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Constitutional and Statutory Provisions Concerning Voter Qualifications as Consistently Construed by Texas Decisions, Do Not Violate But Strengthen the Equal Protection Clause of the Fourteenth Amendment.

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CASE NOTES

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAW—PROPERTY TAXPAYER QUALIFICATIONS FOR VOTING IN SCHOOL BOND ELECTIONS IN TEXAS—CONSTITUTIONAL AND STATUTORY PROVISIONS CONCERNING VOTER QUALIFICATIONS AS CONSISTENTLY CONSTRUED BY TEXAS DECISIONS, DO NOT VIOLATE BUT STRENGTHEN THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT. *Montgomery Independent School District v. Martin*, 464 S.W.2d 638 (Tex. Sup. 1971).

Montgomery Independent School District sought a writ of mandamus directing the Attorney General of Texas to approve an issue of $450,000 of the district's Unlimited Tax Schoolhouse Bonds, Series 1970. The attorney general declined to approve the issue because the bonds did not gain the approval of a majority of the qualified property taxpaying electors of the district. The bond election took place on October 17, 1970, and concerned bonds which would be paid from the levy of ad valorem taxes. At the time of the election some uncertainty had arisen as to the constitutionality of property taxpayer qualifications for voting in such elections.[1] Because of this uncertainty, and in accordance with a policy established by the attorney general,[2] two separate but simultaneous elections were conducted. At one election the school district followed the letter of the Texas law and permitted voting only by the qualified electors of the district who owned taxable property in the district and who had duly rendered their property for taxation. Those voters rejected the bond issue. At the other election all other qualified resident voters of the district were permitted to vote. Those voters approved the bond issue. The majority of voters in both elections, when counted together, also approved the bond issue. The school board adopted an order declaring that the election resulted favorably to the issuance and on December 18, 1970, authorized the issuance and levied an ad valorem tax. Application was made to the attorney general for his required approval.

The attorney general contended that the provisions of Article VI, Section 3a,[3] and Article VII, Section 3, of the Texas Constitu-

1 Letter from Crawford C. Martin, Attorney General of Texas, to all recognized bond counsel in Texas, July 10, 1969. *See also* Comment, *The Equal Protection Clause v. Restriction of the Franchise to Property Owners in Texas*, 22 BAYLOR L. REV. 594 (1970).

2 Letter from Joseph H. Sharpley, Assistant Attorney General, to all recognized bond counsel in Texas, December 19, 1969. Brief for Respondent at 3, Montgomery Independent School Dist. v. Martin, 464 S.W.2d 638 (Tex. Sup. 1971).

3 TEX. CONST. art. VI, § 3a:

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

tion,[4] as well as Section 20.04(a) of the Texas Education Code[5] were not complied with and compelled the disapproval of the issuance. The school district did not dispute this but urged that those provisions were unconstitutionally selective in distributing the franchise in violation of the equal protection clause of the fourteenth amendment. Held—*Writ denied.* "[T]he constitutional and statutory provisions concerning voter qualifications as consistently construed by Texas decisions, do not violate but strengthen the equal protection clause of the Fourteenth Amendment."[6]

The equal protection clause has become the vehicle for the invalidation of many state laws which tended to restrict the franchise. Under this clause the Supreme Court of the United States has held that classifications based upon "suspect criteria," such as race and wealth, or statutory classifications affecting fundamental rights must be supported by a compelling state interest.[7] Both suspect criteria and fundamental rights are involved in the instant case. In order to qualify as a compelling state interest, the law must be shown to be "necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[8] There is a common element in all voting rights cases applying the doctrine. That element is the clear and present danger that the classifications were created by the state for the purpose of, or with the effect of, "fencing out" from the franchise a sector of the population because of the way they might vote.[9] Where fundamental rights and liberties are threatened states are required to "tailor carefully the means of satisfying a legitimate state interest."[10] The classification must be the least restrictive method of achieving the compelling state interest.[11] The usual presumption of constitutionality of state laws

taxable property in the State, county, political subdivision, district, city, town or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote . . . .

[4] TEX. CONST. art. VII, § 3, authorizes the levy and collection of ad valorem taxes, within limits, with this proviso: ". . . provided 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 . . . ."

[5] TEX. EDUC. CODE ANN. 20.04(a) (1969):

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, ...

[6] Montgomery Independent School Dist. v. Martin, 464 S.W.2d 638, 642 (Tex. Sup. 1971).

[7] Affeldt v. Whitcomb, 319 F. Supp. 69, 75 (N.D. Ind. 1970), *citing* Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed.2d 600 (1969) (J. Harlan, J., dissenting).

[8] McLaughlin v. Florida, 379 U.S. 184, 196, 85 S. Ct. 283, 290, 13 L. Ed.2d 222, 231 (1964). *See also* United States v. Texas, 252 F. Supp. 234, 253 (W.D. Tex. 1964), where, in striking down the Texas poll tax, the court noted that while the collection of revenue is a permissible and legitimate interest, "the State of Texas has been able to find other adequate means of collecting revenue which do not restrict the right to vote."

[9] Howe v. Brown, 319 F. Supp. 862, 866 (N.D. Ohio, E.D. 1970), *citing* Carrington v. Rash, 380 U.S. 89, 85 S. Ct. 775, 13 L. Ed.2d 675 (1965).

[10] Katzenbach v. Morgan, 384 U.S. 641, 655 n.15, 86 S. Ct. 1717, 1726 n.15, 16 L. Ed.2d 828, 838 n.15 (1966).

[11] Hall v. Beals, 396 U.S. 45, 52, 90 S. Ct. 200, 203, 24 L. Ed.2d 214, 220 (1969).

does not obtain, but instead, "strict scrutiny" is applied under the equal protection formula.[12]

The school district relied primarily on three recent decisions of the Supreme Court of the United States. In *Kramer v. Union Free School District No. 15*[13] the Court considered a New York statute[14] which limited the vote in local school board elections to parents and guardians of children attending public schools in the district and to residents who owned or leased taxable real property in the district. The contention was made that the state had a legitimate interest in limiting the franchise to those who were "primarily interested" in school affairs. The Court held that the voting qualifications denied equal protection to the excluded voters. *Kramer* applies the "compelling state interest" test to the limited purpose election.

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, 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 exclusion is necessary to promote a compelling state interest.[15]

The question whether a state has a compelling interest in limiting the franchise to those "primarily interested" is not reached in the decision. Instead, the Court assumes that a state might have such an interest, but on "close scrutiny" found the classifications created did not accomplish this purpose with "sufficient precision" to justify denying the franchise to Kramer and others in his class. The New York statute was overbroad. The excluded voters were denied equal protection because they were not in fact "substantially less interested or affected"[16] than those the statute included.

In *Cipriano v. City of Houma*[17] the law under attack gave only "property taxpayers" the right to vote in elections called to approve an issue of revenue bonds by a municipal utility. The revenue bonds were not to be financed by property tax revenue, but were to be paid from revenue derived from operations of the utilities.[18] Both property

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[12] Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626, 89 S. Ct. 1886, 1889, 23 L. Ed.2d 583, 589 (1969), *citing* Williams v. Rhodes, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed.2d 2431 (1968); Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed.2d 506 (1964); Wesbury v. Sanders, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed.2d 481 (1964).

[13] 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed.2d 583 (1969).

[14] N.Y. EDUC. LAW § 2012 (McKinney 1947).

[15] Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627, 89 S. Ct. 1886, 1889, 23 L. Ed.2d 583, 589 (1969).

[16] *Id.* at 632, 89 S. Ct. at 1892, 23 L. Ed.2d at 592.

[17] 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed.2d 647 (1969).

[18] The attorney general has determined that *Cipriano* is to be applied in Texas in bond issues to be funded solely by revenue. In such case the election call should specify that all

owners and nonproperty owners used the utilities and paid utility bills. The city urged that property owners had a "special pecuniary interest" in the election, because the efficiency of the utility system directly affected property and property values. The Court found that nonproperty owners were also substantially affected by the utility operations and therefore their exclusion could only be justified if "necessary to promote a compelling state interest."[19] The statute failed to meet this test. As in *Kramer* the Court found it unnecessary to decide whether a state might, in some circumstances, limit the franchise to those "primarily interested."[20]

In *City of Phoenix v. Kolodziejski*[21] the Supreme Court squarely faced the question whether the Federal Constitution permits a state to restrict to real property taxpayers the vote in elections to approve the issuance of general obligation bonds. The Court held the Arizona statute which excluded nonproperty owners from voting in such elections to be in violation of the equal protection clause.

> [A]llthough owners of real property have interests somewhat different from the interests of nonproperty owners in the issuance of general obligation bonds, there is no basis for concluding that nonproperty owners are substantially less interested in the issuance of these securities than are property owners. That there is no adequate reason to restrict the franchise on the issuance of general obligation bonds to property owners is further evidenced by the fact that only 14 states now restrict the franchise in this way; most states find it possible to protect property owners from excessive property tax burdens by means other than restricting the franchise to property owners.[22]

The court in the instant case found "significant differences between the three cases cited above and this case."[23] *Cipriano* concerned revenue bonds and as noted earlier has been accepted as controlling Texas

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qualified voters in the district may vote. Letter from Crawford C. Martin, Attorney General of Texas, to all recognized bond counsel in Texas, July 10, 1969.

19 Cipriano v. City of Houma, 395 U.S. 701, 704, 89 S. Ct. 1897, 1899, 23 L. Ed.2d 647, 650 (1969).

20 *Id.* at 704 n.5, 89 S. Ct. at 1899 n.5, 23 L. Ed.2d at 651 n.5.

21 399 U.S. 204, 90 S. Ct. 1990, 26 L. Ed.2d 523 (1970).

22 *Id.* at 212, 90 S. Ct. at 1995, 26 L. Ed.2d at 529. The following states restrict the franchise to property taxpayers in some or all general obligation bond elections: Alaska (ALAS. STAT. § 07.30.010(b) (Supp. 1969)); Arizona (ARIZ. CONST. art. VII, § 13, art. VIII, § 9); Colorado (COLO. CONST. art. XI, §§ 6-8); Florida (FLA. CONST. art. VII, § 12); Idaho (IDAHO CODE ANN. § 31-1905 (1963), §§ 33-404 (Supp. 1969), § 50-1026 (1967)); Louisiana (LA. CONST. art. XIV, § 14(a)); Michigan (MICH. CONST. art. II, § 6); Montana (MONT. CONST. art. IX, § 2, art. XIII, § 5); New Mexico (N.M. CONST. art. IX, §§ 10-12); New York (N.Y. TOWN LAW § 84 (McKinney 1965), N.Y. VILLAGE LAW § 4-402 (McKinney 1966)); Oklahoma (OKLA. CONST. art. X § 27); Rhode Island (R.I. CONST. amend 29 § 2); Texas (TEX. CONST. art. VI, § 3a); Utah (UTAH CONST. art. XIV, § 3).

23 Montgomery Independent School Dist. v. Martin, 464 S.W.2d 638, 640 (Tex. Sup. 1971).

election procedures in this area.[24] *Kramer* and *Kolodziejski* are distinguished on the grounds that the decisions in those cases are limited to real property taxpayer qualifications. "The Texas law does not restrict voting rights to owners of *real* property."[25]

It is probably safe to proceed on the premise that the Supreme Court of Texas was intent on rescuing the Texas provisions from the implications of the *Kramer, Cipriano, Kolodziejski* trilogy. There were two possible courses of action before the court. First, Texas might have followed the lead of some of her sister states and declared that restricting the vote in bond elections to property taxpayers met the compelling state interest test in that it assured the solvency of her cities, towns and school districts and it protected the taxpayers from confiscatory taxes.[26] This, however, would have necessitated a holding that nonproperty taxpayers were substantially less interested in the outcome of the election than property taxpayers. In view of the *Kolodziejski* decision this would have been an extremely hazardous course of action.[27] The second course was to simply declare that the challenged provisions were in no way exclusionary. This was the course adopted by the court.

> It is the contention of the Attorney General, and we agree, that voter qualifications of ownership under the Texas constitutional and statutory provisions . . . as interpreted by our decisions, are so universal as to constitute no impediment to any elector who really desires to vote in a bond election. A voter is qualified if he renders

24 Letter from Crawford C. Martin, Attorney General of Texas, to all recognized bond counsel in Texas, July 10, 1969.

25 Montgomery Independent School Dist. v. Martin, 464 S.W.2d 638, 640 (Tex. Sup. 1971). (Emphasis added.) TEX. REV. CIV. STAT. ANN. art. 7145 (1960). "All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed."

26 Prior to the *Kolodziejski* decision the Supreme Court of Oklahoma in Settle v. City of Muskogee, 462 P.2d 642 (Okla. 1969), held that OKLA. CONST. art. X, § 27, which restricts the franchise in certain bond elections to "qualified property tax paying voters," met the compelling state interest test of *Kramer* because it assured the solvency of Oklahoma cities and towns and protected the taxpayers against confiscatory taxes. The court also held that a nonproperty taxpayer was "substantially less interested" in a bond election for a proposed public library.

The attorney general urges the following in his brief filed in the supreme court:

"If the State and its governmental subdivisions do not have a compelling interest in the maximum collection of all available tax revenues for the support of ofttimes desperately needed public improvements, it is difficult, if not impossible to discern what interest of local government, if any, could ever be defined as compelling." Respondent's Brief at 15, Montgomery Independent School Dist. v. Martin, 464 S.W.2d 638 (Tex. Sup. 1971).

27 Prior to *Kolodziejski* the Supreme Court of Idaho in Muench v. Paine, 463 P.2d 939, 945 (Idaho 1970), stated that, ". . . [i]t is apparent that the real property taxpayers have an interest in the outcome of school district bond elections substantially greater than other electors who are not also taxpayers on real property." After *Kolodziejski*, however, Idaho reversed herself in Muench v. Paine, 480 P.2d 196 (Idaho 1971), and held the restrictive Idaho statutes unconstitutional. *See also* Cypert v. Washington County School Dist., 473 P.2d 887, 893 (Utah 1970), in which the Supreme Court of Utah is bitterly critical of the *Kolodziejski* decision and recites portions of the Declaration of Independence to the Supreme Court of the United States.

> any kind of property of any value, and he need not have actually paid the tax.[28]

Thus, as a matter of judicial declaration, there is not a voting-age Texan among us who does not own something that he can pay taxes on. Obviously most electors do own some taxable property. The property tax laws are very broad and very democratic. Anything from hogs and dogs to clocks and watches and money on hand or deposit is taxable property and should be rendered.[29]

"In all the cases applying the Equal Protection Clause to invalidate state election laws, there is none that fails to contain an identifiable group which is the subject of the alleged discrimination."[30] It is doubtful that the Supreme Court of Texas would dispute the statement that "voting laws which deny the right to vote to nonproperty owners are probably invalid."[31] But, that court has now said that the Texas property tax laws are so universal as to enable any otherwise qualified elector to vote in bond elections if he so desires. All electors are presumed to own property which the law requires be rendered for taxation. Thus, under this decision, it would appear that no identifiable group could ever be disenfranchised.

The emphasis of the holding is, of course, on the "correlation between the rights of citizenship and the obligations of citizenship."[32] The court speaks in terms of "distributive burden," and "fair share of the resulting obligation."[33] This Texas brand of equal protection will simply not tolerate a voter who is willing to impose a tax on the property of another without assuming his distributive share of the burden. If it is true that the provisions exclude no one, and that all electors own taxable property, then the court was correct when it said that the provisions "strengthen the equal protection clause. . . ."[34] But, one might suggest that there is at least an identifiable class of citizens who: (1) Own no non-exempt property which the law requires be rendered for taxation, and (2) are substantially interested in the affairs

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[28] Montgomery Independent School Dist. v. Martin, 464 S.W.2d 638, 640 (Tex. Sup. 1971).

[29] TEX. REV. CIV. STAT. ANN. art. 7162 (1960). One exemption in the statute is household and kitchen furniture up to a value of $250.

[30] Campbell v. Board of Education, 310 F. Supp. 94, 103 (E.D.N.Y. 1970), *citing* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed.2d 583 (1969) (those who did not own property); Carrington v. Rash, 380 U.S. 89, 85 S. Ct. 775, 13 L. Ed.2d 675 (1965) (servicemen); Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed.2d 506 (1964) (those living in heavily populated districts). *See also* Evans v. Cornman, 398 U.S. 419, 90 S. Ct. 1752, 26 L. Ed.2d 370 (1970) (federal enclave residents).

[31] Kirby, *The Constitutional Right to Vote*, 45 NEW YORK UNIVERSITY L. REV. 995, 999 (1970).

[32] Montgomery Independent School Dist. v. Martin, 464 S.W.2d 638, 641 (Tex. Sup. 1971), *citing* Markowsky v. Newman, 134 Tex. 440, 136 S.W.2d 808 (1940).

[33] Montgomery Independent School Dist. v. Martin, 464 S.W.2d 638, 641 (Tex. Sup. 1971).

[34] *Id.* at 642.