Golden Gate University Law Review

Volume 11
Issue 1 *Ninth Circuit Survey*

Article 6

January 1981

Constitutional Law

Brian Beverly

Curtis E. Blystone

CONSTITUTIONAL LAW

I. ELECTIONS IN LIMITED PURPOSE DISTRICTS: THE CONTINUING VITALITY OF *SALYER LAND COMPANY*

A. INTRODUCTION

In *James v. Ball*[1] the Ninth Circuit found unconstitutional certain Arizona statutes which mandated that voting in elections for directors of the Salt River Project Agricultural and Improvement and Power District (the District) was limited to landowners, with votes apportioned according to owned acreage.[2] *James* focused on an interpretation of the Supreme Court's decision in *Salyer Land Co. v. Tulare Lake Basin Water Storage District,*[3] and may be viewed as narrowing the scope of that decision.

Under the Reclamation Act of 1902,[4] the federal government and the State of Arizona formed a joint project in the Salt River Valley for the storage and distribution of water. The Salt River Valley Waters Users' Association (the Association) was created to finance the construction of project facilities. Only landowners within the District could belong to the Association. The obligations of the Association were transmuted in prorata liens on the lands of Association members. The District was formed in 1937 when the costs of financing project facilities became overly burdensome for the Association. In exchange for title to project facilities, the District agreed to provide whatever capital and operating funds the Association needed to operate project facilities. Pursuant to the agreement, the District also agreed to operate project water storage and distribution facilities. In order to generate revenue to offset the costs of providing water, the District produces electricity and today is Arizona's

1. 613 F.2d 180 (9th Cir. 1979) (per Choy, the other panel members were Kennedy, J., and Hall, D.J., sitting by designation, dissenting).

2. *Id.* at 181.

3. 410 U.S. 719 (1973). *See* notes 27-42 *infra* and accompanying text.

4. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (current version at 43 U.S.C. §§ 371-1457 (1976)).

second largest utility.

The District is divided into ten electoral subdivisions. Each subdivision elects one director and three council members. The president and vice-president of the district are elected at-large. Qualified electors may vote for these offices according to the amount of land they own in the District. Two at-large directors are elected in addition to the other directors and officers.[5] The twelve-member Board of Directors and the thirty-member Council administer the District.

B. The Equal Protection Challenge

The Constitution does not specifically guarantee the right to vote in state elections, but the Supreme Court has held that once a state grants that right, all infringements upon it must be subjected to the requirements of the equal protection clause.[6] In *Gray v. Sanders,*[7] the Supreme Court held that one person's voting power could not be greater than that of another in a statewide legislative election merely because of the location of his residence. In *Wesberry v. Sanders,*[8] the Supreme Court recognized for the first time that the Constitution protects the right to vote. In the seminal decision of *Reynolds v. Sims,*[9] the Court held that a person's right to vote is unconstitutionally impaired when the weight of the citizen's vote is made to depend on where he lives. The "one person-one vote" standard has its roots in the Court's statement in *Reynolds* that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislatures, as nearly of equal population as is practicable."[10] Since *Reynolds,* the Supreme Court has repeatedly invoked and enlarged the one person-one vote principle.

---

5. 613 F.2d at 239. This number became four in 1980. These at-large directors are elected on a per-person voting basis rather than having the votes apportioned according to owned acreage.

6. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1965). *See generally* 25 Am. Jur. 2d *Elections* §§ 53-57 (1966).

7. 372 U.S. 368 (1963).

8. 376 U.S. 1 (1964).

9. 377 U.S. 533 (1964).

10. *Id.* at 536. The "one person-one vote" terminology arose in Gray v. Sanders, 372 U.S. at 381. *See also* Baker v. Carr, 369 U.S. 186 (1962) (Douglas, J., concurring).

Kramer v. Union Free School District No. 15[11] was the first case to require the invocation of strict scrutiny when examining infringement on the voting franchise. *Kramer* involved a challenge to a section of the New York Education Code[12] which provided that voters, otherwise qualified to vote in state and federal elections, could not vote in certain school district elections unless they (1) owned or leased taxable real property within the district, or (2) were parents or guardians of children enrolled in the local public schools. Plaintiff was denied his application to vote because he did not own or lease any property within the district and had no children.

In finding the statute unconstitutional, the *Kramer* Court recognized the fundamental nature of the right to vote, any impairment of which must be "carefully and meticulously scrutinized."[13] Thus, any state statute that grants the right to vote to some bona fide residents of requisite age and citizenship and denies it to others must be examined to determine whether the exclusions are necessary to promote a compelling state interest.[14] Moreover, the need for strict scrutiny is not affected because the district meetings and the school board do not have general legislative powers.[15] Strict scrutiny is "not necessitated by the subject of the election; rather, it is *required* because some resident citizens are permitted to participate and some are not."[16]

The school district asserted that there was a compelling state interest in restricting the franchise to those members of the community " 'primarily interested in such elections.' "[17] The Court, however, bypassed this issue and went directly to the second half of the equal protection inquiry— whether the statute was necessary to promote the assertedly compelling state interest.[18] The Court ultimately determined that because the law permitted the inclusion of many persons having only a "remote and

11. 395 U.S. 621 (1969).
12. N.Y. EDUC. LAW § 2012 (McKinney).
13. 395 U.S. at 626 (citing Reynolds v. Sims, 377 U.S. at 562).
14. *Id.* at 627 (citing Carrington v. Rash, 380 U.S. 89, 96 (1965)).
15. *Id.* at 629.
16. *Id.* (emphasis added).
17. *Id.* at 631 (quoting Brief for Appellee).
18. *See id.* at 632 n.14. The court stated that if it found the exclusions necessary to promote the *articulated* state interest, it would then have to determine whether the interest promoted by limiting the franchise was a compelling state interest.

indirect interest in school affiars" while disenfranchising others having a "distinct and direct interest in . . . school meeting decisions,"[19] the section was not sufficiently tailored to limiting the vote to those "primarily interested" in school affairs to justify the denial of the franchise to plaintiff.[20]

The Supreme Court has applied strict scrutiny in several challenges to limitations of the right to vote.[21] In *Cipriano v. City of Houma,*[22] the Court held that a statute which provided that a municipal utility could issue revenue bonds only upon approval of a majority of the voters in an election in which only qualified property taxpayers were permitted to vote, violated the equal protection clause. In *Phoenix v. Kolodziejski,*[23] the Court relied upon *Cipriano* in invalidating property ownership requirements in elections approving issuance of general obligation bonds. In *Hill v. Stone,*[24] the Court found that provisions of the state constitution, state election code, and city charter which limited the right to vote in city bond elections to those persons having "rendered" property (listed with the tax assessor-collector either real, mixed, or personal property for taxation in the election district)[25] fell far short of meeting the compelling state interest test consistently applied in *Kramer, Cipriano,* and *Phoenix.*[26]

Recently, in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*[27] and *Holt Civic Club v. City of Tuscaloosa,*[28] the Supreme Court carved out two exceptions to the rule that strict scrutiny should be applied when examining limitations

19. *Id.* at 632.

20. *Id.* at 633. The Court rejected the School District's argument that the legislature was the proper body to balance the interest of the community in the maintenance of orderly school district elections against the interest of the individual in voting in such elections.

21. *See, e.g.,* Hill v. Stone, 421 U.S. 289 (1975); Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969).

22. 395 U.S. 701 (1969).

23. 399 U.S. 204 (1970).

24. 421 U.S. 289 (1975).

25. *Id.* at 291 n.1. Under the statutes rendering even a very small amount of property qualified the person to vote. *Id.* at 299.

26. *Id.* at 301.

27. 410 U.S. 719 (1973). *See also* Associated Enterprises v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973) (decided the same day as *Salyer*).

28. 439 U.S. 60 (1978).

upon the fundamental right to vote. *Salyer* resolved the question left open to *Kramer*—whether states could limit voting to those primarily interested in an election.[29] Defendant Tulare Water District (the TWD) in *Salyer* was created for the acquisition, appropriation, diversion, storage, conservation, and distribution of water for the ultimate benefit of farm land within the District.[30] The TWD was governed by a board of directors. Only landowners could vote in elections for the board and votes were apportioned according to the assessed valuation of their land.

The majority opinion by Justice Rehnquist determined that, because the TWD had a special limited purpose and due to the disproportionate effect of its activities on landowners as a group, the TWD fell within an exception to the one person-one vote principle of *Reynolds*.[31] Justice Rehnquist relied on *Avery v. Midland County*[32] which had intimated that a state could elect certain functionaries who perform duties so far removed from normal governmental activities and affecting certain groups so disproportionately that the one person-one vote principle need not apply.[33]

In *Holt*, defendant City of Tuscaloosa had extended the exercise of its municipal powers over citizens of surrounding communities including those of the City of Holt. State statutes allowed the city to exercise police and sanitary regulations, criminal jurisdiction of the city's court and the power to license businesses, trades and professions, all within a three-mile radius of the city limits. Plaintiff Holt Civil Club alleged a denial of due process and equal protection because citizens of Holt were not allowed to vote in Tuscaloosa municipal elections.

In the opinion by Justice Rehnquist, the Court refused to apply strict scrutiny and distinguished the *Kramer-Cipriano-Phoenix* line of cases. Justice Rehnquist insisted that the holdings in those cases were predicated upon denial of the right to

29. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. at 631.

30. 410 U.S. at 723.

31. *Id.* at 728.

32. 390 U.S. 477 (1968).

33. 397 U.S. at 56. Justice Rehnquist failed to reconcile this conclusion with the language in *Kramer* that an entity's lack of general governmental powers did not affect the need for "close judicial examination." Kramer v. Union Free School Dist. No. 15, 395 U.S. at 629.

vote to individuals "physically resident within the geographic boundaries of the governmental entity concerned."[34] Since Tuscaloosa denied the franchise only to those living outside its corporate limits, a mere rational basis scrutinty was required.[35] Indeed, the Court's inquiry was limited to the question of whether "*any* state of facts reasonably may be conceived to justify" the statute.[36] This standard was easily met by finding that the state legislature could have determined that cities need a certain degree of control over activities just beyond their borders.[37] Moreover, the legislature could legitimately determine that municipalities should have some control over activities conducted within their police jurisdiction.[38]

Both *Salyer* and *Holt* ignored traditional equal protection analysis. Normally, strict scrutiny is triggered when either a fundamental right or a suspect classification is involved.[39] Strict scrutiny requires that the statutory classification be necessary to promote a compelling state interest.[40] Thus, as in *Kramer,* strict scrutiny should first be applied because of the fundamental nature of the right to vote. Then the interests of the otherwise qualified, but excluded, voters must be examined to determine if the statutory disenfranchisement is necessary to advance a compelling state interest. *Salyer* and *Holt* reversed the analysis. These cases initially examined the interest of the excluded voters to determine if strict scrutiny applied in the first instance. In both opinions, Justice Rehnquist concluded that mere rational basis scrutiny was appropriate.[41]

---

34. 439 U.S. at 68.

35. *Id.* at 74.

36. *Id.* (emphasis added) (quoting Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. at 732). By embracing the "any conceivable basis" test Justice Rehnquist reversed the modern trend of the Supreme Court by reverting to the extremely deferential standard of Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). Recent cases applying rational basis scrutiny have demanded a more exacting standard and have refused to manufacture imaginative justifications for the asserted state interest. *Cf.* McGinnis v. Royster, 410 U.S. 263 (1973) (requiring that the challenged distinction rationally further some legitimate, *articulated* state purpose). *See generally* Schlesinger v. Ballard, 419 U.S. 498 (1975) (Brennan, J., dissenting).

37. 439 U.S. at 74.

38. *Id.*

39. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

40. Shapiro v. Thompson, 394 U.S. at 634.

41. Holt Civic Club v. City of Tuscaloosa, 439 U.S. at 70; Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. at 728-30.

Salyer and *Holt* may be viewed as narrow exceptions to the principles established in the *Kramer-Cipriano-Phoenix* line of cases. Nonetheless, at least one commentator perceives them as a shift in the Court's position on equal protection.[42]

C. THE *James v. Ball* ANALYSIS

In *James* the Ninth Circuit attempted to determine the correct interpretation of *Salyer*. Ostensibly for a proper explication of the rationale behind its *James* decision, the majority undertook a dissection of *Salyer*. The majority noted first that the sole means of meeting the expenses of the Tulare Water District was through assessments against landowners; thus landowners as a class bore the entire financial burden. Second, the TWD existed solely in order to procure water for farming the agricultural lands of the district. Third, while the TWD had power to engage in flood control activities, "the Court found these powers were incident to the exercise of its primary functions of water storage and distribution." Finally, the TWD did not provide those services typical of other general public services "such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body."[43]

The situation in *James* is very different from that in *Salyer*. The majority reasoned that although the Salt River District once bore some similarities to the district in *Salyer*, the present reach and effect of the District's operations upon all of the residents of Arizona were far more extensive than those of the TWD in *Salyer*.[44] For example, the District is the second largest utility in Arizona, servicing nearly a quarter of a million persons, with many and diverse activities. In addition, the majority found that the water operations of the District were significantly more diverse than those in *Salyer*.[45] The District provides water to

---

42. Note, *Voting Rights and Extraterritorial Municipal Powers in Light of Holt Civic Club v. City of Tuscaloosa*, 25 WAYNE L. REV. 1085 (1979). *But see* L. TRIBE, AMERICAN CONSTITUTONAL LAW 765 (1978) ("*Salyer* . . . should be treated as a narrowly limited exception to a powerful general principle that interest-based restrictions are constitutionally disfavored.").

43. 613 F.2d at 183 (citing Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 440 U.S. at 728-29).

44. *Id.* Thus at some point along the continuum between the factual setting of *James* and that of *Salyer* the constitutional prerequisites of the one person-one vote principle of *Reynolds* is no longer applicable.

45. *Id.*

major portions of Phoenix, twenty-five percent of its total capacity going to municipal uses and an additional fifteen percent for nonagricultural uses. The inexorable consequence of the diversity of the District was the conclusion by the majority that the District could not be characterized as having a special limited purpose such as in *Salyer*.[46]

Addressing the other half of the *Salyer* test—whether the District's activities disproportionately affected landowners—the majority concluded that they did not.[47] Almost forty percent of the District's water is purchased and consumed in a manner unrelated to agriculture and land ownership. Ninety-eight percent of the District's revenues are produced by its electric utility operations.[48] The District in *James* is therefore fundamentally different from the TWD in *Salyer,* the majority reasoned, because "the financial burden of operating the District does not fall entirely or even primarily on landowners; it falls instead on the *purchasers of electricity*."[49]

In his dissent, District Judge Peirson M. Hall attacked the majority's conclusions as to the special limited purpose of the District, and its disproportionate affect upon landowners. Initially, however, Judge Hall concluded that only the first half of the *Salyer* test—the performance of traditional general governmental functions—was necessary to finding that the *Salyer* exception applies.[50] This conclusion stemmed from language in *Hadley v. Junior College District,*[51] upon which *Salyer* relied, stating in the conjunctive that the possession of vital and traditional governmental powers which had an effect throughout the district as well as disproportionate effect upon different groups, appeared to be prerequisites to the application of strict equal protection requirements, not to the availability of an exception

46. *Id.* at 183-84.

47. *Id.* at 184. The majority quoted dictum from *Cipriano* noting that the operations of gas, water, and electric utility systems affect virtually every citizen of a city. 395 U.S. at 705. It would therefore be doubtful that any established utility could fall within the *Salyer* exception because one of *Salyer's* requirements is a small effect upon the general electorate. *See Salyer,* 410 U.S. at 728-30.

48. 613 F.2d at 184.

49. *Id.* (emphasis added).

50. *Id.* at 190.

51. 397 U.S. 50 (1970).

from them.[52]

The dissent reasoned that the District does not perform traditional general governmental functions because the Arizona legislature has defined the District's purpose as "securing water necessary to improve agricultural land."[53] Moreover, the District's powers are incidental to its primary purpose of water control.[54] Such a limited role as this does not demonstrate an exercise of general governmental powers.[55] Indeed the dissent would

---

52. *Id.* at 53-54, 56.

53. *See* ARIZ. REV. STAT. ANNOT. § 45-903 that provides:

> A. When five or more holders of title or evidence of title to agricultural lands which have at any time been recognized as within the exterior boundaries of a United States reclamation project and which are susceptible of irrigation by the same general system of irrigation works, desire to provide for the improvement of such lands, they may propose the organization of an agricultural improvement district under the provisions of this chapter for any of the following purposes:
>
> 1. To secure all or a portion of the water necessary to irrigate the lands, or any part thereof, or to increase or secure additional water therefor.
>
> 2. To provide for the storage, regulation, control or distribution of all or any part of the water already available or for an additional or increased water supply available or to become available for the irrigation of all or a portion of the lands.
>
> 3. To provide for the development of additional water for the irrigation of all or a portion of the lands.
>
> 4. To provide for the drainage of all or a part of the lands.
>
> 5. To increase, enlarge or extend, operate and maintain any irrigation or drainage works already in existence and available for the irrigation or drainage of all or a part of the lands.
>
> 6. To provide new or additional means for the irrigation or drainage of all or a part of the lands or to provide power or a means of communication for the use of the owners or occupants of the lands.
>
> 7. To reduce the cost of irrigation, drainage and power to the owners of the lands in the district by the sale of surplus water or power produced, owned or controlled by the district, and the construction, maintenance, extension, replacement, financing and refinancing of the works useful for such purpose.
>
> 8. To finance or refinance as its own obligation all or a part of a debt incurred or proposed to be incurred by a public or private agency in the construction, maintenance, improvement or replacement of the structures and equipment necessary or useful for the accomplishment of any of the purposes set forth in this section.

54. 613 F.2d at 190.

55. *Id.*

regard the authority to develop and sell electrical power as preempted by the more basic need for water.[56]

The majority addressed the dissent's concern by noting that the District is not a private company, so the District should not be compared with a private company where only shareholders—here, landowners—may vote. On the contrary, the District is a public entity, being a political subdivision of the State of Arizona with the legal status of a municipality.[57] In addition, the level of the District operations "simply does not permit the interpretation that the electric utility is a side venture that the District dabbles in to pick up a little extra money in order to benefit the landowners."[58] Moreover, the majority stated that the District's electrical operations had taken on independent significance, and it would "elevate form over substance to characterize the District as functioning solely for the benefit of landowners."[59]

The dissent next asserted that, although certain municipalities provide water and electrical services, these functions are not traditionally governmental services.[60] In *Jackson v. Metropolitan Edison Company*,[61] the Supreme Court stated that supplying utility service is not traditionally the exclusive prerogative of the state and is not traditionally associated with sovereignty.[62] The dissent insisted that even if the District is compared to vital governmental services, it is not a utility. The District is not owned by the public, but by private landowners. Since the "profits from the sale of electricity are used to defray the expense in irrigating these private lands for personal profit" the dissent asserted that the District did not function to " 'serve the whole people' but rather operates for the benefit of these 'inhabitants of the district' who are private owners."[63] Therefore, the *Salyer* exception should apply, and not the one person-one vote

56. *Id.* at 186.
57. *Id.* at 184.
58. *Id.*
59. *Id.*
60. *Id.* at 190.
61. 419 U.S. 345 (1974). *See also* National League of Cities v. Usery, 426 U.S. 833, 854 n.18 (1976).
62. 419 U.S. at 353.
63. 613 F.2d at 190 (quoting Local 266 v. Salt River Project Agricultural and Improvement Dist., 78 Ariz. 30, 44, 275 P.2d 393, 403 (1954)).

standard of *Reynolds.*

The *James* majority successfully rebutted Judge Hall's rationale. It pointed out that the issue in *James* is altogether different from the issue in *Jackson.*[64] *Jackson* involved a determination of whether the actions of a private utility were so closely regulated by the state that its actions could fairly be treated as that of the state itself. The *Salyer* court assumed state action and went on to deal directly with the issue of whether the requirements of the fourteenth amendment were applicable. In *James,* the majority framed the issue as "not whether the Salt River District is a state entity, but whether, having made the decision to create the entity and provide for the election of its directors, the state can deny the electoral franchise to citizens whose economic interest and natural environment are vitally affected by the entity's operations."[65]

The majority further asserted that in a factual setting similar to *James* or *Salyer,* the *Salyer* opinion suggests an electric utility *is* governmental in nature.[66] The Supreme Court found support for its conclusion that the Tulare District did not perform general governmental functions from the facts that the district there did not provide " 'other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body.' "[67] The *James* majority reinforced this theory with the Court's opinion in *Cipriano* where a municipal utility serviced so large a percentage of the people in the city that the Court refused to limit elections called to approve the issuance of bonds by the utility to landowners.[68] The *James* majority concluded that the District's electrical operations are so substantial in scope and so closely interwoven with the water delivery functions of the District that the special limited purpose exception of *Salyer* did not apply.[69]

---

64. 613 F.2d at 184.

65. *Id.* at 184-85.

66. *Id.* at 125. *But see* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

67. *Id.* (quoting Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. at 728-29).

68. 613 F.2d at 185. *See* Cipriano v. City of Houma, 395 U.S. 701 (1969).

69. 613 F.2d at 185.

The dissent attempted to strengthen its conclusion that the *Salyer* exception applied through an examination of the disproportionate impact of the District's activities upon District landowners. It asserted that both the legislative purpose and practical effect of the District's activities disproportionately concern the landowners.[70] This effect happens in two ways. First, the sale of electrical power to persons outside the District in essence subsidizes the water delivery functions of the District. If the profit from the electric power sales is viewed as income to the District landowners, the District's purpose to benefit landowners is highlighted.[71] Second, financial reverses of the District fall disproportionately upon landowners. Arizona Revised Statute section 45-1047(A) provides that District bonds may create liens upon the real property within the District.[72] Moreover, state law provides for raising District revenue by taxation of District landowners.[73] Accordingly, the dissent found that the liabilities of the District fall disproportionately upon District landowners.[74]

The majority attacked the legal assumption that "disproportionate representation may be used to prevent electors who have a direct and substantial interest in a government entity's

---

70. *Id.* at 190.

71. *Id.* at 191.

72. ARIZ. REV. STAT. ANNOT. § 45-1047(A) provides in full:

> All bonds issued under the provisions of this chapter shall be a lien upon the real property included in the district, and such bonds and the interest thereon shall be payable from the levy of taxes upon the real property included in the district. All the real property in the district shall be and remain liable to taxation for such payments, but whenever any such bonds are additionally secured by a pledge of the income, revenue and receipts of the district as provided in this chapter, the board shall abate and levy of any tax herein required for the current year in which the income, revenue and receipts to be received by the district, or on hand for that purpose, will be sufficient to make the principal and interest payments due upon such bonds.

73. ARIZ. REV. STAT. ANNOT. § 45-1014(B) provides in full:

> B. The board of supervisors shall levy against such landowner in the district a tax equal to the unit rate multiplied by the number of acres owned, and certified by the board of directors of the district to the board of supervisors. The board of directors, in certifying the annual estimate to the board of supervisors, shall include a list of landowners in the district and the number of acres owned by each.

74. 613 F.2d 191.

operations from out-voting certain other electors who own land that constitutes part of the security for the entity's financial structure."[75] The majority stated that there is no legal support for the implicit rationale that disproportionate electoral representation may serve as a safety device to protect the property interests or expectations of landowners.[76] The *Salyer* exception applies for an altogether different reason; "under conditions, of most narrow dimension, there may exist a state-created entity, limited to operations with little effect on the general electorate and a substantially disproportionate effect on the interests of a discrete group permitted to vote."[77] If, as in *James,* the operations of a state entity affect a diverse group of citizens, the right to vote may not exclude those who have an interest in the election.[78]

D. Conclusion

The courts have two options in cases where the issue is application of the special limited purpose exception of *Salyer.* On the one hand, a court may perform a straightforward analysis based upon the factors enumerated in *Salyer*—possession of general governmental powers and disproportionate affect upon a discrete group. If these factors are found to exist, the court may find that the application of the *Salyer* doctrine is appropriate.

On the other hand, the court may pay lip service to the inherently unsound rationale of *Salyer* by articulating the *Salyer* factors. Once it is found that the *Salyer* exception does not apply, the court should reach the more substantial equal protection issues posed by *Kramer* and its progeny. Only if the statutory scheme is found to be necessary to effectuating a compelling state interest must it be held constitutional.

In light of the fluctuating state of equal protection analysis being performed by the Supreme Court in voting rights cases, it is difficult to predict the outcome of any particular case. The

---

75. *Id.* at 185.

76. *Id.*

77. *Id.* (citing Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. at 728-30). The language chosen by the Ninth Circuit limiting the *Salyer* exception to conditions "of most narrow dimension" indicates the court's desire to give *Salyer* a very restricted interpretation, if not to limit it to its facts.

78. 613 F.2d at 242.

latter approach articulated above offers lower courts the flexibility required to satisfy the competing interests of (1) adherence to Supreme Court precedent, and (2) performing a strict equal protection analysis when faced with infringement of a fundamental right.

The *James* court satisfied the duty of adherence to Supreme Court precedent by choosing to decide the case through a straightforward analysis of *Salyer*. The ultimate result in *James* appears to be correct because under an application of strict scrutiny it is doubtful that the statutory scheme would be found necessary to effectuate a compelling state interest. In consonance with the close judicial examination warranted when examining infringements upon a fundamental right, however, a better approach would have been to reach the same result as the *James* court did by first finding *Salyer* inapplicable and *then* performing a strict equal protection analysis.

*Brian Beverly**

II. EQUAL PROTECTION — "STACKED DECK" AFFIRMATIVE ACTION

A. INTRODUCTION

In *Associated General Contractors v. San Francisco Unified School District*,[1] the Ninth Circuit upheld a challenge to a San Francisco Board of Education's affirmative action policy, thus prohibiting the San Francisco Unified School District (School District) from engaging in a voluntary affirmative action program with respect to the hiring of school district construction contractors.

Under the policy, bidders for School District construction jobs were required to be either minority general contractors or

---

* Third Year Student, Golden Gate University School of Law.

1. 616 F.2d 1381 (9th Cir. 1980), *rehearing denied,* Feb. 22 and April 25, 1980 (per Choy, C. J.; the other panel members were Hug, J. and Richey, D. J., sitting by designation).

to employ minority subcontractors for twenty-five percent in dollar volume of the contracted work.[2] Noncomplying bidders were declared not "responsible bidders"[3] under California Education Code section 39640,[4] which requires the school districts to award construction contracts to the "lowest responsible bidder."[5] Associated General Contractors, Inc. challenged the policy and the district court enjoined the School District from enforcing it, "on the ground that 'responsibility' under the state law referred only to a building contractor's financial and physical ability to do the work."[6]

At approximately the same time as the district court issued an injunction the School District was awarded eight million dollars in public works funds under the Public Works Employment Act of 1977[7] (PWEA). Section 6705(f)(2) of the PWEA requires an applicant to give "satisfactory assurance to the Secretary that at least ten per centum of the amount of each grant shall be expended for 'minority business enterprises.' "[8] Subsequently, the Board enacted another policy substantially similar to the first. The second policy provided for twenty-five percent expenditures on minority contractors instead of the ten percent required by the PWEA and applied only to projects financed by

---

2. 616 F.2d at 1381.

3. *Id.*

4. CAL. EDUC. CODE § 39640 (West 1978) (formerly CAL. EDUC. CODE § 15951).

5. *Id.*

6. 616 F.2d at 1383. The district court also prohibited the School District from awarding contracts to other than the lowest responsible bidder merely because the lower bidder was of the wrong parentage and refused to accede to the School District's views on socially desirable subcontracting. Associated General Contractors v. San Francisco Unified School Dist., 431 F. Supp. 854 (N.D. Cal. 1977).

7. 42 U.S.C. §§ 6701-6710 (Supp. I 1977).

8. *Id.* 42 U.S.C. § 6705(f)(2) provides:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

the PWEA. Associated General Contractors, Inc. then applied for a contempt order to vindicate the earlier injunction. The district court dismissed the proceeding but issued an order reducing the twenty-five percent quota under the policy to the ten percent minimum required under the PWEA and modified its previous injunction so as not to prohibit the new policy.[9]

B. The Decision

The Ninth Circuit considered four major arguments before deciding that the affirmative action policy was impermissible under the law of California. First, the court determined that the authority of the Board was derived from California Education Code section 35160[10] which limits the authority of the school board by prohibiting conflicts with other state laws.[11] The court found that California's "low bid law" for school district contracts, California Education Code section 39640,[12] conflicted with the Board's affirmative action policy.[13] Therefore, the policy was found not to be within the authority of the Board.[14] Second, apparently creating new terminology, the court labelled quota and "positive-factor" type affirmative action programs "stacked deck" programs.[15] The court found there was no affirmative constitutional duty to engage in "stacked deck" affirmative action.[16] Third, the Ninth Circuit held that there was no affirmative duty under the California Constitution to engage in "stacked deck" affirmative action programs.[17] Fourth, the court decided that even though the California low bid law prohibited the affirmative action policy, it was not unconstitutional as applied.[18]

C. The State Law Conflict

The San Francisco School District drew its authority from

---

9. 616 F.2d at 1383.

10. *Id.* at 1384. For the full text of Cal. Educ. Code § 35160 (West 1978) see note 19 *infra.*

11. 616 F.2d at 1384.

12. For the full text of Cal. Educ. Code § 39640, see note 21 *infra.*

13. 616 F.2d at 1385.

14. *Id.*

15. *Id.* at 1386. *See* text accompanying notes 29-35 *infra.*

16. *Id.*

17. *Id.* at 1388.

18. *Id.* at 1390-91.

California Education Code section 35160 which provides that "the governing board of any school district may initiate and carry on any program . . . which is not in conflict with or inconsistent with . . . any law."[19] This is a broad, but limited, grant of power to school districts to engage in appropriate activities. The Ninth Circuit found a basic conflict between the policy adopted by the Board and section 39640,[20] which states "[t]he governing board of any school district shall let any contract . . . to the *lowest responsible bidder* who shall give such security as the board requires, or else reject all bids."[21]

Relying primarily upon *Inglewood-Los Angeles County Civic Center Authority v. Superior Court*,[22] the Ninth Circuit found that the power conferred by section 35160 was inconsistent with state court interpretations of California low bid law.[23] *Inglewood* involved a contract for construction of the City of Inglewood-Los Angeles County Civic Center. Under California Government Code section 25454,[24] the contract was to be awarded to the "lowest responsible bidder." Insofar as it requires contracts to be awarded to the "lowest responsible bidder," section 25454 is similar to section 39640. The *Inglewood*

---

19. CAL. EDUC. CODE § 35160 (West 1978). Section 35160 states in full:

> On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

20. 616 F.2d at 1385.

21. CAL. EDUC. CODE § 39640 (West 1978) (emphasis added). Section 39640 states in full:

> The governing board of any school district shall let any contracts involving an expenditure of more than eight thousand dollars ($8,000) for work to be done or more than twelve thousand dollars ($12,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all material and supplies whether patented or otherwise.

22. 7 Cal. 3d 861, 500 P.2d 601, 103 Cal. Rptr. 689 (1972).

23. 616 F.2d at 1385.

24. CAL. GOV'T CODE § 25454 (West 1968). Section 25454 states in full: "The board shall award the contract to the lowest responsible bidder, and the person to whom the contract is awarded shall perform the work in accordance with the plan, specifications, strain sheets, and working details, unless the contract is modified by a four-fifths vote of the board."

court held that the term "responsible" in section 25454 included the attributes of trustworthiness but it also had reference to the quality, fitness, and capacity of the low bidder to satisfactorily perform the work.[25] Accordingly, a contract must be awarded to the lowest bidder unless it is found that he is not responsible, that is, "not qualified to do the particular work under consideration."[26]

The Ninth Circuit found that "[section] 39640 must be construed to prohibit the Board from considering any factor other than the amount of the bid, the minimum qualifications of the bidder as to financial ability and skills to complete the job successfully, and the quality of the bidder's past work."[27] The result of the court's opinion is that section 39640 prohibits the use of race as a factor in determining the minimum qualifications for a contract bidder. Because the Board could not contract with a company under the policy without consideration of race, the court found the policy to be in conflict with the California low bid law and therefore beyond the authority of the Board.[28]

The state low bid law is race neutral on its face. Unless the Ninth Circuit could find a constitutional duty requiring "stacked deck" affirmative action, it would fail as being in conflict with the state's low bid law.

D. Is "Stacked Deck" Affirmative Action Required by the Constitution?

The Negative Potential of "Stacked Deck" Affirmative Action.

The School District asserted that the Constitution imposed a legal duty to take affirmative action to remedy the effects of past discrimination. In order to decide whether such a duty existed the Ninth Circuit defined two types of affirmative action programs: the "reshuffle" programs and the "stacked deck" programs.[29] The Ninth Circuit explained that "stacked deck" programs are so called to "connote that one contestant has been

25. 7 Cal. 3d at 867, 500 P.2d at 604, 103 Cal. Rptr. at 692.
26. *Id.*
27. 616 F.2d at 1385.
28. *Id.* at 1391.
29. *Id.* at 1386.

given a better-than-equal chance to win."[30] In "reshuffle" programs the "state neither gives to nor withholds from anyone any benefits because of that person's group status, but rather ensures that everyone in every group enjoys the same rights in the same place."[31]

"Stacked deck" programs are those, according to the court, "in which the state specifically favors members of minorities in the competition with members of the majority for benefits that the state can give to some citizens but not to all."[32] The court noted no cases as examples of "stacked deck" affirmative action, but quota and "positive-factor" programs were characterized as "stacked deck" type programs.[33] The Ninth Circuit stated that while there is an "affirmative constitutional duty to use 'reshuffle' programs to cure the effects of past or present de jure segregation," there is "no constitutional duty to engage in 'stacked deck' affirmative action."[34] Other courts, however, have upheld the validity of "stacked deck" type programs as remedial measures to cure the present effects of past discrimination.[35]

A conflict concerning such an affirmative duty exists with the Sixth Circuit, represented by *Detroit Police Officers' Association v. Young*.[36] The Ninth Circuit stated that "[t]o the extent that the Sixth Circuit has relied on 'reshuffle' cases to find a constitutional duty of states to take 'stacked deck' affirmative action to eliminate the effects of past discrimination we disagree."[37] *Detroit Police* concerned a voluntary affirmative action program initiated by the Detroit Police Department. Under that plan, promotions were made to the rank of sergeant from a pool of qualified white and black candidates. With a goal of a fifty-fifty ratio of blacks to whites staffing at all levels the plan produced approximately one new black sergeant for each new white sergeant. Some white candidates with higher qualifying scores

30. *Id.* at 1386 n.7.

31. *Id.* at 1386. *See also* 15 AM. JUR. 2d *Civil Rights* §§ 207, 208 (1976) (defining and discussing reverse discrimination in employment).

32. 616 F.2d at 1386.

33. *Id.*

34. *Id.*

35. *See* Annot., 26 A.L.R. FED. 91-107 (1976).

36. 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3558 (Jan. 10, 1980).

37. 616 F.2d at 1386, 1387 n.9.

were passed over in order to achieve the fifty-fifty ratio.

The Sixth Circuit held that the plan did not violate Title VI,[38] Title VII[39] nor section 1981,[40] but that "[t]he Constitution imposes on states a duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination."[41] However, "the Constitution not only permits but *requires* race-conscious action to remedy a constitutional violation. . . ."[42] The Sixth Circuit then adopted the opinion of Justices Brennan, White, Marshall, and Blackmun in *Regents of the University of California v. Bakke*[43] as offering "the most reasonable guidance" in deciding the constitutional validity of the Detroit Police Department's quota-type affirmative action plan.[44] *Detroit Police,* is directly in conflict with the Ninth Circuit's opinion in *Associated General Contractors* by requiring a "stacked deck" affirmative action program, thereby setting the stage for a petition of certiorari to the Supreme Court for a final resolution of this question.

In support of its conclusion that there is no constitutional duty to engage in "stacked deck" affirmative action, the Ninth

---

38. 42 U.S.C. §§ 2000d - 2000d-6 (1976).

39. *Id.* §§ 2000e - 2000e-17 (1976).

40. *Id.* § 1981 (1870).

41. 608 F.2d at 692.

42. *Id.* (emphasis added).

43. 438 U.S. 265 (1978).

44. 608 F.2d at 694. In Regents of Univ. of Cal. v. Bakke, 438 U.S. 269 (1978), Justice Brennan stated:

> [A] state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.

Id. at 369. Justice Brennan also stated: "In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." *Id.* at 361.

The Ninth Circuit also distinguished United Jewish Organizations v. Carey, 430 U.S. 144 (1977). In that case the New York Legislature, seeking to comply with the Voting Rights Act of 1965, engaged in a reapportionment plan along racial lines which split the Hasidic Jewish community between two districts. The scheme took race into account, was intended to help nonwhites, and had the effect of disadvantaging the Hasidim. Nevertheless, the Ninth Circuit stated that upon "close examination" *Carey* is "just another 'reshuffle' case, because no individual Hasid was placed in a district that violated the one-person-one-vote rule, and the petitioners denied that there was a right to maintain permanently in a single district the community's bloc voting power." 616 F.2d at 1387 n.9.

Circuit asserted that "stacked deck" programs "trench" on fourteenth amendment values.[45] The court advanced four examples of how this may occur: (1) "stacked deck" programs offer the "possibility that the official discrimination is or may become invidious"; (2) in "stacked deck" programs scarce benefits are unilaterally directed to minority individuals thereby neglecting others; (3) "stacked deck" programs carry short run benefits only for minorities and provide no collateral benefits for the majority; and (4) the "stacked deck" program "deprives citizens of rights."[46]

Invidious Discrimination

The Ninth Circuit suggested that if "stacked deck" affirmative action is misused, invidious discrimination may result.[47] This, however, ignores the fact that affirmative action programs are implemented precisely in order to eliminate the effects of invidious discrimination. In a number of cases the Supreme Court has recognized the validity of quota-type affirmative action plans.[48] In the recent case of *United Steelworkers of America v. Weber*,[49] the Supreme Court considered a labor agreement entered into by Kaiser Chemical that provided for a training program under which one minority worker was trained in a skilled craft for each non-minority worker. The Court held

---

45. 616 F.2d at 1386-87.

46. *Id.* at 1387. Commentators have articulated good reasons why the use of racial criteria should be strictly construed, and approved only where a compelling need for remedial action is demonstrated. For example:

> (1) Government recognition and sanction of racial classifications may be inherently divisive, re-enforcing prejudices, confirming perceived differences between the races, and weakening the government's educative role on behalf of equality and neutrality; (2) racial goals may also have unexpected results, such as the development of indicia for placing individuals into different racial categories; (3) once racial classifications are embedded in the law, their purpose may become perverted, and a benign preference under certain circumstances may shade into a malignant preference at other times; and (4) a racial preference for members of one minority may result in discrimination against another minority.

15 AM. JUR. 2d *Civil Rights* § 421 (1976).

47. 616 F.2d at 1387.

48. Fullilove v. Klutznick, 101 S. Ct. 2758 (1980); United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (per Brennan, concurring in part and dissenting in part).

49. 443 U.S. 193 (1979).

that the plan "fell within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[50]

In *Davis v. County of Los Angeles*[51] the Ninth Circuit recognized the utility of hiring quotas to eradicate the effects of past discrimination. In *Davis*, after findings by the district court that the Los Angeles County Fire Department employed blacks and Mexican-Americans "grossly out of proportion to their number in the population of Los Angeles County,"[52] the district court ordered accelerated hiring of minorities "in a ratio of one black and one Mexican-American applicant for each three white applicants until the effects of past discrimination had been erased."[53] The Ninth Circuit affirmed, stating that "the district court was wholly justified in deciding to impose affirmative hiring orders"[54] in light of the substantial disparity between the percentage of minorities in the general population and minority firemen.

---

50. *Id.* at 209.

51. 566 F.2d 1334 (9th Cir. 1977).

52. *Id.* at 1337.

53. *Id.*

54. *Id.* at 1344. Eight courts of appeal have approved the use of accelerated hiring goals or quotas to eliminate the effects of past discrimination. *See* Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975) (§§ 1981 & 1983, Title VII); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2nd Cir. 1974) (Title VII); United States v. Masonry Contractors Ass'n of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974) (Title VII); Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974), *modified,* 424 U.S. 747 (1976) (Title VII); Morrow v. Chrisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 895 (1974) (§ 1983); Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973) (§ 1983); Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974) (Title VII); Bridgeport Guardians, Inc. v. Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973) (§§ 1981, 1983); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973) (en banc) (§ 1983); Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973) (en banc) (§ 1983); United States v. Local 212, 472 F.2d 634 (6th Cir. 1973) (Title VII); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973) (Title VII); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (§ 1983); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir.), *cert. denied,* 409 U.S. 851 (1972) (Title VII); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied,* 406 U.S. 950 (1972) (§ 1983); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971) (Title VII); Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971) (Title VII); United States v. Local 38, 428 F.2d 144 (6th Cir.), *cert. denied,* 400 U.S. 943 (1970) (Title VII); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (Title VII).

Very recently, the Supreme Court upheld the constitutional validity of the ten percent set aside in the PWEA in *Fullilove v. Klutznick*.[55] The Court decided that "given a reasonable construction and *in light of its projected administration,* if we find the [minority business enterprise] program on its face to be free of constitutional defects, it must be upheld as within congressional power."[56] The Court went on to find the program free of any constitutional defects.[57]

The Ninth Circuit failed to take into account that the dangers of invidious discrimination in "stacked deck" programs can be significantly mitigated by the incorporation of administrative safeguards into the program designed to prevent abuse. In *Fullilove* the Supreme Court noted that the program was designed to ensure that PWEA grantees would not employ procurement practices which Congress had decided might result in the perpetuation of the effects of prior discrimination.[58] The court recognized that these effects had "impaired or foreclosed" the availability of public contracting opportunities to minority businesses.[59] If a "stacked deck" program is implemented with the goal in mind of eliminating the effects of past invidious discrimination and with proper administrative safeguards, the present danger of invidious discrimination is nominal.

Unilateral Direction of Benefits

The Ninth Circuit cautioned that a "stacked deck" program will be to the exclusive advantage of the minority to the consequent detriment of the majority.[60] The Supreme Court was faced with the problem of the unilateral direction of benefits to the minority in *Fullilove*. In order to uphold the ten percent set aside in the PWEA for minority contractors, it was necessary for the Court to find a proper justification for the quota that did not violate the Constitution. It reasoned that Congress had evidence

55. 100 S. Ct. 2758 (1980).

56. *Id.* at 2776 (emphasis added).

57. *Id.* at 2776-80. The Court dismissed the contention that Congress must act in a wholly color-blind fashion, the charge that the MBE program deprived nonminority business of access to governmentally generated contracting opportunities, and challenges that the MBE program was both underinclusive and overinclusive.

58. *Id.* at 2775.

59. *Id.*

60. 616 F.2d at 1387.

of a long history of a marked disparity in the percentage of public contracts awarded to minority businesses.[61] This resulted from the existence and continuation of barriers to competitive access which had their roots in racial and ethnic discrimination and which persist today.[62] Moreover, there was evidence of this history not only in the federal procurement arena, but with respect to state and local construction contracting was well.[63]

> Accordingly . . . as one aspect of the equal protection of the laws . . . Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments.[64]

Thus, the Supreme Court found ample justification for Congress to set aside ten percent for minority contractors. When the objective is remedying the present effects of past discrimination the program is constitutionally acceptable at least when it "is narrowly tailored to the achievement of that goal."[65]

The problem which concerned the Ninth Circuit has, therefore, been addressed by the Supreme Court. Recognizing that dangers exist in every affirmative action program, the Supreme Court sought to demonstrate that the program must be properly tailored to achieve an acceptable objective. A program so designed disadvantages the majority only insofar as is necessary to accomplish the program's purpose — placing the minority in an equal position under the laws.

---

61. 100 S. Ct. at 2767.

62. *Id.* The Court noted that this lack of disparity was not considered to have resulted from any lack of capable and qualified minority businesses. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 2776. In his concurring opinion, Justice Powell noted the following additional factors relied upon by courts of appeals:

> (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority group members to be employed and the percentage of minority group members in the relevant population or work force; and (iv) the availability of waiver provisions if the hiring plan could not be met.

Id. at 2791 (per Powell, J., concurring) (citations omitted).

Short Run Collateral Benefits

As its next argument, the Ninth Circuit reasoned that "in the short run, a 'stacked deck' program works wholly to the benefit of certain members of one group, and correspondingly to the harm of certain members of another group."[66] On the other hand the court insisted that "reshuffle" programs provide some benefits also to the whites, "for their exposure to the minorities is expected to bring understanding and wisdom."[67] "Stacked deck" programs do not provide even collateral benefits to the majority.[68]

Responding to a similar contention, the Supreme Court acknowledged that failure of nonminority firms to receive certain contracts is an "incidental consequence" of the program.[69] Nonetheless, "past impairment of minority-firm access to public contracting opportunities may have been an incidental consequence of 'business-as-usual' by public contracting agencies and among prime contractors."[70] The Court held that the disappointed expectations of nonminority firms was not a constitutional defect in a limited and properly tailored program.[71]

Judge Coffin's eloquent and often quoted observation in *Associated General Contractors of Massachusetts, Inc. v. Altshuler*[72] may be the best rejoinder to the Ninth Circuit's "short run" rationale:

> It is by now well understood . . . that our society cannot be completely color-blind in the short term if we are to have a color-blind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is

66. 616 F.2d at 1387.
67. *Id.*
68. *Id.*
69. 100 S. Ct. 2758 at 2778.
70. *Id.*
71. *Id.* The Court stated that "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination such a 'sharing of the burden' by innocent parties is not impermissible." *Id.*
72. 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

> one partial prescription to remedy out society's most intransigent and deeply rooted inequalities.[73]

The Ninth Circuit failed to recognize that, when viewed in its proper perspective, the short run disadvantage to the majority is merely one of the prices to be paid to remedy the long-standing effects of prior discrimination.

Deprivation of Citizen's Rights

The Ninth Circuit states that the "stacked deck" program "arguably deprives citizens of rights[74] . . . whereas a 'reshuffle program does not."[75] Arguably, "stacked deck" affirmative action does deprive the citizen of something — the right to act in a racially neutral manner. The quality of this right must, however, be examined in light of the judicial interpretation of the laws which confer this and other similar rights.

Since the landmark decision of *Brown v. Board of Education*,[76] the courts have recognized the need for and propriety of affirmation action to remedy the effects of prior societal discrimination. The modern trend has been to consistently interpret statutes which bar racial discrimination in such a way as to allow, or even require, racially conscious action in order to remedy "the present effects of past racial discrimination."[77] The Supreme Court in *Bakke* affirmed the validity of affirmative action in the setting of academic admissions to institutions of higher learning. Indeed, four members of the Supreme Court in *Bakke* stated their approval of a quota-type program as a remedial measure.[78] Also, the *Detroit Police* court held that section 1981 does not bar racially conscious action.[79]

"Stacked Deck" Under Other Authorities

The Ninth Circuit ruled that there was no precedent suggesting a fourteenth amendment duty to engage in "stacked

---

73. *Id.* at 16.

74. 616 F.2d at 1387 ("*e.g.*, the right to make contracts, free from racial discrimination; *cf.* 42 U.S.C. § 1981").

75. *Id.* ("*e.g.*, no 'right' to attend a segregated school.").

76. 349 U.S. 294 (1955).

77. 100 S. Ct. at 2795 (per Marshall, J., concurring opinion).

78. 438 U.S. at 378.

79. 608 F.2d at 692.

deck" affirmative action.[80] Consequently, the court found that the duty did not exist.[81] Numerous other authorities, however, have recognized the permissibility of "stacked deck" programs in various settings.[82]

Hiring quotas imposed after judicial findings of discrimination have long been accepted as a proper remedy under Title VII and sections 1981 and 1983.[83] *Weber* made affirmative action more attractive to the private sector by allowing adoption of programs without the necessity of a showing of prior discrimination. It is sufficient that the plan is adopted to eliminate traditional patterns of racial discrimination. Of course, while affirmative action of the quota-type may be permissible under *Weber,* it is not mandatory.[84]

The *Bakke* decision did not foreclose the availability of quotas.[85] Justice Powell's opinion expressly approved of preferential quotas when predicated upon judicial findings of identified discrimination.[86] Nevertheless, nowhere in the *Bakke* decision did the Supreme Court hold that quota-type affirmative action is constitutionally required.[87]

For about the last ten years the Office of Federal Contract Compliance has required federal contractors to implement affirmative action programs to increase and improve the quality of job opportunities for minorities and women pursuant to Executive Order 11,246.[88] Indeed, in *Altshuler* preferential ratios under the Executive Order were approved.[89]

---

80. 616 F.2d at 1337-88.

81. *Id.*

82. *See* notes 83-96 *infra*, and accompanying text.

83. Edwards, *Preferential Remedies and Affirmative Action in Employment in the Wake of Bakke,* 1979 WASH. U.L.Q. 113.

84. *See* Johnson, *One of Weber's Unanswered Questions: How Much Discrimination Justifies Voluntary Preferential Affirmative Action?,* 83 DICKINSON L. REV. 835(1978-1979).

85. Edwards, *supra* note 83, at 123.

86. 438 U.S. at 307.

87. *See* Morrison, *Status of Quotas as a Remedy in Discrimination Cases,* 66 J.C.&U.L. 129 (1979-1980).

88. 3 C.F.R. 339 (1964-1965), as amended by Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970), Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970), *reprinted in* 42 U.S.C. § 2000e note (1976).

89. 490 F.2d at 16-19.

Executive Order 11,246 requires every federal contract to contain an enforceable provision guaranteeing that "applicants and employees are employed without regard to race, color, religion, sex or national origin."[90] The implementing regulations[91] require adoption of an affirmative action program "including, when there are deficiencies, the development of specific goals and timetables[92]. . . . Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."[93] Furthermore, "[e]ach executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant . . . the [above] provisions prescribed for Government contracts."[94]

Because the Board was awarding contracts under the PWEA, the provisions of Executive Order 11,246 appear to apply. If the appropriate "deficiencies" were found, the Board would be required to develop "specific goals and timetables." Obviously, this would mean a "stacked deck" program. Despite the clear language and import of Executive Order 11,246 the Ninth Circuit fails to mention it in *Associated General Contractors*.[95]

The several sources of authority which mandate or approve of affirmative action suggest a trend towards ameliorating the present effects of past discrimination through various experimental methods including quota-type affirmative action. The Ninth Circuit holding in *Associated General Contractors* conflicts with this trend by its broad prohibition of voluntary "stacked deck" affirmative action programs under all circumstances. Therefore, while the Ninth Circuit may be technically correct in its observations that "[n]o authority *impels* us to find a constitutional duty to take 'stacked deck' affirmative action,"[96] it is equally correct to say that substantial authority exists to

90. 3 C.F.R. 339 (1964-1965 Compilation).
91. 41 C.F.R. § 60-1.40(a) (1980).
92. *Id.*
93. 41 C.F.R. § 60-2.12(e) (1977).
94. 3 C.F.R. 339, 345 (1964-1965 Compilation).
95. *See* Annot., 31 A.L.R. FED. 108 (1977).
96. 616 F.2d at 1387 (emphasis added).

support a finding of that duty.

E. California Constitution

The California Supreme Court has recently decided in *Crawford v. Board of Education,*[97] that "public officials in some circumstances bear an affirmative obligation to design programs or frame policies so as to avoid discriminatory results."[98] The California court, however, declined to impose an affirmative duty under the state constitution to take affirmative action of the quota variety.[99] Accordingly, the Ninth Circuit did not feel compelled to find an affirmative duty on the part of the Board to engage in "stacked deck" affirmative action even under the California Constitution, and "especially in areas other than school enrollment."[100]

In *Crawford* the California Supreme Court explained its earlier decision in *Santa Barbara School District v. Superior Court.*[101] *Santa Barbara* held that because a specific statutory racial balance quota was not constitutionally mandated it was invalid. The *Crawford* court noted the limited nature of the *Santa Barbara* holding — "our decision upholding the repeal of the specific racial balance quotas would 'in no way limit or affect the constitutional obligations of school districts.' "[102] Thus, while *Crawford* "did not authorize 'stacked deck' affirmative action,"[103] such affirmative action remains permissible under the California Constitution.

Crawford held that school districts were required to take "reasonably feasible steps to alleviate school segregation."[104] But the court did not specify what steps to take. Therefore, the assertion by the Ninth Circuit that under *Crawford* "school boards have an affirmative duty under the state constitution to take 'reshuffle' affirmative action to alleviate racial segregation in the

97. 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976).
98. *Id.* at 296-97, 551 P.2d at 38, 130 Cal. Rptr. at 734.
99. *Id.* at 303-04, 551 P.2d at 43, 130 Cal. Rptr. at 739.
100. 616 F.2d at 1388.
101. 13 Cal. 3d 315, 530 P.2d 605, 118 Cal. Rptr. 637 (1975).
102. 17 Cal. 3d at 293, 551 P.2d at 35, 130 Cal. Rptr. at 731 (citing Santa Barbara School Dist. v. Superior Court, 13 Cal. 3d at 330, 530 P.2d at 617, 118 Cal. Rptr. at 649).
103. 616 F.2d at 1388.
104. 17 Cal. 3d at 302, 551 P.2d at 42, 130 Cal. Rptr. at 738.

public schools"[105] is illusory.

Recently in *Price v. Civil Service Commission of Sacramento County,*[106] the California Supreme Court upheld a voluntary affirmative action program adopted by the Sacramento County Civil Service Commission which included a two to one minority hiring ratio. The court pointed to its "past decisions construing article I, section 7, subdivision (a) [the state equal protection guarantee as reflecting its] recognition of the importance of interpreting the provision in light of the realities of the continuing problems faced by minorities today."[107] The court held that the plan did not violate federal or state equal protection guarantees "in authorizing the imposition of remedial race-conscious hiring ratios to overcome the effects of past discriminatory employment practices."[108]

As the Ninth Circuit pointed out, the *Price* decision was based on the "government entity's own past discrimination."[109] Moreover, the Commission in *Price* was authorized to make proper findings of prior discrimination upon which the remedial plan was based. Both of these elements are missing in *Associated General Contractors.* Nevertheless, the California Supreme Court has demonstrated a peculiar sensitivity to the plight of minorities. *Associated General Contractors* should not be read to hold that the California Constitution proscribes the adoption of remedial affirmative action programs which incorporate specific goals or ratios reasonably designed to alleviate the present effects of past discrimination.

F. Legislative Competence to Weigh Social Policy

Legislative Foreclosure

After determining that there was no constitutional duty to engage in "stacked deck" affirmative action, the Ninth Circuit held that it was "constitutionally acceptable" for the state legislature to foreclose the Board from voluntarily adopting an af-

105. 616 F.2d at 1388.

106. 26 Cal. 3d 257, 604 P.2d 1365, 161 Cal. Rptr. 475 (1980).

107. *Id.* at 284-85, 604 P.2d at 1382, 161 Cal. Rptr. at 492 (citing Crawford v. Board of Educ., 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976)).

108. *Id.* at 283, 604 P.2d at 1381, 161 Cal. Rptr. at 491.

109. 616 F.2d at 1385 n.4.

firmative action policy.[110] The court noted that "stacked deck" affirmative action is the type of policy question over which the Legislature has greater competence than a local agency like the Board.[111] Legislative interpretations or foreclosures of "stacked deck" type programs are appropriate subjects for legislative consideration. The legislative foreclosure adverted to by the Ninth Circuit is, however, contained in California Education Code section 39640—the "low bid law"—and is based upon the court's strict construction of that section and not upon a "stacked deck" statute. The foreclosure found by the court in the low bid law was not explicitly articulated by the legislature and absent the finding by the court of implicit foreclosure in the statute, there would have been no conflict. A more liberal construction of the low bid law would allow voluntary adoption of quota-type affirmative action policies.

The Washington v. Davis[112] *Test*

Although not unconstitutional per se because of its prohibition of the Board's affirmative action program, the Ninth Circuit held the low bid law must still survive scrutiny under the test articulated in *Washington v. Davis.*[113] The *Washington* Court stated that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is [not] invalid under the equal protection clause simply because it may affect a greater proportion of one race than of another."[114] Even in cases involving discriminatory impact, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[115] Noting that section 39640 is race-neutral on its face, and acknowledging that the low bid law may have a disproportionate impact on minorities, the Ninth Circuit held that "this is not a case where the disparity of a law's impact 'may for all practical purposes demonstrate unconstitutionality because . . . the discrimination is very difficult to explain on nonracial grounds,' thus permitting an inference of discriminatory purpose."[116] Therefore, the Ninth Circuit ulti-

110. *Id.* at 1390.
111. *Id.*
112. 426 U.S. 229 (1976).
113. 616 F.2d at 1390.
114. 426 U.S. at 242.
115. *Id.* at 240.
116. 616 F.2d at 1390 (quoting Washington v. Davis, 426 U.S. at 242).

mately upheld the low bid law as a constitutionally permissible application of the legislature's discretionary powers.[117]

Replying to a similar conclusion, the Sixth Circuit in *Detroit Police* reversed a district court opinion stating that it had failed to follow those portions of the *Washington v. Davis* opinion which gave guidance on evaluating proof of discriminatory purpose.[118] *Detroit Police* pointed to portions of *Washington* which indicated that the necessary discriminatory racial purpose need not be express or appear on the face of the statute, nor is the law's disproportionate impact irrelevant in cases involving constitution-based claims of racial discrimination.[119] A facially race-neutral statute must not be applied so as indiviously to discriminate on the basis of race.[120] An invidious discriminatory purpose may be inferred from the totality of the relevant facts, for example, if the law bears more heavily on one race than another.[121] It is also frequently true that the discriminatory impact may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.[122] The Supreme Court observed that it had not held facially race-neutral laws that serve ends otherwise within the power of government to pursue, invalid under the equal protection clause simply because they may affect a greater proportion of one race than of another.[123] "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[124]

The *Detroit Police* court then pointed to two Supreme Court cases which enumerated a number of "subjects of proper inquiry" to determine the existence of discriminatory intent.[125] For instance,

> [t]he racial impact of the official action, the historical background of decisions having disparate

117. *Id.* at 1391.
118. 608 F.2d at 692.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 692-93.
125. *Id.* at 693.

> racial impact, and the contemporary statements of members of the decision-making body were types of relevant evidence which should be considered. . . . [A]ctions having foreseeable and anticipated disparate impact . . . may be employed "as one of the several kinds of proofs from which the inference of segregative intent may be properly drawn."[126]

The court concluded that discriminatory intent may be established by "any evidence which logically supports an inference that the state action was characterized by invidious purpose."[127]

The *Washington v. Davis* test complements other evidence which may be brought to bear upon the question of invidious discrimination. Taken by itself, *Washington v. Davis* makes it "nearly impossible for plaintiffs to prove unlawful 'motive' in most cases, especially when the challenged employment practice is facially neutral, but has a greater adverse effect on minority persons."[128]

Unless *Washington v. Davis* is read in context with the several other decisions interpreting proof of invidious discrimination, its meaning is subject to distortion. The Ninth Circuit determined that the low bid law passed the *Washington v. Davis* test. This may be interpreted to mean that merely because the law creates a disparate impact upon minorities it is not per se unconstitutional and that further examination is therefore unnecessary.

G. Conclusion

In *Associated General Contractors v. San Francisco Unified School District* the Ninth Circuit invalidated a voluntary affirmative action program of the quota type adopted by the San Francisco Board of Education. The court's analysis reached several conclusions. First, the Ninth Circuit determined that there was a fundamental conflict between California's low bid law and the Board's affirmative action policy. Since the statute which confers the Board's authority proscribes such conflicts, the af-

126. *Id.*
127. *Id.* (quoting Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941, 2950 (1979).
128. Edwards, *supra* note 83, at 119.

firmative action policy was found to be outside the scope of the Board's authority.

The conflict rests upon a strict construction of the low bid law by the Ninth Circuit, precluding race-conscious affirmative action programs. A more encouraging result for proponents of affirmative action could have been reached by a liberal interpretation of the statute. This would have allowed adoption of some race-conscious programs and still enable the courts to find a conflict where reverse invidious discrimination was evident.

Second, using newly created terminology, the Ninth Circuit found no affirmative constitutional duty to take "stacked deck" affirmative action under the United States and the California constitutions. The court's definition of "stacked deck" is subject to varying interpretations and makes the holding suspect. Although a quota-type or "positive-factor" program is still *permissible* in spite of the court's holding, without a precise definition of "stacked deck" affirmative action, many race-conscious programs which stop short of imposing quotas or goals may be faced with substantial new roadblocks. Moreover, the holding has the effect of stifling much needed experimentation with race-conscious affirmative action.

The Sixth Circuit's holding in *Detroit Police,* which upheld the validity of a quota-type affirmation plan, is in direct conflict with *Associated General Contractors.* Unlike *Associated General Contractors,* the *Detroit Police* court followed a line of cases approving the use of quota-type affirmative action programs when employed to ameliorate the present effects of past discrimination. Various limitations have been placed upon these plans to ensure their administration free from abuse.[129] A properly designed quota-type affirmative action program takes into account the dangers inherent in "stacked deck" programs and is an appropriate remedial vehicle. The ultimate resolution of this

129. *See* Fullilove v. Klutznick, 100 S. Ct. at 2784-85 (Powell, J., concurring) (reviewing the requirements imposed by the courts when considering race-conscious affirmative action); Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied,* 406 U.S. 950 (1972) (the plan must be short term after which all decisions are to be made on a racially nondiscriminatory basis); Bridgeport Guardians, Inc. v. Bridgeport Civ. Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975) (quota must be reasonably related to the relevant percentage of minorities in the work force).

controversy, however, awaits a ruling by the Supreme Court.

Insofar as the California Supreme Court has demonstrated a particular awareness of the effects of a history of discrimination against minorities, it appears the court would be receptive to a suggestion that a properly designed quota-type program is constitutionally permissible and even required under appropriate circumstances. The broad prohibition in *Associated General Contractors* of voluntary adoption of "stacked deck" affirmative action programs is therefore especially questionable under the California Constitution.

Finally, the Ninth Circuit decided that, the low bid law was not constitutional as applied. Because this portion of the opinion turned on a strict construction of the low bid law and of the equal protection clause of the fourteenth amendment, it is amenable to the same criticism and mandates an identical concern.

The court's best argument came from its perception that "even if the argued-for constitutional duty exists, it could not come into play until proper findings were made of discrimination and the need for affirmative action to redress it."[130] In *Bakke,* Justice Powell noted that "a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination."[131] The *Bakke* court failed to find that a medical school had the authority to make appropriate findings with respect to its own admissions program. It is, therefore, unlikely that the same court would hold that the Board has authority to make appropriate findings regarding discrimination in the local construction industry.

Because the Board overstepped its authority in making findings of discrimination in the local construction industry, the ultimate holding of the court in *Associated General Contractors* appears to be correct. Despite this fact, however, *Associated General Contractors* is antithetical to the modern trend of widening the scope of remedies available to minorities to relieve

130. 616 F.2d at 1388.
131. 438 U.S. at 309.

the present effects of past discrimination. It should therefore be limited to its facts.

*Brian Beverly**

III. RESIDENT REQUIREMENTS AND THE FORMER RESIDENT'S RIGHT TO TRAVEL — *FISHER V. REISER*

A. INTRODUCTION

In *Fisher v. Reiser*,[1] a divided panel of the Ninth Circuit upheld the constitutionality of Nevada's industrial insurance scheme which provided workers' compensation benefits irrespective of the recipient's place of residence, but which conditioned receipt of cost-of-living supplemental benefits on residence in the state. Plaintiff claimed that the residence requirement for the workers' compensation cost-of-living supplement penalized those beneficiaries who exercised their constitutional right to emigrate from one state to another, and denied them equal protection under the law.

Pursuant to the Nevada Industrial Insurance Act,[2] the Nevada Industrial Commission administered a state insurance fund which was financed by employer premiums and used to pay workers' compensation benefits to injured workers and their survivors. An employee who was injured while working in Nevada for a covered Nevada employer was eligible to receive workers' compensation.[3] Worker's benefits were payable regardless of where the beneficiary resided after his or her injury.

Because the level of benefits available to an injured worker or his or her survivors was based on a percentage of the wage

---

* Third Year Student, Golden Gate University School of Law.

1. 610 F.2d 629 (9th Cir. 1979) (per Kennedy, J.; the other panel members were East, D.J., sitting by designation, and Hufstedler, J., dissenting).

2. NEV. REV. STAT. §§ 616.010-.680 (1977).

3. Also eligible were workers hired or regularly employed in Nevada who were injured while temporarily working for their covered Nevada employer outside the state. *Id.* § 616.520.

earned by the worker at the time of injury,[4] inflation particularly hurt workers' compensation recipients. In response to their plight, in 1973 and again in 1975, the Nevada Legislature appropriated general funds to supplement workers' benefits paid to recipients of permanent and total disability and death benefits.[5] Unlike the basic workers' benefits, the cost-of-living supplemental benefits were not granted to those workers' compensation beneficiaries who had emigrated from Nevada.[6]

Plaintiff, Mrs. Fisher, and her husband were Nevada residents when, in 1962, plaintiff's husband was rendered totally disabled in an industrial accident while employed by a Nevada employer. Under the Nevada Industrial Insurance Act, plaintiff's husband qualified for and received permanent total disability benefits and continued to receive these benefits after plaintiff and her husband moved to California. When plaintiff's husband died in 1972, plaintiff became eligible for and received death benefits[7] because her husband's death resulted from the injuries he sustained in the workers' compensation-covered accident. However, plaintiff was not eligible for the cost-of-living supplement because she was no longer a Nevada resident.

Plaintiff brought an action in federal district court,[8] con-

---

4. The level of benefits available to the injured worker or his survivors was dependent upon the nature of the injury and the average wage of the worker at the time of the injury. Until death, permanently and totally disabled workers were entitled to monthly payments of two-thirds of their average wage. *Id.* § 616.580. The surviving spouse of an employee whose death was caused by a job-related accident was entitled to death benefits of the same monthly amount. Death benefits were paid until the surviving spouse's death or remarriage. *Id.* § 616.615.

5. In 1973, permanent total disability benefits for industrial injuries occurring before April 9, 1971 were increased by 10%, and death benefits based on industrial injuries occurring before July 1, 1973 were also increased by 10%. In 1975 the same benefit adjustment was increased to 20%. *Id.* §§ 616.626, 616.628.

The cost-of-living supplement was paid out of a silicosis and disabled pension fund which had been established by an appropriation from general revenues when the Nevada Legislature extended workers' compensation to persons injured by exposure to silicon dioxide dust. This fund was used to reimburse the Nevada Industrial Commission for payment of silicosis claims and the cost-of-living supplement in disability and death benefit cases. *Id.* §§ 617.323, 617.460.

6. *Id.* §§ 616.626, 616.628.

7. Mrs. Fisher received death benefits equal to one-half of Mr. Fisher's average wage because Mr. Fisher was injured prior to the date when death benefits were increased to two-thirds of the deceased employee's average wage. *Id.* § 616.615.

8. Mrs. Fisher brought a class action on behalf of all non-resident workers' compensation beneficiaries not receiving the cost-of-living supplement, seeking declaratory and

tending that the residence requirement for the cost-of-living supplement impermissibly burdened her constitutional right to travel, and denied her equal protection under the law.[9]

B. Development of the Right to Travel

In recent years the Supreme Court has attempted to delineate the constitutional right to travel, a right long recognized as fundamental.[10] In the landmark case of *Shapiro v. Thompson*[11] the Court struck down state statutes[12] conditioning eligibility for welfare upon a one year durational residence. Viewing the right to travel as including the right to migrate, "with intent to settle and abide,"[13] the Court found that conditioning eligibility for welfare upon a one year durational residence penalized those persons who had exercised their constitutional right to travel.[14] Finding the fundamental right to travel impinged, the Court subjected the durational residence requirement to the strict scrutiny standard of review,[15] and found the requirement unnec-

---

injunctive relief against officials of the Nevada Industrial Commission and the Nevada State Treasurer. Federal jurisdiction was invoked under 42 U.S.C. § 1983 (1976).

9. The district court refused to apply the strict scrutiny standard of review. The court held that the Nevada scheme involved a simple residency requirement which fell outside the scope of the constitutional right to travel. Applying the rational basis standard of review, the district court found no equal protection violation because the residence requirement was rationally related to the legitimate governmental interests of protecting the health and welfare of Nevada's citizens while limiting the expenditure of general revenues. 610 F.2d at 633.

10. The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

. . . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

United States v. Guest, 383 U.S. 745, 757-58 (1966).

11. 394 U.S. 618 (1969).

12. *Shapiro* also involved a District of Columbia statutory provision.

13. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255 (1973) (noting that the Court in *Shapiro* was "concerned only with the right to migrate, 'with intent to settle and abide' or . . . 'to migrate, resettle, find a new job, and start a new life.' ").

14. The Court did not require evidence of actual deterence. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330, 339-40 (1972).

15. Classifications that impinge on a fundamental right or that are based on suspect criteria such as race are subject to the strict scrutiny standard of review. Otherwise a

essary to promote a compelling governmental interest. Accordingly, the Court held the requirement invalid because it denied new residents equal protection under the law.

The *Shapiro* Court made clear that "[t]he residence requirement and the waiting-period requirement are distinct and independent prerequisites,"[16] and that it was only the waiting period which implicated right-to-travel concerns in that case. Two extremely important questions were left unresolved. First, how severely must the constitutional right to travel be burdened before the burden operates to penalize those individuals who choose to exercise the right?[17] Second, can a bona fide residence requirement for government monetary benefits ever unduly impinge the right to travel?[18]

The first question was addressed, but by no means completely resolved, five years later in *Memorial Hospital v. Maricopa County,*[19] in which the Court invalidated a one year durational county residence requirement for nonemergency medical

---

rational basis standard of review is invoked. To survive an equal protection challenge under strict scrutiny, a statutory classification must be necessary to promote a compelling governmental interest, whereas, under the rational basis test, a statutory classification is not violative of equal protection if it is rationally related to a legitimate governmental interest. *See generally* Comment, *A Strict Scrutiny of the Right to Travel,* 22 U.C.L.A. L. REV. 1129 (1975); Note, *The Right to Travel — Quest For a Constitutional Source,* 6 RUT. CAM. L.J. 122 (1974); Gunther, *The Supreme Court 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

16. 395 U.S. 618, 636 (1969). A simple residence requirement requires a person to be present, i.e. be a bona fide resident. A durational residence requirement requires a person to have been a resident for a given period of time as a condition to eligibility for a government benefit.

17. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 256-57 (1974) ("amount of impact required to give rise to the compelling-state-interest test was not made clear" in *Shapiro).*

18. In leaving these two questions unresolved, the Court stated:

> We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

394 U.S. at 638 n.21.

19. 415 U.S. 250 (1974). Two years earlier, the Court held that one-year durational residence requirements for voting were invalid on the ground that the right to exercise the franchise is a fundamental right. Dunn v. Blumstein, 405 U.S. 330 (1972).

care. "Whatever the ultimate parameters of the *Shapiro* penalty analysis," the *Maricopa* Court stated that a classification penalizes the exercise of the right to travel if it denies "a basic necessity of life," or "governmental privileges or benefits necessary to basic sustenance."[20]

In *Califano v. Torres*[21] the Court upheld a requirement of residence in one of the fifty states (the claimant had moved to Puerto Rico) in order to be eligible for various old age and disability benefits under the Supplemental Security Income Act. The Court held that the Constitution does not embrace a doctrine whereby a person who moves to Puerto Rico must be given benefits superior to those enjoyed by other residents of Puerto Rico. The Court went on to state in dictum:

> Such a doctrine would apply with equal force to any benefits a State might provide for its residents, and would require a State to continue to pay those benefits indefinitely to any persons who had once resided there. And the broader implications of such a doctrine in other areas of substantive law would bid fair to destroy the independent power of each state under our Constitution to enact laws uniformly applicable to all of its residents.[22]

The Ninth Circuit in *Fisher* primarily focused on these Supreme Court precedents in resolving the constitutionality of Nevada's industrial insurance scheme.

C. Analysis

Majority Opinion

Construing *Shapiro, Maricopa County,* and *Torres* to stand for the proposition that the right to migrate component of the right to travel insures that only new residents—and not former residents—of a state to have a right to vital government benefits, the majority found the fact that *Fisher* arose in an emigration context to be "critical." Because the cost-of-living supplement was financed by general funds, the majority analogized the supplement to welfare benefits. On this basis, the majority found

20. 415 U.S. at 258-59.
21. 435 U.S. 1 (1978) (per curiam).
22. *Id.* at 4-5.

principles of federalism to be of overriding importance, stating that "a state is limited, both in its competence and its responsibility, to exercising its welfare powers for those persons who are its residents."[23] With principles of federalism placing "[a]ny primary obligation to ascertain a citizen's economic status or condition and to make provision for his or her well-being . . . upon the state of current residence, not the state where the citizen formerly resided,"[24] the majority concluded that Mrs. Fisher and others in her class were not penalized for exercising their constitutional right to travel.

In further distinguishing *Fisher* from *Shapiro* and *Maricopa County,* the majority noted that only certain durational residence requirements were invalidated in *Shapiro* and *Maricopa County,* and held that *Fisher* involved only a simple residence requirement. Close analysis reveals that this second basis for distinguishing *Fisher* is actually an integral part of the immigration/emigration distinction. In construing *Shapiro* and *Maricopa County* as standing for the proposition that the right to travel insures only new residents a right to certain government benefits, the majority effectively ruled out the possibility that in an emigration context a right-to-travel claim could present a durational residence requirement. That is, for the majority, the concept of durational residence can only be applicable in an immigration context. Because *Fisher* arose in an emigration context, *Fisher* necessarily presented to the majority only a simple residence requirement. Thus, this purported second basis for distinguishing *Fisher* from *Shapiro* and *Maricopa County* is not a separate distinction, but is simply an attribute of the distinction between immigration and emigration.

The majority proceeded to find *Shapiro* and *Maricopa County* unsupportive of the plaintiff in *Fisher* on a third basis, and in so doing, confused its analysis. Having "a significant bearing upon [the majority's] decision" was the fact that, unlike the benefits involved in *Shapiro* and *Maricopa County,* eligibility for the cost-of-living supplement was not based upon the re-

23. 610 F.2d at 633. Thus, the majority was "reluctant to impose upon states fiscal burdens that are not coterminous either with their taxing power or their general jurisdiction." *Id.* at 634.

24. *Id.* at 633. The majority did leave open the possibility that a state may be held to have some continuing obligations to former residents.

cipient's financial need. The majority construed Supreme Court precedent to stand for the proposition that the deprivation of a government benefit not based upon the recipient's financial need is not of such severity as to penalize an individual for exercising the right to travel. On this basis the majority concluded that the residence requirement did not penalize the plaintiff in *Fisher*.

The majority's severity-of-the-burden analysis only serves to confuse the actual basis for the holding in *Fisher*. If, as the majority apparently held, a classification based upon residence is not "subject to strict scrutiny when attacked by one who has migrated from the state which denies the benefit in question,"[25] then the severity of the deprivation suffered by the emigrant is irrelevant. Simply put, if principles of federalism are of such importance that the right to travel does not mandate that a state provide former residents with the same government benefits as are provided residents, then the importance of the benefit to the otherwise eligible former resident is simply not an issue. In *Shapiro* and *Maricopa County*, it was necessary to resolve the question of the severity of the burden imposed upon the right to travel in order to determine whether the government's justification had to meet the strict scrutiny or the rational basis standard of judicial review.[26] This was unnecessary in *Fisher* because the majority had already determined that strict scrutiny was inappropriate in an emigration context. Had the majority's finding as to the severity of the deprivation suffered by the *Fisher* claimants been the basis for an alternative holding rather than having had "a significant bearing" upon the overall decision, perhaps the rationale for the decision would have been clearer. The *Fisher* opinion did not make clear whether the right to travel was not sufficiently infringed solely on the ground that the plaintiff was a former resident, that is, because federalism considerations are tantamount to a compelling governmental interest, or because the *Fisher* claimants ended up on the losing side of a balancing test in which concerns of federalism were weighed against the degree of the deprivation they suffered.

---

25. *Id.* at 633.

26. Memorial Hosp. v. Maricopa County, 415 U.S. at 253 ("In determining whether the challenged durational residence provision violates the Equal Protection Clause, we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.").

Whatever the reason for finding that the fundamental right to travel was not infringed in *Fisher,* the majority proceeded to subject the Nevada statutory classification to the deferential rational basis standard of review. As the residence requirement for the workers' compensation supplement was rationally related to the legitimate governmental interests of protecting the welfare of Nevada's citizens while limiting the expenditure of state funds,[27] the majority held there was no equal protection violation.[28]

Dissenting Opinion

Dissenting, Judge Hufstedler took a broader view of Supreme Court precedent, maintaining that the distinction between emigration and immigration "has no constituitonal significance because interstate travel is not a one-way road."[29] For the dissent, a durational residence requirement "occurs when a person is effectively required to have resided in a State at two distinct points in time in order to obtain a benefit."[30] Since the workers' compensation beneficiaries were "effectively required to have resided in the state at the time of their injury and at present" to be eligible for the cost-of-living supplement, the dissent maintained that the durational aspect of residence, at issue in *Shaprio* and *Maricopa County,* was present in *Fisher.*

Accordingly, the dissent viewed the workers' cost-of-living supplement as being unlike welfare because the "essential nexus of eligibility" was a past connection with the state—past employment and injury in the state. In distinguishing the simple residence requirements that the *Shapiro, Maricopa County,* and *Torres* Courts held valid in the context of welfare, nonemer-

27. For the majority, the fact that the residence requirement partially obstructed the objective of providing workers' compensation beneficiaries with additional income was not important because there were other legitimate governmental interests furthered by the residence requirement.

28. The majority noted that the allocation of government revenues demands a high degree of judicial deference when no suspect classification or fundamental right is involved. *See, e.g.,* Mathews v. DeCastro, 429 U.S. 181, 185 (1976) ("Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to [the Legislature], unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.' ") (quoting Helvering v. Davis, 301 U.S. 619, 640 (1937)).

29. 610 F.2d at 640.

30. *Id.*

gency medical care, and Supplemental Security Income benefits, respectively, the dissent observed that bona fide residence was "the nexus of eligibility for those benefits." That is, once a resident, there was no eligibility requirement of a past connection with the state. In the context of workers' benefits which are designed to compensate injured workers and their survivors for loss of earning power caused by injuries sustained while contributing to a state's labor force, the dissent maintained that "to require a present connection . . . unduly penalizes plaintiff's constitutional right to travel."[31] Accordingly, the fact that the worker's supplement was subsidized by general revenues was of no importance to the dissent because "[t]he method that the state chooses to finance payment of workers' benefits does not mean that the state may discriminate against eligible workers solely because they exercise their right to travel."[32]

Having found the durational aspect of residence present in *Fisher*, the dissent proceeded to find the deprivation suffered by the former-resident workers' compensation beneficiaries to be of such severity as to constitute a penalty for having exercised the right to travel. For the dissent, the deprivation of the cost-of-living supplement was analogous to those deprivations found to impermissibly burden the right to travel in *Shapiro* and *Maricopa County* because it was "aid upon which may depend the ability . . . to obtain the very means to subsist — food, shelter, and other necessities of life."[33] The dissent was unable to construe Supreme Court precedent as holding that the benefit in question must be based upon the recipient's financial need before the deprivation of the benefit may constitute a penalty for exercising the right to travel. Undoubtedly, the dissent approached the question of the severity of the burden in accordance with Supreme Court precedent. Although *Shapiro* and

31. *Id.* at 641. As discussed later in the text, the dissent found that the denial of the cost-of-living supplement to former-resident workers' compensation beneficiaries rose to the level of a penalty as delineated in *Shapiro* and *Maricopa County*.

32. *Id.* at 641. In further support of the argument that the cost-of-living supplement was not welfare, but instead was part of the workers' compensation program, the dissent noted that general funds were appropriated to extend workers' compensation to workers contracting silicosis while working in Nevada. The dissent also noted that, unlike the benefits involved in *Torres*, the cost-of-living supplement would not have provided former residents of Nevada with benefits superior to those enjoyed by citizens of the former resident's new state of residence.

33. *Id.* at 642 (quoting Shapiro v. Thompson, 394 U.S. at 627).

Maricopa County involved benefits where eligibility was conditioned upon the recipient's financial need, the Supreme Court focused on the actual significance to the claimant of the benefit in question rather than on the criteria establishing eligibility. Thus, although a government benefit not conditioned upon financial need is likely to be less significant to the recipient than a benefit which is not so conditioned, to find the absence of a financial need requirement conclusive as to the insignificance of the benefit is simplistic.[34] One might speculate whether the majority would have reached the same conclusion had plaintiff returned to Nevada and had been required to wait one year before being eligible for the cost-of-living supplement. Apparently the majority was reluctant to expressly elevate federalism considerations to the level of compelling governmental interests. Thus, the fact that eligibility for the supplement was not based upon financial need provided the majority with a convenient escape.

The dissent, having found that the residence requirement for the cost-of-living supplement effectively penalized those workers' compensation beneficiaries who exercised their constitutional right to travel, applied the strict scrutiny standard of review to the statutory classification. The conservation of state funds was the only justification offered by Nevada for discriminating against former resident workers' compensation beneficiaries. Because this is not a compelling governmental interest,[35] the dissent found the residence requirement violative of equal protection.

D. Conclusion

As the Ninth Circuit's opinion in *Fisher* indicates, the constitutional right to travel, although fundamental, remains quite

---

34. The majority had found support for the notion that severity-of-the-burden analysis turns on whether eligibility for a government benefit is conditioned upon financial need in Mathews v. Eldridge, 424 U.S. 319 (1976), where disability benefits were terminated. Although the Court found the disability benefits to be of less significance than welfare benefits because the former were not based on financial need, *Mathews* involved a due process claim, whereas *Fisher* involved an equal protection claim. Also, unlike *Fisher*, the disability benefits in *Mathews* would have been paid on proof that the claimant was still disabled.

35. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. at 263 ("The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which . . . severely penalizes exercise of the right to freely migrate and settle in another state.").

amorphous. The majority's simplistic approach to the right to travel claim presented in *Fisher* may lead other courts to find that eligibility for a government benefit must be conditioned upon the recipient's financial need before right-to-travel concerns are implicated. If courts adopt the majority's approach, the question of the actual significance of the benefit in question to a potential recipient will be of secondary importance, only becoming an issue if the benefit is based upon financial need. Unfortunately, as the dissent in *Fisher* indicated, a financial need requirement is certainly not determinative of whether a benefit is "aid upon which may depend the ability . . . to obtain the very means to subsist." Adopting the majority's approach will, in effect, base the resolution of right to travel issues on matters of form rather than substance. The fundamental right to travel should certainly not be delineated in such a manner.

Other courts should avoid *Fisher* and continue to adhere to the idea "that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, and regulations which unreasonably burden or restrict this movement."[36]

*Curtis E. Blystone**

IV. COMPLEX CASES: AN EXCEPTION TO THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY?

A. Introduction

In *In re U.S. Financial Securities Litigation*[1] *(USF Litigation)*, the Court of Appeals for the Ninth Circuit addressed the question of "whether there is a 'complexity' exception to the seventh amendment right to a jury trial in civil cases."[2] The trial

36. Shapiro v. Thompson, 394 U.S. at 629.

* Third Year Student, Golden Gate University School of Law.

1. 609 F.2d 411 (9th Cir. 1979) (per Anderson, J.; the other panel members were Kilkenny, J., dissenting, and Byrne, D.J., sitting by designation), *cert. denied*, 100 S. Ct. 1866 (1980).

2. *Id.* at 413.

court had struck *sua sponte* all demands for trial by jury on the ground that the complicated nature of the litigation was such as to render it beyond the practical abilities and limitations of a jury.[3]

USF Litigation involved eighteen separate lawsuits,[4] including five plaintiff classes, filed by a variety of plaintiffs, most of whom were purchasers or representatives of purchasers of various stock and debenture offerings made by U.S. Financial[5] (USF) over a period of several years. Although USF was the focal point of all the controversy, over one hundred defendants were involved in the litigation, including about twenty individual defendants and over eighty corporate and partnership defendants. The litigation was further complicated by the fact that within some of the cases there were sub-groups of plaintiffs asserting claims against sub-groups of defendants. Numerous cross-claims were made by certain defendants against various other defendants. A multitude of allegations were made and a multitude of claims asserted—all dealing with violations of federal and state securities laws, common law fraud, and negligence.

The trial court found that the fact-finder would have to read about 100,000 pages of documents,[6] that about 250 witnesses would be called by the plaintiffs alone,[7] and that the trial would probably last two years.[8] Central to the litigation was the fact-finder's ability to understand the massive and complex ac-

3. *See In re* U.S. Financial Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977). The trial court certified the issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1976).

4. The various lawsuits were filed in five federal judicial districts including the federal court for the Southern District of California. The Judicial Panel on Multidistrict Litigation found that the cases presented common issues and allegations and were accordingly transferred to the Southern District of California for coordinated pretrial proceedings. *See In re* U.S. Financial Sec. Litigation, 385 F. Supp. 586 (Jud. Pan. Mult. Lit. 1974); *In re* U.S. Financial Sec. Litigation, 375 F. Supp. 1403 (Jud. Pan. Mult. Lit. 1974).

5. U.S. Financial was a large vertically integrated corporation which was engaged in virtually all aspects of the real estate development business, including design, construction, and sale of various kinds of structures, financing of real estate projects, and title insurance. It operated individually, through subsidiaries, and through the concept of joint ventures. Its growth from 1966 to 1972 had been phenomenal.

6. The district court stated that "reading those 100,000 pieces of paper would be like sitting down to read the first 90 volumes of the Federal Reporter, 2nd Series —including all the headnotes." *In re* U.S. Financial Sec. Litigation, 75 F.R.D. 702, 707 (S.D. Cal. 1977).

7. *Id.* at 707-08.

8. *Id.* at 713.

counts and the accounting procedures employed by USF, its subsidiaries, and its joint venture partners. The fact-finder would also be required to understand various competing and highly technical accounting theories in order to ascertain whether the accounting practices of USF and its affiliates were as they should have been. The fact-finder would also be required to undersand and apply a variety of legal theories, which varied, of course, depending upon the claims and parties at issue.

The trial court concluded that a jury was not capable of understanding and rationally reconciling the voluminous data and then properly applying the variety of legal theories. The trial court further concluded that it would be extremely difficult to find jurors who could sit through a two-year trial. On these grounds the trial court concluded that there was no adequate remedy at law, and thus ordered that the cases be tried without a jury.[9]

The Ninth Circuit reversed, holding "that there is no complexity exception to the seventh amendment right to jury trial in civil cases."[10] "We do not accept the underlying premise . . . 'that a single judge is brighter than the jurors collectively functioning together.' "[11]

B. Background

Traditionally, the scope of the seventh amendment[12] guarantee has been determined by applying a "historical test" which looks to the English common law as it existed in 1791, the time of the adoption of the Bill of Rights.[13] Although "the thrust of

---

9. *Id.* at 711-15.

10. 609 F.2d at 432.

11. *Id.* at 431, (quoting Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 Tex. L. Rev. 47, 53 (1977)).

12. The seventh amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const. amend. VII.

13. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333 (1979); Curtis v. Loether, 415 U.S. 189, 193 (1974); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted."); Dimick v. Schiedt,

the amendment was to preserve the right to trial by jury as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time."[14] Thus, the critical dividing line under the historical test is between "law" and "equity."[15]

The historical test has been applied to "preserve the substance of the common-law right of trial by jury, as distinguished

---

293 U.S. 474, 476 (1935).

14. Curtis v. Loether, 415 U.S. at 193; Pernell v. Southall Realty, 416 U.S. 363, 374 (1974) (quoting Curtis v. Loether). Thus, the seventh amendment has been found applicable to causes of action based on statutes which create legal rights and remedies. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. at 375-76; Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962) (trademark laws); Porter v. Warner Holding Co., 328 U.S. 395 (1946); Luria v. United States, 231 U.S. 9 (1913); Hepner v. United States, 213 U.S. 103, 115 (1909) (immigration laws).

15. In describing this distinction, the Supreme Court in Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830), stated:

> By common law, [the framers of the seventh amendment] meant what the constitution denominated in the third article "law;" not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contra-distinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit.

Id. at 446. *Accord,* Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 449 (1977); Pernell v. Southall Realty, 416 US. 363, 374-75 (1974); Ross v. Bernhard, 396 U.S. 531, 533 (1970).

Apparently, reference to the English common law and the subsequent establishment of the historical test were more or less accidental developments. *See generally* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973). Justice Story was apparently the first to refer to English common law as the foundation for seventh amendment analysis:

> Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.

United States v. Wonson, 28 F. Cas. 745, 750 (C.D. Mass. 1812). Wolfram stated that this rule has never been seriously questioned; "perhaps later judges have hesitated to appear to be the kind of intractable person that would require Mr. Justice Story to elaborate on the obvious." Wolfram, *supra*, at 641.

At any rate, once reference to English practice became accepted, the historical test followed. Wolfram suggested that this was probably required in order to prevent the seventh amendment's guarantee from depending upon changes which occurred in English practice with respect to jury trials long after Amerian independence. *See* Wolfram, *supra*, at 642. It seems only logical to adopt some sort of historical standard in that the seventh amendment requires that "the right of trial by jury be preserved."

from mere matters of form or procedure . . . ."[16] Thus, although procedural changes since 1791 have contracted the civil jury's historical role to some extent, they have been held as not violative of the seventh amendment.[17]

Other procedural changes have had the effect of expanding the right to trial by jury, particularly the merger of the federal law and equity courts in 1938 and the accompanying new Federal Rules of Civil Procedure. Although the merger of law and equity was not intended to affect the scope of the right to trial by jury,[18] a problem was created as to those matters in which the plaintiff previously "had an option as to the mode of trial that excluded any option by defendant or any discretion by the court . . . . [T]he [post-merger] question, properly put, [was] between giving effect to the plaintiff's former option and giving defendant a counter-option . . . ."[19] The Supreme Court addressed

---

16. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). *See also* Galloway v. United States, 319 U.S. 372, 392 (1943) ("the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details . . . ."); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979) (quoting Galloway v. United States, 319 U.S. at 392).

17. *See e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 335-37 (1979) (use of offensive collateral estoppel when plaintiff was not a party to the previous proceedings is not inconsistent with seventh amendment even though mutuality of parties was required in 1791); Colgrove v. Battin, 413 U.S. 149, 156-57 (1973) (seventh amendment does not require 12-member jury); Galloway v. United States, 319 U.S. 372, 390 (1943) (directed verdict not inconsistent with seventh amendment); Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 498 (1931) (verdict may be set aside in part and new trial ordered on the relevant issues); *Ex parte* Peterson, 253 U.S. 300, 309 (1920) (court appointed auditor for purpose of examining accounts between the parties and simplifying and defining issues to be presented to jury does not violate seventh amendment); Walker v. New Mexico & S.P.R.R., 165 U.S. 593, 596 (1897) (general verdict may be set aside when inconsistent with special verdict and judgment entered on basis of special verdict).

18. FED. R. CIV. P. 38(a) provides that: "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

19. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8.7, at 374-75 (2d ed. 1977). Judge Wisdom described the problem as follows:

> [T]he liberal joinder provisions and the broad, sometimes mandatory, counterclaim provisions of the Federal Rules mixed legal and equitable causes in a single litigation with unprecedented frequency . . . . The difficulty comes in deciding whether the legal or the equitable cause should be tried first—an issue of practical importance to litigants, since the determination of either cause acts as collateral estoppel on common questions of fact in the other. The broad grant of discretion under Rule 42 for a trial judge to order separate trials would seem to imply authority to decide the order of the sepa-

this problem in *Beacon Theatres, Inc. v. Westover*[20] and in *Dairy Queen, Inc. v. Wood.*[21] In each case identical factual issues were presented in the legal and equitable claims. In the *Dairy Queen* opinion the Court stated that:

> The holding in *Beacon Theatres* was that where both legal and equitable issues are presented in a single case, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[22]

This *Beacon Theatres/Dairy Queen* "nature of the issue" test operated to expand the traditional historical test, giving the defendant a right to jury trial where previously there was no right. However, the question of whether the *Beacon Theatres/Dairy Queen* holding was constitutionally required, or only represented an "equitable doctrine," was not made clear by those cases.[23] Undoubtedly, the new Federal Rules of Civil Procedure provided an adequate remedy at law in matters where formerly there was no adequate legal remedy; and, of course, an inadequate legal remedy has always been a requirement for equity jurisdiction. The Supreme Court resolved the unanswered question in *Ross v. Bernhard,*[24] in which it was established that the expanded historical test, that is, the *Beacon Theatres/Dairy Queen* nature of the issue test, is constitutionally required.

> rate trials, but courts struggled with this problem without clear guidelines. Some decisions rested on the "basic nature" of the case taken as a whole. In many other decisions this test was not recognized and the choice was left to the discretion of the trial judge. On occasion, attempts to apply the "basic nature" test have led to inconsistent results.

Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486, 488-89 (5th Cir. 1961) (footnotes omitted).

20. 359 U.S. 500 (1959).

21. 369 U.S. 469 (1962).

22. *Id.* at 472-73 (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. at 510-11). *Dairy Queen* also made clear that "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." Thus, a claim for a money judgment for breach of contract is not equitable solely because the claim is "cast in terms of an 'accounting' rather than in terms of an action for 'debt' or 'damages.' " *Id.* at 477-78.

23. *See* Katchen v. Landy, 382 U.S. 323, 339 (1966), where the Court referred to the *Beacon Theatres/Dairy Queen* holding as an "equitable doctrine."

24. 396 U.S. 531 (1970).

Thus, "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."[25]

However, immediately after this apparent reaffirmation of the historical test, in its constitutionally required expanded version, the Supreme Court added a footnote which has been the source of much of the recent confusion regarding the scope of the seventh amendment. In this footnote the Supreme Court stated the following:

> As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.[26]

It is the third factor of this test which has led to much confusion recently, causing many federal courts to believe that the historical test has been abandoned. The third prong of this test has provided the basis for some federal courts to find that there is a "complexity exception" to the seventh amendment right to trial by jury; the first two prongs of the test traditionally being necessary for seventh amendment analysis.

Until *Ross*, with the possible exception of the equitable accounting cases,[27] the Supreme Court had never indicated that jury competence is a factor to be considered in determining a litigant's seventh amendment right to a jury trial. The Ninth Circuit's rejection of this "suggestion of infidelity to the [histori-

---

25. *Id.* at 538 (footnote omitted). Thus, "where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims." *Id.* at 537-38.

It should be noted that *Ross* did not involve a situation in which the plaintiff had had an option previous to merger of proceeding at law or in equity. *Ross* dealt with the question of whether the plaintiff in a stockholders' derivative suit had a right to trial by jury on legal issues even though before merger such a plaintiff had to proceed in equity because the law courts did not recognize stockholder derivative suits.

26. *Id.* at 538 n.10.

27. For a discussion of the equitable accounting cases, see text accompanying notes 30-41 *infra*.

cal] test"[28] will be discussed in the following section of this Note.

C. Analysis

Three alternative theories have been developed by those federal courts which have found a "complexity exception" to the seventh amendment right to trial by jury and were espoused by the defendants in *USF Litigation.* The Ninth Circuit dismissed each of these theories as being unsound and held the traditional historical test applicable, stating that "where legal relief is sought and legal rights are asserted, . . . the Seventh Amendment preserves the right to jury trial."[29] The following three subsections will analyze each of these theories and the Ninth Circuit's rationale for finding them inapplicable in *USF Litigation.*

Complex Cases—Analogous to an Action for an Equitable Accounting?

The defendants in *USF Litigation* argued that the complexity of the litigation rendered it analogous to an action for an equitable accounting where historically there was no right to a jury trial.[30] This argument actually purported not to be a claim

---

28. Wolfram, *supra* note 14, at 643.

29. *In re* U.S. Financial Sec. Litigation, 609 F.2d 411, 423 (9th Cir. 1979). The Ninth Circuit summarized the type of relief sought and rights asserted in USF Litigation as follows:

> The remedy which is sought in all of the consolidated cases is damages, which is the traditional form of relief granted by the common law courts. The substantive rights asserted are, in part, based on the common law principle of fraud and negligence. The statutory rights under the securities laws . . . merely create new legal duties.

Id.

30. In Kirby v. Lake Shore & M.S.R.R., 120 U.S. 130 (1887), the jurisdiction of equity was sustained even though the matter was cognizable at law on the ground that the complexity of the accounts between the parties rendered the legal remedy inadequate. "The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity." *Id.* at 134. In Fowle v. Lawrason, 30 U.S. (5 Pet.) 495 (1831), the Court stated the rule that "in transactions [not involving certain fiduciary relationships], great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction." *Id.* at 503. *Accord,* H.B. Zachry Co. v. Terry, 195 F.2d 185 (5th Cir. 1952); Quality Realty Co. v. Wabash Ry. Co., 50 F.2d 1051 (8th Cir. 1931); Goffe & Clarkener, Inc. v. Lyons Milling Co., 26 F.2d 801 (D. Kan. 1928), *aff'd on other*

that there is an exception to the seventh amendment for complex cases but instead was based upon the doctrine that traditional equity powers permit equity jurisdiction when the remedy at law is inadequate. The underlying rationale of defendant's attempt to analogize *USF Litigation* to the historical action for an equitable accounting is that when the so-called complexity of a case is such as to render it beyond the practical abilities and limitations of a jury, the remedy at law is inadequate and thus the case should be cognizable in equity. Thus, under this argument, the *Ross* test[31] is purported not to be a new test for the seventh amendment but simply a "restatement of . . . traditional equity powers."[32]

The Ninth Circuit rejected the *USF Litigation* defendants' attempted analogy in a very cursory fashion, simply stating that the argument

> attempts to have the legal or equitable nature of the case characterized as a whole rather than by examining the nature of the issues involved . . . . the issues presented here are of a legal nature. The fact that resolution of the issues will involve an examination of USF's accounts, and accounting procedures, cannot transform the case into an action for an equitable accounting.[33]

Although *USF Litigation* did not involve actions for an equitable accounting, the Ninth Circuit declined to deal specifi-

---

grounds, 46 F.2d 241 (10th Cir. 1931). *See also* Kilbourn v. Sunderland, 130 U.S. 505 (1889); Standard Oil Co. v. Atlantic Coast Line R.R. Co., 13 F.2d 633 (W.D. Ky. 1926), *aff'd on other grounds*, 275 U.S. 257 (1927).

31. *See* note 26 *supra* and accompanying text.

32. Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 66-67 (S.D.N.Y. 1978). In adopting this view of the third prong of the *Ross* test the *Bernstein* court stated that

> where the "remedy sought" necessarily involves determination of complexities that "only a court of equity can satisfactorily unravel," the "practical abilities and limitations of juries" are also necessarily involved and must be considered in evaluating the right to a jury trial. The adequacy of the legal remedy necessarily involves the jury and its competency to find the facts.

Id. at 66. This view was adopted by the district court in *USF Litigation*. *See In re* U.S. Financial Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977) (per Turrentine, D.J.), *rev'd*, 609 F.2d 411 (9th Cir. 1979) (Kilkinney, J., dissenting, based on the views expressed in the district court opinion). *Accord*, ILC Peripherals v. International Business Machs., 458 F. Supp. 423 (N.D. Cal. 1978).

33. *In re* U.S. Financial Sec. Litigation, 609 F.2d 411, 423 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1866 (1980).

cally with the distinguishing factors. Thus, a conclusion as to whether the Ninth Circuit was ultimately correct in rejecting the defendants' attempt to analogize *USF Litigation* to an action for an equitable accounting requires a brief discussion of the nature and present status of the equitable accounting cases, as well as the rationale for historically permitting equity to try those cases.

Historically, a plaintiff had the option of bringing "complex" cases for an accounting in equity or at law even though the claims underlying the demand for an accounting were strictly legal.[34] It is crucial to realize why the "complex" accounting cases were permitted to be brought in equity if the plaintiff so chose. Recourse to equity was not based upon a notion that they were too difficult for juries.[35] Rather, "the whole machinery of Courts of Equity [was] better adapted to the purpose of an account."[36] Blackstone went even further, stating that the existence of law and equity's concurrent jurisdiction in the accounting cases was solely due to equity's power to order discovery.[37] At any rate, the fact that the accounting cases could be brought in equity did not imply that jury incompetence was the reason for permitting the

---

34. In some cases the plaintiff had to proceed at law, there being no equity jurisdiction. *See, e.g.,* Fowle v. Lawrason, 30 U.S. (5 Pet.) 495 (1831) (lessor's action for an accounting of rent allegedly due had to be brought at law). When the underlying claims were equitable, equity jurisdiction was exclusive. *See, e.g.,* Newberry v. Wilkinson, 199 F. 673 (9th Cir. 1912) (suit for accounting against administratrix of a decedent's estate); Miller v. Weiant, 42 F. Supp. 760 (S.D. Ohio 1942) (action to compel directors to account for corporate assets); Williams v. Collier, 38 F. Supp. 321 (E.D. Pa. 1940) (suit by trustee in bankruptcy to void fraudulent transfer and impose a constructive trust).

The third group of cases afforded plaintiff the option of whether to proceed at law or in equity, even though the underlying claims were legal in nature. Plaintiff's ability to proceed in equity was based upon the complexity of the accounts between the parties. *See, e.g.,* Kirby v. Lake Shore & M.S.R.R., 120 U.S. 130 (1887); Fowle v. Lawrason, 30 U.S. (5 Pet.) 495 (1831); H.B. Zachry Co. v. Terry, 195 F.2d 185 (5th Cir. 1952); McNair v. Burt, 68 F.2d 814 (5th Cir. 1934); Goffe & Clarkener, Inc. v. Lyons Milling Co., 26 F.2d 891 (D. Kan. 1928), *aff'd on other grounds,* 46 F.2d 241 (10th Cir. 1931).

35. In the common law action of account the jury did not perform the actual accounting function. The jury would render a verdict that the defendant was obligated to account, at which point a court appointed auditor would settle the accounts between the parties. The jury would simply resolve disputed issues of fact arising before the auditor. Similarly, when equity took jurisdiction, a master would be appointed to perform the accounting function. *See Ex parte* Peterson, 253 U.S. 300 (1920); 2 J. STORY, EQUITY JURISPRUDENCE §§ 587, 590 at 5, 6 & 8 (14 ed. 1918).

36. 2 J. STORY, EQUITY JURISPRUDENCE § 591 at 9 (14 ed. 1918).

37. "But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every court in all matters of account." 3 W. BLACKSTONE, COMMENTARIES 437 (1768).

choice.

> At no time in history was the line dividing equity from law altogether—or even largely—the product of a rational choice between issues which were better suited to court or to jury trial . . . . jury trial (or court trial) was often merely the tail of the dog under a system where you had to take the whole dog.[38]

Since the merger of law and equity, the procedural barriers characteristic of the premerger law courts have been eliminated. It would seem that this should have eliminated the option of a plaintiff to proceed in equity or at law in the equitable accounting cases. However, in dictum, the Supreme Court suggested in *Dairy Queen* that the plaintiff may still have the option of bringing complex accounting cases in equity although with considerably more difficulty than before the law-equity merger; jury competency being the relevant factor in determining whether an accounting case is cognizable in equity.[39] The question of whether this option still exists does not appear to have been resolved by any court since the merger. The reason for this is probably based on the fact that federal courts favor the policy of giving either party a jury trial upon demand when the case presents issues so triable.[40]

As previously mentioned, the Ninth Circuit concluded that the defendants' attempt to analogize *USF Litigation* to the old equitable accounting cases was misplaced because it attempted to characterize the USF cases as a whole rather than character-

---

38. James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 661-62 (1963) (footnotes omitted).

39. [I]n order to maintain such a suit on a cause of action cognizable at law . . . the plaintiff must be able to show that the "accounts between the parties" are of such a "complicated nature" that only a court of equity can satisfactorily unravel them.
In view of the powers given to District Courts by Federal Rule of Civil Procedure 53(b) to appoint masters to assist the jury in these exceptional cases where the legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met.

369 U.S. at 478 (footnotes omitted).

40. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8.7, at 377 (1977). *See, e.g.*, Simler v. Connor, 372 U.S. 221 (1963).

ize each issue. There is no doubt that the *Beacon Theatres/ Dairy Queen* holding stated the general rule that the character of the issue and not the overall action is what controls. The Ninth Circuit declined, however, to deal specifically with the fact that the accounting cases were cognizable in equity based upon the "complexity" of the overall case.

Although the Ninth Circuit did not elaborate on the factors which distinguished *USF Litigation* from the historic equitable accounting cases, the Ninth Circuit's conclusion that the analogy was unsound was correct for several reasons. First, given the present uncertainty of a plaintiff's ability to bring an action for an equitable accounting when the underlying claims are legal, the Ninth Circuit was warranted on this basis alone in not finding the equitable accounting case analogous, as *USF Litigation* did not involve an action for an accounting; and even the *Dairy Queen* dictum only referred to accounting cases. Secondly, and perhaps more importantly, even if the accounting cases could be found to parallel *USF Litigation,* it is still clear that the plaintiffs in *USF Litigation* would have been entitled to the jury trial they demanded as the plaintiff in the old equitable accounting cases had the option of having trial by jury.

The final question to be resolved under the defendants' first argument is whether "complexity" is a basis for equity jurisdiction in non-accounting cases where legal rights are asserted and legal remedies sought. The answer is no.[41] "[M]ere complication

---

41. In United States v. Bitter Root Dev. Co., 200 U.S. 451 (1906), the United States sought relief in equity for the alleged removal and sale of a large amount of timber by means of an intricate conspiracy. The United States invoked equity jurisdiction because "by reason of the frauds and conspiracies . . . and the complications which have resulted therefrom, no plain, adequate, and complete remedy can be given . . . at law . . . ." *Id.* at 462. However, the Court held that the case was not cognizable in equity:

> The principal ground upon which it is claimed that the remedy at law is inadequate is really nothing more than a difficulty in proving the case against the defendants. The bill shows that whatever was done in the way of cutting the timber and carrying it away was done by the defendants as tort feasors and the various devices alleged to have been resorted to by the deceased, Daly, by way of organizing different corporations, in order to, as alleged, cover up his tracks, and to render it more difficult for the complainant to make proof of his action, does not in the least tend to give a court of equity jurisdiction on that account. It is simply a question of evidence to show who did the wrong and upon that point the fact

of facts alone and difficulty of proof are not a basis of equity jurisidiction."[42]

Thus, the defendants' contention that *USF Litigation* was analogous to the old equitable accounting cases was without merit. Had the Ninth Circuit accepted this argument, it would have been tantamount to finding that there is a "complexity exception" to the seventh amendment. Non-accounting cases which present legal issues and legal remedies are simply not triable in equity based upon the notion that there is no adequate remedy at law.

Ross v. Bernhard—*A Functional Interpretation of the Seventh Amendment?*

The second argument offered by the defendants in *USF Litigation* as a basis for finding that there is no right to a jury trial in complex cases was specifically based upon the *Ross* footnote.[43] Under this approach, *Ross* was claimed to establish a new functional test for when a litigant has a constitutional right to a jury trial. Thus, defendants claimed that the historical test has been abandoned in favor of a new test whereby the practical abilities and limitations of a jury are an additional factor to be considered in seventh amendment analysis.[44]

The Ninth Circuit rejected the notion that *Ross* established a new standard governing seventh amendment analysis, and gave several reasons why *Ross* should not be so construed. First, the Ninth Circuit stated that the *Ross* test was only dictum and thus not binding on federal courts. Undoubtedly, this assessment of the *Ross* test was correct. The Supreme Court did not even consider the practical abilities and limitations of jurors in reaching a decision in the *Ross* case itself. That is, the Supreme Court did not apply the third prong of this purported new test

---

could be ascertained as readily at law as in equity.

Id. at 472-73.

42. Curriden v Middleton, 232 U.S. 633, 636 (1914), *aff'g,* United States v. Bitter Root Dev. Co., 200 U.S. 451 (1906).

43. *See* note 26 *supra* and accompanying text.

44. This view of the *Ross* test was adopted in *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976), in which the Court was "of the opinion that the third part to footnote 10 in *Ross v. Bernhard* is of constitutional dimensions. It must be seen as a limitation to or interpretation of the Seventh Amendment." *Id.* at 105 (citation omitted).

in its analysis of the seventh amendment question in *Ross*.[45]

Secondly, as the Ninth Circuit stated, the Supreme Court would certainly not attempt to change the standard for constitutional analysis in a footnote. The Ninth Circuit reasoned that the historical test, having been applied throughout almost the entire history of the seventh amendment, would hardly be discarded without some type of reasoned analysis or cited authority supporting a new functional interpretation of the seventh amendment. There was neither in the *Ross* opinion.[46]

Although the Ninth Circuit correctly construed *Ross* as not intending an alteration of the seventh amendment right to trial by jury, the court incorrectly assessed the variance between the historical test and the purported new *Ross* test. The Ninth Circuit stated that application of the *Ross* test "would necessitate an examination of the whole case."[47] The Ninth Circuit believed that under the *Ross* test the whole case would have to be characterized as legal or equitable and thus application of the *Ross* test would be inconsistent with prior seventh amendment analysis which has always been based on the nature of the issue to be tried.[48]

However, application of the *Ross* test would not require a characterization of the overall case and, indeed, *Ross* prohibited such a characterization. Had *Ross* actually stated a new consti-

---

45. In *Ross* the question of jury competence was raised at every level. The district court had found that the jury was competent to deal with the issues. The appellate court questioned the jury's ability to resolve derivative suits "because of the exceedingly complex nature of many of these actions" but then stated that "the Seventh Amendment does not ask that we assess the suitability of a given type of litigation for jury trial." *See* Ross v. Bernhard, 275 F. Supp. 569, 570 (S.D.N.Y. 1967), *rev'd on other grounds*, 403 F.2d 909, 915 (2d Cir. 1968), *rev'd on other grounds*, 396 U.S. 531 (1970). However, the Supreme Court considered the claims asserted in *Ross* and found them to be "legal" without any mention of a jury's abilities to understand the issues. Implicit in this failure to consider the jury's competence in dealing with the complex issues presented by the *Ross* litigation was that the Supreme Court did not intend that jury competency be a factor in dealing with seventh amendment questions.

46. "[T]he footnote is so cursory, conclusory and devoid of cited authority or reasoned analysis that it is difficult to believe it could have been intended to reject such established historical practice or Supreme Court precedent." Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision-Making*, 70 Nw. U.L. Rev. 486, 526 (1975).

47. *In re* U.S. Financial Sec. Litigation, 609 F.2d 411, 426 (9th Cir. 1979).

48. *Id.*

tutional standard governing seventh amendment questions, that standard would still have required that each issue be evaluated in terms of the three factors comprising the *Ross* test. The sentence explained by the footnote stated that "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."[49] Thus, the question would be whether a given issue, otherwise legal, is beyond the practical abilities and limitations of a jury.

Although the *Ross* test is consistent with the historical test insofar as characterization is to be based upon the nature of the issue, there are major problems inherent in its application. The *Ross* Court gave no guidance as to whether the test is to be applied on a case by case basis or whether it is to be applied on a generic basis. Application on a case by case basis would require a court to characterize an issue as being beyond the jury's capabilities in each case. Application on a generic basis would require that a certain type of issue be generally characterized as beyond the capabilities of a jury.

Application of either method of characterizing an issue immediately leads to the problem of ascertaining the proper standards to be applied. When is an issue beyond the practical abilities and limitations of a jury? Characterization on a case by case basis would force courts to speculate before trial as to whether an issue is going to be too complex for jury resolution. This would lead to a great deal of inconsistency from case to case. A right guaranteed by the Constitution should not be dependent upon the exercise of such a broad discretionary power by federal court judges.[50] Indeed, one of the major purposes of the seventh amendment was to protect litigants from such an arbitrary exercise of power by federal court judges.[51] Much the same problem exists with a generic approach to characterizing an issue. Again, the problem lies in ascertaining what standard is to be applied. For example, are antitrust claims generally too complex for reso-

---

49. Ross v. Bernhard, 396 U.S. 531, 537-38 (1970).

50. Wolfram, *supra* note 15, at 644 (the *Ross* test raises "the spectre of federal judges using a disturbingly broad discretion in their determination of whether a jury ought to be interposed in particular cases.").

51. For an excellent discussion of the seventh amendment's historical background, *see* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

lution by a jury whereas tax claims are not? Where is the line to be drawn? The Supreme Court has never addressed, let alone resolved, any of these problems inherent in an attempt to apply the purported new *Ross* test governing seventh amendment analysis.

Finally, as the Ninth Circuit observed, the Supreme Court has addressed seventh amendment questions in depth on five occasions since the *Ross* decision. Each case was decided on the basis of the traditional historical test.[52] In none of these cases was there any mention of the *Ross* test or jury competence as being relevant in resolving the seventh amendment questions presented. Had the Supreme Court intended the *Ross* test to be of "constitutional dimensions" it most certainly would have applied the test in these later cases and perhaps resolved some of the problems inherent in any attempt to apply it.

It is not clear what the Supreme Court meant by the inclusion of the controversial footnote in the *Ross* opinion. However, the Ninth Circuit was justified in concluding that the Supreme Court did not intend that it be a new functional interpretation of the seventh amendment whereby there is some sort of complexity exception to the right to trial by jury.

Jury Trial—A Violation of Due Process in Complex Cases?

The final argument proffered by the defendants was based upon the due process clause of the fifth amendment. The defendants claimed that because of the complexity of *USF Litigation*, a jury could not make a rational decision and thus due process would be violated by permitting an incompetent fact-finder to render an irrational verdict.[53] The Ninth Circuit rejected this ar-

52. Curtis v. Loether, 415 U.S. 189, 194 (1974) ("[t]he Seventh Amendment . . . requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."); Pernell v. Southall Realty, 416 U.S. 363, 374-75 (1974) (seventh amendment "requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty."). *See also* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (historical test applied without any mention of abilities of juries or the *Ross* dictum); Lorillard v. Pons, 434 U.S. 575 (1978) (holding based on statutory grounds), *aff'g* 416 U.S. 363; Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 449 *aff'g* 416 U.S. 363 (1977).

53. The court in *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976), adopted this view as an alternative basis for striking the jury demands in that

gument, simply stating that a jury is not incompetent to decide complex cases. The Ninth Circuit refused to "accept the underlying premise of [defendants'] argument, 'that a single judge is brighter than the jurors collectively functioning together.' "[54] Furthermore, "[w]hether a case is tried to a jury or to a judge, the task of the attorney remains the same. The attorney must organize and assemble a complex mass of information into a form which is understandable to the uninitiated."[55]

Cases—As Complex as They First Appear?

Although not the basis of the Ninth Circuit's rejection of the defendants' due process argument, the Ninth Circuit discussed the many pretrial occurrences and procedural mechanisms by which cases, originally appearing overwhelmingly complicated, are simplified before they ever reach the jury.

> A motion under Fed. R. Civ. P. 12 may be used to test the sufficiency of an adversary's pleadings. The facts may become sufficiently clear on some issues to entitle a party to have judgment entered as a matter of law under Fed. R. Civ. P. 56. The parties may stipulate to the admissibility of evidence, or to the facts themselves, thus reducing the time necessary to present a case at trial. The trial court could also order separate trials on some of the claims or issues under Fed. R. Civ. P. 42(b). And, . . . many cases or issues may be settled prior to trial.[56]

Furthermore, Federal Rule of Civil Procedure 53(b) empowers a

---

case. The *Boise* court stated that trial by court was necessary "for the appearance and fact of fairness." *Id.* at 105.

54. *In re* U.S. Financial Sec. Litigation, 609 F.2d 411, 431 (9th Cir. 1979) (quoting Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 53 (1977)).

The Ninth Circuit also stated that had it been necessary to resolve the question of jury competency under the first two arguments propounded by the defendants, the court would have resolved the question the same way it did under defendants' due process claim. Implicit in this is that the Ninth Circuit would refuse to uphold the former option of a plaintiff to bring an action for an equitable accounting when the underlying claims are legal in nature. Furthermore, had the Ninth Circuit concluded that the *Ross* test was intended to be of constitutional dimension, the Ninth Circuit would simply have held that no case (or issue) is too complex for jury resolution, and would in effect continue to adhere to the traditional historical test.

55. *In re* U.S. Financial Sec. Litigation, 609 F.2d 411, 428 (9th Cir. 1979).

56. *Id.* at 428 (footnotes omitted).

judge to appoint a master to assist the jury with complicated issues,[57] and Federal Rule of Evidence 1006 permits the use of summaries of voluminous material in order to simplify the evidence presented at trial.[58]

Although the Ninth Circuit discussed all these considerations by which complex cases may be simplified for jury resolution, they were not the basis for the Ninth Circuit's rejection of the defendants' due process argument in *USF Litigation,* because the Ninth Circuit ruled "that the Seventh Amendment requires a jury trial in even the most complex cases at law . . . ."[59]

The defendants' due process argument was rejected by the Ninth Circuit on the ground that "a jury is a competent fact-finder in complex cases."[60] Thus, there is no due process exception to the seventh amendment. The Ninth Circuit did "not believe any case is so overwhelmingly complex that it is beyond the abilities of a jury."[61] "Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equalled in other areas of public service."[62]

To a large extent, the Ninth Circuit's rejection of the due process contention was based upon the Court's own confidence in the jury system. The Ninth Circuit ackowledged, there has been little substantive research conducted dealing with the practical abilities of jurors.[63]

---

57. FED. R. CIV. P. 53(b), *construed in In re* U.S. Financial Sec. Litigation, 609 F.2d at 428.

58. FED. R. EVID. 1006, *construed in In re* U.S. Financial Sec. Litigation, 609 F.2d at 428.

Furthermore, the *Manual for Complex Litigation,* developed by the Federal Judicial Center, provides various suggestions as to how the federal district court judge can manage and direct complex litigation. The *Manual* specifies that the trial judge must not infringe a litigant's right to trial by jury. "Caution: Make sure that the requirements for jury trial enunciated in *Beacon Theatres, Inc. v. Westover,* or *Ross v. Bernhard,* are not violated in ordering trial of a separate issue." FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION 139-40 (1977).

59. *In re* U.S. Financial Sec. Litigation, 609 F.2d 411, 428 n.58 (9th Cir. 1979).

60. *Id.* at 427.

61. *Id.* at 432.

62. *Id.* at 430.

63. *Id.*

However, in the Ninth Circuit's conclusion in *USF Litigation*, the court did note the procedural devices available to the federal courts which, in effect, render the due process claim without foundation.[64] In any trial where a verdict has been returned against the weight of the evidence, where damages are unreasonably high, or where the trial was unfair for some reason, the trial judge has the power under Federal Rule of Civil Procedure 59 to grant a new trial.[65] Also, a judgment notwithstanding the verdict may be granted under Federal Rule of Civil Procedure 50 where there is insufficient evidence to support the jury's verdict.[66] These procedural safeguards protect litigants from the possibility of an "irrational verdict" in any trial.

In view of the fact that the jury system has been part of American jurisprudence for its entire history, it would certainly be highly questionable for the Ninth Circuit to suddenly assert that trial by jury may violate a litigant's right to due process of law, particularly in light of the fact that a litigant who does demand trial by jury is guaranteed the right by the seventh amendment. Thus, the Ninth Circuit was completely justified in concluding that the fifth amendment due process clause does not provide a "complexity exception" to the seventh amendment right to trial by jury.

D. Conclusion

The Court of Appeals for the Ninth Circuit was clearly warranted in rejecting the defendants' effort to deny the plaintiffs their seventh amendment right to trial by jury. Adoption of any one of the three theories advanced by the defendants would have had the effect of establishing some sort of "complexity exception" to the seventh amendment guarantee. Adoption of any one of the three theories would require trial judges to make a speculative and discretionary decision as to when a case is going to be "beyond the practical abilities and limitations of juries" and, as a result, when a litigant has a constitutional right to trial by jury. A constitutional right should not be relegated to such a

64. *Id.* at 432.

65. *Id.* (construing Fed. R. Civ. P. 59).

66. *Id.* (construing Fed. R. Civ. P. 50); Fountila v. Carter, 571 F.2d 487, 489-90 (9th Cir. 1978) (judgment *n.o.v.* may be granted when "the evidence permits only one reasonable conclusion as to the verdict.").

position in light of contrary Supreme Court precedent and the fact that the seventh amendment was intended to protect litigants from just that type of discretionary power in the hands of federal court judges.

*Curtis E. Blystone**

V. OTHER DEVELOPMENTS IN CONSTITUTIONAL LAW

In *Zaslowsky v. Board of Education,* 610 F.2d 661 (9th Cir. Dec., 1979), public schoolteachers alleged that a desegregation plan requiring that the racial and ethnic makeup of teachers at each school in the district reflect the racial and ethnic makeup of teachers in the district as a whole violated their equal protection rights. The plan was instituted as a result of notification from the Office of Civil Rights that a previously instituted plan did not comply with Title VI of the Civil Rights Act of 1964. The plan called for the involuntary transfer of several hundred teachers. Plaintiffs based their equal protection argument on the fact that the plan took race into account.

Relying on *United States v. Montgomery County Board of Education,* 395 U.S. 225 (1969) and its progeny, the court ruled that in assigning teachers, a school district need not be "color blind." The court also stated that race-conscious plans are valid even in the absence of *de jure* segregation. *Regents of the University of California v. Bakke,* 483 U.S. 265, 352 (1978); *United Jewish Organizations v. Carey,* 430 U.S. 144 (1977); *McDaniel v. Barresi,* 402 U.S. 39 (1971). The court also noted the Supreme Court's approval of the adoption of prescribed ratios by a school board in *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 16 (1971).

In *Diaz v. San Jose Unified School District,* 612 F.2d 411 (9th Cir. Nov., 1979), plaintiffs alleged that the school district maintained racially imbalanced schools. The district court found that the schools were indeed segregated as a result of the district's acts, but that the school district did not act with "segre-

---

* Third Year Student, Golden Gate University School of Law.

gative intent," because it had followed a race neutral "neighborhood school policy." The district court held that a strict adherence to such a policy was sufficient to dispell inferences of segregative intent that arose from plaintiffs' evidence.

The Ninth Circuit held that evidence of even the strictest adherence to a neighborhood policy is not determinative of the absence of a forbidden purpose. The court pointed out that under such a policy of building schools in a racially segregated neighborhood could be motivated by a discriminatory intent. *See Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 20-21. The court remanded the case for further factual determinations.

In *United States v. Hicks,* 625 F.2d 216 (9th Cir. April, 1980), defendants argued that state statutes prohibiting carnal knowledge of a female under the age of sixteen years violated equal protection guarantees in that it established an impermissible gender based classification. Under the statute, only male participants were punishable. Although admitting that the statute classified according to gender, the government argued that only males could be perpetrators, and only females victims, of the crime of carnal knowledge.

Relying on *Craig v. Boren,* 429 U.S. 190 (1976), the court of appeals held that in order to survive attack, a statute which classifies according to gender must serve an imporant governmental purpose and must be substantially related to the achievement of that purpose. The government asserted that the statute furthered the goals of preventing teenage pregnancies and injuries to young women. The government's only evidence on the relationship between the purpose and the penalties were the assertions that "only women could get pregnant," and that "there seems to be evidence that women are far more likely to suffer physical damage" than men of the same age. The government produced no evidence that suggested punishing only males furthered either purpose.

The court held that by failing to produce any such evidence, the government failed to meet its burden of proving a substantial relation between the stated goals and the gender based assignment of the roles of "victim" and "perpetrator."

In *Suzuki v. Yuen,* 617 F.2d 173 (9th Cir. April, 1980), the plaintiff challenged the constitutionality of Hawaii's mental

heath laws. Plaintiff argued that a statute which allows for the involuntary commitment of a person who is "mentally ill . . . and is dangerous to property" but not necessarily to himself or other persons was an unconstitutional curtailment of civil liberties. Noting that the statute allowed commitment of any person "inflicting, attempting or threatening imminently to inflict damage to *any* property," the court of appeals agreed. The court cited *Humphrey v. Cady,* 405 U.S. 504, 509 (1972) for the rule that a state may not involuntarily commit a person unless the potential of that person doing harm to himself or others justifies such a curtailment of liberty. The court also cited *Addington v. Texas,* 441 U.S. 418 (1979) for the rule that the individual's liberty interest must be heavily weighed against society's interest to determine if a commitment statute is valid. The court hypothesized that under Hawaii's statute, a person could be involuntarily committed for threatening to shoot a neighbor's dog that had strayed on his property. The court held that society's interest in protecting *any* property did not outweigh the individual's liberty interest.

Hawaii's statute also permitted involuntary commitment for a "diagnostic examination and evaluation" of a person who refuses to submit to such an examination by a physician and "there is sufficient evidence to believe that the allegations of the [commitment] petition are true." The district court held this provision violated the patient's fifth amendment right to remain silent. Finding that the statute imposed incarceration because the patient is dangerous, and not as punishment for refusing to talk, and noting that evidence that the patient is dangerous is also required by the statute, the court held that this portion of the statute was valid under the Constitution. The court relied on *Baxter v. Palmigiano,* 425 U.S. 308 (1976), which upheld a prison disciplinary procedure whereby a prisoner's refusal to speak could be used as evidence against him because under the regulation such a refusal, standing alone, was not sufficient evidence to penalize the prisoner. The court also stated that if the district court's decision were upheld, any subject of a commitment petition could avoid commitment simply by remaining silent.

The court of appeals also considered the constitutionality of a state statute which allowed involuntary commitment of a person who is "dangerous" but did not require the danger to be imminent or substantial. The court struck down this portion of

the statute as a violation of the holding in *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated and remanded for a more specific order*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (E.D. Wis.), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1818 (E.D. Wis. 1976), "[t]hat the proper standard is that which requires a finding of *imminent* and *substantial* danger as evidenced by a recent overt act, attempt or threat." 438 F. Supp. at 1110.

The court of appeals also reversed the district court holding that the need for the five day evaluation confinement be proved beyond a reasonable doubt. The court relied on *Addington* which rejected the argument that the need for civil commitment be proved beyond a reasonable doubt, and held that the proof must be greater than that required in other types of civil suits.

In *Clark v. Chasen*, 619 F.2d 1330 (9th Cir. May, 1980), plaintiff, a female employee of the United States Customs Service, filed a formal complaint with the Customs Service alleging that she was treated differently than the man who had previously held her position. She later left the Service and filed a disability claim based on an inability to continue working. The Service informed plaintiff that it had tentatively found that her employment discrimination charge was unfounded, and that she had a right to a hearing at which she could be represented by counsel. Immediately prior to the scheduled hearing, the plaintiff requested a continuance. This request was denied. Plaintiff thereafter refused to take part in the hearing, and her complaint was cancelled for failure to prosecute. Plaintiff then brought suit in federal district court. This action was dismissed for failure to exhaust administrative remedies.

The court examined the legislative history of the Equal Employment Opportunity Act of 1972 (the Act) and discovered that the Act was passed in an attempt to correct what Congress perceived as an "abysmal record in [governmental] minority employment," and past failures to deal administratively with discrimination claims by federal employees. The court found that Congress wished to change the practice of giving each federal agency the power to police its own employment practices.

Citing *Chandler v. Roudebush*, 425 U.S. 840 (1976), the court noted that the Act provided for a trial *de novo* in federal court for those who had employment discrimination complaints

arising in *private* employment. The *Clark* panel held that there was no reason why federal employees should be more heavily burdened than private employees in bringing discrimination suits, and cited *Grubbs. v. Butz*, 514 F.2d 1323 (D.C. Cir. 1975), which held that the legislative intent would be frustrated by requiring federal employees, but not private employees, to exhaust administrative remedies before bringing suit under the Act. The court therefore reversed the district court, and remanded for a trial *de novo* in the district court, noting that the administrative record could be admitted as evidence at the new trial.

In *In re Paris Air Crash,* 622 F.2d 1315 (9th Cir. June, 1980), the court considered whether the rule in California that punitive damages are not available in wrongful death actions violates the equal protection clause. The case arose out of an airplane crash. Several of the wrongful death actions brought against the airline company included claims for punitive damages. The wrongful death actions were consolidated and transferred to the federal district court in California, and it was determined that California law would apply. The district court held that although California courts of appeal have held that punitive damages are not available in wrongful death actions under California law, such a rule violates equal protection guarantees of both the state and federal constitutions because it establishes an improper distinction between plaintiffs in wrongful death suits and those bringing other tort actions. Defendants appealed, and the Ninth Circuit reversed.

The court first considered whether the California rule violates the federal equal protection clause. Relying on *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the court of appeals held that the relationship between the governmental purpose of limiting liability and the class established by the California rule was rational, and that under the Constitution no greater relationship was required. The court specifically refused to apply a middle-tier analysis.

In rejecting plaintiff's claim that the California rule violated the California Constitution, the court distinguished *Cooper v. Bray*, 21 Cal. 3d 841, 582 P.2d 604, 148 Cal. Rptr. 148 (1978), and *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1975), on the ground that those cases denied a large class of people any recovery whatsoever. The court pointed out that

under the California rule, substantial compensatory damages were available in wrongful death cases.

The court also rejected the district court's holding that a state rule which allows punitive damages for injuries to property while disallowing such damages under the state constitution because the "classification . . . advance[s] a discernible purpose in a rational manner."

In *California Medical Association v. Federal Election Commission*, 641 F.2d 619 (9th Cir. May, 1980) (en banc), the court considered the constitutionality of certain provisions of the Federal Election Campaign Act, 2 U.S.C. §§ 432-442, 451-455 (1976) (amended 1976 & 1980) (the Act). Plaintiffs, the California Medical Association and its political committee affiliate, argued that the Act's limitations on contributions by the medical association to its affiliate was an infringement on their first amendment rights to speech and political expression. Plaintiffs also argued that the requirement that support given by the medical association to a multicandidate political committee must be counted toward the dollar limit on such contributions, even though contributions by labor unions and corporations were not so limited, was unconstitutional. The court of appeals rejected plaintiffs' claims.

The court found the limitations imposed by the Act on the right of association minimal. The court pointed out that the Act did not limit in any way the medical association's right to collect and expend money or efforts to elect any particular candidate. The Act does not limit efforts to *directly* influence others to vote for particular candidates, but only limits the amounts that can be given to a multicandidate political committee. The court relied on *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and *First National Bank v. Bellotti*, 435 U.S. 765 (1978), for the proposition that restrictions on contributions to multicandidate committees were consistent with the Constitution. The court noted that contributions to such committees constitute "potential speech dependent upon the recipient for its ultimate articulation," and limitations on such "potential speech" do not "significantly diminish the effectiveness or the quantity of political speech." The court stated that because the intrusion by the Act on the right to political speech was slight, only the absence of a "discernible, important, and legitimate policy of the Congress" could result in a finding of unconstitutionality. *See Buckley*.

The court also rejected plaintiff's argument that the California Medical Association was more limited in their right to political expression than were corporations and labor unions, pointing out that corporations and labor unions are flatly prohibited from directly spending money to influence federal elections.

Dissenting, Judges Choy and Hug argued that the Act was unconstitutional as to its treatment of unincorporated associations.

In a separate dissenting opinion, Judge Wallace stated that the restriction on contributions to a campaign committee were sustainable under the first amendment only if 1) the government's interest were greater than the group and individual interests in freedom of speech and association, and 2) the restriction and unincorporated associations but not labor unions and corporations were "closely tailored" to achieve a stated governmental interest. Judge Wallace would have held that the Act places "direct and substantial restraints on the quantity" of the associations "political speech" (quoting *Buckley v. Valeo*, 424 U.S. at 39), and that substantial and impermissable restraints were placed on the association member's freedom of association.