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CONSTITUTIONAL STANDARDS APPLICABLE TO VOTER REGISTRATION CLOSING DATES

Judicial pronouncements during the last decade on the relationship between the state, the voter, and the Federal Constitution have circumscribed the power states formerly enjoyed to impose restrictions on availability of the franchise. Nevertheless, all states but one maintain voter registration systems, one element of which is a closing date which cuts off registration at a stipulated point in time prior to election day. While in a statistical sense large scale de facto disfranchisement results from the use of closing dates, a distinct issue is presented as to whether this disfranchisement is of a type that is proscribed by the Federal Constitution.

This article considers the nature and extent of disfranchisement that results from closing dates, the constitutional restrictions and standards that apply, and possible judicial and legislative solutions to this problem.

I. NATURE AND EXTENT OF DISFRANCHISEMENT CAUSED BY VOTER REGISTRATION CLOSING DATES

Registration closing dates work a de facto disfranchisement in two distinct ways. First, to the extent that registration prior to a closing date makes voting an arduous task for the citizen, it deters his exercise of the franchise. In the abstract, the average citizen can be assumed to view registration and voting along rational cost-benefit lines; his decision whether to register is made by balancing the "costs" of complying with registration requirements and the "benefits" he perceives as deriving from the right to vote.

2 The closing dates for those states having a voter registration system are set forth in the Appendix. The minimum closing period is ten days (Oklahoma), the maximum four months (Mississippi).
Other elements of some voter registration systems are provisions that registration may occur only on certain days (see Appendix infra), and provisions that voters must re-register each year to maintain their voting status (see Doty, supra note 1).
3 See text accompanying notes 11–15 infra.
4 This conceptual framework has been adopted in Kelley, Ayers & Bowen, Registration and Voting: Putting First Things First, 61 Am. Pol. Sci. Rev. 359 (1967) (hereinafter cited as Kelley).
Obtaining information on the registration system and then complying with the requirements thereof may involve a good deal of inconvenience as well as a loss of income if the citizen is away from his job or business. At some point these costs may become so great that the citizen simply decides to forfeit the benefits accompanying the right to vote.

Second, in some instances closing dates operate as a form of durational residency requirement insofar as they exclude voters who move into the jurisdiction after the closing date has passed. In this respect, closing dates are analogous to the usual durational residency requirements and occasionally invoked special conditions precedent to voting such as property ownership. Compliance with such requirements hinges upon more than a citizen's cost-benefit analysis. If a citizen moves into the jurisdiction after the closing date or does not meet the durational residency requirement, he will be precluded from voting. If a citizen does not own property, the only way in which he will be able to vote in an election limited to property owners is to acquire property himself.

In short, the potential voter faces a matrix of requirements, not the least of which are closing dates, that he must satisfy before casting his ballot. Access to the polls under these systems is not

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5 Id. at 360–61.
7 Closing dates only operate as de facto residency requirements in a limited number of instances. For example, where the state has a county or precinct residence requirement that is shorter than the closing period, voters moving between two points in the same state would be disfranchised by the closing requirement, although they would meet the state's residence requirements. E.g., Nev. Rev. Stat. §§ 293.485 and 293.560 (1969). However, Nev. Rev. Stat. § 293.490 (1969) permits voters in this situation to vote in their former county or precinct. The same situation would obtain if a state had no residency requirement.
9 Many state durational residence requirements have come under attack in the courts on the ground that they violate equal protection. See, e.g., Andrews v. Cody, 327 F.Supp. 793 (three judge court, M.D.N.C. 1971), appeal docketed, 40 U.S.L.W. 3290 (Nov. 6, 1971) (No. 71-628), holding the North Carolina one year residence requirement invalid as to local elections. The opinion reviews many recent federal cases dealing with the issue. Id. at 794.
10 However, these have almost uniformly been held unconstitutional as infringements on the right to vote. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (only owner or lessee of real property or a parent of school children allowed to vote in school board election); Cipriano v. City of Houma, 395 U.S. 701 (1969) (property ownership a prerequisite for voting in a municipal utility bond election); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (property ownership required for electors in general obligation bond election).
Although no available data demonstrate exactly how many persons fail to vote solely on account of registration closing dates, from what data are available, some estimates can be ventured. One group of students of voting behavior has estimated that a decrease in the period between the close of registration and election day from one month to one week would increase registration by approximately 3.6 percent. Such an increase would be particularly noteworthy in view of the statistical correspondence between increased registration and increased voting.

In those states which express the closing date in terms of a fixed number of days, the average closing date is thirty-three days before the election. Advancing this average from approximately one month to one week could be expected to yield a significant increase in the numbers of those able to vote on election day.

For a graphic presentation of this matrix, see Doty, supra note 1, at 202. See also Note, Election Laws as Legal Roadblocks to Voting, 55 Iowa L. Rev. 616 (1970).

As this group states:

A more striking finding is the extremely strong relationship between the date at which registration rolls are closed and the percentage of the population of voting age that is registered. . . . [Analysis] implies that extending the closing date from say, one month to one week prior to election day would tend to increase the percentage of the population registered by about 3.6 percent. For politicians, varying the closing date for registration would thus appear to be a very effective way in which to manipulate the size of the potential electorate.

Kelley, supra note 4, at 367.

The Kelley study is based on an analysis of statistical data of the 1960 elections for approximately one hundred cities. The limited nature of this study may undermine its applicability to present voter systems, especially because since 1960 many more states have moved to permanent registration systems. Furthermore, the study employs regression analysis which makes no attempt to determine in fact what effect reducing closing dates would have on registration; rather, the analysis seeks to explain differences in voting and registration between cities in terms of factors such as closing dates.

Kelley observed that "if the percentage of population of voting age registered to vote in city A was one percent higher than in city B, then the percentage of the population actually voting in city A was, on the average, almost exactly one percent higher than in city B." Id. at 362 (emphasis added). In 1970, there were 120,701,000 persons of voting age in the United States. Of these, 75,876,000 were registered to vote. U.S. Bureau of the Census, Statistical Abstract of the United States: 1971, at 364-65. If the Kelley analysis is correct, one could project from these statistics that the effect of moving closing dates back from one month to one week would have been to increase registrations by three to four million voters nationally with an increase in the number of votes cast equal to about 80 percent of the number of newly registered votes. Kelley, supra note 4, at 362.

This computation is based upon material set forth in the Appendix, infra.

See notes 11 and 12 supra. On the general subject of what impact more reasonable closing dates might be expected to have, another observer has estimated that "[n]on-voting by two or three percent of the population [in November elections] is associated with . . . September closing dates . . . ". W. Miller, Memorandum to the President's Commission on Registration and Voting Participation, cited in Kelley, supra note 4, at 367 n. 35. In Beare v. Smith, 321 F.Supp. 1100 (three judge court, S.D. Texas 1971), the panel voided the Texas annual re-registration statute which permitted registration only during a four month period ending January 31 of each year and covering all elections for approximately the next twelve months. The court noted that a professor at the University of Texas had testified that in Texas registration would increase about 2.7% for each month closer to the general
Interestingly, available data suggest that the length of closing dates has greater statistical significance on voting than the length of durational residency requirements. Thus, while only a series of oblique statistical estimates can be called upon, it is at least logically inferrable that voter registration closing dates act to prevent thousands of otherwise qualified voters from voting.

II. Analysis Of Constitutional Standards Governing Voter Registration Closing Dates

Under our federal system, the power to establish qualifications for voters in state and national elections resides in the states. Furthermore, the states are authorized to prescribe the procedures and details of elections, subject only to the power of Congress to make laws regulating the time and manner of holding elections for United States Senators and Representatives. The post-Civil War amendments restructured the state-federal balance of power in the voting rights area. In the early years after passage of the fourteenth amendment, the courts held that the states were free to impose any "reasonable" restrictions on the availability of the franchise so long as they avoided arbitrary and irrational discrimination between individuals. Recently, however, the Supreme Court has regarded this traditional con-

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15 "We found that differences among cities in rates of registration were not significantly related to differences in the length of residence in states and localities required of voters. This finding is surprising." Kelley, supra note 4, at 368 (emphasis added). It should be noted that this finding cannot be said to stand for the proposition that fewer people are being disfranchised by residency requirements than by closing dates. It merely indicates that as applied to various localities no significant relationship exists between the length of a residency requirement and registration rates.


17 U.S. Const. art. I, § 4. This limited view of congressional power over elections and voting is expanded, however, by the congressional power to make substantive findings of violations of equal protection. See Katzenbach v. Morgan, 384 U.S. 641 (1966), and Oregon v. Mitchell, 400 U.S. 112 (1970).

18 U.S. Const. amend. XIII, XIV, XV.

19 E.g., in Pope v. Williams, 193 U.S. 621, 632 (1904), a Maryland statute requiring that new residents delcare their intent to make Maryland their residence as a condition precedent to registration for voting was held to be entirely within the state's power to prescribe non-discriminatory requirements for voters. More recently, in Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), the Supreme Court held that it was reasonable for a state to enact a literacy test as a condition precedent to voter registration and that this classification was entirely within the state power. Compare Katzenbach v. Morgan, 384 U.S. 641 (1966).
stitutional analysis under the equal protection clause as inappropriate when applied to voting rights.\textsuperscript{20}

In a democratic society where major governmental decision-making and accountability are vested in elected officials, voting plays a key role in the functioning of the entire political system. The right to vote is important in our governmental system because it is "preservative of other basic civil and political rights."\textsuperscript{21} From this it follows that restrictions on free exercise of the franchise can result in an erosion of all rights including voting rights. The obvious, if circular, result can be a disfranchisement of groups which then have no political representation with which to remedy their exclusion from the political process. This theme has recurred in many of the voting rights cases of the past decade.\textsuperscript{22}

This article attempts to distill the teaching of two competing lines of cases in order to determine with reasonable specificity that standard of constitutional equal protection which is applicable in the closing date context. It necessarily leaves to the courts the difficult task of applying this standard to complex factual situations that will differ from one jurisdiction to the next. Knowing what the proper test is at least allows courts to concentrate on those facts that are constitutionally relevant.

\textbf{A. Evolution of the Constitutional Standards}

Because the franchise is a constitutionally protected right,\textsuperscript{23} the equal protection clause of the fourteenth amendment has been held to apply to state restraints on voting.\textsuperscript{24} In creating a closing date a state legislature classifies citizens on the basis of when they choose to register, that is, the state gives the right to vote to those


\textsuperscript{21}Reynolds v. Sims, 377 U.S. 533, 562 (1964), \textit{reh. denied}, 379 U.S. 870 (1964). \textit{See also} Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886), where the Court first advanced the notion that "voting . . . is regarded as a fundamental political right, because preservative of all rights."

\textsuperscript{22}\textit{See, e.g.}, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969), where the Court held that New York could not make property ownership a precondition for voting in school elections. "[W]hen the challenge to the statute is . . . a challenge of this basic assumption [that an election fairly represents the voice of the people], the assumption can no longer serve as the basis for presuming constitutionality." \textit{Id.} at 628.

\textsuperscript{23}\textit{In Reynolds v. Sims}, the Court stated: "Undeniably, the Constitution of the United States protects the rights of all qualified citizens to vote in state as well as in federal elections." 377 U.S. at 554.


\textit{For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment . . . [T]he right of suffrage is subject to the imposition of state standards which are not discriminatory. . . .}
who register before the closing date, while it denies the vote to those who attempt to register after the closing date. The constitutional issue then is whether a classification which withholds the franchise from those who register after the closing date denies those precluded from voting equal protection of the laws.

To resolve this issue, a formulation of a constitutional standard of equal protection which courts can apply in determining whether a state is violating constitutional rights in its regulation of the franchise is necessary. Departing from the traditional equal protection analysis, the major voting rights opinions of the past decade have evolved a standard against which state closing dates must be measured.

For reasons of policy, states have created classifications in granting the franchise. For example, many state statutes provide that felons and illiterates may not vote, and several state laws require that one be a resident of the jurisdiction for six months prior to election day. In answer to the charge that such a classification violates equal protection, courts have traditionally stated that only a rational basis need be found to justify the legislative classification. While the rhetoric of these earlier cases at times reappears, modern holdings have evolved a more rigorous standard for application where the franchise is involved.

In Reynolds v. Sims, the Alabama legislative apportionment scheme was challenged on equal protection grounds for weighting the votes of rural citizens more heavily than those of their urban counterparts. In its opinion the Court discussed voting as a "fundamental right" and noted that any restriction on that right must be "carefully and meticulously scrutinized." However, while the Court injected this new language, it invalidated the apportionment plan on the ground that it was a discriminatory and irrational scheme that made the value of one's vote depend solely upon his

25 See, e.g., N.Y. Election Law § 152 (McKinney 1964); Texas Election Code art. 5.01 (1967).
27 See, e.g., Drueg v. Devlin, 234 F.Supp. 721 (D. Md. 1964), aff'd mem., 380 U.S. 125 (1965), where a Maryland durational residency requirement was upheld on the grounds that it was not "so unreasonable as to amount to a prohibited discrimination," since the requirement might have been enacted to protect the voting process against fraud and insure that citizens would have an interest in the election. 234 F.Supp. at 723-24. See generally, Developments in the Law, Equal Protection, 82 Harv. L. Rev. 1065 (1969).
30 377 U.S. at 561-62.
31 Id. at 562.
The Court employed a similar analysis in *Carrington v. Rash*, which involved a Texas statute prohibiting any member of the armed forces from voting in a Texas election unless that person had been a Texas resident before entering the service. Carrington alleged that Texas, in conclusively presuming that he lacked residency for registration purposes, regardless of whether he met current state qualifications for the franchise, violated his right to equal protection of the laws. While the Court recognized a valid state interest in insuring that all voters were bona fide residents of the jurisdiction, discrimination on the basis of occupation was held to be an impermissible means for advancing that interest. The Court’s conclusion that the Texas statutory residence provision was not “reasonable in light of its purpose” follows from the fact that excluding citizens by occupational criteria does not insure that all bona fide residents and only bona fide residents will be allowed to vote. In effect, the Court found the Texas provision to be unreasonably broad in its sweep.

In *Harper v. Virginia Bd. of Elections*, the Court faced the question whether a Virginia poll tax violated equal protection. Mr. Justice Douglas for the majority noted that “[w]e have long been mindful that where fundamental rights and liberties are asserted under the equal protection clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.” However, in holding that the tax violated equal protection, he concluded that “[w]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so conditioned or burdened.” Therefore, *Harper*, read in the light of *Reynolds*, suggests a more rigorous analysis under the equal protection clause than the typical rational relation test. Where voting rights are involved and an infringement of the right is alleged, the Court will not afford

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32 *Id.* at 568: “Furthermore, the existing apportionment, and also to a lesser extent the [proposed] apportionment, presented little more than crazy quilts, completely lacking in rationality and could be found invalid on that basis alone.”

33 380 U.S. 89 (1965).

34 *Id.* at 93–94.

35 *Id.* at 96.

36 *Id.* at 93, quoting from *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

37 Such a classification is unreasonable in excluding possibly bona fide residents of Texas from voting because presumably no member of the armed forces can establish residence while in service, even though a similarly situated citizen not in the armed forces could do so.


39 *Id.* at 670.

40 *Id.*

41 See cases cited in note 27 supra.
legislatures the former presumption of reasonableness and validity of classification; rather, these classifications will come under close scrutiny in order to determine whether in fact they advance any legitimate state interest.

Arguably, in asserting that any alleged infringement of the right to vote must be meticulously scrutinized, the Court has not changed its basic equal protection test. In one sense the Court is reiterating old language and ideas: in *Carrington* and *Harper* the Court struck down voting restrictions on the ground that because the lines drawn by the states bore no relationship to their legitimate interests in the franchise, the classification was not rational.42 On the other hand, the Court is using new language and ideas: where an infringement of so fundamental a right as voting is alleged, the Court will subject the state's justification for its classification to meticulous scrutiny. No longer will the Court be willing to presume that a classification is valid.43 In retrospect it seems fair to conclude that *Carrington* and *Harper* together indicate a change in the equal protection analysis to be used in voting rights cases.

With its decision in *Williams v. Rhodes*44 the Court limited a state's power to restrict the availability of a position on the ballot. Some months before the 1968 election, the American Independent Party sought a place on Ohio's printed ballot. State law provided that a minority party could only be put on the ballot by presenting a petition signed by at least 15 percent of the number of voters in the last election and by meeting other requirements. Neither the Democratic nor Republican parties had to clear such a difficult hurdle to get on the ballot, and this disparity was alleged to violate equal protection. The Court stated: "We must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. [Citing *Carrington*]."45 However, the opinion goes on to recognize that the case also involved the right to associate freely as protected by the first amendment. Furthermore, when a first amendment liberty is infringed, the infringement can be justified only by a "compelling

42 See text accompanying notes 35–40 supra.
43 Compare *Lindsay v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911): "One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." While only economic rights were involved under a statute restricting extraction of underground water in *Lindsay*, the same standard has been applied to voting rights. See, e.g., *Drueding v. Devlin*, 234 F.Supp. 721 (D. Md. 1964), aff'd mem., 380 U.S. 125 (1965).
44 393 U.S. 23 (1968).
45 *Id.* at 30.
The notion that a fundamental right can be lawfully abridged only when there is a showing of a compelling state interest derives from an earlier line of cases; however, it had not previously been applied in the voting rights area. Nevertheless, the Williams Court found that the state had failed to show any “compelling interest” which would justify imposing such heavy burdens on the “right to vote and associate.” On this ground the Court ordered the American Independent Party placed on the ballot.

Decided after Williams, Kramer v. Union Free School Dist. No. 15 involved a citizen’s challenge to a New York statute that prevented him from voting in a school district election because he did not own or lease property and was not a parent of children enrolled in school. The Court found the statute invalid as a violation of equal protection. Mr. Chief Justice Warren wrote: “If a challenged state statute grants the right to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. [citing Carrington].” Taking the matter under “exacting judicial scrutiny,” the Court goes on to find that while the state may well have an interest in limiting the franchise to those who are primarily

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47 In general, the compelling state interest standard has been employed: (1) where “fundamental rights” are involved [see, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to travel); N.A.A.C.P. v. Button, 371 U.S. 415 (1963) (rights of expression and association); Skinner v. Oklahoma, 316 U.S. 535 (1942) (the right to procreate); Bates v. Little Rock, 361 U.S. 516 (1960) (freedom of association)]; and (2) where “suspect classifications” are involved [see, e.g., McLaughlin v. Florida, 379 U.S. 184 (1964) (racial classifications); Korematsu v. United States, 323 U.S. 214 (1944) (racial classification); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (wealth as a classification)]. More often than not these “suspect classifications” call for a Harper “close scrutiny,” rather than a compelling state interest test. An interface of these two lines of cases can be seen in Loving v. Virginia, 388 U.S. 1, 11 (1967) (racial classification must serve an “overriding purpose independent of invidious racial discrimination”).
48 See the discussion of the standards employed in Reynolds, Harper and Carrington in text accompanying notes 29-43 supra.
49 393 U.S. at 31 (emphasis added).
51 Id. at 627. The reference to Carrington is puzzling. The opinion in that case clearly applies a test of reasonableness rather than compelling state interest. However, the Kramer test is foreshadowed in the cited section of Carrington: “[S]tates may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. . . .” 380 U.S. at 96.
52 395 U.S. at 628. Note that the Court denies the state a presumption of validity (the same analysis as employed in Harper) and examines the rationality of the statute in light of its goals:

[The deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators. . . . When we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality
affected by the consequences of the election.\textsuperscript{53} the New York statute does not achieve even that end with sufficient precision. Rather, it draws into the classification of included voters some who do not have a stake in the outcome of the election, while it excludes others who do have an interest in the election.\textsuperscript{54}

Decided the same day as \textit{Kramer, Cipriano v. City of Houma}\textsuperscript{55} involved a citizen who was denied the vote in a municipal utility system revenue bond election pursuant to a Louisiana law that limited participation in such elections to property owners. In applying the compelling state interest test as enunciated in \textit{Kramer}, the Court found that the state had "fenced out" a sector of the population which had a valid interest in the election and that the state had no legitimate interest in so doing.\textsuperscript{56} One year later, in \textit{City of Phoenix v. Kolodziejski}, the Court extended the holding of \textit{Cipriano} and the test used in \textit{Kramer} to cover an authorization election for municipal bonds, holding that exclusion of non-property owners from the vote in such elections again served no compelling state interest.\textsuperscript{57}

In \textit{Evans v. Cornman}\textsuperscript{58} the Court faced the problem of the residency for voting purposes of residents of a federal enclave. Local voter registrars in Maryland sought to exclude plaintiffs from the polls on the ground that as residents of the National Institutes of Health, they did not meet Maryland's residency requirements. The Court first noted that states cannot draw lines inconsistent with the equal protection clause, and that courts should carefully scrutinize the purposes and interests behind such a restriction of the franchise.\textsuperscript{59} In holding that Maryland's exclusion of plaintiffs from the franchise was an impermissible


\textsuperscript{54} 399 U.S. 419 (1970).

\textsuperscript{55} Id. at 627-28.

\textsuperscript{56} Id. at 632. However, the Court did not decide whether such an interest is a compelling one. \textit{Id. n.} 14.

\textsuperscript{57} 395 U.S. 701 (1969).

\textsuperscript{58} Id. at 705-07. The Court noted that only 40 percent of the city's registered voters were property owners, while all residents would be affected as rate payers and beneficiarion of improvements. While property owners and non-property owners may have different interests, these interests do no afford a valid distinction in distributing the franchise.

\textsuperscript{59} Id. at 422.
fencing out, the Court found that there were not sufficient differences between plaintiffs and other citizens of Maryland to justify excluding the former from the right to vote.\footnote{Id. at 424–26.}

The tests and analysis employed in \textit{Kramer} and the other cases of exclusion from the franchise discussed above have carried over into cases involving state durational residency requirements, with most courts holding those requirements invalid.\footnote{Recent cases are collected in Andrews v. Cody, 327 F.Supp. 793, 794 (three judge court, M.D.N.C. 1971), appeal docketed, 40 U.S.L.W. 3290 (Nov. 6, 1971) (No. 71-628).} \textit{Affeldt v. Whitcomb}\footnote{319 F.Supp. 69 (three judge court, N.D. Ind. 1970), appeal docketed, 39 U.S.L.W. 3334 (December 10, 1970) (No. 1081. 1970 Term; renumbered No. 70-51. 1971 Term). It should be noted that the Supreme Court has twice been presented with equal protection challenges to durational residency statutes. In Hall v. Beals, 396 U.S. 45 (1969), the Court dismissed a complaint as moot because plaintiffs satisfied the residency requirement in question before their case reached the Court, and hence the Court did not squarely face the issue. In Drueding v. Devlin, 380 U.S. 125 (1965), aff’d mem. 234 F.Supp. 721 (D. Md. 1964), the Court dismissed a challenge to a durational residency requirement on the ground that it was a reasonable exercise of state power to establish qualifications for electors.} is illustrative. Plaintiffs’ demand to be registered by local Indiana election officials was denied on the ground that they had not resided in that jurisdiction for the six months required by statute. Plaintiffs then asserted the violation of first amendment rights\footnote{319 F. Supp. at 71.} as well as rights secured to them by the due process, privileges and immunities, and equal protection clauses of the fourteenth amendment. The court noted that such classifications must be carefully scrutinized\footnote{Id. at 73.} and tested with reference to the \textit{Kramer} compelling state interest standard.\footnote{Id. at 74.} It then asked whether Indiana had a compelling interest in its residency requirement and whether the means chosen to carry out that interest were necessary.\footnote{Id. at 75–76. This interpretation of the compelling state interest standard is considered in further depth in Comment, Limitations on the Voting Franchise and the Standard of \textit{Kramer} v. Union Free School District No. 15, 1970 UTAH L. REV. 143. See also Socialist Workers Party v. Welch, 334 F.Supp. 179, 181 (S.D. Texas 1971).} The court found that Indiana had a compelling interest in purity of elections;\footnote{By “purity,” the state presumably means protection against fraud in the form of voting by persons not truly residents of the state.} however, the durational residency requirement was found not to insure that end.\footnote{319 F.Supp. at 76–77. The court reasoned that since a person can always swear falsely to his residence, Indiana’s presumption that those who have resided in the state are residents does not prevent fraud. Nor does the requirement itself tend to insure an enlightened electorate. “Indiana’s six-month requirement imposes an overbroad burden upon the right to vote.” Id. at 77.} In effect, the \textit{Affeldt} court sees the residency requirement as unnecessarily depriving citizens of the vote without fully protecting against
fraud. While holding the Indiana durational residency statute invalid, the court noted that the Indiana closing date statute had not been affected by the decision.69

While cases like Affeldt purport to employ the Kramer standard of equal protection, a more complex test is actually used. Although Kramer says that where a fundamental right such as voting is in issue only a compelling state interest can justify its limitation, that case and its progeny base their holdings on an analysis that assumes the state has a compelling interest in the restriction and then shows that the state statute is too broad to accomplish only the allegedly compelling state interest. Thus, nowhere do the courts consider what is a compelling state interest. The narrow holding in all of these cases appears to be that the state has swept within its franchise-denial classification some citizens for whom the denial of the franchise does nothing to advance the state interest involved.

B. The Rational Relation Test as Applied to Closing Dates: Ferguson v. Williams

Although other courts have touched on the issue of voter registration closing dates, most have not faced the issue squarely.70 However, one recent federal decision, Ferguson v. Williams,71 confronted closing dates as a primary issue. In that case, Mississippi's voter registration closing date statute72 cut off registration four months before election day. Plaintiffs alleged that the statute violated the equal protection clause under either the rational relation or compelling state interest standards. The three judge court decided that the proper test to be used in determining the validity of the Mississippi provision was the rational relation test.73 The court hinged its conclusion on a finding that Kramer and the compelling state interest standard do not apply to all voting rights cases. The court quoted Kramer to the effect that the

69 Id. at 78–79. Plaintiffs did not challenge the twenty-nine day closing date set forth in IND. ANN. STAT. § 29-3412 (Supp. 1970).
71 330 F.Supp. 1012 (three judge court, N.D. Miss. 1971). On September 24, 1971, Mr. Justice Brennan ordered registration to be continued until October 6, 1971, and that the votes of voters so registered be impounded until final resolution of the case. VOTER REGISTRATION EXCHANGE, October 15, 1971, at 5.
72 MISS. CONST. art. 12, § 251 and MISS. CODE ANN. § 3235 (1943).
73 330 F.Supp. at 1023.
sole issue in this case is whether the additional requirements of [the New York statute]—requirements which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections—violate the Fourteenth Amendment. . . .

The court stated that Kramer only applies where part of the qualified electorate is granted the franchise and another part is denied the franchise. The court found support for this narrow view of Kramer in Howe v. Brown, a durational residency case that held Kramer inapplicable to that issue and hence applied the rational relation test. Under this analysis, the Howe court saw the compelling state interest standard as applying only to cases where a fencing out of qualified voters has occurred because of the way they might vote.

The Ferguson court found further support for this view in Gordon v. Lance, a Supreme Court decision holding a West Virginia super-majority requirement valid. In Gordon the Supreme Court, while not considering Kramer, implied that Cipriano is very limited in its impact and that the compelling interest standard is to be applied only to cases where an independently identifiable group is fenced out because of the way they will vote. As a third authority for rejecting the compelling interest test, the Ferguson court noted that in Oregon v. Mitchell, where the Supreme Court considered the validity of congressional legislation lowering the voting age, the Court did not employ the compelling state interest test. The Ferguson court then concluded that the compelling state interest test applies only to cases involving the fencing out of voters, whereas here no independently identifiable group has been excluded. Hence the compelling interest test is inapplicable.

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74 Id. at 1020. It seems that even this language applies to closing dates. Plaintiffs in Ferguson were otherwise qualified, and the only issue concerned the additional requirement of the statute, that is, registration before the closing date.

75 Even under this formulation, plaintiffs have been prevented from voting while other citizens with similar qualifications have been permitted. However, it might be assumed that by the language, "granting the franchise to the electorate," the court means that plaintiffs have been granted the franchise but have simply chosen not to use it in a timely fashion.


77 Id. at 866–67.

78 403 U.S. 1 (1971).

79 Id. at 5.


81 330 F.Supp. at 1022. The issue in Mitchell was, of course, congressional power to enact such legislation, not the validity of state action in this respect.


83 Id. at 1023.

84 The court realized that the choice of tests is outcome determinative. Id. at 1019.
Under the rational relation test the court reasoned that it only need find "any state of facts [which could] reasonably... be conceived"\(^8\) to justify Mississippi's closing date in order to sustain the statute. The court then looked to the reasons which the state offered in support of its closing date and noted that up-to-date and accurate registration records had to be compiled before the election. This task alone, according to defendants, required four to six weeks in Mississippi, due to the flood of "last-minute" registrants. While the state has an interest in hearing registration appeals and checking voter qualifications during the closing period, it can be inferred that the most persuasive reason for closing dates is the preparation of accurate registration lists up-dated to reflect new registrants and the deletion of citizens no longer qualified to vote for whatever reason.\(^6\) Having found that Mississippi had reasonably persuasive reasons for imposing a closing date, the court concluded that the statute was not arbitrary and did not deny plaintiffs equal protection of the laws.\(^7\)

As the court concluded, the validity of closing dates seems to depend largely on which equal protection standard is used.\(^8\) Where the rational relation test is applied, the classification is presumed to be reasonable and the challenger has the burden of showing that it is arbitrary or unreasonable.\(^9\) This saddles a plaintiff with the extremely heavy burden of proving, for example, that the legislature has been arbitrary in adopting a one month rather than a one week closing date. However, when the compelling state interest test is applied, the state must demonstrate overriding reasons to justify its classifications.\(^0\) This would seem to require more than a conclusory legislative finding that a given closing period was necessary.

C. The Compelling State Interest Test as Applied to Closing Dates: Beare v. Smith

The standards developed in Kramer and its progeny were applied to a case involving voter registration closing dates in Beare v. Smith.\(^1\) Texas required annual re-registration of voters and

\(^8\) Id. at 1023.
\(^6\) Id. at 1023–24.
\(^7\) Id.
\(^8\) See note 84 supra.
\(^9\) Id.
\(^0\) Id.
\(^1\) 321 F.Supp. 1100 (three judge court, S.D. Texas 1971). Doty argues that the court could have found the re-registration requirement unconstitutional as a deprivation of the right to vote without due process of law. Doty, supra note 1, at 199–201. For a discussion...
also provided that registration would be open only from October 1 to January 31, covering the elections in the twelve month period beginning the following March 1. Plaintiffs sought and were denied registration after January 31. They asserted in federal district court that the closing date and annual re-registration together created an unconstitutional obstacle to their free exercise of the franchise. The court here noted the disfranchising effect of the Texas system was such that these requirements prevented over a million Texans from voting. The court reasoned that the Texas registration system must be invalid unless the state could demonstrate that it served a compelling state interest.

Texas first argued that its goal was insuring "purity of the ballot," since only those interested and informed would be able to vote. The court responded that Texas cannot unduly restrict the vote to achieve other goals. Texas secondly argued that it had a compelling state interest in the prevention of election fraud. The court fully agreed with the validity of such an interest, but opined that less drastic solutions could be formulated to meet that need. It concluded that the restrictions Texas imposed on the availability of the franchise in the form of annual re-registration and an effective nine month closing date attempted to promote state interests in an unnecessarily heavy-handed manner and as such violated equal protection.

Beare indicates that the Kramer standards are applicable to


92 See note 14 supra.


94 321 F.Supp. at 1105-06.

95 Id. at 1106-07, citing Reynolds v. Sims, 377 U.S. 533 (1964).

96 321 F.Supp. at 1107.

97 While the court does not consider what these less drastic solutions might be, a reasonable alternative that Texas might formulate could include permanent registration with a shorter closing period and more comprehensive checks against fraud. See Doty, supra note 1, at 204-05.

This less restrictive alternative approach used by the court is considered in connection with Affeldt v. Whitcomb, discussed in note 62 supra and accompanying text. An elucidation of this approach as it flows out of Kramer can be found in Comment, Limitations on the Voting Franchise and the Standard of Kramer v. Union Free School District No. 15, supra note 66.

areas outside that of property ownership restrictions on the franchise. However, two factors qualify any conclusion that Beare stands for the principle that Kramer applies to closing dates. First, the Texas annual re-registration statute was adopted as a successor to a constitutionally invalid poll tax, and the court was well aware of this. Second, the court fails to distinguish between the two aspects of the system, that is, re-registration and the lengthy closing period. It is uncertain then if the outcome would be the same were the court to consider closing dates alone.

D. Resolution of the Conflict? Gordon v. Lance

The issue posed by the constitutionality of closing dates has been resolved differently by the two federal courts which have directly faced it. Beare v. Smith held that a closing date included in a larger restrictive system conflicted with the equal protection clause; this finding necessarily relies on an expansive reading of Kramer by applying it to all voting rights cases. On the other hand, the opinion in Ferguson v. Williams upholds a closing date by distinguishing Kramer and limiting that case to its narrow facts. This latter approach appears to be the one favored by the Supreme Court as evidenced by its recent decision in Gordon v. Lance. The issue there was whether a West Virginia requirement that state political subdivisions could not increase their indebtedness beyond certain levels without the approval of 60 percent of the voters violated equal protection by causing the votes of dissenters to be weighed more heavily than the votes of electors favoring approval. Relying on Cipriano v. City of Houma, the West Virginia Supreme Court of Appeals held this super-majority requirement unconstitutional. The Supreme Court reversed, finding the West Virginia court's reliance on Cipriano inappropriate. Cipriano was no more than a reassertion of the principle, consistently rec-

100 403 U.S. 1 (1971), discussed in text accompanying note 78 supra. Although the Gordon Court does not discuss the merits of judicial involvement with state electoral processes, a persuasive case for the Court's withdrawal from this area is made by Justice Harlan in his separate opinion in Whitcomb v. Chavis, 403 U.S. 124, 165 (1971).
103 The West Virginia majority found Cipriano "in point because it dealt with a local election and the rights of voters in an election dealing with the issuance of municipal bonds as distinguished from an election to nominate or elect public officials." Id. at 570. 170 S.E.2d at 789. In a dissenting opinion, the president of the West Virginia court vigorously rejected the tack taken by his colleagues:
ognized, that an individual may not be denied access to the ballot because of some extraneous condition such as race... [Gomillion]... wealth [Harper]... tax status [Kramer] or military status [Carrington].

The Court found the West Virginia scheme consistent with the equal protection clause on the ground that the state had not picked out a "'discrete and insular minority' for special treatment." Cipriano, then, appears merely to stand for the proposition that when a state attempts to fence out a certain sector of citizens the normal rational relation standard of equal protection does not apply. By logical inference Gordon v. Lance may stand for the proposition that the compelling state interest test will not be applied to all cases dealing with the right to vote but will be limited to cases where the traditional suspect classification is involved, where a fundamental right has been infringed, or where a state has acted to discriminate "against any identifiable class." Viewed in the light cast by Gordon, Kramer and its progeny do not really articulate a new and more rigorous equal protection standard applicable to all cases involving voting. Rather, Harper and Carrington are cases involving traditional suspect classifications; Williams v. Rhodes involved a traditional fundamental right; and Kramer, Cipriano, Phoenix, and Evans can be seen as either involving other suspect classifications or representing a third area for application of the compelling interest test where the classification has the effect of fencing out an identifiable class of potential voters. Assuming that this analysis is correct,

The majority opinion cites and relies on [Carrington]... [Kramer]... [Cipriano]... Each of these is utterly inapplicable to the case at bar.

I can detect not even a remote connection between the question of authorization of an issue of municipal bonds at a local election and the applicability or the non-applicability of the one person-one vote principle in evaluating the votes cast at such an election and, as already indicated, that question was not involved or considered in the election dealt with in the Cipriano case.

Id. at 594, 596, 170 S.E.2d at 801-03.

403 U.S. at 5.

Id.

And, by implication, Kramer as well. See text accompanying notes 71-90 supra, considering Ferguson v. Williams.

This is the conclusion reached in Ferguson.

See, e.g., note 47 supra.

The Gordon Court ignores the often stated proposition that voting is a fundamental right. See Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). Perhaps the Court is intimating that only first amendment rights are fundamental enough to warrant application of the compelling interest test.

403 U.S. 1, 7 (1971).

The right of free political association.

To this general effect, see also Mr. Justice Stewart's dissent in Kramer, 395 U.S. 621, 639 (1969). There are two problems in drawing this inference as to the relationship between these cases from Gordon v. Lance: (1) It seems to ignore some of the language in
the court in *Ferguson v. Williams* properly relies on *Gordon v. Lance* in holding that the compelling state interest test will not be applied to voter registration closing dates.\(^ {113}\) Because access to the polls is open to all, provided they act in a timely fashion, voter registration closing dates do not fence out any identifiable group. This is to be distinguished from the case where access to the polls is denied an independently identifiable group such as non-property owners. Since with closing dates there is no fencing out and the state clearly has some rational reasons for its closing date, a court would have to uphold such a statute.

It should be noted that *Gordon v. Lance* does more than suggest how the Supreme Court might view the issue of closing dates; it also anticipates a withdrawal from the expansive language used in *Kramer*. Applying the *Kramer* compelling state interest test to all voting rights cases would further embroil the Court in regulating state electoral processes. Thus, limiting the *Kramer* standard to cases of fencing out would surely appeal to a Court intent upon avoiding further involvement in the electoral process.

Nevertheless, even assuming that *Gordon* has no bearing on the issue of voter registration closing dates, there are other reasons why the compelling state interest test may not apply to closing dates. First, note that in *Kramer*, while the Court discusses the compelling interest test, it grounds its decision on the fact that the New York statute was not sufficiently precise to advance the state interest in limiting the franchise to those primarily interested without in fact excluding citizens who likely were interested and had a stake in the outcome.\(^ {114}\) The same is true with respect to *Phoenix*\(^ {115}\) and *Cipriano*\(^ {116}\) to the extent that they

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*Kramer* and other cases implying a broad use of the compelling state interest test in voting rights cases. See, e.g., 395 U.S. 621, 627–28 (1969). (2) There is a seeming lack of relevance of *Cipriano* and similar cases to the *Gordon v. Lance* problem. This is keenly highlighted by the dissenting opinion in the state court. See note 103 *supra*. If *Cipriano* has no relevance, the construction given it by the Supreme Court could be dictum.

\(^ {113}\) However, one could still argue that the *Ferguson* Court misapplied the compelling interest test in holding it inapplicable to closing dates because: (1) the super-majority requirement at issue in *Gordon v. Lance* is factually distinguishable from closing dates; (2) *Gordon v. Lance* construes *Cipriano* but does not consider *Kramer* or the basic standards laid out in that opinion, an opinion that implies that its teaching would apply to most voting cases, presumably including closing dates (see 396 U.S. 621 at 627); and (3) the case fails to consider the broader proposition that a fundamental right can be abridged only upon a showing of a compelling state interest (see note 47 *supra*).

\(^ {114}\) 395 U.S. at 633.

\(^ {115}\) 399 U.S. at 209–14. In view of the goals sought to be advanced by requiring property ownership as a condition to voting (e.g., promoting an informed and interested electorate by insuring that voters have a stake in the outcome of the election), the differences between property owners and non-property owners were not sufficient to justify denying the latter the franchise.

\(^ {116}\) 395 U.S. at 706: "The challenged statute contains a classification which excludes
involve statutes which unnecessarily exclude some identifiable group of voters. Arguably then, the compelling state interest test may be only surplusage added on to what is in fact a variant of the traditional rational relationship analysis as it applies to voting cases, a variant because the Court meticulously scrutinizes the classification and places the burden of proof upon the state to justify the classification as one reasonably calculated to serve the state's interest without unnecessarily restricting exercise of the franchise by any voter.

A second reason why the compelling state interest test may not apply to closing dates even if Gordon has no bearing on the issue is seen in McDonald v. Bd. of Election Comm'rs.\textsuperscript{117} The Court distinguished its holding in Kramer\textsuperscript{118} on the ground that Kramer involved an absolute denial of the franchise whereas McDonald involved a situation where only some citizens encountered greater difficulty in voting than did others.\textsuperscript{119}

Confronted with a constitutional challenge to a particular state's closing date, a court must decide as a threshold matter what standard of equal protection to apply. The voting rights cases teach that voting is a fundamental right any infringement of which must be meticulously scrutinized. At the same time, the compelling interest test seems to be a singularly inappropriate standard. Narrowly restricted as regards voting by the Gordon case, it is too meagerly developed to serve as anything more than an outcome determinative shibboleth in the closing date context. The rational basis test is the only proven analytical standard left to the court.

The rational basis test to be applied, however, is not the traditional one. Instead of hypothesizing any state of affairs wherein the time gap between the closing of registration and election day would serve a valid purpose, the court should require the state to carry the burden of proving it is in fact using the period following the closing date to serve the state interest asserted.

As applied to closing dates, such a legal analysis strikes a balance between the interests involved. It recognizes that the state has an interest in closing dates as well as that the individual

\textsuperscript{117} 394 U.S. 802 (1969). The Court held that a provision in the Illinois absentee ballot system denying absentee ballots to citizens incarcerated in jail while awaiting trial does not violate the equal protection clause. Note that McDonald was decided before Kramer.

\textsuperscript{118} 395 U.S. at 626–27 n. 6.

\textsuperscript{119} But cf. Williams v. Rhodes, 393 U.S. 23 (1968), discussed in text accompanying note 44 supra, where the compelling state interest test was applied in a case where exercise of a fundamental right was only made more difficult for some citizens than for others.
has an interest in free access to the polls. Applying this framework to the facts of the particular case before it, the court will be able to determine whether citizens are unnecessarily deprived of their right to vote. Using this standard legal framework, it is conceivable that variations in conditions between jurisdictions will result in different findings of constitutionality with respect to an identical time period.

### III. The State Interest in Closing Dates

Although the standard of equal protection to be applied to closing dates is an open question, a court will in any event be required to make a factual inquiry into what interests the state has in closing dates. This inquiry is necessary regardless of the test applied.

The first state interest in having a closing date is the enforcement of voter qualifications. A state may establish certain non-discriminatory qualifications for the exercise of the franchise. Typical are restrictions that minors and felons cannot vote, and that only those who are bona fide residents of a political subdivision (for example, state or county) may exercise the franchise. Assuming that these are valid objectives, the state uses registration, and closing dates in particular, as a means of achieving them; the time between the closing date and election day theoretically can be used to investigate qualifications and allow for the resolution of disputes.

Second, registration serves a seemingly legitimate state interest in preventing persons from fraudulently voting more than once. At least, in theory, closing dates offer a period in which to ascertain whether a citizen is registered to vote at more than one place.

Third, and perhaps most important, registration closing dates assist in the administration of the registration system itself. It is argued that public officials must have time in which to compile corrected lists of qualified voters for distribution to local polling places. Voter registration lists are the practical key to insuring purity of the ballot and are the essence of a voter registration system.

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120 See text accompanying notes 16–19 supra.


123 If the purpose of voter registration systems is to insure that only qualified voters are permitted to vote, necessarily a record must be kept of those who are qualified. These registration lists are then distributed to polling places where a citizen attempting to vote is identified by the registration list.
Assuming that a court views one or more of these state interests as legitimate and that it applies a variant of the rational basis test, the question then becomes whether the closing date which the state has established unnecessarily excludes a number of otherwise qualified voters, or whether the closing date excludes these voters only to the extent necessary to serve the state's interest.

In *Kramer*, the court said that the New York statute restricting the franchise in school board elections to parents of children attending school and property owners or lessees was invalid on the ground that the statute needlessly excluded citizens who may well have an interest in such elections. The Court said that while New York may have an interest in excluding those citizens not affected by the election, it excluded many who were *in fact* affected by the election. The state had not tailored its statute "with sufficient precision to justify denying appellant the franchise." The Court applied similar reasoning in *Cipriano* and *Phoenix*. From this it can be concluded that at least in these three cases the Court felt that the state's interest, whether or not compelling, should be accomplished by means less restrictive of the right to vote.

Applying this mode of analysis to closing dates yields a similar conclusion. Clearly the state has interests to be served. But the precise issue is whether a less drastic means might accomplish the same end. With closing dates, an ad hoc approach will be necessary, but the legal test should be the same in all instances. Thus the state will be required to show that the exclusion of citizens from the franchise is demonstrably reasonable to advance important state interests. If, in light of local demography and technology, less restrictive alternatives are feasible, courts will require that the state resort to such alternatives. In each case, a

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124 See text accompanying notes 114–116 *supra* and text following note 119 *supra*.
125 395 U.S. at 630–33.
126 Id. at 632.
127 Id. at 704–06. See note 116 *supra*.
128 399 U.S. at 209–13. See note 115 *supra*.
130 One aspect of this factual inquiry by the court would be what technology is in use locally that could be brought to bear on voter registration systems. In some areas modern technological advances are being currently applied on the municipal level to voter registration with promising results, particularly in shortening the time required to maintain registration files. See Pentworthy, *Computerized Voter Registration*, THE AMERICAN CITY, Nov. 1967, vol. 82, at 78; Murphy, *Data Processing Speeds the Election Process*, THE AMERICAN CITY, May, 1967, vol. 82, at 100. For a general overview of current uses of data processing in municipal government, see K. KRAEMER & G. HOWE, *AUTOMATED DATA PROCESSING IN MUNICIPAL GOVERNMENT*, THE MUNICIPAL YEARBOOK 1968, at 280.
court will be able to sustain a closing date that excluded citizens only if such exclusion is in fact necessary. Outside the pure fencing out cases, such an analysis is more viable than a pure test of compelling state interest; nevertheless, it still recognizes the special importance of the right to vote. In practical terms, the state will be under pressure to restrict its closing dates to a demonstrably reasonable period. Yet it will not be under the burden of continually putting forward a compelling interest to justify any restriction of the franchise.

Alternatively, a court may elect not to apply a variant of the rational basis test discussed above, but rather to apply the compelling state interest test.\footnote{See text accompanying note 51 supra, for a formulation of the broadly construed compelling state interest test.} Since the courts have not defined a compelling state interest, it is difficult to say, for example, that although a state has an overriding interest in a seven day closing, its interest in a thirty day closing is insufficiently compelling. The difficulty in distinguishing between a state’s interests in having registration close on election day itself, one week in advance, or one month in advance itself suggests that the simple compelling state interest standard, as an outcome-determinative shibboleth, is both intellectually and logically untenable in the closing date context. This difficulty in differentiating between these periods may suggest that the only judicial alternative under the compelling state interest test is the choice of either validating or invalidating all closing dates. This suggests that a more traditional requirement that states trim their restrictions on availability of the franchise to the bare minimum may be more appropriate in considering the validity of closing dates.\footnote{See, e.g., the analysis used in Affeldt v. Whitcomb, discussed in text accompanying notes 62-69 supra.} Thus, the compelling state interest test as enunciated in Kramer may be either bare rhetoric concealing the variant of the rational basis test discussed above or too radical a tool to be applied to closing dates.\footnote{See, e.g., the interpretation given the standard in Howe v. Brown, 319 F.Supp. 862, 869 (three judge court. N.D. Ohio 1970).}

IV. LEGISLATIVE SOLUTIONS

If courts are either unwilling or unable to remedy the large scale disfranchisement resulting from voter registration closing dates, the only recourse short of a constitutional amendment lies in legislative action. As suggested above, closing dates bring into conflict the individual’s interest in free access to the polls and the
state's interest in elections that are orderly and free from fraud. Because of its superior ability to gather pertinent information and use it to remedy a narrowly defined problem, the legislature, acting pursuant to constitutional standards, may well be better equipped to reconcile these competing interests than the judiciary.

Two possible approaches are available. First, action could be taken at the state level to reduce the duration of closing periods. Such an attempt, presumably on the order of a uniform act, could be made part of a more general reform of the voting registration system. Some lobbying attempts have already been made to encourage state legislatures to adopt a nation-wide seven day minimum closing date. The advantages in state action are twofold: first, the federal government is not drawn into what is traditionally an area of state concern. Second, it allows the state to fit its legislation to peculiar needs. Concomitant with the first point is the notion that state action avoids any possibility of invasion of privacy or political abuses that might be connected with a centralized federal registration system. On the other hand, such legislation might merely further the already existing patchwork of election laws. It is also likely that since the size of the electorate is a politically volatile issue, any legislation in this area would be difficult to pass.

Second, although Congress might abolish or limit state registration closing dates, congressional power may be restricted to elections for federal offices. Article I, section 4, allowing Con-

134 The public interest lobbying organization Common Cause is attempting to establish a seven day closing by means of action aimed at state legislatures. N.Y. Times, February 9, 1971, at 9, col. 1.
135 Any federal activity here necessarily withdraws this area from state control, possibly at the sacrifice of some ideals of federalism.
136 Differences in population and geographic variables between states are probably of great importance in administering a voter registration system in that they largely control the numbers of potential voters per registration office. Necessarily, these differences would lead to pressures to deviate from any uniformity attempted by a uniform act.
138 Id. See also N.Y. Times, October 29, 1971, at 21, col. 1.
139 Whether realistic or not, the argument to be presented against a national registry of voters is that in having one registry rather than fifty, the possibility of abuse of the information stored increases greatly.
140 The political impact of such legislation would likely be more drastic than that of previous uniform acts such as the Uniform Commercial Code, in that effectively it directly regulates the size and composition of the electorate. There is some intimation that voter registration reform might make voting easier for the poor and minority groups in particular. See N.Y. Times, October 11, 1971, at 21, col. 2; N.Y. Times, October 13, 1971, at 21, col. 1; also Kelley, supra note 4. The Kelley group has also found data indicating that the composition as well as the size of the electorate are functions of registration systems. Id. at 368–69.
141 In Oregon v. Mitchell, 400 U.S. 112 (1971), the Court held that Congress' power to lower the voting age to eighteen was valid only as it applies to federal elections. The Court also considered section 202 of the Voting Rights Act Amendments of 1970, 42 U.S.C.
gress to regulate the time, place and manner of elections, clearly applies to federal elections only. Congressional action on closing dates as they apply to state and local elections would have to be based on other authority.¹⁴² To date, bills on this issue have applied only to elections for federal officers,¹⁴³ and therefore it might be inferred that Congress believes that its power in regulating elections extends no further than federal elections. However, were it to legislate in this area, albeit reaching only federal elections, the administrative inconvenience in maintaining dual registration systems might force the states to bring their systems into accord with the federal model.¹⁴⁴

V. CONCLUSION

This article has sought to consider the legal issue presented by voter registration closing dates. In effect, closing dates act to disfranchise voters both by acting as durational residency requirements in some situations and by creating a procedural hurdle that deters registration. Taken together, these facets of closing dates prevent many citizens from registering and voting.

Traditionally, the power to regulate elections has been in the state, and this power was circumscribed as a constitutional matter by a test of rationality. As a result, a qualification or procedure would not violate equal protection unless it could be shown to be

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¹⁴² The enforcement power of the fourteenth amendment might provide this authority, but Oregon v. Mitchell, 400 U.S. 112 (1971), leaves this question unanswered.

¹⁴³ See, e.g., S. 2456, 92d Cong., 1st Sess. (1971) (establishing a Universal Voter Registration Administration, registration by mail, and a thirty day closing period); H.R. 10442, 92d Cong., 1st Sess. (1971) (establishing a federal registration system under the Social Security Administration); S. 2445, 92d Cong., 1st Sess. (1971) (providing for federal registration through the Internal Revenue Service); H.R. 10496, 92d Cong., 1st Sess. (1971) (establishing a thirty day closing period); H.R. 7213, 92d Cong., 1st Sess. (1971) (abolishing durational residency requirements for federal elections and providing for a thirty day closing); H.R. 9979, 92d Cong., 1st Sess. (1971) (providing for registration and residence requirements in elections for President and Vice President); S. 2596, 92d Cong., 1st Sess. (1971) (providing for a thirty day durational residency requirement and closing date in congressional elections).

arbitrary or unreasonable. With the voting rights cases of the 1960's, the presumption of validity shifted away from state restrictions on the franchise, and the property ownership cases make it appear that the state could restrict access to the franchise only upon a positive showing of a compelling interest. At first glance this analysis would also seem to apply to procedural requirements like closing dates. However, some recent cases have indicated that the compelling interest analysis may be very limited in its applications. Under the traditional analysis, a state would almost surely prevail in upholding its closing date; under the new analysis which posits that the state can only restrict the right to vote by showing a compelling interest, the answer is uncertain.

Since it is uncertain that courts will or should remedy this large scale disfranchisement, there may exist an opportunity for remedial legislation at the federal level if the states do not act. With closing dates, as with many of our other crazy-quilt election laws, a remedy to this roadblock would go far in maintaining one of the most important theoretical precepts of our democratic system, citizen control of government by the electoral process.

—Jeffrey M. Petrash

APPENDIX

Voter Registration Closing Dates

<table>
<thead>
<tr>
<th>STATE</th>
<th>CLOSING DATE†</th>
<th>STATUTE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>10 days*</td>
<td>ALA. CODE tit. 17, § 27(2) (1958)</td>
</tr>
<tr>
<td>Alaska</td>
<td>14 days (in person), 30 days (by mail)</td>
<td>ALASKA STAT. § 15.07.040 (1962)</td>
</tr>
<tr>
<td>Arizona</td>
<td>2 months prior to primary, 8th Monday prior to general election</td>
<td>ARIZ. REV. STAT. ANN. § 16-107 (1956), as amended, (Supp. (1971)</td>
</tr>
<tr>
<td>Arkansas</td>
<td>20 days</td>
<td>ARK. CONST. amend. 51, § 9(b)</td>
</tr>
<tr>
<td>State</td>
<td>Closing Date†</td>
<td>Statute</td>
</tr>
<tr>
<td>-------------</td>
<td>------------------------</td>
<td>----------------------------------------</td>
</tr>
<tr>
<td>California</td>
<td>53 days</td>
<td><strong>CAL. ELECTIONS CODE ANN.</strong> § 203 (West 1961)</td>
</tr>
<tr>
<td>Colorado</td>
<td>20 days*</td>
<td><strong>COLO. REV. STAT. ANN.</strong> § 49-4-2 (1963)</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Opens 6th week prior to election, closes 4th week prior to election*</td>
<td><strong>CONN. GEN. STAT. ANN.</strong> § 9-17 (1967), as amended, (Supp. 1971)</td>
</tr>
<tr>
<td>Delaware</td>
<td>4th Saturday in July, 2nd Saturday in September, 3rd Saturday in October</td>
<td>**DEL. CODE ANN. tit. 15, § 1105 (1953), as amended, (Supp. 1970)</td>
</tr>
<tr>
<td>Florida</td>
<td>30 days</td>
<td><strong>FLA. STAT. ANN.</strong> § 98.051 (1964), as amended, (Supp. 1970)</td>
</tr>
<tr>
<td>Georgia</td>
<td>50 days*</td>
<td><strong>GA. CODE ANN.</strong> § 34-611 (1970)</td>
</tr>
<tr>
<td>Hawaii</td>
<td>5th Friday before primary, open for 10 days after primary, closed until general election</td>
<td><strong>HAWAII REV. STAT.</strong> tit. 2, § 11-13 (1968)</td>
</tr>
<tr>
<td>Idaho</td>
<td>Last Saturday next preceding election*</td>
<td><strong>IDAHO CODE ANN.</strong> §§ 34-807, –808 (1963)</td>
</tr>
<tr>
<td>Illinois</td>
<td>28 days</td>
<td><strong>ILL. ANN. STAT.</strong> ch. 46, § 4–6 (Smith-Hurd 1965), as amended, (Smith-Hurd Supp. 1972)</td>
</tr>
<tr>
<td>Indiana</td>
<td>29 days*</td>
<td><strong>IND. ANN. STAT.</strong> § 29-3407 (1969), as amended, (Supp. 1971)</td>
</tr>
<tr>
<td>State</td>
<td>Closing Date†</td>
<td>Statute</td>
</tr>
<tr>
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<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Iowa</td>
<td>10 days* (permanent registration)</td>
<td>IOWA CODE ANN. §§ 48.11, 47.16, 47.32 (1949), as amended, (Supp. 1971)</td>
</tr>
<tr>
<td>Kansas</td>
<td>20 days</td>
<td>KAN. STAT. ANN. § 25-2311 (Supp. 1971)</td>
</tr>
<tr>
<td>Kentucky</td>
<td>59 days</td>
<td>KY. REV. STAT. § 117.620 (1971)</td>
</tr>
<tr>
<td>Louisiana</td>
<td>30 days</td>
<td>LA. REV. STAT. ANN. § 18:170 (1969)</td>
</tr>
<tr>
<td>Maine</td>
<td>Open for limited periods at different times depend-</td>
<td>ME. REV. STAT. ANN. tit. 21, § 631 (1964), as amended, (Supp. 1972)</td>
</tr>
<tr>
<td></td>
<td>ing on size of city</td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>5th Monday prior to election*</td>
<td>MD. ANN. CODE art. 33, § 3-8 (1957), as amended, (Supp. 1971)</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>31 days (state and national),</td>
<td>MASS. ANN. LAWS ch. 51, § 26 (1971)</td>
</tr>
<tr>
<td></td>
<td>20 days (city elections)</td>
<td></td>
</tr>
<tr>
<td>Michigan</td>
<td>5th Friday prior to election</td>
<td>MICH. COMP. LAWS ANN. § 168.497 (1967), as amended, (Supp. 1971)</td>
</tr>
<tr>
<td>Minnesota</td>
<td>20 days</td>
<td>MINN. STAT. ANN. § 201.16 (1962)</td>
</tr>
<tr>
<td>Mississippi</td>
<td>4 months</td>
<td>MISS. CONST. art. 12, § 251; MISS. CODE ANN. § 3235 (1956), as amended, (Supp. 1971)</td>
</tr>
<tr>
<td>Missouri</td>
<td>Depends on county:</td>
<td>MO. ANN. STAT. §§ 113.210, 113.670, 114.120, 116.030, 117.290, 118.240,</td>
</tr>
<tr>
<td></td>
<td>4th Wednesday prior to election, or 28 days</td>
<td>119.280 (1966), as amended, (Supp. 1971)</td>
</tr>
<tr>
<td>State</td>
<td>Closing Date†</td>
<td>Statute</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>Montana</td>
<td>30 days in national elections, 40 days in all other elections</td>
<td>Mont. Rev. Codes AN. § 23-3016 (Supp. 1971)</td>
</tr>
<tr>
<td>Nebraska</td>
<td>2nd Friday prior to election</td>
<td>Neb. Rev. Stat. § 32-216 (1968)</td>
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<tr>
<td>Nevada</td>
<td>6th Saturday prior to general election 7th Saturday prior to primary election</td>
<td>Nev. Rev. Stat. § 293.560 (1967)</td>
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<tr>
<td>New Mexico</td>
<td>42 days</td>
<td>N.M. Stat. Ann. § 3-4-8 (1953), as amended, (Supp. 1971)</td>
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<tr>
<td>North Dakota</td>
<td>none</td>
<td></td>
</tr>
<tr>
<td>STATE</td>
<td>CLOSING DATE†</td>
<td>STATUTE</td>
</tr>
<tr>
<td>-----------------</td>
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</tr>
<tr>
<td>Pennsylvania</td>
<td>50 days*</td>
<td>PA. STAT. ANN. tit. 25, §§ 951-16, 623-17 (1963), as amended, (Supp. 1971)</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>60 days</td>
<td>R.I. GEN. LAWS ANN. § 17-9-3 (1969)</td>
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<tr>
<td>South Dakota</td>
<td>15 days</td>
<td>S.D. COMP. LAWS § 12-4-4 (1967), as amended, (Supp. 1971)</td>
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<tr>
<td>Tennessee</td>
<td>30 days</td>
<td>TENN. CODE ANN. § 2-304 (1971)</td>
</tr>
<tr>
<td>Texas</td>
<td>January 31 before November elections*</td>
<td>TEX. ELECTION CODE art. 5.11(a) (1967), conditionally amended, Acts 1970, ch. 287, §§ 3, 24</td>
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<tr>
<td>Utah</td>
<td>Limited to specific days</td>
<td>UTAH CODE ANN. § 20-2-6 (1955), as amended, (Supp. 1970)</td>
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<tr>
<td>Vermont</td>
<td>30 days</td>
<td>VT. STAT. ANN. tit. 17, § 201 (1967)</td>
</tr>
<tr>
<td>Virginia</td>
<td>30 days</td>
<td>VA. CODE ANN. §§ 24.1-49, -50 (Supp. 1971)</td>
</tr>
<tr>
<td>West Virginia</td>
<td>29 days</td>
<td>W. VA. CODE ANN. § 3-2-30 (1966), as amended, (Supp. 1970)</td>
</tr>
<tr>
<td>STATE</td>
<td>CLOSING DATE†</td>
<td>STATUTE</td>
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</tr>
<tr>
<td>Wisconsin</td>
<td>3rd Wednesday prior to election in large cities, 2nd Wednesday prior to election in small cities</td>
<td>Wis. Stat. Ann. § 6.28 (1967)</td>
</tr>
</tbody>
</table>

† In days previous to election day unless otherwise noted.
* These states impose other significant restrictions on the times available for registration.