hearing from time to time, for periods not to exceed two months in all. If at the time set for the first hearing, there are insufficient written protests filed with the board to terminate further proceedings, the meeting shall be recessed not less than 14 days, and supplemental protests may be filed within 10 days after the first hearing.
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> If upon the final hearing the board of supervisors finds and determines that written protests to the proposed incorporation have been filed with the board, signed by qualified signers representing 51 percent of the total assessed valuation of the land within the boundaries of the proposed incorporation, the jurisdiction of the board of supervisors shall cease; no election shall be called and no further petition for the incorporation of any of the same territory shall be initiated for one year after the date of such determination.

3. A "qualified signer" is defined by section 34301 of the California Government Code as the "owner of an interest in fee" or the purchaser of land under a written agreement to buy. CAL. GOV'T CODE ANN. § 34301 (West 1968). For the purposes of the incorporation procedure, "assessed value of land" does not include the value of improvements. Krouser v. County of San Bernardino, 29 Cal. 2d 766, 772, 178 P.2d 441, 443 (1947).

4. The writ of mandate was immediately transferred by the Supreme Court to the court of appeals. Curtis v. Board of Supervisors, 97 Cal. Rptr. 44, 45 (1971). There was a sufficient showing of urgency by the petitioners to justify application to an ap-

because it violated the equal protection clauses of the Fourteenth Amendment and of the California Constitution.[5] They argued that section 34311 permitted the owners of 55 percent of the assessed valuation of land to thwart the intent of 63.6 percent of the landowners and precluded non-landowning voters registered in the area from expressing their opinions on the issue of incorporation.[6]

The petition for a writ of mandate was transfered by the California Supreme Court to the court of appeal for determination.[7] The court of appeal denied the petition, reasoning that the effect of incorporation on owners of real property permitted the use of a property value measure[8] similar to the one approved in *Schindler v. Palos Verde Irrigation District.*[9] A subsequent petition to the California Supreme Court resulted in the rejection of the appellate court's reasoning. The supreme court held that section 34311 violated the equal protection clauses of the Fourteenth Amendment and of the California Constitution since the respondents had failed to show that the discriminatory provisions of section 34311 furthered a "compelling state interest."[10]

Before the strict scrutiny of the "compelling state interest" test can be applied there must be a suspect classification or a fundamental interest

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pellate court without first applying to a superior court for relief. *See* County of Sacramento v. Hickman, 66 Cal. 2d 841, 845, 428 P.2d 593, 595, 59 Cal. Rptr. 609, 611 (1967).

5. CAL. CONST. art. I, §§ 11, 21.

6. 7 Cal. 3d at 950, 501 P.2d at 542, 104 Cal. Rptr. at 302. Non-landowning voters could only express their opinions on the issue of incorporation through an election procedure. However, the election could not be called once the owners of 51 per cent or more of the assessed valuation of land filed written protests to the proposed incorporation. CAL. GOV'T CODE ANN. § 34311 (West 1968).

7. Curtis v. Board of Supervisors, 97 Cal. Rptr. 44, 45 (1971).

8. The possibility that additional taxes and laws affecting real property might be superimposed by the additional level of government was considered to be an interest distinguishing real property owners from resident voters which would support the Legislature's decision to allow those property owners with more valuable property to have initial control over the execution or nonexecution of the incorporation plan. *Id.*

9. 1 Cal. App. 3d 831, 82 Cal. Rptr. 61 (1969). See text accompanying note 23 *infra.*

10. 7 Cal. 3d at 946, 501 P.2d at 539, 104 Cal. Rptr. at 299. Two equal protection standards have evolved in the cases. The first includes general social and economic legislation. If the classifications of different groups created by the legislation are not arbitrary and are relevant to achieving the objectives of the regulation, such legislation will be held constitutional. McGowan v. Maryland, 366 U.S. 420, 426 (1960). The second group of cases involves statutory classifications based on race, color, religion or alienage, or legislation which impinges on fundamental rights or liberties. These cases require close court scrutiny and a showing of a "compelling state interest." McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

involved.[11] Voting rights have long been considered fundamental.[12] However, there need not be an election per se for this fundamental interest to be present since state action need only "touch upon" or burden the right to vote.[13] Thus, the strict test has been applied not only where the right to vote is denied,[14] but where it has been diluted[15] or conditioned on the payment of a fee.[16] The "compelling state interest" test has also been applied to pre-election laws which specified unjust requirements for placing candidates on the ballot.[17] Consistent with this trend the *Curtis* decision applied the concept of "touching upon" to include a statutory proceeding which may preclude a general election.[18]

Among the franchise cases two valid state interests for classification have been evident: (1) to promote intelligent and responsible voting[19] and (2) to separate persons with a substantial interest in the outcome of an election from those with little or no such interest.[20] The latter interest, the subject of the dispute in *Curtis*, has been the focus of many recent cases wherein the United States Supreme Court has rejected classifications based upon a special interest which failed to include *all* who are substantially interested.[21] The California Supreme

11. Fundamental interests have included the right to marry, Loving v. Virginia, 388 U.S. 1 (1967); the right to have children, Skinner v. Oklahoma, 316 U.S. 535 (1942); the right to move from state to state, Shapiro v. Thompson, 394 U.S. 618 (1969); and the right to vote, Carrington v. Rash, 380 U.S. 89 (1965); Reynolds v. Sims, 377 U.S. 533 (1964). If the basis of classification is inherently suspect, such as race, the statute is subject to close scrutiny by the court. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 420 (1948); Oyama v. California, 332 U.S. 633, 640 (1948).

12. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

13. The franchise as a fundamental right has been extended into the peripheries surrounding voting rights. *See* notes 15-17 *infra* and accompanying text.

14. Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969).

15. Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

16. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

17. Williams v. Rhodes, 393 U.S. 23 (1968).

18. 7 Cal. 3d at 952-55, 501 P.2d 544-46, 104 Cal. Rptr. at 304-06.

19. "The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot." Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959).

20. Schindler v. Palos Verde Irrigation District, 1 Cal. App. 3d 831, 82 Cal. Rptr. 61 (1969).

21. In Kramer v. Union Free School District, 395 U.S. 621 (1969), the Court held invalid a statute limiting the right to vote in school elections to property owners, renters of taxable property and parents. Excluded voters were held to also have a substantial interest. In Cipriano v. City of Houma, 395 U.S. 701 (1969), the Court held invalid a Louisiana statute allowing only property taxpayers to vote in special elections to approve issuance of revenue bonds by a municipal utility system. Phoe-

Court found the facts in *Curtis* to be within the rationale of these cases, and rejected the purported similarity to the *Schindler* case.[22] The *Schindler* court had upheld a system of voting for irrigation district trustees based on property value because benefits and burdens from the district accrued according to the extent of land owned, and votes proportioned to land value fairly distributed voting influence according to the stake held. The *Curtis* court determined that, unlike an irrigation district composed almost exclusively of landowners with a specific interest in the district, as was the situation in *Schindler,* incorporation of Rancho Palos Verde would burden and benefit non-landowners as well as landowners.[23] Also, the landowners themselves would be affected by taxes and ordinances in ways not proportionate to their assessed land values.[24] Thus, the court held:

> [N]o compelling state interest requires that nonlandowners be excluded from the group empowered to decide whether an election to incorporate a city be called, and no compelling interest is served by allocating power within that group on the basis of assessed value of land.[25]

In this way the court followed the recent trend of the United States Supreme Court while retaining the *Schindler* rationale for possible future application in limited factual contexts.[26]

In its decision, the court referred to three classifications that were being drawn by section 34311: those who own land and those who do not; those who own more valuable land and those owning less valuable parcels; and those who own unimproved land and those owning improved land.[27] The court emphasized that the power derived from the

nix v. Kolodziejski, 399 U.S. 204 (1970), extended *Cipriano* to general obligation bond elections.

22. 7 Cal. 3d at 958-59, 501 P.2d at 548-49, 104 Cal. Rptr. at 308-09.

23. The burden of revenues would derive from sources other than property taxes, and zoning laws and land use regulations affect the community as a whole and not just the landowners. 7 Cal. 3d at 961, 501 P.2d at 550, 104 Cal. Rptr. at 310. Also property taxes affect non-landowners who rent in the area. Usually a percentage of rent is allocated for taxes, and when property taxes rise so do rents.

24. For instance, property taxes are levied on improvements as well as on the land, whereas the measurement of assessed land value used in section 34311 did not include improvements. Also, the direct effect of zoning and land use regulations on the landowner cannot be measured in terms of assessed value. 7 Cal. 3d at 961, 501 P.2d at 550, 104 Cal. Rptr. at 310.

25. *Id.*

26. It should be noted that the *Curtis* court views *Schindler* as perhaps being difficult to reconcile with United States Supreme Court cases on the subject. 7 Cal. 3d at 958 n.19, 501 P.2d at 548 n.19, 104 Cal. Rptr. at 308 n.19, *citing* Burrey v. Embarcadero Mun. Improvement Dist., 5 Cal. 3d 671, 682 n.8, 488 P.2d 395, 403 n.8, 97 Cal. Rptr. 203, 210 n.8 (1971).

27. 7 Cal. 3d at 954, 501 P.2d at 545, 104 Cal. Rptr. at 305. The third classification

statute to deny the incorporation election not only harmed the non-landowner resident voters, but also caused owners of less land or land of lower valuation to suffer a limitation in voting power and choice.[28] The *Curtis* court, unlike the court in *Schindler*,[29] deliberately considered all these classifications and implicitly held each of them to constitute unconstitutional violations of due process in the absence of an adequate showing of a "compelling state interest."[30] The court noted that the United States Supreme Court has recognized that a state may provide procedures for the incorporation of cities in which the issue never goes to popular vote.[31] However, it also noted that this state power to determine how to create and alter municipal corporations is not unlimited,[32] and any classifications drawn in the exercise of this power cannot abridge the equal protection of the laws by allowing one group to control the other's exercise of a fundamental right.

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results from the fact that, for the purposes of the incorporation procedure, assessed valuation does not include the value of improvements. *See* note 3 *supra.*

28. *Id.* at 955, 501 P.2d at 545, 104 Cal. Rptr. at 305; *cf.* Adams v. City of Colorado Springs, 308 F. Supp. 1397 (D. Colo.), *aff'd*, 399 U.S. 901 (1970) (a statute which provided for annexation of an unimproved area which had two-thirds contiguity with an incorporated city without an election was upheld because there was no class being granted the franchise while it was being denied to another) *and* Lance v. Gordon, 403 U.S. 1 (1971) (Court refused to apply the "compelling state interest" test where an extra majority bond election was challenged as a violation of equal protection).

29. *Schindler's* holding was limited to the situation of voting rights being allocated among landowners in proportion to the assessed valuation of land held. The case expressly refrained from a determination of the constitutionality of a property qualification for voting. Petitioners in *Schindler* were held to have no standing to raise the constitutional claims of non-landowners under section 24, article I of the California Constitution, which states: "No property qualification shall ever be required for any person to vote or hold office." CAL. CONST., art. I, § 24. However, the court did not foreclose inquiry into property qualification issues when raised in a proper factual context. 1 Cal. App. 3d at 834 n.3, 82 Cal. Rptr. at 62 n.3. It should be noted that the constitutionality of property qualifications in special district elections is presently before the United States Supreme Court in Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 490 P.2d 1069 (Wyo. 1971), *prob. juris noted*, 407 U.S. 908 (1972).

30. The court gave all of the classifications concerned in *Curtis* equal weight; equal concern for the abridged rights of both non-landowners and landowners was evident throughout the opinion. The court was not concerned with voter qualifications, but with the denial of an election by petition of owners of a majority of the assessed valuation of land in the proposed incorporation area.

31. 7 Cal. 3d at 954-55 n.16, 501 P.2d at 545 n.16, 104 Cal. Rptr. at 305 n.16, *citing* Hunter v. Pittsburgh, 207 U.S. 161, 179 (1907). In regard to annexation, *cf.* Adams v. City of Colorado Springs, 308 F. Supp. 1397 (D. Colo.), *aff'd* 399 U.S. 901 (1970), discussed in note 28 *supra.*

32. 7 Cal. 3d at 951, 501 P.2d at 543, 104 Cal. Rptr. at 303, *citing* Gomillion v. Lightfoot, 364 U.S. 339, 342-45 (1960).

The constitutionality of concurrent majorities[33] was an additional issue raised in the *Curtis* decision. The respondents had argued that the statutory plan was constitutional because it did not exclude interested persons from voting on incorporation, but only conditioned incorporation on concurrent approval of two interested groups—the residents who vote in the incorporation election and the landowners who may invoke the protest procedure specified in section 34311. The court rejected this argument and emphasized that section 34311 did not grant landowners a concurrent voice in the incorporation proceedings, but gave them a veto power.[34] Even if section 34311 were interpreted as a concurrent majority procedure, the court pointed out, such a procedure is, at the least,[35] inherently suspect and can only be justified by a "compelling state interest."[36] The court found no "compelling state interest" which would allow resident landowners to *twice* express their preferences regarding the proposed incorporation.[37]

The *Curtis* case calls into constitutional question not only those statutes which apportion voting power according to assessed land value,

33. The court's term "concurrent majorities" refers to a procedure which requires separate passage of the same provision in each of two or more bodies of the electorate to effect a single act. Hagman & Disco, *One-Man One-Vote as a Constitutional Imperative for Needed Reform of Incorporation and Boundary Change Laws*, 2 URBAN LAW 459, 470 (1971).

The constitutionality of concurrent majorities is not well-defined in case law. A requirement of concurrent geographic majorities for amendment of certain state constitutional provisions was held invalid in State v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968). A provision of the Hawaii Constitution was struck down because it required a separate majority of the votes in each of a majority of counties in order to reapportion the State Senate. Holt v. Richardson, 238 F. Supp. 468 (D. Hawaii 1965). *Contra* Keane v. Golka, 304 F. Supp. 331 (D. Neb. 1969), wherein the court upheld a separate majorities scheme for determining a school district reorganization.

34. 7 Cal. 3d at 962, 501 P.2d at 551, 104 Cal. Rptr. at 311. However, a veto power is what in effect is given by an actual concurrent majority proceeding. If one group does not give its approval, the measure is not passed. The mechanics of a concurrent election are different from the proceedings of section 34311, but the result is similar.

35. *Cf.* Lance v. Gordon, 403 U.S. 1, 8 n.6 (1971), where the Court stated: "We intimate no view on the constitutionality of a provision requiring unanimity or giving a veto power to a very small group. . . ." *with* the majority opinion in Phoenix v. Kolodziejski, 399 U.S. 204, 215 (1970), where the Court dismissed without discussion Mr. Justice Stewart's argument that the statute did not exclude non-landowners, but provided for a concurrent majority of property owners and the city council elected by the general populous.

36. 7 Cal. 3d at 962, 501 P.2d at 551, 104 Cal. Rptr. at 311.

37. Residents have a constitutional right to vote in municipal elections. Avery v. Midland County, 390 U.S. 474, 476 (1968). However, non-residents have no such right. 7 Cal. 3d at 963, 501 P.2d at 551, 104 Cal. Rptr. at 311, *citing* Chadwell v. Cain, 160 N.E.2d 239, 243 (Ohio 1959).

but also those which authorize property ownership qualifications in election-related proceedings where the issue is deemed to affect landowners more substantially than non-landowners. Some forty-two statutes restrict to landowners the right to sign petitions or instruments of protest.[38] Most of these statutes involve special districts similar to the irrigation district in *Schindler*, where an adequate showing of an express special interest will most likely serve to establish a "compelling state interest."[39] However, other statutes, particularly other Government Code sections dealing with incorporation and annexation of cities, may be deeply affected by this decision.[40] They may be so deeply affected as to require a complete revamping of the incorporation and annexation procedures.[41]

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38. 7 Cal. 3d at 960, 501 P.2d at 549, 104 Cal. Rptr. at 309.

39. *Id.* *But cf.* notes 21 & 26 *supra.*

40. Several other Government Code sections concerning incorporation have property qualifications. To incorporate a city in California 25 to 50 qualified signers must file a notice of intention. CAL. GOV'T CODE ANN. § 34302.5 (West 1968). A qualified signed is a landowner. *Id.* at § 34301. A second petition must be signed by at least 25 percent of the qualified signers representing at least 25 percent of the assessed value of the land. *Id.* at § 34303.

41. Such a complete revamping is suggested in Hagman & Disco, *One-Man One-Vote as a Constitutional Imperative for Needed Reform of Incorporation and Boundary Change Laws*, 2 URBAN LAW 459 (1971).