Property Ownership Versus the Right to Vote: A Question of Equal Protection

Barry M. Bloom

Property Ownership Versus the Right To Vote: A Question of Equal Protection

In October 1970 the Montgomery Independent School District held a bond election seeking approval of general obligation bonds which would be paid from the levy of ad valorem taxes. Because of uncertainty over the laws concerning voter qualifications,[1] two separate but simultaneous elections were conducted. At one election only the qualified electors of the school district who owned taxable real or personal property in the district and who had duly rendered their property for taxation were allowed to vote. These voters rejected the bond issue. At the other election all other qualified resident voters of the district were permitted to vote. These voters approved the bond issue. When all the votes were added together, the majority of all who voted in the bond election had approved issuance of the bonds. In December 1970 the school board authorized the issuance of the bonds and levied an ad valorem tax. The Texas attorney general refused to approve the issue.[2] The school district then petitioned the Supreme Court of Texas for a writ of mandamus directing the attorney general to approve an issue of $450,000 of the district's Unlimited Tax Schoolhouse Bonds. The school district contended that the challenged Texas laws were violative of the equal protection clause of the fourteenth amendment of the United States Constitution. *Held, writ denied*: Although the Texas constitutional and statutory provisions restrict the right to vote in school bond elections to real and personal property owners who have rendered their property for taxation, that class of persons is so all-inclusive as to constitute no violation of the equal protection clause. *Montgomery Independent School District v. Martin*, 464 S.W.2d 638 (Tex. 1971).

I. The Equal Protection Clause and Restrictions on the Right To Vote

The United States Supreme Court has established two basic standards by which it may categorize cases involving equal protection issues. The first may be termed the "traditional test of reasonableness." This test allows a challenged

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[1] The qualifications for voting in a Texas school bond election were expressed by two constitutional provisions and one statutory requirement. TEX. CONST. art. VI, § 3a provides:

> When an election is held . . . for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, only qualified electors who own taxable property in the State, county, political sub-division, district, city, town or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote . . . .

TEX. CONST. art. VII, § 3 authorizes the levy and execution of ad valorem taxes, within limits, with this proviso: "[P]rovided that a majority of the qualified property tax-paying voters of the district voting at an election to be held for that purpose shall vote . . . such tax . . . ." TEX. EDUC. CODE ANN. § 20.04 (1969) reads: "No such bonds shall be issued and none of the aforesaid taxes shall be levied unless authorized by a majority of the resident, qualified electors of the district, who own taxable property therein and who have duly rendered the same for taxation, voting at an election held for such purpose . . . ."

[2] The Texas Education Code requires that all bonds of a school district and the proceeding authorizing their issuance must be submitted to the attorney general of Texas for examination. If the attorney general finds that the bonds have been authorized in accordance with the law, he shall approve them for issuance. TEX. EDUC. CODE ANN. § 20.06 (1969).

classification to stand as long as it is not irrational, arbitrary, or unreasonable.[3] The second may be characterized as the "compelling state interest test." This test requires a balancing of state and individual interests, and is the more demanding of the two tests.[4] The compelling state interest test will supersede the reasonableness test only when certain elements are involved.[5]

The reasonableness test is based upon the philosophy that "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality."[6] Therefore, a questionable classification will not be declared violative of the equal protection clause if any facts reasonably justify the classification.[7] The rationale for such a position is simply that the Supreme Court is reluctant to substitute its own judgment for that of the legislature.[8]

Nevertheless, when suspect criteria or fundamental rights are involved,[9] the Court requires the application of the compelling state interest test.[10] This standard is equivalent to a balancing process, balancing the rights of individuals against the interest sought to be achieved by the state. The more significant and important the individual right is, the more persuasive and compelling the state interest must be for the legislation to be sustained. The presumption favoring the constitutionality of legislative classifications is disregarded in situations that involve suspect criteria or fundamental rights.[11]

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[3] *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959).

[4] Shapiro v. Thompson, 394 U.S. 618, 638 (1969). *See generally* 30 OHIO L.J. 202 (1969). *See also* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716 (1969).

[5] The elements referred to include the presence of suspect criteria or fundamental rights, both of which are discussed at note 9 *infra*.

[6] McGowan v. Maryland, 366 U.S. 420, 425 (1961).

[7] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[8] "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." Ferguson v. Skrupa, 372 U.S. 726, 729 (1963).

[9] "Suspect criteria" usually concern classifications that deal with discrimination against race, color, creed, or religion; whereas, "fundamental rights" deal with those rights that the Supreme Court has from time to time classified as being within the realm of the term "fundamental." The following are examples of some rights that the Court has termed as "fundamental": Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (the right to move from state to state); Loving v. Virginia, 388 U.S. 1, 12 (1967) (the right to marry); NAACP v. Button, 371 U.S. 415, 438 (1963) (the first amendment freedoms of association and expression); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (the right to have children); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (the right to vote). *See also* Karst, *supra* note 4, at 732-46.

[10] In order to satisfy the compelling state interest test the traditional test for reasonableness must necessarily have been met. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

A precise definition of compelling state interest has yet to be reached by the Court; however, it appears that a state interest is "compelling" if the Court is persuaded to suppress an individual right. Therefore, rather than developing a strict definition of compelling state interest, the Court has chosen to deal with the problem on a case-by-case basis. As a result, there now exists a diversity of situations in which the Court has classified state interests as compelling or noncompelling. For example, in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the Court invalidated a poll tax provision on the basis that it failed to promote a compelling state interest. Likewise, in Shapiro v. Thompson, 394 U.S. 618, 633-34 (1969), the Court stated that the fiscal integrity of a state is not a compelling state interest so as to justify the infringement of fundamental rights. *See* Comment, *Limitations on the Voting Franchise and the Standard of Kramer v. Union Free School District No. 15*, 1970 UTAH L. REV. 143, 146.

[11] Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627-28 (1969).

Property Ownership as a Prerequisite to the Right To Vote. No right is so precious and fundamental to a democratic society as the right to vote.[12] Despite the importance of this right, the Supreme Court has decided that the states have the power to condition the franchise.[13] The Court has held that the language of the Constitution and its amendments do not alter or destroy the state's power to determine qualifications for voting.[14] Indeed, as late as 1959, while upholding a North Carolina literacy test as a valid prerequisite to vote, the Court was of the opinion that "[t]he States have . . . broad powers to determine the conditions under which the right of suffrage may be exercised."[15]

One of the leading cases regarding the relationship between the equal protection clause and the franchise was *Harper v. Virginia Board of Elections.*[16] In *Harper* the Court faced the question of whether the Virginia poll tax was a valid prerequisite to voting in a general election. The Court concluded that whenever the affluence of the voter is made an electoral standard there is a violation of the equal protection clause.[17] This decision was based on the theory that "[v]oter qualifications have no relation to wealth nor to paying this [poll tax] or any other tax."[18] The Court held that the right to vote was "too precious, too fundamental to be so burdened or conditioned."[19] Although the Court was not faced with the question of property ownership as a qualification to vote, it is significant to note that Mr. Justice Harlan, in a dissenting opinion, viewed the opinion of the majority as being applicable to property ownership qualifications.[20]

The principles in *Harper* reappeared in *Kramer v. Union Free School District No. 15.*[21] The issue in *Kramer* was whether the State of New York could limit the right to vote in school board elections to those qualified electors who owned or leased taxable real property within the school district or had children enrolled in the local public schools.[22] The plaintiff contended that such voting requirements prohibited him from exercising his right to vote and, therefore, violated the equal protection clause.[23] The Court, agreeing with the plaintiff's

[12] The right to vote first received judicial recognition as a fundamental right in 1886 when it was recognized as preservative of all other rights. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[13] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959); Pope v. Williams, 193 U.S. 621, 633 (1904).

[14] The equal protection clause did not fully emerge as a device to invalidate state statutes that infringe upon voting rights until the Court's decision in Baker v. Carr, 369 U.S. 186 (1962). Prior to *Baker* most state statutes that infringed upon voting rights were upheld by the Court on the premise that the right to vote was *not* one of the privileges and immunities protected by the fourteenth amendment. Hence, the effect of such decisions was to ignore the application of the equal protection clause to voting rights. *See, e.g.*, Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959); Breedlove v. Shuttles, 302 U.S. 277 (1937); Pope v. Williams, 193 U.S. 621 (1904). *But see* Nixon v. Herndon, 273 U.S. 536 (1927).

[15] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959).

[16] 383 U.S. 663 (1966).

[17] *Id.* at 666.

[18] *Id.*

[19] *Id.* at 670.

[20] *Id.* at 683 (Harlan, J., dissenting): "But today in holding unconstitutional state poll tax and property qualifications for voting . . . ." However, Mr. Justice Harlan failed to give any significant indication as to why he interpreted the majority opinion as he did.

[21] 395 U.S. 621 (1969). For a general discussion of *Kramer*, see Young, *Review of Recent Supreme Court Decisions*, 55 A.B.A.J. 1074, 1078 (1969).

[22] *See* N.Y. EDUC. LAW § 2012 (McKinney 1969).

[23] Plaintiff was a 31-year-old, college-educated stockbroker who lived with his parents in

contention, relied on *Harper* and stated that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause . . . ."[24] The challenged New York statute was held invalid because it failed to sufficiently limit the franchise to those who had a direct interest in school affairs.[25] The case was then remanded to the district court for a determination of whether the state had a compelling interest in limiting the franchise.[26]

Cipriano v. City of Houma[27] extended the rule in *Kramer* to elections for the approval of revenue bonds. The issue in *Cipriano* was whether a state could extend exclusively to property owners the right to vote in an election called to approve the issuance of revenue bonds by a municipal utility.[28] The Court found the limitation unconstitutional, and further emphasized the close scrutiny and exacting standards required of a statute that selectively distributed the right to vote to those with a "special interest."[29] The effect of *Cipriano* was to prohibit a state from using property ownership as a prerequisite for voting in revenue bond elections.

The Court faced the problem of determining whether the general principles of *Cipriano* could be applied to the exclusion of nonproperty owners in general obligation bond elections in *City of Phoenix v. Kolodziejski*.[30] In that case the right to vote in general obligation bond elections was limited to real property owners. Although it was conceded that this precise issue (approval of *general obligation bonds*) was never approached in *Cipriano*, the Court concluded that the principles of *Cipriano*, as well as *Kramer*, were applicable in *Phoenix*.[31] For several reasons the Court was of the opinion that the distinction between the interests of real property owners and nonproperty owners was insufficient to deprive the latter of the franchise.[32] The Court sought to put to rest any con-

the Union Free School District No. 15. He was a bachelor, had no children, and neither owned nor leased taxable real property. Otherwise, he satisfied the age, citizenship, and residency requirements to vote.

[24] 395 U.S. at 629.

[25] The Court noted an example of the problem presented in *Kramer* by way of a footnote, in which it stated: "[A]ppellant resides with his parents in the school district, pays state and federal taxes and is interested in and affected by school board decisions; however, he has no vote. On the other hand, an uninterested unemployed young man who pays no state or federal taxes, but who rents an apartment in the district, can participate in the election." *Id.* at 632 n.15.

[26] Despite the fact that the Court failed to determine whether a compelling state interest was present, *Kramer* is especially significant for establishing basic constitutional principles and standards by which one may scrutinize voting restrictions.

[27] 395 U.S. 701 (1969). For a general discussion of *Cipriano*, see Young, *supra* note 21, at 1078.

[28] 395 U.S. at 702.

[29] *Id.* at 706. Since all members of the electorate were substantially affected by the operation of the public utility, the Court considered it a violation of equal protection to exclude nonproperty owners on the basis of a different opinion they might hold regarding the bond election. It was generally thought that the property owners favored the bond issue since an improvement of the city's utility operations would produce additional revenues which would eventually have the effect of reducing the burden on the property owner to support city services. On the other hand, nonproperty taxpayers would generally oppose the issue since it would result in a rate increase for the use of the utility without the benefits realized by real property taxpayers. *Id.* at 705.

[30] 399 U.S. 204 (1970).

[31] *Id.* at 208-09.

[32] The Court cited three basic reasons for its decision. First, there was a general belief that both property and nonproperty owners were affected by any decision regarding bond elections; thus, there was no compelling state interest to justify such power being placed

tention of future litigants who might attempt to limit *Phoenix* to situations in which the bonded indebtedness was to be repaid from taxes besides those of property owners.[33]

The most recent federal decision to deal with the question of the constitutionality of restricting eligibility to vote in bond elections to property-owning taxpayers was *Stewart v. Parish School Board.*[34] *Stewart* dealt with two basic constitutional issues: first, whether the right to vote in school bond elections could be limited to property taxpayers;[35] and second, whether a voter's ballot could be weighed according to the monetary value of his assessed property.[36] The court resolved both issues against the limitations. In the opinion of the district court a reading of *Kramer* and *Cipriano* led to the conclusion that "laws are unacceptable if they exclude non-property electors who have a substantial stake in the result of the election."[37] The "stake" the court referred to was more than a pecuniary interest, for the court emphasized that all persons residing in a particular school district have a substantial stake or interest in public education.[38] The court saw that the objective sought to be achieved[39] was in no way promoted by the exclusion of nonproperty-owning taxpayers whose interest in public education was not less substantial than their property-owning counterparts.[40]

The result of these recent decisions is to limit any legislation a state might enact in an attempt to regulate the distribution of the franchise. It has been made clear by these decisions that any question involving voting rights will be analyzed with exacting scrutiny. Whether any given limitation of the franchise violates the concept of equal protection will rest upon a determination of

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solely in the hands of property owners. Second, in many instances the taxes of nonproperty owners, in the form of goods and services, as well as other local taxes, contribute to satisfying the debt requirements of general obligation bonds. Thus, nonproperty owners would be directly affected by that in which they had no say. Third, the nonproperty owner eventually bears the burden of the tax on property in the form of increases in rent requirements. *Id.* at 209-10.

[33] The Court said: "[T]he justification for restricting the franchise to property owners would seem to be strongest in the case of a municipality which, unlike Phoenix, looks only to property tax revenues for servicing general obligation bonds. But even in such a case the justification would be insufficient." *Id.* at 210 (dictum).

[34] 310 F. Supp. 1172 (E.D. La.), *aff'd mem.*, 400 U.S. 884 (1970).

[35] By way of footnote the district court pointed out that:

> [I]n Louisiana few individuals pay any personal property taxes; those who do pay a nominal tax usually based on the value of their automobile. Louisiana law, however, provides that 'all properties situated within the state . . . shall be subject to taxation' . . . . Tax assessors in this state primarily place business, commercial, and corporate *personal* property (merchandise inventory) on the assessment rolls. Considerable personal property is exempt from taxation. Article 10, Section 4 of the Louisiana Constitution. In effect, the term 'property taxpayer' equates with the term 'real property taxpayer' or 'landowner.'

Id. at 1173 n.3.

[36] The district court considered that the unconstitutionality of the first issue made the determination of the second unnecessary. However, since the issues, for all practical purposes, were inseparable, the court chose to render an opinion on both. *Id.* at 1180.

[37] *Id.* at 1176.

[38] *Id.* at 1178, 1181.

[39] It was determined that the interest of the state in regulating the qualifications of the voters in school bond elections was to insure that the voters of each district had the ability to improve the educational system within their district. *Id.* at 1177-78.

[40] *Id.* at 1178.

whether it tends to promote a compelling state interest; but, by virtue of the current trend of the law,[41] such an interest will be quite difficult to find.[42]

II. MONTGOMERY INDEPENDENT SCHOOL DISTRICT v. MARTIN

In *Montgomery Independent School District v. Martin*[43] the Texas Supreme Court held that the voter qualification of property ownership under the Texas constitutional and statutory provisions[44] was so broad and universal in application that it constituted no violation of the equal protection clause of the fourteenth amendment to the United States Constitution. In reaching such a decision, the court quickly eliminated the contention that the doctrines of *Kramer, Cipriano, Phoenix*, and *Stewart* were controlling. The court concluded that neither *Kramer* nor *Phoenix* were applicable since they involved situations in which only real property owners were allowed to vote, while the Texas statutes had been construed to apply to both real and personal property owners. Likewise, *Cipriano* was distinguished since its decision turned on the issue of revenue bond elections. The court was of the opinion that the determinative factor in *Stewart* was the weight given the ballot of each voter in accordance with the assessed value of his property; therefore, since Texas placed equivalent weights on all ballots cast in an election, the decision in *Stewart* was not applicable. The court emphasized that the real or personal property of the voter need only appear on the tax rolls to be considered "duly rendered." It was insignificant that the property was placed on the tax rolls by one other than the owner. Thus, a voter was determined to be qualified to vote if, prior to the bond election, he rendered for taxation any property of any value, even if he had not paid the tax on it at the time of the election. By virtue of this liberal interpretation of the Texas constitutional and statutory provisions, the court was of

[41] Before *Kramer* was decided, only fourteen states still had provisions that restricted the right to vote in elections to property owners. ALASKA CONST. art. V, § 1; ARIZ. CONST. art. VII, § 13; COLO. CONST. art. XI, §§ 6, 7, 8; FLA. CONST. art. IX, § 6; IDAHO CONST. art. VIII, § 3; LA. CONST. art. XIV, § 14(a); MICH. CONST. art. II, § 6; MONT. CONST. art. IX, § 2; N.M. CONST. art. IX, § 12; N.Y. EDUC. LAW § 2012 (McKinney 1969); OKLA. CONST. art. X, § 27; R.I. CONST. amend. XXIX, § 2; TEX. CONST. art. VI, § 3(a); UTAH CONST. art. XIV, § 3. Since *Kramer* the specified provisions of the states of Arizona, Louisiana, and New York have been declared unconstitutional by the United States Supreme Court. *See* City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969). Likewise, the specified provisions of Colorado, Idaho, New Mexico, Oklahoma, and Utah have been declared unconstitutional by the highest court of each of those states. *See* Pike v. School Dist. No. 11, 474 P.2d 162 (Colo. 1970); Muench v. Paine, 94 Idaho 12, 480 P.2d 196 (1971); Board of Educ. v. Maloney, 82 N.M. 167, 477 P.2d 605 (1970); City of Spencer v. Rayburn, 483 P.2d 735 (Okla. 1971); Cypert v. Washington County School Dist., 24 Utah 2d 419, 473 P.2d 887 (1970).

[42] Since the Supreme Court's decision in *Kramer* only two states, Oklahoma and Texas, have upheld the constitutionality of challenged state constitutional provisions that limit the right to vote in elections to property owners. In Settle v. City of Muskogee, 462 P.2d 642 (Okla. 1969), the Oklahoma Supreme Court, while applying and recognizing the principles and standards in *Kramer* and *Cipriano*, determined that the challenged Oklahoma constitutional provisions were necessary to promote the compelling state interests of municipal solvency and protection from confiscatory taxes and therefore did not violate the equal protection clause of the fourteenth amendment. However, some two years after the decision in *Settle* the Oklahoma Supreme Court, in City of Spencer v. Rayburn, 483 P.2d 735 (Okla. 1971), determined that the same Oklahoma constitutional provision did not promote a compelling state interest and was, therefore, in violation of the equal protection clause of the fourteenth amendment.

[43] 464 S.W.2d 638 (Tex. 1971).

[44] *See* the content of these provisions in note 1 *supra*.

the opinion that anyone who really wanted to vote faced no impediment in an attempt to qualify.

The court also noted that since the Texas Constitution was approved by the voters of the state, the constitutional provisions merely reflected the desire of the electorate to insure that a voter had a tangible financial stake in the outcome of the election.[45] Thus, before a voter could vote to impose a tax on others, he must be prepared to bear his distributive share of the burden. It was determined that the property ownership qualification and the requirement of rendering the property for taxation as a prerequisite to the right to vote were an inducement to owners of property to place their property on the tax rolls, the assumption being that one who exercises the right of citizenship should also assume its obligations.[46]

In the final analysis it was determined that the challenged laws did not violate the concept of equal protection; rather, the laws did not confer preferential rights on any citizen. In other words, the court was of the opinion that the Texas constitutional and statutory provisions strengthened the precepts of the equal protection clause because they made all voters assume the responsibilities and obligations of citizenship as a prerequisite of the right to vote in a school bond election.

III. A VIOLATION OF EQUAL PROTECTION

The Real and Personal Property Argument. State laws limiting the right to vote are constitutionally suspect and subject to careful scrutiny to determine whether they meet the equal protection standards established by the fourteenth amendment.[47] While the standards and principles established by the decisions of the Supreme Court are not susceptible of automatic application to all analogous situations, they are not strictly limited to identical facts or circumstances. Nevertheless, in *Montgomery* the Texas Supreme Court determined that none of the principles enunciated in *Kramer, Cipriano*, and *Phoenix* were applicable since these cases dealt with laws which limited the franchise to real property owners, while the Texas laws allowed *both* real and personal property owners to vote. Is there a valid distinction between bond elections limited to real property owners and bond elections limited to both real and personal property owners? *Montgomery* merely begs the question.

The only basis for such a distinction lies in the relative number of voters that each limitation disenfranchises. The number of individuals who may own real property within a given district is severely limited by the amount of real property available and the financial integrity of the electorate within that district. In comparison, the supply of personal property is virtually unlimited, and

[45] *But see* Lucas v. Forty-Fourth Gen'l Assembly, 377 U.S. 713 (1964), wherein the United States Supreme Court said: "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Id.* at 736-37.

[46] The court relied upon Markowsky v. Newman, 134 Tex. 440, 136 S.W.2d 808 (1940), for the "obligation of citizenship" philosophy. *Markowsky* determined that the goal sought to be achieved by requiring the rendering of taxable property was to induce the owners of such property to place it upon the tax rolls in order that they would be liable for their proportionate share of the taxes assessed by the municipality. *Id.* at 450, 136 S.W.2d at 813.

[47] Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626 (1970); Williams v. Rhodes, 393 U.S. 23, 31 (1969).

the financial position of the electorate is almost insignificant. Most persons own some personal property. The result of such distinction makes it appear that the universe of potential voters who own either real or personal property is so broad that almost any otherwise qualified voter could qualify to vote in a bond election. Such rationale appears to be a criterion upon which the philosophy of *Kramer, Cipriano,* and *Phoenix* was disregarded by the Texas Supreme Court. Regardless of the rationale, it is extremely questionable whether the distinction was a valid platform from which the court could proceed to disregard such basic equal protection doctrines.

As indicated in *Stewart,* the principles established in *Kramer* were not necessitated by the subject matter of the election, but rather the Court sought to examine the New York laws because some citizens were allowed to vote while others were denied this fundamental right.[48] In Texas one is denied the right to vote in a general obligation bond election unless he owns real or personal property which has been rendered for taxation.[49] Therefore, the mere fact that the Texas laws allow a greater number of individuals to qualify to vote fails to negate the fact that some individuals do not own real or personal property and are completely denied the exercise of the franchise in general obligation bond elections. The denial of such a fundamental right requires the application of the compelling state interest test.[50] As a result, any distinction between laws limiting the franchise to real property owners or to both real or personal property owners is no more than a superficial distinction. In both situations the franchise is denied to some members of the electorate, and without a compelling state interest such denial violates the equal protection clause of the fourteenth amendment.[51]

As with *Kramer, Cipriano,* and *Phoenix,* the Texas Supreme Court distinguished and disregarded the doctrines enunciated in *Stewart.* The court took the position that the issue of the "weight" placed on each elector's vote was the determinative factor in that case; therefore, it was determined that the theories in that case were not applicable. However, another issue was present in *Stewart; viz.,* whether the state could limit the franchise in a school bond election to property owners.[52] By the language of the district court, this issue was of significant importance to the decision in *Stewart,* and the "weight" issue was not necessarily the controlling issue.[53] Thus, the significance of a "property ownership" issue makes one question the justification of the Texas Supreme

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[48] Stewart v. Parish School Bd., 310 F. Supp. 1172, 1176 (E.D. La.), *aff'd mem.,* 400 U.S. 884 (1970). *See also* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 629 (1969).

[49] *See* note 1 *supra.*

[50] Shapiro v. Thompson, 394 U.S. 618 (1969).

[51] *See* Carrington v. Rash, 380 U.S. 89, 96 (1965).

[52] *See* note 35 *supra.*

[53] The district court said:

> There are two . . . issues in this case; first, the restriction of the franchise to property taxpayers; second, the requirement that the majority of the voters represent a 'majority of the assessed property.' Since the Court agrees with the plaintiffs on the first issue, it might be said that it is unnecessary to reach the second issue. But the two limitations have been inseparable since 1898.

Stewart v. Parish School Bd., 310 F. Supp. 1172, 1180 (E.D. La.), *aff'd mem.,* 400 U.S. 884 (1970).

Court in failing to mention a factor which bears a significant resemblance to the issue raised in *Montgomery.*

The Scope of Interest Argument. The Texas laws clearly establish two distinct prerequisites for entry into the voting class: (1) ownership of real or personal property that is the subject of taxation; and (2) the rendering of such property for taxation.[54] Those who fail to qualify are denied membership in the class, and thereby denied the right to vote. The Texas court contended that anyone who really desired to vote in a bond election would have no problem satisfying these prerequisites. However, that the situation is to the contrary is only too obvious. There are several situations in which an interested voter, who is in no way evading his obligation to render his property for taxation, is denied the right to exercise the franchise.[55] The existence of such instances creates a distinct classification of voters who are denied their constitutional rights even though they have satisfied all the "obligations of citizenship" that the law requires of them.

An additional position of the Texas court was that those who will bear the burden of financing a bond issue should be the only ones who vote to impose a tax obligation. In other words, only members of the electorate who maintain a financial stake in the bond election should be allowed to vote since the result of the election has a direct effect upon their pecuniary interests.[56] *Stewart* emphasized that elections which exclude certain individuals with a substantial stake in the result of the election are constitutionally impermissible.[57] The "stake" referred to in *Stewart* was not limited to pecuniary interests. Rather, *Stewart* recognized that all persons residing in a particular school district have a substantial interest, exclusive of a pecuniary interest, in public education.[58] All members of a given community have an interest in the result of a school

[54] *See* note 1 *supra.*

[55] The following are examples of a few situations in which persons who do not evade the tax rendition laws are denied the right to vote under the challenged Texas constitutional and statutory provisions: (1) Those who own only property which is exempt under the Texas laws (*see, e.g.,* TEX. CONST. art. VIII, § 19 (exempts farm products in the hands of the producer as well as family supplies for home and farm use); TEX. CONST. art. VIII, § 1, and TEX. REV. CIV. STAT. ANN. art. 7150, § 11 (1960) (exempt household furniture up to a value of $250.00)); (2) those persons who own no property whatsoever—*i.e.,* paupers and those who have taken a vow of poverty; (3) those persons who rent or lease all of their property, the taxes on such property being paid by the lessor; (4) those persons who own taxable property in a locale other than their voting domicile, but own no taxable property in the political district in which they vote—*e.g.,* students or military personnel; (5) those persons who own no taxable property within the political district on tax day; *i.e.,* those who own property subject to taxation in one political subdivision on tax day and subsequent thereto, but prior to the beginning of the next tax year have moved their residence to another political subdivision. These persons are disenfranchised even though they own property in the voting district. Brief for Relator's Motion for Rehearing at 10-11, Montgomery Ind. School Dist. v. Martin, 464 S.W.2d 638 (Tex. 1971).

[56] The fallacy of this argument was recognized in *Stewart* in which the court said:

> True, the school bonds are secured by ad valorem taxation. Property taxpayers are faced with additional taxes for the years authorized by the bond issue; they are subject to having a lien on their property for the life of the issue. But if protection of the property taxpayer had been the legislature's chief interest, the law would not have excluded business entities. These are the taxpayers who pay the largest share of taxes in most voting districts.

Stewart v. Parish School Bd., 310 F. Supp. 1172, 1178 (E.D. La.), *aff'd mem.,* 400 U.S. 884 (1970).

[57] *See* notes 37-38 *supra,* and accompanying text.

[58] *Id.*

bond election, and certain individuals should not be "weeded out" because the result of the election may not directly affect their pocketbook. It is a well-recognized principle that the manner in which one may vote can never be used as a criterion for prohibiting his exercise of the franchise.[59] Therefore, the premise of the Texas Supreme Court, that only those with a financial interest in the bond election should be permitted to vote, is a rather tenuous position, for it fails to recognize fully the direct and indirect interests of all segments of the electorate.

The Compelling State Interest Argument. In *Montgomery* the apparent primary interest of the state was to induce property owners to render property for taxation; *i.e.*, to bring taxable personal property out of hiding.[60] Whether that was a compelling state interest was an issue which the Texas court did not discuss. The recent cases of *Kramer, Cipriano, Phoenix*, and *Stewart* have unquestionably established that a state is prohibited from restricting the franchise to a particular class of voters in a limited purpose election unless there is a clear showing of a compelling state interest. Furthermore, since the fundamental right of voting is involved, the restriction placed upon the electorate must be *necessary* to promote the state's compelling interest.[61] It would logically appear that if a law is determined to be necessary to promote a compelling state interest, such interest would be incapable of being promoted without the law. However, in Texas means, other than restrictions placed upon voters, are available to induce property owners to render their property for taxation.[62] It would thus appear that the restrictions which the Texas laws place upon the right to vote are not necessary to promote a compelling state interest. In fact, it would seem that denial of the right to vote to those who fail to render their property would have the effect of encouraging the electorate not to vote, rather than encouraging them to render their property for taxation.

Additionally, the Supreme Court has determined that the preservation of the fiscal integrity of a state is not a compelling state interest when it infringes upon one's constitutional right to move freely from state to state.[63] The right to vote is of equivalent, if not greater, importance than the right to move freely from state to state. It is extremely doubtful that a law that promotes the rendering of property for taxation, a situation quite analogous to the preservation of the fiscal integrity of a state, would be considered valid in light of the right upon which it infringes, the right to vote.

The Taxation Argument. In *Harper v. Virginia Board of Elections* the United States Supreme Court determined that "[v]oter qualifications have no relation to wealth nor to paying . . . [a poll tax] or any other tax."[64] Therefore, even

[59] Carrington v. Rash, 380 U.S. 89, 94 (1965).
[60] 464 S.W.2d at 641.
[61] City of Phoenix v. Kolodziejski, 399 U.S. 204, 205, 208-09 (1970); Cipriano v. City of Houma, 395 U.S. 701, 704 (1969); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969); Stewart v. Parish School Bd., 310 F. Supp. 1172, 1175 (E.D. La.), *aff'd mem.*, 400 U.S. 884 (1970).
[62] *See, e.g.*, TEX. PEN. CODE ANN. art. 125 (1952), which levies a fine upon any person who either refuses or neglects to render his property for taxation when called upon to do so.
[63] Shapiro v. Thompson, 394 U.S. 618 (1969).
[64] 383 U.S. 663, 666 (1966).

if every voter, otherwise qualified, in the state of Texas had property to render for taxation and qualified to vote in a school bond election, the unconstitutionality of the Texas constitutional and statutory provisions would nevertheless exist since they tend to create a class of voters based upon the satisfaction of a voting requirement not too much unlike a poll tax.[65] Under the challenged Texas laws one incurs a tax liability upon rendering property for taxation. Thus, the mere fact that these laws allow one to vote in a bond election without actually having paid any tax is insufficient to remove them from the scope of state activity proscribed by *Harper*. The fact remains that one can avoid the eventual payment of the tax or the possible foreclosure of the tax lien only if the state chooses not to collect the tax that has been levied. Logically, it would appear that the state cannot qualify the right to vote upon the rendition of property for taxation, especially since it is prohibited from qualifying that right upon the payment of any tax.

IV. CONCLUSION

Although *Montgomery* seeks to end a great deal of confusion in the area of Texas school bond elections, it falls far short of that goal. The apparent lack of a willingness to come face-to-face with basic constitutional issues places the Texas bond election requirements in a state of irresolution. Even though the court upheld the Texas voting requirements, the manner in which this was done leaves a great deal to be desired.

While there are certain obligations expected from every citizen, it is extremely doubtful that one's inability to meet his "obligation of citizenship" would be a sufficient basis to deny him equal protection of the law. Nevertheless, if the particular obligation sought to be obtained from an individual was one which was necessary to promote a compelling state interest, then such a situation would warrant a denial of equal protection.[66] Since the issue of a compelling state interest was not expressly discussed by the Texas Supreme Court, it leaves one wondering whether the rendering of property for taxation is necessary to promote such an interest.

One reason for the avoidance of a direct confrontation with the compelling state interest test may rest in the apparent absence of such a constitutionally compelling interest. But again this forces one to question the wisdom of the supreme court in entirely avoiding an issue so fundamental to the equal protection clause. While the "obligation of citizenship" argument raised by the court[67] merits some philosophical discussion, it is extremely questionable that the discussion of an issue as important as voting rights and the compelling state interest question should be neglected under the auspices of a theoretical "you can't get something for nothing" attitude.

Barry M. Bloom

[65] In 1966 a three-judge federal district court held that making the payment of a Texas poll tax a prerequisite to vote was a violation of the due process clause of the fourteenth amendment. United States v. Texas, 252 F. Supp. 234 (W.D. Tex. 1966).

[66] Williams v. Rhodes, 393 U.S. 23, 31 (1968); NAACP v. Button, 371 U.S. 415, 438 (1963).

[67] 464 S.W.2d at 641.