INCORPORATION, PROPERTY OWNERSHIP AND EQUAL PROTECTION

After the owners of 55% of the assessed value of land within the proposed city of Rancho Palos Verdes filed a petition objecting to incorporation, the Board of Supervisors of Los Angeles County discontinued incorporation proceedings pursuant to a remonstrance statute.[1] This statute terminates the jurisdiction of the board when a petition objecting to incorporation is presented by the owners of 51% of the assessed value of the land in the area to be incorporated. Plaintiffs, representing resident nonproperty owners and owners of 43% of the assessed value of land, sought a writ of mandate to require the board of supervisors to hold an incorporation election. Citing an article by Professors Hagman and Disco,[2] the Supreme Court of California in *Curtis v. Board of Supervisors*,[3] held that

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1. CAL. GOV'T CODE § 34311 (Deering Supp. 1972) reads in part:
If upon the final hearing the board of supervisors finds and determines that written protests to the proposed incorporation have been filed with the board, signed by qualified signers representing 51% of the total assessed valuation of the land within the boundaries of the proposed incorporation, the jurisdiction of the board of supervisors shall cease; no election shall be called and no further petition for the incorporation of any of the same territory shall be initiated for one year after the date of such determination.

2. Hagman & Disco, *One-Man One-Vote as a Constitutional Imperative for Needed Reform of Incorporation and Boundary Change Laws*, 2 URBAN LAW. 459 (1970).

3. 7 Cal. 3d 942, 501 P.2d 537, 104 Cal. Rptr. 297 (1972). Facts and statutes relevant to the case: A. City of Rancho Palos Verdes: Area—12.688 sq. miles; Population—38,885; Land use—primarily single-family housing; Voters—16,763 (over 1,000 of the voters owned no real property); Assessed value of the land—$66,836,080.00. The two largest property owners owned over $7,000,000 of the land. The petition for incorporation was signed by 63.6% of the landowners who owned 42.8% of the assessed land. Protestors owned 55% of the assessed land. 7 Cal. 3d at 950, 501 P.2d at 542, 104 Cal. Rptr. at 302. B. CAL. GOV'T CODE § 34303 (Deering Supp. 1972) reads in part: "Proceedings are initiated by filing with the board of supervisors at a regular meeting a petition signed by at least 25% of the qualified signers, representing at least 25% of the assessed value of the land included in the proposed city limits . . . ." " 'Qualified signer' is defined by § 34301 as the 'owner of an interest in fee' or the purchaser of land under a written agreement to buy. 'Assessed value of the land' for purposes of § 34303 does

the remonstrance statute violated the equal protection clauses of both the California[4] and United States Constitutions.[5] The court found that the State, in an incorporation proceeding, had no compelling interest in granting property owners the power to effectively bar the exercise of the franchise by resident nonproperty owners and the owners of a minority percentage of the assessed value of land.

The central thesis of those persons who challenged the grant of exclusive power to property owners to initiate or terminate boundary change proceedings has been stated as follows:

> In California and in many other states of the nation, provisions for municipal incorporation and for changes in the boundaries of local jurisdictions are archaic abominations dominated by the "horse and buggy" concepts of our rural past. . . . *Legislation in many states still reflects outdated patterns where the property tax was virtually the sole source of local government revenue and outdated beliefs that the people in an area, however small, should have virtually absolute control over their "turf" as demarcated by city and other local government boundaries.*[6]

After commenting that this language provided a "fitting background"[7] for the present case, the *Curtis* court proceeded to test the remonstrance statute by standards developed to judge legislation challenged on equal protection grounds.[8] The court examined the statute under

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not include the value of improvements. (Krouser v. County of San Bernardino, 29 Cal. 2d 766, 772, 178 P.2d 441, 444 (1947)).” 7 Cal. 3d at 948 n.4, 501 P.2d at 540 n.4, 104 Cal. Rptr. at 300 n.4.

4. CAL. CONST. art. I, §§ 11, 21.

5. U.S. CONST. amend. XIV, § 1.

6. Hagman & Disco, *supra* note 2, at 459 (emphasis added). The authors question whether property owners should be able to prevent an election by either failing to initiate or by protesting and terminating the proceedings. Generally, they suggest that any system, with or without an election provision, whereby property owners are given the power to control incorporation and boundary change procedures violates equal protection. They argue that the property tax is no longer a rational basis for drawing a distinction between land owners, personal property owners and nonproperty owners. The authors would limit property owner classifications to situations where the property tax was the sole source of revenue for the municipality. The underlying philosophy of the authors is that all persons affected by the incorporation or boundary change should have a voice in the decision making. *Id.* at 463-64.

7. 7 Cal. 3d at 946, 501 P.2d at 539, 104 Cal. Rptr. at 299.

8. *Id.* at 951-52, 501 P.2d at 543-44, 104 Cal. Rptr. at 303-04.

1) the "rational relationship" standard, which requires that the classification be reasonable and bear a substantial relation to the object of the legislation so that persons similarly situated will be treated alike,[9] and 2) the more critical "compelling interest" standard, which requires the court to examine the statute more closely when "suspect criteria" or "fundamental rights" are present.[10] Although the court found that the statute also violated the "rational relationship" test,[11] the court focused primarily on whether there was a compelling interest which justified the statute and whether the distinctions drawn by the statute were necessary to further its purpose.[12]

The court felt justified in using the "compelling interest" test since the effect of the statute was to "touch upon" or burden the right to

9. The basis of the "rational relationship" test is stated in F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920): "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." This approach has been characterized as involving limited judicial scrutiny, whereby the court recognizes both the need for reasonable legislative classifications and the paradoxical fact that the very idea of classifications produces some inequality. *See* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949). *See, e.g.,* Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); Railway Express Agency v. New York, 336 U.S. 106 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948).

10. In more recent cases beginning with Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court has adopted a stricter scrutiny of state legislation and has required the state to show a compelling interest when the legislative classification is viewed as involving "suspect criteria" based on race or wealth and "fundamental rights," including the right to vote and the right to travel. Under this approach, the reasonableness of the statute is not presumed unless the state can show compelling reasons for the classification. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Levy v. Louisiana, 391 U.S. 68 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). *See also* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection,* 1967 SUP. CT. REV. 39; *Developments in the Law —Equal Protection,* 82 HARV. L. REV. 1065, 1077-1132 (1969).

Criticism of the "compelling interest" standard centers on the view that the equal protection clause requires only that the classification be based on some rational legislative objective and that the clause has never required equal treatment of all persons despite differing circumstances. The basic concern of the critics is to prevent the judiciary from making arbitrary decisions and to preserve the legislature as the instrument of social change. See Justice Harlan's dissents in Shapiro v. Thompson, 394 U.S. 618, 655 (1969), and Harper v. Virginia Bd. of Elections, 383 U.S. 663, 680 (1966).

11. 7 Cal. 3d at 963, 501 P.2d at 551-52, 104 Cal. Rptr. at 311-12.

12. *Id.* at 951-52, 501 P.2d at 544, 104 Cal. Rptr. at 304.

vote.[13] Although the challenged statute did not contain an election provision, incorporation was predicated upon approval by the residents in the area to be incorporated.[14] The court determined that the statute delegated the power to forestall the election without providing standards for decision making and without including other groups who had equally important political and financial interests.[15] Specifically, the court noted the statute's threefold distinction: "Between those who own land and those who do not. Between those who own more valuable land, and those owning less valuable parcels. Between owners of unimproved land as against owners of improved land."[16] The court stated as a general proposition,

> [T]hat all residents share a substantial interest in the government of their state, city, county, school district, and other agencies of general governmental power, and in the issuance of bonds by these entities. Consequently the special concern of the landowners as to the level of taxes upon real property cannot justify exclusion of the nonlandowner nor the proportionate reduction of the vote of owners of less valuable property.[17]

To arrive at this result the court felt compelled to distinguish *Adams v. City of Colorado Springs,*[18] where a federal district court upheld a state statute which allowed a city to annex unilaterally, without an election, land which was two-thirds contiguous with the city, but provided for an election where the land was less than two-thirds contiguous. The *Curtis* court noted that even though the contested grant of power was to the landowners and not to the city, as in *Adams,* it was immaterial that the grant of power to bar exercise of the franchise, not the franchise itself, was at issue.[19]

The holding in *Curtis* challenges some of the traditional concepts concerning the creation and change of municipal boundaries.[20] The California court has expanded the scope of equal protection to include classifications based on property ownership which give property owners the power to effectively deny others the right to vote in an

13. *Id.* at 953, 501 P.2d at 544, 104 Cal. Rptr. at 304.
14. *Id.* at 954, 501 P.2d at 545, 104 Cal. Rptr. at 305.
15. *Id.*
16. *Id.*
17. *Id.* at 960, 501 P.2d at 549, 104 Cal. Rptr. at 309.
18. 308 F. Supp. 1397 (D. Colo.), *aff'd,* 399 U.S. 901 (1970).
19. 7 Cal. 3d at 955 n.17, 501 P.2d at 546 n.17, 104 Cal. Rptr. at 306 n.17.
20. *Id.* at 954, 501 P.2d at 545, 104 Cal. Rptr. at 305.

incorporation proceeding. The question remains, however, whether the logic and rationale of the *Curtis* opinion is valid and can be applied to other statutes governing incorporation and boundary change which grant power according to property ownership classifications.

I. Municipal Corporations and Constitutional Development

Many courts, when interpreting statutes governing the incorporation of municipalities or changes in their boundaries, rely on the concept that municipal corporations are creatures of the state which can be fashioned or altered at will,[21] and that boundary change procedures are not subject to judicial review.[22] Especially in the case of annexation, the attitude is prevalent that the issue is strictly political and requires legislative determination[23] rather than the consent of the persons affected.[24] The United States Supreme Court has become increasingly aware, however, that fundamental rights may be involved in the setting of municipal boundaries and that such procedures should be subject to judicial review.[25] Competing both with the legislature's exclusive control over municipal incorporation and boundary change and with notions of equality are the traditionally vested rights and powers of the owners of property.[26]

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21. *See, e.g.,* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), wherein the Court stated:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. . . . The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.

Id. at 178-79.

22. Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir.), *cert. denied,* 389 U.S. 975 (1967); Detroit Edison Co. v. East China Township School Dist. No. 3, 247 F. Supp. 296 (E.D. Mich. 1965), *aff'd,* 378 F.2d 225 (6th Cir. 1966), *cert. denied,* 389 U.S. 932 (1967).

23. 2 E. McQuillin, Municipal Corporations § 7.10, at 309 (3d ed. 1966).

24. *Id.* § 7.14, at 332.

25. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

26. 1 F. Thorpe, A Constitutional History of the American People, 1776-1850, 92-98 (1898); C. Williamson, American Suffrage From Property to Democracy, 1760-1860 (1960).

The standard rationale for giving property owners predominant, if not exclusive, control of the decision-making process in municipal incorporation and boundary change situations is that property owners are primarily interested in the outcome and will ultimately bear the burden of municipal costs through payment of property taxes.[27] The argument that classifications based on property ownership are rational and reasonable finds support in Justice Harlan's dissent in *Harper v. Virginia Board of Elections*,[28] where he noted that property qualifications have been a traditional part of our political structure and have gradually changed only as theories of political representation have changed.[29] Although such classifications may not conform to popular notions of an egalitarian society, Justice Harlan concluded that there is arguably a rational basis for these classifications.[30]

The rationale supporting property owner classifications has been increasingly challenged, both as a matter of political theory[31] and economic reality.[32] An indication of the changing attitude towards classifications based on property ownership is seen in the Supreme Court's decision in *Turner v. Fouche*,[33] where the Court held that a

27. Hagman & Disco, *supra* note 2, at 464.

28. 383 U.S. 663, 680-86 (1965).

29. *Id.* at 684.

30. He stated:

> It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.

Id. at 685.

31. McBain, *Law-Making by Property Owners*, 36 POL. SCI. Q. 617, 641 (1921).

32. Hagman & Disco, *supra* note 2, at 464, *citing* 5 U.S. DEP'T OF COMMERCE, CENSUS OF GOVERNMENTS 9 (1967), state that: "In the nation, considering all forms of local government in Standard Metropolitan Statistical Areas, the average government in those areas receive only 44.6 per cent of its revenue from property taxes, and received 32.4 per cent of its revenue by way of inter-governmental transfers from the state or federal governments." Note, however, that the above figures reflect only the average SMSA income from the property tax. When broken down according to size groupings, income received from property taxes reaches as high as 50.4% for areas with populations of 50,000 to 99,000, while income from inter-governmental transfers was only 28.8%. *Id.* These statistics raise the general question of what percentage of its revenue derived from property taxes should a municipality have in order to make classifications based on property ownership unreasonable or arbitrary.

33. 396 U.S. 346 (1970).

Georgia statute requiring members of the county board of education to be "freeholders," denied equal protection to non-landowning residents of the county.[34] The thrust of the Court's argument was that property ownership did not determine responsibility or the ability to participate intelligently in educational decisions.[35]

Other recent United States Supreme Court decisions concerning property ownership restrictions on voting in municipal bond elections were crucial to the analysis developed by the *Curtis* court. The Court held unconstitutional a New York statute which limited the right to vote in school board elections to owners and lessees of real property and parents of school-age children, on the grounds that the State had no compelling interest in denying the franchise to a resident of the school district who was a taxpayer and interested in and affected by school board decisions.[36] Similarly, the Court invalidated a statute which allowed only property owners to vote on the issuance of revenue bonds by a municipal utility.[37] Also, the Court has found that, even in the case of general obligation bonds, the requirements of equal protection were violated when the vote was limited to property owners because "property owners and nonproperty owners alike have a substantial interest in the public facilities and the services available in the city and will be substantially affected by the ultimate outcome of the bond election at issue in this case."[38]

Although the *Curtis* court could have argued on the basis of the above cited cases that both property and nonproperty owners alike

34. *Id.* at 364.

35. *Id.* at 363-64.

36. Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

37. Cipriano v. City of Houma, 395 U.S. 701 (1969). The Court concluded that while the franchise, in certain elections, could be limited to persons who were "specially interested," here the benefits and burdens of the revenue bonds fell on property and non-property owners indiscriminately. *Id.* at 705.

38. City of Phoenix v. Kolodziejski, 399 U.S. 204, 209 (1970). The Court also noted that the ultimate burden for property taxes will fall on tenants in the form of increased rents and not upon the property owners. *Id.* at 210. *See* Stewart v. Parish School Bd., 310 F. Supp. 1172 (E.D. La.), *aff'd*, 400 U.S. 884 (1970), where the federal district court held unconstitutional a Louisiana statute which limited the franchise in school bond elections to landowners and allocated votes on the basis of assessed value of property. The court noted that: "It is not enough to show that included groups have an interest. It must be shown that the exclusions are necessary to promote a compelling state interest. In terms of voting responsibly, there is no necessary correlation between the amount of an assessment and the degree of interest a taxpayer may have in a particular bond issue." *Id.* at 1179.

would bear the burden of paying for municipal services, the challenged statute did not directly prohibit nonproperty owners from voting. The court solved this problem by carrying the equal protection analysis one step further to include a statute which burdened the right to vote by giving property owners the ability to prevent an election altogether.[39] Furthermore, the court felt that it was unnecessary to decide whether the remonstrance procedure constituted an "election" for equal protection purposes.[40]

II. Comparable Cases and Statutes

In the context of annexation, there are statutes giving the right to frustrate annexation proceedings unless the petition is signed by owners of all of the land in the area to be annexed,[41] by owners of one-half of the real and personal property,[42] or by both a majority of the owners of land and a majority of the resident electors.[43] Indiana statutes permit annexation proceedings to be initiated by a petition signed by 51% of the owners of land in territory sought to be annexed.[44] A companion statute permits an appeal to be taken "[F]rom the annexation by either a majority of the owners of land in the territory or by the owners of more than seventy-five per cent (75%) in assessed valuation of the real estate in the territory, if they deem themselves aggrieved or injuriously affected . . . ."[45] Based on these statutes the Supreme Court of Indiana has reached an opposite result from the court in *Curtis.*

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39. 7 Cal. 3d at 955, 501 P.2d at 546, 104 Cal. Rptr. at 306.

40. *Id.* at 953, 501 P.2d at 544, 104 Cal. Rptr. at 304.

41. Ga. Code Ann. § 69-902 (Supp. 1972).

42. Ariz. Rev. Stat. Ann. § 9-471 (1956).

43. Ill. Ann. Stat. ch. 24, § 7-1-2 (Smith-Hurd Supp. 1973). "The petition must be signed, not only by a majority of legal voters in the territory, but also by a majority of property owners therein, whether they live in the territory and are entitled to vote therein or not." People *ex rel.* Metz v. City of St. Elmo, 306 Ill. 168, 137 N.E. 459 (1922).

> All petitions shall be supported by an affidavit of one or more of the petitioners, or someone on their behalf, that the signatures on the petition represent a majority of the property owners of record and the owners of record of more than 50% of land in the territory described and a majority of the electors of the territory therein described. . . . If the court finds that (1) the annexation petition is not signed by the requisite number of electors or property owners of record . . . the court shall dismiss the petition or ordinance, as the case may be.

Ill. Ann. Stat. ch. 24, § 7-1-4 (Smith-Hurd Supp. 1973).

44. Ind. Ann. Stat. § 48-720 (Supp. 1972).

45. *Id.* § 48-721.

In *Forks v. City of Warsaw*,[46] plaintiffs, who did not own any real property in the area to be annexed, but who owned mobile homes and other tangible and intangible personal property, sought to challenge the remonstrance statute on the grounds of equal protection. The Supreme Court of Indiana premised its decision by commenting "Inasmuch as the legislature may provide for the annexation of territory to municipal corporations without the consent of the inhabitants of the annexed territory, the inhabitants cannot complain of any limitation upon their ability to express their disapproval if the legislature sees fit to make the statute conditional upon its acceptance by the affected territory."[47] Using the "rational relationship" equal protection test and avoiding mention of recent United States Supreme Court decisions concerning equal protection, the Indiana court followed the traditional argument in disposing of plaintiffs' equal protection claim. The Court stated that even though all residents of the territory are affected by the annexation, the legislative classification is reasonable since non-landowners are more likely to be temporary residents while persons who do own land have a permanent investment which cannot be removed.[48] The primary difference found to justify the classification, however, was in the distinction between the right to remonstrate against an annexation and the right to vote in an election.[49]

In the incorporation context there are statutes which give property owners the power to prevent municipal incorporation. Indiana presently has a remonstrance statute which allows either 51% of the owners of a fee simple in real property or the owners of 75% in assessed value of real estate in the affected area to petition and stop the in-

46. —Ind.—, 273 N.E.2d 856 (1971), *cert. denied*, 93 S. Ct. 39 (1972). *See also* Montagano v. City of Elkhart, —Ind. App.—, 271 N.E.2d 475 (1971).

47. —Ind. at—, 273 N.E.2d at 859.

48. *Id.* at—, 273 N.E.2d at 858.

49. The court stated:

> In a referendum the question is submitted to the entire voting public for a choice. The purpose of a remonstrance is to afford the opportunity to any person seeking to object to the proposed action of a body politic by taking the affirmative step to register their objection. We, therefore, hold that the right to remonstrate as provided by the statute in question is not an election to the extent that all voters in the community must be afforded the opportunity to participate.

Id. at—, 273 N.E.2d at 859.

corporation proceedings.[50] The distinctions drawn by this statute are similar to those in *Curtis*. The difference is that Indiana does not provide for an election to determine the incorporation issue, but rather, incorporation is either permitted or denied on the basis of a hearing by commissioners.[51]

Other state statutes give property owners the power to initiate incorporation proceedings. Louisiana permits 25% of the resident electors of an area who own 25% of the assessed value of property to initiate incorporation proceedings.[52] Alabama requires that the owners of 60% of the acreage within the territory to be incorporated give their consent together with a number of resident electors.[53] New York permits initiation of incorporation proceedings in an alternative fashion: either a specified percentage of the owners of real property may petition and/or the owners of a specified percentage of the assessed value of real property may petition.[54] Although there is a shift in focus at this point from remonstrance to initiation of incorporation proceedings, many of the arguments presented in *Curtis* could logically be applied if the court was correct in saying that a classification based on property ownership is no longer reasonably related to the purposes of an incorporation statute. The statutory grant of power to property owners to initiate incorporation proceedings was not raised as an issue by plaintiffs, but the *Curtis* court served warning that such a statute may also violate equal protection concepts if nonproperty owners were not also given the same right to act.[55]

Conclusion

The Supreme Court of Indiana's holding that a remonstrance is not equivalent to an election in weighing equal protection claims and that the legislature may make a rational distinction between property and

50. Ind. Ann. Stat. § 48-136 (Supp. 1972).

51. *Id.* § 48-135.

52. La. Rev. Stat. Ann. § 33:52 (Supp. 1973). In Stein v. Town of Lafitte, 266 So. 2d 516 (La. App. 1972), plaintiffs alleged that this statute denied equal protection since it allowed the will of a minority to impose itself on the majority. The court refused to discuss the constitutional question, but held for plaintiffs on the ground that the petition was defective.

53. Ala. Code tit. 37, § 10 (Supp. 1971).

54. N.Y. Village Law § 2-202(1)(a) (McKinney Supp. 1971).

55. 7 Cal. 3d at 964 n.30, 501 P.2d at 553 n.30, 104 Cal. Rptr. at 313 n.30.

nonproperty owners in incorporation and annexation proceedings is contrary to the Supreme Court of California's conclusion that all persons are affected by and have an interest in these decisions. The difference in the holdings of the California and Indiana courts reflects not only a difference in philosophy concerning the reasonableness of a legislative classification based on property ownership, but also a difference in the scope and application of equal protection in municipal incorporation and boundary change proceedings.

If the *Curtis* court was correct in its conclusion that a classification based on property ownership is no longer reasonable in incorporation and boundary change questions where the action or inaction of property owners can effectively prevent the final determination of the issue in a general election, then the rationale of the opinion could logically be extended to include statutes which give the power to initiate or to terminate such proceedings whether or not the statute is coupled with an election provision. If the Supreme Court of Indiana was correct, however, in its view that a legislature may rationally distinguish between property and nonproperty owners, then statutes which make this distinction do not violate equal protection concepts. While the view of the *Curtis* court seems to follow modern concepts of municipal planning[56] and egalitarian democracy, the view of the Indiana court is supported by the argument of Justice Harlan that even though such classifications may not be currently popular, they are at least not unreasonable and should be eliminated by the legislature and not by the courts.[57]

John G. Vogel, Jr.

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56. *See* Mandelker, *Standards for Municipal Incorporations on the Urban Fringe,* 36 TEXAS L. REV. 269 (1958).

57. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 686 (1966) (dissenting opinion).