OWNERSHIP OF LAND AS A PREREQUISITE TO THE RIGHT TO VOTE: EQUAL OR UNEQUAL PROTECTION?

Much precedent has evolved concerning the extent to which the equal protection clause of the fourteenth amendment protects the right to vote. In addition to its adventuresome forays into the thicket of one man—one vote and legislative reapportionment,[1] the Supreme Court has invoked the equal protection clause to void limitations on the franchise on the basis of status [2] and wealth.[3] At stake in these cases was the privilege of participation in state and federal general elections for the selection of political representatives. In defense of its conclusions the Court has hastened to emphasize that the vote is "close to the core of our constitutional system" [4] and among our "fundamental rights and liberties," [5] so that any infringements "must be closely scrutinized and carefully confined." [6] More recently, additional equal protection issues have arisen testing the scope of this "close scrutiny" in a slightly different context: local elections dealing not with the selection of legislators but with particular local propositions. Two lower federal courts appear to have reached inconsistent results on the issue of the permissibility of conditioning the right to participate in such decisions upon the ownership of and payment of tax upon real property.

In *Pierce v. Village of Ossining* [7] a group of resident nonproperty owners challenged a provision of New York state law that permits local municipalities to limit the vote to owners of taxable real estate.[8] The particular proposition involved in the local referendum was whether to change the form of village government from a mayoral system to a village manager system. Noting that the "proposition on which plaintiffs have been excluded from voting would work a fundamental change in the village," [9] the court struck down the exclusion as an "invidious discrimination." [10] The *per curiam* opinion contained little

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[1] *See generally* Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

[2] Carrington v. Rash, 380 U.S. 89 (1965) (disenfranchisement because of military status violative of equal protection notwithstanding legitimate state interest in insulating local elections from transients and recognition that military status is a good test of transiency).

[3] Harper v. Board of Elections, 383 U.S. 663 (1966) (state poll tax violates equal protection).

[4] Carrington v. Rash, 380 U.S. 89, 96 (1965).

[5] Harper v. Board of Elections, 383 U.S. 663, 670 (1966).

[6] *Id. See also* Louisiana v. United States, 380 U.S. 145, 153 (1965).

[7] 292 F. Supp. 113 (S.D.N.Y. 1968).

[8] N.Y. VILLAGE LAW § 4-402(b) (McKinney 1966).

[9] 292 F. Supp. at 115.

[10] *Id. But see* Harris v. McMillan, 186 Ga. 529, 198 S.E. 250 (1938). *Harris* involved a similar voting restriction for mayoral and councilmanic elections. The limitation was found consonant with the state constitution. The equal protection clause of the federal constitution was not even adverted to in the opinion.

analysis, merely citing the Supreme Court's decisions in *Harper v. Board of Elections*[11] and *Carrington v. Rash*[12] and noting that the defendants did not even choose to defend on the merits.[13]

Several months earlier, a federal district court in Louisiana had reached the opposite result. In *Cipriano v. City of Houma*,[14] a local referendum was conducted to secure approval of a revenue bond issue for the construction of an electric utility. Participation in this sort of election is restricted by the Louisiana state constitution[15] and enabling legislation[16] to property owners and taxpayers. Although this denied a voice in the decision to a majority of the residents of the city[17] (as was also the case in *Pierce*),[18] the court found no violation of the equal protection clause. This conclusion presents difficulties.

Cipriano first sought to distinguish *Harper v. Board of Elections*,[19] the case thought dispositive in *Pierce*.[20] In *Harper* the Supreme Court held a state poll tax invalid on the grounds that "wealth or payment of a fee as a measure of a voter's qualifications is . . . a capricious or irrelevant factor."[21] If the property ownership limitation of the Louisiana constitutional scheme is intended solely to, or without other justification has the effect of, restricting the vote to a presumptively wealthier segment of the community, it would seem to run afoul of the *Harper* rationale.

Cipriano, however, claimed to discern an operative distinction in the fact that the poll tax struck down in *Harper* concerned the general franchise whereas the disability in *Cipriano* involved only participation in the decision of a particular municipal issue. The distinction in the case, however, is one without constitutional significance. It is true that the cases that have emphasized the preciousness of the franchise and the zealousness with which it must be guarded from discriminatory infringement have involved the general franchise.[22] But the root concern

11 383 U.S. 663 (1966).

12 380 U.S. 89 (1965).

13 292 F. Supp. at 115:
the chief arguments presented on behalf of defendants go . . . to various considerations which might lead a court to withhold equitable relief.

14 286 F. Supp. 823 (E.D. La. 1968), *prob. juris. noted*, 89 S. Ct. — (1969) (No. 705). Judge Wisdom dissented.

15 LA. CONST. art. 14, §§ 14(a), (m).

16 LA. REV. STAT. ANN. § 33:4258 (1966).

17 The City of Houma has a resident population of 35,000. As of October 24, 1967, it had 11,606 registered voters. Of these, only 4,680 were property taxpayers, 2,724 of whom voted in the election in question. Cipriano v. City of Houma, 286 F. Supp. 823, 829 (E.D. La. 1968).

18 The resident population of Ossining, New York is about 22,300, slightly less than 10,000 of whom are qualified to vote in general elections. However, only 4,500 are owners of tax-assessed property. Pierce v. City of Ossining, 292 F. Supp. 113, 115 (S.D.N.Y. 1968).

19 383 U.S. 663 (1966).

20 And by Judge Wisdom, dissenting. 286 F. Supp. at 828.

21 383 U.S. at 668.

22 *See* notes 2-6 *supra* and accompanying text.

of *Harper* and the other voting cases was the importance of self-determination, and the primacy in our constitutional system of the opportunity to participate in the democratic process.[23] This concern is just as relevant as regards a local proposition as it is to the selection of state or federal representatives. Although general disenfranchisement is by definition more of a deprivation than disenfranchisement on a local proposition,[24] unless the disability is de minimis its constitutional vice remains.[25] At any rate, there is no suggestion in *Harper* that the demands of equal protection would so nicely vary according to the object of the particular electoral process; it is sufficient to note that such issues as community indebtedness and utility service are significant local decisions warranting close scrutiny of any bar to participation. Last, and perhaps most important, the irrelevance perceived in *Harper* of any wealth criterion is not reduced one whit by the difference in the type of election. Thus, if the Louisiana property ownership voting restriction amounts to no more than a disguised or indirect poll tax, *Harper* directly controls.

It might be argued that property ownership is, in this context, more than a simple test of wealth; this was the position taken by the city of Houma. If so, the measure could escape at least the per se condemnation of *Harper*.

The State of Louisiana, as an intervening defendant, argued successfully that the real estate tax payment requirement was a valid limitation on the power of the municipality to go into debt,[26] analogous to the state constitutional debt limitations placed on other types of

[23] *See* text accompanying notes 4-5 *supra*.

[24] This was apparently the view of the majority in *Cipriano*. It was suggested that the principle vice of a restriction upon statewide voting is that it denies a chance to end the restriction through political action. Local restrictions however, can be overborne by state legislative action or a change in the state constitution. In these latter situations those excluded on the local level can work on the statewide level for the abolition of the exclusion through the election of appropriately inclined political representatives. 286 F. Supp. at 827-28. *See also* Kramer v. Union Free School District, 379 F.2d 491, 497 (2d Cir. 1967) (Lumbard, C. J., dissenting). This argument would appear all the stronger in light of the reapportionment cases (see note 1 *supra*); not only is there access to the state legislature to cure local voting inequities, but that the legislature will be fairly apportioned. However, Avery v. Midland County, 390 U.S. 474 (1968), extended the rule of one man—one vote to county elections. Thus it would be unsafe to assume that the Supreme Court would presently be receptive to any argument based solely on political accessibility at the state level.

[25] Query, for example, the relative importance, both apprehended and actual, of a bond issue sorely needed by the local school system and a vote for United States Senator in a one-party state.

[26] Brief for Defendant at 4-5; 286 F. Supp. at 827. At least two other cases have advanced a like justification for similar voting restrictions. In State *ex rel.* Voiles v. Johnson County High School, 43 Wyo. 494, 5 P.2d 255 (1931), school bond issues had to be approved by a majority of each of two classes: (1) owners of real property and (2) residents in general, *including* property owners. In sustaining the added electoral weight thus given to the property owners, the court asserted that a purpose of the scheme was "to place additional restrictions on the right of the municipality to borrow money on its written obligations." *Id.* at 505, 5 P.2d at 258. *Accord,* Spitzer v. Village of Fulton, 172 N.Y. 285, 64 N.E. 957 (1902). In neither of these cases was the equal protection issue raised; the only point at issue was the permissibility of the limitations in terms of state constitutional standards.

bonds.[27] However, these other debt limitations are fixed mathematically,[28] and while debt limitation might be a legitimate community objective, the reasonableness of this particular means is doubtful. The assumption that debt limitation is a legitimate goal implies some notion of an optimum or at least, a maximum desirable level of indebtedness. But there is no reason to suspect that this particular limitation on the right to vote would in any way tend to insure the defeat of any proposed bond issues which, if passed, would cause the aggregate indebtedness of the municipality either to deviate from the optimum or to exceed the desired maximum, whatever these undefined figures may be. At the least, unless it can be shown that owners of real estate as a group have any particular orientation in this regard that would further a demonstrable community interest, the debt limitation theory makes little sense. Given that any group would probably oppose further indebtedness at some level, there is nothing to make this particular limitation any more rational than a restriction to those with light hair or to those with brown eyes.

The principal and interest on the bond issue involved in *Cipriano* would be repaid from operating revenues to be derived from utility consumers.[29] Since the servicing and retirement of the bond would not necessitate any tax increase, there would appear to be no tax minimization motive to distinguish the attitudes of property owners from those of the citizenry at large. It might be a reasonable hypothesis that the construction of the utility, if needed, would tend to inflate local real estate values, and that property taxpayers would tend in consequence to favor such a bond issue, but this is scarcely consistent with the notion of the voting restriction as a debt *limiting* device.

It was also stressed in *Cipriano* that the process for mandating the revenue bond was dissimilar to an ordinary election.[30] The question arises only after passage of an appropriate resolution by the municipal governing body,[31] and even if the issue is approved by a majority of those voting, the decision is not binding unless subsequently ratified by the city council.[32] This lack of finality, however, does not render the referendum unimportant. It still remains open for a majority to categorically veto the proposal, and conversely, majority approval is still essential to the issuance of the bond. Furthermore, even though this procedure is not identical to the normal electoral process, it would be difficult to categorize it as an administrative decision.[33] A body of

[27] Utility revenue bonds of the type here in question are not computed in determining the permissible limits of local public indebtedness, as are general obligation bonds. LA. CONST. art. 14, §§ 14(f), (m).

[28] *See* note 27 *supra.*

[29] LA. REV. STAT. ANN. § 33:4251-53 (1966).

[30] 286 F. Supp. at 286.

[31] LA. REV. STAT. ANN. § 33:4251 (1966).

[32] *Id.* § 33:4258.

[33] *But cf.* Oregon-Wisconsin Timber Holding Company v. Coos County, 71 Ore. 462, 467-8, 142 P. 575, 577 (1914).

over forty-five hundred [34] scarcely resembles traditional notions of an administrative agency. Even if the property owners' approval were so characterized, there would still remain the problem of the absence of any standard, either express or implicit, to guide the decision. On the contrary, those voting not only were left free but were even expected to vote solely for reasons of self-interest.[35] If the doctrine of illegal delegation of legislative power has any current vitality whatsoever,[36] it would present a great obstacle to this line of justification.

As an alternative defense, the city of Houma argued that the voting limitation was reasonable because it restricted popular participation to those truly interested in the proposition.[37] This contention, if accepted, would serve to distinguish *Cipriano* from the situation in *Pierce*: all citizens presumably have an equal concern for the form and structure of their local government.[38] There seems nothing constitutionally objectionable about this approach, at least in theory. The Supreme Court's prior approval of residency requirements to protect local elections from transients' votes [39] gives support, at least in the broad sense, to the notion that elections may be restricted to those "interested." Perhaps then, when dealing with more specific issues, the concept of electoral interest can be drawn more narrowly to permit even broader restrictions upon the right to vote.

The obvious problem, of course, is to define the electoral interest of the class of property owners and to demonstrate the lack of a significant interest in their propertyless brethen. In such an endeavor, the court in *Cipriano* first noted that it could be reasonably thought "that property owners by and large have a greater and more permanent economic stake in the community than nonproperty owners." [40] However, even if this is true, it does not support the classification. The "greater . . . economic stake" probably means nothing more than that they constitute a wealthier class. The future prosperity of the com-

[34] *See* note 17 *supra.*

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

[36] This is not of course a federal question in this context. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 2.08 (1959). The force of the argument, however, might exert influence *sub silentio* on the resolution of the equal protection issue.

[37] A number of state cases have in the past justified the limitation of the franchise to those who own taxable real property on the basis that this group has a particular interest, usually financial, in the bond issue. State *ex rel.* Voiles v. Johnson, 43 Wyo. 494, 5 P.2d 255 (1931); Hartman v. Meier, 39 Idaho 261, 227 P. 25 (1924); Oregon-Wisconsin Timber Holding Co. v. Coos County, 71 Ore. 462, 142 P. 575 (1914); Spitzer v. Village of Fulton, 172 N.Y. 285, 64 N.E. 957 (1902). In each of the cases the issue was whether the voting restriction comported with the state constitution rather than with the equal protection clause of the federal constitution.

One recent federal case did defend a voter restriction on the basis of exclusivity of interest. In Kramer v. Union Free School District, 282 F. Supp. 70 (E.D.N.Y. 1968), *prob. juris. noted,* 89 S. Ct. 117 (1968) (No. 258), a three-judge district court, one judge dissenting, upheld N.Y. EDUC. LAW § 2012 (McKinney Supp. 1968), which limits voting in school district meetings to property owners and their spouses, lessees (but not their spouses), and parents or guardians of school-age children.

[38] *See* text accompanying notes 7-10 *supra.*

[39] Pope v. Williams, 193 U.S. 621 (1904).

[40] 286 F. Supp. at 827.

munity can be and probably is just as important to those of more modest means. A local economic recession, for example, may entail serious financial consequences to the propertied class, but it would be equally, if not more disastrous, to the local apartment dweller who is laid off or even loses his job due to the closing of a local industry. Property owners may have a more permanent interest in the community, but this crude generalization is a tenuous [41] basis for exclusion from an activity "close to the core of our constitutional system." [42] There are undoubtedly many landless persons who have a permanent stake in the community, and to exclude all of them on this basis is to erect a seriously underinclusive classification.[43]

The court also speculated that property owners might reasonably be thought to have a special electoral interest in the bond issue in that the value of their properties might be directly affected.[44] This is certainly not true in the sense of increased taxes, since the bonds would be retired solely from the revenues of the utility,[45] and even if the utility failed altogether the bondholders would have no claim upon general municipal financial resources.[46] It is true, as the court observed,[47] that real estate values might be affected by the quality and cost of utility service. Generically, however, this is merely a financial interest, and others in the community also share a concern for the cost of electrical service. Many who do not own real estate doubtlessly purchase electrical service from the utility and, as succinctly put by Judge Wisdom, "they are no less interested in the amount of their light bills." [48] Even tenants whose rents include a charge for electrical service will find their rent reflecting this expense, unless one makes the rather implausible assumption that the local demand for rented real estate is totally inelastic.[49] And as to concern for the quality of service, power failures will certainly darken rented premises with equal inconvenience.

Turning from consideration of the relative efficiency and expense of electrical services offered to individual consumers to the profitability of the utility, there again fails to materialize any special interest of

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[41] *See* Carrington v. Rash, 380 U.S. 89, 94-97 (1965).

[42] *Id.* at 96.

[43] *See generally* Tusman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 344-53 (1949).

[44] 286 F. Supp. at 827.

[45] LA. REV. STAT. ANN. § 33:4253 (1966).

[46] *Id.*

[47] 286 F. Supp. at 827.

[48] *Id.* at 829 (Wisdom, J., dissenting).

[49] This same consideration would also be relevant to assessing the uniqueness of the financial interest of the landed class if the bonds were a general obligation on the fisc. In such a case, there would be a possibility of a rise in the ad valorem tax. Even here, there would be a strong possibility that the incidence of the tax increment would be borne in large measure by the tenant class. *See generally* P. SAMUELSON, ECONOMICS 208-10 (5th ed. 1961).

property owners to distinguish their concerns from those of others in the community. As previously noted, even the complete financial failure of the enterprise would in no way imperil the municipality's general fund so as to make necessary a rise in the property tax rate. By the terms of the bonds the holders in such circumstances would be without recourse. Nevertheless, it is contended in *Cipriano* that the failure of the utility might cause an impairment of the city's credit by deterring potential investors in future projects.[50] This contingency, however, in no way harms only the interests of the propertied class. This impairment of credit might in the future frustrate the attainment through bond financing of any number of municipal goals, education for instance, which would benefit the community as a whole.

On the other hand, if the utility were profitable, all surplus revenues would be transferred to the city's general fund to help achieve any governmental purpose: fire protection, police protection or any other municipal service. Thus it is said by *Cipriano* that the property owners might have a special interest in relieving themselves of some of the financial burden that would otherwise be borne by ad valorem taxation of their real estate.[51] This may constitute a "special interest" in some sense of the term, but surely it cannot sustain the constitutionality of this distinction. To the contrary, it serves to emphasize the invidiousness of the classification. Those who do not own and pay tax upon real property have an equally special, albeit diametrically opposed, interest: to wit, the maximization of the portion of city expenses borne by property taxation.[52] From the perspective of those who stand to gain from the operation of a utility with surplus profits, the situation is not dissimilar to limiting the vote to property owners where the question is whether to increase municipal revenues by raising either the property tax rate or the sales or wage tax rates.

Furthermore, even assuming that those who pay real estate taxes have some sort of unique pocketbook interest, the constitutionality of the voting restriction might yet be suspect. Is there any reason to suppose that the command of equal protection requires only the participation of those with interests consistent with the valuable though simplistic assumption of classical economics that man is motivated solely by considerations of economic profitability? As one example, suppose a decision were to be made concerning the sale of state forest lands to private lumber companies. It is likely that the major political issues involved would be questions of conservation and public recreation rather than the adequacy of the sale price.

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[50] 286 F. Supp. at 827.

[51] *Id.*

[52] Apparently the City of Houma conducted a rather extensive advertising campaign to urge passage of the bond, which tends to support this view: property owners were urged to vote in favor of the bond as a method of assuring the protection and preservation of low real estate tax rates. Brief for Plaintiff at 6; 286 F. Supp. at 823.

It is also easy to hypothesize noneconomic concerns even in as mundane a matter as the financing, construction, and operation of an electrical utility. For example, there might be an aesthetic interest in the power lines which transmit the electrical power, and there would undoubtedly be a safety interest in the design and location of the lines. If the contract for the construction of the utility was to be let to the mayor's brother-in-law at an excessive price or to a firm that discriminated against blacks in its hiring practices, there might be a moral concern in the bond issue. If the purpose of the bond was to construct a utility with large surplus capacity for the purpose of luring new industry into the area, some might have an interest in opposing the issue in order to preserve the rural and pastoral quality of the community, even at the expense of a possible long-range increase in per capita income. It would be difficult indeed to justify subordination of any of these interests, which might be held by any segment of the citizenry, to purely financial concerns.

CONCLUSION

Whether in a given situation any interest analysis can be devised to support a restriction on the franchise other than residency has yet to be fully tested.[53] No doubt "many innovations, numerous combinations of old and new devices, [and] great flexibility in municipal arrangements" [54] will remain open to the states and cities. Nevertheless, at least since the decision in *Harper* a more substantial justification of wealth-related criteria seems imperative. And given the specific situation in *Cipriano*, the payment of real estate tax as a condition to the opportunity to vote is insupportable in light of the requirements of equal protection. Even leaving aside esoteric concerns and considering solely selfish, material interests, the restriction creates a grossly underinclusive classification which furthers no legitimate governmental purpose.

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[53] In discussing the problems with defining who is interested in a particular issue, one court stated:

> Contemplating the possibility of some such question arising, if this statute should be upheld, it would, perhaps, be pertinent to inquire as to the existence of any reasonable ground of public policy upon which it might be insisted that only those who are taxpayers upon real property should be permitted to vote upon a proposition to issue state bonds for the purpose of highway construction or maintenance, thereby excluding from the electorate all other electors, regardless of the amount they might pay in taxes upon live stock, farm implements, mechanics' tools, automobiles and other vehicles of transportation, railroad properties, oil, coal and other mineral production, many of whom, no doubt, would not only be equally interested with real estate taxpayers in the convenience afforded by the highways so constructed and maintained, and their welfare equally promoted or injured by the result of such an election, and who might also be subject to taxation to pay the interest and principle upon any such bond issue.

Simkin v. City of Rock Springs, 33 Wyo. 166, 189, 237 P. 245, 252 (1925).

[54] Sailors v. Board of Educ. 387 U.S. 105, 110-11 (1967).