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# The Extraordinary Majority Rule in Municipal Bonding: Westbrook v. Mihaly

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# THE EXTRAORDINARY MAJORITY RULE IN MUNICIPAL BONDING:

## *WESTBROOK v. MIHALY*[1]

At a special election in November, 1969, the voters of San Francisco gave greater than a simple majority to two propositions.[2] These propositions sought authorization to incur local general bonded indebtedness of $9,998,000 for park and recreation improvements and $5,000,000 for new school construction and modernization of older facilities.[3] Although simple majorities were received by both propositions, neither received the two-thirds majority required by the California Constitution[4] and thus were not certified as approved.[5] The petitioners, all of whom were affirmative voters,[6] demanded that the respondent, the San Francisco Registrar of Voters, certify the propositions as approved and commence offering the bonds for sale. When the registrar refused, the petitioners instituted suit to have the California constitutional provision declared violative of the federal consti-

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[1] 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970), *petitions for cert. filed*, 39 U.S.L.W. 3171 (U.S. Sept. 2, 1970) (No. 641) and 39 U.S.L.W. 3204 (U.S. Sept. 21, 1970) (No. 730). The opinion is by the court. Justice Mosk, joined by Justice Peters, concurred in part and dissented in part.

[2] Proposition "A" received 56.8% affirmative majority vote and Proposition "B" received 52.3%. *Id.* at 772 n.3, 471 P.2d at 491 n.3, 87 Cal. Rptr. at 843 n.3.

[3] School construction and modernization was primarily for the Hunters Point area of San Francisco, which is largely a minority area. *Id.* at 772, 471 P.2d at 491, 87 Cal. Rptr. at 843.

[4] The court considered former CAL. CONST. art. XI, § 18, now renumbered CAL. CONST. art. XIII, § 40 (1970), which provides:

> No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same. . . .

[5] CAL. EDUC. CODE ANN. § 21754 (West 1969) provides that the school district governing board shall certify the results to the board of supervisors if it appears from the certification of election results that two-thirds of the votes cast favored issuance of the bonds.

CAL. GOVT. CODE ANN. § 29910 (West 1968) provides that the county board may adopt a resolution providing for bond issuance if the bonds are authorized at an election. This implies a clerk/registrar certifying the results of the election in order to be authorized.

CAL. GOVT. CODE ANN. § 43614 (West 1966) provides for city bond issuance if two-thirds of the electors vote affirmatively. This, too, implies that an election official must certify the results in order to validate the findings.

[6] 2 Cal. 3d at 772-73, 471 P.2d at 491, 87 Cal. Rptr. at 843.

tutional guarantee of the equal protection of the laws.[7] They further sought a peremptory writ to command the registrar to certify the propositions as approved and to offer the bonds for sale.[8]

The California Supreme Court exercised original jurisdiction[9] and found that this particular extraordinary majority provision discriminatorily classified the petitioners, and thus denied them equal protection of the laws by giving their votes less value than those of negative voters. The court declined, however, to grant affirmative relief by peremptory writ of mandate, thus giving solely prospective effect to its decision.[10]

The first issue faced by the court was whether or not the two-thirds requirement classified the petitioners at all. The state argued that no citizens were classified in any manner whatsoever, because no one was objectively identifiable by the California constitutional provision.[11] Prior to the election one could not distinguish any separate class of persons to be treated differently from any other. However, even though the classification was not based upon generally impermissible characteristics such as race,[12] indigence,[13] occupation,[14] political party association,[15] religion,[16] or property ownership,[17] the voters were nonetheless classified by the manner in which they voted (either "Yes" or "No" on the particular issue).[18]

The United States Supreme Court has declared that mere classification does

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[7] U.S. CONST. amend. XIV, § 1 states in part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[8] 2 Cal. 3d at 773, 471 P.2d at 491-92, 87 Cal. Rptr. at 843-44.

[9] *Id.* at 773, 471 P.2d at 491, 87 Cal. Rptr. at 843. CAL. CONST. art. VI, § 10 provides in part: "The Supreme Court . . . [has] original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition."

[10] 2 Cal. 3d at 800-01, 471 P.2d at 512-13, 87 Cal. Rptr. at 864-65. Justices Mosk and Peters dissented as to this issue and would have granted the writ.

[11] *Id.* at 782, 471 P.2d at 498, 87 Cal. Rptr. at 850.

[12] Hunter v. Erickson, 393 U.S. 385 (1969).

[13] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[14] Carrington v. Rash, 380 U.S. 89 (1965).

[15] Williams v. Rhodes, 393 U.S. 23 (1968).

[16] Sherbert v. Verner, 374 U.S. 398 (1963).

[17] City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

[18] The court concluded:

> It appears obvious to us that section 18 implicitly creates two classes of voters: those who favor a proposed bond issue and those who oppose it. It is not essential that a classification appear in explicit terms on the face of the law. Nor is it necessary that those who are allegedly disadvantaged by the classification either constitute a class which is 'objectively identifiable' prior to the election or that they share in common other characteristics, such as race, economic status or residence. It is sufficient that the class emerge from its inchoate state at the time of the election and that it be defined by the act of voting affirmatively on a bond issue proposition. The equal protection clause extends to the shared political interests of groups otherwise random and diverse.

2 Cal. 3d at 782, 471 P.2d at 498, 87 Cal. Rptr. at 850.

not of itself deprive a group of equal protection.[19] Only those classfications which in fact discriminate need be examined. Therefore, the California Supreme Court reached the second issue: Since there was a classification, was it discriminatory? The state argued that regardless of which way persons intended to vote on any particular issue, no one was disenfranchised and all votes were fully counted. However, in the *Westbrook* situation, there are definite adverse consequences to those who are in favor of a proposition. The two-thirds requirement in fact diminishes the power of the "Yes" voters because their number need be twice as great as that of the "No" voters in order to prevail. Thus, the "No" voters are a favored class, based solely upon the way in which they cast their ballots. This is a case of the state constitution discriminating against the "Yes" classification of voters.[20]

A similar situation was found in *Rimarcik v. Johansen.*[21] A United States district court considered the constitutionality of a Minnesota statute requiring a 55% favorable vote for adoption of a home rule charter.[22] The court found that the voting percentage requirement unfairly classified voters because

> [t]he efficacy of the 'Yes' vote is effectively diminished by the 55% voter approval requirement. The basis for the discrimination is that the statute, in granting the franchise in the manner it does, ascribes a value to the vote according to the voter's preference on the issue to be decided in the election.[23]

In *Williams v. Rhodes,*[24] an Ohio elections statute required established political parties to file voter signatures equal to only 10% of the total number of ballots cast in the last gubernatorial election in order to secure a position on the ballot, whereas new parties needed 15%. The United States Supreme Court held that the statute violated the equal protection clause because it classified citizens either on the basis of political party association or by the candidate which they wanted to support. Although that case dealt with an election of a governmental representative, the classification itself was very similar to that in the *Westbrook* case. In *Westbrook*, "No" voters needed only 33-1/3% of the total votes cast to prevail on the bond issue whereas "Yes" voters needed 66-2/3%. Thus, the affirmative voters in *Westbrook* and the new political party voters in *Williams* were required to manifest a greater voting percentage than the other classifications.

The California Supreme Court found that there was a classification of voters by the two-thirds requirement and that the classification discriminated against the "Yes" voters by favoring the "No" voters. It was thus faced with

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19 Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

20 2 Cal. 3d at 782-83, 471 P.2d at 499, 87 Cal. Rptr. at 851.

21 310 F. Supp. 61 (D. Minn. 1970).

22 A home rule charter is a document issued by the state which outlines the conditions under which a city or other unincorporated body may organize to establish self-government over its own local matters.

23 310 F. Supp. 61, 68 (D. Minn. 1970).

24 393 U.S. 23 (1968).

its third issue: Which test was applicable to determine whether or not the the discriminatory classification violated the equal protection clause of the Fourteenth Amendment?

Two tests have been used by the United States Supreme Court to evaluate discriminatory classifications for compliance with the Constitutional requirement of equal protection under the law. These alternatives are the traditional "rational relationship" test[25] and the more recent "compelling state interest" test.[26]

The traditional test generally holds that a state statute will be set aside only if it bears no rational relationship to a legitimate state end. The Supreme Court applied this test in *McGowan v. Maryland*,[27] where the statute in question was a "Sunday Closing Law" which the Court found was rationally related to the state's objective of providing for the health of its populace and enhancing the recreational atmosphere of the day. The Court there stated that the Fourteenth Amendment

> permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard [of equal protection] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.[28]

In *Kotch v. Board of River Port Pilot Commissioners*,[29] apprenticeship requirements for river pilot licenses were upheld because the statutory discrimination did bear some rational relation to the regulated activites.[30] The traditional rule might be interpreted to mean that states are benefited by a presumption of constitutionality. Justice Black has proclaimed that state statutes do "not violate the Equal Protection Clause so long as these distinctions and discriminations are not 'irrational', 'irrelevant', 'unreasonable', 'arbitrary', or 'invidious'."[31]

The "compelling state interest" test has been applied to two factual categories: suspect classification (such as racial criteria) and fundamental interests (such as voting rights).[32] The "suspect classification" category deals with classifications which by their nature are arbitrary and invidious. In an early leading case, *Yick Wo v. Hopkins*,[33] the application of a building and

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[25] McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 564 (1947).

[26] McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969); Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

[27] 366 U.S. 420 (1961).

[28] *Id.* at 425.

[29] 330 U.S. 552 (1947).

[30] *Id.* at 564. Both *McGowan* and *Kotch* dealt with purely regulatory laws.

[31] Harper v. Virginia Bd. of Elections, 383 U.S. 663, 673-74 (1966) (dissenting opinion).

[32] Westbrook v. Mihaly, 2 Cal. 3d 765, 784-85, 471 P.2d 487, 500, 87 Cal. Rptr. 839, 852.

[33] 118 U.S. 356 (1886).

occupation code to exclude Chinese was invalidated because it was discriminatorily based upon national origin. And, although decided by other criteria, *McDonald v. Board of Elections Commissioners*[34] designated wealth and race as two factors which independently rendered a classification highly suspect and therefore demanded a much more exacting standard of judicial review than the traditional test.[35]

The "fundamental interests" situation has often swallowed up "suspect classification" because so many cases of discriminatory classification involve restrictions placed upon the fundamental freedoms[36] guaranteed by the United States Constitution.[37]

Although the phrase "compelling state interest" was used in the 1963 case of *Sherbert v. Verner*,[38] it was not designated as a guideline until 1969, in *Shapiro v. Thompson*.[39] Nevertheless, its principles had been previously formulated, discussed and applied for many years, with special attention being devoted to them by the Supreme Court during the reapportionment period.[40] In *Reynolds v. Sims*,[41] the Court dealt with the malapportionment of the Alabama legislature and stated that when a state denied the franchise, careful and meticulous scrutiny was required to determine if it was necessary to further a valid state interest.[42] In *Carrington v. Rash*,[43] the Court again dealt with the right to vote and determined that conclusive residency presumptions made for "some remote administrative benefit to the State"[44] were not sufficiently compelling to restrict the franchise. In *Kramer v. Union Free School District*,[45] the reason for the close and exacting examination of state statutes was given: the right to vote in a free and unimpaired manner is preservative of other basic civil and political rights. In *Kramer*, Chief Justice Warren stated

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34 394 U.S. 802 (1969).

35 *Id.* at 807.

36 Fundamental freedoms is a somewhat vague term, but includes at least the first amendment freedom of religion as demonstrated in Sherbert v. Verner, 374 U.S. 398 (1963); the right to vote as demonstrated by the reapportionment cases, Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962); *See also* Kramer v. Union Free School-Dist., 395 U.S. 621 (1969) and Carrington v. Rash, 380 U.S. 89 (1965); perhaps even the right to inter-state travel, Shapiro v. Thompson, 394 U.S. 618 (1969); *but see* the strong dissent by Justice Harlan, *id.* at 659.

37 *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 30, 39 (1968) where the issue of invidious discrimination becomes intertwined with the fundamental right to vote. *See also* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966).

38 374 U.S. 398, 406 (1963).

39 394 U.S. 618 (1969).

40 This period began with Baker v. Carr, 369 U.S. 186 (1962).

41 377 U.S. 533 (1964).

42 *Id.* at 562.

43 380 U.S. 89 (1965).

44 *Id.* at 96.

45 395 U.S. 621 (1969).

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.[46]

This test raises the question, is the statutory classification necessary to promote a valid and compelling state interest? The *Kramer* case demonstrates the division of the test into its two separate components: 1) whether the discrimination is necessary to promote the state interest, and 2) whether the state interest is compelling.[47] It is this two part distinction that demonstrates the relationship between the traditional test and the compelling state interest test. Both tests ask if the classification is rational and relevant, but the compelling state interest test goes far beyond and inquires if the classification is *necessary* to implement the state purpose. It also requires that the state interest be a most powerful and compelling one. The first component, the necessity requirement, involves the search for a less objectionable method by which the state's purpose may be achieved. As stated in *Sherbert v. Verner*,[48] it is "incumbent upon [the state] to demonstrate that no alternative forms of regulation would [achieve the intended state interest] without infringing [constitutional] rights."[49] The *Kramer* case illustrates the necessary tailoring and the exacting standard of precision which is required when dealing with the franchise.[50] A New York statute limited the franchise in certain school district to owners or lessees of taxable realty plus parents or guardians of children in public schools. This was intended to limit the franchise to persons primarily interested in the elections. The Court considered the contention that this statute excluded persons honestly interested in educational standards and programs and who were intimately affected by school board decisions as reflected in the price of goods and services in the community[51] and thus was not sufficiently tailored to comply with the necessity requirement. In *Harper v. Virginia Board of Elections*,[52] a poll tax requirement was invalidated with the Court emphasizing that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."[53] Here, the tailoring of the statute was much too broad because the tax requirement was not at all germane to the voter's ability to participate intelligently in the election process.

Often times, the difficulty in applying the equal protection clause standards

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[46] *Id.* at 626-27 (footnote omitted).

[47] *Id.* at 632 n.14.

[48] 374 U.S. 398 (1963).

[49] *Id.* at 407.

[50] 395 U.S. 621, 639 (1969) (Stewart, J., dissenting).

[51] *Id.* at 630. The level of property taxes affects non-property owners because the rise in property taxes causes businesses to charge more for their products and residents to demand more for their services in order to offset the tax increase.

[52] 383 U.S. 663 (1966).

[53] *Id.* at 670.

(traditional versus compelling state interest) does not stem from the differences of opinion as to what the specific tests are.[54] Instead, the difficulty arises when determining which test fits a particular fact situation.

On the one hand there is the narrow interpretation proposed by the state interests in *Westbrook*. This viewpoint contends that the fundamental rights test applies only if the right to vote is completely denied and if the denial is based upon objectively indentifiable characteristics such as race, creed, economic status, or geographical location.[55] The state argued that the right to vote was not involved at all in *Westbrook* because voting on a bond issue is only a procedural step in an administrative process[56] to authorize a particular form of indebtedness, whereas voting rights only apply to elections of public officials.

On the other hand, the petitioning voter relied upon a broad interpretation. This viewpoint contends that it is the right to vote itself that is sacred, and emphasizes that this right is to be protected regardless of the manner in which the vote is affected, either by dilution or denial. The petitioner argued that he did not claim the right to vote on all issues of governmental expenditures, but that when the electorate is given that privilege, it must be in accord with the equal protection clause. He further argued that a dilution causes as much injury as an outright denial because the dilution denies the voter an effective voice in governmental affairs which substantially affect his life.[57]

These two opposing viewpoints may best be summarized by labeling them the *"Bogert"* view for the state and the *"Lance"* view for the petitioner.

In *Bogert v. Kinzer*,[58] the qualified but unsuccessful electors in a municipal bond election contended that the *Idaho* constitutional provision[59] which required a two-thirds majority vote for issuance of general obligation bonds by subdivisions of the state government was unconstitutional as violative of the equal protection clause of the United States Constitution. The

[54] *But see* Shapiro v. Thompson, 394 U.S. 618, 659-62 (1969) (dissenting opinion) where Justice Harlan argued against the use of the compelling state interest test when dealing with fundamental rights. However, Justice Harlan was arguing to affirm state restrictions on welfare because food, welfare, and other necessities of life were not fundamental rights as he saw them (*e.g.*, rights specifically guaranteed in the Constitution). In *Westbrook*, however, the right to vote is clearly a fundamental right. Justice Harlan would argue that the overextension of the fundamental rights category should be cured by eliminating it and handling such deprivations under the due process clause instead.

[55] In *Westbrook*, the identifiable characteristic was the "Yes"-"No" classification. 2 Cal. 3d at 782-83, 471 P.2d at 498-99, 87 Cal. Rptr. at 850-51.

[56] *Id.* at 785-86, 471 P.2d at 501, 87 Cal. Rptr. at 853.

[57] *Id.* at 773, 783-84, 471 P.2d at 491, 499-500, 87 Cal. Rptr. at 843, 851-52. *But see* Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

[58] 465 P.2d 639 (Idaho 1970).

[59] IDAHO CONST. art. 8, § 3 states that no subdivision of the state may incur any indebtedness exceeding the income and revenue provided for that year without the assent of two-thirds of the qualified electors at a special election. 465 P.2d at 640.

Idaho Supreme Court opinion reviewed the cases from *Baker v. Carr*[60] to *Cipriano v. City of Houma.*[61] The court analyzed these cases by reference to two primary inquiries: First, was the case involved with a denial or a mere dilution of the vote, and second, was it an election of a governmental representative or merely a referendum. After a lengthly analysis, the court concluded that voters for representatives may not have their right to vote denied nor the value of their vote diluted because of geographical location, but that voters in other decisional processes, such as general obligation bond and revenue bond elections, are protected only from the denial of the right to vote, and then only if that denial is without a rational basis.[62] Several commentators have followed this same line of reasoning, and argued that the compelling state interest test does not apply to decisional elections (as opposed to elections of governmental representatives) where there is a mere dilution of voting power.[63]

The "*Lance*" viewpoint is illustrated in the case of *Lance v. Board of Education.*[64] In that case, the West Virginia constitution[65] required a three-fifths (60%) majority to pass general obligation bonds when the cost would exceed the income and revenues of the year for the municipality. When challenged, the West Virginia Supreme Court held that the state constitutional provision was violative of the equal protection clause of the federal Constitution. In analyzing the apportionment cases stressing "one man, one vote", the court noted that most of the cases involved elections of legislative representatives. But the court went behind these surface distinctions to the theory underlying the decisions. The court seemed most concerned with the citizen's interest in maintaining the effectiveness of his vote. It was emphasized in *Gray v. Sanders*[66] that:

> [I]f a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote. . . .[67]

Although concerned with the type of election, the Court concentrated on the value of one person's vote in relation to that of another. Heavy reliance

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60 369 U.S. 186 (1962).

61 395 U.S. 701 (1969).

62 465 P.2d at 645.

63 *See, e.g.*, Note, 7 HOUST. L. REV. 500 (1970); Note, 11 B.C. IND. & COM. L. REV. 553 (1970).

64 170 S.E.2d 783 (W. Va. 1969), *cert. granted*, 397 U.S. 1020 (1970).

65 W. VA. CONST. art. X, § 8; 170 S.E.2d at 784.

66 372 U.S. 368 (1963).

67 *Id.* at 379 (citation omitted).

was placed upon *Cipriano v. City of Houma,*[68] a class action to enjoin the city from issuing utility revenue bonds voted on by only property taxpayers. The United States Supreme Court extended the "one man, one vote" rule to elections involving municipal bonds, and applied the compelling state interest test for the first time to this class of case. Although that case dealt with a complete denial of the right to vote, the right to vote was heavily emphasized, not the type of election. In *Lance,* the West Virginia Supreme Court stated that

> if the weight and force of a person's vote can be debased and diluted in accordance with [a strict interpretation, there is] no escape from the conclusion that the weight and force of such a vote may legally be debased and diluted virtually to the point of total extinction.[69]

The *"Bogert"* view advances two primary reasons in support of its theory. First, a strict application of stare decisis dictated that the rationale for finding a violation of equal protection did not extend to dilution of voting strength in a municipal bond referendum.[70] The court developed for itself a theory which is almost inflexible. Since no prior case had dealt with the question whether municipal bond elections involved dilution of voting strength, then the *Bogert* court would not decide that such elections did involve a dilution in voting strength. The problem with this view is that a tedious analysis of past case holdings does not cast any light on new situations and circumstances. The law grows and functions only by being able to adapt to new situations. For example, in *City of Phoenix v. Kolodziejski*[71] the Supreme Court of the United States expanded their holding in *Cipriano* to include municipal general obligation bonds as well as revenue and utility bonds. The *Bogert* court could have applied this type of analysis. It chose not to.[72] If the rules were never applied to situations slightly different from those previously decided, a vast array of grievances would be left unconsidered because of the rigidity of the legal system.

The second *Bogert* argument is based upon the belief that "majoritarianism" is a governmental theory unfit for judicial review.[73] Furthermore, many federal constitutional provisions demonstrate that the United States is not completely committed to the rule of the simple majority.[74] This denial of judicial review would leave the question to the legislature.

Regardless of legislative review, there are many constitutional guarantees which require judicial interpretation in order to adequately safeguard individual rights from state action. A state cannot completely dispense with jury trials in criminal matters because it is a right guaranteed by the federal Con-

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[68] 395 U.S. 701 (1969).
[69] 170 S.E.2d at 791.
[70] 465 P.2d at 645.
[71] 399 U.S. 204 (1970).
[72] 465 P.2d at 645.
[73] *Id.* at 648.
[74] *Id., quoting Misreading Democracy,* NEW REPUBLIC, Sept. 27, 1969, at 10.

stitution,[75] which is the supreme law of the land.[76] The state cannot reduce the jury in size to one man (who might also function as judge) because this would dilute the right to a jury trial to the point of virtual extinction.[77] Similarly, unless voting percentage requirements can be judicially examined, what would prevent the state from requiring 75% majorities, then 90%, then even 100% to effect certain actions? Many federal provisions which require extraordinary majority votes were compromises provided in order to establish a nation of many states.[78] Since the Constitution is the supreme law of the land, it is not necessary that all of its procedural guarantees conform to the other general standards it sets forth. Furthermore, treaty ratifications, impeachment proceedings, even the electoral college perhaps would meet the test of a compelling "United States" interest themselves.

One of the strongest analytical arguments has recently been made by Susan J. Selvern.[79] Miss Selvern contended that the extension of "one man, one vote" to tax and bond referenda is unwarranted because it involves a two-step process. The first step is where the people vote directly for their representatives, and here the "one man, one vote" standard is applicable in order to preserve the equal representation of all citizens and to retain citizen faith in the governmental process. However, Miss Selvern contended that voting in a bond referendum is much more akin to the "second step" in the legislative process. The second step is where the representative votes on issues within the legislative body itself. At this step the "house rules" come into play and may require more than a simple majority for passage of certain issues and bills. Since this is an organizational and political question the courts will not and should not intervene. What Miss Selvern implied was that in decisional processes *other* than direct elections of governmental representatives, the voters are really acting in the capacity of a "super-legislature", and thus the equal protection clause should not apply. In this instance, since the matter need not be submitted to the voters at all, equal protection standards should give way to the legislature's own house

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[75] U.S. CONST. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

[76] U.S. CONST. art. VI provides in part: "This Constitution . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding . . . ."

[77] Williams v. Florida, 399 U.S. 78 (1970).

[78] *See* M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1966) [hereinafter cited FARRAND] and S. PADOVER, TO SECURE THESE BLESSINGS (1962) [hereinafter cited PADOVER]:

(1) ⅔ vote for expulsion: 2 FARRAND at 254; PADOVER at 262.
(2) ⅔ vote for treaty ratification: 2 FARRAND at 544, 547-48; PADOVER, at 321.
(3) ⅔ vote to override veto: 2 FARRAND at 585-87; PADOVER at 382.
(4) ⅔ vote for impeachment: 1 FARRAND at 85-87; *Padover* at 390.
(5) Constitutional amendments: 1 FARRAND at 202-03, 206, 478; PADOVER at 423-24.

[79] Note, 11 B.C. IND. & COM. L. REV. 553 (1970).

rules.[80] In *Bogert,* the rules of the super-legislature are contained in the Idaho constitution, and these rules require a two-thirds majority vote in order to authorize certain types of indebtedness.

This analogy to legislative rules is superficially strong. The effect of this analytical "two-step" process is to take us one step further away from individual acts and rights guaranteed by the Constitution and one step closer to the "political thicket".[81] The judicial function is not to analyze, approve and ratify "house rules" of the legislature; it is instead to provide a forum for individual citizens to obtain redress of their grievances. As stated in *Kramer v. Union Free School District:*[82]

> States do have a latitude in determining whether . . . various questions shall be submitted to the voters. . . . However, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[83]

When Miss Selvern assumed a state where "all citizens are considered representatives", she assumed away the problem at hand. If every citizen can be equated with the government itself, then governmental discriminatory classification of citizens and inequalities of voting power become impossible, because no longer are there any "citizens" to classify.[84]

The "*Lance*" view presents four primary reasons to support its theory that it is the vote that is all-important and not the manner of impairment. First, the court recognized that the United States Constitution is supreme in relation to the West Virginia constitution.[85] Second, the *Cipriano* decision that the equal protection clause applies to utility revenue bond elections (and not just elections of public officials) greatly assists the case for general obligation bonds, since the difference between general obligation bonds and utility revenue bonds is slight. In *Cipriano,* the Court placed heavy reliance upon

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[80] In City of Phoenix v. Kolodziejski, 399 U.S. 204, 215-18 (1970), the dissent suggested a similar theory whereby the first step is the same, the election of representatives by a simple majority, and the second step is the legislative decision to submit general obligation bond questions to a vote by property taxpayers, where the burden supposedly "legally" falls. The dissent argues that if the representatives could take the action on their own initiative, without violating the equal protection clause, why does seeking a referendum change matters?

[81] Colegrove v. Green, 328 U.S. 549, 556 (1946).

[82] 395 U.S. 621 (1969).

[83] *Id.* at 629, *quoting* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).

[84] Miss Selvern's opinion impliedly takes the view that the people, in establishing a constitution and in forming a government, give all governing powers to the state, and if anything is given back, it is by the grace of the state and with any restrictions the state wishes to place on it. This argument is answered by the "retention of rights" theory which holds that the voters retain all powers not completely exercised by the state. Thus the citizens retain the rights and powers on an equal basis with all other citizens.

[85] U.S. CONST. art. VI provides in part: "This Constitution . . . shall be the supreme Law of the Land . . . ."

W. VA. CONST. art. I, § 1 states in part: "The Constitution of the United States of America . . . shall be the supreme law of the land."; 170 S.E.2d at 786.

the fact that the exclusion of non-property owners excepted "substantially affected and directly interested"[86] voters. In *Lance*, voters who were not property owners were also affected and interested. If only property taxes increased (and no others) because of the passage of the bond issues, all citizens would still be affected because of the rise in cost of services and housing. This is probable because those property owners directly affected by property tax increases were likely to pass on such tax increases by increasing prices where those property owners were also proprietors of local businesses. Thus the substantial effect and direct interest rationale applies equally to utility revenue and general obligation bonds. Third, since the state constitution granted the right to vote on these issues, the equal protection clause of the federal Constitution immediately attached to protect the citizen's exercise of this right. This argument received great support from *Kramer*.[87] Fourth, dilution of voting strength can be easily made complete denial by simply increasing the percentage requirement until a 100% vote is necessary to prevail. If a vote may be diluted by a 60% requirement, why not a 90% or 100% as well?

The *Lance* viewpoint is more persuasive since it recognizes the crucial fact that voting on bond referenda is a fundamental right because of the act of voting. *Lance* recognized that denial of the vote and dilution of voting strength are not opposites. Whereas the *Bogert* court looked at denial and dilution as totally distinct and unrelated concepts justifying the application of different tests to each, the *Lance* court, in effect, looked upon the concept of voting as a continuum: at one end there is the unrestrained power to vote completely on par with other citizens; in the middle area is the diluted vote; at the other end is the totally denied vote. It is a differentiation of degree, not of kind. As stated in *Reynolds v. Sims*,[88]

> the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[89]

*Lance* realistically looked at the whole concept of voting—that is, each voter making his decision, marking his ballot, *and* having his ballot given equal weight with that of his fellow voters. The *Bogert* court, in contrast, concentrated on the form of the voting, not on the substance. If a vote is not weighted equally, then confidence in the election process is undermined. Thus, *Lance* found that the concept of voting is the key to the decision and recognized the franchise as a fundamental right not to be divested or diluted unless a compelling state interest so requires.

After determining that the compelling state interest test was the applicable standard to evaluate the discriminatory classification in *Westbrook*, the Cali-

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[86] 395 U.S. 701, 706 (1969).
[87] Kramer v. Union Free School Dist., 395 U.S. 621, 629 (1969).
[88] 377 U.S. 533 (1964).
[89] *Id.* at 555.

fornia Supreme Court inquired whether or not the state had such an interest to justify the two-thirds requirement for passage of local general obligation bonds.

The state argued in *Westbrook* that the two-thirds requirement was necessary to prevent the creation of improvident debt.[90] It feared that malevolent popular majorities would approve projects beyond their ability to pay and thus cause financial irresponsibility and municipal ruin. The court answered that this possibility was extremely remote because of a corps of professional administrators, strict procedures for reporting and auditing bond transactions, and the presence of a constitutional provision requiring the collection of interest yearly plus a sinking fund for repayment of principal.[91] Furthermore, California state general obligation bonds require only a simple majority for approval and no improvident borrowing or even lower ratings have resulted.[92]

The state also contended that the restriction was aimed at developing a strong popular and informed public sentiment regarding the wisdom and financial ability of the community to absorb the costs of the bonds.[93] However, no proof was offered to show that a two-thirds requirement automatically fulfills this requirement. The fact that there is a compulsory referendum alone probably stimulates a more enlightened citizenry.[94]

The state further argued that the two-thirds extraordinary majority requirement "placed [inherent] obstacles in the path of improvident borrowing."[95] However, this same requirement places obstacles in the path of prudent and long-range borrowing for needed future contingencies. The state also argued that a majority of those voting on any particular bond proposition rarely equals a majority of the total number of qualified electors. By this reasoning, the state accepts the simple majority theory in principle. However, the two-thirds requirement itself does not guarantee that a majority of the qualified electors will vote. All that the extraordinary majority requirement does is to assist the "No" voters at the expense of the "Yes" voters. In essence, no arguments were advanced which demonstrate that the two-thirds requirement is a necessary restriction to promote a compelling and necessary state interest. It is granted that the status of municipal

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90 Brief for Respondent at 16 [on Issue of Compelling State Interest], Westbrook v. Mihaly, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970).

91 2 Cal. 3d at 789-90, 471 P.2d at 503-04, 87 Cal. Rptr. at 854-55, *quoting* CAL. CONST. art. XI, § 18.

92 *Id.* at 790-91, 471 P.2d at 505, 87 Cal. Rptr. at 857.

93 *Id.* at 792, 471 P.2d at 506, 87 Cal. Rptr. at 858.

94 *Id.* at 795, 471 P.2d at 508-09, 87 Cal. Rptr. at 860-61. *See* Brief for Respondent, *supra* note 90, at 9, *quoting* CAL. CONST. REVISION COMM'N, BACKGROUND STUDY 3, at 19-20 (1969) where the reason for a two-thirds majority is declared to promote local citizen interest and control over their government.

95 Brief for Respondent, *supra* note 90, at 9, *quoting* CAL. CONST. REVISION COMM'N, BACKGROUND STUDY 3, at 19-20 (1969).

finances is a valid interest of the state, but the restrictions upon the franchise in the discriminatory manner employed (the two-thirds requirement) are not necessary to, nor do they serve, any such interest.

The state expressed the fear that if this decision were followed to its logical conclusion, then simple majority approval of all governmental action (both state and federal) would be required. This is not necessarily true. Many statutes and provisions requiring extraordinary majorities may still pass the compelling state interest test. For example, impeachment proceedings might still be permitted to retain extraordinary majority requirements to preserve the stability and constant operation of government necessary for effective administration.[96] In *State ex. rel. Witt v. State Canvassing Board*[97] the New Mexico requirement for a 75% majority for constitutional amendment was impliedly upheld. In a different respect, federal requirements of extraordinary majorities were often based upon compromises necessary to establish the federal government and are stated within the Constitution itself. Many involve the "checks and balances" between branches of government (for example, two-thirds vote to override a presidential[98] or gubernatorial[99] veto) which do not effect a dilution of the individual's voting power.

The last issue handled by the Supreme Court of California was the question of affirmative relief. The court held that considerations of fairness and public policy compelled a limitation of the effect of this decision to prospective matters only. It stated that any other ruling would logically commit the court to validate all past bond issues which received simple majority approval.[100] This is not logically true, because the court might have restricted the effect of their judgment to this case *plus* all future bond elections. Nonetheless, their second argument was more acceptable; that is, since there was a misunderstanding as to the rules for approval, many voters might not have voted at all because they might have believed the propositions could not possibly get the two-thirds majority required. Since the ground rules of the election provided for a two-thirds approval, it would be unfair to change them after-the-fact and declare the bonds approved. The petitioners have another chance to put forth their proposals before the voters with the new rules fully in force. Although Justice Mosk believed that the prospective application was arbitrary and unfair to the petitioners,[101] if the bonds were certified as approved, then the other qualified voters who would have voted "No" but chose not to vote at all because of their "security" in the

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[96] *E.g.*, CAL. CONST. art. XII, § 22 deals with the removal from office of Public Utilities Commission members.

[97] 78 N.M. 682, 437 P.2d 143 (1968).

[98] U.S. CONST. art. I, § 7.

[99] CAL. CONST. art. IV, § 10(a).

[100] 2 Cal. 3d at 801, 471 P.2d at 513, 87 Cal. Rptr. at 865.

[101] *Id.* at 803, 471 P.2d at 514, 87 Cal. Rptr. at 866.

two-thirds requirement would have no remedy whatsoever.

The decision in *Westbrook v. Mihaly* does expand the application of the "one man, one vote" principle, but it also clarifies the tests to be applied when determining whether or not there are sufficient reasons for allowing the departure from the strict majority rule. The function of this decision should be to better protect the individual voter from encroachment of his vote by any method. The burden has merely shifted to the state, when challenged on a particular extraordinary majority provision, to justify and bear the burden of proof of any deviations from the rule of equal voting power for individual citizens.[102]

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[102] *Id.* at 799, 471 P.2d at 511, 87 Cal. Rptr. at 863, where the court declared:
> We see no *a priori* reason to assume that other extraordinary majority provisions cannot be shown to be necessary to attain 'compelling' ends. Each must be judged on its particular facts. Those which serve no such end will fall, but our decision today commits us to no wholesale elimination of such laws.