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The Right to Vote--Equal Protection for Students

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nated. From the vantage point of the car owner, legal defenses to the garageman's claim no longer need to be "relegated to the dustbin."[37]

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THE RIGHT TO VOTE—EQUAL PROTECTION FOR STUDENTS

Plaintiff, a student at North Texas State University in Denton County, Texas, made application to the County Assessor and Collector of Taxes to register to vote. Pursuant to a Texas statute,[1] plaintiff was asked whether he intended to make his home in Denton County indefinitely after he ceased to be a student. When he replied that he had no such intentions, the county official refused to register him. On behalf of himself and all others similarly situated, the student brought suit in federal district court seeking a declaration that the statute was unconstitutional. The lower court held that the suit was properly maintainable as a class action,[2] and declared the statute invalid under the equal protection clause of the fourteenth amendment to the United States Constitution.[3] On appeal, the United States Court of Appeal, Fifth Circuit, *held*, affirmed: A requirement that a student intend to remain at the place where he attends school after he concludes his studies is an improper exercise of the state's power to impose reasonable residence requirements upon the right to vote. *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973).

Shortly after the twenty-sixth amendment[4] to the United States Constitution was enacted, the nation's estimated eleven million[5] newly en-

37. Klim v. Jones, 315 F. Supp. 109, 123 (N.D. Cal. 1970).

1. TEX. REV. CIV. STAT. ANN. art. 5.08(k) (Supp. 1972-73). The statute provides:

> The residence of a student in a school, college, or university shall be construed to be where his home was before he became such [a] 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. It was held that plaintiff represented a class that included "students who consider their community their home but whose present intentions for the future either are unclear or are not definite enough to reflect plans to move to another community after graduation." Whatley v. Clark, 482 F.2d 1230, 1231 n.2 (5th Cir. 1973).

3. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

4. "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, § 1.

5. Guido, *Student Voting and Residency Qualifications: The Aftermath of the Twenty-Sixth Amendment*, 47 N.Y.U.L. REV. 32, 38 (1972) [hereinafter cited as *Student Voting*].

franchised voters began to register with their local election officials. Of these eleven million potential new voters, approximately four and one-half million were expected to be enrolled in institutions of higher learning.[6] The problem immediately arose as to whether students should be permitted to vote in their local college community rather than the locality wherein their parents resided.[7]

Approximately one-half of the states[8] have constitutional or statutory provisions relating to student residency requirements for voting purposes.[9] Many of those states have interpreted these provisions as creating a rebuttable presumption[10] that the student came to the area without the intent necessary to establish bona fide residency.[11]

Statutory and constitutional provisions relating to student residency requirements remained substantially unchallenged for decades.[12] But in the years just prior to and immediately subsequent to the enacting of the twenty-sixth amendment, the United States Supreme Court began to show great concern about the more restrictive burdens that states had imposed upon the most basic of constitutional rights—the right to vote.[13] These decisions proved to be the guiding light for subsequent federal and state court decisions, such as *Whatley,* permitting students to register and vote in their college communities.[14]

In *Carrington v. Rash,*[15] the Supreme Court examined a provision of the Texas constitution that absolutely prohibited nonresident service-

6. *Id.*

7. In most of the cases involving residency requirements as applied to students, the courts invariably spoke of the elements commonly regarded as necessary for the acquisition of domicile. The basic requirements include:

(1) physical presence at a particular place;
(2) legal capacity to change one's domicile; and
(3) the intention to effect such a change.

Annot., 44 A.L.R.3d 797, 801-02 (1972).

8. Singer, *Student Power at the Polls,* 31 OHIO ST. L.J. 703 (1970).

9. A typical provision reads:

> For the purpose of registering and voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States . . . nor while a student of any institution of learning.

N.Y. ELECTION LAW § 151 (McKinney Supp. 1972-73).

10. In a few jurisdictions, the presumption has been viewed as a conclusive one that students cannot overcome. In other states, the student's presence in the college community is regarded as a neutral factor in the determination of whether he has acquired domicile and the attendant right to vote. For a complete list, see Annot., 44 A.L.R.3d 797 (1972), and the authorities cited therein.

11. Comment, *A Constitutional Analysis of Student Residency Laws,* 18 VILL. L. REV. 461, 465 (1973) [hereinafter cited as *Student Residency Laws*]; *see* Note, *Constitutional Law—Twenty-Sixth Amendment—Residency Requirements And The Right to Vote,* 21 DE PAUL L. REV. 843 (1972).

12. *Student Residency Laws, supra* note 11; *see Student Voting, supra* note 5.

13. *E.g.,* Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Evans v. Cornman, 398 U.S. 419 (1970); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533, *reh. denied,* 379 U.S. 870 (1964).

14. *E.g.,* Bright v. Baesler, 336 F. Supp. 527 (E.D. Ky. 1971); Worden v. Mercer County Bd. of Elections, 61 N.J. 325, 294 A.2d 233 (1972).

15. 380 U.S. 89 (1965) [hereinafter referred to as *Carrington*].

men who had been stationed in Texas from ever acquiring a voting residence in that state for the duration of their military service. The Court held that this provision denied petitioner, a member of the armed services who otherwise would have been eligible to vote in Texas, a fundamental right in violation of the equal protection clause of the fourteenth amendment.[16] The Court pointed out that although students at colleges and universities may be as transient as military personnel, they "are given at least an opportunity to show the election officials that they are bona fide residents."[17]

In *Whatley*, the state argued that *Carrington*, which had dealt with a conclusive presumption, in effect approved the treatment of students as presumptive nonresidents because this particular presumption was rebuttable, giving students "at least an opportunity" to establish their claims of domicile.[18] This contention was rejected. Although the determining factor in *Carrington* was "the *conclusiveness* of the presumption with regard to servicemen,"[19]

> [t]he Court in *Carrington* did not purport to evaluate the distinctions that Texas had made as between members of the favored class; its reference to the "opportunity" given to students . . . to prove their claims of residence should be seen only in contrast to the total disenfranchisement of servicemen, not as tacit approval of a rebuttable presumption of nonresidency as applied to students.[20]

The right to vote is a fundamental right preservative of other basic rights.[21] A state statute that restricts the exercise of such a fundamental right must be shown to promote a compelling state interest or it is invalid under the equal protection clause.[22] In *Whatley*, the state advanced the argument that this "compelling interest" test was met since the provision in question "preserve[s] the purity of the ballot,"[23] an interest that is expressed in the Texas constitution.[24] The Fifth Circuit conceded that Texas does have a legitimate interest in limiting the right to vote to bona fide residents and in "guarding against fraudulent evasions of valid residence requirements."[25] However, the court found it "difficult to believe

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16. *Id.* at 96.
17. *Id.* at 95.
18. 482 F.2d at 1233.
19. *Id.* at 1234.
20. *Id.*
21. *Id.* at 1233.
22. *Id.*
23. *Id.* at 1234.
24. In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters.
TEX. CONST. art. 6, § 4.
25. 482 F.2d at 1234.

that a presumption that students are not residents of their college communities is *necessary* to promote those goals."[26]

In general, voter residence requirements are defended by the states on the ground that they serve three legitimate policies:

(1) prevention of fraudulent or double voting;
(2) promotion of a more concerned, interested, and informed electorate; and
(3) identification of the prospective voter in advance of the election.[27]

Traditionally, there has been a popular distrust of student voting power and what its effect would be on the local college community.[28] Most of the courts, which have recently decided the question of the "presumptive nonresidence" of students, have pointed out that this distrust and a fear of a student "takeover" is unfounded.[29] Further, "there is every reason to believe they might be even better informed on current issues than other citizens."[30] Even if there is some basis for this distrust, "it is no longer constitutionally permissible to exclude students from the franchise because of the fear of the way they may vote."[31]

Two of the leading cases in the student voting rights area, although not cited as authority by the Fifth Circuit in *Whatley*, are *Wilkins v. Bentley*[32] and *Jolicoeur v. Mihaly*.[33] In *Wilkins*, the Supreme Court of Michigan stated that the rebuttable presumption of a student's nonresidence at a school which was created by state statute[34] placed an undue burden on the student's voting rights.[35] The law was held to deprive stu-

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26. *Id.* (emphasis in original). It is interesting and also puzzling to note, as did the Fifth Circuit, that one of the original defendants in the case at bar, testifying as the state's chief election officer, stated unequivocally that the statute in question created a "special classification" that served no purpose other than to discourage students from voting. *Id.*

27. Note, *ELECTIONS—Student Voting—Students Residing in University Communities Must Be Permitted To Register To Vote Without Regard to Future Plans—Worden v. Mercer County Board of Elections, 61 N.J. 325, 294 A.2d 233 (1972)*, 4 SETON HALL L. REV. 329, 340 (1972) [hereinafter cited as *ELECTIONS*]; Macleod & Wilberding, *State Voting Residency Requirements and Civil Rights*, 38 GEO. WASH. L. REV. 93, 94-95 (1969). *See also Student Voting, supra* note 5, at 46-53.

28. *ELECTIONS, supra* note 27, at 335.

29. Even apart from the constitutional question, the possibility of student bloc voting has not been proven where a college community actually facilitated student voting. A recent American Council on Education survey of college freshmen showing that forty-four per cent considered themselves liberal and twenty per cent moderate conservative demonstrates that students would not vote as a solid unit but in fact fairly approximate the voting patterns of the national electorate.

Worden v. Mercer County Bd. of Elections, 61 N.J. 325, 337-38, 294 A.2d 233, 239 (1972), *quoting* Note, *Restrictions On Student Voting*, 4 U. MICH. J.L. REFORM 215, 236 (1970).

30. Wilkins v. Bentley, 385 Mich. 670, 690, 189 N.W.2d 423, 432 (1971).

31. *Id.* at 693, 189 N.W.2d at 433.

32. 385 Mich. 670, 189 N.W.2d 423 (1971).

33. 5 Cal. 3d 565, 488 P.2d 1, 96 Cal. Rptr. 697 (1971).

34. The statute involved was of the typical type that appears in note 9 *supra*.

35. The court stated that it is not mandatory that the students demonstrate an absolute denial of the right to vote in order to require the state to show a compelling interest. Plain-

dents of due process[36] and equal protection.[37] In *Jolicoeur*, the Supreme Court of California held that both the twenty-sixth amendment and California law require that local registrars treat all citizens eighteen years of age or older alike for all purposes related to voting.[38] The registrars were specifically forbidden from specially questioning the validity of an affiant's claim of domicile because of his age or occupational status.[39]

Thus, the *Whatley* decision is one of a continuing line of cases recognizing that the student is fully deserving of equal protection of the laws with regard to his voting rights. "The fundamental importance of the franchise, as both a symbol and a vital tool of our democracy, requires that every effort be made to apply uniform standards and procedures to all qualified voters equally."[40]

JAMES S. BRAMNICK

FLORIDA SUPREME COURT FINDS FAULT WITH NO-FAULT

Plaintiff brought an action in the Dade County Circuit Court alleging that defendant should be held liable for damages to her car, even though Florida's no-fault insurance law exempted defendant from tort liability.[1] Plaintiff, whose car had been involved in a collision with defendant's car, alleged that the driver of defendant's car had been negligent and had been formally charged with failure to yield the right of way. The recoverable damages were limited to $250, the fair market value of the car.[2] The circuit court dismissed the action on the ground that Florida's no-fault insurance law, Florida Statutes section 627.738 (1971), exempted defendant from tort liability. This statute provides that an owner who has elected not to purchase property damage insurance may maintain an action in tort only if such damage exceeds $550. On appeal to the Supreme Court of Florida, *held*, reversed and remanded: Florida Statutes, section 627.738 (1971) is void since it is repugnant

tiffs need only show that a burden has been placed on this precious right in order to avail themselves of the equal protection clause. Wilkins v. Bentley, 385 Mich. 670, 684, 189 N.W.2d 423, 429 (1971).

36. *Id.* at 678, 189 N.W.2d at 426-27.

37. *Id.* at 694, 189 N.W.2d at 434.

38. Jolicoeur v. Mihaly, 5 Cal. 3d 565, 582, 488 P.2d 1, 12, 96 Cal. Rptr. 697, 708 (1971).

39. *Id.*

40. *Id.* at 582, 488 P.2d at 11, 96 Cal. Rptr. at 707.

1. FLA. STAT. § 627.738 (1971).

2. Kluger v. White, 281 So. 2d 1, 3 (Fla. 1973). Damages were alleged to be $750, but the fair market value of the car was only $250. The court noted that plaintiff's damages were limited to the fair market value of the car, since repair costs could not be recovered when they exceeded the fair market value of the automobile before the collision. 25 C.J.S. *Damages* § 82 (1966); 15 D. BLASHFIELD, AUTOMOBILE LAW § 480.1 (3d ed. 1969).