Wilkins v. Bentley: Getting Out the Student Vote in Michigan

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COMMENTS

Wilkins v. Bentley:* Getting Out the Student Vote in Michigan

I. INTRODUCTION

The right to vote is one of the most precious constitutional rights. The Supreme Court has described it as preservative of all rights,1 a fundamental matter in a free and democratic society,2 and a bedrock of our political system.3 Justice Black once stated, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."4 It supports not only the individual's personal interest in self-government, but also the collective societal interest in broadly based consensual representation. The magnitude of these interests suggests a strong policy favoring extension of the franchise with as few limitations as possible.

On the other hand, conditions on suffrage may further legitimate state interests that include promoting intelligent use of the ballot,5 identifying the voter and preventing voting fraud,6 and assuring the voter's membership and interest in the community.7 These interests suggest a competing policy favoring some conditions on suffrage in order to safeguard and effectuate the electoral process. The Supreme Court has recognized that the states "have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised."8 However, it is equally clear that conditions imposed by the states on suffrage must be consistent with all limitations on governmental power imposed by the Constitution.9

The constitutionality of voting qualifications is an issue brought sharply into focus by the current controversy regarding state residency requirements for student voters.10 Students face a serious

7. See cases cited in note 6 supra.
10. See, e.g., MICH. COMP. LAWS ANN. § 168.11(b) (1967), set out in note 17 infra. See
problem because state residency statutes often contain special require-
ments that effectively bar them from voing in local elections. This
problem has only been intensified since the twenty-sixth amendment
to the United States Constitution lowered the minimum voting age
to eighteen, thereby significantly increasing the number of potential
student voters.

The frustrations, fears, and tensions surrounding these statutes
are aptly illustrated by recent reports in newspapers and magazines
across the country. A classic statement of the problem comes from
an Illinois state representative: "For goodness sakes, we could have
these transients actually controlling the elections, voting city councils
and mayors in or out of office." A related fear is expressed by the
New Hampshire Attorney General: "They [students] float a bond
issue and then move on, and who's left holding the bag?" On the
other hand, advocates of student registration contend that since
students pay local taxes and are subject to authority of local govern-
ment they should also have a hand in the city's administration. The
courts are presently re-examining the issue of student participation
in local elections. The early returns are in the students' favor.

II. THE WILKINS DECISION

In Wilkins v. Bentley the Michigan supreme court considered a
challenge to the state's residency requirement for students. The


(a) The term "residence," as used in this act, for registration and voting purposes shall be construed to mean that place at which a person habitually sleeps, keeps his or her personal effects and has a regular place of lodging. Should a person have more than 1 residence, or should a wife have a residence separate from that of the husband, that place at which such person resides the greater part of the time shall be his or her official residence . . . . This section shall not be construed to affect existing judicial interpretation of the term residence.

(b) No elector shall be deemed to have gained or lost a residence by reason of
plaintiff-students maintained their regular place of lodging in Ann Arbor and satisfied the general residency requirements applicable to other citizens. The students, however, were denied the right to register and vote in Ann Arbor under a special section of the state residency statute that provides: "No elector shall be deemed to have gained or lost a residence . . . while a student at any institution of learning." This provision had long been held to mean that the student must overcome a rebuttable presumption that he is not a resident in the locale of the institution of learning. It would seem that the presumption could be rebutted by some showing of an intention to remain in the locale, although it was established that a mere declaration of intention by the student would not suffice to establish residence. The Michigan decisions failed to indicate precisely what factors would rebut the presumption. Against this background the Michigan supreme court held that the student residency provision violated the due process and equal protection clauses of the Federal Constitution.

his being employed in the service of the United States or of this state, nor while engaged in the navigation of the waters of this state or of the United States or of the high seas, nor while a student at any institution of learning, nor while kept at any almshouse or other asylum at public expense, nor while confined in any public prison. Honorably discharged members of the armed forces of the United States or of this state and who reside in the veterans' facility established by this state may acquire a residence where the facility is located.

(c) No member of the armed forces of the United States shall be deemed a resident of this state in consequence of being stationed in any military or naval place within the state.

18. MICH. COMP. LAWS ANN. § 168.11(a) (1967), set out in note 17 supra.
19. MICH. COMP. LAWS ANN. § 168.11(b) (1967), set out in note 17 supra.
21. See Note, supra note 11, at 216-21 (detailed history and analysis of Michigan law—a presumption against student voting). See also Comment, supra note 11, at 406-69 (students as residents); Note, Student Voting and Apportionment: The "Rotten Boroughs" of Academia, 81 YALE L.J. 35, 39-42 (1971) (case law of student voting and residence).
23. Factors which various state courts have considered to be relevant include the following: a student's gainful employment in the college community, homeownership with no present intention of pulling up stakes, apartment dwelling as head of family, holding a teaching and research assistantship, stated intention to make the university town a home upon graduation, year-round residence, financial independence from parents, and payment of local property and income taxes. Note, supra note 11, at 220 (footnotes omitted). See generally Singer, supra note 10, at 721-23; Comment, supra note 11, at 406-69; Note, Election Laws as LegalRoadblocks to Voting, 55 IOWA L. REV. 615 (1970); Note, supra note 11, at 229-43 (Appendix of student voter questionnaires used in different Michigan cities).
III. Due Process

The starting point for the court's due process analysis was the statement that the right to vote is "a fundamental political right, because preservative of all rights,"\textsuperscript{25} and that "courts have closely scrutinized any law that interferes with fundamental rights to insure that they are not unduly vague or give local officials unfettered discretion."\textsuperscript{28} The court noted that in cases involving voter registration, the Supreme Court has struck down such state laws.\textsuperscript{27} Substantial reliance was placed upon the language of Justice Black in \textit{Louisiana v. United States}:\textsuperscript{28} "'The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar.'"\textsuperscript{29} The court found common ground between the problems faced by students in the instant case and those faced by blacks in \textit{Louisiana}:

Although the voter qualification tests involved [in \textit{Louisiana}] were used to disfranchise blacks, thus bringing into play the fifteenth as well as the fourteenth amendment, the inherent vagueness of the interpretation test and the imprecise criteria used by the registrars presented prospective black voters with a dilemma analogous to that faced today by students.\textsuperscript{30}

Having established the legal principle against discretion in the voter registration context, the court proceeded to find that Michigan registrars were in fact allowed unfettered discretion under the student voter registration provision:

"[In Michigan] . . . the standards which students must meet in order to vote in the locality in which their college is located are extremely vague. . . . [T]hus each registration clerk determines himself which factors will overcome the presumption against student registrability in his city."\textsuperscript{31}

The court found that "[t]he record in this case amply supports this assertion."\textsuperscript{32} In addition it noted a concession made by the Ann

\textsuperscript{25} 385 Mich. at 676, 189 N.W.2d at 425, quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

\textsuperscript{26} 385 Mich. at 676, 189 N.W.2d at 425. As authority for this proposition the court cited Kunz v. New York, 340 U.S. 290 (1951), a case that dealt with a prior restraint on free speech.

\textsuperscript{27} 385 Mich. at 676, 189 N.W.2d at 425.

\textsuperscript{28} 380 U.S. 145 (1965).

\textsuperscript{29} 385 Mich. at 677, 189 N.W.2d at 425. As authority for this proposition the court cited Note, supra note 11, at 220.

\textsuperscript{30} 385 Mich. at 677-78, 189 N.W.2d at 426, quoting Note, supra note 11, at 220.

\textsuperscript{31} 385 Mich. at 678-79, 189 N.W.2d at 426.
Arbor city attorney that "while Ann Arbor uses an elaborate questionnaire before allowing students to register, the city clerk of Detroit (where . . . several colleges are located) does not ask any special questions of student registrants." Thus, the court held that the student residency provision was overbroad and granted a constitutionally prohibited discretion to local clerks in Michigan. The nature of the discretion held unconstitutional is not clear. If Wilkins is limited to its facts, the critical element of discretion may be the lack of any judicial or legislative standards or criteria, and the resulting range of questions asked by clerks in different areas. Assuming this discretionary element was cured by judicial construction or legislative enactment of standards establishing uniform state-wide questioning, it could be argued that an impermissible degree of discretion still inheres in the necessity for clerks to weigh the various criteria, deciding which factors might overcome the presumption against student residence. On the other hand, as long as subjective intent is relevant to students' residency, the administrative need for flexibility and decisions at a local level suggests that this kind of discretion—the weighing of uniform criteria—might be permissible. Thus, under a narrow reading of Wilkins, whether uniform state-wide questioning would satisfy due process requirements remains an open question. While some of the court's language may be read to condemn discretionary factor-weighing in and of itself, the court's suggestion, in dicta, that but for equal protection considerations the due process violation might have been cured by judicial construction may support the constitutional sufficiency of uniform statewide questions.

Assuming that uniform questioning would withstand due process problems, an additional problem arises. While it was not necessary to the due process holding on discretion, the Michigan supreme court summarily considered the nature of questions that registrars asked students in determining residence. The court stated:

At the trial, the plaintiffs were asked questions concerning bank accounts; where they obtained their support; whether they owned or leased property, and where they spent their vacations. However, these

33. 385 Mich. at 678, 189 N.W.2d at 426. For a comparison of various questionnaires used by city clerks for student registration, see Note, supra note 11, at 239-43 (Appendix).
34. 385 Mich. at 679, 189 N.W.2d at 427. The court added that "[t]he ability to exercise the precious right to vote cannot depend on whether a student attends school in a large city or a smaller town." 385 Mich. at 679, 189 N.W.2d at 427, citing Reynolds v. Sims, 377 U.S. 533 (1964). It is interesting that this possible equal protection consideration arises as a direct consequence of unfettered discretion, a due process consideration.
35. 385 Mich. at 679, 189 N.W.2d at 427. See notes 109-12 infra and accompanying text.
questions concerning wealth, property ownership, and travel, if used as criteria to establish residence for voting purposes are constitutionally impermissible.\textsuperscript{36}

In making this broad assertion the court relied upon Harper v. Virginia Board of Elections,\textsuperscript{37} Kramer v. Union Free School District,\textsuperscript{38} and Shapiro v. Thompson,\textsuperscript{39} within which cases classifications based respectively upon wealth, property ownership, and travel were struck down.

There are two difficulties with the court's interpretation of these cases. First, questions used as criteria to determine a fact (such as intent regarding residence) are not classifications per se. The term "classification," as related to equal protection considerations, has traditionally meant the "legislative classification" of the persons to whom the law applies. "This sense of 'classify' ... must be distinguished from the sense in which 'to classify' refers to the act of determining whether an individual is a member of a particular class."\textsuperscript{40} However, a showing of a one-to-one correlation between the answer to a question and the decision to register the student could arguably support a finding of classification. Even assuming such questions to be classifications they would not be invalid per se. The state would have the opportunity to demonstrate compelling interests.\textsuperscript{41}

Thus the court's suggestion that questions regarding bank accounts, home ownership, and vacation travel are constitutionally impermissible as criteria to establish residence should be viewed with extreme caution. Nevertheless, this problem is independent of the holding that the Michigan student residency provision violated due process since it granted, at least in the absence of uniform state standards, a constitutionally prohibited discretion to local clerks in Michigan.

A. The Scope of Louisiana v. United States

The language relied on from Louisiana seems strikingly susceptible of application to the facts of Wilkins, as the voting fate of students was indeed being left to "the passing whim or impulse of an individual registrar."\textsuperscript{42} If, however, the principle is applied that the language of a decision must be construed in light of its constituant

\begin{itemize}
\item\textsuperscript{36} 385 Mich. at 678, 189 N.W. 2d at 426 (emphasis added, footnotes omitted). Concerning wealth as a classification, see note 119 infra.
\item\textsuperscript{37} 383 U.S. 663 (1966).
\item\textsuperscript{38} 395 U.S. 621 (1969).
\item\textsuperscript{39} 394 U.S. 618 (1969).
\item\textsuperscript{40} Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341, 344 (1949).
\item\textsuperscript{41} See text accompanying notes 167-89 supra.
\item\textsuperscript{42} See text accompanying note 29 supra.
\end{itemize}
tionally significant facts, the Wilkins result does not flow automatically from Louisiana. Indeed, it may represent a significant extension of prior case law. The thesis of this section is that the Wilkins due process holding, nevertheless, rests firmly upon constitutional principles, reason, and policy, and is a fulfillment of the doctrinal promise, made in Louisiana, to safeguard voter registration from unfettered discretion of local officials.

Critics of the Wilkins decision might contend that Louisiana should be read narrowly in light of the facts of that case. At issue in Louisiana was an “interpretation test,” under which a voter registration applicant was required to “understand” and “give a reasonable interpretation” of any section of the state or federal constitution “when read to him by the registrar.” This discretionary registration process differed in several ways from the discretion held unconstitutional in Wilkins. First, the Court in Louisiana stressed that the interpretation test “was part of a successful plan to deprive Louisiana Negroes of their right to vote.” Thus, the discretion which was held unconstitutional in Louisiana might be viewed not as a constitutionally impermissible evil in and of itself, but rather as an element of an over-all plan to disenfranchise blacks. It could be contended that this discriminatory plan was essential to the Louisiana holding. Weight is given to this argument by the alternative holdings in Louisiana that the interpretation test not only violated fourteenth amendment due process and equal protection, but also violated the fifteenth amendment on the ground that the interpretation test “specifically conflicted with prohibitions against discriminations in voting because of race.” In Schnell v. Davis, mentioned by the Court in Louisiana as being “squarely in point,” discretion in a voter registration context similar to that in Louisiana was held to violate the equal protection clause and the fifteenth amendment, with no mention being made of due process. Furthermore, while Louisiana has been relied upon in a successful attack on discretion in a jury selection process, it has usually been cited only as authority

43. 380 U.S. at 149.
44. 380 U.S. at 151.
45. The express language of the Court was: “[W]e . . . affirm here the District Court’s holding that the provisions of the Louisiana Constitution and statutes which require voters to satisfy registrars of their ability to ‘understand and give a reasonable interpretation of any section’ of the Federal or Louisiana Constitution violate the Constitution.” 380 U.S. at 151 (emphasis added). The district court expressly found violations of both due process and equal protection. 225 F. Supp. 353, 391 (E.D. La. 1963).
46. 380 U.S. at 153.
48. 380 U.S. at 151.
49. Rabinowitz v. United States, 366 F.2d 34, 51 n.34 (5th Cir. 1966). See also Chestnut v. New York, 370 F.2d 1, 7 n.13 (2d Cir. 1966) (dictum). But see Carter v.
for equal protection or fifteenth amendment decisions.  

A second distinction is that in Louisiana the Court stressed both the history of discrimination against blacks and the striking evidence that discrimination resulted from the registrar's unfettered discretion:

As the evidence showed, colored people, even some with the most advanced education and scholarship, were declared by voting registrars with less education to have an unsatisfactory understanding of the Constitution of Louisiana or of the United States.

Comparable evidence of blatant abuse of discretion was not presented in Wilkins. Moreover, it could be argued that a court should scrutinize discretion more vigorously to protect blacks than to protect students, and that the analogy between blacks and students as facing many of the same problems is overstated.

While these distinctions carry some weight, their significance should not be exaggerated to the point that sight of the obvious is lost. When viewed as a whole, the thrust of the Louisiana decision is well represented by the language of Justice Black relied upon by the Wilkins court. Above all else, the Court in Louisiana repeatedly stressed the elements of unfettered discretion. Citing United States v. L. Cohen Grocery Co., a traditional due process vagueness case, it stated that "[m]any of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints." Moreover,


Louisiana has also been cited in dicta in several cases for its antidiscretion principles. See Crews v. Clonce, 462 F.2d 1259, 1262 n.4 (7th Cir. 1970); Castro v. State, 2 Cal. 3d 223, 229 n.7, 466 P.2d 244, 247 n.7, 85 Cal. Rptr. 20, 23 n.7 (1970).


52. 380 U.S. at 153.

53. The city clerk estimated that "between 85 and 90 per cent of those students seeking to register are permitted to do so." Brief for Appellee at 3, Wilkins v. Bentley, 385 Mich. 670, 189 N.W.2d 423 (1971).

54. E.g., "no definite and objective standards," "no effective method whereby arbitrary and capricious action by registrars . . . may be prevented or redressed," "official's uncontrolled power." 380 U.S. at 152, 153.

55. 255 U.S. 81 (1921).

56. 380 U.S. at 153.
the alternative holdings in \textit{Louisiana} do not detract from the mandate against vagueness in the voter registration context, for it is normal judicial practice to develop new doctrinal applications while holding alternatively on well-established grounds.\textsuperscript{57} It also appears that in light of the commonly accepted rationale for striking down vague statutes—the lack of fair warning to the individual subject to the statute and the inadequate guidance to the trier of fact\textsuperscript{58}—evidence of actual discrimination is not necessary to a due process violation. Finally, while analogy between blacks and students may be weak, the proper focus should be on the nature of the voting registration process, and not upon the identity of the applicants for registration. In other words, it is solicitude for protection of the right to vote that should compel application of the vagueness doctrine, and not solicitude for blacks or for students.\textsuperscript{59} In summary, it is submitted that \textit{Louisiana} does rest primarily on a due process right against vagueness and unfettered discretionary procedures in voter registration.

\textbf{B. The Critical Elements: Discretion and Voting}

\textit{Louisiana}, by its own weight, should compel the decision in \textit{Wilkins} that the student residency provision violates the due process clause. If, however, any doubt exists as to the scope of \textit{Louisiana} in due process cases, it is useful to consider two ancillary questions. First, is the decision consistent with the range of established constitutional principles against discretion and the rationales underlying these principles? Second, does special significance attach by reason of the voter registration context? It is suggested that the answers to these questions strongly support the \textit{Wilkins} due process result.

\textbf{1. The Established Principles Against Discretion}

\textbf{a. Statutes void for vagueness.} Some cases related to \textit{Wilkins} have been decided under the long established void-for-vagueness doctrine.\textsuperscript{60} In these decisions the Court scrutinized state and federal statutes to resolve whether their “words and phrases are so vague and indefinite that any penalty prescribed for their violation consti-}

\textsuperscript{57} Although the vagueness doctrine was well established prior to \textit{Louisiana}, the Supreme Court had never applied it to voter registration. \textit{See generally Amsterdam, The Void for Vagueness Doctrine in the Supreme Court}, 109 U. PA. L. REV. 67 (1960).

\textsuperscript{58} This rationale has often been noted by courts and commentators. \textit{See, e.g.}, Giacco v. Pennsylvania, 382 U.S. 399, 402-03 (1966); Winters v. New York, 333 U.S. 507, 512 (1948) (Frankfurter, J., dissenting); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Amsterdam, supra note 57, at 68 n.3; Freund, \textit{The Supreme Court and Civil Liberties}, 4 VAND. L. REV. 533, 541 (1951).

\textsuperscript{59} \textit{See text accompanying notes 69-108 infra.}

\textsuperscript{60} For a thorough collection of such cases and discussion of the vagueness doctrine, see Amsterdam, supra note 57.
tutes a denial of due process of law.”61 Wilkins differs from traditional vagueness cases because the traditional cases involve scrutiny of penal statutes,62 while the statute in issue in Wilkins was one that placed residency qualifications on the right to vote. However, examination of the policies underlying traditional vagueness cases suggests that this distinction should not compel a different result.

As previously noted, the rationale behind the void-for-vagueness doctrine rests upon two requirements of due process: fair notice to the individual who is subject to the statute, and adequate guidance to the trier of fact.63 As to the first, fundamental fairness clearly requires adequate notice of acts that will result in a criminal penalty.64 It is submitted that fundamental fairness also requires fair notice of affirmative acts that are required as a condition precedent to the exercise of a fundamental right. For example, some students might have been unable to establish residence in Ann Arbor because of a lack of notice of what acts were acceptable to the registrars as evidence of bona fide residence. For those students the loss of voting rights may be characterized as substantially similar to a “penalty” that is not preceded by fair warning.65

Does the “guidance for the trier of fact” rationale apply strongly to Wilkins? In a narrow sense, registrars are not “triers of fact” if that term is to be limited to the trial situation. Voting registrars, however, if administering a rebuttable presumption against students’ residence, must make factual determinations in the sensitive context of voting rights. Judges are trained to reason impartially, and juries may be said to represent the voice of the community;66 yet the law

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“Although it is usual to conceive of the void-for-vagueness cases as cases in which the Supreme Court passes upon the ‘face’ validity of statutes, in fact what the Court is far more frequently reviewing is a state court’s reading of the challenged statute.” Amsterdam, supra note 57, at 68 n.4 (citations omitted). Thus in Wilkins the court found no vagueness in the literal terms of Mich. Comp. Laws Ann. 168.11(b) (1967), set out in note 17 supra. Rather, vagueness principles were applied to the statute as it had been construed by the Michigan courts “to mean that a student must overcome a rebuttable presumption that he is not a resident in the locale of the institution of learning.” 385 Mich. at 675, 189 N.W.2d at 425.


63. See authorities cited in note 58 supra.


65. Application of the void-for-vagueness doctrine is not limited to cases involving a “penalty” created by a penal statute. See Giacco v. Pennsylvania, 382 U.S. 999 (1966) (civil statute permitting jurors to determine whether an acquitted defendant must pay costs held void for vagueness in absence of any standards preventing arbitrary imposition of costs). It is, of course, possible that even if given notice of the factors considered by the registrars, students would not change their activities.

requires standards to guard against discretionary decision by these presumably impartial triers of fact. Similarly, legal standards should be imposed to guard against vesting discretion in voting registrars, who by virtue of their politically oriented office may be more prone to arbitrary action than a judge or jury.

b. "Overbroad" statutes. Some related cases involving "overbroad" statutes have used two additional grounds to support a finding of unconstitutionality: (1) the potential danger of discriminatory enforcement, and (2) the resulting chilling effect of such a statute on constitutionally protected activity. Do these rationales apply with force to Wilkins?

The "potential discriminatory enforcement" and "chilling effect" rationales are illustrated by *NAACP v. Button*. At issue was the constitutionality of a statute that banned solicitation of certain legal business, including that of being an agent "for any . . . organization or association which employs, retains, or compensates any attorney at law in connection with any judicial proceeding . . . in which it has no pecuniary right or liability." The state court had held that the activities of the NAACP legal staff constituted solicitation of legal business. However, the Supreme Court found that the statute violated first amendment freedoms:

> It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia . . . In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.

67. See note 58 supra and accompanying text.


The *Thornhill* case contains the classic statement of the overbreadth doctrine:

> [The penal statute in question here] does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.

310 U.S. at 97-98. The problem of the overbroad statute has been described as "a special case of the problem of vagueness." Freund, * supra* note 58, at 540.


70. 371 U.S. at 423 n.7.

71. 371 U.S. at 424-26, 426 n.9. Prominent among the activities of the legal staff was "to explain to a meeting of parents and children the legal steps necessary to achieve desegregation." 371 U.S. at 421.

72. 371 U.S. at 425-36 (emphasis added).
The "chilling effect" rationale does not apply with great strength in the Wilkins context. While vague standards may create some disincentive to student attempts to register, it is unclear whether they will operate as a significant deterrent. Students have only their time to lose, and do not face the threat of criminal sanction.

The "discriminatory enforcement" rationale, however, is strikingly applicable to Wilkins. This rationale has been stressed in contexts not involving racial tensions and in light of the strong opposition to student registration often expressed by some members of the community, there exists a real danger that a registrar might intentionally discriminate against students. This danger may be further illustrated by Cox v. Louisiana. At issue in Cox was a statute providing criminal sanction for breach of peace that the Supreme Court held unconstitutionally overbroad. In a concurring opinion, Justice Black stated:

Such a statute does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat. This kind of statute provides a perfect device to arrest people whose views do not suit the policeman or his superiors, while leaving free to talk anyone with whose views the police agree.

Similarly, the ability to register and vote should be a function of "clearly defined laws" rather than the "passing whim or impulse of an individual registrar."

c. Prior restraint cases. Another group of cases that may be compared profitably to Wilkins are those in which statutes have been held unconstitutional under the first amendment as prior restraints devoid of standards. In these cases the Court has proclaimed that the Constitution does not allow administrative officials unfettered discretionary control over the fundamental rights of freedom of speech and religion.

As an illustration, in Kunz v. New York, the Court considered a statute that required a permit as a condition precedent to conducting religious services in public places; it held that "New York cannot

73. See, e.g., Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940) (statute proscribing "loitering" and "picketing" as applied to labor disputes).
74. See text accompanying notes 12-13 supra.
75. 379 U.S. 536 (1965).
76. 379 U.S. at 552.
vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action.\textsuperscript{81} Similarly, in \textit{Shuttlesworth v. City of Birmingham},\textsuperscript{82} the Court struck down a statute requiring permits for parades or public demonstrations, stating that “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.”\textsuperscript{83}

In \textit{Wilkins}, there were no “appropriate” or “narrow, objective, and definite standards” to guide the individual registrars,\textsuperscript{84} yet in a rough sense these registrars were broadly empowered to administer prior restraints on the right to vote. \textit{Wilkins} differs from \textit{Kunz} and \textit{Shuttlesworth} only in that the latter cases involved discretionary prior restraints upon first amendment rights, whereas \textit{Wilkins} dealt with a discretionary restraint on the right to vote. The potential danger of unfettered administrative power stifling fundamental rights seems clear in either case. If one accepts the proposition that the right to vote deserves judicial protections as stringent as those afforded freedom of speech and religion, then the Court’s mandate against unfettered discretion should apply in the \textit{Wilkins} voter registration context. This proposition is commended by the Court’s solicitude for the right to vote in equal protection settings.\textsuperscript{85}

Moreover, it may be contended that voting rights are even more in need of protection against unfettered discretion than are those of freedom of speech and religion. First, one may assume that many persons whose freedoms of speech or religion are infringed will vigorously fight for their rights and may even ignore a restraining statute, proceeding to demonstrate or speak at the risk of imprisonment if courts do not find the statute unconstitutional.\textsuperscript{86} On the other hand, the voter applicant may not be as committed to protecting his rights, because the individual who is refused registration and voting rights may not feel that his personal interests are seriously threatened. Therefore, the burden of safeguarding the interest in a fair and democratic voting process falls heavily upon the courts,\textsuperscript{87} re-

\textsuperscript{81} 340 U.S. at 295. On the other hand the Court has specifically illustrated the nature of a “limited discretion” that is constitutionally permissible if “exercised with ‘uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination’... [and with] a ‘systematic, consistent and just order of treatment’...” Cox v. New Hampshire, 312 U.S. 569, 576 (1941), quoting Cox v. New Hampshire, 91 N.H. 137, 143, 16 A.2d 508, 513 (1940). See Poulos v. New Hampshire, 345 U.S. 395 (1953).

\textsuperscript{82} 394 U.S. 147 (1969).

\textsuperscript{83} 394 U.S. at 150-51.

\textsuperscript{84} See text accompanying notes 31-33 supra.

\textsuperscript{85} See text accompanying notes 126-36 infra.


quiring a strict standard of review over administrative discretion when voting registration procedures are at issue.

Second, many individuals whose freedom of speech is infringed by a restraining statute may be able to find alternative, legally permissible, methods of communicating their ideas. On the other hand, while voter applicants who are refused registration might still participate indirectly in local election processes—for example, through alternatives such as campaign activities and voter drives—these persons suffer an absolute loss of their right to the direct participation in self-government in the college community. Finally, those individuals whose speech is infringed may use the vote to induce legislative change that would enable them to express their views more satisfactorily, whereas voter applicants who have been refused registration are left with significantly less leverage in the legislative process.

2. The Significance of the Voting Context

The preceding section analyzed the general treatment of "discretion" and demonstrated that Wilkins is consistent with a wide range of settled case law. It is useful to consider next what special significance should attach because Wilkins involved the voter registration context.

It has been suggested by Professor Amsterdam that the void-for-vagueness doctrine "has been used by the Supreme Court almost invariably ... [as a] buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms." In support of this thesis Professor Amsterdam pointed to the initial use of the vagueness doctrine in the business regulation context during the era in which the Court gave strong protection to property and contract rights, and its later use as a buffer for first amendment freedoms. Significantly, Professor Amsterdam's article was written in 1960, prior to Reynolds v. Sims and the host of cases establishing voting rights as those perhaps most highly protected by the Court. The logical extension of his thesis is that the void-for-vagueness doctrine should be used by the Court to establish "buffer zone" protection against discretion in the voting rights area. In retrospect, Louisiana may be viewed as the genesis and Wilkins as a strong endorsement of such "buffer zone" protection for voting rights.

88. For a full discussion of the problem of reasonable alternatives, see Blasi, Prior Restraints on Demonstrations, 68 Mich. L. Rev. 1481, 1497-1501 (1970).
89. Amsterdam, supra note 57, at 75.
90. Id. at 84-85. Cf. Freund, supra note 58, at 540.
A second reason for requiring strict review of vagueness and discretion in the voter registration context is suggested by decisions under the equal protection clause. When a voting right is infringed, the Court has adopted, in lieu of traditional equal protection standards, the "strict scrutiny" of the "compelling state interest" test. Voting rights should also command stringent review against vagueness and discretion.

In light of these reasons for protecting voting rights with the vagueness doctrine, it is useful to examine Carter v. Jury Commission, the only case in which the Supreme Court squarely considered application of the Louisiana holding on vagueness, and one that might seem to preclude application of Louisiana to the Wilkins case. In Carter, the Court refused to apply Louisiana to an attack on vague statutory standards concerning jury selection, holding that the statute "requiring the jury commissioners to select for jury service those persons who are 'generally reputed to be honest and intelligent and . . . esteemed in the community for their integrity, good character and sound judgment'" was not unconstitutional on its face. In refusing to apply Louisiana, the Court stressed that there was "no suggestion that the law was originally adopted or subsequently carried forward for the purpose of fostering racial discrimination." The treatment of Louisiana in Carter might suggest that the Louisiana principle invalidating a statute governing voter registration for lack of standards will not apply absent a finding of discriminatory purpose or application. But several factual distinctions between Louisiana and Carter indicate that this conclusion is not justified.

First, Carter involved jury rights and the Court might well have made a less stringent review of vagueness than it would have in a voting rights case. Thus Carter may suggest only that in the context of attacks on jury exclusion the Court will look not only for vagueness and discretion, but also for discriminatory purpose as prerequisites to holding a statute void on its face. But if one accepts the notion that the vagueness doctrine should provide a "buffer zone" for voting rights, then Carter is not inconsistent with the application of Louisiana principles against discretion in the voter registration

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93. See text accompanying notes 126-36 infra.
95. 396 U.S. at 331.
96. 396 U.S. at 336.
97. The essence of the constitutional attack in Carter was that qualified blacks were being systematically excluded from Greene County, Alabama, grand and petit juries, 396 U.S. at 321-30.
context even absent an allegation or finding of discriminatory purpose. Moreover, this construction of *Carter* is consistent with a recognition that judicial review of legislative motive is disfavored, and that the focus should be upon the nature of the infringed right.

A second factual distinction between *Carter* and the *Louisiana* or *Wilkins* cases centers around the quantitative degree of vagueness in the statutes at issue. While in *Carter* the words in the statute were susceptible of varying meaning, it is arguable that the exercise of discretion by jury commissioners was not as totally unfettered as that present in *Louisiana* or *Wilkins*. The statute in *Carter* at least purported to set forth standards for decision: the commissioners could exercise discretion within the ambit of meaning attributable to words such as "honest" and "intelligent," but they could not use any standards whatsoever for jury selection. In contrast, in *Louisiana* a wider latitude arguably existed in defining what would constitute a "reasonable interpretation" of the Constitution, and in *Wilkins* there were no state-wide standards regarding what evidence might rebut the presumption against a student's residence. Moreover, in a factual setting where jury commissioners exercised "unfettered discretion," by choosing jurors on the basis of subjective standards not included in the federal statutory scheme, one court relied on *Louisiana*, absent evidence of discriminatory purpose, in holding that violation of the statutory plan required reversal of convictions by improperly drawn juries. Thus, if the jury commissioners in *Carter* had been vested with a higher degree of discretion, it is possible that the Court might have applied *Louisiana* without evidence of discriminatory purpose, even in the jury selection context.

A third reason for requiring registrars to make decisions in accordance with uniform and specific standards is that the evils of discretionary denials of voting rights are magnified when there is no method by which a voter applicant can obtain adequate judicial review of a registrar's decision. This problem was considered by the district court in *Louisiana*. That court stated:

> The State does not deny that unlimited discretion is vested in the registrars by the laws of Louisiana, but argues that officials must act reasonably and that their decisions are subject to review by district courts. Louisiana, however, provides no effective method whereby

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100. See text accompanying note 95 supra.
101. See 380 U.S. at 148.
102. See text accompanying notes 31-33 supra.
103. Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966).
arbitrary and capricious action by registrars of voters may be prevented or redressed. Unreviewable discretion was built in the test.\textsuperscript{105}

Uniform standards guiding registrars' decisions are necessary to facilitate judicial review, and this minimum requirement supports the Wilkins decision.

In addition to uniform standards, it might be contended that even greater procedural protection should be afforded the voting process. It has been held that procedural safeguards to facilitate an expeditious review of film censorship are required by the Constitution.\textsuperscript{106} Moreover, there is emerging doctrinal authority for expeditious review procedures in other first amendment contexts.\textsuperscript{107} As Justice Harlan has stated, "[T]iming is of the essence in politics.... [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."\textsuperscript{108} Similarly, time is of the essence in voting since once an election has been held, no judicial decision can restore the right to participate in the past event. Expeditious review procedures are necessary to safeguard voting rights.

C. Conclusion

The Louisiana decision should govern the invalidation of the vaguely construed Michigan residency provision. If any doubt exists regarding the scope of Louisiana in due process cases, absent evidence of discriminatory purpose or application, the rationales underlying a broad range of settled case law suggest that vague statutes touching upon voting rights violate the due process clause. This position is supported by the general legal proscriptions against unfettered discretion, and by the special significance and protections that attach when voting rights are in issue. Finally, it is difficult to imagine any competing state policies that would compel a contrary result in Wilkins. Little can be said for any policy that unnecessarily fosters unfettered discretion. In fact, it seems to be in a state's best interest to define accurately the class to which legislation applies, and to establish specific standards by which administrative officials may reliably determine which individuals are members of the defined class.

The impact of the Wilkins due process holding upon the Michigan student residency provision is perhaps not as devastating as might

\textsuperscript{105} 225 F. Supp. at 384 (emphasis added). This passage was cited in part by the Supreme Court. 380 U.S. at 152.

\textsuperscript{106} Freedman v. Maryland, 380 U.S. 51 (1965).


first appear. The Michigan supreme court commented that "if this [due process violation] were the only infirmity of the statute, we could correct this defect by issuing guidelines consistent with the Constitution." There is authority for judicial "saving" of a vague statute by construction. Moreover, even if a judicial "saving construction" would have been improper in Wilkins, the legislature might have re-enacted a similar provision including standards for registrars sufficient to withstand due process attack. In short, the due process holding standing alone proscribes only the discretionary manner of administrative action.

In light of the subsequent equal protection holding invalidating the statutory provision, the Michigan supreme court refrained from issuing guidelines for registrars to cure the discretion. That equal protection holding is potentially of more far-reaching consequence than the finding of a constitutionally prohibited unfettered discretion in the registrars.

IV. EQUAL PROTECTION

A. The Applicable Equal Protection Standard

As the starting point for its equal protection analysis, the Michigan supreme court faced the problem of determining the equal protection standard applicable in reviewing the constitutionality of the student residency provision. Most statutory classifications, such as those affecting economic rights, have been upheld under the equal protection clause where it is shown that the legislature had a reasonable basis for the classification, or, in other words, where the classification was not purely arbitrary. On the other hand, in several types

110. See, e.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147, 154-55 (1969); Cox v. New Hampshire, 312 U.S. 569, 575-77 (1941). See also Freund, supra note 58, at 540-41:

Can an overbroad statute be saved by construction? If the limiting construction is a relatively simple and natural one it can probably be made to save the statute. A law requiring street parades to be licensed, but containing no standards to govern the grant of a license, appears to be invalid on its face, and yet when the highest court of the state interpreted it to condition the grant or refusal of a license only on the basis of safety and convenience of traffic, the Supreme Court accepted the limitation and sustained a conviction.

(Emphasis added.)
111. When a "saving construction" would involve the promulgation of complex and lengthy standards in a setting of ambiguous legislative intent, it is arguable that court-made standards are insufficient and that legislative criteria are necessary.
112. 385 Mich. at 679, 189 N.W.2d at 427.
of cases the Supreme Court has ruled that a more stringent review of legislative classification is applicable, requiring a higher degree of justification for the classification.\textsuperscript{115}

The first group of cases invoking this higher standard of review have been those in which the classification is "suspect" because of the nature of the group of persons singled out for different treatment. Thus, when classifications are based on race,\textsuperscript{116} alienage,\textsuperscript{117} or nationality\textsuperscript{118} a heavy burden of justification must be met.\textsuperscript{119} In order to show this justification "[the classification] must be shown to be necessary to the accomplishment of some permissible state objective."\textsuperscript{120} Moreover, the Court may require that the state's objectives be sufficiently important, relative to the obvious evils of the classification, to constitute a "legitimate overriding purpose."\textsuperscript{121}

A second group of cases involving the higher standard of justification consist of those in which, without respect to the identity of the designated class, the classification infringes upon a fundamental constitutional right.\textsuperscript{122} For example, the Supreme Court in \textit{Shapiro v. Thompson}\textsuperscript{123} treated the right to travel as fundamental and stated:

\[\text{[I]n moving from State to State or to the District of Columbia appel­leees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is un­constitutional.}\textsuperscript{124}\]

Thus the infringement of a fundamental constitutional right will invoke the strict equal protection standard commonly referred to as the "compelling state interest" doctrine.\textsuperscript{125}

In \textit{Wilkins}, the court focused upon this second group of cases\textsuperscript{126}

\textsuperscript{115} See \textit{Developments in the Law}, supra note 114, at 1087-1132.
\textsuperscript{117} E.g., Takahashi v. Fish & Game Commn. 334 U.S. 410 (1948).
\textsuperscript{118} E.g., Oyama v. California, 332 U.S. 633 (1948).
\textsuperscript{120} Loving v. Virginia, 388 U.S. 1, 11 (1967).
\textsuperscript{121} Loving v. Virginia, 388 U.S. 1, 11 (1967).
\textsuperscript{123} 394 U.S. 618 (1969).
\textsuperscript{124} 394 U.S. at 634 (emphasis added).
\textsuperscript{125} For a discussion of the "compelling interest" doctrine, see notes 159-66 infra and accompanying text.
\textsuperscript{126} Any contention that the compelling interest doctrine should be invoked on the ground that classification of "students" is suspect would be questionable. There is no
involving the assertion of a fundamental constitutional right. Justice Swainson, speaking for the state supreme court, noted that “the right to vote is one of the most precious, if not the most precious, of all our constitutional rights.”\footnote{127} He amply supported this assertion by reference to relevant statements of the United States Supreme Court:

“Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.”\footnote{128}

... “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”\footnote{129}

Moreover, Justice Swainson stated that “[t]he U. S. Supreme Court has applied the compelling interest test in recent cases involving the right to vote.”\footnote{130} By reference to these cases, including \textit{Carrington v. Rash},\footnote{131} \textit{Kramer v. Union Free School District},\footnote{132} \textit{Cipriano v. City of Houma},\footnote{133} \textit{City of Phoenix v. Kolodziejski},\footnote{134} and \textit{Evans v. Corman},\footnote{135} the court concluded that the compelling interest test must be applied to determine whether the student residency requirement violated the equal protection clause.\footnote{136}

In reaching this result, the court rejected the defendant's contention that the above cases were distinguishable because they involved “an absolute denial of the right to vote” whereas the Michigan statute merely involved a “rebuttable presumption against gaining residence.”\footnote{137} Comparing the students’ predicament to that of litigants in the other cases, the court noted that in several ways the exclusion of students from the franchise was more absolute than the denials of voting rights in the allegedly distinguishable cases. For example, with respect to servicemen denied the right to establish residence and vote in \textit{Carrington}, the court stated: “All states allow

\begin{footnotesize}
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\item \footnote{127}{385 Mich. at 680, 189 N.W.2d at 427.}
\item \footnote{128}{385 Mich. at 681, 189 N.W.2d at 427-28, quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964).}
\item \footnote{129}{385 Mich. at 681, 189 N.W.2d at 428, quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964).}
\item \footnote{130}{385 Mich. at 681, 189 N.W.2d at 428.}
\item \footnote{131}{380 U.S. 89 (1965).}
\item \footnote{132}{395 U.S. 621 (1969).}
\item \footnote{133}{395 U.S. 701 (1969).}
\item \footnote{134}{399 U.S. 204 (1970).}
\item \footnote{135}{398 U.S. 419 (1970).}
\item \footnote{136}{385 Mich. at 681, 189 N.W.2d at 428.}
\item \footnote{137}{385 Mich. at 683, 189 N.W.2d at 428-29.}
\end{enumerate}
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servicemen to vote by absentee ballot. In contrast, because of the various civilian absentee voters' laws, many students would be unable to register and vote anywhere."\textsuperscript{138} Moreover, the court reasoned, \textit{Kramer}, \textit{Cipriano}, and \textit{Kolodziejski} involved statutes denying the right to vote only in "special elections" (for example, those involving bond issues and school district elections) and the litigants in those cases "still could vote for every office from president to local officials."\textsuperscript{139} In contrast, some students would be left with no vote in local elections.\textsuperscript{140}

As an additional reason for rejecting the defendant's contention, the court apparently found the distinction between an \textit{absolute denial} of voting rights and a \textit{burden} on them imposed by a rebuttable presumption to be irrelevant to whether the compelling interest test should be applied. The Supreme Court had long noted that "the [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."\textsuperscript{141} Justice Swainson reasoned that "[t]he Equal Protection Clause likewise guards against subtle restraints on the right to vote, as well as outright denial."\textsuperscript{142} Additionally, the court relied upon the Supreme Court's concern with \textit{burdens} on the right to vote, as expressed in \textit{Williams v. Rhodes},\textsuperscript{143} wherein the Court stated:

In the present situation the state laws place \textit{burdens} on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . . In determining whether the State has power to place such unequal \textit{burdens} on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."\textsuperscript{144}

Thus the Michigan supreme court concluded that "the fact that a burden is placed on the right to vote because of the [statutory] rebuttable presumption . . . is sufficient to require the State to demonstrate a compelling interest."\textsuperscript{145}

\begin{itemize}
\item \textsuperscript{138} 385 Mich. at 683, 189 N.W.2d at 429.
\item \textsuperscript{139} 385 Mich. at 683, 189 N.W.2d at 429.
\item \textsuperscript{140} 385 Mich. at 683-84, 189 N.W.2d at 429.
\item \textsuperscript{141} Lane v. Wilson, 307 U.S. 268, 275 (1939).
\item \textsuperscript{142} 385 Mich. at 684, 189 N.W.2d at 429.
\item \textsuperscript{143} 393 U.S. at 30-31 (emphasis added).
\item \textsuperscript{144} 393 U.S. at 30-31 (emphasis added).
\item \textsuperscript{145} 385 Mich. at 685, 189 N.W.2d at 429.
\end{itemize}
The refutation of the alleged distinction between absolute denial of the right to vote and a rebuttable presumption affecting voting rights appears sound, particularly in light of the fact that it was conceded that the effect of the rebuttable presumption on the litigants was a denial of the right to vote in Ann Arbor. Moreover, the State did not contend that these students could vote elsewhere, even if such an alternative were assumed relevant.

On the other hand, the court's proposition that a "burden" on the right to vote invokes the "compelling interest" test needs qualification. The court's assertion rests on sound ground as long as it is limited to the narrow situation where the magnitude of the "burden" demonstrably dilutes voting rights, as in Williams, or where it results in denial of voting rights, as in Wilkins. However the court left unanswered the question of what magnitude of burden is necessary for invocation of the compelling interest doctrine. Obviously, all burdens on voting rights should not suffice. For example, while a requirement that voter applicants register at the City Hall between specified hours places some burden on those persons for whom the locale and timing are inconvenient, surely the court did not intend that its proposition stretch this far. Moreover, the notion that certain burdens on the right to vote may not invoke the compelling interest test finds support in a Supreme Court decision holding that the denial of absentee ballots to prisoners is not a burden sufficient to invoke the compelling interest doctrine absent an allegation that the right to vote was denied.

Taken as a whole, the Court's decisions in the voting rights context demonstrate the utmost concern for and strict scrutiny of all aspects of the electoral process that may cause a denial or serious dilution of voting rights, including dilution through apportionment, limited ballot choice, durational residency requirements, conclusive bars to residency and other qualifications on the right to vote. The protections afforded voting rights could be rendered meaningless if the states were able to circumvent these protections by a threshold determination of nonresidency. A decision to apply only the traditional equal protection test to special residency determinative provisions raises the credible danger that such tests might be

146. 385 Mich. at 674, 185 N.W.2d at 424.
utilized in efforts to disenfranchise minority groups. The Court should apply the compelling interest doctrine to residency-determinative provisions that stand critically at the threshold of the electoral process.

Thus, the Michigan supreme court's decision to apply the compelling interest test seems well grounded in both precedent and policy. In addition, a federal district court has recently followed its lead by applying the compelling interest test to a similar student residency provision.

There can be no doubt that the decision in Wilkins to apply the "compelling interest" test is of immense significance. Special residency provisions for students are probably valid under the traditional equal protection test. Since most students do not intend to remain indefinitely in the locale, special treatment of students does not seem "wholly arbitrary." The fact that others equally transient are not subject to special provisions is not necessarily a critical flaw in the statute under this traditional standard, for as stated in Railway Express Agency v. New York, "it is no requirement of equal protection that all evils of the same genus be eradicated or none at all." In sharp contrast, Wilkins illustrates the extreme, and possibly insurmountable, difficulties in justifying special residency provisions for students under the compelling interest test.

B. Mechanics and Application of the Compelling Interest Test

The scrutiny given a statutory classification under the compelling state interest doctrine involves the combination of numerous judicial techniques utilized to test the state's justification for the statutory classification. First, in contrast to the "traditional" equal protection standard, the burden of justification rests on the state, and it must assert the nature of the interests the classification seeks to further. At this stage the Court may find that an interest asserted by the state is "constitutionally impermissible." Second, the state must tailor the

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153. Cf. text accompanying note 141 supra.
154. An additional argument for application of the compelling interest doctrine should also be noted. The Court has invoked the compelling interest test where the fundamental right of travel has been infringed. Shapiro v. Thompson, 394 U.S. 618 (1969). Cf. United States v. Guest, 383 U.S. 745 (1966); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Edwards v. California, 314 U.S. 160 (1941). It could be argued that a rebuttable presumption against students' residence acts as a deterrent to interstate travel. The difficult question is whether such a deterrent is a sufficient penalty upon the exercise of the constitutional right of interstate travel so as to mandate strict scrutiny of the provision. Cf. Shapiro v. Thompson, 394 U.S. 618, 639 n.21 (1969).
156. See text accompanying note 114 supra.
158. 336 U.S. at 110.
159. E.g., Shapiro v. Thompson, 394 U.S. 618, 631 (1969) (detererring immigration of
classification so that its application to the designated class is "necessary" to achieve the articulated state interest. In finding that classifications are not "necessary" to the asserted interest, the Court has utilized at least three distinct techniques: (1) it may place an evidentiary burden upon the state, requiring evidence that the asserted interest is in fact furthered by the classification; (2) it may deem that classification unnecessary if alternative "less drastic means" can be employed to achieve the asserted interest; (3) an "exacting standard of precision" regarding the "coverage" of the statute may be required—the classification will not be countenanced if it includes a significant number of persons whose inclusion does not further the asserted interest while excluding others whose inclusion would have furthered the asserted interest. Finally, even if the classification is necessary to promote a legitimate state interest, presumably the court must then determine whether the interest promoted is compelling when weighed against the countervailing interests infringed upon by the classification.

The Michigan student residency provision, as construed to create a rebuttable presumption against students’ residence, effected a classification denying voting rights of the vast majority of students, who would be unable to rebut the presumption. Since the presumption might have been rebutted by evidence of intent to remain indefinitely in the locale, the crux of the equal protection issue is whether the exclusion from local elections of students who do not intend to remain indefinitely in the locale is justified by a compelling state interest.

In Wilkins, the court considered three state interests that the statutory provision might have promoted: (1) preserving the purity of indigents is constitutionally impermissible purpose); Carrington v. Rash, 380 U.S. 89, 94 (1965) ("fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible).

161. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969): "The argument that the waiting-period requirement facilitates budget predictability is wholly unfounded. The records • • • are utterly devoid of evidence that either State or the District of Columbia in fact uses the one year requirement as a means to predict the number of people who will require assistance in the budget year."
163. See, e.g., Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969). A useful terminology that has been suggested in connection with this problem would describe such a classification as both "underinclusive" and "overinclusive." Slightly different considerations may be raised by classifications that are only "underinclusive" or only "overinclusive." For a full discussion, see Tussman & tenBroek, supra note 40, at 344-55.
165. See text accompanying note 20 supra.
166. See notes 21-23 supra and accompanying text.
of elections; 167 (2) excluding students from the franchise because of fear of the way they may vote; 168 and (3) promoting a concerned and interested electorate. 169 It is worth noting that the court asserted these interests upon its own initiative because the defendant city clerk, and the Michigan attorney general, had declined to suggest any possible compelling interests. 170

1. Purity of Elections (Anti-Fraud)

The Michigan Court of Appeals had held that the student residency provision aids in preserving the purity of elections by ensuring that students will not vote twice. 171 While conceding that the statutory provision might "to some extent aid in this purpose," the Michigan supreme court believed "that [was] not sufficient to justify its constitutionality." 172 The court gave two reasons for this conclusion. First, it drew upon the authority of United Mine Workers v. Illinois Bar Association, 173 in which the Supreme Court had stated:

"We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil." 174

In United Mine Workers, the Supreme Court, faced with legislation infringing first amendment rights of association, 175 applied established balancing techniques in holding that the state's speculative interest in high standards of legal ethics did not justify the "substantial impairment" of associational rights of mine workers. 176 Implicit in the Michigan supreme court's reliance on United Mine Workers is the proposition that the "anti-voting fraud" benefits accruing to the state from the voter registration provision do not justify a substantial infringement of voting rights.

The second reason given for rejecting the "purity of elections"

167. 385 Mich. at 685-87, 189 N.W.2d at 430.
168. 385 Mich. at 691-93, 189 N.W.2d at 432-34.
169. 385 Mich. at 687-90, 189 N.W.2d at 430-32.
172. 385 Mich. at 685, 189 N.W.2d at 430.
174. 385 Mich. at 685-86, 189 N.W.2d at 430, quoting 389 U.S. at 222.
175. At issue was an injunction preventing the union from hiring attorneys on a salary basis to assist its members on the ground that this assistance constituted "unauthorized practice of law." The union had asserted that its members had a first amendment right to legal assistance on a collective basis. See 389 U.S. at 218-21. Cf. Railroad Trainmen v. Virginia Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).
176. 389 U.S. at 225.
interest was that the Michigan legislature "had provided numerous sanctions which insure the sanctity and purity of elections." The provisions noted by the court clearly establish that the registrar has means to check information given by registrants and that misdemeanor sanctions are available if the registrant has purposely given incorrect information. In light of these less drastic means it is apparent that the asserted interest does not withstand "strict scrutiny." On the other hand, the "purity of elections" interest might raise more difficult questions if the state could show that no alternatives were administratively feasible.

2. "Fencing Out" Students

The court took judicial notice of a purported state interest in excluding students from the franchise for fear of the way they may vote. Holding this interest to be "constitutionally impermissible," it followed the Supreme Court's unequivocal holding in Carrington:

"'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. '[T]he exercise of rights so vital to the maintenance of democratic institutions,' . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents."

But, as the language above suggests, Carrington only establishes that a group of otherwise bona fide residents may not be "fenced out" for fear of political impact. Thus it does not answer the question whether students may be "fenced out" because, in connection with some compelling state interest, independent of fear of political impact, they may permissibly be deemed nonresidents.

3. Interested and Concerned Electorate

The most troublesome of the issues treated by the Michigan supreme court was the question whether promoting a concerned and interested electorate constitutes a compelling state interest. The court noted that this same interest was asserted unsuccessfully in Kramer,
Cipriano, Evans, and Kolodziejski, and placed primary reliance upon the language of Chief Justice Warren in Kramer:

"[T]he classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Section 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. The classification in § 2012 permits inclusion of many persons who have, at best, a remote and indirect interest in school affairs and on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions." 184

The Michigan supreme court stressed:

The provisions of MCLA § 168.11(b) ... in regard to students, like § 2012 of the New York laws in Kramer, are not sufficiently drawn to insure that only voters who are primarily interested are allowed to vote. . . .

Clearly, MCLA § 168.11(a) . . . (the general voter registration statute) will allow many disinterested persons, by any criteria, to vote, while MCLA § 168.11(b), as applied to students, disenfranchises many interested and concerned citizens. 185

Moreover, in support of the proposition that many students are generally “interested and concerned” citizens, the court drew upon the standards established by the Supreme Court in Evans 186 and in Kolodziejski. 187 The court stated:

[W]e see that students have just as many connections with the community as those found by the Supreme Court in Evans and Kolodziejski. Students . . . are included in the census determination of the state's congressional apportionment . . . [and] are subject to the state's laws and regulations. Jury lists are chosen from lists of registered voters. Thus, by denying students the right to register and vote, they are also denied . . . trial by a jury of their peers. Students pay State income tax, city income tax (if any), gasoline, sales and use taxes . . . As the United States Supreme Court has recognized, property taxes are ultimately paid by renters such as some of the appellants . . . Students with children can and do enroll them in the public school system, and, therefore, have more than a passing interest in the educational standards of the community. 188

Furthermore, the court strengthened its attack on the rationality of the statutory coverage by pointing out that the statute failed to

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184. 385 Mich. at 687, 189 N.W.2d at 430, quoting 395 U.S. at 632.
185. 385 Mich. at 687, 189 N.W.2d at 430, 431.
186. Evans considered the community contacts of residents of the National Institute of Mental Health, a federal enclave in Maryland.
187. Kolodziejski considered the interest of renters in a bond issue referendum open only to property owners.
188. 385 Mich. at 688-90, 189 N.W.2d at 431-32.
establish special provisions for other groups more transient than students. In light of its analysis, the court held that students could not be denied voting rights because of the state’s interest in promoting a concerned and interested electorate, and that the student residency provision was unconstitutional as a violation of the equal protection clause.

C. An Interested and Concerned Electorate Reconsidered; The Problem of Transients and a Distinction Between Immediate and Long Run Concern

It is worthwhile to dwell upon the meaning of the Wilkins holding that promoting a concerned and interested electorate does not justify the provision creating a rebuttable presumption against students’ residence. The court’s rationale rested upon two defects it noted in the coverage of the statute. First, the student classification was overinclusive since it included a significant number of students who were deemed interested and concerned citizens by the court, and whose inclusion therefore did not further the asserted interest in a concerned and interested electorate. Second, the student classification was underinclusive since it did not include other groups more transient, and presumably more disinterested, than students, and the inclusion of these groups would have furthered the asserted interest. These defects go to the rationality and fairness of the classification and need not suggest any judgment regarding the weight of the state’s interest in a concerned and interested electorate, were it promoted by a more precisely tailored classification.

The evil of overinclusiveness is obvious as the disenfranchisement of interested and concerned students does not even further the state’s interest in an interested and concerned electorate. On the other hand an underinclusive classification might to some extent further the state’s interest. Its defects are more subtle. The underinclusiveness is differential treatment that seems prima facie contrary to notions of equal treatment under law. Such differential treatment may sometimes be justifiable, but in other cases it can be evidence of discriminatory motives or sloppy drafting by the legislature.

If we accept the premise that students are as interested and concerned as other citizens, then promoting an interested and concerned electorate is clearly not a compelling state interest justifying the statute, since exclusion of interested and concerned students from the

189. 385 Mich. at 690, 189 N.W.2d at 432. See text accompanying notes 199-201 infra.
190. 385 Mich. at 690, 189 N.W.2d at 432.
191. 385 Mich. at 694, 189 N.W.2d at 434.
192. See notes 220-21 infra and accompanying text. See generally Tussman & ten-Broek, supra note 40, at 344-53.
franchise in no way furthers the asserted interest. But if the students are not generally interested in and concerned for the local community, then more difficult problems arise under the compelling interest test because the state could show that the student residency provision did substantially promote an interested and concerned electorate. Thus the nature of students' concern for the community seems a critical issue.

As a starting point regarding this factual issue the Court has suggested that the state has the burden under the compelling interest test of showing that the classification in fact promotes the asserted interest. Thus the burden of proof was upon Michigan to show that students were not generally interested and concerned citizens, and clearly this burden was not met in Wilkins since the state had declined even to suggest possible compelling interests.

The Michigan supreme court relied upon students' objective "connections with the community"—for example, payment of taxes and subjection to local laws—to demonstrate that students were interested and concerned citizens. This argument appears to rest on the assumption that when a person's life is connected with the community for a period of time sufficient to meet durational residency requirements that person will usually become concerned and interested in the community out of conscious self-interest and because of unconscious reaction to events surrounding his daily life.

A difficulty in this position is that testing the subjective interest of a citizen by his objective connections with the community is at best a rough measure since many persons with substantial objective ties to the community may in fact be subjectively disinterested. The use of this objective test may simply reflect judicial opposition to attempted disenfranchisement on the basis of an alleged differential in interest between classes of citizens when the disenfranchised have sufficient connections with the community. Such a concern is perhaps justifiable when applied to the enclave residents in Evans and to the nonproperty-owning citizens in Kolodziejski. Since different classes of citizens have different interests, "interest and concern" does not appear to be a concept readily susceptible of comparison between classes or even individuals. Moreover, it may be contended that the grant of suffrage in a democratic society should encourage citizen interest as well as give voice to those already interested.

Regardless of the justifications for relying upon objective connections with the community to demonstrate the interest of citizens in Evans and Kolodziejski, the validity of this test is less evident as applied to students since it fails to focus on the essentially transient

193. See note 161 supra and accompanying text.
194. See text accompanying note 170 supra.
195. See text accompanying note 188 supra.
nature of most students. In contrast no contention was made in *Evans, Kolodziejski, Cipriano,* and *Kramer* (in which cases an interest in a concerned and interested electorate was asserted unsuccessfully by the state)\(^{196}\) that those persons whom the state sought to exclude from the franchise were transients. Therefore the state might have contended that even if students' connections with the community demonstrate immediate interest and concern, students nevertheless lack a *long-run* interest and concern for the community.

This distinction between immediate concern and long-run concern is suggested by the implicit recognition in *Carrington* of the state's interest in barring transients from the franchise\(^{197}\) and also by the traditional common-law formulation of residency that requires an intent to remain indefinitely.\(^{198}\) Nevertheless the validity of the proposed distinction rests upon an assumption that long-run concern corresponds to intent to remain indefinitely; and so those who do not intend to remain indefinitely have a qualitatively inferior concern for the long-run welfare of the community—perhaps because they will neither reap the benefits nor endure the burdens arising from decisions with long-run effects. If this assumption were valid, could the state justify the rebuttable presumption against students' residence at issue in *Wilkins* by asserting an interest in promoting an electorate with *long-run* concern?

In relation to this state interest, the classification of students is not overinclusive, as exclusion of most students from the vote would further the interest in long-run concern if the latter is evidenced by an intent to remain indefinitely. But as Justice Swainson observed, the special residency provision applicable to students does not require other groups equally or more transient than students to meet its provisions. These other groups include operative and kindred workers, craftsmen, foremen, and some professionals,\(^{199}\) groups representing a substantial number of persons. Therefore it might be contended that the provision is grossly underinclusive in respect to the state's interest in long-run concern and that such interest is not compelling under the precise coverage requirement of the compelling interest doctrine.\(^{200}\)

On the other hand some workers and professionals, who appear more transient than students, nevertheless may have initially intended to remain indefinitely in the community, their transience being a consequence of some external event such as loss of a job or

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196. See text accompanying note 184 supra.
197. See text accompanying notes 215-14 infra.
198. See text accompanying note 21 supra.
200. See note 163 supra and accompanying text.
involuntary relocation. Thus these statistical transients may have had the requisite degree of long-run concern. But what of those workers and professionals who never intended to remain indefinitely? It should be noted that the group of workers who move away from the community as a consequence of initial intent, as opposed to some external event, are not a readily identifiable class within the larger group of transient workers. It is arguable that the precise coverage demanded under the compelling interest test\(^{201}\) does not require inclusion within the classification of persons who are similarly situated in relation to the state's interest but who are not members of a readily identifiable or ascertainable class.

In support of this contention, commentators have noted that “the judicial task has really just begun” upon a finding that a classification is underinclusive or overinclusive.\(^{202}\) Specifically, it has been suggested that an underinclusive classification might be justified by administrative considerations under some circumstances.\(^{203}\) The Court has suggested that individuals may not be deprived of fundamental voting rights because of some “remote administrative benefit to the State.”\(^{204}\) However, questions with respect to more substantial administrative problems appear unresolved. Thus, it is possible that an underinclusive classification might be justifiable even under the compelling interest test when it can be shown that the nonincluded persons, although similarly situated in relation to the state's interest, are not members of an identifiable class.

Under this theory, the fact that workers statistically more transient than students are not subject to special residency tests would not in and of itself be a fatal defect in the student residency provision. Thus a court could reach the question whether the interest in long-run concern is compelling when weighed against the substantial infringement of voting rights of excluded students who have immediate concern for the locale. These students are denied the right to a voice in governmental affairs in the community that is most important to them.

How substantial is the state's competing interest in promoting an electorate with long-run concern? It might be contended that long-run concern is preservative of stability in local government\(^{205}\) and is conducive to responsible voting to the end of long-run welfare of the community. In this respect the spectre of students irresponsibly floating long-term bond issues and leaving the town “holding the bag” is

\(201.\) See note 163 supra and accompanying text.

\(202.\) See Tussman & tenBroek, supra note 40, at 379.

\(203.\) Id. at 349.


\(205.\) Cf. text accompanying note 12 supra.
relevant. In addition, to the extent that this contention is valid, its force is magnified by the concentration of students who do not intend to remain indefinitely in the college locale.

Conversely, many arguments can be mounted in derogation of the state's interest in long-run concern. First, many persons who do not intend to remain indefinitely but are not members of an identifiable class are permitted to register and vote, and this suggests that the interest in long-run concern may not be of drastic import to the state. Second, students with immediate concern will surely be thoughtful voters, and the interest in long-run concern is only marginal in relation to the broader societal interest in "fair and effective representation," which the Supreme Court has suggested lies at the core of our electoral process. Third, assuming that students will consider the ramifications of their vote upon future students, even those who do not intend to remain indefinitely may have some long-run concern for the community. In other words, present student voters as a group may stand in the shoes of future classes of students.

Finally, even if barring students from the franchise promotes the state's interest in an electorate with long-run concern, it seems clear that such disenfranchisement will tend to negate other vital interests of the community. Justice Brandeis in a different context noted that "fear breeds repression; that repression breeds hate; that hate menaces stable government." Similarly, to disenfranchise and thereby alienate a large ever-present student body closes off legitimate channels through which students might have a voice in their community. Surely this "repression" is not conducive to the long-run welfare of the community. Moreover, the inclusion of student voters in local elections should enhance the democratic process in those communities; as the Court has stated, "Competition in ideas and governmental policies is at the core of the electoral process ... ."

Thus, it is contended that on balance, the state's interest in promoting an electorate with long-run concern is not of compelling weight in view of the substantial denial of voting rights worked by the Michigan provision.

A possibility left open by this conclusion, however, is that the state's interest in long-run concern might be compelling justification for a special student residency provision if applicable only to special elections dealing solely with approval of bonds and long-term financing. In these situations, the state's interest in long-run concern is 206. Cf. text accompanying note 13 supra.
210. The Supreme Court has not distinguished between general elections and special
of greatest force. Moreover, assuming that students could vote in the election of officials whose tenure strongly affected their daily lives, a limited disenfranchisement, in regard to these special elections, of those who do not intend to remain indefinitely would work a substantially diminished infringement of students' voting rights. Therefore, a different balance might be struck under the compelling interest test, provided that a court would first find the coverage of the provision satisfactory despite noninclusion of "unidentifiable" transients. This accommodation of competing interests would have the advantage of giving students a voice in local government, while assuaging some of the fears of those who oppose the student vote.\footnote{211}

On the other hand, the administrative burden of a dual registration system may be an insurmountable obstacle to this approach.

D. Conclusion

The holding in Wilkins that the compelling interest test was the proper equal protection standard for scrutiny of the student residency provision is supported by the voting rights cases, by reason, and by policy. As to the application of the test, consideration of the state's interest supports the court's holding that the residency provision is not justified by a compelling state interest and is therefore in violation of the equal protection clause of the fourteenth amendment.

It is possible to read Wilkins broadly for the proposition that in relation to residency and voting "students must be treated the same as all other registrants."\footnote{212} Under this view, any residency provision placing a special burden upon students violates the equal protection clause. Student residency provisions, however, might well be justified on several theories. Arguably, a statute placing less burden on students' voting rights than that imposed by the Wilkins provision might not invoke the compelling interest test, and might be valid under traditional equal protection notions of rationality and reasonableness. In addition, it is possible that some provisions, particularly if limited to special purpose elections, might be justifiable under the compelling interest test provided that the state were able to bolster its contentions with actual evidence of student disinterest and provided also that a court would tolerate some degree of underinclusiveness if justified by administrative considerations of a substantial nature. Finally it is worth noting that the Court in Carrington seem-

\footnote{211. See text accompanying notes 12-13 supra.}

\footnote{212. 385 Mich. at 694, 189 N.W.2d at 434.}
ingly approved in dictum the use by states of special residency tests for students and others who "present specialized problems in determining residence." While the weight and implications of this dictum are open to question, it at least remains as a significant caveat to the Wilkins equal protection result.

In the past decade, the equal protection clause, when interpreted under the compelling interest test, has come to be perhaps the primary judicial safeguard for individual civil rights and civil liberties. But Wilkins suggests a problem that arises from the overwhelming nature of the compelling interest test, wherein lies its greatest strength and perhaps its greatest weakness. In the voting rights context a paradox arises. On the one hand, the Supreme Court's decisions safeguarding voting rights seem to mandate the application of the compelling interest test over statutes affecting all critical stages in the electoral process. On the other hand, the Court has approved some restrictions on voting rights, such as minimum age requirements, and there may be a judicial hesitancy to extend the juggernaut-like compelling interest test to these requirements for fear that no statute would withstand scrutiny.

One answer to this problem would be for the Court to find some reason for not applying the compelling interest test in hard cases—those in which substantial state interests are supported by a statute that appears to touch upon fundamental rights. But it seems somewhat disingenuous to have the initial determination whether to apply the compelling interest test turn on the foregone conclusion of the Court that certain restrictions are justifiable, or vice versa.

213. 380 U.S. at 95.
214. Can Wilkins be reconciled with this dictum? The implied validity of special residency provisions for students might be disregarded as unpersuasive since while the Court's reasoning demonstrated that the conclusive presumption against servicemen's residence was invalid, it does not suggest any reasons why a rebuttable presumption against students' residence should be valid. On the other hand, this reconciliation is not wholly satisfactory since the approval of such tests was arguably not gratuitous in light of the total problem before the Court—how a state may determine bona fide residence of servicemen. While students can be distinguished from servicemen on the ground that they are less transient and not subject to involuntary relocation, the analogy is perhaps too close to be lightly dismissed. In essence, this latter view seems in direct conflict with Wilkins. Although the cases can be reconciled on the theory that some student residency provisions, less burdensome than that at issue in Wilkins, are valid, such a reconciliation would not appear to be within the clear thrust of Cartrighton. In addition, in footnotes the Court suggested that residency tests involving virtually the equivalent of the Michigan rebuttable presumption were examples of "reasonable and adequate steps" which states could take to determine residence of students and others presenting special residency problems. 380 U.S. at 91-93 n.3, 96 n.6.

215. See text accompanying notes 127-36, 148-54 supra.
218. For example, it is possible that the Supreme Court might decline application of the compelling interest test if called upon to review eighteen-year old minimum age requirements for voting. See note 221 infra.
critical need, therefore, is for the development of judicial standards that would more clearly delineate when the compelling interest test should be invoked and what limitations exist of necessity on the doctrine’s application under specific categorical circumstances.

Perhaps the most troubling difficulties under the compelling interest test arise in connection with the requirement of an “exacting standard of precision” of the classification in relation to the state’s interests.219 Does this requirement preclude a classification that does not include all persons similarly situated with respect to the state’s interest when the underinclusiveness of the statute may be necessitated by the fact that those persons not included are not part of a readily identifiable group?220 What if a classification must of necessity be both overinclusive and underinclusive if the state is to promote a substantial interest?221 In the final analysis, the compelling interest doctrine will retain its vitality only through the careful doctrinal development of such “necessity” limitations on its requirements, rather than through the more expedient path of a threshold determination to apply the traditional equal protection standard in difficult cases.

219. See note 165 supra and accompanying text.

220. See text accompanying notes 199-204 supra.

221. Justice Stewart has commented:
[There has been no suggestion] that the States have anything but a constitutionally unimpeachable interest in establishing some age qualification as such. Yet to test the power to establish an age qualification by the “compelling interest” standard is really to deny a State any choice at all, because no State could demonstrate a “compelling interest” in drawing the line with respect to age at one point rather than another.
Oregon v. Mitchell, 400 U.S. 112, 294 (1970). This contention seems true under a rigid application of the compelling interest test requirement of an “exacting standard of precision.” See text accompanying note 165 supra. For example, assuming an interest in a mature electorate asserted in justification of even an eighteen-year old minimum age requirement, many seventeen-year olds might have the desired maturity while many nineteen-year olds might not. Clearly, however, drawing the line somewhere is “necessary” to the state’s interest.