Indiana Law Journal

Volume 43 | Issue 4 Article 5

Summer 1968

The Impact and Constitutionality of Voter Residence Requirements as Applied To Certain Intrastate Movers

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NOTES

THE IMPACT AND CONSTITUTIONALITY OF VOTER RESIDENCE REQUIREMENTS AS APPLIED TO CERTAIN INTRASTATE MOVERS

The laws of virtually every state contain state, county, and township or precinct residence requirements for voting. Most of these provisions were enacted in a period when populations were less mobile[1] and the right to vote was considered less basic and universal both by the courts and the public.[2] Two purposes are offered as justifications for these voter residence requirements: the promotion of a more intelligent vote by insuring that voters have a minimum of knowledge and interest in local affairs,[3] and prevention of fraud.[4] Whether residence requirements do effectively accomplish either purpose may be doubted. But assuming their efficacy, the reasonableness of their application may be questioned both in terms of whether they are the best means available and in terms of whether the avowed purposes apply to all persons residence requirements affect. There are alternative methods which prevent fraud and yet do not deny suffrage to a person who has not resided in a certain locale for a given period of time.[5] And, while it may be justified to deny an otherwise qualified voter who has moved from New York City to Davenport, Iowa, the right to vote for the mayor of Davenport until he has familiarized himself with the candidates and the local issues, residence requirements denying him the right to vote in a presidential election in which the issues and candidates are the same in Davenport as in New York are not justified.

Recognizing that the justification of familiarity with local issues is not applicable to state residence requirements as applied to interstate movers for presidential elections, that there are alternative methods for preventing fraud, and that the population is becoming increasingly transient, the Commissioners on Uniform State Laws have drafted a remedial statute aimed at granting wider suffrage in presidential elec-

1. See Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 MICH. L. REV. 823, 824 (1963).
2. *E.g.*, Baker v. Carr, 369 U.S. 186 (1962).
3. *See* HARRIS, MODEL VOTER REGISTRATION SYSTEM 7-27 (National Municipal League 1957).
4. *See* UNIFORM VOTING BY NEW RESIDENTS IN PRESIDENTIAL ELECTIONS ACT (Commissioners Prefatory Note), 9 UNIFORM LAWS ANNOTATED 201 (Supp. 1967).
5. See text accompanying note 46, *infra*.

tions.[6] But the residence requirements fail to insure familiarity with local issues and yet reduce the otherwise eligible electorate whenever a voter is denied the right to vote in an election in which the candidates and the issues are identical to those of his previous residence. The Uniform Act, however, concerned only *inter*state movers and *state* residence requirements and relatively little attention has been directed to the plight of *intra*state movers. The purpose of this Note, therefore, is to consider the effect and constitutionality of county, township, and precinct residence requirements which deny intrastate movers the right to vote in presidential, United States senatorial, or gubernatorial elections and congressional or state legislative elections where the move was within the United States congressional, state senatorial, or state representative district.

THE IMPACT OF INTRASTATE RESIDENCY REQUIREMENTS

Indiana's residency requirements are fairly typical. In order to vote in any election a voter must comply with the procedures of registration.[7] He must sign an affidavit declaring, *inter alia*, that he has been a resident of the state six months, the township sixty days, and the precinct thirty days preceding the election.[8] If a registered voter moves within the county in which he is registered, regardless of the fact that he may move into a new township or precinct, he may transfer his registration to the new township and precinct.[9] He is not, however, required to reregister or transfer his registration,[10] and he may continue to vote in the precinct of his past registration even though he has moved. A registered voter moving within the county, therefore, is never deprived of his vote by a residency requirement. If he moves within the twenty-eight days immediately preceding a general election, during which the registration books are closed both for registration and for transfers,[11] he may still return to his original precinct to vote. The precinct requirement, therefore, is a vestige which no longer has substantial legal significance. It does, however, have the practical effect of forcing a voter moving within the twenty-eight days preceding the election to return to his original

6. UNIFORM VOTING BY NEW RESIDENTS IN PRESIDENTIAL ELECTIONS ACT, 9C UNIFORM LAWS ANNOTATED 203 (Supp. 1967). The act allows a new resident to vote in a presidential election "if he had been qualified to vote in the state of his prior residence or would have been so qualified had he remained there until the presidential election."

7. IND. ANN. STAT. § 29-3401 (Burns Supp. 1967).

8. IND. ANN. STAT. § 29-3409 (Burns Supp. 1967).

9. IND. ANN. STAT. § 29-3413 (Burns 1949 Repl.).

10. IND. ANN. STAT. §§ 29-3403, 3413 (Burns 1949 Repl.).

11. IND. ANN. STAT. §§ 29-3407, 3410 (Burns Supp. 1967).

precinct to vote.[12]

A registered voter who moves intercounty in Indiana may lose his vote due to the sixty day township residence requirement. An intercounty mover is not provided with a transfer procedure; he must cancel his registration in the county from which he moved and reregister in the new county of his residence.[13] If a voter moves intercounty within sixty days of an election, he will not be able to sign the affidavit required for registration without perjuring himself since he will not have resided in the new township for sixty days on the date of the upcoming election.[14] Approximately 0.5 percent of Indiana's voting population, or 13,900 persons, are prevented by the township requirement from voting in every general election because of an intrastate move.[15]

Like Indiana, most states provide either transfer or return-to-vote provisions for the intracounty mover but not for the intrastate intercounty mover,[16] because most state registration systems are organized on a county basis. But several state registration procedures have both greater and lesser potentials for denying otherwise qualified voters the franchise.[17] California appears to have solved the problem by allowing all intrastate movers to vote in their original precinct until fulfilling residence requirements in their new precinct.[18] Mississippi's requirements,

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12. If he is unwilling to make this effort, the effect is to keep him from voting. No county in Indiana seems large enough to make this a very harsh burden on the voter, but in a state with large counties the distance a voter might need to travel would be a factor to consider.

13. IND. ANN. STAT. § 29-3413 (Burns 1949 Repl.).

14. IND. ANN. STAT. § 29-3409 (Burns Supp. 1967).

15. Adapted from U.S. BUREAU OF THE CENSUS, MOBILITY OF THE POPULATION OF THE UNITED STATES, Series P-20, No. 156, Table 4 (December 9, 1966). The impact in terms of the number of potential voters disenfranchised in Indiana was approximated as follows: the percentages were computed on the assumption that Indiana conforms to the national average in the case of all statistics used, primarily because statistics are not readily available for individual states, and secondarily so that the computation for Indiana could be quickly adapted to compare the percentage of possible voters disenfranchised in states with different residency requirement complexes. Of a total voting age population of 116,107,000 in the United States, 3,849,000 moved to a different household which was within the state but outside the county of their original residence during the year from March 1, 1964 to March 1, 1965. Thus, intercounty movers constitute 3.3 percent of the total voting age population. The Indiana township residence requirement reaches precisely this description of the intrastate mover. However, only those moving within sixty days of an election are unable to fulfill the residency requirements. The 0.5 percent figure assumes that the same percentage of persons moves during each month throughout the year. This presumption is probably not fully warranted because families would be more likely to move during the summer months in order to take advantage of vacations and minimize the disruption of children's education.

16. *See, e.g.*, VA. CODE ANN. § 24-17 (Supp. 1966); MO. ANN. STAT. §§ 118-250, 118-380 (1966); ILL. ANN. STAT. ch. 46, §§ 5-2, 5-23 (Smith-Hurd 1965).

17. The number of voters disenfranchised depends upon two factors: the length of the residence requirement and the area encompassed by the requirement.

18. CAL. CONST. art. 2, § 1 provides that

> any person duly registered as an elector in one precinct and removing therefrom to another precinct in the same county within 54 days, or any

at the other extreme, have a potential of keeping 16.2 percent of the otherwise eligible population from voting.[19] Assuming Indiana to be the norm, 641,500 persons in the United States are kept from voting in every general election because of intrastate moves which prevent them from fulfilling residency requirements.[20]

THE CONSTITUTIONALITY OF INTRASTATE RESIDENCE REQUIREMENTS AS APPLIED TO CERTAIN INTRASTATE MOVERS[21]

Since *Baker v. Carr*,[22] the Supreme Court has been willing to strike down apportionment laws to protect votes against dilution resulting from weighting of voting districts. Language in the apportionment cases indicates that the Court now views the right to vote as basic and important and is now willing to utilize the equal protection clause to protect the right to vote from interference by the states:

> if 'discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to politcial rights.'[23]

But the apportionment cases dealt with laws which had no positive justification for their discrimination. The dilution of votes resulted from historic inaction on the part of the legislature to reapportion and from a shift of population from rural to urban areas. These factors combined to cause a proportional decrease in per capita urban representation. While increasing mobility of the country's population has similarly broadened the impact of residency laws, the apportionment cases are not helpful in discerning a standard of protection applicable to residency requirements

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person duly registered as an elector in any county in California and removing therefrom to another county in California within 90 days prior to an election, shall for the purpose of such election be deemed to be a resident and qualified elector of the precinct or county from which he so removed until after such election; . . .

For similar residency provisions, see OHIO REV. CODE § 3503-01 (1960); N.C. GEN. STAT. § 163-29 (1963) (state-wide transfer provision); MINN. CONST. art. 7 § 1. Note, however, that the California solution may be superficial in that it may require a voter to travel the length of the state in order to vote. It is not clear whether such a voter could utilize an absentee ballot. *Cf.* CAL. ELECTIONS CODE § 14662 (West Supp. 1967). Minnesota does allow such movers to vote by mail. MINN. STAT. ANN. § 207-02 (1962).

19. *See* MISS. CONST. § 241 requiring an election district residence period of one year that would affect intracounty as well as intercounty movers. The calculation and source are the same as that referred to in note 15, *supra.*

20. *See* note 15, *supra.*

21. While the following constitutional arguments are directed toward residence requirements which deny intrastate movers the franchise, the arguments apply equally as well to interstate movers denied the right to vote in presidential elections by states which have not adopted the uniform statute mentioned *supra* note 6.

22. 369 U.S. 186 (1962).

23. Baker v. Carr, 369 U.S. 186, 207 (1962); *see also* Gray v. Sanders, 372 U.S. 368, 380-82 (1963) and Wesberry v. Sanders, 376 U.S. 1, 7-9 (1964).

because they, ostensibly at least, prevent fraud even where the justification of familiarity with local issues does not apply. However, in view of the general trend indicated by the apportionment cases, the Court might regard the right to vote as sufficiently important that it would not permit a state to deny suffrage when alternative methods for preventing fraud are available. Several precedents are readily amenable to application in support of such a result.

Carrington v. Rash[24] involved an issue analogous to that presented by intrastate residency requirements when the justification of familiarity with local issues does not apply. There, the Court struck down a statute which prohibited any member of the armed forces who moved into Texas during his tour of duty from voting notwithstanding the fact that he had fulfilled all other requisites for voting. The avowed purpose of the law was to enable small communities near large military installations to avoid an influx of military votes on local issues. It was feared that military personnel might vote contrary to community interests by reason of differing backgrounds, occupations, and the influence of superior officers. This purpose, unlike the prevention of fraud, was therefore suspect in that it admittedly attempted to fence out an identifiable group because of its political viewpoint.[25]

But the case is most helpful when considered from this viewpoint: the statute in *Carrington* attempted to create a conclusive presumption that a man who entered Texas during his tour of duty did not intend to reside there permanently merely because he was a soldier. Texas provided no means by which a soldier could rebut the presumption and the Supreme Court of Texas thought this justified because:

> [p]ersons in military service are subject at all times to reassignment, and hence to a change in their actual residence . . . . they do not elect to be where they are. The reasons for being where

24. 380 U.S. 184 (1964).

25. The effect of the intrastate residence requirements could be similar to that of the statute involved in *Carrington*. When a large industry transfers en masse into a voting district, residence requirements might operate to exclude a physically and politically identifiable group. The personnel of a firm have a political identity for much the same reasons a military installation does. Employees of a large company, like the personnel of a military base, are subject to the influence of superiors and have a common set of past and present environmental factors associated with employment which might differentiate their political outlook from that of the rest of the community. Also, there is a possible correlation between the economic strata of the population most likely to make an intrastate move and certain political leanings. *See generally* U.S. BUREAU OF THE CENSUS, MOBILITY OF THE POPULATION OF THE UNITED STATES, Series P-20, No. 156, Table 4: *Broad Occupation Group and Class of Worker of the Employed Male Population 14 Years Old and Over, by Mobility Status and Age for the United States* (1966). But these arguments confront the familiarity with local issues justification for residence requirements. As indicated in text at notes 34-36, *supra,* residence requirements, where these justifications are applicable, are constitutional.

> they are . . . cannot be the same as permanent residents.[26]

The Supreme Court of the United States, however, allowed this presumption to be rebutted when all other factors[27] indicated that the plaintiff intended to reside permanently in the election district and to remain there after his tour of duty:

> [t]he right [to vote] . . . that this Court has been so zealous to protect means, at least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state.[28]

Thus, Texas was not allowed to deprive all soldiers of the franchise merely because soldiers in general are less likely than the population as a whole to have an intention to reside permanently in their present locations. Texas was required by the equal protection clause to make a reasonable effort to winnow out of the class of all soldiers those with bona fide intentions to remain permanently where they were stationed; reasonable effort means that such persons must be allowed to show other factors which might overcome the presumption created solely by their military status and which would indicate a bona fide residence and intention to remain in spite of the fact that a soldier has no choice as to his location during his tour of duty.

Persons who have not yet resided in a county for the period necessary to satisfy residency requirements may quite well be more likely than the population as a whole to be transients or persons attempting to perpetrate voter fraud by moving merely for purposes of an election. But a substantial number, if not a majority, of persons making an intrastate move acquire immediately a new and bona fide domicile and are, therefore, persons for which the state has no justification for denying a ballot. Just as the equal protection clause required Texas to make reasonable efforts to determine which soldiers are and which soldiers are not bona fide domiciliaries, that clause should require a state to consider, in addition to length of residence, other available factors to determine, as among persons who have recently moved into a voting district, those who should be allowed to vote. The only administrative benefit which accrues to the state from making a blanket denial of the ballot to intrastate movers for

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26. 378 S.W.2d 304, 306.
27. [Petitioner] . . . has been domiciled in Texas since 1962, . . . he intends to make his home there permanently. He has purchased a home in El Paso where he lives with his wife and two children. He is also the proprietor of a small business there. . . . He pays property taxes in Texas and has his automobile registered there.
380 U.S. at 91.
28. 380 U.S. at 96.

the residency period is that it eliminates the administrative hearing at which such a mover could show other factors which evidence his intention to reside permanently, *i.e.*, acceptance of a permanent job, purchase of a house, etc. If a state is required by the equal protection clause to provide such a hearing for a soldier, whose intention to reside permanently in an election district is called into question by the fact that he is ordered to move there, a fortiori a state should be required to provide such a hearing for one who has made a conscious choice to move to the district.

The constitutional standard established in *Carrington* was that classifications designed to determine bona fide residence must be "reasonable in the light of their purpose."[29] The Court was willing to assess whether the classification was reasonable as it applied to the individual case and gave relief even though it felt the classification may have been reasonable in the majority of circumstances. According to this standard, the reasonableness of denying intrastate movers the right to vote when a residency period would not contribute to a more intelligent vote may be questioned on two grounds. First, the two most likely forms of voter fraud, in addition to the case of the transient who represents himself as a permanent resident and the person who moves merely for purposes of an election, would seem to be "ghost voting' (the registering of fictitious or deceased voters) and voting in more than one precinct. Persons who register non-existent voters under fictitious names or who register in two precincts violate the registration laws by definition. The additional penalty for perjury in the affidavit of residence would not be a likely deterrent nor does the residency period aid in detection which can be accomplished only by cross checking lists or by checking the lists with reality. Registration, rather than the number of days of residency seems to be the factor which prevents these forms of voter fraud.[30] Secondly, there are alternatives to residence requirements which would prevent fraud and yet avoid any disenfranchisement.[31]

Although the Court has never considered the extent to which voting is protected as a form of political expression by the concept of fundamental rights implicitly protected by the fourteenth amendment,[32] a discussion seems relevant in view of *Harper v. Virginia Board of Elections*.[33] While the plaintiff in *Harper* attempted to invoke the first amendment to strike down a poll tax, the Court felt that the equal protection clause

29. 380 U.S. 89, 93-94; cf. 380 U.S. 89, 99-100 (Justice Harlan dissenting).

30. Further, the most recent instances in which election fraud has been exposed have involved not voters but the election officials themselves. *See* Indianapolis Star, Nov. 7, 1967, § 1, at 1, Co. 1, (Gary, Indiana election scandal).

31. See text at note 46, *infra*.

32. *See* Palko v. Connecticut, 302 U.S. 319 (1937).

33. 383 U.S. 663 (1966).

was sufficient to decide the case. Yet the language of the case indicates that the Court may, in the future, utilize the concept of "fundamental rights" to protect the right to vote. The Court quoted language from *Yick Wo v. Hopkins*[34] that "the political franchise of voting" is "a fundamental political right, because preservative of all rights," but was very careful to leave as an open question the "relation between political expression and voting."[35]

Lassiter v. Northampton Election Board[36] upheld a North Carolina literacy test as constitutional on its face; the Court noted that the prima facie purpose of a literacy test, unlike the poll tax involved in *Harper,* is a "standard designed to promote more intelligent use of the ballot."[37] Like literacy tests and unlike a poll tax, residence requirements have a prima facie purpose to promote more intelligent use of the ballot. Therefore, residence requirements are constitutional when they are applied to elections requiring a knowledge of local issues and candidates with which the intrastate mover was not previously familiar. However, *Lassiter* clearly did not foreclose an attack on the application of the literacy test. The Court noted that while the test was unimpeachable on its face, the plaintiff could later show that as applied to him there was an unconstitutional discrimination.[38] Likewise a person denied a vote because of an intrastate move before an election in which the candidates and issues are the same as those of his previous residence should be allowed to overcome the presumption of constitutionality created by the prima facie purpose of the residence requirements and to show that, as applied to him, the purpose is invalid and, therefore, the requirement is an unconstitutional discrimination.

The case most directly in point, and which would require qualifying or overruling, is *Pope v. Williams.*[39] Pope had moved from the District of Columbia to Maryland more than a year before he attempted to register to vote. The Maryland residence requirement was one year, but by statute the year was deemed to begin to run only from the time when

34. 118 U.S. 356, 370 (1886).

35. The Court also cited and quoted from United States v. Texas, 252 F. Supp. 234 (W.D. Tex. 1966), which did not reserve the question and declared a poll tax unconstitutional in violation of the first amendment. See also Reynolds v. Sims, 377 U.S. 533, 561-62 (1964), where the Court said:

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

36. 360 U.S. 45 (1959).

37. *Id.* at 51.

38. *Id.* at 53.

39. 193 U.S. 621 (1903).

a person moving into the state filed with the election board a statement of his intention to reside permanently in the state.[40] Pope had not filed the required statement and, even though at the time he attempted to register he did sign an affidavit stating that his intention of permanent residence dated from his move, the Court upheld the election board's refusal to register him. The Court was unwilling to scrutinize the legislative purpose: "[t]he reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them."[41] Consequently, the Court did not consider whether the election involved was one which required familiarity with local issues.[42] But *Pope* was decided seventeen years before political thinking had advanced to the point of granting the franchise to women,[43] and the majority in *Harper* considered "Equal Protection" and "Fundamental Rights" to be "changing rather than static concepts" not "shackled to the political theory of a given era."[44] The Court of today might well find that the right to vote has been elevated from its status in the era of *Pope* and is now too fundamental to be denied on the dubious ground that in some instances the denial might prevent fraud.[45]

Alternative Solutions

A consideration of alternative means of preventing fraud that might replace residence requirements where they serve no function of promoting more intelligent voting on local issues is not only relevant in determining the constitutionality of residence requirements, but also indicates that a

40. *Id.* at 623.

41. *Id.* at 634.

42. The Court did, however, note that a presidential election was not involved and reserved that question. *Id.* at 633.

43. "Some states permit women to vote, others refuse them that privilege." *Id.* at 633.

44. 383 U.S. at 1082-83.

45. Though the law in Indiana prohibits a person moving intercounty within sixty days of an election from voting at either his previous or new residence, election officials are not notified that a voter has moved from their county within sixty days of an election and, therefore, there is little chance that he would be prevented from returning to vote even though this violates the election law. If election officials either condone this practice or take no positive steps to prevent movers from returning to vote, an issue similar to that raised in Poe v. Ullman, 397 U.S. 497 (1961), is presented. In that the case the plaintiffs were seeking declaratory relief from an 1879 Connecticut statute which prohibited the use of contraceptive devices and the giving of medical advice concerning such devices. Since the state had only sought to enforce the statute once in more than seventy-five years, the Court held the plaintiff's claims to be nonjusticiable. But *Poe* could be distinguished on two grounds. First, the proof, if any is available, that the election law is being disregarded would fall far short of Connecticut's allowance of the "common and notorious" sale of contraceptive devices. Second, requiring a voter to return from Lake County to Vanderburgh County, for example, some 400 miles, would seem to be a substantial injury in itself and sufficient to discourage the great majority of such movers from voting.

legislative solution to the problem is preferable to a judicial determination that residence requirements are unconstitutional in certain instances. If Indiana's residence requirements were found to be in violation of the Constitution, as against intercounty movers attempting to vote in elections involving issues and candidates with which they had previously acquired an acquaintance, the sole means of getting a determination of whether other factors were sufficient to override the recent move and indicate bona fide residence would be court action. A statute providing for a prior administrative determination by the county election board or official and for court action only as a final alternative would be more economical and expedient. An administrative determination would also reduce the possibility that a vote would be lost while court action is pending.

Other possible legislative solutions which might effectively eliminate fraud with no resulting disenfranchisement are:

(1) a statewide registration procedure;
(2) a procedure of co-operation between counties or precincts, that would enable them to cross check registration lists;
(3) allowing a person who has moved intrastate to vote absentee in these particular elections in his original precinct or county until he has fulfilled residence requirements in that to which he has moved; or
(4) a statewide transfer provision similar to that presently available to the intracounty mover in Indiana.

Of these, the transfer provision would seem preferable[46] because it would prevent a double registration fraud while necessitating only a minimal change in the present law. An intelligent vote on local issues could be insured by allowing the transferring voter to vote only in elections involving issues and candidates common to both the mover's new and previous residences. This could be accomplished by requiring the election official in the county to which the voter transfers his registration to make a notation by the voter's name in registration lists to the effect that he is limited to voting only in certain elections for sixty days. For example, if the voter moved within a United States representative district he could vote for the representative without waiting sixty days. If not, so that the election presented him with an unfamiliar slate of candidates for the office, he could not vote for a candidate. Since the move would, by definition, be intercounty, the mover could not vote for any of the county offices,

46. Solutions (1) and (2) would require a major revision of most states' present election laws.

i.e., county clerk, auditor, treasurer, etc. during the sixty day period. The fact that these voters would be voting for candidates on a limited number of slates would necessitate that these voters vote by paper ballot; it would be impractical to change the combination of slates offered on a voting machine for an individual voter.

The return-to-vote solution, if similarly limited to elections involving candidates and issues with which the voter is already familiar might be equally feasible. The California[47] provision, which is of the return-to-vote type, is not so limited. It apparently allows a person moving from one county to another within sixty days of an election to vote for county officials in the county from which he has moved and in which he no longer has an interest or a residence.[48]

While the need for a solution to the problem of disenfranchisement of intrastate movers in Indiana is not so shocking as it is in Mississippi,[49] it is a real need.[50] It will affect more voters as the population becomes increasingly mobile. Because the situation could be solved by the enactment of a relatively simple transfer provision, it would be preferable for the legislature to take the initiative and solve the problem before the courts are forced to adjudicate the constitutionality of the present statutes. This would avoid the situation which has obtained with apportionment laws where the courts, in the face of legislative intransigence, have been forced to solve a problem which they are ill equipped to handle.

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47. *See* note 19, *supra.*
48. *Id.*
49. *See* text accompanying note 15, *supra.* One need only note the number of recent elections decided by this margin.
50. *See* text accompanying note 20, *supra.*