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**THE RIGHT TO VOTE OF NON-RESIDENT CITIZENS:
A COMPARATIVE STUDY OF THE FEDERAL REPUBLIC
OF GERMANY AND THE UNITED STATES OF AMERICA**

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THE RIGHT TO VOTE OF NON-RESIDENT CITIZENS: A COMPARATIVE STUDY OF THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED STATES OF AMERICA

I. INTRODUCTION

On October 7, 1981, the Federal Constitutional Court (Bundesverfassungsgericht) of the Federal Republic of Germany released a decision¹ regarding the right of non-resident citizens to vote in federal elections. The appellant, a German national residing in Brussels and employed as a civil servant of the European Communities, challenged the validity of the federal elections of 1980 to the Bundestag. He claimed these elections were invalid because he, as a resident abroad, and most other citizens residing abroad, were unconstitutionally denied the franchise by section 12 (1) of the Federal Electoral Law (Bundeswahlgesetz).² This section excludes non-resident citizens from voting if they are not members of four distinct groups for which the law provides an exception in sections 12 (2) and (4).³ Under the Federal Electoral Law, an election can be declared invalid.⁴

The appellant alleged the unconstitutionality of section 12 of the Federal Electoral Law, and consequently the invalidity of the federal elections. Under Federal Electoral Law, the Bundestag may examine the election results for irregularities.⁵ This appellant's request for examination⁶ was rejected because the right to challenge elections before the Bundestag does not extend to constitutional issues, but is limited only to faults in the application of the Electoral Law. Only the Federal Constitutional Court can declare a statute unconstitutional.⁷ The subsequent appeal to that court was unsuccessful on the merits. As it had done several times before,⁸ the Federal Constitutional Court upheld the Federal Electoral Law as constitutional and dismissed the complaint. However, this time the court added a new dimension to the problem. It concluded that civil servants of the Community participate in various ways in the

¹ Judgment of Oct. 7, 1981, 2 BvC 2/81, Bundesverfassungsgericht [BVerfG] (W. Ger.).

² Bundeswahlgesetz § 12(1), 1975, 1 Bundesgesetzblatt [BGBl] 2325 (W. Ger.).

³ See *infra* text accompanying notes 19-20.

⁴ Wahlprüfungsgesetz § 1, 1951 1 BGBl 166 (W. Ger.).

⁵ Grundesgesetz [GG] art. 41 (W. Ger.).

⁶ Bundestags Drucksache (BT Drucks.) 9/316, Annex 52, May 7, 1981 (W. Ger.).

⁷ *Id.*

⁸ 5 BVerfG 2 (W. Ger.); 36 BVerfG 139 (W. Ger.).

formulation, development, and execution of the common legal order, and that this participation has many implications for the legal order of the Federal Republic.⁹ As the Federal Republic is a member of the European Community, the court took into account the process of integration of the members of the European Community when considering the voting rights of non-resident citizens. Moreover, the federal legislature already has provided the right for all German citizens living in the countries of the Communities to vote for representatives to the European Parliament in Strasbourg.¹⁰ From this legislation, the court concluded, at least from the constitutional principle of equality, that civil servants of the Communities should be included in the group of exceptions to section 12 (1) of the Federal Electoral Law.¹¹

Thus, instead of striking the challenged statute as unconstitutional, the court suggested that the statute was of dubious constitutionality and very strongly hinted to the legislature that *de lege ferenda* a change in the right to vote for non-resident citizens is compelling. The Federal Constitutional Court restricted this ruling to Germans who are civil servants of the European Community. However, it is generally understood that such a modification of the Electoral Law would apply to those Germans living in the countries of the Community, and perhaps to all Germans living abroad. The legislature reacted surprisingly quickly, and on November 20, 1981, a draft bill¹² was introduced by the "opposition parties" in the Bundestag Christian Democratic Union/Christian Social Union (CDU/CSU) amending the Federal Electoral Law to broaden the participation of non-resident voters. It is assumed that the "coalition parties" Social Democratic Party of Germany/Free Democratic Party (SPD/FDP) will introduce another bill that would seize the initiative from the opposition parties.

In contrast to the Federal Republic, which is just changing its law, the United States addressed the same problem several years ago. Here, too, the legislature determined that the situation concerning the right to vote for non-resident citizens was unsatisfactory, especially after a court suggested existing voter protection laws did not extend to non-resident citizens.¹³ Congress found that

⁹ 2 BvC 2/81, BVerfG (W. Ger.).

¹⁰ Europawahlgesetz § 6(2), 1978 1 BGBl 709 (W. Ger.) (European Electoral Law).

¹¹ 2 BvC 2/81, BVerfG (W. Ger.).

¹² Entwurf eines Sechsten Gesetzes zur Aenderung des Bundeswahlgesetzes, BT Drucks. 9/1062, Nov. 20, 1981 (W. Ger.).

¹³ *Hardy v. Lomenzo*, 349 F.Supp. 617, 620 (S.D.N.Y. 1972).

"Americans outside the United States possess both the necessary interest and the requisite information to participate in the selection of Senators and Congressmen back home."¹⁴ The fact that United States citizens abroad do not actually reside in congressional districts was not seen as a disability because Congress represents the common legislative interest of the entire nation, along with the specific interests of each district.¹⁵

Hence, the Overseas Citizens Voting Rights Act of 1975 was passed to ameliorate the situation for non-resident voters.¹⁶ Section 3 of the Act provides that each citizen residing outside the United States has the right to register for, and vote by, an absentee ballot in any federal election (subject to certain requirements to be discussed). A non-resident citizen who meets the Act's requirements can vote absentee in federal elections via his state of former domicile. In 1978, the Act was amended¹⁷ with respect to the right of states to tax citizens exercising their rights under the 1975 Act, and with respect to several administrative matters not germane to this discussion.

This study first separately examines the respective situations in the Federal Republic and in the United States. After describing the present laws and focusing on the historical contexts, the constitutionality of the laws in their constitutional settings is examined. The authors conclude by comparing various problems arising under the two legal systems and illuminating their often striking similarities.

II. THE RIGHT TO VOTE OF NON-RESIDENT CITIZENS IN THE FEDERAL REPUBLIC OF GERMANY

Section 12 (1) of the Federal Electoral Law, as it is still valid today, reads in its relevant parts: "All Germans are entitled to vote . . . who, at the date of the election, . . . for at least three

¹⁴ H.R. Rep. No. 649 pt. 1, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 2358 [hereinafter cited as 1975 House Report].

¹⁵ *Id.* at 2, U.S. CODE CONG. & AD. NEWS at 2359.

¹⁶ 42 U.S.C. § 1973dd (1975). State-by-state compliance is listed in a Department of Justice memorandum to Sen. Claiborne Pell, Apr. 4, 1977; *reprinted in Overseas Absentee Voting: Hearing before the Senate Comm. on Rules and Administration on the Overseas Citizens Voting Rights Act of 1975, the Federal Voting Assistance Act of 1955, and S.703, 95th Cong., 1st Sess. 84, 85-88 (1977)* [hereinafter cited as 1977 Senate Hearings].

¹⁷ Act of Nov. 4, 1978, Pub. L. 95-593, 92 Stat. 2535 (codified as amended at 42 U.S.C. § 1973dd-5 (1975)). For partial legislative history see H.R. Rep. No. 1568, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5759.

months, have had a residence within the territory of application of the Law, or else have their habitual abode therein."¹⁸ Section 12 (2) also grants the right to vote to soldiers, civil servants, employees and workers in the civil service who have, on orders of their employer, their residence or their habitual abode outside the territory of the application of the Law, as well as to the members of their household.¹⁹ The same exception is made in section 12(4) of the Federal Electoral Law for seamen who work on ships that fly the German flag.²⁰

Thus, apart from seamen, only members of the German civil service abroad on order, such as embassy personnel, and their families, are exempted from the requirement of having a residence in the Federal Republic in order to be entitled to vote. The reason for this exception is apparently that these citizens, although abroad, still are strongly connected to the Federal Republic for which they work, and therefore should not be denied the right to vote.²¹ It is foreseeable in our modern world of ever-increasing international relations, with more and more people working abroad, that other groups of non-resident citizens would challenge the exceptions made for civil servants on the ground that they are just as strongly connected to the Federal Republic and that they also work in its interest, be it as a civil servant with the European Communities, as a German cultural officer or language teacher attached to the Goethe Institutes worldwide, or as an engineer in Saudi Arabia.²²

The constitutionality of section 12 (1) of the Federal Electoral Law was challenged in this case with respect to articles 38 (1), 3 (1), 20 (1), and 1 (1) of the Basic Law (Grundgesetz). It was alleged principally that section 12 (1) violated the principle of equality as laid down in article 3 (1)²³ and article 38 (1)²⁴ of the Constitution. The Federal Constitutional Court long has held that article 38 (1) and its notion of electoral equality is *lex specialis* to the more general norm of article 3 (1).²⁵ Therefore, a violation of article 38 (1) is always also a violation of article 3 (1).

¹⁸ Bundeswahlgesetz § 12(1), 1975 (W. Ger.).

¹⁹ *Id.* at § 12(2).

²⁰ *Id.* at § 12(4).

²¹ 2 BvC 2/81, BVerfG; Judgment of Oct. 15, 1970, 36 BVerfG 134, 143.

²² See Hilf, *Das Wahlrecht fuer Deutsche im Ausland zum Bundestag*, 1977 EuGRZ, 14, 15 [hereinafter cited as Hilf].

²³ GG art. 3(1) (W. Ger.) reads: "All persons shall be equal before the law."

²⁴ GG art. 38(1) (W. Ger.) reads in part: "The deputies to the German Bundestag shall be elected in general, direct, free, equal, and secret elections."

²⁵ 1 BVerfGE 208, 242; 4 BVerfGE 31, 39; 6 BVerfGE 84, 91; 11 BVerfGE 266, 271; 12

In similar prior cases before the Federal Constitutional Court, the appellants maintained that article 38 (1) was violated because no reasonable justification for a distinction between resident and non-resident citizens existed. As the link of nationality persists even when residing abroad, non-resident citizens still are governed by the German Federal Government. From this it was inferred that they also should have the right to participate in federal elections. For example, non-resident citizens are in principle subject to military service, though they cannot be drafted while outside the country,²⁶ and are subject to limited taxation irrespective of residence.²⁷ Moreover, the distinction made in section 12 of the Federal Electoral Law between German civil servants and the members of their household and other Germans abroad is also allegedly unjustified. The work of journalists, engineers, or civil servants of the Communities is just as much in the interest of the Federal Republic as is the work of German civil servants abroad. There especially is no rational distinction between the members of the household of German civil servants and other groups of Germans living outside the country, because none have the special relationship of civil servants with the Federal Republic.²⁸

It was alleged also that section 12 (1) violated the principle of democracy in article 20 (1)²⁹ of the Constitution. Democracy traditionally includes the notion of "no taxation without representation."³⁰ As non-resident citizens are in principle fully subject to taxation in the Federal Republic, if they have inland income,³¹ but are not entitled to vote, this notion and thus article 20 (1) of the Constitution supposedly are violated.

Finally, section 12 (1) of the Federal Electoral Law has been said to violate article 1 (1)³² of the Constitution. For example, in the case of death of a civil servant of the European Communities, the state of which that civil servant is a national treats him as though he

BVerfGE 10, 25; 13 BVerfGE 1, 12; 18 BVerfGE 220, 225; 24 BVerfGE 300, 340; 34 BVerfGE 81, 98; 36 BVerfGE 139, 141.

²⁶ Wehrpflichtgesetz, §§ 1, 43, 1977 1 BGBl 2021, 2023, 2036 (W. Ger.).

²⁷ Einkommenssteuergesetz § 1(3), 1981 1 BGBl 1249, 1250 (W. Ger.) (Income Tax Law).

²⁸ Compare the allegations of the appellant in 2 BvC 2/81, BVerfG at 3.

²⁹ GG art. 20(1) (W. Ger.) reads: "The Federal Republic of Germany is a democratic and social federal state."

³⁰ See appellant's argument in 2 BvC 2/81, BVerfG at 4.

³¹ Einkommenssteuergesetz § 1(3), 1981 1 BGBl 1249, 1250 (W. Ger.) (Income Tax Law). Section 49 of the Income Tax Law spells out the kinds of income considered to be inland income.

³² GG art. 1 (1) (W. Ger.) reads: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority."

never left the country, and thus full estate taxes must be paid upon the inheritance.³³ While still alive, the civil servant is not entitled to vote and thereby participate in the political process of his country. Thus, the somewhat odd conclusion is reached that this citizen is treated like an object, in such a way that the dead citizen is worth more than the living citizen.³⁴ This allegedly is violative of basic human dignity protected by article 1 (1) of the Constitution.

In its opinions on the subject, the Federal Constitutional court dealt with these arguments rather quickly. In 1956, the court decided nationality alone could not entitle someone to vote in federal elections.³⁵ This is because Germany is divided, if not *de jure* at least *de facto*, and the Bundestag only represents that part of the German population that lives within the territory of application of the Constitution of the Federal Republic. The other part of the German population living in the German Democratic Republic (GDR) legally is considered still to be of German nationality. The Federal Republic has resisted and rejected the move of the GDR toward separate German citizenships.³⁶ Linking the right to vote with nationality would grant citizens of the GDR participation in the federal elections of the Federal Republic of Germany. As the right to vote can be granted only to the part of the population living under the jurisdiction of the Federal Republic, the court upheld the decision of the legislature that the right to vote should be linked to residency.³⁷ This opinion long was considered to prohibit the Bundestag from enacting a Federal Electoral Law that entitles non-resident citizens to vote.³⁸ However, in the ruling of September 23, 1976,³⁹ rejecting the case, the court held the legislature can make certain exceptions to the traditional requirement of residency.

³³ Protocol of Privileges and Immunities of the European Communities, art. 14, Apr. 8, 1965, 1965 2 BGBl 1453.

³⁴ See appellant's argument in 2 BvC 2/81 BVerfG.

³⁵ 5 BVerfGE 2, 6.

³⁶ In the Federal Republic, it is still accepted legal and political doctrine, following a decision by the Federal Constitutional Court of 1973, that the German Reich continued to exist within the boundaries existing in 1937, although it is incapable of performing legal acts; and that under its superstructure two German entities were established in 1949 of which only one, the Federal Republic of Germany, is entitled to act for the whole German nation. 36 BVerfGE 1, 16. *Contra* Gelberg, *The Warsaw Treaty of 1970 and the Western Boundary of Poland*, 76 AM. J. INT'L L. 119 (1982).

³⁷ 5 BVerfGE 2, 6.

³⁸ See appellant's arguments in 2 BvC 2/81, BVerfG.

³⁹ Judgment of Sept. 23, 1976, 2 BvR 733/76, BVerfGE (W. Ger.).

In its opinion of October 20, 1973,⁴⁰ the court addressed in detail the argument based on article 38 (1) of the Constitution. Article 38 (1) prohibits the legislature from excluding particular groups of the population from voting based upon political, economic, or social grounds.⁴¹ This principle of general elections is derived from the principle of equality in article 3 (1), but should be distinguished by its formal application of the principle of equality specifically to voting. It requires that everyone be able to exercise his right to vote in the same formal way. But this formality in the area of voting rights does not mean that no differentiation is permitted at all. Limitations to the principle of general elections are possible if a compelling reason exists,⁴² just as discriminatory classifications sometimes are permitted under the equal protection clause of the fourteenth amendment to the United States Constitution.⁴³

One of the traditional limitations is the requirement of residence in the Federal Republic. Even section 7 of the Electoral Law of the North German Federation⁴⁴ of 1867 contained this limitation. Section 11 of the Electoral Law,⁴⁵ which was passed pursuant to article 22 of the Constitution of the Weimar Republic of 1919,⁴⁶ also conditioned voting upon residence within the German Reich. It is possible therefore, that article 38 (1) of the Basic Law was drafted in 1949 with the understanding that it did not alter the traditional residency requirement.⁴⁷

The exception for German civil servants living abroad on orders (section 12 (2) of the Federal Electoral Law) was justified by the Federal Constitutional Court, which concluded that these persons are very firmly connected to the Federal Republic because they work for it. It found, without much explanation, that these persons are so different from those who live abroad for other reasons that the Constitution does not prevent the legislature from denying the right to vote to persons living outside the Federal Republic of their free will.⁴⁸ In language familiar to scholars of United States constitutional law, these classes of citizens simply were deemed

⁴⁰ Judgment of Oct. 20, 1973, 36 BVerfGE 139 (W. Ger.).

⁴¹ 15 BVerfGE 165, 166, explaining the principle of general elections in GG art. 38(1) (W. Ger.).

⁴² 28 BVerfGE 220, 225; 36 BVerfGE 139, 141.

⁴³ See *infra* text accompanying note 158.

⁴⁴ Wahlgesetz fuer den Reichstag des Norddeutschen Bundes, 1869 BGBl 145 (W. Ger.) (Electoral Law for the Reichstag of the North German Federation).

⁴⁵ Wahlgesetz, 1920 RGBl 627, 629 (W. Ger.).

⁴⁶ Weimarer Reichsverfassung art. 22, 1919 RGBl 1383, 1388 (W. Ger.).

⁴⁷ 36 BVerfGE 139, 142; see also 2 BvC 2/81 BVerfG at 5.

⁴⁸ 36 BVerfGE 139, 143.

not to be "similarly situated"; thus similar treatment was not required. The reason for this is that civil servants can be ordered to go to a post abroad. By that order they could be compelled to leave the country and lose their right to vote.

This opinion is, however, somewhat illogical. Except for the draft, government service is voluntary. It can be argued that a citizen consents to being transferred when seeking voluntarily public or private employment because he serves the needs of his employer. For all practical purposes, a private employee is under as much pressure when his employer wants him to go abroad as a civil servant in a similar situation. Therefore, it seems that they should be treated similarly with respect to their voting rights. Only with regard to the draft might the discussion lead to a different result, at least in theory. In practice, however, the Federal Republic, unlike the United States, does not station any troops in foreign countries. The only leave a drafted soldier might have to take from Germany during his time of service would be for training, a short time during which he would not lose his residence at home.

Later decisions of the Federal Administrative Tribunal (Bundesverwaltungsgericht)⁴⁹ and the Federal Constitutional Court⁵⁰ closely followed the above analysis of the Federal Constitutional Court. These decisions also further developed some points. The Federal Administrative Tribunal examined the case of civil servants of the European Community. It distinguished Community civil servants from German civil servants abroad because Community civil servants do not live outside the Federal Republic on orders.⁵¹ As such, they do not, according to the Administrative Tribunal, have such strong connections to West Germany because as civil servants of the Community they must serve the interests of the Community exclusively.⁵²

Furthermore, although Community civil servants of German nationality in principle are subject to German taxation, they are exempted from paying national taxes on Community salaries.⁵³ The court analogized Community civil servants to other Germans living abroad who are subject only to limited taxation,⁵⁴ rather than

⁴⁹ 51 Bundesverwaltungsgericht (BVerwG) 69 (W. Ger.), *reprinted in* 1976 *Europarecht* 343 (with commentary by Henkel).

⁵⁰ 2 BvC 2/81 BVerfG at 5.

⁵¹ 51 BVerwG 69, *reprinted in* 1976 *Europarecht* at 348.

⁵² *Id.* at 349. *See also* 2 BvC 2/81 BVerfG at 7.

⁵³ Protocol of Privileges and Immunities of the European Communities, art. 13(2) 1965 2 BGBI 1482 (W. Ger.).

⁵⁴ Einkommenssteuergesetz § 1(3) 1981 1 BGBI 1249, 1250 (W. Ger.). *See also supra* text accompanying note 31.

to German civil servants.⁵⁵ This argument is not very convincing. Two concepts have to be distinguished here, namely "representation without taxation" and "taxation without representation." Probably everyone agrees that the latter is undesirable. The court dealt with a case falling within the former because Community civil servants are subject only to limited taxation; thus at first sight the ruling seems to be conclusive. This view is, however, disrupted when taking into account that students, the unemployed and the aged fit into the first category, but they are not denied the franchise. Hence, taxation or lack of taxation can hardly explain the distinction made between residents and non-residents with respect to their voting rights.

Finally, the court rejected arguments based upon the exception made for German seamen because this exception is justified by article 5 (1) of the 1958 High Seas Convention.⁵⁶ Thus, the Administrative Tribunal concluded that the failure of section 12 of the Federal Electoral Law to secure the voting rights of Community civil servants of West German nationality does not violate articles 38 (1) and 3 (1) of the Constitution. Also article 20 (1) and its notion of democracy was not violated because its principles are specified in article 38 (1) with respect to elections.⁵⁷

The latest ruling of the Federal Constitutional Court⁵⁸ repeated all of these arguments, but added, as mentioned above, that the process of integration of the European Community suggests that *de lege ferenda* the legislature also should grant the right to vote to civil servants of the Community.

When analyzing these opinions, it is evident that the reasons supporting section 12 of the Federal Electoral Law as constitutional are mainly historical. The thrust of the court's argument is really that because, under the Constitution of the North German Federation and under the Weimar Constitution, residency in Germany was a prerequisite to voting, this limitation is traditional and therefore cannot violate the principle of general elections in article 38 (1) of the Constitution. That is, article 38 (1) was written with full awareness of the traditional exception and was not intended to be in derogation of it. This assumes that the content of the principle of general elections in the Basic Law of 1949 was the same as under the Constitution of the North German Federa-

⁵⁵ 51 BVerwG 69 (W. Ger.), reprinted in 1976 *Europarecht* at 349.

⁵⁶ Convention on the High Seas, Apr. 29, 1958, art. 5, para. 1, 13 U.S.T. 2312, 2315, 450 U.N.T.S. 82, 84.

⁵⁷ 2 BvC 2/81 BVerfG.

⁵⁸ 51 BVerwG 69 (W. Ger.), reprinted in 1976 *Europarecht* at 350.

tion and still has not undergone any changes in meaning. This assumption is, at least, doubtful. Notions of equality can and do change as a nation develops socially and politically.

More doubts arise when considering that under section 12 (2) of the Federal Electoral Law not only the German ambassador abroad but also the nanny for his children, if a German national, is allowed to vote.⁵⁹ It is difficult to perceive how this nanny, who is not a federal employee, is different from, for example, an engineer working outside the Federal Republic. Of course, some reasons support distinctions between citizens abroad, as the right to vote should not extend to real emigrants who have lived abroad for decades. The legislature had to make this distinction and made it in section 12 (2) of the Federal Electoral Law. However, the distinction should be drawn more narrowly. At least with respect to citizens living in the member states of the Community, the dividing line should be drawn anew to take cognizance of the process of Community integration. The use of the rights granted under the Treaty of Rome that directly flow to individuals should not lead to a loss of the right to vote.⁶⁰

The Bundestag has addressed this question over the last two decades without achieving a meaningful resolution.⁶¹ The legislature appeared to have been motivated by political or tactical considerations, such as whether non-resident citizens would vote for the CDU/CSU or for the SPD/FDP coalition, rather than by the desire to find a just solution to the problem. However, the strong hint of the Federal Constitutional Court that some action ought to be taken on this issue, quickly prompting the draft bill⁶² in the Bundestag, supports the theory that sometimes it takes a strong word from the judiciary to move the legislature on a difficult political question.

The draft bill grants the right to vote not only to German civil servants living abroad on orders, but also to everyone living in the European territories of the member states of the European Community, without time limitations.⁶³ Any German citizen living outside the Community for no longer than ten years also may vote.⁶⁴

⁵⁹ Henkel, *Anmerkung zu 51 BVerwGE* 69, 1976 EuR 350, 351.

⁶⁰ *Id.* at 352; Hilf, *supra* note 22, at 16.

⁶¹ See Protocol of the Bundestag, 4th session, 187th meeting, May 25, 1965, at 9383; see also BT Drucks. 7/2063 and 7/2123; Protocol of the Bundestag, 7th session, 103rd meeting, May 22, 1974, at 6880 and 6882.

⁶² *Supra* note 12.

⁶³ *Id.*

⁶⁴ *Id.*

The reasons appended to the draft bill state that this change follows the example of other democratic states, namely France, and as will be examined, the United States. The democratic right to vote is of such importance that it must prevail over possible technical problems. The limitation of the right to vote for citizens outside the Community to ten years was believed necessary because after ten years it is difficult to discern the connection between the citizen and the Federal Republic. Because of the process of integration toward a European Union, this limitation does not apply to anyone living within the European territories of the Community. It is assumed that the bill probably will lead in 1983, the year before the next general elections to the Bundestag, to an appropriate amendment of the Federal Electoral Law.

III. THE RIGHT TO VOTE OF NON-RESIDENT CITIZENS IN THE UNITED STATES

A. *Introduction*

The enactment of the Overseas Citizens Voting Rights Act of 1975⁶⁵ (OCVRA), which protects the right of otherwise qualified non-resident citizens to vote in federal elections, differed from the process now taking place in Germany. Whereas the Federal Republic has a modern constitution with broad suffrage provisions, universal suffrage in the United States evolved from the Constitution of 1789 through a difficult process of constitutional amendment, congressional enactment, judicial decision, and divisive periods of domestic violence in both the 1860's and 1960's. In 1789, most of the former colonies allowed only white male landowners to vote. By 1970, all citizens age 18 or older were eligible to vote in both federal and state elections.

B. *Inadequacy of Prior Initiatives: The Need For Reform*

Before 1955, Congress had addressed the voting problems of Americans abroad only on a limited, ad hoc basis. Except for legislation establishing a method for absentee voting in presidential and congressional elections during wartime by members of the armed services,⁶⁶ later extended to include members of the merchant

⁶⁵ 42 U.S.C. §§ 1973dd, 1973dd-1, 1973dd-6 (1976).

⁶⁶ Act of Sept. 16, 1942, Pub. L. No. 77-712, 56 Stat. 753 (1942), amended by Act of Apr. 1, 1944, Pub. L. No. 78-277, 58 Stat. 136 (1944), Pub. L. No. 78-277, 58 Stat. 136 (1944), repealed by 70A Stat. 1, 81 (recodifying provisions in military code as 10 U.S.C. §§ 1071-86), expunged by Act of Sept. 2, 1958, Pub. L. No. 85-861 § 25(c), 72 Stat. 1437, 1450 (1958).

marine and members of auxiliary and welfare organizations attached to and serving the armed forces,⁶⁷ the voting rights of overseas United States citizens largely were neglected.

Only in 1968 did Congress realize that private citizens abroad also affected the interests of the United States and were in need of the protection already recommended by a 1955 act for four categories of overseas citizens.⁶⁸ Therefore, Congress struck the last two categories of the 1955 Act and replaced them with "Citizens of the United States temporarily residing outside the territorial limits of the United States and the District of Columbia and their spouses and dependents residing with or accompanying them."⁶⁹ However, by 1977 twenty-six states (plus Guam and Puerto Rico) had failed to adopt one or more of the recommended balloting procedures under section 102 of the 1955 Act.⁷⁰ More alarmingly, seventeen states (and Puerto Rico and the Virgin Islands) had failed to extend absentee registration or voting to all of the persons addressed in the 1955 Act as amended.⁷¹ While twenty-eight states and the District of Columbia at least partially accepted the 1955 and 1968 recommendations,⁷² problems remained.

The definition of residence under the laws of each state was confusing and obstructed re-enfranchisement of citizens residing abroad. Additionally, some states interpreted "temporarily" to exclude otherwise eligible persons not maintaining an abode or ad-

⁶⁷ Act of Apr. 1, 1944, Pub. L. No. 78-277, 58 Stat. 136 (1944) (repealed 1958), *supra* note 66.

⁶⁸ Federal Voting Assistance Act of 1955, Pub. L. No. 55-296, 69 Stat. 584 (codified as amended at 42 U.S.C. §§ 1973cc, 1973cc-1 (1976)). The four categories were: (a) Members of the armed forces while on active service, and their spouses and dependents; (b) Members of the merchant marine and their spouses and dependents; (c) Civilian employees of the United States while serving outside the United States, and their dependents; and (d) Members of religious groups or welfare agencies assisting and officially attached to the armed forces, and their spouses and dependents. 50 U.S.C. § 1451, recodified as amended, 42 U.S.C. § 1973cc(a) (1981). The act also recommended essential balloting procedures to facilitate voting, including federal postcard absentee registration. 50 U.S.C. § 1452, recodified as amended 42 U.S.C. § 1973cc-1 (1981).

⁶⁹ Federal Voting Assistance Act of 1955 Amendments, Pub. L. No. 90-343, 82 Stat. 180, 181 (1968) (codified as amended at 42 U.S.C.A. § 1973cc(a)(3) (West 1981)). For legislative history, see 1968 U.S. CODE CONG. & AD. NEWS 2064. In 1978, Congress further amended the Act, requiring the states to allow absentee registration and voting by members of the first two categories of the 1955 Act. For partial legislative history, see H.R. Rep. No. 1568, 95th Cong., 2nd Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5759.

⁷⁰ Letter from John C. Broger, Deputy Coordinator, Voting Assistance Program, U.S. Department of Defense, to Sen. Claiborne Pell (Mar. 23, 1977), *reprinted in* 1977 Senate Hearings, *supra* note 16, at 79, 80.

⁷¹ *Id.* at 80-81.

⁷² *Voting Rights for U.S. Citizens Residing Abroad: Hearings on H.R. 3211 before the Subcomm. on Elections of the Comm. on House Administration, 94th Cong., 1st Sess.* 281 (1975), [hereinafter cited as 1975 House Hearings].

dress in the state, or who for some other reason were not considered as having retained their state domicile.⁷³ New York was particularly notorious in both regards.⁷⁴

The Voting Rights Act Amendments of 1970⁷⁵ also proved to be of little comfort to overseas United States citizens. Title II of that Act provided for absentee registration and balloting in presidential elections. Section 202(d) reduced the maximum registration deadline to thirty days prior to a presidential election. Citizens moving to a new state or political subdivision within thirty days of a presidential election who were unable to register at the new residence because of expiration of the registration deadline also were protected. Section 202(e) permitted such citizens to vote in person or absentee, in the place of their former residence.⁷⁶ In this respect, the concept of bona fide residency⁷⁷ in the state of former residency was abridged federally.

When the Amendments were debated in the Senate, it was argued that Title II should be interpreted as providing for the enfranchisement of "all citizens who are temporarily living away from their regular homes," even if working or studying abroad in a private capacity.⁷⁸ This interpretation was never accepted.⁷⁹ Thus, while Congress went to great lengths to enfranchise minorities and those in government service, most United States

⁷³ 1975 House Report, *supra* note 14, at 3, 1975 U.S. CODE CONG. & AD. NEWS at 2360.

⁷⁴ Compare the facts of *Hardy v. Lomenzo*, 349 F. Supp. 617 (S.D.N.Y. 1972).

⁷⁵ Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315 (1970) (codified as amended at 42 U.S.C. § 1973aa-1 (1976)).

⁷⁶ *Id.* at 317 (codified as amended at 42 U.S.C. § 1973aa-1(e) (1976)).

⁷⁷ Bona fide residence is one that amounts to a domicile. *Ballentine's Law Dictionary* 145 (3d ed. 1969). It must be distinguished from a durational residency requirement, which requires bona fide residence for a particular length of time. The latter concept was abolished by Congress respecting presidential elections in the Voting Rights Acts Amendments of 1970, *supra* note 74, at 316 (codified at 42 U.S.C. § 1973aa-1(c) (1976)). The concept was virtually eliminated regarding all other elections by the Supreme Court in *Dunn v. Blumstein*, 405 U.S. 330 (1972).

⁷⁸ 116 Cong. Rec. 6989-96 (1970) (remarks of Sen. Goldwater).

⁷⁹ The court in *Hardy v. Lomenzo*, 349 F. Supp. 617 (S.D.N.Y. 1972) interpreted the Voting Rights Act Amendments of 1970 as abolishing durational residency requirements, not bona fide residency requirements, regarding United States citizens abroad. If this limited result was not desired, the court added, "the remedy lies with the legislature and not in judicial elision." *Id.* at 620. The same conclusion was reached on reargument after amicus intervention by Sen. Goldwater. *Id.* at 621. The U.S. Justice Department took a similar restrictive view. Letter from David L. Norman, Assistant Attorney General, Civil Rights Division, to J. Eugene Marans, Esq., Counsel to the Bipartisan Committee on Absentee Voting (Mar. 13, 1972), reprinted in *Voting by U.S. Citizens Residing Abroad: Hearings before the Senate Subcomm. on Privileges and Elections of the Comm. on Rules and Administration on S.2102 and S.2384*, 93d Cong., 1st Sess. 99 (1973), [hereinafter cited as 1973 Senate Hearings].

citizens abroad in the private sector⁸⁰ were excluded from the democratic process in their country.

These citizens, including at least 750,000 otherwise eligible voters abroad in non-governmental capacities,⁸¹ encountered various difficulties in voting. Studies before Congress suggested that nearly all of these private citizens in various ways were strongly discouraged or barred by the laws of the state of their last domicile from registering and voting absentee in presidential and congressional elections.⁸² It was argued that these citizens served national interests abroad, even though in a private capacity. Furthermore, as they were subject to federal taxation and other obligations of United States citizenship,⁸³ Congress found that taxation and other obligations without representation was inequitable.

Despite this continuing nexus with the United States, many states⁸⁴ imposed rules requiring actual presence or maintenance of a home or other abode in the state in order to satisfy tests of bona fide residency. These rules also created doubts as to voting eligibility of private citizens abroad when the citizen's date of return was uncertain. An uncertain return date often was equated with an intent to remain outside the state indefinitely. When combined with the fact of extra-state residency, some states concluded that both residence and domicile⁸⁵ within the state no longer existed. Even when laws did not exact such requirements, some states' absentee registration and voting forms were so confusing that they appeared to require maintenance of a home or abode in the state.⁸⁶

⁸⁰ In 1979, 2.5 million U.S. citizens lived abroad, compared with 2.2 million in 1975 when the Overseas Citizens Voting Rights Act (OCVRA) was passed, and compared with the 1.7 million reported in the 1970 census. In 1979, 1.6 million private citizens resided abroad, twice the number of private citizens abroad in 1968. In 1979, military employees, federal civilian employees, and military and civilian dependents abroad numbered, respectively, 481,000, 405,000, and 44,000. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 9, 15 (1980).

⁸¹ 1975 House Report, *supra* note 14, at 2, 1975 U.S. CODE CONG. & AD. NEWS at 2359.

⁸² *Id.*

⁸³ 26 U.S.C.A. § 911 (West Supp. 1982) (taxation); 50 U.S.C.A. App. § 543 (West Supp. 1982) (military obligations); 28 U.S.C. § 1783 (1976) (civil subpoena).

⁸⁴ See, e.g., *Hardy v. Lomenzo*, 349 F. supp. 617 (S.D.N.Y. 1972).

⁸⁵ Domicile classically consists of residence plus a present intention to remain indefinitely or for an unlimited time. 25 AM. JUR. 2d Domicil §§ 1, 4; BALLENTINE'S LAW DICTIONARY 369 (3d ed. 1969); *Pope v. Howle*, 227 Ala. 154, 156, 149 So. 222, 223 (1933).

⁸⁶ Statement of Sen. Mathias (Feb. 25, 1975), *reprinted in* 1975 House Hearings, *supra* note 72, at 12-13. In every state and in the District of Columbia, the typical private U.S. citizen residing outside the U.S. could not register and vote absentee in federal elections unless he specially declared and proved an intent to return, not only to the U.S., but to that state. If he did not have such an intent, he could not register and vote without committing perjury. Even if such a citizen honestly could state an intent to return to the state

Thus Congress, prompted by the inadequacy of prior federal voting initiatives, the confusing and possibly unconstitutional maze of restrictive state residency and balloting procedures, and by its belief that overseas citizens possessed the requisite interests and information for participation in federal elections, passed the Overseas Citizens Voting Rights Act of 1975.⁸⁷

C. *The Act Defined*

Section 3 of the Act provides that a citizen residing outside the United States is eligible to register and vote absentee in federal elections at the location where he was last domiciled immediately prior to his departure from the United States, if the citizen meets all other qualifications (except minimum voting age)⁸⁸ for voting in federal elections under any present law. Such a citizen may vote even if, while residing outside the United States, he has no place or abode or other address in his former state or district, and his intent to return to such state or district is uncertain.⁸⁹ This protection was made subject to three limitations.⁹⁰

In 1978, the Act was amended.⁹¹ The OCVRA Amendments made

of former residence, only a chance of enfranchisement existed in twenty-eight states and the District of Columbia. These jurisdictions expressly allowed absentee registration voting in federal elections for citizens "temporarily residing" abroad. The remaining states had no specific provisions governing private citizens residing abroad temporarily. Eight states allowed absentee registration but not absentee voting by non-governmental overseas voters in federal elections. Two states specifically required non-governmental overseas citizens to register and vote in person, allowing no absentee privilege. Every state, however, allowed military personnel and often federal employees and dependents of both groups, to register and vote absentee. Statement of J. Kevin Murphy, 1973 Senate Hearings, *supra* note 79, at 90, 91-92; Statement of Sen. Mathias (Feb. 25, 1975), *reprinted in* 1975 House Hearings, *supra* note 72, at 12, 13. (This information originated in a study by the Federal Voter Assistance Task Force of the Defense Department, established as part of the Federal Voting Assistance Act of 1955, *supra* note 68. States are listed and categorized in 1975 House Hearings, *supra* note 72, at 281-83.

⁸⁷ 42 U.S.C.A. §§ 1973dd (West 1981).

⁸⁸ Congress' attempt to lower the nationwide voting age through the Voting Rights Act Amendments of 1970 was rebuffed by the Supreme Court in *Oregon v. Mitchell*, 400 U.S. 112 (1970). Subsequent to this decision, the twenty-sixth amendment to the U.S. Constitution was ratified by the requisite number of states and lowered the minimum voting age to 18 for all elections.

⁸⁹ 42 U.S.C.A. § 1973dd-1 (West 1981).

⁹⁰ Limitations: (1) the citizen must comply with all applicable qualifications and requirements respecting absentee voting and registration; (2) he cannot maintain a domicile, register to vote, or vote in another state or election district of a state, or in any territory, possession, of the United States; (3) he must have a valid passport or card of identity and registration issued by the State Department, or an acceptable alternate if no passport or card of identity exists. *Id.*

⁹¹ Act of Nov. 4, 1978, Pub. L. No. 95-593, 92 Stat. 2535 (1978).

major technical, mechanical, and administrative changes and recommendations to insure that citizens abroad are informed properly of their rights under the Act, and are able to receive and return ballots by election day.⁹² More importantly, the amendments eliminated the tax neutrality of the original act.⁹³ This action was prompted by the 1976 elections, when it was learned that many overseas citizens were discouraged from using their newly gained rights because of a fear of state and local taxation, even though the citizens may have voted only for federal officers.⁹⁴ Therefore, the 1978 Amendments re-established a tax provision, already suggested in the Senate Bill for the 1975 Act, providing that exercise of the right to register and vote under the bill could not affect the determination of residence or domicile for the purpose of any federal, state, or local tax.⁹⁵

D. *Constitutionality of the Voting Provisions*

The constitutionality of OCVRA may be questioned on the ground that Congress usurped the traditional state prerogative over elections and therefore acted *ultra vires* when it passed the Act.

1. *Analytical Framework*

Proper constitutional analysis commences with a statement of the precise power at issue. The OCVRA extends the concept of bona fide residency to include certain cases in which actual residency no longer exists but in which a strong connection to the federal government and to the former electoral district is believed to exist. The OCVRA extends the same concept that every state practiced respecting federal military and civilian employees, and which twenty-eight states extended to citizens temporarily abroad.⁹⁶ The Supreme Court sanctioned limited extension of the bona fide residency concept respecting presidential elections in *Oregon v. Mitchell*.⁹⁷ The opinions in that case figure prominently in understanding the power of Congress over the franchise.

The United States Constitution allows the "[p]eople of the several

⁹² 42 U.S.C.A. §§ 1973dd-2 (West 1981).

⁹³ 42 U.S.C.A. § 1973dd-5(b) (1981).

⁹⁴ 1977 Senate Hearings, *supra* note 16, at 2.

⁹⁵ See S.95, H.R. 3211, 94th Cong., 1st Sess. § 8(b) (1975); 1975 U.S. CODE CONG. & AD. NEWS 2358; See also the Senate debate after House amendment, 121 CONG. REC. 41, 517-20 (1975). Although there are doubts as to the constitutionality of these provisions, this Note examines only the extension of the bona fide residence concept.

⁹⁶ See *supra* note 86.

⁹⁷ 400 U.S. 112 (1970).

states" to choose United States Representatives and allows the "people thereof" (each state) to select United States Senators.⁹⁸ The states were given the power to establish qualifications for the voters selecting these officers, provided the qualifications were those "requisite for electors in the most numerous branch of the state legislature."⁹⁹ Article I, section 4 provides: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the place of choosing Senators."¹⁰⁰ This provision did not address qualifications.¹⁰¹ In fact, a provision allowing federal regulation respecting property qualification as Congress "deems proper and expedient" was eliminated.¹⁰² Nevertheless, at least one Supreme Court justice read Congress' power under article I, section 4 to be plenary, giving Congress inherent power to set qualifications in all federal elections.¹⁰³

Respecting the Presidency, the Constitution again left much discretion to the states. Article II, section 1 provides for election by special electors selected in a manner directed by the state legislatures. Congress determines a uniform date for the times of choosing the electors and for reporting their votes.¹⁰⁴ These provisions seem to give Congress only a minor role respecting presidential elections. Nevertheless, the Court has held, at least since 1934, that Congress' power over presidential elections is not to be limited narrowly to those express terms.¹⁰⁵ While admittedly presidential electors are not officers or agents of the federal government,¹⁰⁶ they exercise federal functions and as such, Congress can govern

⁹⁸ U.S. CONST., art. 1, § 2, amend. XVII. (This amendment altered the original scheme for selection of Senators by the state legislatures, in favor of popular election. See U.S. CONST., art. 1, § 3).

⁹⁹ U.S. CONST., art. 1, § 2, amend. XVII.

¹⁰⁰ The exception regarding the place of choosing Senators was inserted to exempt the seats of state government, which originally selected Senators, from the power of Congress. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 613 (M. Farrand ed. rev. ed. 1966) [hereafter cited as Farrand] (Madison's Journal, Sept. 14, 1787). This provision was unnecessary after the 17th amendment, which provided for popular election of Senators. In any event, Congress has the power to regulate the time and manner of the selection of Senators.

¹⁰¹ THE FEDERALIST, No. 59, at 362, No. 60, at 371 (A. Hamilton) (C. Rossiter ed. 1961).

¹⁰² Compare Farrand, *supra* note 100, at 155-56 (Report of Committee of Detail, VI) with *id.* at 567 (as referred to the Committee of Style for final preparation).

¹⁰³ Oregon v. Mitchell, 400 U.S. 112, 124, 134 (1970) (Black, J., announcing the judgments of the Court in an opinion expressing his view of the cases.)

¹⁰⁴ U.S. CONST., art. II, § 1.

¹⁰⁵ Burroughs v. United States, 290 U.S. 534 (1934).

¹⁰⁶ Ray v. Blair, 343 U.S. 214, 224-25 (1955); Burroughs v. United States, 290 U.S. 534 (1934).

such elections at least to the extent necessary to preserve the integrity of the elections.¹⁰⁷ This right inheres, if not from the nature of the presidency itself, from the "necessary and proper" clause of the Constitution.¹⁰⁸ Thus, it was said in *Oregon v. Mitchell*¹⁰⁹ that just as Congress has ultimate supervisory power over congressional elections, "it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set the qualifications for voters for electors for those offices."¹¹⁰ Other opinions in *Oregon v. Mitchell* suggest that Congress' power over congressional and presidential elections are coextensive. The opinions were framed to apply to "national officers"¹¹¹ or to "federal elections" in the broad context of protecting the right to interstate migration.¹¹² Finally, three justices suggested, at least in the context of protecting the right to travel, that "nothing in the Constitution prevents Congress from protecting . . . [against] disenfranchisement in any federal election, whether congressional or presidential."¹¹³

The constitutional provisions quoted above have never been changed expressly, but state discretion regarding both qualifications and the conduct of elections has been eroded in order to expand, promote, and protect the right to vote. This phenomenon is illustrated most dramatically by the partnership between the Congress and the states in restricting state discretion through constitutional amendments.¹¹⁴ Congressional enactments promoting and enforcing rights granted by the Constitution also have limited the discretion given the states by article II, and judicial acquiescence has sanctioned congressional alteration of some state voting qualifications.¹¹⁵

While the Supreme Court formally recognizes the original con-

¹⁰⁷ *Burroughs v. United States*, 290 U.S. 534 (1934).

¹⁰⁸ U.S. CONST., art. I, § 8, cl. 18; *Ex Parte Yarbrough*, 110 U.S. 651 (1884).

¹⁰⁹ 400 U.S. 112 (1970).

¹¹⁰ *Id.* at 124 (Black, J.).

¹¹¹ *Id.* at 149 (Douglas, J.).

¹¹² *Id.* at 237 (Brennan, White and Marshall, JJ.).

¹¹³ *Id.* at 287 (Stewart, Blackmun, JJ., and Burger, C.J.).

¹¹⁴ U.S. CONST. amend. XIV (equal protection and privileges and immunities of federal citizenship), amend. XV (race and color), amend. XIX (gender), amend. XXIV (abolished poll taxes respecting federal elections), amend. XXVI (age if 18 years or older).

¹¹⁵ Voting Rights Act of 1965, § 4(e), 42 U.S.C. § 1973 b(e) (1976) limiting literacy tests in some states, sustained in *Katzenbach v. Morgan*, 384 U.S. 641 (1966); Voting Rights Act Amendments of 1970, 42 U.S.C. §§ 1973aa, -bb (1976) lowering minimum voting age in federal elections, and abolishing state literacy tests in all elections, sustained in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

stitutional structure governing elections,¹¹⁶ it has expanded the sphere of legitimate federal involvement gradually by broadly interpreting the old formulations and making new formulations instead of overruling previous broad statements of state power. Citing with approval in modern cases language from the turn of the century, the Court has stated that "the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the federal Constitution."¹¹⁷ Sixty years later the Court cited this language to support invalidation of an oppressive Texas residency requirement under the equal protection clause of the fourteenth amendment to the Constitution. Thus, there was no question of the historic function of the states in establishing nondiscriminatory qualifications for the exercise of the franchise.¹¹⁸ The constitutional amendments restricting state power over the franchise¹¹⁹ could be applied with vigor. The Court demonstrated a willingness to read the fourteenth amendment as a restriction on state powers over the franchise, allowing the amorphous concepts of "equal protection" and "privileges and immunities" to be used to expand federal power over the franchise.¹²⁰ By 1972, the Court clearly was requiring state restrictions, including durational residency requirements, to be tailored carefully in order to promote a "compelling state interest."¹²¹ With this background in mind, constitutional bases supporting the voting provisions of the OCVRA now will be examined.

2. *Protecting the Privileges and Immunities*

a. The Right to Vote in Federal Elections

Notwithstanding the vesting of the power to prescribe voting qualifications in the states, for almost a century the Supreme Court has made it clear that conceptually the right to vote for federal

¹¹⁶ See *Ex Parte Yarbrough*, 110 U.S. 651, 663 (1884).

¹¹⁷ *Pope v. Williams*, 193 U.S. 621, 632 (1904) (upholding a state residency requirement), quoted in *Carrington v. Rash*, 380 U.S. 89 (1964).

¹¹⁸ *Carrington v. Rash*, 380 U.S. 89, 91 (1964).

¹¹⁹ *Id.*

¹²⁰ See *Kramer v. Union Free School District*, 395 U.S. 621, 627-30 (1969); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966); *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966); *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45, 50-51 (1959) (upholding a state literacy test).

¹²¹ *Dunn v. Blumstein*, 405 U.S. 330 (1972).

officers is derived from the Constitution,¹²² and is secured directly to citizens by the Constitution. This includes the right to vote for presidential electors.¹²³ Because of its fundamental importance, implicit in democracy,¹²⁴ the right to vote for national officers is one of the few privileges and immunities of national citizenship recognized¹²⁵ since the Court virtually eliminated that doctrine in the *Slaughter-House* cases.¹²⁶ Congress can protect by appropriate legislation the rights and privileges of federal citizenship under both the "necessary and proper" clause¹²⁷ and the enforcement clause, section 5, of the fourteenth amendment.¹²⁸ The propriety of such legislation must be governed by the standards of *McCulloch v. Maryland*.¹²⁹ This Note now considers whether the OCVRA can be upheld as a means of promoting and protecting the right to travel by prohibiting states from forcing a choice between two fundamental rights: travel and voting in federal elections.

b. The Right to Travel

The provisions of the OCVRA that extend the concept of bona fide residency to include certain types of former actual residency may be supported as reasonable Congressional protection of the right to travel. This analysis examines the opinions in *Oregon v. Mitchell* that upheld a limited extension of the bona fide residency concept by sanctioning the notion of "bona fide voting residency." Whether such analysis also can embrace the plight of overseas United States citizens is examined subsequently.

In *Oregon v. Mitchell*, eight Justices of the Supreme Court upheld section 202 of the Voting Rights Act Amendment of 1970.¹³⁰ In that opinion, at least three Justices gave substantial attention to

¹²² *Ex Parte Yarbrough*, 110 U.S. 651, 663 (1884).

¹²³ *United States v. Classic*, 313 U.S. 299, 314-15 (1941) (and cases cited therein).

¹²⁴ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The right to vote for federal officers is the "fundamental political right because preservative of all rights." *Id.*

¹²⁵ *Oregon v. Mitchell*, 400 U.S. 112, 149 (1970) (separate opinion of Douglas, J.); *Twining v. N.J.*, 221 U.S. 78, 97 (1908); *Wiley v. Sinkler*, 179 U.S. 58 (1900); *Ex Parte Yarbrough*, 110 U.S. 651 (1884).

¹²⁶ 83 U.S. (16 Wall.) 36 (1873).

¹²⁷ *Katzenbach v. Morgan*, 384 U.S. 641, 650, 651 (1966); *United States v. Texas*, 252 F. Supp. 234 (1966), *aff'd*, 384 U.S. 155 (1966); *United States v. Reese*, 92 U.S. 214, 217 (1875).

¹²⁸ U.S. CONST., art. I, § 8, cl. 18.

¹²⁹ 17 U.S. (4 Wheat.) 316 (1819). "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and the spirit of the Constitution, are constitutional" *Id.* at 421.

¹³⁰ 400 U.S. 112 (1970).

the issue of congressional power to regulate federal elections by the "change of residency provision."¹³¹ Justice Stewart, writing for himself, Justice Blackmun, and Chief Justice Burger, framed the issue as "whether, despite intentional withholding from the Federal Government of a general authority to establish qualifications to vote in either congressional or presidential elections, there exists congressional power to do so when Congress acts with the objective of protecting a citizen's privilege to move his residence from one state to another."¹³²

The three concluded that the basic constitutional provisions discussed above were sufficient to prevent Congress from vindicating the fundamental right of interstate travel, which is personal and virtually unconditional.¹³³ Implicit in the constitutional discussion was consideration of both the durational residency prescription and the change of residency provision.¹³⁴ These Justices believed that the right of a citizen to exercise his constitutional privilege to change his residence cannot be left to the states without a reduction in the level of protection available.¹³⁵ Federal action was required to avoid parochial undermining of the right to travel and change residence. While states can act in concert, in the absence of a uniform compact, the problem can be solved only by Congress. Thus Congress can act to protect constitutional privileges that are national in character and originate in the federal government.¹³⁶ Instead of grounding this right in the enforcement clause (section 5) of the fourteenth amendment, the Justices reached this result by sustaining the power of Congress to protect and facilitate the exercise of privileges of United States citizenship under the "necessary and proper clause,"¹³⁷ tempered by the classic requirement of *McCulloch v. Maryland*¹³⁸ that such initiatives be legitimate in ends and rational in means.

Lest the opinion be taken as a total abrogation of the basic constitutional electoral structure, Justices Stewart and Blackmun, and Chief Justice Burger refined their holdings. They stated that the

¹³¹ *Id.* There is a rather curious reading of the Court's opinion suggesting that the Court did not mention the change of residency provision in its 186 page opinion. See 1975 House Report, *supra* note 14, at 18, 1975 U.S. CODE CONG. & AD. NEWS 2358, 2373 (minority views).

¹³² *Oregon v. Mitchell*, 400 U.S. 112, 291-92 (1970).

¹³³ *Id.* at 292 (citing *Williams v. Rhodes*, 393 U.S. 23 (1968) and *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

¹³⁴ *Oregon v. Mitchell*, 400 U.S. 112, 285 (1970).

¹³⁵ *Id.* at 292.

¹³⁶ *Id.* at 286-87.

¹³⁷ *Id.* at 286.

¹³⁸ 17 U.S. (4 Wheat.) 316 (1819) (see also *McCulloch v. Maryland*, *supra* note 129, at 421).

permissible scope of congressional power to protect federal constitutional rights is confined to federal action against a particular problem clearly within the purview of congressional authority.¹³⁹ Justices Brennan, White, and Marshall treated the residency provisions together and concluded that whether or not Congress has particular and express power to set qualifications for voting in strictly federal elections, both residency sections could be sustained under the enforcement clause of the fourteenth amendment. Both provisions were justifiable in protecting the right of all citizens to unhindered interstate travel and settlement, regardless of the specific provision from which this construction flows. Such a burden on interstate travel was not justified by a compelling state interest, thus Congress could exercise reasonable means to eliminate it.¹⁴⁰

Justice Black upheld section 202 on broad constitutional grounds, based on an extremely generous reading of article I, section 4. He was the only Justice not to discuss the change of residence provision.¹⁴¹ Justice Douglas likewise gave abbreviated consideration to section 202, upholding it under section 5 of the fourteenth amendment as a means of protecting privileges and immunities of national citizenship. Such privileges include the right to vote in national elections, especially presidential elections, where "no parochial interests of the State, county, or city are involved."¹⁴² Thus a majority of the Supreme Court explicitly affirmed the right of Congress to protect a group of citizens with a particular problem through reasonable extension of the concept of bona fide residency. The issue now is to determine whether principled distinctions exist between those protected under the 1970 Voting Rights Act Amendments and those sought to be protected under the OCVRA.

The OCVRA applies to all federal elections. Section 202 of the 1970 Act applied only to those voting in presidential and vice-presidential elections. Should the *Oregon v. Mitchell* holding be so limited? Presidential and vice-presidential elections were covered because the president and vice-president are arguably the quintessential example of national officers, as they are the only officers elected by every voter. Congressmen and Senators likewise may be treated as national officers. First, the broad opinions cited above suggest that the Court perceives little distinction between

¹³⁹ *Oregon v. Mitchell*, 400 U.S. 112, 292 (1970).

¹⁴⁰ *Id.* at 237-39.

¹⁴¹ *Id.* at 134.

¹⁴² *Id.* at 147-50.

federal officers when examining federal power over the franchise.¹⁴³

Second, it should not be ignored that Congress represents both local and national interests. Congress specifically concluded that this fact supported the extension of the franchise to United States citizens abroad.¹⁴⁴ Congress concluded that overseas citizens do not have a lesser interest or stake in obtaining the franchise than do actual residents. It is possible to have a legitimate connection without a physical presence or a fixed date of return to a state. The experience of the states with respect to their prior special absentee exceptions proved this. A state can reasonably extend its political community to embrace overseas residents without destroying its "political community." Traditional bona fide residency requirements have been suggested, in dicta, to meet even the compelling state interest test¹⁴⁵ because they may be essential to preservation of the political community. States allowing the extension of a bona fide residence to federal military and civilian employees acknowledge that these groups are members of the political community, despite their absence and an uncertain date and place of return. Otherwise, the states could not extend the franchise to these groups without diluting the vote of actual residents, in contravention of the vote dilution-equal representation cases.¹⁴⁶

The fact that section 202 of the Voting Rights Act Amendments of 1970 did not apply to presidential primaries while the OCVRA does apply to presidential and congressional primaries¹⁴⁷ is not a sufficient basis for distinguishing the reasoning applied to the change of residency provisions in *Oregon v. Mitchell*. The federal prerogative over elections extends to primaries, even privately run primaries, when they are essential parts of the electoral process.¹⁴⁸ It must be admitted, however, that it is quite possible that there is much less national character respecting primaries selecting delegates for national nominating conventions than respecting general primaries preceding general elections.¹⁴⁹

¹⁴³ See *supra* text accompanying notes 111-13.

¹⁴⁴ S. REP. NO. 94-121, 94th Cong., 1st Sess. 2 (1975) [hereinafter cited as 1975 Senate Report]; 1975 U.S. CODE CONG. & AD. NEWS 2358.

¹⁴⁵ *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972).

¹⁴⁶ *United States v. Saylor*, 322 U.S. 385 (1944).

¹⁴⁷ 42 U.S.C.A. § 1973dd (West 1981).

¹⁴⁸ *United States v. Classic*, 313 U.S. 299 (1941); see also *Smith v. Allwright*, 321 U.S. 649 (1944).

¹⁴⁹ In dicta, three traditionally conservative members of the Court stated that federal power against disenfranchisement was the same with regard to both congressional and presidential elections. *Oregon v. Mitchell*, 400 U.S. 112, 287 (1970).

Even a cursory reading of *Oregon v. Mitchell* reveals that the opinions on the right to travel mention only the right to travel interstate and establish a new residence. Such rights are personal, fundamental, and almost unconditional. However, the Court has extended a similar protection to international travel.¹⁵⁰

This protection should not extend only to the jet-setting multimillionaire or peripatetic traveller. It should extend to the right of international travel and settlement as well as to the right of interstate travel and settlement.¹⁵¹ While the right of international travel is not as absolute as the right of interstate travel, cases significantly restricting international travel are distinguishable as products of foreign policy and wartime restrictions.¹⁵² Substantial national interests have been held, nevertheless, to be insufficient when balanced against the right of international movement.¹⁵³

The OCVRA was passed to prevent the states from forcing certain voters to choose between two fundamental rights when other citizens were allowed to exercise both privileges. The OCVRA addressed an inequity far worse than the inequities attacked in section 202 of the Voting Rights Act Amendment of 1970. Those moving interstate were not denied a voice in the federal government totally. They were denied nothing if they moved prior to the registration deadline; if they did not, they could vote in their former district through creation of a bona fide voting residence. Even if they could not vote immediately after a move, the abolition of durational residency requirements insured that they were able to qualify for the next election. By contrast, without extension of the bona fide residence concept, United States citizens abroad were deprived permanently of a voice in the federal government, despite the fact that they continued to be subject to the obligations of citizenship.

c. Promoting Equal Protection of the Laws

Another constitutional basis for support of the OCVRA is that of promoting equal protection of the laws. The legislative history of the OCVRA indicates congressional realization that many state practices regarding the franchise were at least suspect under the

¹⁵⁰ *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

¹⁵¹ *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868); *Edwards v. California*, 314 U.S. 160 (1941); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹⁵² See, e.g., *Zemel v. Rusk*, 381 U.S. 1 (1965). But see *Califano v. Aznavorian*, 439 U.S. 170 (1978) (right to international travel is less absolute than right to interstate travel; incidental burdens not in conflict with the first amendment right of association are tolerated).

¹⁵³ *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

equal protection clause of the fourteenth amendment.¹⁵⁴ A judicial determination that state electoral practices violate the mandates of equal protection is no longer a prerequisite to congressional action under the enforcement clause, section 5, of the fourteenth amendment.¹⁵⁵ The Court's limiting view that Congress cannot prohibit a state practice as violative of fourteenth amendment rights absent a prior judicial determination that the law violates some portion of the fourteenth amendment was overruled *sub silentio* in *Katzenbach v. Morgan*.¹⁵⁶ Congress will not be overridden by the Court if there is a reasonable basis for congressional belief that the outlawed practice constitutes invidious discrimination.¹⁵⁷

In light of *Katzenbach v. Morgan*, it is conceivable that Congress sought to remedy perceived equal protection violations by passing the OCVRA. Whether this perception is correct is a question the Court has not yet addressed. It has long been established legal doctrine that equal protection demands that similarly situated people within a class be treated similarly, absent adequate justification for discrimination.¹⁵⁸ Distinctions affecting fundamental rights such as voting and traveling are impermissible unless justified by a compelling state interest.¹⁵⁹

In analyzing the OCVRA, the requisite class is that of all state citizens. States are the fundamental electoral unit, and the equal protection clause applies only to persons within a state's jurisdiction. Special groups of absentee voters, such as government personnel, were considered to be within the state's jurisdiction prior to the passage of the OCVRA. Unlike most overseas citizens, certain classes were deemed to have retained a sufficient connection

¹⁵⁴ 1975 House Report, *supra* note 14, at 3, 1975 U.S. CODE CONG. & AD. NEWS 2358, 2360.

¹⁵⁵ U.S. CONST. amend. XIV, § 5.

¹⁵⁶ 384 U.S. 641 (1966). Compare *The Civil Rights Cases*, 109 U.S. 3, 13-14 (1883) (section 5 of the 14th amendment permits only "corrective legislation"; a court first must have established a section 1 violation).

¹⁵⁷ *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966). The Court need only "perceive" a reasonable basis for Congress' particular resolution of a supposed problem. *Id.*

¹⁵⁸ This common sense proposition results from reconciling two concepts. First, "the equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Second, every law of specific application classifies, and in order for government to function, the Constitution does not require that things different in fact be treated in law as though they were the same. *Tigner v. Texas*, 310 U.S. 141, 147 (1940). Thus, a rule of reasonable classification must be the norm, except where heightened scrutiny is given to certain bases of discrimination, or burdens on fundamental rights. See *infra* note 159. See generally Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

¹⁵⁹ *Hill v. Stone*, 421 U.S. 289, 297 (1975); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 627, 634, 638 (1969); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

with the former residence to justify extension of the concept of a bona fide residence. If this special group were not so designated, extension of the vote to them would dilute the vote unconstitutionally of those truly eligible to vote.

The right to travel cases, when viewed in tandem with the citizenship cases, show that state and federal citizenship and the resultant right to vote cannot be destroyed by virtue of physical absence from the state. *Afroyim v. Rusk* established that citizenship can neither be deprived as punishment nor "shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit."¹⁶⁰ States cannot use the exercise of the right to travel to sever state citizenship. Residence is important to state citizenship only when one moves interstate. The circumstances of the enactment of the fourteenth amendment's citizenship clause make it clear that the goal of the provision was to insure that residents were also state citizens.¹⁶¹ A change of residence must, implicitly, terminate citizenship in the former state, not because the citizen is out of the state, but because residence in the new state creates citizenship in the new state. The first sentence of the fourteenth amendment must be interpreted to mean that residence in a new state is tantamount to renouncing citizenship in the former state voluntarily and swearing allegiance to the new state. Only in this way can the incongruous result of membership in two discrete parts of the same federal entity be avoided.¹⁶²

Finding a renunciation of citizenship is unnecessary when considering moves to foreign countries. Typically, the United States citizen abroad does not renounce state or federal citizenship. There is no reason for a state to attempt to deprive him of citizenship or its privileges because the incongruity of dual citizenship does not exist. The incongruity results from applying residency principles applicable to interstate moves to international moves. The effect is to strip a citizen of a fundamental right.

The first clause of the fourteenth amendment speaks to the creation of citizenship, not its termination. Only interstate moves affect state citizenship. United States citizenship is not affected by either an interstate or international move. As such, a state cannot use an international move as a basis for abridging the right to vote for federal officers, a privilege of all federal citizens even

¹⁶⁰ 387 U.S. 253, 262 (1967).

¹⁶¹ The amendment rejected the "3/5ths compromise" of the U.S. CONST. art. I, § 2, cl. 3, and insured that native born or naturalized blacks clearly would be citizens of the U.S. and the state in which they resided.

¹⁶² Davidson, *Voting Rights of Americans Abroad*, 18 BUFFALO L. REV. 469, 480-81 (1969).

if outside the state. Similarly, an interstate move cannot alter state citizenship absent the traveller expressly taking up a new citizenship, because there is no reason to infer a renunciation. A United States citizen abroad is still a state citizen, subject at least partially to that state's laws (i.e., its jurisdiction) and thus cannot be denied equal protection of the laws.

Once it is illustrated that a class of state citizens exists, and that distinctions are made within that class, it must be considered whether Congress could have concluded rationally that these distinctions violated equal protection. Alternately, it can be considered whether Congress could have found the bona fide voting residence requirement necessary to promote interests of the fourteenth amendment, regardless of whether a technical equal protection violation existed.¹⁶³

If extension of the franchise is merited with respect to special groups, it likewise can and should be extended to those similarly situated. It is difficult to perceive how federal employees can be distinguished in terms of bona fide voting residence from private civilian employees. There arguably is no principled distinction between government employees abroad engaged in national service and private civilians abroad of their free will. The class of citizens abroad cannot be distinguished on the basis of employment. As previously noted, Congress found that United States citizens abroad serve the interests of the United States in many ways,¹⁶⁴ and their daily decisions can affect the nation as greatly as those of domestic citizens.

Also, it is difficult to understand how some of the various state distinctions bore any serious relationship to the national service rationale. Many private citizens abroad serve the interest of the United States at least to the same extent as do spouses and dependents of government personnel. In addition, the Supreme Court specifically has said that occupation is not a permissible factor in determining who shall vote.¹⁶⁵ The proper standard is the likelihood of the existence of a bona fide connection to the United States and to the former election district. Otherwise, the right to vote is given as a reward for national service where no bona fide

¹⁶³ *Katzenbach v. Morgan*, 384 U.S. 641 (1966), allows Congress to pass laws "plainly adapted" to furthering the aims or spirit of the equal protection clause of the 14th amendment, even if it is unclear whether the outlawed state practices actually offend equal protection. *Id.* at 652-53.

¹⁶⁴ 1975 House Report, *supra* note 14, at 2, 1975 U.S. CODE CONG. & AD. NEWS 2358, 2359; 1975 Senate Report, *supra* note 144, at 2.

¹⁶⁵ *Carrington v. Rash*, 380 U.S. 89 (1965); *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

connection exists, and the power of those actually entitled to vote is diluted.

Finally, it may be suggested that a distinction based on voluntariness exists. Perhaps the special absentee statutes protecting limited classes were justified by a presumption that one involuntarily transferred from the state would return to that state once given the chance. The states might require only those leaving voluntarily to prove an intent to return. Those leaving "on orders" are presumed to possess an intent to return. However, the voluntariness distinction may assume too much. There is no compulsory civilian or military service in the United States. Neither is one forced to work for the federal government. An individual employed by a multinational enterprise is as subject to the needs of his employer as the military or civilian federal employee. The element of volition or non-volition is complete in both cases. In the absence of the draft or its equivalent, there is no basis for distinguishing special absentee groups from private citizens living abroad.

Thus, it can be concluded that the Congress represents national interests as well as local interests; that this does not differ respecting citizens abroad; and that citizens abroad have a connection with the United States worthy of extension of the franchise. Unfortunately, states irrationally distinguished between classes of citizens abroad who had equally valid connections to the United States and the former state. In light of these factors, if Congress can extend bona fide voting residence respecting presidential and vice-presidential elections, the concept likewise can be extended to congressional elections.

The bona fide voting residency provision in section 202 of the Voting Rights Act Amendments of 1970 was limited to thirty days. Should the Court's approval be limited only to this situation and not be extended to the moves of longer duration covered by the OCVRA? It is suggested that the two situations are similar enough to merit judicial approval. The fact that a stay abroad is of indeterminate length does not preclude the existence of a bona fide voting residence. With regard to federal elections, Congress decided that a sufficient nexus exists, despite length of stay, as long as one is subject to the obligations of United States citizenship. Congress simply will risk the fact that some absentee voters may no longer have a sufficient connection with the United States. Such citizens would be violating their oaths as bona fide voting residents and would be subject to the fraud penalties of the OCVRA,¹⁶⁶ just

¹⁶⁶ 42 U.S.C.A. § 1973dd-3(c) (West 1981).

as those who fraudulently vote absentee within the United States are subject to criminal sanction. While violations may be difficult to detect, and judgments difficult to enforce abroad, it was expected that the incidents of fraud would be slight.¹⁶⁷

There is no doubt that insuring membership in the political community is a compelling state interest. Such is constitutionally required to avoid vote dilution. However, when the relevant political community is defined, it is apparent that Congress could have concluded that actual residence is an underinclusive and insufficient classification. United States citizens abroad are no different from domestic citizens in terms of membership in the political community of the federal government. Both groups are subject to the benefits and abuses of matters subject to vote; and while federal power may fall differently between the two groups, the same differences occur domestically.

When measuring "bona fides," a state cannot exclude a segment from the franchise because of some remote administrative benefit, such as not having to administer the voting of overseas citizens or avoiding the uncertainty of sworn statements of bona fides.¹⁶⁸ When there is a compelling interest, and measuring bona fides and excluding non-members of the political community can be said to be one, the least restrictive alternative must be selected. The standard can be neither overinclusive nor underinclusive.¹⁶⁹ Thus, if procedures already exist for determining bona fides, such as the oath systems often applied to domestic absentee voters and to overseas citizens in the favored classifications, the discrimination is wholly gratuitous. Without the discrimination, benefits would be provided to those similarly situated to the favored class, not in any way compromising the states' goals or interests.¹⁷⁰

Of course, "[i]n every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitu-

¹⁶⁷ In 20 years under the recommendations of the Federal Voting Assistance Act of 1955, see *supra* notes 68-69 and accompanying text, not a single incident of fraud was detected. Letter from J. Eugene Marans, Counsel, Bipartisan Committee on Absentee Voting (June 23, 1975), reprinted in 1975 House Hearings, *supra* note 72, at 264, 270. The House Administration Committee found the potential of voting fraud under OCVRA to be remote and speculative. 1975 House Report, *supra* note 14, at 4, 1975 U.S. CODE CONG. & AD. NEWS 2358, 2361.

¹⁶⁸ *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

¹⁶⁹ *Kramer v. Union Free School District*, 395 U.S. 621, 633 (1969).

¹⁷⁰ Cf. *Orr v. Orr*, 440 U.S. 268, 282 (1979) ("A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny.").

tion's commands either by extending benefits to the previously disfavored class or by denying benefits to both" classes.¹⁷¹ Thus, states could respond to an adjudication that state restrictions violated equal protection by denying all absentee voting benefits to all citizens abroad. The only recourse for such citizens would be to argue that actual residency requirements are unconstitutional respecting federal elections. Congress can be seen as foreclosing both of these possibilities by acting pursuant to its powers under section 5 of the fourteenth amendment to force states to extend the concept of bona fide voting residence to embrace those similarly situated.

While it is said that states clearly can require bona fide actual residence as a precondition to voting, those statements can be distinguished as dicta.¹⁷² Furthermore, these cases deal with establishing connections in a new state, not continuing political ties to a former place of actual residence. Finally, it must be remembered that definitions of residency must fall within constitutional grounds.¹⁷³ A state, in pursuing its legitimate interests, cannot choose means unnecessarily burdening or restricting constitutionally protected activities such as travel and voting for national officers.¹⁷⁴

Thus, Congress acted reasonably pursuant to its fourteenth amendment, section 5 enforcement powers, as interpreted by the Court in *Katzenbach v. Morgan*, in enacting the OCVRA. Some suggest the *Katzenbach v. Morgan* interpretation of section 5 was a short-lived phenomenon that did not survive *Oregon v. Mitchell*. However, in *Oregon v. Mitchell*, Justices Brennan, White, Marshall¹⁷⁵ and Douglas¹⁷⁶ accepted this interpretation in full. Justices Stewart and Blackmun, and Chief Justice Burger, with respect to residency provisions, gave Congress some discretion in making substantive decisions about what state actions are discriminatory above and beyond judicial views of the matter.¹⁷⁷ These three Justices also stated that the "necessary and proper" clause could be used as easily to reach the same result.¹⁷⁸ Only Justice Harlan clearly re-

¹⁷¹ *Id.* at 272.

¹⁷² *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972) (and cases cited therein).

¹⁷³ *Ramey v. Rockefeller*, 348 F. Supp. 780, 788-89 (E.D.N.Y. 1972) (N.Y. definition does not offend equal protection).

¹⁷⁴ See cases cited *supra* note 159.

¹⁷⁵ *Oregon v. Mitchell*, 400 U.S. 112, 229, 278-81 (1970).

¹⁷⁶ *Id.* at 135, 141-44.

¹⁷⁷ *Id.* at 286, 296.

¹⁷⁸ *Id.* at 286.

jected the *Katzenbach v. Morgan* formulation.¹⁷⁹ Justice Black limited it to race discrimination cases.¹⁸⁰ It would not be fatal though, even if the current Court adopted the Black interpretation. While overseas United States citizens are not likely "discrete and insular minorities,"¹⁸¹ it is not at all unreasonable to consider the restrictive state laws struck by the OCVRA as "legislation which restrict those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."¹⁸² In *United States v. Carolene Products Co.*,¹⁸³ it was intimated that such laws may be subject to more exacting scrutiny under the fourteenth amendment, just as minorities are afforded heightened judicial solicitude. Congress' response to the plight of overseas citizens can be sustained even under a conservative reading of *Katzenbach v. Morgan*.¹⁸⁴

d. Conclusions on the Constitutionality of OCVRA

One can conclude that Congress could act constitutionally to enfranchise overseas United States citizens. The OCVRA, like section 202 of the Voting Rights Act Amendments of 1970, was "necessary and proper" legislation "plainly adapted" to secure and further constitutional rights. The OCVRA did not abolish, but only uniformly extended the concept of bona fide residence. This concept was sanctioned in *Oregon v. Mitchell* as either "necessary and proper" to promote federal rights or within the enforcement clause of the fourteenth amendment. As explained, there are few principled reasons for not extending similar reasoning to the OCVRA. The Court easily can distinguish its prior dicta and holdings that suggest that bona fide residency requirements demanding actual residence are beyond constitutional challenge because connected to the compelling state interest of preservation of the "political

¹⁷⁹ *Id.* at 152, 204-09.

¹⁸⁰ *Id.* at 119, 126-31.

¹⁸¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ This case should not be rejected as a derelict in the stream of law. It does not stand *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) on its head by allowing judicial deference to congressional interpretation of the Constitution in contravention of Chief Justice Marshall's pronouncement. "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. *Katzenbach v. Morgan* is best read as a case about institutional competence. Congress is a superior fact finder as compared to the courts. Factual decisions usually are set aside only if patently erroneous. Congressional action typically involves more fact finding than interpretation of the law, to the extent law and fact are discrete entities. Viewed this way, *Katzenbach v. Morgan* is not inconsistent with *Marbury v. Madison* or the doctrine of separation of powers.

community.”¹⁸⁵ These cases are inapposite. They deal with establishment of a new bona fide residence in a state. They say nothing about continuing, for limited purposes, the connection with the former state. The proper questions are not what is required to constitute residency in a new jurisdiction, but when residency in a former jurisdiction completely ends, and whether that former residency can be extended within the former state, where no one disputes that residency once existed. Such a limited extension allows voting in federal elections and allows those votes to count along with those of actual residents and federal military and civilian employees abroad.

As to the propriety of the means, Congress probably could not have selected a more reasonable scheme. Short of a federal system of administering elections, which would be anathema to many (and require a constitutional amendment), Congress had no choice but to work through the existing state electoral system, and to create a bona fide voting residence. It was eminently reasonable to select the state of immediate former residence for this purpose. As far as knowledgeable voting is concerned, Congress could have concluded that the overseas voters would be most familiar with candidates and issues from the former district and aware of current needs through contacts with family, friends, and employers. The authorities of the former state are also most likely to have records of the citizen's existence and be able to verify the absent resident's claim to voting status. Thus a strong case can be made for the constitutionality of both the ends and means of the voting provision of the OCVRA.

IV. CONCLUSIONS

In both the United States and the Federal Republic of Germany, non-resident citizens were denied the right to vote in federal elections. This denial still exists in Germany and only now is being addressed seriously by the Bundestag. The United States Congress, after much deliberation, acted upon its own initiative and passed the OCVRA. In contrast, in the Federal Republic, it took a ruling from the Supreme Constitutional Court to prompt the legislature to consider the question of non-resident citizens. Both countries have been uncomfortable for a long time when dealing with this neglected group of citizens. In both countries as well, various objec-

¹⁸⁵ *E.g.*, *Dunn. v. Blumstein*, 405 U.S. 330, 343 (1972) (and cases cited therein).

tions were raised as to the propriety of including non-resident nationals in the political process of their home states.

Of course, the Federal Republic and the United States both encountered some problems that are unique to their respective political situations and constitutional settings. The Federal Republic, since its inception, has been plagued by the dilemma of a divided German nation. As explained,¹⁸⁶ the Federal Republic considers all citizens of the German Democratic Republic (GDR), which it does not recognize as a sovereign state, to be German nationals in the sense of the Basic Law. Granting the right to vote to every German national, irrespective of his residence, would have conferred the franchise in the Bundestag elections to the citizens of the GDR. In contrast, the specific problem of the United States can be described best by the word federalism. Congress, operating within the very delicate balance of federal and state powers created by the Constitution, is often susceptible to allegations of infringement of state rights.

In spite of the particular problems of each of the two legal systems, the similarity of the constitutional questions is striking. In both countries, the major argument against the old laws excluding non-residents from voting is based upon grounds of inequality. Both legislatures had long provided exceptions for government personnel and their spouses and dependents.¹⁸⁷ This exception, based upon the distinction between a government employee residing abroad on orders and a private citizen leaving his country voluntarily, may have had some validity in former times, especially in Germany. The German constitutions before 1949, when the Federal Republic came into being, had not created a system of legally enforceable civil rights. It is at least conceivable that a government could have ordered civil servants, who were considered to be politically unreliable, to go abroad in order to exclude them from voting. However, in the United States and in modern Germany, the courts will prevent such flagrant violations of the civil rights of government employees. Thus, the distinction between civil servants residing abroad on orders and private citizens is no longer valid, if it ever was.

It has been shown, however, that there are compelling reasons under both constitutions to afford equal voting rights to non-resident citizens. In the Federal Republic, these reasons are based

¹⁸⁶ See *supra* notes 36-38 and accompanying text.

¹⁸⁷ For the Federal Republic, see *supra* text accompanying notes 18-21, particularly notes 18-19. For the United States, see *supra* notes 86, 164-65.

upon the principle of equality, as set forth in articles 3 (1) and 38 (1) of the Basic Law, as well as on the principle of democracy in article 20 (1) of the Basic Law. In the United States, Congress' authority to pass OCVRA can be upheld upon the grounds of promoting equal protection of the laws and its power to do what is "necessary and proper" to protect the privileges and immunities of federal citizenship.

One might be tempted to suspect that, due to their similarity, the problems arising under both constitutional systems when attempting to enfranchise non-resident citizens are inherent in the democratic system. However, it is suggested here that the origin of those problems is attributed more correctly to a particular period of history rather than the political system itself. Only in this century, and specifically after the Second World War, have hundreds of thousands of people moved abroad without emigrating and thereby severing all ties to their former home countries. With the rapid development of mass communication and transportation, the significance of physical distance has diminished. A degree of international cooperation and interdependence has been reached that could not be foreseen a hundred years ago. The strong interconnection of the industrialized countries, of which the European Communities are only one example, and the urge to develop other parts of the globe, require many citizens to live and work abroad, be it in the service of a multinational corporation or an international agency.

These citizens do not intend to relinquish all ties with their home countries, because they normally view their stay abroad as temporary. Legislatures should take cognizance of this development and not cling to old laws and concepts of allegiance that do not fit the modern realities. The United States Congress has realized this necessity by passing OCVRA. It can only be hoped that the Federal Republic of Germany also will succeed in granting a right to its non-resident citizens that is demanded by the very basic foundations of representative democracy.

Robert Dilworth and Frank Montag

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