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Assembly Bill 251: School’s Out for New Residents

The California Education Code requires that nonresident students attending California public colleges and universities pay nonresident tuition. Students entering school in 1982 who are classified as nonresidents can expect to pay about $4,500 more per year than students classified as residents if attending one of the University of California campuses, and approximately $2,800 more per year if attending a division of the California State University and Colleges.

The Education Code defines residence for tuition purposes and provides procedures for residence determination. A determination of residency is made initially upon enrollment; each student is classified a resident or nonresident, based on information provided by the student. At the beginning of each subsequent term students may apply for reclassification.

Formerly, the Education Code prescribed a three-part test for residence determination. Admissions officers were directed to grant resident status to students who had legal capacity to establish residence, had been physically present in the state for more than one year, and had manifested intent to make California their bona fide residence. Apparently, the former test permitted too many students without good faith intentions of remaining in California following graduation to create sham residences to avoid paying nonresident tuition.

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1. CAL. EDUC. CODE §68050 (“A student classified as a nonresident shall be required, except as otherwise provided in this part, to pay, in addition to other fees required by the institution, nonresident tuition.”).
2. Id. §§68040, 68041.
3. 5 CAL. ADMIN. CODE §41907; CAL. EDUC. CODE §§68023, 68041.
4. 1981-82 General Catalog, University of California, Davis, at 37.
5. Spring 1982 Class Schedule, California State University, Sacramento, at 5.
6. CAL. EDUC. CODE §§68061, 68062(f), (g).
7. Id. §68017.
8. 5 CAL. ADMIN. CODE §41905; CAL. EDUC. CODE §§68062(d).
9. See REPORT OF THE LEGISLATIVE ANALYST, Analysis of the Budget Bill (fiscal year 1981-1982) 1242 [hereinafter cited as REPORT OF THE LEGISLATIVE ANALYST] (“Under the current statutory definition of residency, virtually all nonresident students from other states are eligible for resident status after one year. All a student need do to obtain residency is live in the state one year (the first year of academic attendance plus the summer months) and show intention to remain in California through such actions as registering to vote in California, obtaining a California driver’s license, and joining local organizations. Consequently, most nonresident students from other states within the U.S. are only ‘technical nonresidents’ who are in the process of establishing California residency. As a result, they usually pay nonresident tuition for only one year.”).
Bill 251,\textsuperscript{10} signed into law by the Governor on June 28, 1981, included an amendment to the Education Code intended by the Legislature to overcome this problem.\textsuperscript{11} The amendment adds a fourth requirement to the three-part test; students must now show financial independence from their parents as a condition to gaining resident status.\textsuperscript{12}

A student is considered financially independent, as defined by the new law, when \textit{all} of the following criteria are present: (1) the student has not been and will not be claimed as an exemption for state or federal tax purposes by his parent(s) in the year application for reclassification is made or in any of the three preceding years; (2) the student has not received and will not receive more than $750 in financial assistance from his parent(s) in the year application for reclassification is made or in any of the three preceding years; and (3) the student has not stayed and will not stay more than a total of six weeks in the home of his parent(s) during the year application for reclassification is made or in any of the three preceding years.\textsuperscript{13} A student who fails to satisfy any one of these requirements is considered a dependent and consequently classified a non-resident.

This comment will show that the new statutory requirement of financial independence, as defined by the amendment, and as interpreted and implemented by the governing boards\textsuperscript{14} of the respective systems of public higher education, unconstitutionally denies many students their rights to due process and equal protection of the law. First, attention will be directed to the language in the amendment, the official interpretation of legislative intent by the governing boards, and the practical impact at the campus level of the amendment as thus interpreted. This will be followed by a discussion of those personal rights guaranteed under the federal and state constitutions that are affected by the amendment. The strongest opposition to Assembly Bill 251 is drawn from the California Constitution and opinions by the Supreme Court of California interpreting state law. The primary theory of unconstitutionality asserted by this comment, therefore, is that Assembly Bill 251 denies lower tuition to a class of bona fide residents in violation of equal protection under the state constitution. Prior to an attack of the amendment on state grounds,\textsuperscript{15} however, the theory that Assembly Bill 251 creates an unconstitutional irrebuttable presumption under

\begin{enumerate}
\item CAL. STATS. 1981, c. 102, 338, at 18.
\item See CAL. EDUC. CODE §68044.
\item Id.
\item Id.
\item Id. §68012 (definition of governing board).
\item See generally Comment, Camping on Adequate State Grounds: California Ensures the Reality of Constitutional Ideals, 9 Sw. U. L. Rev. 1157 (1977).
\end{enumerate}
the federal Constitution invites consideration. The amendment will be analyzed according to the standard of judicial review that arguably would be applied under either theory by the court in an action challenging the statute's constitutionality.

**INTERPRETING ASSEMBLY BILL 251**

This section will develop some background relating to the enactment of Assembly Bill 251 to identify latent ambiguity in the language of the amendment. The official interpretation resolving the ambiguity will be discussed and an argument will be presented that lends support to this seemingly harsh application of the law by college and university officials.

Assembly Bill 251 was the trailer bill to the 1981 budget for the State of California. Based on a proposal by the Legislative Analyst, the budget reduced the appropriation from the General Fund to the California State University and Colleges by $2.4 million, and to the University of California by $2.9 million. Then, as the means of recouping this revenue, the Legislature included a provision in Assembly Bill 251 requiring that "the financial independence of a student seeking reclassification as a resident shall be included among the factors to be considered in the determination of residency." The actual dollar amounts by which the budget was reduced were based on a projection by the Analyst forecasting revenue that could be generated through nonresident tuition pursuant to the amendment.

Historically, the test for determining residence has been the same for both initial enrollees and continuing students seeking reclassification as residents. The Education Code directs admissions officers to make three findings of fact before granting a student's request for resident classification. First, the student must be legally capable of establishing residence. Unemancipated minors, for example, whose parents are

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16. See Report of the Legislative Analyst, supra note 9, at 1242.
18. Id. c. 99, item 644-001-001.
19. Apparently, by requiring the financial independence of only those students seeking reclassification, the Legislature intended the amendment to apply to students who have been classified as nonresidents once already, under the old residence test. Applying the amendment to initial enrollees would require the financial independence of residents as well as nonresidents.
21. See Report of the Legislative Analyst, supra note 9, at 1242.
22. See Cal. Educ. Code §68041 ("Each student enrolled or applying for admission to an institution shall provide such information and evidence of residence as deemed necessary by the governing board to determine his [residence] classification.").
23. Id. §68061.
not residents of California, are legally incapable of establishing their own independent residence in the state.\textsuperscript{24} Second, the student must show that he has maintained constructively uninterrupted physical presence in the state for more than a year.\textsuperscript{25} Finally, the student must demonstrate subjective intent to remain in California.\textsuperscript{26}

Regarding this third element of intent, the Board of Trustees of the California State University and Colleges was authorized by the Education Code to develop a uniform survey of objective evidence useful for measuring subjective intent.\textsuperscript{27} The adopted test appears in Title 5 of the California Administrative Code and includes a consideration of whether the student has: (1) obtained a California driver's license and vehicle registration, (2) maintained an active California bank account, (3) voted in California elections, (4) paid California income taxes, (5) purchased real property in California, (6) obtained a license for professional practice in California, (7) engaged in litigation for which California residence is required, (8) maintained active membership in California social or professional organizations, or (9) exhibited any other relevant indicia of intent.\textsuperscript{28} The Administrative Code cautions that "[n]o single factor is controlling or decisive."\textsuperscript{29}

Assembly Bill 251 requires that "the financial independence of a student seeking reclassification as a resident shall be included among the factors to be considered in the determination of residency."\textsuperscript{30} This language is capable of more than one reasonable interpretation. Did the Legislature merely intend to include financial independence among the several factors, found in the Administrative Code, indicating intent to establish residence?\textsuperscript{31} Or did the Legislature intend to supplant the existing three-part test for determining residency with a new four-part test? Under the latter interpretation, meeting the requirement of financial independence would represent an additional fact to be proved by the student seeking reclassification after the requirements of legal capacity, presence, and intent were satisfied.\textsuperscript{32}

If the first interpretation had been accepted, a student’s financial independence or lack thereof would be considered as merely one factor

\textsuperscript{24} Id. §68062(f),(g).
\textsuperscript{25} Id. §68017; see Michelman v. Frye, 238 Cal. App. 2d 698, 704, 48 Cal. Rptr. 142, 145-46 (1965) ("Absence from one’s permanent residence, if all the while he intends the absence only for a special temporary purpose and to be followed by resumption of the former residence, constitutes neither abandonment thereof nor a change of residence.").
\textsuperscript{26} 5 CAL. ADMIN. CODE §41905, CAL. EDUC. CODE §68062(d).
\textsuperscript{27} CAL. EDUC. CODE §68044.
\textsuperscript{28} 5 CAL. ADMIN. CODE §41905.
\textsuperscript{29} Id.
\textsuperscript{30} CAL. EDUC. CODE §68044 (emphasis added).
\textsuperscript{31} See text accompanying notes 27-28 supra.
\textsuperscript{32} See text accompanying notes 22-26 supra.
among the number of other factors indicating subjective intent to establish residence, such as whether the student's vehicle was registered in California, or whether the student maintained a California bank account. Had this been the Legislature's intent, however, the fact that a student was not financially independent, like the fact that he had not opened a bank account, would be subject to the Administrative Code caveat, "[n]o single factor is controlling or decisive"; a favorable balance of other factors would rebut whatever inference of nonresidency was raised by the student's lack of financial independence. Consequently, students who demonstrated sufficient other indicia of intent to establish residence would be classified as residents, notwithstanding their failure to satisfy the financial independence requirement, and they would not be required to pay nonresident tuition. The amendment to the statute would thus be without effect because the creation of sham residences by out-of-state students would continue—obviously a result not intended by the Legislature. Furthermore, the legislative objective of raising $5.3 million through nonresident tuition would be frustrated.

Accordingly, the Office of the Chancellor of the California State University and Colleges has officially interpreted the new law to mean that financial independence from one's parents is a separate fact to be proved, in addition to legal capacity, presence in the state for more than one year, and intent to establish residence. In a memorandum from the Chancellor's General Counsel entitled "Implementation of Assembly Bill 251," admissions officers were instructed that a student's failure to satisfy the financial independence requirement should "predominate" over favorable evidence of presence and intent except in a "rare and exceptional" case. A sample residence reclassification

34. See id.
35. See Report of the Legislative Analyst, supra note 9, at 1242.
37. See text accompanying notes 16-21 supra.
38. See General Counsel Memorandum, supra note 17, at 4, 5.
39. General Counsel Memorandum, supra note 17, at 1.
40. General Counsel Memorandum, supra note 17, at 5. Because the change in the law was unanticipated by many students who had enrolled in California state schools relying on prior law, admissions officers are currently permitted to make an exception when a student can show that he has no present financial ties with parent(s); meets all applicable factors evidencing intent; and undue hardship would otherwise occur—i.e., the student would be unable to continue his education. The burden of proof rests on the student and each element must be supported by adequate documentation. This exception will be discontinued for future entering classes, who will be on notice concerning the change in the law. Clearly, it must be discontinued if the legislative directive to require three years of financial independence is to have any practical effect. Interview with Scott Plotkin, Assistant Director of Governmental Affairs for the California State University and Colleges (Dec. 4, 1981) (notes on file at the Pacific Law Journal).
worksheet was included in the Chancellor's memorandum; the worksheet depicts financial independence as a separate step in the formula for reclassification. Thus, under the Chancellor's interpretation of the new law, a student who fails to demonstrate financial independence from his parents is classified a nonresident, despite positive evidence that he has lived in the state for more than a year and intends to remain in California after graduation.

The Chancellor's interpretation is in fact the most reasonable construction of the amendment for several reasons. First, it gives practical effect to the change in the law by making it impossible for students to circumvent the new requirement of financial independence by any means short of postponing their enrollment one year. Second, it is the only application of the statute that has a chance of raising the projected $5.3 million in revenue. Finally, the state of a student's past financial situation seems to bear no logical relation to the student's present intent to live or not to live in California. Thus, it is unlikely the Legislature intended the factor of financial independence as an indicator of intent. Rather, the Legislature more likely intended the requirement of financial independence to operate as a separate hurdle students must clear if they are to be reclassified as residents.

The fact, however, that Assembly Bill 251 erects an additional barrier to residence reclassification does not of itself make the amendment unconstitutional. The evil in Assembly Bill 251 lies in its overbreadth as implemented.

APPLYING THE NEW LAW

The preceding section presented the official interpretation of Assembly Bill 251 by the Chancellor of the California State University and Colleges. This section will compare the legislative purpose of the amendment and the permissible means for accomplishing that purpose with the results achieved by application of the Chancellor's interpretation.

Assembly Bill 251 was passed as a revenue-raising measure. The concern that motivated the Legislature to enact the bill is neatly summarized in a brief supporting the proposed amendment prepared by the Assembly Education Subcommittee on Postsecondary Education. The brief challenged the existing law with this question: "Should the state allow the dependents of families paying taxes in other states to

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41. See text accompanying notes 16-20 supra.

42. EDUCATION SUBCOMMITTEE ON POSTSECONDARY EDUCATION, REPORT ON AB 1175, 1 (April 16, 1981). The amendment as it appears in AB 251 was originally introduced as AB 1175 by Assemblyman Rogers.
attend California public institutions without paying out-of-state tuition? The state purpose, then, is to protect the fiscal integrity of the California higher education systems by no longer subsidizing the education of students who do not contribute to the state treasury through the payment of taxes. This purpose, however, cannot be achieved permissibly by a statute that, regardless of the students' residency, separates for disparate treatment students who are dependents of nonresident parents on the theory that neither they nor their parents pay taxes in California. The United States Supreme Court decision in Shapiro v. Thompson made it clear that legislation may not attempt to distinguish between new and old residents on the basis of their contribution in taxes. The Court noted that such reasoning "would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection."

The California Education Code conditions lower tuition on proof of bona fide residence. Residents of California are entitled to lower tuition; nonresidents are not. Any means employed to distinguish between students for the purpose of denying lower tuition, then, must be intended by the Legislature to distinguish between residents in fact and those students temporarily present within the state merely for the purpose of receiving an education.

To evaluate the ability of Assembly Bill 251 to distinguish between true residents and nonresidents through its financial independence test, the terms "resident" and "nonresident" must be defined. The Government Code defines "residence" for general purposes. The Education Code defines "residence" for tuition purposes. The two definitions

43. Id.
44. See Vlandis v Kline, 412 U.S. 441, 449-50 n.6 (1973).
46. Id. at 632-33.
47. Id. at 632.
48. Compare CAL. EDUC. CODE §68050 with id. §§68017, 68062(b).
49. CAL. GOV'T CODE §§243, 244.
50. CAL. EDUC. CODE §§68017 ("A 'resident' is a student who has residence, pursuant to Article 5 (commencing with Section 68060) of this chapter in the state for more than one year immediately preceding the residence determination date.").
are roughly identical. As thus defined, the term "residence" is used to mean domicile. It is defined as the place where one lives when not called elsewhere for special or temporary purposes, and to which one intends to return in seasons of repose. Residence is gained by the union of act (physical presence) and intent, to live in that place exclusively, with no intentions of returning to live elsewhere. Thus, "residents" for tuition purposes are students who have maintained residence, as defined above, for at least one year. "Nonresidents" are students who either have not been present within the state for more than a year or have not been present with the intent of establishing residence.

Comparing the Legislature's purpose and the permissible means for achieving that purpose with the actual results produced by the amendment, it appears that the amendment was not drafted in a way that executes either of these objectives with much accuracy. The provisions in Assembly Bill 251 requiring proof of financial independence apply only to enrolled students who are seeking reclassification as residents. The amendment's definition of financial independence focuses entirely on the student's relationship to his parent(s). Furthermore, the definition takes into account the student's financial status for the three years preceding the date of reclassification. These features of the new law produce some curious results when applied. Some students who have genuinely decided to establish permanent residence in California will be unable to show the requisite financial independence. Conversely, other students who are in California only temporarily for the purpose of pursuing an inexpensive education will be granted residence status because they meet the definition of financial independence or are transferring from another school. The following examples illustrate situations when application of Assembly Bill 251 would produce unfair results.

Example A—In 1979 Ann graduates from high school in Nevada where she lived with her parents. In June, following graduation, Ann moves...
to California where she has been accepted at a state college. She intends to settle in California as a permanent resident. Over the summer she works full time and pays California state income tax. Upon enrollment in the fall Ann is initially classified as a nonresident because she has not lived in the state for more than a year. During the school year she continues to work part-time and pay taxes. In the beginning of Ann's second year she applies for reclassification as a resident. Her application will be denied because she lived with her parents for two of the three preceding years while a high school student.

Example B—Bill is also attending a state college in California from out of state. He intends to return to his home state following graduation, however, to marry his high school sweetheart. Bill makes plans after one year in school to transfer from his present campus to another. Since he is applying for an initial classification as a new enrollee, Bill's residence is determined without reference to his financial independence. He meets the old test of presence plus intent and is classified as a resident. Bill's parents could be entirely supporting him; the result would be the same.

Example C—Carleton, another Nevada high school graduate, lives on his own in Nevada and is self-supporting, living off his gambling winnings, for three years after graduation. Carleton is initially classified as a nonresident because he has not lived in the state for more than a year. He applies for and receives comprehensive financial aid. In the beginning of his second year he applies for reclassification as a resident. Despite his complete reliance on financial aid, the absence of ties with his parents makes him financially independent for purposes of the statute. Assuming he meets the other tests, he is classified as a resident.

The foregoing examples demonstrate that the state's aim of separating tax-paying students from non-tax-paying students is not always achieved. From the scenarios proposed above it seems clear that Ann, the only person contributing to the state treasury through taxes, was also the only person denied lower tuition.

In addition, the financial independence test does not tend to identify nonresidents, nor does it tend to exclude residents from classification as nonresidents. Indeed, in the examples above, despite Ann being the only student who subjectively intended to establish residence, she was the only one denied residency classification.

Rather than falling on nonresidents, the burden of the new legislation will fall primarily on students entering California colleges directly from high school. Assuming that most students live with their parents

\[\text{Id}\]
while they are in high school, it will be possible for a student graduat-
ing from high school and continuing directly into college to live four
uninterrupted years in California and never purge his record of the
fictional evidence of nonresidency, regardless of his good faith intent to
establish residence.

In summary, Assembly Bill 251 was intended by the Legislature to
discontinue tuition subsidies to dependents of nonresident parents who
do not pay taxes in California. The permissible means of achieving
that objective is by separating nonresidents from residents and charg-
ing nonresidents higher tuition. Assembly Bill 251 does not accomplish
either of these tasks with much accuracy. The hypothetical examples
above illustrate the amendment's overinclusiveness when the financial
independence formula is applied to determine residence. The next sec-
tion will consider the propriety of employing an indiscriminate formula
when more accurate methods for ascertaining residence are already
available.

DUE PROCESS UNDER THE FEDERAL CONSTITUTION

The due process clause of the fourteenth amendment to the federal
Constitution provides that no state shall "deprive any person of . . .
liberty or property, without due process of law."\textsuperscript{61} To determine
whether the state, by enacting and enforcing Assembly Bill 251, has
deprieved any person of property\textsuperscript{62} without due process of law requires
an answer to two questions. First, is an interest in lower tuition pro-
tected by the term "property?" Second, what process is due under the
guarantee of due process?

A. Property Interests

The term "property" encompasses a broad concept of benefits and
interests that cannot be deprived by arbitrary state action.\textsuperscript{63} In Board
of Regents of State Colleges \textit{v. Roth},\textsuperscript{64} Justice Stewart's majority opin-
ion articulated the guidelines currently employed by the United States
Supreme Court in determining what benefits or interests qualify as
"property" within the meaning of the fourteenth amendment. He
wrote:

Property interests, of course, are not created by the Constitution.

\textsuperscript{61} U.S. Const. amend. XIV, §1.
\textsuperscript{62} For a case suggesting that the right to acquire useful knowledge is an attribute of "lib-
   erty" protected by the due process clause, see Meyer \textit{v. Nebraska}, 262 U.S. 390, 399 (1923).
\textsuperscript{63} See generally J. Nowak, R. Rotunda, \& J. Young, \textsc{Handbook on Constitutional}
   Law} 490-96 (1978) [hereinafter cited as Nowak].
\textsuperscript{64} 408 U.S. 564 (1972).
Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.  

Whether interests in a particular case constitute property thus depends on what rights are conferred by state law in that jurisdiction. California law entitles state residents attending public universities and colleges to pay lower tuition. Under the Roth standard, a property interest has been created because state law supports a claim of entitlement to the benefit on a showing of residency. The United States Supreme Court decision in Vlandis v. Kline [discussed with further detail infra] supports this conclusion. That case was premised on the Court's recognition that lower in-state tuition is a property interest protected by the due process clause.

Thus, the benefit of lower tuition, being a right conferred by state law, is a property interest belonging to all bona fide residents of California—a property interest that, having been granted to all the state's residents, cannot be withheld from some of them without due process of law.

B. What Process is Due

The constitutional guarantee of procedural due process requires fair procedure in administrative proceedings when the disposition of an individual's property is at stake. This right to fair procedure is frequently held to require an impartial hearing or some other form of case-by-case fact-finding, grounded on relevant evidence, prior to the agency's finalized determination. Whether due process necessitates special procedure in a particular case is determined by weighing the individual interest involved, and the value of specific procedural safeguards to that interest, against the governmental interest in fiscal and

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65. Id. at 577. This represents the most narrow view of "property" the Court is likely to take. Justice Stewart writes for a majority of only five members. The dissenting justices would find some minimum guarantees to property in the Constitution itself.

66. See 4 Op. ATT'Y GEN. 181, 183 (community and state colleges are free to residents of California except that the state colleges may charge limited tuition fees when necessary); CAL. EDUC. CODE §§89703 (maximum tuition fee for residents shall not exceed $25 per year), 89705 (tuition for nonresidents shall not be less than $360 per year). See generally 49 CAL. JUR. 2d Universities and Colleges §§49-51 (Supp. 1980).


68. See text accompanying notes 78-84 infra.

69. 412 U.S. at 444-45.


71. See generally 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 399 (2d ed. 1978); NOWAK supra note 63, at 490-512.

administrative efficiency.\footnote{Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976).} In the case of Assembly Bill 251, the importance to the individual of impartial fact-finding weighs heavily because factual issues are in dispute that will determine his right to significantly lower tuition. Specifically, the admissions officer must make a determination of the student's residence. Only when procedures for impartial fact-finding are provided may the individual challenge an incorrect administrative determination by presenting evidence of the bona fides of his residence in California.

In contrast, the interest of the state in making this factual determination by reference to a financial independence formula is meager since procedures roughly equivalent to an individualized hearing are currently authorized by statute. The Education Code already provides for residence determination on a case-by-case basis, including the taking of individual testimony under oath.\footnote{CAL. EDUC. CODE §§68041 ("An oath or affirmation may be required in connection with taking testimony necessary to ascertain a student's classification.")}, 68042 ("The governing board . . . may appoint persons to administer oaths or affirmations in connection with taking testimony necessary to ascertain a student's classification."). Moreover, the Administrative Code permits students to submit other evidence as proof of residence in addition to the information provided on the school's questionnaires.\footnote{5 CAL. ADMIN. CODE §41907 ("Classifications shall be based on evidence presented in, and supporting, applicants' answers to uniform residence questionnaires and supplemental residence questionnaires approved by the Chancellor, such further evidence of residence deemed necessary by the institution and such further evidence as the applicant submits.").} The provision and authorization of these specific procedures indicates recognition by the Legislature that a student's subjective intent to retain former residence or establish California residence can be discovered only through the testimony of the student and an evaluation of affirmative steps the student has taken to make California his home. The state, having authorized adequate procedures for the accurate determination of student residence, has no legitimate need for an inexact formula that abandons fact-finding in favor of a statutory presumption.

C. Irrebuttable Presumptions

Whenever a factual determination in an administrative proceeding is resolved by reference to a statute rather than by consideration of relevant evidence, the statute must be examined to ascertain whether the requirement of fair procedure has been satisfied.\footnote{Vlandis v. Kline, 412 U.S. 441, 451-52 (1973).} A statute which operates on a presumption that conclusively disposes of the very matter being contested by the person whose property is at stake denies this individual a fair opportunity to challenge the matter. To comport with due process, the statute must either operate on a presumption that is
universally true in fact or refer to a fact in issue that cannot be determined by more reasonable alternative methods.\textsuperscript{77}

In the landmark decision of \textit{Vlandis v. Kline},\textsuperscript{78} decided on facts quite similar to those presented by Assembly Bill 251, the United States Supreme Court declared unconstitutional a Connecticut statute creating an irrebuttable presumption of nonresidency.\textsuperscript{79} The Connecticut statute provided that a student attending school in Connecticut would be classified a nonresident if the student’s legal address was outside the state for any part of the year preceding his or her application for admission. In addition, the student’s classification as initially established would be effective for the entire period of attendance at that school.\textsuperscript{80} The offensive feature of the Connecticut statute was not its initial classification. The Court conceded the right of a state to impose a requirement of presence within the state for a reasonable duration as an element in demonstrating bona fide residence.\textsuperscript{81} The Court pointed out, however, that the durational residency requirement must be capable of being met “while in student status.”\textsuperscript{82} For this reason, the Court’s primary objection was to the statute’s failure to account for students who, once enrolled, decided to become permanent residents.\textsuperscript{83} An antecedent condition, unrelated to their present intent to become residents, prevented these students from rebutting the presumption of nonresidency. The opinion states:

\begin{quote}
Assuming that it is permissible for the state to impose a heavier burden of tuition and fees on non-resident than on resident students, the state may not classify as ‘out of state students’ those who do not belong in that class.\textsuperscript{84}
\end{quote}

Two years later in \textit{Weinberger v. Salji},\textsuperscript{85} the Supreme Court upheld a Social Security Act provision that no survivor’s benefits would be paid to a surviving spouse unless the couple had been married at least nine months prior to the spouse’s death.\textsuperscript{86} The Court limited its \textit{Vlandis} holding to situations in which the statute involved \textit{purports} to condition a governmental benefit on the true status of an applicant, but then forces the applicant into a given status by making plainly relevant evidence concerning that status impotent against a statutory

\begin{footnotes}
\textsuperscript{77}  \textit{Id}.
\textsuperscript{78}  412 U.S. 441 (1973).
\textsuperscript{79}  \textit{Id} at 454.
\textsuperscript{80}  \textit{Id} at 442-43.
\textsuperscript{81}  \textit{See id} at 452.
\textsuperscript{82}  \textit{Id}.
\textsuperscript{83}  \textit{See id} at 446.
\textsuperscript{84}  \textit{Id}.
\textsuperscript{85}  422 U.S. 749 (1975).
\textsuperscript{86}  \textit{Id} at 781.
\end{footnotes}
presumption. 87

D. Application to Assembly Bill 251

The rule against irrebuttable presumptions, as announced in Vlandis and refined by Sapi, is violated by Assembly Bill 251. The bill represents an effort to achieve the same results contemplated by the Connecticut statute by erecting a slightly different statutory presumption. In Vlandis, it was presumed that a student who registered from out of state intended to return to his former place of residence following graduation, notwithstanding positive evidence to the contrary. 88 In the present situation, Assembly Bill 251 creates the presumption that students who are presently, or were formerly, dependent on out-of-state parents for some degree of financial support intend to return to the state wherein their parents reside. 89 The same inequitable results that occurred in Vlandis are occurring under Assembly Bill 251; students who lived with their parents or received support from them in the year of, or in any of the three years preceding, their determination date are classified as “out-of-state students” although some of them do not belong in that class. 90 Recall that “residence” is defined as the place where one intends to live exclusively when not called elsewhere for special or temporary purposes, and to which one intends to return in seasons of repose. 91 The Education Code purports to be concerned with ascertaining students’ residences in fact. The amendment to the Code, however, abandons this aim in favor of a blunt formula that classifies as nonresidents all new residents who could be characterized as dependents, or former dependents, of their parents. 92 No counterbalancing offer of proof tending to confirm the genuineness of a student’s California residence will rebut this presumption of nonresidency.

The test for constitutionality applied to the Connecticut statute by the Court in Vlandis was articulated as follows:

[I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alterna-

87. See id. at 772; see also Elkins v. Moreno, 435 U.S. 647 (1978) (a recent Supreme Court case reaffirming the vitality of Vlandis as limited by Sapi).
89. If the Legislature does not at least justify its classification on the theory that dependence on nonresident parents can be used as an indicator of intent, the legislative purpose may be impermissible. See text accompanying notes 44-46 supra.
90. See text accompanying notes 48-61 supra.
91. CAL. EDUC. CODE §68062; CAL. GOVT CODE §244. See text accompanying notes 49-55 supra.
92. See text accompanying notes 56-61 supra.
Applying the Vlandis test to Assembly Bill 251, students are denied resident tuition rates because they do not meet the test for financial independence. Yet that test, as an indicator of residence, is not necessarily or universally true in fact. Furthermore, the state has reasonable alternative means of making the determination of residency. For example, the statute could take into account only present financial ties with parents. The existence of such ties could be considered only as a factor negating intent to establish residence in California that could be rebutted by sufficient evidence of intent to stay beyond college. Finally, this factor could be made applicable to transferring students as well as continuing students seeking reclassification. By revising the amendment as proposed, the objective suggested by the Assembly Subcommittee on Postsecondary Education would still be achieved: dependents of out-of-state taxpayers who are temporary California residents, here only for the purpose of obtaining a college education, would pay nonresident tuition.

To summarize, students who are residents of California cannot be denied lower in-state tuition. Due process requires that students be provided a hearing, or similar fair procedure, to protect against arbitrary state action prior to their being denied residence reclassification. Vlandis v. Kline held that fair procedure could not be avoided through an irrebuttable presumption of nonresidency. Assembly Bill 251 erects a presumption of nonresidency in cases in which new residents are not "financially independent." Considering that reasonable alternatives for determining residence are already authorized, Assembly Bill 251 fails the test for constitutionality articulated in Kline. It should therefore be amended or repealed.

The next section will analyze Assembly Bill 251 not merely as a conclusive statutory presumption, but as an unnecessarily overreaching classification that infringes a fundamental right to higher education recognized in California. The argument will be presented, therefore, that Assembly Bill 251 violates equal protection under the California Constitution.

EQUAL PROTECTION UNDER THE CALIFORNIA CONSTITUTION

The concept of equal protection of the law embodies the premise that
persons similarly situated, with respect to the legitimate purpose of the law, must receive like treatment. This proposition, however, does not preclude the Legislature from making statutory classifications, but simply prevents it from granting privileges to or imposing burdens on a group of people arbitrarily. When legislation defines a class for special treatment, equal protection requires that there exist some reasonable distinction between those included in and those excluded from the class.

The "reasonableness" of a classification can be measured by its tendency to include those persons whom the legislation was intended to affect and to exclude those whom the legislation was not intended to affect. Thus, the ideal classification would include all of the former group and none of the latter. A classification that identifies for special treatment more persons than the legislation was intended to affect is overinclusive, that is, it reaches out to persons it defines as members of the class when in fact the legitimate purpose of the law is not furthered by their inclusion. If these people are injured by the law affecting them, their right to equal protection is violated. This comment has noted that the legitimate legislative purpose for the classification in Assembly Bill 251 is to distinguish residents from nonresidents for the purpose of charging nonresidents out-of-state tuition. The financial independence classification must therefore tend to identify students who are temporarily present within the state merely for the purpose of receiving an education, and exclude from classification students who intend to remain in California as permanent residents following graduation. Judging from the amendment's failure to distinguish nonresidents who are financially dependent from new residents who are financially dependent, the classification appears to be grossly overinclusive. Many students who have genuinely decided to establish their permanent residence in California will be unable to show the requisite financial independence. At the same time, other students who are in California only temporarily for the purpose of pursuing an inexpensive education will be granted resident status because they meet the definition of financial independence or are transferring from another state.

98. 5 Cal. 3d at 303, 486 P.2d at 1207, 96 Cal. Rptr. at 6-7.
99. Id.
101. 8 Cal. 3d at 876, 506 P.2d at 227, 106 Cal. Rptr. at 403; see also Tussman & tenBroek, supra, at 351.
102. 8 Cal. 3d at 877-78, 506 P.2d at 227-28, 106 Cal. Rptr. at 403-04.
103. See text accompanying notes 44-55 supra.
104. See text accompanying notes 56-61 supra.
For these reasons, Assembly Bill 251 is subject to equal protection review to determine whether the financial independence classification is constitutionally justifiable.

A. Standards of Review

The United States Supreme Court, in applying the equal protection clause of the federal Constitution, has developed two standards for reviewing legislative classifications. The standard of general application requires only that the classification drawn by the Legislature be rationally related to a legitimate state objective. Under this test, a statute is not doomed simply because the classification “is not made with mathematical nicety or because in practice it results in some inequality.” The second, more intensive standard of review requires that legislative classifications be drafted in their particular fashion out of necessity, to achieve a compelling state interest. This latter, so-called “strict scrutiny” test applies when the statute under review affects certain personal rights that are deemed “fundamental” or uses certain sensitive classifications considered “suspect.”

The California Supreme Court, in reviewing statutes under the state constitution, has generally borrowed the vocabulary and applied the standards devised by the United States Supreme Court. Thus, California courts will uphold statutes that are rationally related to a legitimate state objective except when statutes employ suspect classifications or affect fundamental rights. In these latter cases the court will vacate a statute that is not necessary to promote a compelling state interest. Pursuant to the doctrine of adequate state grounds, however, the California Supreme Court has demonstrated its willingness on many occasions to part ways with the federal trend and discover suspect clas-

105. See text accompanying notes 56-61 supra.
106. See generally NOWAK, supra note 63 at 380-84. An intermediate standard of review, requiring that legislation be substantially related to an important governmental objective, has been applied to statutes involving classifications based on gender, see generally Craig v. Boren, 429 U.S. 190 (1976), or involving classifications disadvantaging non-marital children, see generally Lalli v. Lalli, 439 U.S. 259 (1978).
111. Hawkins v. Superior Court, 22 Cal. 3d 584, 600, 586 P.2d 916, 926, 150 Cal. Rptr. 435, 445 (1978) (Mosk, J., concurring). The equal protection clauses of the California Constitution appear in Article I, Section 7(a) (“A person may not be . . . denied equal protection of the laws.”); Article I, Section 7(b) (“A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.”); and Article IV, Section 16(a) (“All laws of a general nature shall have uniform operation.”).
112. 22 Cal. 3d at 600, 586 P.2d at 916, 150 Cal. Rptr. at 445.
113. See id. at 592, 586 P.2d at 921, 150 Cal. Rptr. at 440.
sifications or fundamental rights protected under the state constitution that are unrecognized at the federal level.114

B. Adequate State Grounds

In an early case, Murdock v. City of Memphis,115 the United States Supreme Court declared a limit to its jurisdiction preventing review of state court decisions interpreting state law.116 From this rule has developed the corollary principle that state court judgments decided on two alternative grounds, one federal and one state, will not be reviewed if the judgment can be supported entirely on "adequate and independent state grounds."117 While state courts may not, of course, interpret state law as grounds to deny or dilute the exercise of rights guaranteed by the federal Constitution,118 state courts are at liberty to interpret their own constitutions as granting additional rights, or providing increased protection for rights already protected to some degree by the federal Constitution.119

C. California Equal Protection

The preceding sections presented general concepts of equal protection and outlined the standards of review employed by the United States Supreme Court when testing the constitutionality of state statutes under the federal Constitution. Concerning laws that affect education, the United States Supreme Court has generally deferred to the judgment of the state legislatures. In San Antonio Independent School District v. Rodriguez120 the Court held that education was not a fundamental right requiring strict scrutiny review of a Texas school financing program.121 In Memorial Hospital v. Maricopa County122 the Court noted that it did not consider higher education a vital governmental benefit whose denial would penalize the exercise of one's right to

114. See, e.g., Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (holding that education is a fundamental right); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (treating classifications based on gender as suspect).
115. 87 U.S. (20 Wall.) 590 (1875).
116. Id. at 634-35.
118. See Free v. Bland, 369 U.S. 663, 666 (1962); U.S. CONST., art. VI, cl. 2 (supremacy clause).
119. See, e.g., White v. Davis, 13 Cal. 3d 757, 773-74, 533 P.2d 222, 233-34, 120 Cal. Rptr. 94, 105-06 (1975); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 20, 485 P.2d 529, 541, 95 Cal. Rptr. 329, 341 (1971) (treating gender as a suspect classification); CAL. CONST. art. I, §1 (California right to privacy is right to be left alone).
120. 411 U.S. 1 (1973) (discussed with further detail infra).
121. Id. at 35.
The United States Supreme Court having decided that education is a matter of local concern best left in the hands of the states, the Supreme Court of California, interpreting the state's own constitution pursuant to the doctrine of adequate state grounds, has held that education is a fundamental right and has invalidated statutes that interfere with it.

I. Education as a Fundamental Right

_Serrano v. Priest_, a 1976 California Supreme Court decision interpreting the state constitution, laid the foundation for the case against Assembly Bill 251. In _Serrano_, plaintiffs brought an action challenging the constitutionality of the California public school financing system. Under the existing scheme, public schools were financed from local property taxes. Consequently, schools in neighborhoods with a low tax base provided a learning environment inferior to that offered in schools located in wealthier districts. While an appeal to the Supreme Court of California was pending, the United States Supreme Court decided _San Antonio Unified School District v. Rodriguez_, ruling on the constitutionality of a similar public school financing system in Texas. _Rodriguez_ held that education was not a fundamental right because a right to education was not expressly or implicitly provided for or protected by the federal Constitution.

On appeal, the Supreme Court of California refused to follow the result in _Rodriguez_. Instead, the court's opinion in _Serrano_ observed that the right to education was expressly provided for and protected by the California Constitution and for that reason education in California must be regarded as a fundamental right. Proceeding on this conclusion the court analyzed the statute under the strict standard of review, shifting the burden of proof to the state to show that the financing system was necessary to achieve a compelling state interest. The court concluded that the state had not met this level of proof and invalidated the statutory scheme as violative of the rights of students to equal protection under the state constitution.

Although _Serrano_ involved primary and secondary public education, the court's conclusion that education is a fundamental right logically

123. Id. at 259.
124. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).
125. Id. at 737-38, 557 P.2d at 932-33, 135 Cal. Rptr. at 348-49.
126. Id. at 747-48, 557 P.2d at 939, 135 Cal. Rptr. at 355.
128. Id. at 35.
129. See 18 Cal. 3d at 763-66, 557 P.2d at 950-51, 135 Cal. Rptr. at 366-67.
130. Id. at 768, 557 P.2d at 952-53, 135 Cal. Rptr. at 368-69.
applies to higher education as well. The provisions in the constitution referred to by the court as granting Californians a fundamental right to education were Article IX, sections 1 and 5, and Article XVI, section 8.\textsuperscript{131} Both articles appear to incorporate higher education within their scope. Article IX, section 1 reads:

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.\textsuperscript{132}

Article XVI, section 8 plainly refers to higher education: “From all state revenues there shall first be set apart the monies to be applied by the state for support of the public school system and public institutions of higher education.”\textsuperscript{133}

A right to education, then, is provided for by the state constitution and for this reason was declared “fundamental” by the California Supreme Court. The relevant language in the constitution does not limit the right to a particular level of education. Rather, the right to higher education, particularly state-subsidized higher education, is expressly protected as a budgetary priority.\textsuperscript{134} To the extent Assembly Bill 251 singles out a class of people and conditions their exercise of this right, it must be evaluated under the strict test of judicial review to determine whether the classification is justified.\textsuperscript{135}

Before proceeding with analysis under the strict standard of review, however, a preliminary point must be addressed. The contention can be made that bona fide California residents who are caught in the overbreadth of Assembly Bill 251 are not denied their fundamental right to higher education—they simply must pay more for it. This argument was advanced by state officials in a 1981 case, Committee to Defend Reproductive Rights v. Myers,\textsuperscript{136} in which public funds were being withheld from Medi-Cal recipients choosing to have an abortion. In deciding the case, the Supreme Court of California declined to follow the United States Supreme Court decision in Harris v. McRae.\textsuperscript{137} Har-

\textsuperscript{131} Id. at 764, n.42, 557 P.2d at 950 n.42, 135 Cal. Rptr. at 366 n.42.
\textsuperscript{132} CAL. CONST., art. IX, §1.
\textsuperscript{133} Id. art. XVI, §8.
\textsuperscript{134} Id.; see also CAL. EDUC. CODE §66201:
It is the intent of the Legislature that each resident of California who has the capacity and motivation to benefit from higher education should have the opportunity to enroll in an institution of higher education. Once enrolled he should have the opportunity to continue as long and as far as his capacity and motivation . . . will lead him . . . The Legislature hereby reaffirms the commitment of the State of California to provide an appropriate place in California public higher education for every student who is willing and able to benefit from attendance.
\textsuperscript{135} 18 Cal. 3d at 768, 557 P.2d at 952, 135 Cal. Rptr. at 368.
\textsuperscript{136} 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).
\textsuperscript{137} 448 U.S. 297 (1980).
ris held that, while the right to choose an abortion was a fundamental right protected by the federal Constitution, public funds to secure an abortion were not similarly protected. Instead, the California court in Committee to Defend Reproductive Rights declared invalid as violative of the privacy and equal protection clauses of the state constitution those items in the budget that withheld Medi-Cal funds from recipients who chose to have abortions. The court stated, “the governing California cases . . . have long held that a discriminatory or restricted government benefit program demands special scrutiny whether or not it erects some new or additional obstacle that impedes the exercise of constitutional rights.” The opinion concluded that while the state is under no duty to subsidize public health care, if it elects to do so it cannot arbitrarily withhold that benefit when nonreceipt of Medi-Cal funds would prevent some persons entitled to funds from exercising their fundamental right to an abortion. Applying this principle to Assembly Bill 251, denying lower, in-state tuition to residents entitled to lower tuition will prevent residents who cannot afford to pay out-of-state rates from exercising their fundamental right to higher education. Accordingly, the strict scrutiny test is the appropriate standard of review to apply to a constitutional challenge to Assembly Bill 251. Under this standard, the presumption of constitutionality normally attaching to legislative classifications disappears and the state must show that the classification used in the statute is necessary to achieve a compelling state interest.

2. The State’s Compelling Interest

The foregoing section showed that by interfering with the fundamental right of California residents to publicly funded higher education, Assembly Bill 251 is subject to heightened judicial scrutiny. The question remains whether the financial independence classification is justifiable as necessary to achieve a compelling state interest. If the state can

138. Id. at 316-17.
139. 29 Cal. 3d at 262, 625 P.2d at 784, 172 Cal. Rptr. at 871.
140. Id. at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868.
141. Id. at 262, 625 P.2d at 784, 172 Cal. Rptr. at 871. Chief Justice Bird, concurring, wrote:
   An artificial distinction between so called direct and indirect infringement begs the question as to whether the state has infringed a fundamental right . . . . The fact that the state has not banned the exercise of the right entirely is irrelevant to the basic issue. Our courts have frequently struck down restrictions that did not completely prohibit the exercise of a fundamental right. [Citations omitted.] If the exercise of the right is burdened, a compelling interest must be shown to avoid constitutional validity regardless of the manner of infringement.

Id. at 288 (Bird, C.J., concurring).
142. 18 Cal. 3d at 768, 557 P.2d at 952-53, 135 Cal. Rptr. at 368-69.
support this burden of proof, the amendment will remain law, even though in practice it results in inequality.

The concern that motivated the Legislature to enact Assembly Bill 251 was that under prior law nonresident students were able to create sham residences and thereby receive a state-subsidized education, when at the same time neither the students nor their parents paid taxes in California. By forcing nonresident students to pay out-of-state tuition, the state would both decrease its cost and increase its revenue. In Boren v. California Department of Employment Development, the California Court of Appeal indicated that dollar savings, while a legitimate state interest, is not a compelling state interest that could independently support an improper classification. The court stated:

A state may not preserve the fiscal integrity of its programs by invidious distinctions between classes of citizens. [Citations omitted.] When a statutory classification is subject to strict scrutiny, the state must do more than show the exclusion saves money.

Even assuming for the sake of argument that the state could advance some compelling interest other than dollar savings, the financial independence classification is still an unnecessarily drastic means of achieving the statute's legitimate aim of distinguishing residents from nonresidents. As mentioned earlier, the Education Code provides for case-by-case evaluation of students' reclassification requests, including the taking of individual testimony under oath. Admissions officers may require students to produce documentation supporting their answers to questionnaires and statements under oath. These procedures are designed to ascertain the two statutory elements of residence, presence and intent. Instead of overriding these existing procedures, the financial independence factor could be incorporated with them to make the discovery of intent more effective. For example, the statute could take into account only present financial ties with parents. The existence of these ties could be considered only as a factor negating intent to establish residence in California which could be rebutted by sufficient evidence of intent to stay beyond college. Finally, this factor could be made applicable to transferring students as well as continuing students seeking reclassification. By revising the amendment as proposed, the state's objective of saving money and raising revenue would

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143. See text accompanying notes 42-44 supra.
144. See REPORT OF THE LEGISLATIVE ANALYST, supra note 9, at 1242.
146. Id. at 261, 130 Cal. Rptr. at 689-90.
147. Id.
148. CAL. EDUC. CODE §68041.
149. 5 CAL. ADMIN. CODE §41907.
150. CAL. EDUC. CODE §68062(d).
still be achieved, at least to the extent permissible. Dependents of out-of-state taxpayers who are in fact temporary California residents because they intend to remain in the state only for the purpose of obtaining a college education, would pay nonresident tuition.

In sum, applying the strict scrutiny standard of equal protection review to Assembly Bill 251, it appears the amendment cannot be justified as necessary to promote a compelling state interest. Thus, Assembly Bill 251 fails the test for constitutionality under the equal protection clauses of the California constitution and should be amended or repealed.

CONCLUSION

Assembly Bill 251 is intended as a dollar-saving measure, the legitimate purpose of which is separating true residents from nonresidents. The amendment erects a separate obstacle for students attending state colleges and universities who wish to establish residence, by requiring the financial independence of students as a condition to residence reclassification.

The classification of students into two groups—those who are financially dependent on parents and those who are not—does not effectively serve the state’s purpose of distinguishing residents from nonresidents. Rather, the statute tends to charge nonresident tuition to students entering college directly from high school. As the California Education Code purports to be concerned with ascertaining students’ residence in fact, Assembly Bill 251 creates an irrebuttable presumption of nonresidency in violation of due process under the United States Supreme Court decisions of *Vlandis v. Kline* and *Weinberger v. Safi*.

In addition, the amendment infringes the equal protection rights of new residents who, as a result of the financial independence requirement, are denied lower tuition. Under the California state constitution, education—including higher education—is a fundamental right. The California Supreme Court has held that public funding for a fundamental right cannot be arbitrarily withheld. Thus, the appropriate test for judicial review permits the statute to employ an inexact classification only if that is necessary to promote a compelling state interest. The state interest in dollar savings, while legitimate, is not a compelling state interest that can justify the inequitable effects of Assembly Bill 251.

Justice Jackson, concurring in *Railway Express Agency v. New*
York,\textsuperscript{151} wrote:

[N]othing opens the door to arbitrary action so effectively as to allow [state] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.\textsuperscript{152}

The risk of arbitrary state action of which Justice Jackson warned is greatest when the class of persons affected by the statute is effectively insulated from the political process, because persons without a vote cannot exert political pressure on the Legislature to alter its policies.\textsuperscript{153} New residents of California had no political voice in the state when they were yet residents of other states. Laws affecting the rights of new residents must therefore be scrutinized by the judiciary even more closely than laws affecting other groups if the rights of new residents to due process and equal protection are to be fairly protected.

\textit{Timothy Bittle}

\textsuperscript{151} 336 U.S. 106 (1949).
\textsuperscript{152} \textit{Id.} at 112-13.