Elections—Voting Residence—A Statutory Presumption That a Student Is Not a Resident of the Community Where He Is Attending School Violates the Equal Protection Clause of the Fourteenth Amendment. *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973).

Several students brought a declaratory judgment action to contest the constitutionality of article 5.08(k) of the Texas Election Code.[1] The statute created a presumption that students were nonresidents of their college communities.[2] The students had attempted to register to vote in Denton County. The registrar, pursuant to article 5.08(k), asked each student whether he intended to make his home in Denton County indefinitely after he ceased to be a student. When the students replied negatively, they were not allowed to register.[3] The trial court[4] held article 5.08(k) invalid under the equal protection clause of the fourteenth amendment. The Court of Appeals for the Fifth Circuit affirmed.[5] It held that the statutory presumption of nonresidency,[6] applicable to students only, violated the equal protection clause of the fourteenth amendment.[7]

Although the right to vote is fundamental,[8] it is not absolute.[9] States have broad powers to impose voter qualifications, to require voters to be bona fide residents and to establish other reasonable suffrage requirements.[10] Once the franchise is granted, however, voting requirements may not be established that are inconsistent with the equal protection clause.[11]

Traditionally, a statutory classification does not violate equal pro-

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1. TEX. ELECTION CODE ANN. art. 5.08(k) (Supp. 1973) reads as follows:
   The residence of a student in a school, college, or university shall be construed to be where his home was before he became such student unless he has become a bona fide resident of the place where he is living while attending school or of some other place. A student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student.
2. Whatley v. Clark, 482 F.2d 1230, 1233 (5th Cir. 1973).
3. *Id.* at 1231.
4. Whatley v. Clark, Civil No. 5474 (E.D. Tex., Oct. 2, 1972).
5. Whatley v. Clark, 482 F.2d 1230 (5th Cir. 1973).
6. *Id.* at 1232-33.
7. *Id.* at 1231.
8. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
9. The states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. Lassiter v. Northampton Election Bd., 360 U.S. 45, 50 (1959).
10. *Id.* at 51.
11. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).

tection if it reasonably relates to effectuation of a legitimate legislative purpose.[12] The statute is generally presumed valid[13] and courts permit a wide range of discretion in achieving proper legislative goals.[14] But when the classification involves an inherently suspect discrimination or affects the assertion of a fundamental right, a more rigid standard is applied.[15] The compelling interest test is invoked, and the classification is subjected to close judicial scrutiny.[16] The burden then falls on the state to demonstrate that a compelling state interest can be achieved only by the restriction.[17] If no such interest is shown, the statute is unconstitutional as a violation of the equal protection clause.[18]

In *Whatley v. Clark*,[19] the Fifth Circuit held that article 5.08(k) of the Texas Election Code failed to satisfy the compelling interest test.[20] Article 5.08(k) established the same residency requirement for all voters, but the requirement was applied differently to students.[21] While all voters were required to have the intention to remain in the community for an indefinite time to establish domicile,[22] only students had to *prove* such intent.[23] The burden was on the student to overcome the statutory presumption that he was not a resident. In defense of article 5.08(k), the state argued that the proof requirement for students was necessary to prevent them from voting twice.[24] But the *Whatley* court found it "difficult to believe" that the presumption of nonresidency was necessary to promote that goal[25] because prevention of duplicate voting could be achieved by less restrictive sanctions.[26]

The United States Supreme Court has never ruled on the issue of residency requirements for student voters. But it has decided several related voting cases concerning statutory restrictions on the right to

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12. Kramer v. Union Free School Dist., 395 U.S. 621, 627-28 (1969); *see* McGowan v. Maryland, 366 U.S. 420 (1961).
13. Kramer v. Union Free School Dist., 395 U.S. 621 (1969).
14. Carrington v. Rash, 380 U.S. 89, 91 (1965); Lassiter v. Northampton Election Bd., 360 U.S. 45, 50 (1959).
15. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964).
16. *Id.*
17. *See* Annot., 31 L. Ed. 2d 861, 870-71 (1972).
18. 383 U.S. 663 (1966).
19. 482 F.2d 1230 (5th Cir. 1973).
20. *Id.* at 1234.
21. *Id.* at 1233.
22. TEX. ELECTION CODE ANN. art. 5.08 (1967).
23. 482 F.2d at 1233.
24. *Id.* at 1234.
25. *Id.*
26. *See* Wilkins v. Bentley, 385 Mich. 670, ____, 189 N.W.2d 423, 430 (1971).

vote.[27] In *Carrington v. Rash*,[28] the Court struck down a Texas statute which created an irrebuttable presumption that military personnel in Texas were nonresidents.[29] Defending the validity of the statute, the state asserted its alleged interest in protecting the franchise from transients and in preventing a "takeover" by military personnel.[30] The court responded that to deny the franchise to a sector of the population because of the way they might vote is constitutionally impermissible.[31] Further, to forbid a soldier to controvert the presumption of nonresidency is an invidious discrimination which violates the fourteenth amendment.[32]

In *Evans v. Cornman*,[33] the Supreme Court struck down a Maryland statute that created a presumption that residents of a federal enclave were not bona fide residents of Maryland.[34] The *Evans* Court found the state's claim that the restriction maintained an informed and interested electorate to be groundless.[35] Local issues and actions, the Court reasoned, substantially affected all residents, regardless of whether they lived in the federal enclave.[36]

The Supreme Court has also nullified laws which restricted voting on revenue bonds to property owners[37] or to persons who had been residents for one year or more.[38] In these cases, the states argued that a person who owned no local property or who had been a resident less than one year would presumably have less interest in an election and

27. Each case dealt with the restriction of the right to vote to a limited class. These include: Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (property owners or parents of school children); Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (property taxpayers); Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residency requirements); Cipriano v. Houma, 395 U.S. 701 (1969) (property owners). Each of these voting restrictions was declared unconstitutional because no compelling state interest was found. The compelling interest test was set out in *Kramer*:

> If a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

395 U.S. at 627. *See also* Oregon v. Mitchell, 400 U.S. 112 (1970) which upheld the constitutionality of Title II of the Voting Rights Act of 1970 (42 U.S.C. § 1973aa—1(a—i)) which banned durational residency requirements in Presidential elections.

28. 380 U.S. 89 (1965).
29. TEX. ELECTION CODE ANN. art. 5.02 (1967).
30. 380 U.S. at 93.
31. *Id.* at 94.
32. *Id.* at 96.
33. 398 U.S. 419 (1970).
34. *Id.*
35. *Id.* at 426.
36. *Id.* at 424.
37. Phoenix v. Kolodziejski, 399 U.S. 204 (1970).
38. Dunn v. Blumstein, 405 U.S. 330 (1972).

was more likely to be a transient. If the voter proved that he owned property, paid taxes, or was a bona fide resident, then he could vote. However, the Supreme Court nullified each of these laws because it found no compelling state interest that made such a discriminatory classification necessary. The Court reasoned that a person who rents may be just as concerned about a revenue bond election as a property owner. The renter's payments will ultimately pay the property tax on his residence; therefore, limiting the vote to property owners serves no real purpose.[39]

On the strength of these precedents alone it was predictable that the Texas student residency statute would fall.[40] Article 5.08(k) required a student to prove that he planned to remain in his college community indefinitely after he ceased to be a student.[41] No other class of voters was required to prove such intent even if it did not plan to remain there indefinitely.[42] Thus, as in *Carrington*, the legislature had singled out for different treatment a particular class of prospective voters without demonstrating a compelling state interest.[43]

It became more apparent that the Texas statute would be struck down after the decision in *Wilkins v. Bentley*.[44] In *Wilkins*, the Michigan Supreme Court held unconstitutional a statute similar to article 5.08(k).[45] The court rejected the state's argument that the measure preserved the purity of the ballot box by insuring that students would not vote twice.[46] Because other methods are available to accomplish this

39. *See* discussion in Wilkins v. Bentley, 385 Mich. 670, 189 N.W.2d 423 (1971).

40. It would appear that even the Texas Attorney General recognized the weakness of this provision since article 5.08(j) of the Texas Election Code, which applied a similar presumption of nonresidency to military personnel, was ruled unconstitutional by opinion of the attorney general. TEX. ATT'Y GEN. OP. NO. M-702 (1970).

41. Whatley v. Clark, 482 F.2d 1230, 1231 (5th Cir. 1973).

42. *Id.* at 1233.

43. *Id.* at 1234.

44. 385 Mich. 670, 189 N.W.2d 423 (1971). Other important decisions in this area include Bright v. Baesler, 336 F. Supp. 527 (E.D. Ky. 1971), and Jolocoeur v. Mihaly, 5 Cal. 3d 565, 488 P.2d 1, 96 Cal. Rptr. 697 (1971). In *Bright v. Baesler*, the students were required to successfully complete a series of questions designed to overcome the presumption that they were domiciliaries of their parent's or their own previous homes. No other group of individuals were required to undergo such examination. The court ruled that the presumption was invalid.

The California Supreme Court in *Jolocoeur v. Mihaly*, relied on the twenty-sixth amendment and the Voting Rights Act of 1970 to invalidate a statute that treated minors' parents' homes as the residence of the minor regardless of his present or intended future domicile.

45. 385 Mich. at ___, 189 N.W.2d at 426-27, *construing* MICH. COMP. LAWS ANN. § 168.11(b) (1948). The statute had been defined by Michigan courts as creating a rebuttable presumption that the student is not a resident in the locale where he or she is attending school. The burden was on the student to prove otherwise.

46. *Id.* at ___, 189 N.W.2d at 430.

goal, the restriction could not be necessary to prevent voting fraud.[47]

Although the state claims an interest in preserving the purity of the ballot box, article 5.08(k) appears to be a sophisticated method of disenfranchising student voters because of fear of the way they might vote. "Fencing out" from the franchise a sector of the population because of the way they might vote is constitutionally impermissible.[48]

> The exercise of rights so vital to the maintenance of democratic institutions cannot be obliterated because of a fear of the political views of a particular group of bona fide residents.[49]

Beyond the constitutional grounds, there are policy reasons why the student residency statute should have been eliminated. First, students have as many interrelationships with their college communities as other residents. They pay local sales and gasoline taxes, indirectly pay their landlord's property taxes and are counted as residents of that community in census figures which are used in apportioning the legislature.[50] Second, most students have a greater political interest in the area where they attend school because local decisions affect them directly. Forcing a student to register in a community other than his school residence may contravene an important state interest. The student may spend little or no time there and have no interest in that area. He may also be forced to vote absentee which is a very difficult process. This can hardly promote good government through an interested and informed electorate. Thus, a student interested in his college area may be denied the right to vote there while a disinterested nonstudent could vote without question. Finally, although students are usually transients, they are no more so than the military personnel in *Carrington* or any other group in our mobile society.[51]

While a state has the right to require all voters to be bona fide residents, it cannot arbitrarily presume that some people are not residents merely because of the way they think, the manner in which they live, or the way they may vote. The strength of the democratic process is weakened when a particular class receives discriminatory treatment.

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47. *Id.*

48. Carrington v. Rash, 380 U.S. 89, 94 (1965).

49. Schneider v. State, 308 U.S. 147 (1939).

50. *See generally* Wilkins v. Bentley, 385 Mich. 670, 189 N.W.2d 423 (1971); Annot., 44 A.L.R.3d 780 (1972).

51. *See* 31 OHIO ST. L.J. 703 (1970). Another excellent work in this area of students and voting residency is Guido, *Student Voting and Residency Qualifications: The Aftermath of the Twenty-Sixth Amendment* (pt. 1), 47 N.Y.U.L. REV. 32 (1972).

The Fifth Circuit has taken a significant step in eliminating such discrimination and in preserving the right to vote for everyone—equally.

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