THE ELECTION PROCESS:

LAW OF PUBLIC ELECTIONS AND ELECTION CAMPAIGNS

Second Edition

by Alan Reitman
and Robert B. Davidson

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ELIGIBILITY TO VOTE

Federal v. State Authority

Even a cursory reading of the Constitution discloses that each state seems to possess unquestioned authority over both the qualifications of persons selected to the Presidential Electoral College and the election machinery within the state's borders. Article II, Section 1 gives states the authority to determine the manner of appointing presidential electors. Article I, Section 4 grants to state legislatures the power to prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives". Article I and the 17th Amendment (which provides for direct election of United States Senators), in declaring that people who vote for Senators or Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature", not only insure that a state cannot place greater restrictions on voting in federal elections than exist in statewide elections, but implicitly grant to the states the power to set their own qualifications for voters.

These provisions, coupled with each state's authority to supervise all elections for state office, appear to endow the states with decisive control over all elections. The fact that the Constitution, as part of Article I, Section 4, reserved to Congress the right to make or alter regulations for congressional or senatorial elections, "except as to the Places of choosing Senators", hardly downgrades state authority, for Congress has only rarely exercised this power and then only in very limited ways. Moreover, the Constitution also authorizes each state governor to call a special election when vacancies occur in congressional representation.

But the meaning of state constitutional provisions is always open to alteration by Supreme Court interpretation or amendment of the Constitution. Further change in constitutional edicts can result from congressional statutes, drawing on explications of the Constitution. All of these forces were activated in the last decade, primarily under the impetus of the various movements for major social reform. The result of three key developments

has been to temper the seemingly unrestricted power of the states. First, there was the adoption of certain constitutional amendments. In the initial voting change since the 19th Amendment in 1920 granted women the right to vote, Congress and the states approved the 24th and 26th Amendments, ending, in federal elections, the poll tax as a requirement for voting and lowering the voting age from 21 to 18. Second, reduction of state authority in voting matters was reinforced by passage of the major voting rights laws enacted by Congress in 1965 and 1970, especially the literacy and registration provisions, which drastically altered the shape of state legislative power over voting. Third, the Supreme Court contributed to the broadening of federal supremacy in voting by a number of decisions applying to various aspects of the franchise.

The power of states to specify who may vote was severely limited by the high court's interpretation of the 13th, 14th, and 15th Amendments, the so-called "Civil War Amendments". These three amendments, originally enacted in order to grant civil rights to newly-freed slaves, were repeatedly used to strike down state laws which directly or indirectly restricted minority Americans from gaining access to the ballot. The poll tax, literacy tests and related devices, and even to a great extent residency requirements, all fell in the face of constitutional attack. The 14th Amendment's proscription against any state law "which shall abridge the privileges or immunities of citizens of the United States" or which may "deny to any person within its jurisdiction the equal protection of the laws", proved to be one of the most potent weapons challenging state control of all elections.

The result of all this federal activity has been gradually to erode the states' power over voting to the point where it can now be stated that primary responsibility for insuring voting rights resides with the federal government.

Interestingly, the Constitution does not expressly and concretely define who shall have the right to vote. However, the lack of an affirmative declaration does not diminish the protection afforded individuals. Governmental power used to deny citizens the right to vote can be interdicted on the grounds noted above. Even a section of the 14th Amendment defining "citizens" as "all persons born or naturalized in the United States and subject to the jurisdiction thereof", can be seen as a positive protection of the right of franchise, since citizenship is in all states a requisite for suffrage.

Voter Qualifications

In view of the changes in federal-state relations affecting the franchise, examination of the state codes and federal legislation is necessary if one wants to understand fully the extent of the right to vote and how this right is now protected. At first glance the basic qualifications for voting on which state legislation is predicated seem direct, reasonable, and relatively simple for the average person to fulfill. On the whole, they are seldom arbitrary and seem to represent justifiable attempts to ensure an electorate with the maturity, mental capacity, and stake in the community to cast a responsible ballot. However, the federal actions alluded to in the preceeding section demonstrate how unsatisfactory these codes were in making the right to vote a reality for many Americans. Moreover, the state election codes are such a patchquilt that their bewildering array of minute provisions present obstacles which impede rather than facilitate voters' access to the polling booth.

Age

Since the beginning of World War II, there was considerable pressure for a constitutional amendment which would reduce the national voting age to 18. By 1960 only two states, Georgia and Kentucky, permitted 18-year olds to vote. Advocates of lowering the voting age continued to argue that a man who is old enough to face bullets is old enough to mark ballots--a difficult contention to refute, especially as the latest American military commitment, Vietnam, involved many thousands of young men who had not reached their maturity. Joined with the military argument was the claim that modern mass communication and transportation had so widened young peoples' bounds of knowledge that they were as informed as their elders on the issues of the day. The deep-felt involvement of high school and college students in social reform causes in the 1960's strengthened this argument and heightened the demand for lowering the voting age.

Finally, following the urging of several Presidents, the pressure of interested citizens' groups and the organization of youth itself, Congress, which has the sole power to enact a national law establishing for all states a revision in the voting age, took this significant step. Section 302 of the Votings Rights Act Amendments of 1970 specified an 18-yearold voting age in all elections. However, impediments to full-scale voting remained when the Supreme Court in its 1970 landmark decision,

Oregon v. Mitchell, upheld the constitutionality of the federal statute only as applied to federal elections. But the high court's decision set the tone for further advance. A constitutional amendment extending the 18-year-old vote to state elections was approved by Congress, and finally ratified by the states on June 30, 1971.

There are already signs that the influence of the 18-year-old vote is being felt or represents portents for the future. Many under or just-over-21 candidates are running for local political office, and some have been elected; young people are in the forefront of the campaigns for favorite presidential candidates. Perhaps of equal long-range importance, lowering of the voting age to 18 has led many states to lower the 21-age majority for entering into marriage and commercial contracts, for jury service and for exercising numerous other rights now enjoyed by persons over 21.

Citizenship

Citizenship is an unexceptionable requirement for voting in every state. In addition to the broad provision of the 14th Amendment that a citizen is anyone born or naturalized in the United States, there are numerous laws dealing with special cases for the acquisition of citizenship. Anyone wishing to vote who is uncertain of his or her citizenship status should check with the Immigration and Naturalization Service of the United States Government (which has field offices in a number of major cities) to establish their exact standing, since the local registrar for elections in a community is not legally qualified to determine citizenship status. There are also non-governmental organizations, such as the American Immigration Conference, 509 Madison Avenue, New York City, and the American Council for Nationality Services, 20 West 40th Street, New York City, which can provide information. When applicants present themselves to the registrar, they must either take an oath that they are a natural-born citizen or present their original naturalization papers or a certified copy for the registrar's inspection before they can be registered as an elector. New citizens attempting to vote should be aware that three states require citizenship for specified time periods. In California and Utah, the registrant must have been a citizen for at least 90 days. Pennsylvania prescribes a 30-day minimum.

Residency

Every state code sets forth requirements specifying the

length of time one must reside in the state, the county, and the election district before a person can register to vote. The underlying principle for all these stringent state regulations is clear: the assumption that only through living in a state for a specified period of time can a person become sufficiently conversant with local problems and candidates to vote intelligently. This prerequisite for voting not only prevents transients or migrants from participating in elections and possibly over-ruling the votes (and presumably the better judgment) of long-time residents, but also prevents fraud by providing a sufficient time period for registering (and verifying) voters and handling the other administrative details of the election process.

The idea of state residency requirements for specified time periods, however, came under sharp attack. Critics charged that such requirements were unnecessary and even unconstitutional. In view of the broadening channels of communication and the increased educational level of voters, information about issues and candidates, even local ones, can be easily obtained, certainly within a lesser period, such as 30 days. It was argued that a similar time was more than sufficient for handling the normal registration procedures. But the most important criticism heard was that a durational residency requirement restricted a citizen's right to travel freely from state to state. This restriction, in effect, amounted to a penalty for changing a residence prior to an election.

The problem was not insignificant, as statistics on the high mobility of the American people demonstrated. According to a report of the Bureau of the Census, about 18% of the national population, 36.2 million persons, moved during the March, 1970 - March 1971 period. The Bureau estimates that five and one-half million Americans are disfranchised each election because of their failure to fulfill state durational residency provisions. When county and district residency requirements are counted, the problem becomes more acute. In his book, Principles of Demography (1969), Donald Bogue estimated that one of every five persons was changing residence every year; 27.8 million were crossing county borders. Surprisingly, before the Voting Rights Act Amendments of 1970 were passed, only 29 states*took formal

* Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Texas, Washington, Wisconsin and Wyoming.

notice of the problem. They provided that a former state resident could vote in presidential elections in his or her old precinct for a specified length of time after moving to another location, if they could not qualify in their state of new residence, or that a new resident could vote in such elections even though the local residency requirements were not fulfilled.

Responding to the current realities of American life, both Congress and the courts acted to eliminate or reduce the impact of state durational residency requirements. In 1970 Congress abolished them for presidential elections. Section 202 of the Voting Rights Act Amendments of 1970 provides that no person will be denied the right to vote in a presidential election because of failure to fulfill state durational residency requirements. Every state must register a transient voter who applied up to 30 days before a presidential election. If a transient voter moves to another state within 30 days before the election, he or she may now--in all states--obtain an absentee ballot up to a week before the election from the state of prior residency and cast that ballot in the presidential contest.

The Supreme Court, while initially dragging its feet, finally knocked out state residency requirements for all elections. But the all-embracing decision in the 1972 Dunn v. Blumstein case was not reached until after a lengthy court campaign involving a number of cases. In its 1965 Drueding v. Devlin ruling, the Supreme Court had upheld a one-year residency provision for voting in a presidential election. However, pressures for reconsideration mounted, with the focus on durational requirements for all elections. The results were mixed. United States District Courts had declared durational residency requirements unconstitutional in Tennessee, Indiana, Massachusetts, Minnesota, North Carolina, Alabama, Virginia, and Vermont, even though the same federal courts in Mississippi, Illinois, Washington, Louisiana, Ohio, Arizona, and Wisconsin had ruled just the opposite. And while the Voting Rights Act Amendments solved the problem of residency standards in presidential elections, the Supreme Court, in its 1971 Oregon v. Mitchell decision approving Congress' authority to pass laws banning state durational residency requirements, did not tackle the question of whether such requirements were unconstitutional.

This barrier was broken in the 1972 decision which concerned a Tennessee citizen's challenge of that state's one-year residency requirement. In its opinion, the high court held the one-year requirement invalid as a violation of the equal protection clause, largely as a consequence of several non-voting de-

cisions favoring freedom of interstate travel. (The right to travel, although nowhere specifically mentioned in the Constitution, is often said to find its constitutional under-pinnings in the 14th Amendment's prohibition against any state law which "abridges the privileges or immunities of citizens"). In 1966, the Supreme Court held, in part, in U.S. v. Guest, that restricting a citizen's right to travel freely from state to state was a deprivation of civil rights and thus amounted to a crime under federal law. In 1969, the Supreme Court declared, in Shapiro v. Thompson, that the government could not impose residency requirements on a person as a condition for receiving welfare benefits. The Court reasoned that the right to travel was a "fundamental" right and could only be abridged if the state showed that it had a compelling interest for doing so. This same rationale was used in the Blumstein decision. As Justice Thurgood Marshall stated:

> Durational residency laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right. In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote. Absent a compelling state interest, a State may not burden the right to travel in this way.

While the Supreme Court did not fix a permissible time period in the Blumstein case, it did say "that 30 days appears to be an ample period of time" for a state to guard against election fraud. The pre-Blumstein durational requirements can be noted on the chart at page 101. While it is still too early to define precisely the impact of the Blumstein decision, it is certain that lengthy durational residence requirements, like so many other burdens on the franchise, are remnants of the past, having fallen before the commands of the Constitution's equal-protection guarantee.

Defining Residency for Voting Purposes

Quite apart from the durational residency requirements, the ability of people to vote can be affected by the definition of residency. Most codes very carefully define the term. Residence refers to the voter's permanent abode, to the location from which there is intention to return after temporary absence. For a married person, the place where the family resides is usually considered the residence unless either spouse is separated and

maintains a separate home. For a single person, the place where he or she sleeps is usually regarded as the residence. Two residences cannot be listed, for as soon as one place is recorded, the right to claim a second is relinquished. For military personnel and related groups, the Federal Voting Assistance Act of 1955 states that legal residence

> "is generally considered the state from which the person entered military service, left the territorial United States in the service of the Federal Government, or left in the service of a religious group or welfare agency assisting members of the Armed Forces."

An elector does not lose residence because he or she is temporarily absent from the home. (In most states the law declares that confinement to prison or to a charitable institution or asylum does not deprive one of residence rights, but persons confined to mental or penal institutions are generally not allowed to register and those in charitable institutions are almost never granted the franchise.) All election codes specifically state that residence is not lost by a person who is serving in the armed forces or in agencies providing services for the armed forces; most codes further provide that electors who are absent because they work for the state or federal government, or are employed in navigation in inland waterways, or who are attending a school, college, university or other institution of higher learning, retain their residence rights.

It should be noted, however, that just as one does not lose residence while engaged in these pursuits, for two large segments of the population--military personnel and students--there is growing controversy over whether state residency can be acquired by virtue of being stationed at a military establishment or by being a resident student within the state. The issue is not one of losing totally the right of franchise, as state laws provide absentee ballots for servicemen, their spouses and dependents, and students. Instead, the argument revolves around whether members of the Armed Forces and students can make their right to vote effective, by voting in places where they presently reside and thus have an impact on the conditions of their life in those communities and states. Since career servicemen are stationed at military bases indefinitely and students spend at least four years at institutions of higher learning, this comment is frequently heard: can they really be regarded as transients undeserving of equal treatment, along with other newcomers who establish voting residence. The problem is not an illusory one nor lacking legal complexities. By 1970, 24 states had laws on their

statute books which, in effect, asserted that no one gains or loses a residency for purpose of voting because he or she resides at a military installation or institution of higher learning. It is important to emphasize that restrictive state practices affecting military personnel apply only to persons residing within a military installation. In all states, members of the armed forces living off-base may qualify to vote in the same manner as any other state resident.

Indicative of the drive to liberalize the right of franchise, the Supreme Court and the Congress have moved to ease state restrictions affecting members of the armed forces. In its 1965 Carrington v. Rash decision, the Supreme Court voided a Texas statute which effectively barred resident military personnel from voting in local elections. The Court held that the state must at least give any person who wished to establish a permanent residence an opportunity to present evidence as to his domicile. Three years later, in the interest of removing all legal obstacles to military people residing on a military installation, Congress enacted Public Law 90-344 which suggested to the states that a military family be allowed to change its state of legal residence if it so desired, even though all or part of a residency requirement was fulfilled while the family resided on a military installation.

Thirteen states, including many with significant military populations (Mississippi, Georgia, South Carolina, and Texas), have enacted laws permitting on-base residents to qualify in their state of military assignment, often after some additional proof or declaration that the military voter intends to remain permanently in the state. Two states, Nevada and Utah, permit only spouses and dependents of on-base military residents to qualify to vote, on the theory that unlike their husbands or fathers, spouses and dependents are "voluntary" residents who by their presence have evidenced an intent to make the state their permanent home.

The problem has been further eased by the Supreme Court's 1970 Evans v. Cornman decision which held that an otherwise qualified voter, who is regarded as a resident of the state, cannot be denied the franchise solely because he or she resides on a federal enclave.

Although reform steps have opened the doors to increased voting by resident military personnel, students have to face much stiffer opposition in claiming the right to vote in places of residency. On the surface there are differences. Students are considered more transient than military personnel because of

vacations, the usual summer recess, and flexible educational programs which feature spending a semester or year at different colleges and universities. But a more likely explanation is the conservative cast of most state legislatures and their fear of student voting power.*

While the rationale of the Supreme Court's Carrington v. Rash decision by implication forbids a state from arbitrarily excluding students from local voter lists, subtle (and not so subtle) forms of discrimination have been practiced. Registrars have refused to place students on registration rolls without some impossible-to-obtain definitive proof--such as property ownership--of their intention to remain permanently within the voting district. University of Alabama students were blocked from voting in the 1968 election when the Tuscaloosa Board of Registrars required the completion of a "Voter Registration Student Questionnaire"; this provided an excuse for failing to register students pending "evaluation" of the forms. Initially, California's Attorney General ruled that unmarried students must, in general, vote in their parent's precinct. In New York, the state legislature recently made it almost impossible for all but a few students to register where they go to school by empowering local election officials to consider among voting qualifications for students the residency of parents.

Efforts to stymie student voting have not gone unchallenged, primarily on the ground of discriminatory treatment. States that make student voters fill out special forms, or answer a special questionnaire, or produce documentation not required of other registrants, violate the 14th Amendment's equal protection clause by effectively discriminating against these new voters solely because they are students. In addition, the federal voting law

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*The legislators fear is not without cause. In Massachusetts, students have the power to control at least seven communities. In the same state, students comprise more than 10% of the total number of potential voters in 17 localities. Similar situations exist in many college towns. In Champaign, Illinois, for example, 16,000 votes are cast at a usual election--the same as the number of students who live at the University of Illinois. The concentration of students in certain communities presupposes that students will vote as a bloc. While this may be true in certain communities, many analysts believe that the student vote will be divided according to their home background and parents' voting pattern.

(1971 (a)(2)(A) of Title 42 of the United States Code) prohibits any administrative officer from applying to any otherwise qualified individual "any standard, practice, or procedure different from the standards, practices, or procedures applied under such voting laws to any other individuals." The legal challenges also rest on the newly-ratified 26th Amendment to the Constitution which states that:

> "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

The language of the Amendment is broad enough, it is felt, to cover localities which discriminate against students who wish to register in their college towns. The 1970 Census, which is used to apportion Congressional representation, also has been cited as precedent for recognizing students' residency in their college community for voting purpose. The Bureau of the Census counted the college locality as a student's place of residency, not the parent's home district.

The heavy controversy stirred by the student voting problem has led to a flurry of court decisions and state attorney general opinions. The response has been mixed, but the trend seems to be toward qualifying students to vote in their college or university site of residence.

Before the 26th Amendment was ratified on June 30, 1971, only six states (Alaska, Colorado, Nebraska, Utah, Washington, and Wisconsin) permitted students to register in their college town. Presently, 22 states now allow students to register in exactly the same manner as all other voter applicants, including many with significant college populations (Massachusetts, Michigan, Connecticut, Illinois and Pennsylvania). And five other states permit students to vote in their college communities after some questioning designed to verify the student's expressed intention to make the college town his or her permanent residency.

Literacy and Related Tests

There can be no quarrel that literacy is a desirable condition for creating an informed and responsible electorate. A voter able to read and write is in a better position to evaluate candidates and issues, by reviewing newspapers and television

political coverage and party campaign materials, than if he or she were dependent on word-of-mouth recommendations or hearsay about political figures. If voters are literate there is greater possibility that they will exercise independent thinking about candidates and issues. And independent political attitudes go hand-in-hand with freedom from political domination.

Originally, literacy tests were adopted to try to avoid the corruption of political machines. Some of the northern states (Connecticut in 1855 and Massachusetts in 1875) sought to prevent voting by new immigrants who, because of their inability to read or write, were thought susceptible to the favors of political bosses. But the focus of literacy tests changed after adoption in 1870 of the 15th Amendment, which removed color, race and previous servitude as conditions for voting. Southern states seized on these tests as a device to thwart voting by the "freed" blacks who, in their previous slave status, had been denied such rudiments of education as reading and writing.

The historical record shows that state attempts to enfranchise only the "literate" ranged from a requirement that the applicant be able to read or write English or his mother tongue, to one that the potential elector be able to read any section of the state or federal constitution and demonstrate understanding of it. An obvious drawback to provisions which required a voter to show understanding or give a reasonable interpretation of a section of a constitution (as the Louisiana and Mississippi statutes required) was the difficulty of establishing fair and sound criteria for the determination of "understanding". When such evaluation fell within the discretionary power of the registrar (as it did in North Carolina where the statute declared it the duty of the local registrar to "administer" the literacy tests), it was almost impossible to ensure uniform treatment of registrants throughout the state. Any evaluative system lacking specific standards for determining success and failure is subject to the partiality of the person giving the test. New York evolved probably the best answer to this problem by placing literacy testing in the hands of the Board of Regents which provided an official examination that was graded objectively. The elector who could not produce evidence of educational attainment was required to pass such a test. In Georgia, on the other hand, the alternative test for the person who could not read or write contained a set of 30 standard questions of which the illiterate voter orally had to answer 20 in order to qualify to vote. The detailed questions (What is the definition of a felony in Georgia? Who is the solicitor general of the State Judicial Circuit in which you live and who is

the judge of such circuit? What are the names of the persons who occupy the following offices in your county: Clerk of the Superior Court, Ordinary, Sheriff?) obviously were extraordinarily difficult for the generally well-informed and presumably well-qualified voter to answer, to say nothing of the illiterate.

The unabashed discriminatory purpose of such tests was marked in the laws that many southern states adopted exempting illiterate whites. White voters in Louisiana, North Carolina and Oklahoma were exempted by a "voting grandfather clause" which permitted lineal descendants of early voters to vote without taking such a test. Other exceptions flowed from property ownership (Louisiana, Alabama, Virginia, Georgia and South Carolina); being a person "of good moral character" who understood the "duties and obligations of citizenship under a republican form of government" (Alabama and Georgia); or could satisfy the registrar that a person could "understand" and "interpret" a constitutional text when it was read to them (Mississippi, South Carolina, Virginia and Louisiana). The grandfather clause was voided by the Guinn v. U.S. Supreme Court decision in 1915, but the other devices remained.

While literacy provisions in state election laws were revised and refined from time to time, states which did not have them showed little interest in adopting these tests. Undoubtedly the national decrease in immigration since the 1920's and the spread of compulsory public education tended to lower desire for such tests. By 1960, fewer than half the states administered literacy tests to voters, and most of these were in the South, where the purpose remained to impede the Negro registrant. However, under the massive pressures built up by the advocates of civil rights, even the legal restrictions in Southern states were swept away.

The civil rights movement pinpointed voting reform as a prime target and eventually succeeded in ending literacy tests as a qualification for voting. But the struggle was not an easy one. The first round was unsuccessfully fought in the Supreme Court which, in its 1959 Lassiter v. Northhampton County Board of Elections decision, rejected a frontal attack on literacy requirements. The Court held that the 14th Amendment did not forbid literacy tests as long as they were administered in a nondiscriminatory manner.

The battleground then shifted to the Congress where major breakthroughs occurred in the Civil Rights Acts of 1957, 1960, and 1964. Interference with a person's exercise of voting rights was made a federal crime, but the enforcement provisions were