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Residency Requirements for Voting and the Tensions of a Mobile Society

John R. Schmidhauser
State University of Iowa

RESIDENCY REQUIREMENTS FOR VOTING AND THE TENSIONS OF A MOBILE SOCIETY

*John R. Schmidhauser**

"No man can boast of a higher privilege than the right granted to citizens of our State and Nation of equal suffrage and thereby to equal representation in the making of the laws of the land. Under our *Constitution* that right is absolute. It is one of which he cannot be deprived, either deliberately or by inaction on the part of a Legislature. . . ."†

THE spirit of contemporary appellate decision-making in the field of voting rights is daring and realistic. This spirit is perhaps best exemplified by the Supreme Court's recent decision in *Baker v. Carr*.[1] While deliberate deprivations of voting rights assume a variety of forms, the most blatant have been grounded upon racial discrimination. The 1961 report of the United States Commission on Civil Rights indicates that in approximately 100 counties in eight Southern states most Negro citizens are prevented from voting.[2] Economic considerations also have been recently invoked to provide a basis for disenfranchisement. In Virginia in November 1962 approval was sought, albeit unsuccessfully, of a state constitutional amendment rendering persons who were not freeholders of land ineligible to vote on bond issue referenda for new schools, streets, libraries and other local improvements.[3] Most of the deliberate efforts at invidious restriction of suffrage have received searching analysis by the United States Civil Rights Commission. But one of the most striking examples of denial of voting rights because of legislative inaction, that arising from outmoded state residency requirements for voting, was omitted from the long list of "problems still unsolved" which was compiled by the Commission in 1961.[4]

It is the purpose of this article to determine the extent to which persons otherwise qualified to vote are disenfranchised by the complex of state residency requirements and to assess the practical and constitutional aspects of any statutory prospects for change.

What are the dimensions of the problem of disenfranchisement

* Professor of Political Science, State University of Iowa.—Ed.

† Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 11, 161 A.2d 705, 710 (1960).

1 369 U.S. 186 (1962).

2 See 1961 U.S. COMM'N ON CIVIL RIGHTS REP., bk. 1, 5.

3 See Washington Post, Oct. 8, 1962, p. B1, col. 6; *id.* Nov. 27, 1962, p. A16, col. 1.

4 1961 U.S. COMM'N ON CIVIL RIGHTS REP., bk. 1, 5-6.

through the operation of state residency requirements? Two salient factors are involved: the restrictions imposed by the particular state residency requirements and the mobility of the population of the United States. Certainly the restrictive nature of state residency requirements for voting would not seriously affect voting participation if Americans were not inveterate movers.

Geographic mobility has intensified at a comparatively steady rate in every decade since 1900. Historical census data indicate that the percentage of persons who do not live in the state of their birth has in 1960 increased by 5.7 percent over the percentage of such persons in 1900. The shift is much more striking among non-whites than among whites. The percentage of non-whites who do not live in the state of their birth has increased by 12.2 percent (27.7 percent of the nation's population in 1960 as compared with 15.5 percent in 1900). For whites the increase is modest—4.7 percent (26.1 percent of the nation's population in 1960 as compared with 21.4 percent in 1900). Demographically, the highest percentage of persons living in states in which they were not born is found in urban settings (29.4 percent), the next highest in rural non-farm areas (22.1 percent), and the lowest in rural farm areas (12.1 percent). These and subsequent migration data were derived from Census Bureau sources partially reproduced in the two charts and the map. (See pages 825, 826 and 827.)

These three basic sources of demographic information underscore the following salient features concerning interstate mobility. (a) Such mobility has increased steadily since 1900. (b) The rate of increase has been more intense for non-whites than for whites. (c) Geographically, interstate mobility is most characteristic of urban dwellers, is next highest among rural non-farm dwellers, and least significant among rural farm dwellers. With respect to intrastate and interstate mobility, the census data indicate that (a) nearly half of the urban and rural non-farm dwellers moved to a different house in the five years prior to 1960, (b) over 17 percent of such urban and rural non-farm dwellers moved to a different county during the same time period, (c) rural farm dwellers experienced a markedly lower rate of movement, (d) non-whites generally had a somewhat higher rate of movement than whites, and (e) non-whites from rural farm areas experienced a markedly higher rate of movement than whites. In short, the foregoing demographic information suggests that the persons most likely to be adversely affected by rigid state residency requirements

CHART I

State of Birth of the Native Population, by Color, for the United States, Urban and Rural, 1960, and for Conterminous United States, 1900 to 1960*

Area, census year, and color	Total native population	Percent distribution				
		Total native population	Born in the United States			Born in U.S. outlying area, at sea, etc.
			In State of residence	In different state	State of birth not reported	
UNITED STATES, 1960						
Total	169,587,528	100.0	70.3	26.4	2.7	0.6
Urban	116,773,631	100.0	66.6	29.4	3.2	0.8
Rural nonfarm	39,589,369	100.0	75.7	22.1	1.8	0.3
Rural farm	13,224,528	100.0	86.9	12.1	0.9	0.1
White	149,543,638	100.0	70.7	26.2	2.4	0.7
Urban	102,311,633	100.0	67.5	28.8	2.8	0.9
Rural nonfarm	35,592,497	100.0	74.6	23.2	1.8	0.3
Rural farm	11,639,508	100.0	85.9	13.1	0.9	0.1
Nonwhite	20,043,890	100.0	68.0	27.2	4.5	0.3
Urban	14,461,998	100.0	60.4	33.7	5.5	0.4
Rural nonfarm	3,996,872	100.0	85.5	12.3	2.1	0.2
Rural farm	1,585,020	100.0	93.9	5.2	0.9	...
CONTERMINOUS UNITED STATES						
All Classes						
1960	168,805,716	100.0	70.4	26.3	2.7	0.6
1950	139,868,715	100.0	73.5	25.2	1.0	0.3
1940	120,074,379	100.0	77.1	22.4	0.2	0.2
1930	108,570,897	100.0	76.2	23.4	0.2	0.2
1920	91,789,928	100.0	77.4	22.1	0.3	0.1
1910	78,456,380	100.0	78.0	21.6	0.4	0.1
1900	65,653,299	100.0	79.1	20.6	0.3	0.1
White						
1960	149,181,384	100.0	70.8	26.1	2.4	0.7
1950	124,382,950	100.0	74.0	24.8	1.0	0.3
1940	106,795,732	100.0	77.3	22.3	0.2	0.2
1930	96,303,335	...	...	...	...	...
1920	81,108,161	100.0	77.1	22.4	0.3	0.1
1910	68,386,412	100.0	77.2	22.3	0.4	0.1
1900	56,595,379	100.0	78.2	21.4	0.3	0.1
Nonwhite						
1960	19,624,332	100.0	67.5	27.7	4.5	0.3
1950	15,485,765	100.0	69.8	28.8	1.1	0.3
1940	13,278,647	100.0	75.9	23.5	0.2	0.1
1930	12,267,562	...	...	...	...	...
1920	10,681,767	100.0	80.0	19.5	0.4	0.5
1910	10,069,968	100.0	83.2	16.3	0.4	...
1900	9,057,920	100.0	84.2	15.5	0.3	...

* Adapted from U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1960, GENERAL, SOCIAL AND ECONOMIC CHARACTERISTICS, UNITED STATES SUMMARY, Final Report PC(1)-1C (1962) Table 68. Reproduced with the permission of the Bureau of the Census.

CHART II

Residence Five Years Prior to Census Date, By Color, for the United States, Urban and Rural, 1960, and for Conterminous United States, 1960 and 1940*

Residence 5 years prior to census date and color	Total	Percent distribution: United States, 1960				Conterminous United States	
		Total	Urban	Rural nonfarm	Rural farm	1960	1940
TOTAL							
Population 5 years old and over	159,003,807	100.0	100.0	100.0	100.0	100.0	100.0
Same house	79,331,022	49.9	47.9	48.7	71.4	49.9	(1)
Different house in the U.S.	75,185,793	47.3	48.9	49.0	28.0	47.2	(1)
Same county	47,461,137	29.8	31.3	29.0	19.2	29.9	(1)
Different county	27,724,656	17.4	17.6	20.0	8.8	17.4	13.0
Same State	13,583,173	8.5	8.1	10.7	5.9	8.6	7.6
Different State	14,141,483	8.9	9.4	9.3	2.8	8.8	5.4
Abroad	2,002,822	1.3	1.5	1.0	0.2	1.2	0.5
Place of prior residence not reported[2]	2,484,170	1.6	1.7	1.4	0.4	1.6	0.9
WHITE							
Population 5 years old and over	141,472,113	100.0	100.0	100.0	100.0	100.0	100.0
Same house	70,912,796	50.1	48.3	48.1	72.9	50.2	(1)
Different house in the U.S.	66,704,903	47.2	48.6	49.6	26.5	47.1	(1)
Same county	40,863,788	28.9	30.2	28.8	17.5	28.9	(1)
Different county	25,841,115	18.3	18.4	20.9	9.0	18.2	13.4
Same State	12,762,949	9.0	8.7	11.1	6.0	9.0	7.9
Different State	13,078,166	9.2	9.8	9.7	3.0	9.2	5.5
Abroad	1,834,946	1.3	1.5	1.0	0.2	1.3	0.3
Place of prior residence not reported[2]	2,019,468	1.4	1.6	1.3	0.4	1.4	0.9
NONWHITE							
Population 5 years old and over	17,531,694	100.0	100.0	100.0	100.0	100.0	100.0
Same house	8,418,226	48.0	45.0	54.5	59.5	47.9	(1)
Different house in the U.S.	8,480,890	48.4	50.8	42.6	40.0	48.5	(1)
Same county	6,597,349	37.6	39.9	31.1	33.0	37.7	(1)
Different county	1,883,541	10.7	10.9	11.5	7.0	10.8	9.4
Same State	820,224	4.7	4.1	6.7	5.3	4.7	5.6
Different State	1,063,317	6.1	6.9	4.9	1.7	6.1	3.9
Abroad	167,876	1.0	1.1	0.9	0.1	0.9	0.1
Place of prior residence not reported[2]	464,702	2.7	3.1	2.0	0.4	2.7	1.2

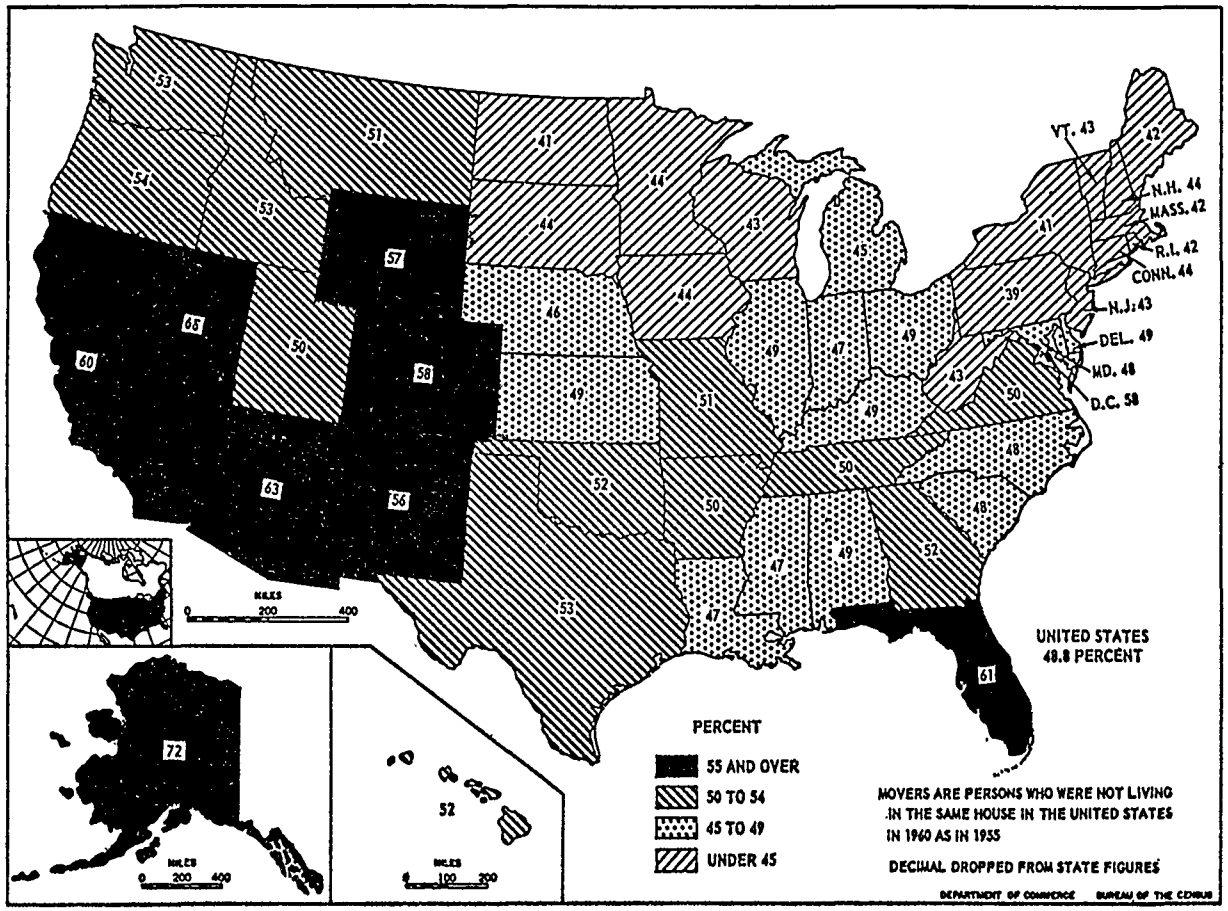
* Adapted from U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1960, GENERAL, SOCIAL AND ECONOMIC CHARACTERISTICS, UNITED STATES SUMMARY, Final Report PC(1)-1C (1962) Table 71. Reproduced with the permission of the Bureau of the Census.

1 Persons living in the same house in 1935 and persons living in a different house in the same county or quasi-county (cities of 100,000 or more and the balance of their counties) in 1935 not tabulated separately.

2 In 1960, comprises persons who moved but for whom place of residence in 1955 was not reported. In 1940, comprises persons for whom migration status was not reported.

MAP I

Movers, 1955 to 1960, as percent of population 5 years old and over, by states: 1960*



* U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1960, GENERAL, SOCIAL AND ECONOMIC CHARACTERISTICS, UNITED STATES SUMMARY, Final Report PC(1)-1C (1962) *Figure* 4. Reproduced with the permission of the Bureau of the Census.

for voting are those caught up in the two major historic streams of domestic migration—from farm and small town to city, and from the South to other regions of the United States.

Given an intensive rate of geographic mobility in the 1960's, what is the precise nature of state residency laws affecting voting? Modern laws of this genre are surprisingly uniform in regard to their theoretical bases despite considerable diversity in the details of such legislation. In general, state residency requirement laws concerning voting have reflected two fundamental assumptions which were especially important in nineteenth century America. First, liberal democracy, while presupposing the accessibility of voting facilities, requires that adequate safeguards be devised to inhibit corruption of elections. Harsh nineteenth century experience with "floaters" and the organized voting of transients[5] continues to influence strongly the development of residency provisions relating to the exercise of suffrage. For example, the major concern underlying the voting registration recommendations of the National Municipal League is the desire to thwart voting fraud.[6] Secondly, state residency requirements for voting reflect nineteenth century conceptions of federalism which, in practical effect, embody state dominance of the voting process regardless of whether the offices to be filled are national, state or local. A rationale which has often been invoked to reinforce arguments for state control of voter registration requirements is the notion that a voter should have roots in the community of sufficient permanence to insure adequate familiarity with local candidates and issues. This concept of the "enlightened" voter has relevance for state and local elections, but has been subjected to increasing criticism because it is not germane to presidential elections.[7]

Specifically, the requirements for a minimum term of residence within a state, varying from six months in twelve states to a high of two years in four states, present the greatest difficulty to the mobile who wish to vote in elections for national legislators or presidential and vice-presidential electors. In a few instances, fairly lengthy county, district or precinct requirements also bar voting.[8] The complex of these residency requirements for voting

5 Yates, *Residence Requirement for Voting: Ten Years of Change*, pp. 1-2, a paper delivered at the 1962 Annual Meeting of the American Political Science Association, Sept. 5-8, 1962, at Washington, D.C.

6 HARRIS, MODEL VOTER REGISTRATION SYSTEM 7-27 (National Municipal League 1957).

7 Ogul, *Residence Requirements as Barriers to Voting in Presidential Elections*, 3 MIDWEST J. POL. SCI. 254-56 (1959).

8 For complete information, see Chart III.

constitutes, quantitatively, the single greatest impediment to voting by those desiring to do so. The American Heritage Foundation has systematically analyzed the causes of non-voting in several recent presidential and congressional elections. For 1960, the Foundation indicated that approximately 104,000,000 adult citizens were of voting age at the time of the November elections. Of these, it estimated that 8,000,000 were mobile adults unable to meet state, county or precinct residency requirements set by state statutes.[9]

The American Heritage Foundation emphasizes the impact of residency laws upon what it calls "our better educated and more responsible citizens—people with the initiative and character needed to pull up stakes and seek advancement in a new community. Many are educators, lawyers, clergymen; others are busi-

CHART III
Residence Required by States for Country, State, County and District (or Precinct) in 1962*

Required Duration of Residence	Place where voter must reside for period indicated			
	In U.S.(1)	In State(2)	In County	In District (or Precinct)
Years:				
2	—	4	—	—
1	—	34	3	2
Months:				
12	—	3	—	—
6	—	12	8	6
4	—	—	2	1
3	—	—	3	5
1	—	—	—	1
Days:				
90	—	—	7	1
60	—	—	6	5
54	—	—	—	1
40	—	—	2	1
30	—	—	5	16
15	—	—	—	1
10	—	—	—	5
No Requirement:	53	—	17	8
	53	53	53	53

* Informational source: THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1962-1963, 20 (1962); Chart form source (with minor revisions): Goldman, *Move—Lose Your Vote*, 45 NAT'L MUNICIPAL REV. 6, 7 (1956).
[1] Four states require that the voter shall have been a citizen of the United States for at least ninety days.
[2] Included in these figures are the requirements for voting in Guam, Puerto Rico and the Virgin Islands.

9 Byrne, *Let's Modernize Our Horse-and-Buggy Election Laws!*, in THE CENTER FOR INFORMATION ON AMERICA 4 (1961).

ness executives."[10] Disenfranchisement by state residency requirements may, however, have a greater effect upon non-professionals, particularly those who through occupational necessity are condemned to ceaseless geographical movement. Perhaps the plight of the migratory farm worker in America best exemplifies this type of disenfranchisement.

> "Migratory farm laborers move restlessly over the face of the land, but they neither belong to the land nor does the land belong to them. They pass through community after community, but they neither claim the community as a home nor does the community claim them."[11]

Technological changes have brought forced mobility to skilled as well as unskilled workers. Secretary of Labor Willard Wirtz has stated that, in 1962, 35,000 persons were being "pushed out of their jobs" by the development of automated industrial processes.[12] Similarly, the movement of economically distressed farmers to urban centers and of ethnically disadvantaged Negroes from the South provides additional evidence that disenfranchisement by state residency requirements is not the unique burden of the middle-class professional.

Viewed from the perspective of the state legislatures, residency requirements for voting are part of a complex of residency provisions governing a wide variety of matters. Not only is voting contingent upon particular state residency requirements, but so also are public office holding, the use of some state courts, the practice of many professions, the securing of public financial assistance, and public medical, psychiatric, child welfare and adoption services.[13] State legislatures derive their authority to impose residency requirements for voting not only from the provisions of their respective state constitutions but also from the federal constitution. But the problems basic to the task of rendering state residency requirements for voting more equitable to the mobile are political as well as constitutional. Consequently, the occasional suggestion that Congress assume responsibility to correct the situa-

10 *Id.* at 5. But Census Bureau information indicates that the largest group of migrants comprise "operatives and kindred workers," the second largest consists of craftsmen and foremen, and the third professional and technical personnel. U.S. BUREAU OF THE CENSUS, MOBILITY OF POPULATION OF THE UNITED STATES, APRIL 1958 TO 1959, No. 104, at 23 (1960).

11 REPORT OF THE PRESIDENT'S COMMISSION ON MIGRATORY LABOR, MIGRATORY LABOR IN AMERICAN AGRICULTURE 3 (1951).

12 Des Moines Register, Oct. 21, 1962, p. 3B.

13 Note, 12 WYO. L.J. 50-51 (1957).

tion[14] has been treated as being both political and constitutionally impractical. Indeed, the immediate efforts to permit voting by movers were made with seemingly full acceptance of the notion of state primacy in the field. Whether this approach actually meets the test of practicality and whether it constitutes the only constitutionally acceptable course are the questions to be answered.

There is little doubt that the major efforts to alleviate the disenfranchisement of the mobile in the 1950's and early 1960's have been predicated upon the assumption that state action was the only feasible solution. In 1953, the Connecticut legislature passed a law permitting former Connecticut residents to vote for presidential and vice-presidential electors for fifteen months after they had moved from the state or until they had fulfilled the residency requirements of the state to which they had moved, if this occurred within fifteen months. In the same year, Wisconsin adopted a different approach by passing legislation permitting new residents—who would have been eligible to vote in the state from whence they came had they remained there until election day—to vote for presidential and vice-presidential electors.[15] By 1959, several additional states had adopted laws embodying either the Connecticut or Wisconsin approach. These inceptions of state legislative activity underscored one of the characteristic practical shortcomings of dependence upon state action—lack of uniformity.

In its initial consideration of the voting problems of the mobile in 1952, the Council of State Governments did not deal with positive legislation but chose to attack possible national intervention in the matter. Consequently, by the time the Council made a formal recommendation in 1956, the contradictory approaches made by Connecticut and Wisconsin were being appraised by their sister states. The Council adopted a resolution supporting the Connecticut plan. In 1955 the national Congress adopted a concurrent resolution suggesting that the states meet the problem, but the resolution did not specify which of the two solutions it deemed best.[16] Finally, in August 1962 the National Conference of Commissioners on Uniform State Laws adopted a proposed uniform act embodying the essentials of the Connecticut plan. Section one of this uniform act provides:

"Each citizen of the United States who, immediately prior

14 See, *e.g.*, Goldman, *Move—Lose Your Vote*, 45 NAT'L MUNICIPAL REV. 6, 46 (1956).
15 See Ogul, *supra* note 7, at 258-59.
16 *Id.* at 257-62.

to his removal to this state, was a citizen of another state and who has been a resident of this state for less than [insert period of required residence for voting] prior to a presidential election is entitled to vote for presidential and vice-presidential electors at that election, but not for other offices, if

(1) he otherwise possesses the substantive qualifications to vote in this state, except the requirement of residence [and registration], and

(2) he complies with the provisions of this act."[17]

Even before the drafting of the proposed uniform act by the Commissioners, several states had modified their residency requirements for voting in accordance with the Connecticut or Wisconsin model. Prior to 1950, a number of states had adopted "return-to-vote" clauses designed to modify residency requirements to permit *intra*state movers to cast ballots in their former precincts. The comprehensive study by Yates[18] indicated, however, that no state had used the "return-to-vote" clause to alleviate the problem for *inter*state movers. After 1950, several significant statutory approaches were utilized to meet the growing problem of interstate movers and to render voting easier for intrastate movers as well, and the period between 1950 and 1962 was one of intensified although non-uniform activity. Six states have reduced their state, county or precinct time of residence requirements for voting.[19] Twelve states have added or extended "return-to-vote" clauses affecting intrastate movers.[20] Eight have adopted a suspension of their state residency requirement for voting for presidential and vice-presidential electors (the Wisconsin approach).[21] Two states adopted a "return-to-vote" clause (actually by absentee ballot) applicable to movers who had left their states.[22] One state has adopted both the Wisconsin and Connecticut approaches.[23] With respect to the espousal of the Connecticut approach by the National Conference of Commissioners for Uniform State Laws, the immediate prospects for uniformity appear to be dim. In fact,

17 Uniform Act for Voting by New Residents in Presidential Elections, in 71 ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 1 (1962).

18 See Yates, *supra* note 5, at 4-7, 14-15.

19 Alabama, Louisiana, New Jersey, North Carolina, Rhode Island, and Tennessee.

20 California, Delaware, Michigan, Minnesota, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, and Tennessee.

21 California, Idaho, Massachusetts, Missouri, North Carolina, Ohio, Oregon, and Wisconsin.

22 Connecticut and Vermont.

23 Arizona.

three of the adoptions of the Wisconsin approach were made in November 1962, only three months after the Commissioners had indicated support of the alternative plan.[24]

Against this backdrop of non-uniformity and strong emphasis upon states' rights conceptions of the status of residency requirements for voting, persistent advocacy has developed for a larger role for the national Congress in these matters. As early as 1952, the National Institute of Municipal Clerks advocated action by Congress to alleviate the voting problems of "interstate movers."[25] By the late 1950's and early 1960's, increasing emphasis was placed upon the need for national rather than state action with respect to voting residency requirements affecting congressional and presidential elections. Professor Goldman, writing in the *National Municipal Review*, argued:

> "Congress, for example, could direct that no citizen shall be denied the right to vote in a congressional election for failure to meet a residence requirement. To prevent fraud or indiscriminate voting behavior, Congress could make special provision for adequate identification of recently arrived voters in a community."[26]

In particular, the clash of constitutional views which emerged in debates over proposed civil rights legislation in Congress stimulated extended debate in the law journals. From these exchanges a body of doctrines justifying extension of national influence has developed.[27]

What are the salient constitutional issues? Senator Ervin of North Carolina recently summarized the traditional states' rights arguments.[28] He argued that "the states alone possess the right to establish qualifications for voting."[29] This derives from article 1, section 2, and the seventeenth amendment which specifically provide that the electors for Representatives and Senators "in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Senator Ervin cited an 1879 Supreme Court decision[30] as evidence that the Court was

24 Washington Post, Nov. 11, 1962, p. E3, col. 1.
25 Ogul, *supra* note 7, at 256.
26 Goldman, *supra* note 14, at 46.
27 See, *e.g.*, Kirby, *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROB. 495-500 (1962).
28 Erwin, *Literacy Tests for Voters: A Case Study in Federalism*, 27 LAW & CONTEMP. PROB. 481 (1962).
29 *Id.* at 483.
30 *Ex parte* Clarke, 100 U.S. 399, 418 (1879).

committed to this viewpoint soon after the Civil War. Supporters of Senator Ervin's position occasionally invoke the historic experience of residents in federal enclaves scattered throughout the states as verifying contentions of exclusive state control of the qualifications of presidential and congressional electors. Furthermore, the two major proposals for alleviating the effect of rigid state residency requirements for voting which emerged in the first full-scale congressional consideration of the problem were predicated upon the assumption that state primacy in the matter of voting qualifications was unquestioned.

In 1961 consideration was given to the residency requirement problem in hearings before a Senate Judiciary subcommittee.[31] Senator Kefauver of Tennessee proposed adoption of a constitutional amendment providing that:

> "The residence requirement for voting for President and Vice-President shall be residence within one of the several states for a period not to exceed one year. A qualified voter changing residence from one State to another shall be entitled to vote for President and Vice-President by absentee ballot in the state from which he moves for a period of two years after the change of residence, provided he is not qualified to vote in another state within that period."[32]

Senator Keating of New York proposed an amendment which would lower the state residency requirements for presidential and vice-presidential electors to ninety days.[33] The fact that both Senators Kefauver and Keating felt that a constitutional amendment was necessary purportedly substantiated (or judiciously sought to avoid) the claims of advocates of state primacy regarding voting qualifications. In terms of the prospects of voluntary and uniform state action to meet the problem, Senators Keating and Kefauver were strong in their expressions of disbelief in the practicality of relying upon state action.[34]

What, if anything, can be said for direct congressional action through ordinary legislation? Pragmatically, the prospects for adoption of a constitutional amendment patterned after those proposed by Senators Kefauver and Keating are exceedingly slim.

31 *Hearings Before the Subcommittee on Constitutional Amendments Concerning the Nomination and Election of the President and the Vice-President and on Qualifications for Voting of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. (1961).

32 S.J. Res. 14, 87th Cong., 1st Sess. (1961). See *Hearings, supra* note 31, pt. 1, at 13.

33 S.J. Res. 90, 87th Cong., 1st Sess. (1961). See *Hearings, supra* note 31, pt. 1, at 23.

34 *Hearings, supra* note 31, pt. 1, at 34, 275-77.

Similarly, the possibilities for voluntary uniform state action are slight. Not only is the non-uniform and rather sporadic experience of the past decade discouraging, but also, because residency requirements for voting are often written into the state's fundamental law, meaningful change can be accomplished in many states only through amendment of the state constitution. Advocates of state activity argue on the authority of article II, section 1, clause 2,[35] and *McPherson v. Blacker*,[36] that state constitutional requirements for a minimum term of residence have no limiting authority in situations where a state legislature prescribes lesser requirements for those voting for presidential and vice-presidential electors.[37] Yet the strong resistance to this interpretation that developed at recent governors' conferences portends extended political debate and prolonged litigation should an attempt to implement this approach be made. In short, the practical and constitutional difficulties inherent in state activity suggest that a thorough appraisal of the alternative of direct congressional action via ordinary legislation might be appropriate.

Direct congressional action would meet the need for uniformity and could also incorporate provisions which would embody full recognition of the fact that modern America is a highly mobile society. Professor Goldman has specifically recommended that "Congress develop some system of reward for those States adopting reciprocal arrangements to allow recently moved voters to exercise the franchise in presidential elections without undue delay upon arrival to the new residence."[38] Because concern about possible fraud has been a prime topic in every serious discussion about the possibility of minimizing residency requirements, Goldman has also suggested that modern identification techniques be adapted to the registration and voting process. In order to provide an effective and nationwide system, Congress should, he concluded, create a National Board of Elections.[39] These suggestions, if properly implemented, would render state residency requirements more flexible and yet sufficient to inhibit fraud.

What constitutional justification can be found for such congressional intervention? Perhaps the boldest and most direct in-

35 "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."

36 146 U.S. 1 (1892).

37 Lugg, *Memorandum Concerning Election Laws*, in 71 ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 10 (1962).

38 *Hearings, supra* note 31, pt. 2, at 349.

39 *Id.* at 349-50.

vocation of constitutional scripture can be made with respect to section 2 of the fourteenth amendment. Vitalization of this provision would inhibit the setting of residency requirements for voting by the states by reducing a state's representation in the House of Representatives when the right to vote "is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime."[40] The historical record of the adoption of this amendment and the literal interpretation of the penalty clause underscore the fact that this embodies the most direct of federal constitutional limitations upon the powers of the states.[41]

The considerations in *The Slaughter-House Cases*[42] which impelled Mr. Justice Miller to reject John Archibald Campbell's argument that the relationship of individuals to the nation had been fundamentally altered at the expense of the states no longer obtain. Indeed, the fact that Mr. Justice Field and his fellow dissenters in *Slaughter-House* have long been recognized as more successful prophets, as to the due process and equal protection clauses, than Mr. Justice Miller suggests that implementation of the penalty clause of the fourteenth amendment would be consistent with contemporary developments in federal-state relations.

The prospect that the equal protection clause of the fourteenth amendment may be invoked as a limitation on state power to set voting qualifications has received extensive consideration as a result of the recent congressional debates over poll tax and literacy test provisions. It is pertinent to note that the clause was first invoked for this purpose in *Pope v. Williams*,[43] a 1904 case involving a complicated state residency requirement for voting, and that the possibility was commented upon favorably by the Court even though the circumstances did not warrant application in that case.

In the oral argument for plaintiff in that case, the contention was made that:

> "On the transfer of residence from one State to another a citizen of the United States is vested 'with the same rights as other citizens of that State.' . . . This necessarily includes

40 *Cf.* Everett, *Foreword*, 27 LAW & CONTEMP. PROB. 327, 328 n.4 (1962).

41 See Bonfield, *The Right To Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108 (1960), for an excellent case for utilization of this provision.

42 83 U.S. (16 Wall.) 36 (1873).

43 193 U.S. 621 (1904).

> the right not to be arbitrarily discriminated against in the acquisition and enjoyment of political rights, because of his removal from another State. The statute may, therefore, properly be held also to be repugnant to the second section of the fourth article of the Constitution of the United States."[44]

In reply, the attorney for the state of Maryland argued:

> "Tests, qualifications, disqualifications, denials, abridgments, distinctions, inequalities, may still lawfully be made at the pleasure of the States, provided only they do not discriminate against the negro.
>
> "If they apply equally, impartially and uniformly to white and black citizens alike, they are not condemned by the letter or the spirit of the Thirteenth, Fourteenth and Fifteenth Amendments. They may perhaps cost the States a reduction in their Congressional representation in the proportion in which the number of adult males disfranchised in such state legislation bears to the whole number of its adult male population. But this is the only legal consequence, and there is not warrant for the contention that the Federal judiciary can also declare such legislation absolutely void."[45]

Mr. Justice Peckham, in ruling against the plaintiff, did not see fit to utilize the equal protection clause, but left no doubt that the clause could be invoked against state voting regulations of a discriminatory nature. He speculated that:

> "The question might arise if an exclusion from the privilege of voting were founded upon the particular State from which the person came, excluding from that privilege, for instance, a citizen of the United States coming from Georgia and allowing it to a citizen of the United States coming from New York, or any other state. In such case, an argument might be urged that, under the Fourteenth Amendment of the Federal Constitution, the citizen from Georgia was by the state statute deprived of the equal protection of the laws."[46]

In the modern context, the unusually long residency required for voting in several of the Southern states may well constitute "invidious discrimination" against poor whites and Negroes who

44 *Id.* at 627.
45 *Id.* at 631.
46 *Id.* at 634.

by occupational necessity are forced to migrate seasonally. This sort of discrimination, properly documented, could provide a judicially acceptable basis for invocation of the equal protection clause as a limitation upon state authority to set voting qualifications.[47] But where the impact of rigid and long residency requirements does not fall in a manner suggestive of ethnic, class, or economic discrimination, public policy alternatives predicated upon assumptions of congressional supremacy in the field of voting rights deserve full consideration and effective implementation.

Electoral procedures which make citizenship participation difficult affect not only the rate of participation but often influence the partisan direction of balloting. Thus the ethnic, occupational or political groups which have, and realize that they have, only a very limited ability to influence elections and subsequent public policy often are oriented toward the minority political party within their state. When a longstanding majority party enacts statutes which render voting more difficult, it serves not only to enhance its own position but to weaken the sense of public obligation of some elements in the citizenry and to render more difficult the development of effective two-party competition.[48] These latter elements are traditionally considered foundations of the democratic process.

The Supreme Court, in *United States v. Classic*,[49] recognized that Congress had a constitutional obligation to protect the "integrity" of elections for representatives to the House of Representatives. The salient commitment of *Classic* is that those elements in such electoral processes which are "integral" fall within proper congressional authority under article 1, section 4, and article 1, section 8, clause 18. Specifically, the majority wrote:

> "While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states . . . , this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution 'to

47 For a contemporary statement of the argument that this clause may be invoked in voting discrimination cases, see Kirby, *supra* note 27, at 496.

48 For an excellent analysis of the relationship of state election laws and political behavior, see CAMPBELL, CONVERSE, MILLER & STOKES, THE AMERICAN VOTER 266-89 (1960).

49 313 U.S. 299 (1941).

make all laws which shall be necessary and proper to carry into execution the foregoing powers.' "[50]

Similar interpretative justification for congressional intervention can be found regarding voting for presidential and vice-presidential electors in *Burroughs v. United States*.[51] There the Court held that the Federal Corrupt Practices Act of 1925 could be applied to such electors.

Indeed, Congress has successfully invoked not only the constitutional provisions directly referring to elections, but also the war power and its power to govern federal territory. In a 1942 act,[52] for example, Congress granted members of the armed forces the right to vote for members of Congress and presidential and vice-presidential electors without fulfillment of various state registration, residency or poll tax requirements. The validity of this act has not been tested constitutionally.[53] Similarly, some commentators argue that Congress may, if it desires, draft legislation insuring that residents of enclaves under exclusive federal jurisdiction may vote for federal officers in elections regulated by authorities of the state surrounding the enclave.[54] That the Congress has already assumed such authority is found in the statute relating to the voting rights of persons living within the jurisdiction of Shenandoah National Park in the state of Virginia.[55] The statute provides:

"Persons residing in or on any of the said lands embraced in said Shenandoah National Park shall have the right to establish a voting residence in Virginia by reason thereof, and the consequent right to vote at all elections within the county or city in which said land or lands upon which they reside are located upon like terms and conditions, and to the same extent, as they would be entitled to vote in such county or city if the said lands on which they reside had not been deeded or conveyed to the United States of America."[56]

In the final analysis, the solution of the problem of the mobile voter lies not in speculation over alternative modes of constitutional interpretation. Justification for uniform legislation can be derived

50 *Id.* at 315.

51 290 U.S. 534 (1934).

52 Act of Sept. 16, 1942, ch. 561, 56 Stat. 753, repealed and replaced by Federal Voting Assistance Act of 1955, 69 Stat. 584, 5 U.S.C. §§ 2171-96 (1958).

53 Kirby, *supra* note 27, at 500.

54 Gerwig, *The Elective Franchise for Residents of Federal Areas*, 24 GEO. WASH. L. REV. 404 (1956).

55 56 Stat. 322 (1942), 16 U.S.C. § 403c-1(h) (1958).

56 *Ibid.* See also Gerwig, *supra* note 54, at 421 n.69.

from a variety of constitutional, statutory and judicial sources. Clearly, impediments to such congressional action are political rather than constitutional. Yet the tensions of our mobile society have themselves pointed toward bolder federal activity in the field of voting rights. To the extent that urbanites achieve greater representation in the state legislatures and the national House of Representatives, their self-interest renders politically feasible the establishment of a national policy governing residency requirements for voting. The political repercussions of *Baker v. Carr* and its progeny give promise of swift developments in this direction.