Washington Law Review

Volume 45 | Issue 2

4-1-1970

Constitutional Law—Voting Rights—State English Literacy Requirements Upheld.—Mexican-American Federation-Washington State v. Naff, 299 F.Supp. 587 (E.D. Wash. 1969)

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CONSTITUTIONAL LAW—VOTING RIGHTS—STATE ENGLISH LITERACY REQUIREMENT UPHELD.—*Mexican-American Federation-Washington State v. Naff*, 299 F. Supp. 587 (E.D. Wash. 1969).

The four individual plaintiffs, who were participating in a voter registration project initiated by the plaintiff Federation,[1] appeared on separate occasions in the offices of the deputy voting registrars for the towns of Zillah and Toppenish, Washington, intending to register to vote. Each time, the applicants were accompanied by an interpreter associated with the Federation, who informed the registration officers that the applicants wished to register to vote and that he would act as Spanish-English interpreter. But the registration officers insisted that the applicants present their requests in person and in English, and refused to register them when it became apparent that the plaintiffs had not fully mastered the English language,[2] although they were otherwise fully qualified as to age and citizenship. The registration officers acted pursuant to article VI, amendment 5, of the Washington constitution, which requires that persons otherwise qualified be "able to read and speak the English language" in order to vote in the state; more specifically, their refusals seem to have been prompted by R.C.W. § 29.07.070, which provides that:[3]

> (h)aving administered the oath, the registration officer shall interrogate the applicant for registration . . . requiring him to state: . . . (w)hether the applicant . . . is able to read and speak the English language so as to comprehend the meaning of ordinary English prose, and in case the registration officer is not satisfied in that regard, he may require the applicant to read aloud and explain the meaning of some ordinary English prose . . . .

Both the Federation and the individual plaintiffs brought suit against the county registration authorities and the State, asking that enforce-

1. The Mexican-American Federation is a Washington Corporation. Its purposes include to represent, promote, and achieve the economic, social, and cultural interests of all Mexican-American people in the State of Washington.
Mexican-American Federation—Washington State v. Naff, 299 F. Supp. 587, 588 (E.D. Wash. 1969), *appeal docketed sub nom.* Jiminez v. Naff, 38 U.S.L.W. 3390 (U.S. April 7, 1970) (No. 1367).

2. One plaintiff, Marta Cantu, "was unable to read the preliminary oath. Thereupon (the registrar) asked her if she could read the names on the list of candidates which he presented to her. She was unable to read the list and did testify that her ability to read was limited to a few simple words in her children's school books . . . ." 299 F. Supp. at 593.

3. WASH. REV. CODE § 29.07.070(13) (1965).

ment of the Washington literacy requirement be enjoined as unconstitutional, that Spanish-speaking registrars be ordered appointed, and that plaintiffs be permitted to register to vote. Plaintiffs contended, *inter alia,* that the literacy requirement infringed upon their rights under the fourteenth and fifteenth amendments to the United States Constitution, and that they had been given literacy tests violating the Voting Rights Act of 1965.[4] *Held*: the Mexican-American Federation lacks standing to sue,[5] and, in its application to the individual plain-

4. 42 U.S.C. § 1971 *et seq.* (Supp. IV, 1969) (Voting Rights Act of 1965), which provides in pertinent part that:

> No person acting under color of law shall . . . (C) employ any literacy test as a qualification for voting in any election unless (i) such test is administered to each individual and is conducted wholly in writing . . . .

42 U.S.C. § 1971(a)(2)(C)(i) (Supp. IV, 1969). The validity of this statute, and the authority of Congress to suspend application of literacy tests under the accompanying provision, 42 U.S.C. § 1973b(a)-(d) (Supp. IV, 1969), were upheld in South Carolina v. Katzenbach, 383 U.S. 301, (1966), on the basis of the language of the Supreme Court in Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959), to the effect that "a literacy test, fair on its face, may still be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." 360 U.S. at 53, *quoted in* South Carolina v. Katzenbach, 383 U.S. at 333.

Defendants in the principal case conceded that the Washington statute, WASH. REV. CODE § 29.07.070(13) (1965), which permits the registrar to "require the applicant to read aloud and explain the meaning of some ordinary English prose," was violative of the above-quoted portion of the 1965 Voting Rights Act, as not ensuring objectivity in application. Nevertheless, the District Court held that the request for injunction against the application of this statute raised an issue which was rendered moot by opinions of the Washington State Attorney General prohibiting further application of the test "until such time as a universal test has been promulgated." 299 F. Supp. at 592.

In a rather cavalier treatment of the facts of the principal case, the court did not consider the registrar's administration of a reading test to one of the plaintiffs (*see* note 2 *supra*) as evidence tending to prove that the unconstitutional statute was in fact being applied, but instead held that this was merely "an isolated incident," not necessarily indicating discriminatory practices. 299 F. Supp. at 593. The Court apparently relied on the questionable assumption that discrimination cannot be proved by evidence of only one incident.

The oral literacy test administered by the registration officers—asking the plaintiffs ". . . can you speak and read English?"—was characterized by the court as "a simple inquiry" which could not possibly result in discrimination, and was not the sort of *test* which Congress intended to prohibit. 299 F. Supp. at 592. The Act defines "test or device" as

> . . . any requirement that a person as a prerequisite for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, [or] (2) demonstrate any educational achievement or his knowledge of any particular subject. . . .

42 U.S.C. § 1973b (c) (Supp. IV, 1969). It seems inexcusable for the Court to have ignored such language which plainly appears to govern the facts of this case.

5. The District Court noted that the Federation's claims were "of the same character" as the claims of the American Civil Liberties Union in Hague v. CIO, 307 U.S. 496 (1939), in which the Supreme Court reasoned that a corporation, as an artificial person, cannot possess or be deprived of civil rights, since civil rights are personal. *But see* N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), in which the Supreme Court allowed the plaintiff Association to assert its members' *personal* first amendment rights before the Court. The fact that an artificial person cannot possess the rights asserted did not prevent the Court from granting the Association standing.

tiffs, the English literacy requirement is a valid exercise of state power and is not being administered in a discriminatory manner. *Mexican-American Federation-Washington State v. Naff,* 299 F. Supp. 587 (E.D. Wash. 1969).

In upholding the constitutionality of the Washington literacy requirement, the District Court relied upon *Lassiter v. Northampton County Board of Elections,*[6] where the United States Supreme Court upheld the constitutional validity of a North Carolina requirement that applicants be able to read and write any section of the state constitution. The holding in *Lassiter* was grounded on two premises: (1) that a state has broad powers in legislating voter qualifications, limited only by constitutional prohibitions against discrimination,[7] and (2) that a literacy requirement, since it might conceivably be used for a legitimate state purpose, cannot be deemed an unjustified infringement of the right to vote.[8] The Supreme Court noted that literacy does bear[9]

> some relation to standards designed to promote the intelligent use of the ballot. . . . (I)n our society where newspapers, periodicals, and other printed matter canvas and debate campaign issues, a state might conclude that only those who are literate should exercise the franchise.

Lassiter unequivocally held that *a literacy requirement, in itself,* is not a violation of the fourteenth or fifteenth amendments' prohibitions against discrimination. However, the Court excepted from its holding those tests which are obviously nothing more than "device(s) to make discrimination easy,"[10] and those instances in which a test "fair on its face"[11] is in fact used to discriminate.[12]

6. 360 U.S. 45 (1959). *See also* Guinn v. United States, 238 U.S. 347 (1915).
7. 360 U.S. at 50-51. U.S. CONST. amend. XIV; amend. XV; art. I, § 2; amend. XVII. *See* United States v. Classic, 313 U.S. 299, 303 (1941): "Voters in a primary election are denied the equal protection of the laws by state officers who refuse to count their votes as cast and count them in favor of an opposing candidate." *See also* Pope v. Williams, 193 U.S. 621 (1904) (States have broad powers to set residence requirements); Hall v. Beals, 396 U.S. 45 (1969) (post-election review of Colorado residency requirement for voting in presidential elections barred by mootness).
8. 360 U.S. at 51-54.
9. *Id.* at 51-52.
10. *Id.* at 53.
11. *Id.* at 53.
12. Discrimination in the use of a test "fair on its face" was not alleged in *Lassiter;* nor did the Court indicate how an objective test might be misused. *Id.* at 53.

A literacy test can be so patently a tool for discrimination that it is, prima facie, unconstitutional. In *Davis v. Schnell*,[13] an Alabama requirement that applicants "understand and explain" some part of the Federal Constitution *to the satisfaction of* the voting registrar was declared unconstitutional on the grounds that it gave the voting registrar uncontrolled discretion to screen the electorate on the basis of his own personal prejudices, as well as those of the white community in general. Since the test was subjective, there was no way of reviewing disqualifications of "illiterate" blacks.

The Washington statute contains the same defect of subjectivity found in *Davis*: if the registrar "is not satisfied . . . he may require the applicant to read aloud and explain the meaning of some ordinary English prose . . ."[14] The court in the principal case took note of this defect,[15] but, relying on two opinions of the Washington Attorney General directing that no literacy tests be administered in Washington "until such time as a universal test has been promulgated,"[16] the court concluded that the issue of subjective discrimination should be deemed moot, since there was no proof that the Attorney General's orders were not being followed. Unfortunately, the court ignored the basic thrust of plaintiff's argument—they were not simply attacking the potential for discrimination under the Washington statute; they also were challenging the application of *any* English literacy requirement to Spanish-speaking citizens. Rather than merely posing a query as to the applicability of *Davis* to the Washington facts, the plaintiffs also questioned the validity of any reliance on *Lassiter* as the final word concerning the validity of literacy requirements.

Indeed, more recent cases support the contention that the *Lassiter* analysis is no longer controlling. In *Harper v. Virginia State Board of Elections*,[17] payment of a poll tax as a prerequisite to voting was held unconstitutional under the fourteenth amendment because "the Equal Protection Clause . . . restrains the states from fixing voter qualifica-

13. 81 F. Supp. 872 (D. Ala.) *aff'd* 336 U.S. 933 (1949) (per curiam). *Accord*, Alabama v. United States, 304 F.2d 583 (5th Cir.), *aff'd* 371 U.S. 37 (1962) (per curiam); and Louisiana v. United States, 380 U.S. 145 (1965).
14. WASH. REV. CODE § 29.07.070(13) (1965). This provision is quoted in full in text accompanying note 3 *supra*.
15. 299 F. Supp. at 591.
16. 299 F. Supp. at 592. *See* note 4 *supra*.
17. 383 U.S. 663 (1966).

tions which invidiously discriminate."[18] The *Lassiter* Court asserted that English literacy bears "some relation to standards designed to promote the intelligent use of the ballot,"[19] and the court in *Harper* likewise focused on germaneness, reasoning that "(w)ealth, like race, creed or color, is not germane to one's ability to participate intelligently in the electoral process."[20] But *Harper* went further—quoting from *Reynolds v. Sims*,[21] an apportionment case:[22]

> Undoubtedly the right to suffrage is a fundamental matter in a free and democratic society. . . . Especially since the right to exercise the franchise . . . is preservative of other basic civil and political rights, *any alleged infringement of the right to vote must be carefully and meticulously scrutinized.*

Lassiter proposed that a literacy requirement was justified if it might conceivably be related to a legitimate state purpose; now *Harper* and *Reynolds*[23] require courts reviewing voting statutes to go beyond presumptions of constitutionality and simple speculation as to what a "state might conclude"[24] and instead to devote "careful and meticulous scrutiny" to the effect of the requirement on the right to vote.

Further, a 1969 Supreme Court case clearly demonstrates that *Lassiter's* "rational basis" concept has been abandoned as a test of the propriety of a state's voting requirements. In *Kramer v. Union Free School District*,[25] a case involving voter qualifications for school district elections, the Supreme Court, again relying on the *Reynolds* principle that the right to vote is the foundation of a representative society, rejected both the presumption of constitutionally and the "rational basis" test for determining the validity of statutory classifications. The Court held that the statutory denial of the franchise, to be valid, must be *"necessary to promote a compelling state interest"* and that, even when such an "interest" is shown, any limitation of the

18. *Id.* at 666.
19. 360 U.S. at 51. *See* text accompanying note 9 *supra.*
20. 383 U.S. at 668.
21. 377 U.S. 533 (1964). *See also* Wesberry v. Sanders, 376 U.S. 1 (1964).
22. 377 U.S. at 561-562 (emphasis added).
23. Wesberry v. Sanders, 376 U.S. 1, at 17-18 (1964), contains language very similar to that quoted from *Reynolds.*
24. Lassiter v. Northampton County Bd. of Elections, 360 U.S. at 52. *See* text accompanying note 9 *supra.*
25. 395 U.S. 621 (1969). *See also* Cypriano v. City of Houma, 395 U.S. 701 (1969) (per curiam).

electorate must meet an extreme standard of precision and shall exclude no more than the "compelling state interest" demands.[26] Thus, *Kramer* appears to supersede *Lassiter* as regards the substantive standards against which voter qualifications must be judged. Neither *Lassiter* nor the principal case concern themselves with the magnitude of the interest to be protected or its corollary, precision of exclusion.

The Court in the principal case, relying on the teachings of *Lassiter*, accepts the possibility that only those who are literate in English can vote properly, in lieu of specific proof that Washington's English literacy provisions do, in fact, preserve the purity of the ballot. While "intelligent use of the ballot" may well be the sort of "compelling" interest that *Kramer* requires, *Kramer* also requires a certainty, rather than a possibility, that the continued existence of the literacy requirement is necessary to promote intelligent voting.

If there exist alternatives to an English literacy test which can adequately guarantee intelligent voting by non-English-speaking citizens without excluding them from the polls, then literacy provisions can hardly be considered *necessary*.[27] In fact, such alternative methods *are* available. Devices such as foreign language voter's pamphlets; translations of speeches and debates; foreign language newspapers, periodicals, and broadcasts; voter education programs; and dual language ballots either exist or, where appropriate, can be implemented at a cost to the state which would be small in comparison to the harm which results from denying citizens the exercise of a most basic right.

In addition, the precision with which literacy requirements guarantee intelligent use of the franchise is questionable. *Kramer*, paralleling a line of First Amendment cases,[28] requires that a voter qualification exclude *only* those whose use of the ballot would be contrary to the "compelling state interest." But a statute like the one involved in the

26. 395 U.S. 621, 627 *et seq.* (emphasis added).

27. Similar reasoning is found in a commerce clause case, Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951); and in a first amendment case, Shelton v. Tucker, 364 U.S. 479, 488 (1960). A requirement to which there are more acceptable alternatives (alternatives less likely to compromise a fundamental right) can hardly be considered "necessary to promote a compelling state interest."

For a discussion of the alternatives available in the instant situation *see* the dissenting opinion of Mr. Justice Douglas, Mr. Justice Fortas concurring, in Cardona v. Power, 384 U.S. 672 (1966). *See also* Katzenbach v. Morgan, 384 U.S. 641 (1966).

28. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1966); United States v. Robel, 389 U.S. 258 (1967).

principal case, which operates to exclude all citizens whose English language ability falls below an arbitrary level, denies the right to vote to some citizens who are capable of voting at least as intelligently as their English-speaking counterparts. The overbreadth involved becomes especially apparent when one considers the ease with which the state could have foreign language ballots printed and the effect which that would have in enabling intelligent voting by Spanish-speaking citizens. To exclude from the electorate persons who are able to vote intelligently, although they cannot pass a literacy test, is to deny a basic right to some who present no threat to the interest the state seeks to protect. To proceed on the assumption that English-speaking citizens keep themselves informed and conversant concerning election issues, but that non-English-speaking citizens (such as the plaintiffs in this case, who were actively engaged in a voter registration project) do not, is to rely on a fiction supported by little more than ethnic bigotry.

Under the recent decisions concerning reapportionment,[29] states have an affirmative duty to eliminate violations of equal protection which are implicit in their voting systems. Given the facts of the principal case, where a citizen's vote is not merely diluted but is completely denied by an imprecise statute of doubtful justification, the state should be under a similar affirmative duty to implement available alternatives[30] to insure intelligent use of the ballot, by means less drastic than total exclusion of all citizens who are not fluent in the majority language. Until such remedial measures are taken in Washington, the state will remain guilty of denying both the exercise of a fundamental right and the means by which Spanish-speaking citizens might become qualified to exercise that right.

In addition to *Kramer*'s emphasis on the special value of the voting right, which underlines the need for very close examination of state actions which restrict the right, a different analysis, which shifts the emphasis to discrimination in education, also presents a persuasive challenge to the continued use of the Washington requirement.

In *Gaston County v. United States*[31] the County sought to reinstate a literacy test which had been suspended under the authority of the

29. Baker v. Carr, 369 U.S. 186 (1962); Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).
30. *See* note 27 and accompanying text *supra*.
31. 395 U.S. 285 (1969).

1965 Voting Rights Act[32] on the ground that, during the five preceding years, it had not been applied "for the purpose or with the effect of denying or abridging the right to vote on account of race or color."[33] Taking judicial notice of the fact that the County had for many years maintained a segregated school system, which was itself a violation of equal protection, the Supreme Court reasoned that it must also violate equal protection for the state to deny black applicants the right to vote due to their inability to pass a literacy test, since, *no matter how fairly the test might be administered,* that inability was traceable to the inferior education provided in the black schools.

The County, by administering a literacy test, *gave effect to prior discrimination* and the situation would not have been corrected by the most objective and fairly administered of tests.[34] The Washington provision is vulnerable on the same grounds. It seems likely that many migrant workers who are now of voting age and residing in Washington State were the victims of discrimination in the schools which they attended, whether in Washington or in other (perhaps Southwestern) states. Remedial programs for non-English-speaking students should be an essential element of an educational system, yet such programs are a fairly recent development. The norm seems to have been failure to provide Latin American students with an effective education, something that the English-speaking majority takes for granted.[35] Although the probability of inferior education is a defect for which the state is arguably responsible, the State of Washington denies Mexican-Americans the right to vote because this inferior education has not enabled them to learn a second language. Thus, the state's use of a literacy requirement perpetuates the effect of prior discrimination, as in the *Gaston County* case.

32. 42 U.S.C. § 1973a(b), 1973b(a)-(d), 1973c (Supp. IV, 1969).

33. Gaston County v. United States, 395 U.S. at 287 (1969). 42 U.S.C. § 1973b(a) (Supp. IV, 1969).

34. *Compare* Guinn v. United States, 238 U.S. 347 (1915): The effect of a Grandfather Clause which exempts those registered before a certain date from the application of a literacy test is to continue conditions which existed prior to the adoption of the fifteenth amendment.

35. *See generally*: Sanchez, *History, Culture, and Education*, in LA RAZA: FORGOTTEN AMERICANS 1 (J. Samora ed. 1966); Rowan, THE MEXICAN AMERICAN (paper prepared for the U.S. Commission on Civil Rights—1968); WASHINGTON STATE LEGISLATURE, JOINT COMMITTEE ON EDUCATION, EDUCATION IN WASHINGTON 39 (Fifth Biennial Report—1968); CONSULTING SERVICES CORPORATION, MIGRANT FARM WORKERS IN THE STATE OF WASHINGTON, Vol. III, *An Analysis of Migrant Agricultural Workers in Washington State* 14-16 (May 15, 1967); Vol. IV, *Recommendations* 9-13.

If the state declines to take the necessary steps to assure that an identifiable group of non-English-speaking citizens can cast an informed ballot, an effort to secure educational equality exemplifies an alternate approach that the state could take to eliminate proscribed impediments to access to the ballot box. Having undertaken to educate school-age citizens to be intelligent electors, the state should be bound to pursue that goal for all citizens. Until equality in educational opportunity is achieved, a literacy requirement will discriminate against an identifiable group of non-English-speaking citizens.

Certainly the state cannot justify its literacy test on the ground that it is necessary for intelligent use of the ballot, when it is imposed with such heavy-handed overbreadth, and when the state itself declines to implement alternatives to the present electoral and educational systems which would be much more rationally related to fulfillment of the state's legitimate goal. Therefore, it seems clear that the State of Washington did violate the constitutional rights of the plaintiffs by imposing a literacy test without the identification of a compelling state interest which cannot be served by alternative means, and by penalizing citizens for the effects of an educational system that seems to have discriminated, either intentionally or unintentionally, on the basis of ethnic background.