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Domicile, student voters and the Constitution



JOHN GREABE

Constitutional Connections

The wisdom of using the Electoral College to choose our president is a hot topic. For the second time in 16 years (and the fifth time in our history), the “winner” of the national popular vote lost the presidential election in the Electoral College. To many, this “undemocratic” outcome seems wrong.

Moreover, as usually happens, the outcome of the election turned on a relatively small number of swing states, where the presidential contest was close and contested.

Thus, relatively speaking, the presi-

dential ballots cast in these states carried significantly more weight than those cast by the majority of Americans who live in solidly “red” or “blue” states. To many, this incongruence in voter impact also seems wrong.

Whether our system for electing a president is wise or not, New Hampshire undeniably benefits from it. The New Hampshire primary often plays a significant role in the presidential nominating process.

And New Hampshire is a perennial

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Right to vote isn't just a state concern; it's protected by the Constitution

CONSTITUTION FROM D1

swing state, where winners and losers often are separated by only a few thousand votes. Recall that, in 2000, Al Gore would have become our 43rd president if only 3,700 New Hampshire voters had cast ballots for him instead of George W. Bush.

But in the eyes of many, there are downsides to New Hampshire's privileged position in national electoral politics. Many believe that students who come from out of state to attend school in New Hampshire tend to maximize the impact of their ballots by voting here instead of in their states of origin.

And because student voters disproportionately prefer liberal candidates, many believe that these student voters put conservative candidates at an unfair disadvantage.

As a consequence, there are periodic calls for changes to the laws that define a person's eligibility to vote in New Hampshire.

Often, such calls include proposals for tightening the state's definition of what it means to have a New Hampshire "domicile." We presently are hearing such calls.

It therefore is worth discussing the constraints that the Constitution places on the definition of domicile that states may adopt for voting purposes. For the right to vote is not merely a state concern; it is also protected by the federal Constitution.

Domicile is a legal concept used to assign every person within a group to a single jurisdiction for a particular purpose – here, voting. The domicile state of a United States citizen is the state in which one has a physical presence and

an intention to make the state one's home for the time at least.

At any given moment, every United States citizen who resides within the United States has a single state in which she is domiciled, and no person has more than one domicile state.

That domicile state, according to the United States Supreme Court, is also the state of which one is a "citizen" – a term that appears in several parts of the Constitution.

In other words, as a matter of federal law, a United States citizen also is a citizen of the state in which she is domiciled under the traditional definition of the concept.

Under the Constitution, states have the primary responsibility to administer federal and state elections. Accordingly, states have wide latitude to adopt measures that

affect the federally protected right to vote. States may, for example, disenfranchise felons and require voters to present a photo identification at the polling station.

But there are constitutional limits on the voting regulations states may impose. States may not, for example, withhold the franchise on account of race, sex, failure to pay a poll tax, or failure to attain an age greater than 18. And they may not adopt definitions of domicile for voting purposes that are narrower than the definition the Supreme Court has used to describe state citizenship.

Consider the hypothetical (but typical) case of Mary, a United States citizen who leaves her parents' home in Massachusetts at the age of 18 to attend the University of New Hampshire. Mary does not know where she will move

after college, but she has no definite intention to return to Massachusetts.

If forced to choose, she would say that she considers New Hampshire to be her home for the time at least.

Under the traditional definition of domicile, Mary is a citizen of New Hampshire, not Massachusetts. New Hampshire therefore could not adopt a definition of domicile for voting purposes that would treat Mary as domiciled within Massachusetts. Doing so would both disenfranchise Mary (who could not vote in Massachusetts unless Massachusetts were to allow voting by non-Massachusetts citizens, which it does not) and invade Massachusetts' sovereign prerogatives.

The subjective nature of the state of mind that determines one's domicile makes it difficult for public officials to

contest a person's declaration that she is domiciled in New Hampshire when she registers to vote here.

But the difficulty in disproving a person's claim of domicile would not justify a state's adoption of a more restrictive definition of the concept. On this issue, federal law controls and imposes a uniform definition on the states.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education. To read Greabe's paper "A Federal Baseline for the Right to Vote" in the Columbia Law Review, go to columbialawreview.org/content/a-federal-baseline-for-the-right-to-vote/ and click the pdf icon.)