1970

Residence Requirements for Voting in Presidential Elections

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Residence Requirements for Voting in Presidential Elections

The Supreme Court has described the right to vote as the right "preservative of other basic civil and political rights," and has declared that "any restrictions on that right strike at the heart of representative government." Nevertheless, while recent judicial decisions and congressional enactments have reflected an increasing national concern with infringements on the right to vote, the plight of what is probably the largest class of disenfranchised citizens in America today—the "movers"—has been virtually ignored.

Every four years, millions of American citizens are precluded from voting for President and Vice-President merely because they have changed their place of residence. Virtually every state, by maintaining state and local residence requirements, disenfranchises large segments of the electorate in every presidential election. In terms of absolute numbers, the effects of these residence requirements have been dramatic. John Kennedy defeated Richard Nixon by barely 100,000 votes in 1960, while between five and eight million otherwise qualified voters were made ineligible to vote for failure to satisfy residence requirements. In the 1968 election, estimates of disenfranchisement due to

5 Hearings on Nomination and Election of President and Vice President and Qualifications for Voting Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. at 471 (1961) [hereinafter cited as 1961 Hearings]. See notes 7, 9 infra.
6 Kennedy received 34,226,925 votes and Nixon received 34,108,662 votes, resulting in a margin of victory of 118,268 votes. 1961 World Almanac 240.
7 Due to difficulties in determining the number of persons disenfranchised by state and local residence requirements, the estimates vary considerably for any presidential election. The most reliable estimates for the 1960 election state that eight million were disenfranchised. 1961 Hearings at 467, 849; 110 Cong. Rec. 14662 (1964) (remarks of Mr. Schwegel). This represents between 4% and 8% of the potential electorate.
state and local residence requirements ranged from five to eight million.\textsuperscript{9}

The constantly increasing mobility of our nation in the twentieth century,\textsuperscript{10} in conjunction with residence requirements for voting, has created a new class of disenfranchised Americans.\textsuperscript{11} This "new class" includes a highly disproportionate number of young\textsuperscript{12} and black\textsuperscript{13} voters, who, while representing only thirty per cent of the voting age population, constitute approximately fifty-five per cent of those precluded from voting by these requirements. The disenfranchisement of these traditionally Democratic voters\textsuperscript{14} has significant political implica-


\textsuperscript{10} Geographic mobility has increased at a comparatively steady rate in every decade since 1900. Schmidhauser, Residency Requirements for Voting and the Tensions of a Mobile Society, 61 Mich. L. Rev. 823, 824 (1963); see Note, Federal Elections—The Disenfranchising Residence Requirement, U. Ill. L.F. 101, 102 (1962).

In 1968, 86,603,000 persons over one year of age, constituting 18.8\% of the population, changed their place of residence. Of these persons, some 22,960,000 (11.8\% of the population) moved within the same county; 6,607,000 (3.4\%) moved from one county to another within the same state; and 7,085,000 (3.6\%) moved from one state to another. U.S. Bureau of the Census, Mobility Status of the Population, by Characteristics: 1967 and 1968, in Statistical Abstract of the United States, Table No. 38 (1970) [hereinafter cited as Mobility Status of the Population].

\textsuperscript{11} 113 Cong. Rec. 14041 (1967) (The Political Process in America, a speech by President Lyndon Johnson).

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Per Cent of Voting Age Population</th>
<th>Per Cent of Movers</th>
</tr>
</thead>
<tbody>
<tr>
<td>20-29</td>
<td>22</td>
<td>45</td>
</tr>
<tr>
<td>30-49</td>
<td>38</td>
<td>33</td>
</tr>
<tr>
<td>over 50</td>
<td>40</td>
<td>22</td>
</tr>
</tbody>
</table>

Adapted from Mobility Status of the Population.

\textsuperscript{12} 18.8\% of white voters move each year, while 20.5\% of black voters move each year. See Mobility Status of the Population.

\textsuperscript{13} In the 1968 election, for example, these groups voted as follows:

<table>
<thead>
<tr>
<th>Classification</th>
<th>Per Cent Voting for Nixon</th>
<th>Per Cent Voting for Humphrey</th>
</tr>
</thead>
<tbody>
<tr>
<td>By Age</td>
<td></td>
<td></td>
</tr>
<tr>
<td>20-29</td>
<td>38</td>
<td>47</td>
</tr>
<tr>
<td>30-49</td>
<td>41</td>
<td>44</td>
</tr>
<tr>
<td>over 50</td>
<td>47</td>
<td>41</td>
</tr>
<tr>
<td>By Color</td>
<td></td>
<td></td>
</tr>
<tr>
<td>black voters</td>
<td>12</td>
<td>85</td>
</tr>
<tr>
<td>white voters</td>
<td>47</td>
<td>38</td>
</tr>
</tbody>
</table>
In short, as a result of increasing mobility, residence requirements for voting in presidential elections have created a crisis that has now "reached the dimensions of a serious national injustice."\(^{16}\)

This comment will analyze what has been done in the past and what can be done in the future by the states, the Supreme Court, and the Congress to eliminate the disenfranchising effects of residence requirements for voting in presidential elections.\(^{17}\)

I. The States

Article II, section 1 of the Constitution\(^ {18}\) reserved the power of determining voter qualifications for national elections to the states.\(^ {19}\)

Adapted from Gallup Poll, Dec. 8, 1968.

Moreover, while mobility among various occupational groups is relatively constant, Gallup Poll, June 7, 1957, the rate of mobility among farmers, who voted heavily for Nixon in 1968 (farmers cast 51% of their votes for Nixon and only 29% for Humphrey); Gallup Poll, Dec. 8, 1968, is far below that of other occupational groups. Gallup Poll, June 7, 1957.

As a result, while 43.4% of the population voted for Nixon in 1968 and 43.0% voted for Humphrey, Gallup Poll, Dec. 8, 1968 of the disenfranchised movers, approximately 38% would have voted for Nixon and 47% would have voted for Humphrey. (This approximation is adjusted for voting participation differences among the various groups).

\(^ {15}\) It is also important to note that most Americans who move do so in order to achieve economic advancement. Over three-fourths of all males who move from one state to another do so for job-related reasons. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, (Series P-20, No. 154, 1966). Generally, migrants have achieved higher income and greater employment than those who have not moved. See Lansing and Morgan, The Effect of Geographical Mobility on Income, II J. Hum. Res. 449, 460 (1967); Saben, Geographic Mobility and Employment Status, 87 MONTHLY LABOR REV. 873-81 (1964). In 1960, for example, General Electric reported that 6% of its executive personnel were disenfranchised because of interstate moves. 1961 Hearings at 95.

\(^ {16}\) 107 CONG. REC. 1008 (1961).

\(^ {17}\) It should be noted that residence requirements are separate and distinct from registration requirements. Residence requirements refer to the length of time a person must have resided in a state, county or precinct before he is qualified to vote, while registration requirements relate to the time at which qualified voters must register in order to vote. See note 114 infra. The problems relating exclusively to registration requirements are beyond the purview of this comment.

\(^ {18}\) "[E]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."

\(^ {19}\) This section has not retained its original interpretation. It was the hope of the founders that the electoral college would contain the nation's leaders. By 1796, however, the members of the electoral college had become political puppets and, as the states adopted the popular vote as the method of selecting electors, the voting populace found itself, in essence, voting directly for the President and Vice-President. Notwithstanding this change of philosophy, the states still control the qualifications of voters. Comment, Federal Elections—The Disenfranchising Residence Requirement, U. ILL.L.F. 101, 102 (1962); see A. CORWIN, COURT OVER CONSTITUTION 89-90 (1938). The states' control over voter qualifications, however, has been effectively limited in certain areas by constitutional amendments. For example, the equal protection clause of the fourteenth amendment has been utilized as a means of restricting state control over the electoral process. See, e.g.,
It was on the basis of this authority that the states first adopted residence requirements for voting. These requirements are of two distinct forms: state residence requirements, which affect *interstate* movers; and county and precinct requirements, which involve *intrastate* movers.

A. The Interstate Mover

State residence requirements which were adopted in the nineteenth century by all the states remained essentially unchanged until 1953. At that time five states required two years residence within the state, thirty-two states required one year, and eleven states required six months. By 1953, however, the states recognized that the distinct characteristics of presidential elections made the application of such stringent residence requirements inappropriate, and they began gradually to liberalize their residence requirements for presidential elections.

1. Connecticut's Absentee Approach. The movement toward protecting disenfranchised voters in presidential elections began with Connecticut's passage, in 1953, of a statute extending the state's absentee balloting privilege to former residents. The Connecticut statute permitted a voter, upon leaving Connecticut and taking up residence in another state, to cast an absentee ballot in Connecticut until he had complied with the requirements for voting in the new state. This statute was applicable only to presidential elections, and the right to cast an absentee ballot was limited to twenty-four months. Since 1953 eight other states have followed the Connecticut approach.

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Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (eliminating the poll tax); Katzenbach v. Morgan, 384 U.S. 641 (1966) (restricting the use of literacy tests); cf. Baker v. Carr, 369 U.S. 186 (1962) (reapportionment). In addition, the fifteenth amendment barred the states from denying the right to vote to blacks; the nineteenth amendment forbade the states to deprive women of the right to vote; and the twenty-fourth amendment eliminated the poll tax in primaries and all other elections. See Kirby, *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 Law & Contemp. Prob. 495, 496-7 (1962). Thus, the power granted to the states by article II, section 1 is far from unlimited.

20 Some of the characteristics of presidential elections which distinguish them from all other types of elections are as follows: the President represents all the people, he does not serve merely one geographic area; local issues are relatively insignificant in presidential elections; and, lastly, increased press, television, and radio coverage of Presidential elections enable a citizen to inform himself of national issues no matter where he resides.

21 For example, the National Institute of Municipal Clerks, in 1953, urged the national government to act to make it possible for intrastate movers to vote in presidential elections. See Ogul, *Residence Requirements as Barriers to Voting in Presidential Elections*, 3 Mw. J. Pol. Sci. 254, 256 (1959).


23 Ariz. Rev. Stat. Ann. § 16-171 (Supp. 1967) (fifteen month period in which the former resident may vote absentee); Mich. Comp. Laws § 168.758a (1967) (the former resident may vote absentee until he is qualified to vote under the laws of his new state
Residence Requirements for Presidential Elections

The absentee method enables all otherwise qualified citizens to vote for President and Vice-President. The uniform adoption of this method would eliminate the disenfranchising effects of residence requirements on interstate movers. There are, however, three weaknesses in the absentee approach. First, new residents might postpone acquiring familiarity with local political conditions. This is not a decisive difficulty, since it is generally agreed that local issues are of little consequence in presidential elections. Secondly, some voters might be discouraged by burdensome absentee ballot procedures. A third defect in this approach arises out of the fact that voting qualifications are commonly established in state constitutions. One qualification common to almost every state is that one must be a resident of the state in order to vote. In order to provide absentee voting for former residents, most states would be required to amend their constitutions, a time-consuming approach, involving considerable political difficulties. Some authorities have suggested that this problem can be circumvented by adopting a strict construction of article II, section 1.

Since this section grants the power to regulate voting qualifications to


24 1961 Hearings at 854.
25 See text at notes 100-2 infra.

27 See Council of State Governments, Program of Suggested State Legislation 77 (1962); 1961 Hearings at 37.

In 1960 the New Jersey Assembly passed a bill which would allow an otherwise qualified voter who had moved out of New Jersey to vote in presidential elections by absentee ballot if he was not yet qualified in his new state. Governor Meyner vetoed the bill on grounds of unconstitutionality, relying on provisions of the New Jersey Constitution which limited voting in all elections to persons residing within the state at the time. 1961 Hearings at 38. Eventually New Jersey did adopt absentee voting by former residents (N.J. Stat. Ann. § 19:58-2 (Supp. 1967)), but not until after the Constitution was amended (N.J. Const. art. 2, § 3 (Supp. 1967)).


29 See note 18 supra.
the state legislatures, a strict construction of this section would enable these legislatures to establish voter qualifications without regard to their state constitutions.30

2. Wisconsin's "New Resident" Approach. In 1954 Wisconsin devised an alternative method of protecting the interstate mover,31 permitting a new resident to vote for President and Vice-President if he would have been qualified to vote in the state of his prior residence had he remained there until the election. Since 1954, twelve other states have adopted this approach. Three states,32 following Wisconsin, have eliminated their residence requirements completely, while nine other states33 have adopted special residence requirements, for presidential elections only, which are significantly shorter than their normal requirements.

The mechanics of voting under these statutes, while more complex than standard voting procedures, are considerably less burdensome on the voter than the absentee approach.34 Moreover, the problem of

30 See McPherson v. Blacker, 146 U.S. 1, at 34 (1892), in which the Supreme Court quoted with approval the following statement made in 1874 by a Senate Committee:

The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. . . . This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away or abdicated.

For a full discussion of this possibility see Kirby, supra note 28, at 500-4.

34 The procedures followed in Wisconsin are typical. The new resident need not register to vote, but he must apply to the proper municipal clerk either in person or in writing at any time prior to the election. The applicant must swear to an affidavit and must complete a card saying that he intends to vote for President and Vice-President in Wisconsin and that his voting privileges should be cancelled at his previous residence. The municipal clerk then forwards the card to the proper officials of the state of former residence and requests a certificate from that official certifying to the fact that the applicant would have been qualified to vote in his former state had he not moved. When the municipal clerk receives this certification, he notifies the applicant that he may vote. Wis. Stat. Ann. § 6.15 (1969). Under these procedures the burden on the applicant is slight, for the state handles most of the correspondence itself. See also Ill. Rev. Stat. ch. 46, § 21-1.01 (1965); N.D. Cent. Code §§ 16-16-18, 19, 21, 22 (Supp. 1967); Tex. Election Code art. 5.05a (Supp. 1967).
amending state constitutions, inherent in the absentee approach, is avoided. When the Wisconsin method is used only to shorten normal residence requirements, however, certain new residents will still be precluded from voting. And by requiring that the new resident must have been qualified to vote in his prior state of residence, this approach does not enfranchise those new residents who were not qualified to vote in their prior state of residence.

3. The Uniform Law Approach. The most recent attempt to aid the interstate mover differed from the Wisconsin method in that it eliminated the requirement that the new resident must have been qualified in his prior state. This approach was formulated in 1962 by the Conference of Commissioners on Uniform State Laws in its Uniform Voting by New Residents in Presidential Elections Act. The Uniform Act has been adopted in seven states, four of which have eliminated their normal requirements entirely for presidential elections, and three of which have shortened their normal requirements. In addition, another eleven states, while not formally adopting the Uniform Act, have enacted similar legislation. Of these eleven states, two have completely eliminated their requirements, and nine have

35 This problem is discussed in text at notes 27-30 supra.
36 There are essentially two types of situations in which a new resident would be qualified in his new state but not in his prior state: (1) when the new resident moves from a state with an age qualification which is higher than that in the state to which he has moved, and where he is old enough to satisfy his new state's requirement, but not his old state's requirement; (2) when the new resident had not lived in the prior state long enough to fulfill that state's residency requirement.
shortened them.\textsuperscript{43}

Presently, state residence requirements, while less restrictive than they were seventeen years ago, still impose significant restrictions on an interstate mover’s eligibility to vote in presidential elections. Thirty-four\textsuperscript{44} states have modified their residence requirements through the adoption of one or more\textsuperscript{45} of the above methods.\textsuperscript{46} Table I illustrates the changes that have been made and sets forth the present breakdown of residence requirements in the fifty states and the District of Columbia. Table I also indicates the nonuniform character of these require-

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Length of Requirement & Number of States & 1953 & 1970 \\
\hline
2 years & 5 & 1 & \\
1 year & 32 & 15 & \\
6 months & 11 & 3 & \\
3 months (or ninety days) & 3 & & \\
2 months (or sixty days) & 10 & & \\
54 days & 1 & & \\
45 days & 2 & & \\
40 days & 1 & & \\
31 days & 1 & & \\
30 days & 4 & & \\
no requirement & 0 & 10 & \\
absentee method & 0 & 9 & \\
\hline
\end{tabular}
\caption{INTERSTATE RESIDENCE REQUIREMENTS}
\end{table}

\textsuperscript{*} Does not include Alaska, Hawaii, or the District of Columbia.

\textsuperscript{43} The advantages and disadvantages of this approach are almost identical to those of the Wisconsin approach. See text at notes 34-36 \textit{supra}. The only significant difference is that the Uniform Act does not require that the new resident have been qualified in his prior state.

\textsuperscript{44} See notes 22-23, 31-33, 41-43 \textit{supra}.

\textsuperscript{45} Arizona, Connecticut, Michigan, New Jersey, Texas, and Wisconsin have adopted both the absentee and one of the new resident approaches.

\textsuperscript{46} The District of Columbia (one year) and the following states have not modified their residence requirements: Alabama (one year); Arkansas (one year); Hawaii (one year); Indiana (six months); Iowa (six months); Kentucky (one year); Mississippi (two years); Montana (one year); Nevada (six months); Pennsylvania (ninety days); Rhode Island (one year); South Carolina (one year); South Dakota (one year); Utah (one year) (Utah is presently considering a proposed amendment to article IV, \textsection 2 of the Utah Constitution, which would establish a maximum thirty-day requirement for presidential elections, \textit{Utah Laws}, 1969, S. J. Res. no. 3); Virginia (one year); and West Virginia (one year). In addition, Tennessee (one year), Vermont (one year), and Wyoming (one year), while adopting the absentee approach, have not modified their requirements for new residents.
ments. The great variation in the present laws creates confusion and leads to discrimination between citizens of different states. For example, a citizen moving from Maine to Rhode Island loses his right to vote for President and Vice-President for a full year, while a citizen moving from Rhode Island to Maine may vote immediately; and a citizen moving from Vermont to Rhode Island does not lose his right to vote, while a citizen moving from Rhode Island to Vermont loses it for a year.

B. The Intrastate Mover

In addition to state requirements, most states also maintain county and precinct residence requirements which serve to disenfranchise the intrastate mover. The states have made virtually no attempt to reduce these county and precinct requirements, and confusion and discrimination among intrastate movers has resulted.\textsuperscript{47} Table II indicates the

\begin{table}[h]
\centering
\caption{Intrastate Residence Requirements}
\begin{tabular}{lcccc}
\hline
\textbf{Length of Requirement} & \textbf{1956\textsuperscript{48}} & \textbf{1970\textsuperscript{49}} & \textbf{1956\textsuperscript{*}} & \textbf{1970} \\
\hline
1 year & 3 & 0 & 1 & 1 \\
6 months & 13 & 13 & 1 & 2 \\
5 months & 1 & 0 & 0 & 0 \\
4 months & 3 & 1 & 2 & 0 \\
3 months (or 90 days) & 8 & 10 & 2 & 4 \\
2 months (or 60 days) & 5 & 8 & 2 & 3 \\
54 days & 0 & 0 & 1 & 1 \\
45 days & 0 & 0 & 0 & 1 \\
40 days & 2 & 3 & 1 & 1 \\
30 days & 4 & 7 & 17 & 16 \\
29 days & 1 & 0 & 0 & 1 \\
15 days & 0 & 0 & 1 & 1 \\
10 days & 0 & 0 & 3 & 4 \\
no requirement & 8 & 9 & 17 & 16 \\
median requirement (in days) & 105 & 84 & 32 & 32 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{*} Does not include Alaska, Hawaii, or the District of Columbia.

\textsuperscript{47} For example, a voter may be precluded from voting in a presidential election merely because he has moved "across the street" (when such a move involves a change of county or precinct). See 1961 Hearings at 34, 36, 471. Moreover, the lack of consistency between state and local requirements occasionally results in situations in which an intrastate mover is precluded from voting, while an interstate mover, moving at the same time and into the same county or precinct, is allowed to vote.

\textsuperscript{48} The 1956 requirements, both county and precinct, were adapted from Goldman, Move—Lose Your Vote, 45 Nat'L Muníc. Rev. 6, 7 (1956).

\textsuperscript{49} The 1969 requirements, both county and precinct, were adapted from 115 Cong. Rec. S5745 (daily ed. May 13, 1969) (Bureau of the Census study).
absence of change in local requirements, and it sets forth the present county and precinct requirements.

Two possible approaches might be taken to protect intrastate movers.\(^5\) First, the states may allow intrastate movers to vote absentee in the original precinct or county until qualified in the new place of residence. A number of states have formulated such “return-to-vote” clauses for intracounty movers,\(^6\) and a few have applied these clauses to intercounty movers.\(^7\) Alternatively, statewide transfer provisions comparable to the Uniform Act approach for interstate movers may be adopted, but this method is rarely used.\(^8\)

With respect to their residence requirements for voting in presidential elections, the states have not satisfactorily confronted the problems of the interstate and intrastate movers in our increasingly mobile society. At both the state and local levels, the movement toward eliminating these requirements has been uneven and incomplete. Although the states have liberalized their residence requirements over the past seventeen years, these requirements still effectively disenfranchise millions of otherwise qualified voters.

II. THE SUPREME COURT

The power conferred on the states by article II, section 1, of the Constitution to regulate elections is limited by the equal protection clause of the fourteenth amendment.\(^9\) The central issue in any action challenging the constitutionality of residence requirements for voting in presidential elections is whether such restrictions on the electorate are valid under the equal protection clause. A subsidiary procedural issue will also confront the Court in most actions challenging the constitutionality of these requirements. If the election in which the plain-

\(^5\) In addition to these possibilities, two others have been suggested. First, the states might adopt statewide registration procedures, thus eliminating registration problems created by intrastate moves. Second, a procedure of cooperation between counties or precincts might be initiated. Such a procedure would enable cross-checking of registration lists in order to prevent fraud. Neither of these alternatives is immediately feasible, however, since they would entail extensive revision of state election laws. See Note, The Impact and Constitutionality of Voter Residence Requirements as Applied to Certain Intrastate Movers, 43 Ind. L.J. 901, 910-1 (1968).


Residence Requirements for Presidential Elections

The question of mootness arises.

A. The Procedural Issue: Mootness

The question of mootness will frequently arise in actions challenging the constitutionality of residence requirements from the combination of three factors: first, the plaintiff cannot institute the action until he has become a resident of the state and has been precluded from registering; second, the litigation, particularly if an appeal is involved, probably will not be concluded until the election has already been conducted; third, the relief typically sought in such cases (injunctive relief aimed at allowing the plaintiff to vote) cannot be granted once the

55 The Supreme Court has consistently held that it will not grant an advisory decree upon a hypothetical state of facts, see, e.g., Golden v. Zwickler, 394 U.S. 103, 110 (1969); Electric Bond & Share Co. v. SEC, 303 U.S. 419, 443 (1938); Ashwander v. TVA, 297 U.S. 288, 324 (1936); and the Court has ruled that it will not decide an action unless there is an "actual controversy," see, e.g., Evers v. Dwyer, 358 U.S. 202, 203 (1958); United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947); Coffman v. Breeze Corps., 323 U.S. 316, 324 (1945). Furthermore, the courts have explicitly held that there must be no uncertainty that the asserted right will be invaded, see, e.g., Johnson v. Interstate Transit Lines, 163 F.2d 125 (10th Cir. 1947); and that the mere possibility that a person may at some future time be adversely affected by the provisions of a statute, or by the acts of government officials, does not give rise to a justiciable case until an actual, concrete controversy occurs, see, e.g., Poe v. Ullman, 367 U.S. 497 (1961); West v. Bank of Commerce & Trusts, 153 F.2d 566 (4th Cir. 1946); Walker v. First Trust & Savings Bank, 12 F.2d 896 (8th Cir. 1926). In International Longshoremen's & Warehousemen's Union v. Boyd, 347 U.S. 222 (1954), an action was brought for both injunctive and declarative relief to prevent immigration officials from construing the Immigration and Nationality Act in a particular manner. The Court dismissed the action for want of a "case or controversy" since the sanctions of the statute had not yet been set in motion against the plaintiffs, even though it was virtually certain that the sanctions would be applied in the near future. On the basis of these cases it is clear that an action challenging the constitutionality of residence requirements cannot be instituted until the plaintiff has at least become a resident of the state.

56 In his dissent in Hall v. Beals, 90 S. Ct. 200, 202 (1969), Justice Brennan suggests two possible methods of hastening the litigation process in cases challenging the constitutionality of residence requirements for voting. First, he suggests that such cases might be given "preferred calendar position." Second, he suggests that a "waiver of the requirement of exhaustion of remedies" might enable the case to be instituted as soon as the new resident enters the state. Such a waiver is usually permitted when the cause of action is pleaded under the Civil Rights Act, 42 U.S.C. § 1983 (1964); see, e.g., King v. Smith, 392 U.S. 809, 812 (1968); Monroe v. Pape, 365 U.S. 167, 183 (1963); McNeese v. Board of Education, 373 U.S. 668, 671 (1963); but see, e.g., Harrison v. NAACP, 360 U.S. 167 (1959) (waiver denied until the state court could clarify the challenged statute). Since an action to declare a state's residence requirement unconstitutional can be brought under 42 U.S.C. § 1983, waiver of the requirement of exhaustion of remedies would be allowed in a case brought under this statute since there is no question of clarification involved. It is uncertain, however, whether preferred calendar position and waiver of the requirement of exhaustion of remedies would enable the litigation process to conclude prior to the election.

57 Such relief typically consists of (1) a writ of mandamus compelling the election
election has taken place.58 The application of traditional standards of mootness would require a dismissal of the action.59 Nevertheless, in analogous situations the Supreme Court has decided otherwise moot cases on the grounds that the problem is "capable of repetition, yet evading review."60 In Moore v. Ogilvie,61 the Court rejected a claim of mootness in a case challenging the constitutionality of Illinois' nominating procedure for candidates for the offices of President and Vice-President. The Court rejected the argument that the case was moot because the election had been held and stated that

while the 1968 election is over, the burden . . . placed on the nomination of nominees . . . remains and controls future elections, as long as Illinois maintains her present system, as she has done since 1935. The problem is therefore "capable of repetition, yet evading review" . . . .62

officials to register the plaintiffs; and (2) an injunction restraining the enforcement and operation of the challenged residence requirement.

This problem would be avoided if the plaintiff claimed money damages, since the right to such damages does not expire with the happening of the election. The right to money damages in cases involving the loss of the right to vote is authorized by 28 U.S.C. § 1343(4), and has been consistently recognized by the Supreme Court. See, e.g., Smith v. Allwright, 321 U.S. 649 (1944); Lane v. Wilson, 307 U.S. 268 (1939). Moreover, the Court has decided cases involving money damages long after the contested election has been conducted. See, e.g., Smith v. Allwright, 321 U.S. 649 (1944) (a "white primary" law was declared unconstitutional, and the plaintiff recovered $5,000 in damages for loss of his right to vote three and one-half years after the election); Nixon v. Herndon, 273 U.S. 536 (1927) (a "white primary" law was declared unconstitutional, and the plaintiff recovered $5,000 two and one-half years after the election); Myers v. Anderson, 238 U.S. 368 (1915) (Maryland's grandfather clause was declared unconstitutional, and the plaintiff received damages six years after the election). Thus, it is clear that if the action challenging residence requirements was brought for money damages the mootness problem would be eliminated.

In Mills v. Green, 159 U.S. 651 (1895), the Court dismissed on grounds of mootness an action seeking to enjoin allegedly unreasonable registration procedures that had been adopted for a special election. The basis for this dismissal rested upon the fact that the election had taken place prior to the Court's decision. The Court declared that "when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." Id. at 658. Accord, Poe v. Ullman, 367 U.S. 497, 504 (1961); St. Pierre v. United States, 319 U.S. 41, 42 (1943); Allen-Bradley Local v. Wisconsin Employment Relations Bd., 315 U.S. 740, 746 (1942); Richardson v. McChesney, 218 U.S. 487 (1910); Tennessee v. Condon, 189 U.S. 64 (1903). For an extensive judicial analysis of mootness, see Ashwander v. TVA, 297 U.S. 288, 346-56 (1936) (Brandeis, J., concurring).


See Gray v. Sanders, 372 U.S. 368 (1963), in which the Supreme Court
On the basis of Moore, it would seem that an action challenging a state's residence requirements should not be dismissed on grounds of mootness merely because the election in which the plaintiffs sought to vote has taken place prior to the Court's decision.63

B. The Substantive Issue: Constitutionality

In Hall v. Beals,64 the United States District Court for Colorado held that the imposition of residence requirements for voting is a constitutional exercise of the power conferred on the states by article II, section 1 of the Constitution. In reaching this conclusion, the court declared that

the members of the Court recognize the unfairness and injustice in depriving the plaintiffs of their vote. However, we are powerless to remedy this since we must follow the law.65

The "law" which the court felt bound to follow was the Supreme Court's summary per curiam affirmance of the United States District Court for Maryland's decision in Dreuding v. Devlin.66 In that case the

held that the completion of the particular election did not make the case moot when the challenged "Act remains in force; and if the complaint were dismissed it would govern future elections . . . ." Id. at 376.

It should be noted that the "capable of repetition, yet evading review" standard does not require that the problem be repetitive for the particular plaintiff. In Moore the Court applied this standard even though the plaintiff did not allege that the operation of the statute would affect him in the future. Thus, in a suit challenging the constitutionality of residence requirements, this standard is applicable even though the plaintiff has fulfilled the requirement at the time of adjudication, and even though it is unlikely that he will be injured by its future operation.

63 The injection of additional circumstances into the factual situation surrounding a challenge to residence requirements, beyond the mere conduction of the election, might, of course, render the action moot. In Hall v. Beals, 90 S. Ct. 200 (1969), this situation was presented. In this action, Colorado's six month residence requirement for voting in presidential elections, COLO. REV. STAT. ANN. § 49-24-1 (1963), was challenged. This statute was amended, however, after the election, but prior to the Court's decision (amended on April 23, 1969 so as to require two months residence). Thus, while the Hall court noted that "[t]he 1968 election is history, and it is now impossible to grant the appellants the relief they sought in the District Court . . . .," it dismissed the action on grounds of mootness not on the basis of these "considerations," but on the fact that Colorado had amended its statute. Id. at 201. In considering the plaintiffs' challenge, the Court looked to the statute as it stood after it was amended. Id. at 201; see, e.g., Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1968); Ziffrin, Inc. v. United States, 318 U.S. 73 (1943); Carpenter v. Wabash Ry. Co., 309 U.S. 23 (1940); United States v. Schooner Peggy, 1 Cranch 103, 109 (1801). Since the plaintiffs would have been able to vote in the 1968 election if the amended statute had been in effect at that time, they had no interest in challenging the statute as amended.

65 Id. at 615 n.8.
court held that the classification of the electorate created by the imposition of Maryland's one-year residence requirement satisfied the traditional test of constitutionality under the equal protection clause:

[T]he Fourteenth Amendment safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.67

After recognizing that the state's objectives in imposing residence requirements were to identify the voter, to protect against fraud, and to insure that the voter will become a member of the community,68 the court upheld the statute saying that the residence requirement was not "wholly irrelevant to the achievement of the State's objective[s]."69 However, the "wholly irrelevant" standard is no longer the applicable standard in determining whether classifications of the electorate are permissible under the equal protection clause.

1. The "Compelling State Interest Test" and the Right to Vote. The equal protection clause does not forbid all classifications of the populace. Even classifications which result in inequality among various segments of the population are permissible in certain circumstances. Under the traditional standard, as applied in Dreuding, equal protection is denied only if the classification is not reasonably related to the government's objectives.70 In recent years, however, the Supreme Court has employed an alternative standard, to be applied only in certain circumstances, under which equal protection is denied unless the classification is necessary to promote "compelling state interests." If the state's objective is not deemed "compelling" or if the means chosen by the state to achieve a particular objective are not deemed "necessary," the classification in question will be held unconstitutional.

The "compelling state interest" doctrine has two branches. First, classifications based on suspect criteria are subject to this doctrine. The Supreme Court has ruled that classifications based on race,71 religion,72

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68 234 F. Supp. at 723.
69 Id. at 725.
wealth, or political beliefs are unconstitutional unless necessitated by compelling state interests. The second branch of this doctrine holds that any classification which burdens the exercise of a constitutional right is invalid under the equal protection clause unless shown to be necessary to promote compelling state interests. "Constitutional right" in the Supreme Court's usage includes not only those rights explicitly granted by the Constitution, but also fundamental rights which are protected by it. For example, in *Bates v. Little Rock*, a case involving the constitutionally protected right of association, the Supreme Court stated that "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." And in *Shapiro v. Thompson*, the Court, after recognizing that the right to travel is constitutionally protected, asserted that "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."

While it has generally been held that the right to vote is not explicitly granted by the Constitution, it is well established that the right to vote is a fundamental right protected by the Constitution. And the

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74 See Williams v. Rhodes, 393 U.S. 23, 31 (1969) (election laws preventing minority parties from being on ballot).
75 Some rights which, although not explicitly mentioned in the Constitution, have been held to be constitutionally protected are: the right to marital privacy, see Griswold v. Connecticut, 381 U.S. 479 (1965); the right to travel, see, e.g., United States v. Guest, 383 U.S. 745, 757-8 (1966); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871); the right to associate freely and privately, see, e.g., NAACP v. Alabama, 357 U.S. 449 (1958).
76 361 U.S. 516 (1960).
77 Id. at 524; accord, Gibson v. Florida Legislative Investigating Comm., 372 U.S. 539, 546 (1963).
79 Id. at 634 (emphasis in original); accord, e.g., Sherbert v. Verner, 374 U.S. 98, 463 (1965) and cases cited therein; see, e.g., Korematsu v. United States, 323 U.S. 214, 216 (1944); Skinner v. Oklahoma, 315 U.S. 535 (1942).
81 See, e.g., Williams v. Rhodes, 393 U.S. 23, 31-34 (1969); NAACP v. Button, 371 U.S. 415, 438-43 (1965). This comment, while recognizing the difficulties inherent in so problematic a doctrine, also recognizes the importance the Court has attributed to this standard, and, therefore, will consider its application to the question of residence requirements for voting.
The Supreme Court has ruled that classifications impairing the right to vote are valid only if necessary to promote compelling state interests. In *Kramer v. Union Free School District*, for instance, the Court held that "if a challenged state statute grants the right to vote to some ... and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."  

Residence requirements for voting in presidential elections would therefore appear to be constitutional only if they are necessary to promote compelling state interests. Three state interests are commonly urged as justifications for these requirements: "[t]o preserve the purity of elections," "[t]o insure that the voter is, in fact, a member of the state community," and "[a]dministrative reasons."  

(a) "To preserve the purity of elections." The states have a legitimate, and perhaps compelling, interest in identifying the voter and protecting against "double-voting" and fraud. However, in order to satisfy the compelling state interest standard, not only must the interest be compelling, but the means adopted to promote that interest must be necessary. In *Shapiro v. Thompson*, the Court ruled that the use of residence requirements for receipt of welfare benefits as a safeguard against fraud was not necessary to promote a compelling state interest because "less drastic means are available, and are employed, to minimize that hazard." Other and less drastic means are also available to protect against voting fraud. For example, voter identification today can be facilitated by the use of drivers' licenses, credit cards, photographs, and fingerprints. States which have eliminated their residence requirements have protected themselves against "double-voting" and "colonization" by requiring certifications from the new resident's prior election district, thereby ensuring local officials that the new resident has not retained his registration in the prior district. Moreover, the imposition of residence requirements does not effectively prevent fraud, since, under most state statutes, a voter's qualifications, including dura-

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87 Id. at 637.
88 See note 34 supra.
tional residency, are established by oath. As Justice Marshall aptly observed in his dissent in *Hall*:

> [t]he nonresident, seeking to vote, can as easily falsely swear that he has been a resident for a certain time, as he could falsely swear that he is presently a resident. The requirement of the additional element to be sworn—the duration of residency—adds no discernible protection against "dual-voting" or "colonization" by voters willing to lie.

Residence requirements are not necessary to promote the states' interests in preserving "the purity of election," and, therefore, this interest does not meet the requirements of the compelling state interest standard.

The Supreme Court's decision in *Carrington v. Rash* raises additional constitutional questions concerning the use of residence requirements as a means of limiting the electorate to bona fide residents. In *Carrington* the state argued that it could not be certain whether military personnel residing in Texas had a genuine intent to become bona fide residents. The state claimed that the administrative convenience of avoiding that difficult factual determination justified a blanket exclusion of all servicemen. The Court, while recognizing that the state had a right to restrict the vote to bona fide residents, held that such a conclusive presumption against bona fide residency was impermissible, and that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." While a state has a legitimate interest in protecting the "purity" of its elections, it may not adopt a conclusive presumption, such as a residence requirement, that all new residents are not bona fide residents.

(b) "To insure that the voter is, in fact, a member of the state community." Since the Electoral College system makes the states and not individual citizens the electors of President and Vice-President, it is argued that the states may legislate to ensure that those voting for its presidential electors are truly members of the state community.

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89 See, e.g., COLO. REV. STAT. ANN. § 49-4-17 (1963); HAWAII REV. STAT. § 11-4 (1966); IDAHO CODE ANN. § 34-807 (1963); KAN. STAT. ANN. § 25-410 (1964); UTAH CODE ANN. § 20-2-11 (1953); VA. CODE ANN. § 24-74 (1969).
90 90 S. Ct. at 205 (dissenting opinion of Marshall, J.).
91 380 U.S. 89 (1965).
92 Id. at 91.
The Supreme Court has held that the states have a right to require their voters to be bona fide residents. Two questions are posed by the "bona fide resident" or "member of the community" doctrine: (1) May the establishment of bona fide residency be conditioned on the fulfillment of a durational residence requirement? (2) Are there any compelling state interests, founded in this doctrine, which necessitate the imposition of residence requirements?

The first question has been answered above in the negative. Whether a new resident is a bona fide resident or merely a visitor is a question of fact. The state must determine if a new resident has a genuine intent to remain in the community. Through the imposition of residence requirements the state avoids making this determination by assuming that most new residents do not have the requisite intent. However, the Supreme Court has held that a state may not exclude persons from the franchise merely because of some remote administrative benefit to the state. This thus, a state may not deprive all new residents of the vote in order to avoid making factual determinations as to whether some of these new residents are not bona fide residents. Even if the "community" argument were to satisfy the requirements of Carrington, it would still have to satisfy the compelling state interest doctrine in order to justify the imposition of residence requirements. It is sometimes suggested that the state has a right to prevent new residents from voting until they have had an opportunity to inform themselves of national issues. This argument rests upon the assumption that "long-time" residents are better informed of national issues than are new residents. This assumption is of dubious validity. Modern developments in the press, radio, and television have enabled citizens to inform themselves of the issues involved in a presidential election no matter where they reside. The fact that a voter moves from one state or county to another does not mean that he is in any way less informed of national issues. The argument that a state has an


In Pope v. Williams, 193 U.S. 621 (1914), the Court held that residence requirements for voting in state elections were constitutional. However, the Court explicitly stated that "[i]n this case no question arises as to the right to vote for electors of President and Vice President, and no decision is made thereon." Id. at 633.

96 See note 93 supra.

97 In Shapiro v. Thompson, 394 U.S. 618 (1969), the Supreme Court rejected an argument that residence requirements for welfare receipts were justified as means of objectively determining residence. The Court held that "[t]he residence requirement (requirement that welfare applicant be a bona fide resident) and the one-year waiting period requirement are distinct and independent . . . ." Id. at 636.
interest in ensuring that new residents are informed of national issues is thus unsupported, if not unsupportable.

The second purported state interest rests upon the somewhat doubtful assumption that, even in presidential elections, a voter's "primary" community is the state and not the nation. It is argued that a state may deprive new residents of the vote until they have become familiar with local attitudes and their interests are the same as those of "long-time" residents. In *Carrington* the Court rejected this argument because "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." It would likewise be impermissible for a state to exclude new residents from the franchise merely because their political attitudes and probable voting habits differ from those of "long-time" residents.

The third justification for residence requirements stemming from the "community" doctrine rests on the fact that each state has unique problems of its own. It is argued that the state has a right to assure itself that new residents are adequately informed of local issues before allowing them to vote in presidential elections. Yet the assumption underlying this argument that knowledge of local issues is essential for a voter to cast an intelligent and meaningful vote in presidential elections has been almost unanimously rejected by statistical analysts, politicians, and academicians. Voters simply do not consider local

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98 See, e.g., 114 Cong. Rec. 15090 (1968), where Senator Montoya stated "[f]true we are each a citizen of a State, but we are first each a citizen of the United States."


100 See, e.g., Gallup Polls of Aug. 4, 1968; Oct. 10, 1968; Oct. 30, 1968. These polls illustrate the fact that voters are minimally concerned with local issues when considering presidential candidates. Statistical abstracts of voting behavior reveal that factors such as party identification, a candidate's image, social differentiation and perception, and national issues are the primary bases upon which voters make their choice. Local issues are of little or no importance. See, e.g., A. Campbell, P. Converse, W. Miller & D. Stokes, *Elections and the Political Order* (1966); A. Campbell & R. Kahn, *The People Elect a President* (1952); A. Campbell, G. Gurin & W. Miller, *The Voter Decides* (1954); P. Lazarsfeld, B. Berelson & H. Gaudet, *The People's Choice* (2nd ed. 1948).

101 See, e.g., *Hearing on Voting Rights Act Extension Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 1st Sess., ser. 3*, at 225 (1969) [hereinafter cited as *1969 Hearings*], in which Attorney General John Mitchell, discussing the Voting Rights Act Amendments of 1969, stated that "[n] residency requirement may be reasonable for local elections to insure that the new resident has sufficient time to familiarize himself with local issues. But such requirements have no relevance to presidential elections because the issues tend to be nationwide in scope and receive nationwide dissemination by the communications media. The President is the representative of all the people and all the people should have a reasonable opportunity to vote for him." See, e.g., 115 Cong. Rec. S5176 (daily ed. May 14, 1969) (remarks of Senator Edward Kennedy); 114 Cong. Rec. 15090 (1968) (remarks of Senator Montoya); 113 Cong. Rec. 14043 (1967) (remarks of Congressman Hechler).

102 See, e.g., 1961 *Hearings* at 472-3 (Statement of Brendan Byrne, Executive Director
issues in national elections. So while residence requirements might ensure informed ballots in local elections, no such justification supports these requirements for presidential elections.

Even if the Supreme Court were to find a compelling state interest here, the use of residence requirements to achieve the interest is of questionable constitutionality. By attempting to justify the imposition of residence requirements on the basis of the state's interest in ensuring that all voters possess knowledge of local issues, for instance, the state creates two presumptions: (1) most long-time residents possess such knowledge, and (2) most new residents do not possess such knowledge. The Supreme Court has formulated two somewhat problematic doctrines which, when applied to residence requirements for voting, prohibit the adoption of these presumptions.

First, as discussed earlier in terms of presumptions of non-bona fide residency, a state may not exclude a segment of its citizenry from the franchise because of a remote administrative benefit to the state. If a state wishes to allow only those citizens who are informed of local issues to vote, it may do so (the constitutionality of this possibility is not here in question) by administering tests to all potential voters. It may not, however, avoid the administrative problems inherent in the adoption of such tests simply by presuming that most new residents would fail and that most long-time residents would pass.

The second objection to the utilization of such presumptions stems from the proposition that even if a state's exclusion of certain citizens from the franchise is justified by compelling state interests, the exclusion is unconstitutional unless the least restrictive method of achieving the desired purpose is used. In Kramer v. Union Free School


See note 100 supra.

While the following discussion is phrased in terms of knowledge of local issues, it is equally applicable to knowledge of national issues and local attitudes.

See notes 107, 112 infra.

See text at notes 96-97 supra.

This argument is rendered uncertain by the Court's failure to adequately define "remote." For example, a literal interpretation of the Court's decision in Carrington might lead to the abolition of age requirements for voting, for the states should factually determine whether each individual is intelligent, experienced, or informed enough to vote. Surely the Court did not have the testing of two-year olds in mind when it formulated this doctrine, but, without limitations, the doctrine could logically be argued to require just that.

Residence Requirements for Presidential Elections

District the Court declared unconstitutional a New York statute which restricted the franchise for school district elections to those citizens who, in addition to possessing normal qualifications, also either (1) owned or leased taxable property within the district or (2) had children enrolled in the local public schools. The school district argued that the statute limited the franchise to those "primarily interested" in school affairs, and that this limitation was necessary to ensure that voters were informed of complex school matters. The Court, noting that some residents excluded under the statute might have a greater interest (albeit indirect) in school elections than some included under the statute, held that the statute was "not sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs to justify the denial of the franchise to [those who did not fulfill the statute's requirements]." The Kramer decision is directly applicable to the problem of residence requirements for voting in presidential elections. Since some new residents may be better informed of local issues than "long-time" residents, residence requirements, if intended to limit the franchise to those with knowledge of local issues, do not meet the "exacting standard of precision [the Court] require[s] of statutes which selectively distribute the franchise." State interests asserted under the "community doctrine" fail to justify the imposition of residence requirements for voting in presidential elections for two reasons: the asserted interests do not satisfy the compelling state interest doctrine; and the conclusive presumptions created by such requirements are constitutionally impermissible.

(c) "Administrative reasons." The states by closing voter registration at some time prior to an election, create a time period in which administrative tasks, such as processing registration lists and preparing polling places, may be performed. As recognized by Justice Marshall in his Hall dissent, the disenfranchisement that results from the closing

110 N.Y. EDUCATIONAL LAW § 2012 (1953).
111 395 U.S. at 633.

The Court's failure to define "least restrictive method" results in confusion as to the meaning of the doctrine. It could be argued that the Court is recognizing some form of mathematical jurisprudence. Under this approach, only the method which could be shown statistically to exclude the lowest number of voters for a given state objective would be acceptable under the "least restrictive method" rubric. The difficulties with this approach are self-evident and do not warrant elaboration. On the other hand, if the "least restrictive method" only signifies that method which satisfies five justices of the Supreme Court as striking a fair balance between the interests of the state in regulating elections and of the individual in voting in them, the doctrine is hardly a useful one.

of registration may be justified by compelling state interests, but this interest does not justify the imposition of residence requirements which are significantly longer than the period established in the registration laws.\footnote{114} In fact, it is difficult to conceive of any time-consuming administrative tasks—excepting those normally performed during the registration periods—which would justify extended residence requirements for those persons recently arrived from other states.

2. The "Compelling State Interest" Test and the Right to Travel. The right to travel has been "firmly established and repeatedly recognized" as constitutionally protected.\footnote{115} The constitutionality of

\footnote{114} Id. at 205.

In Virginia, for example, there is a one year residence requirement, VA. CODE ANN. § 24-17 (1969), VA. CONST. § 18 (1968), but registration is not closed until thirty days before the election, VA. CODE ANN. § 24-74 (1969). The state's need for a thirty day period in which it may perform administrative tasks does not justify the imposition of a one year residence requirement. See also IDAHO CODE ANN. § 34-808 (1963) (registration closes three days prior to the election), IDAHO CODE ANN. § 34-408 (1963) (sixty day residence requirement); LA. REV. STAT. ANN. §§ 18:71 et seq. (1969) (registration closes thirty days prior to the election), LA. REV. STAT. ANN. § 18:1393 (1969) (sixty day residence requirement).

It should be noted that the closing of registration creates de facto residence requirements, since new residents who enter the state after the close of registration are precluded from voting. While the closing of registration may be justified by compelling administrative interests, the impact of this closing upon persons who establish residence in the state after such closing might not be so justified. The closing of registration is necessary because of the large number of registrants the state must deal with. The number of persons who establish residence after the closing of registration is relatively small, however. While no figures are available as to how many persons would, in fact, be disenfranchised by de facto requirements, the number is certainly far smaller than those disenfranchised by statutorily imposed residence requirements, which are considerably longer. Those states which have eliminated their statutorily imposed residence requirements for presidential elections have also eliminated these de facto requirements by waiving registration requirements for those new residents who enter the state after the closing of registration. See, e.g., OHIO REV. CODE ANN. § 3504.02 (1964); OKLA. STAT. ANN. tit. 26, § 603 (Supp. 1967); WIS. STAT. ANN. § 6.18 (Supp. 1969). Since no significant administrative difficulties would result from exempting new residents from registration requirements, these requirements are probably not necessary to promote compelling administrative interests, and, as applied to new residents, these requirements may be unconstitutional.

\footnote{115} United States v. Guest, 383 U.S. 745, 757 (1966). The Guest Court added that "the right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." Id. at 757-8. Accord, Shapiro v. Thompson, 394 U.S. 618, 630-1 (1969); see, e.g., Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849); Randall v. Nevada, 73 U.S. (6 Wall.) 35 (1869); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 79 (1873); Twining v. New Jersey, 211 U.S. 78, 97 (1908); Edwards v. California, 314 U.S. 160, 181, 183-5 (1941) (Douglas & Jackson, J.J., concurring); Kent v. Dulles, 357 U.S. 116, 125 (1958); Zemel v. Rusk, 381 U.S. 1, 14 (1965).
Residence requirements may be challenged on the theory that classifications which penalize the exercise of the right to travel are unconstitutional unless necessary to promote compelling state interests. In Shapiro v. Thompson, the Supreme Court, after holding that welfare residence requirements were penalties on the right of travel and that they were not necessary to promote any compelling state interests, declared these requirements unconstitutional under the equal protection clause. In reaching this decision, the Court noted that:

[w]e imply no view of the validity of . . . residence requirements determining eligibility to vote . . . . Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

Since it has already been argued that residence requirements for voting in presidential elections are not necessary to promote compelling state interests, the only question remaining is whether or not these requirements are penalties upon the right to travel.

Unfortunately, the Court has never expressly defined the concept of "penalty" in this context. As a result, a discussion of whether residence

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116 This is a secondary basis for challenging residence requirements for voting in presidential elections. In his dissent in Hall v. Beals, 90 S. Ct. 200, 208 (1969), Mr. Justice Marshall, while concluding that residence requirements are unconstitutional as deprivations of the right to vote, does not even consider this subsidiary rationale for their unconstitutionality.

117 See Shapiro v. Thompson, 394 U.S. 618, at 634 (1969), in which the Court declared that "in moving from State to State or to the District of Columbia" a person is exercising his constitutional right to travel, "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." Cf. Carrington v. Rash, 380 U.S. 89, 96 (1965); United States v. Texas, 384 U.S. 155 (1966); Sherbert v. Verner, 374 U.S. 398, 463 (1963) and cases cited therein; Skinner v. Oklahoma, 316 U.S. 535 (1942).


119 Four asserted state interests were rejected by the Court as failing to satisfy the compelling state interest requirement: to facilitate the planning of the welfare budget, to provide an objective standard of residency, to minimize fraud, and to encourage early entry of new residents into the labor force.

120 394 U.S. at 638 n.21. In reference to this statement, Chief Justice Warren, dissenting, stated that:

Nor can I understand the Court's implication, ante, at 638, n.21, that other state residence requirements such as those employed in determining eligibility to vote do not present constitutional questions. Despite the fact that in Dredging v. Devlin, 380 U.S. 125 (1965), we affirmed an appeal from a three-judge District Court after the District Court had rejected a constitutional challenge to Maryland's one-year residence requirement for presidential elections, the rationale employed by the Court in these appeals would seem to require the opposite conclusion. If a State would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote. Id. at 654.

121 See text at notes 90-114 supra.
requirements for voting penalize the right to travel must be essentially speculative in nature. The Court, in applying this concept, has ruled that: (1) the loss of the right to welfare benefits penalizes the right to travel;\(^{122}\) (2) the conditioning of the right to vote upon the payment of a poll tax penalizes the right to vote;\(^{123}\) and (3) requiring organizations to disclose their membership lists, when such disclosure might result in discrimination against such members, penalizes the right to associate.\(^{124}\)

In each of these situations there was most likely some degree of deterrence in that the "penalty" deterred persons from exercising their constitutionally protected rights. It is doubtful that the loss of the right to vote due to the existence of residence requirements deters the exercise of the right to travel. If the Court is equating "penalty" with "deterrence," it is unlikely that residence requirements for voting would be considered penalties on the right to travel. On the other hand, it should be noted that when residence requirements deprive persons of their constitutionally protected right to vote, in contrast, for example, to depriving them of welfare benefits, the deprivation—at least in constitutional terms—is greater. If the Court looks to the nature of the deprivation as a determining factor, it is quite possible that the imposition of residence requirements does constitute a penalty on the right to travel.

### III. Congress

Attempted legislative action concerning residence requirements has a long history.\(^{125}\) In 1956 Congress officially recommended\(^{126}\) that the states adopt "reciprocal arrangements" similar to Connecticut's absentee

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\(^{125}\) As early as 1952 the National Institute of Municipal Clerks advocated federal action in this area, Ogul, Residence Requirements as Barriers to Voting in Presidential Elections, 3 Mw. J. Pol. Sci. 254, 255 (1959).

\(^{126}\) H.R. Con. Res. 94, 84th Cong., 1st Sess. (1955). This resolution, which was introduced by Rep. Curtis of Massachusetts in 1955, stated that Congress favored, and recommended to the states, the passage of reciprocal arrangements between the states which would allow a citizen to vote in his state of prior residence until he is qualified in his new state. This resolution was adopted in 1956. In 1954, Rep. Curtis introduced H.R. Con. Res. 218, 83rd Cong., 2nd Sess. (1954), proposing that Congress recommend to the states immediate enactment of appropriate legislation to enable a person to vote for federal officials when such persons would be eligible to vote but for residence requirements. This resolution was passed by the House, but was not reported from committee in the Senate.
The ineffectiveness of this indirect action led Congress to consider two possible direct solutions to the problem: the adoption of a constitutional amendment and the passage of direct federal legislation.

A. Proposals for a Constitutional Amendment.

The states' power to impose residence requirements for voting can be limited by constitutional amendment. Since 1961, over twenty-five constitutional amendments of this type have been proposed in Congress. The most popular form of amendment, following the Wisconsin approach, would restrict residence requirements to a stated maximum period. A second group of proposals follow the Connecticut approach, permitting ex-residents to vote by absentee ballot until they are qualified in their new state of residence. A third proposal couples a maximum requirement with an equally long absentee provision and is more desirable than either of the above approaches, for it eliminates disenfranchisement while subjecting only a limited number of movers to the burdensome absentee procedures. All these proposals are limited to protecting only interstate movers.

127 The absentee approach is discussed in the text at notes 22-23 supra.
128 Only nine states have adopted the absentee method, see notes 22-23 supra.
129 This power is derived from article II, section 1 of the Constitution. See note 18 supra.
130 Prior to 1961, proposals for such an amendment were rare. See S.J. Res. 51, 86th Cong., 1st Sess. (1958); H.R.J. Res. 524, 86th Cong., 1st Sess. (1959). The closeness of the 1960 election and the large numbers of citizens disenfranchised in it, however, effectively dramatized the need for federal intervention in this area, see notes 6-7 supra.
131 See text at notes 31-36 supra.
132 See, e.g., S.J. Res. 59, 91st Cong., 1st Sess. (1969) (thirty day maximum requirement) (sponsored by twenty-nine senators); H.R.J. Res. 550, 91st Cong., 1st Sess. (1969) (thirty day maximum requirement); H.R.J. Res. 539, 91st Cong., 1st Sess. (1969) (thirty day maximum); S.J. Res. 174, 90th Cong., 2nd Sess. (1968) (thirty day maximum); S.J. Res. 5, 90th Cong., 1st Sess. (1967) (sponsored by eight senators) (thirty day maximum); H.R.J. Res. 238, 88th Cong., 1st Sess. (1963) (ninety day maximum); S.J. Res. 90, 87th Cong., 1st Sess. (1961) (ninety day maximum); S.J. Res. 128, 87th Cong., 1st Sess. (1961) (ninety day maximum, but all those who would have been qualified to vote in their old state if they had not moved are allowed to vote immediately).
133 See text at notes 22-30 supra.
136 The question of residence requirements arose in conjunction with a bill recently passed by the House proposing a constitutional amendment eliminating the Electoral College and replacing it with direct election of the President and Vice-President. H.R.J. Res. 681, 91st Cong., 1st Sess. (1969). This amendment, in pertinent part, said: "The electors
B. Proposals for Direct Federal Legislation.

Congressional action was limited to proposals for constitutional amendments and concurrent resolutions until 1966. It was generally agreed, until that time, that Congress had no power to legislate under the equal protection clause of the fourteenth amendment to eliminate or restrict the imposition of residence requirements for voting.\(^3\)

Section 5 of the fourteenth amendment declares that “... Congress shall have power to enforce this article by appropriate legislation.” In the late nineteenth century, the Supreme Court had interpreted this amendment as having given Congress no independent authority to interpret the substantive provisions of the fourteenth amendment.\(^3\)

of President and Vice-President in each state shall have the qualifications requisite for electors of the most numerous branch of the State legislature, except that for electors of President and Vice-President the legislature of any State may prescribe less restrictive residence qualifications, and for electors of President and Vice-President the Congress may establish uniform residence qualifications.” Attempts to require the adoption of absentee procedures for those who had moved interstate were rejected, 115 Cong. Rec. H7784 (daily ed. Sept. 11, 1969); and a proposal to amend this clause to state that Congress will establish uniform residence requirements was rejected because it would be “suicidal” and would make a controversial amendment even more difficult to pass. 115 Cong. Rec. H8117 (daily ed. Sept. 18, 1969).

While it is true that the adoption of an amendment instituting the direct election of the President will probably be difficult to pass, there is little justification whatever for allowing the states to retain their control over voter qualifications for presidential elections once the Electoral College is abolished. Under the direct popular election system, all voting requirements should be uniform, and, as to residence requirements, there is no reason why any person should be deprived of his right to vote for President merely because he has changed his place of residence.


Prior to 1966 Congress might have been able to legislate with regard to residence requirements on the basis of the commerce clause. The Supreme Court has upheld the constitutionality of congressional enactments relating to the movement of persons across state lines on this basis, see, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). However, legislation based on the commerce clause would necessarily be limited to restricting state residence requirements. Local requirements could not be regulated since they do not affect interstate commerce.

\(^3\) See generally Burt, Miranda and Title II: A Morgantic Marriage, 1969 Sup. Cr. Rev. 81. The background of the equal protection clause makes it clear that the draftsmen of the fourteenth amendment regarded Congress as the primary organ for its enforcement. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 2459, in which Congressman Stevens stated that the amendment “allows Congress to correct the unjust legislation of the States . . . .” R. Harris, The Quest for Equality 53 (1960); J. Tenbroek, Equal Under Law 205-7 (1965); Comment, Equal Protection Clause—Congressional Power of Initial Determination, 20 Rutgers L. Rev. 827, 828 (1966). The Reconstruction Congress believed that the enforcement clause of the fourteenth amendment had enlarged congressional power by enabling Congress to by-pass state governments and act directly to protect the civil rights of all citizens. Acting under this belief, Congress enacted five acts pertaining to civil rights from 1866 to 1875: The Civil Rights Act of 1875, 18 Stat. 335 (1875); The Ku
As a result, congressional legislation based on the enforcement clause became virtually non-existent. These cases remained the law until 1966 when the Court rejected this narrow view of section 5 and replaced it with a broader construction.\footnote{This reversal was first hinted at by Justice Black in his dissenting opinion in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), in which he stated that he had "no doubt that Congress had the power under § 5 [of the fourteenth amendment] to pass legislation to abolish the poll tax . . . if it believes that the poll tax is being used as a device to deny voters of equal protection of the law." Id. at 679. In United States v. Guest, 383 U.S. 745 (1966), Justice Brennan, dissenting in part, stated that a majority of the Court rejected the contention that congressional power under section five was limited to "correcting the effects of prohibited state laws." Id. at 788.}

In \textit{Katzenbach v. Morgan},\footnote{384 U.S. 641 (1966).} the Supreme Court upheld the constitutionality of section 4(e) of the Voting Rights Act of 1965,\footnote{42 U.S.C. § 1973(b)(e) (Supp. I, 1964).} which provided that no person who had completed the sixth grade in any Puerto Rican school, in which the language of instruction was other than English, should be denied the right to vote in any election because of his inability to read or write English. The appellees argued that section 4(e) exceeded congressional power because there had been no prior judicial determination of a violation of equal protection upon which to base this section 5 legislation.\footnote{384 U.S. at 648.}

The Court ruled that section 5 was a positive grant of power authoriz-
ing Congress to exercise its discretion as to whether and what legislation is needed to secure the guarantees of the fourteenth amendment. In determining whether the challenged statute constituted “appropriate legislation,” as required by section 5, the Court considered three questions: may the enactment be regarded as an enforcement of the equal protection clause; is the enactment “plainly adapted to that end”; and, is it not prohibited by, but consistent with, the letter and spirit of the Constitution? Proposed federal legislation concerning residence requirements should be measured against these same standards.

In answering the first question, the Morgan Court considered two factors. First, Congress had expressly declared that section 4(e) was enacted to secure fourteenth amendment rights; the same declarations are present in residence requirement legislation. More importantly, the Court seemed to judge the nature of the deprivation of the right to vote and conclude that it might well be subsumed under the equal protection clause; the parallel with the residence requirement legislation is striking.

In answering the second question, whether the legislation was “plainly adapted” to enforce the equal protection clause, the Court viewed the statute on two levels. First, the Court noted that competing state and individual interests had to be balanced against one another in determining when federal intervention was appropriate. With regard to this balancing process, the Court stated:

[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . . . It is not for us to review the congressional resolution of these factors.

143 Id.
144 Id. at 651.
145 For example, the Residency Voting Act of 1967, proposed by President Johnson, explicitly declared that: “Sec. 2 The Congress hereby declares that to enhance the right under the fourteenth amendment to the Constitution of citizens who change their residence to enjoy equal access to the right to vote in the election for President and Vice President of the United States . . . it is necessary to prohibit the States from conditioning the right to vote on the fulfillment of unfair requirements of residence and registration.” See H.R. 10949, 90th Cong., 1st Sess. (1967); H.R. 12133, 90th Cong., 1st Sess. (1967); H.R. 12255, 90th Cong., 1st Sess. (1967); H.R. 12635, 90th Cong., 1st Sess. (1967).

In some situations the text of the proposed bill does not explicitly declare that it is intended as an enforcement of the equal protection clause. In such situations, however, the background of the bill makes it clear that it is so intended. See, e.g., 1969 Hearings at 277-8, in which Attorney General Mitchell states that the Voting Rights Act Amendments of 1969 (H.R. 12695, 91st Cong., 1st Sess. (1969); S. 2507, 91st Cong., 1st Sess. 1969)) is intended as an enforcement of the fourteenth amendment.

146 384 U.S. 641, 652.
It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.\textsuperscript{147}

A congressional decision to restrict the imposition of residence requirements for voting rests upon such a reasonable balancing of interests. Factors such as increased mobility,\textsuperscript{148} the disenfranchisement caused by residence requirements,\textsuperscript{149} the importance of the right to vote,\textsuperscript{150} and the nonuniformity of state action\textsuperscript{151} can, at the very least, rationally be thought to outweigh the state interests in preventing fraud,\textsuperscript{152} ensuring that new residents are members of the community,\textsuperscript{153} and handling the administrative problems inherent in conducting an election.\textsuperscript{154}

At a second level, the Court upheld Congress' power to decide that New York's English literacy requirement created an invidious discrimination,\textsuperscript{155} and it declared that such a decision is valid if the Court can perceive a basis on which the judgment was made.\textsuperscript{156} Given the constitutionally protected nature of the right of vote,\textsuperscript{157} and the fact that residence requirements are not necessary to promote any compelling state interests,\textsuperscript{158} Congress could reasonably decide that residence requirements create an invidious discrimination.

The third question, whether the challenged statute is consistent with the letter and spirit of the Constitution, poses some difficulties. There are four types of legislation which Congress could enact with regard to residence requirements for voting in presidential elections: legislation establishing a maximum permissible residence requirement; legislation requiring the states to allow ex-residents to vote absentee if they are prohibited from voting in their new place of residence by residence requirements; legislation combining a maximum permissible requirement with absentee provisions; and legislation eliminating residence requirements entirely. The first and third alternatives involve the

\textsuperscript{147} Id. at 653.
\textsuperscript{148} See note 10 supra.
\textsuperscript{149} See notes 7, 9 supra.
\textsuperscript{150} See note 81 supra.
\textsuperscript{151} See Tables I and II supra.
\textsuperscript{152} See text at notes 89-94 supra.
\textsuperscript{153} See text at notes 95-112 supra.
\textsuperscript{154} See text at notes 113-4 supra.
\textsuperscript{155} The Court declared that "[t]rue, the statute [§ 4(e)] precludes, for a certain class, disenfranchisement and thus limits the States' choice of means of satisfying a purported state interest. But our cases have held that the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened, ... and Congress is free to apply the same principle in the exercise of its powers." 384 U.S. at 655, n.15 (emphasis added).
\textsuperscript{156} 384 U.S. at 656.
\textsuperscript{157} See text at note 81 supra.
\textsuperscript{158} See text at notes 89-114 supra.
adoption of a maximum permissible requirement and would, in effect, authorize the states to adopt requirements of shorter duration than the maximum. Since, as seen above, the constitutionality of any residence requirement for voting in presidential elections is dubious, the adoption of a maximum requirement might well have the effect of authorizing the states to violate the equal protection clause. In *Shapiro v. Thompson* it was argued that section 402(b) of the Social Security Act of 1935 authorized the imposition of one year residence requirements for receiving welfare benefits. The Court declared that if section 402(b) did authorize such requirements it was unconstitutional, for "Congress may not authorize the States to violate the Equal Protection clause." Hence, a federal enactment permitting a maximum residence requirement might not be consistent with "the letter of the Constitution."

However, neither of the two remaining possible enactments, the adoption of a complete absentee system and the complete elimination of residence requirements for voting in presidential elections, authorizes the states to adopt unconstitutional residence requirements. Both of these alternatives are consistent with "the letter and spirit of the Constitution," and are, therefore, permissible under the *Morgan* standard.

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159 See text at notes 64-124 supra.
161 42 U.S.C. § 602(b).
162 394 U.S. at 641.
163 A related yet distinguishable problem confronted the Court in *Morgan*. There the appellees claimed that § 4(e) of the Voting Rights Act worked an invidious discrimination in that it was not applicable to people educated in schools beyond the territorial jurisdiction of the United States. The Court rejected this contention, noting that "reform may take one step at a time . . . ," and that a reasonable limitation on the scope of applicability of a reform measure was not prohibited by the Constitution. *Id.* at 656-7. Such reasoning, however, is not applicable to a statute establishing a maximum residence requirement. Section 4(e) merely prohibited a certain type of literacy test and was silent as to all others, while a statute establishing a maximum residence requirement authorizes the adoption of requirements of shorter duration than the maximum. Moreover, even if § 4(e) were interpreted as authorizing other types of literacy tests, such an authorization would not be unconstitutional, since such tests are generally constitutionally permissible. *See*, e.g., *Lassiter v. Northampton County Bd.* of Elections, 360 U.S. 45 (1959).
164 A statute requiring the states to adopt absentee procedures, while recognizing the existence of residence requirements for voting in presidential elections, cannot be said to authorize their imposition. Such a statute neither prohibits nor permits the imposition of such requirements, it merely provides a remedy.
165 It should be noted that the Supreme Court's decision in *Dreiding v. Devlin*, 380 U.S. 125 (1965), holding that residence requirements for voting are not violative of the equal protection clause, did not foreclose Congress' right to restrict the imposition of these requirements on the basis of the equal protection clause. The *Morgan* Court confronted this problem with regard to its decision in *Lassiter v. Northampton County Bd.*
Since Morgan there have been over twenty-five proposals for federal legislation in this area. These proposals are of primarily two types. The first type calls for the establishment of September first as the maximum permissible residence requirement for voting in presidential elections.¹⁶⁶ This approach offers protection neither to intrastate movers nor to interstate movers who changed their residence after September first. The second approach aims not only at establishing September first as the maximum requirement, but also at allowing anyone moving interstate after September first to vote absentee in the state from which he had moved.¹⁶⁷ None of these proposals has been reported from committee. The most comprehensive bill¹⁶⁸ yet proposed, however, has already passed the House,¹⁶⁹ and is presently under consideration in the Senate Committee on the Judiciary. This bill, which has the support of the Nixon administration, would establish September first as the maximum residence requirement at both the state and local levels, and would permit absentee voting for persons who move after that date.

Two further approaches are available to Congress which might comport more closely with the standards for appropriate legislation to enforce the equal protection clause.¹⁷⁰ First, Congress may require that all states provide absentee ballotting privileges to all citizens who have


¹⁷⁰ See text at notes 159-63 supra.
changed their place of residence (either interstate or intrastate) and who, as a result of this move, cannot meet the residence requirements of their new place of residence. While such an enactment would eliminate the disenfranchisement caused by residence requirements, it would be subject to the many problems previously discussed with regard to the adoption of such an absentee approach.

The most desirable form of congressional action would be the adoption of a statute abolishing all residence requirements for voting in presidential elections. Such a statute would avoid the constitutional objections which would arise with regard to a statute establishing a maximum requirement, would avoid the problems inherent in a complete absentee approach, would provide the states with sufficient time to handle administrative difficulties and prevent fraud through their registration laws, and would eliminate all disenfranchisement due to the imposition of residence requirements for voting in presidential elections.

CONCLUSION

Residence requirements for voting in presidential elections have deprived millions of Americans of their constitutionally protected right to vote for President and Vice-President of the United States. The states have moved slowly and unevenly in dealing with this problem, and the solution will have to be found at the national level. While recent Supreme Court decisions seem to indicate that the Court will soon strike down these requirements as unconstitutional, the adoption of a federal statute completely abolishing residence requirements for voting in presidential elections would be the swiftest, most equitable, and most efficient method of eliminating the unnecessary disenfranchisement that these requirements will otherwise cause in future presidential elections.

172 See text at notes 24-30 supra.
173 In addition, Congress may eliminate the disenfranchising effects of the de facto residence requirements created by registration laws by either exempting new residents from registration requirements, or by allowing persons who enter a state or political subdivision after the closing of registration to vote in their prior place of residence by absentee ballot. See note 114 supra.