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Durational Residency Requirements for Public Office

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DURATIONAL RESIDENCY REQUIREMENTS FOR PUBLIC OFFICE

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Ye shall have one manner of law, as well for the stranger as for one of your country. *Leviticus* 24:22.

I. INTRODUCTION

A candidate for public office encounters many barriers in seeking election, but few are as traditional and restrictive as durational residency requirements. Most states, counties, and municipalities impose such requirements as a qualification for executive, legislative, and judicial office.[1] Recently, however, the constitutional validity of durational residency requirements for public office has been repeatedly questioned in the courts. Since 1970, 25 cases have been decided in the federal and state courts challenging the constitutionality of residency requirements, but these cases probably represent only a small fraction of the instances in which candidates for public office have been frustrated by the conclusive presumption of incapacity imposed by the requirements. Some of the cases have been concerned with *state* durational residency requirements which impose a penalty on

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1. *See generally* CONSTITUTIONS OF THE UNITED STATES (Legislative Drafting Research Fund of Columbia University ed. 1962). For example, 43 states currently have durational residency requirements as conditions of eligibility for the office of governor. Twenty-nine of these states require 5 or more years, 10 states require 7 or more years and 2 states require 10 years. *See* Chimento v. Stark, 353 F. Supp. 1211, 1217 n.14 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1974).

Forty-nine of the fifty states impose durational residency requirements upon state legislators. The residency requirements range from 6 months to 5 years.

Durational Residency Requirement for State Representatives

	5 Yr.	4 Yr.	3 Yr.	2 Yr.	1 Yr.	6 Mo.	None
No. of States	3	2	10	11	18	5	1

See Hayes v. Gill, 52 Hawaii 251, 259, 473 P.2d 872, 878 (1970).

Durational residency requirements of from 1 to 5 years are likewise common as qualifications for state judicial office. *See, e.g.*, Hadnott v. Amos, 320 F. Supp. 107 (D. Neb. 1970), *aff'd mem.*, 401 U.S. 968 (1971).

Counties and municipalities generally impose durational residency requirements on candidates for public office through their corporate charters. *See* notes 2-9 *infra*.

interstate migration, while others have involved *county, municipal,* or *district* durational residency qualifications which penalize *intrastate* migration.

Ten years ago, the New Jersey Supreme Court became the first court to invalidate a durational residency requirement for public office on federal constitutional grounds.[2] Since 1970, such requirements have been invalidated by state courts of last resort five times,[3] three times by federal courts of appeals,[4] five times by federal district courts,[5] and twice by three-judge federal panels.[6] In the same five year period, however, similar requirements, when challenged on federal constitutional grounds, have been approved on four occasions by state courts of last resort,[7] once by

2. In Gangemi v. Rosengard, 44 N.J. 166, 207 A.2d 665 (1965), a 2-year residency for Mayor of Jersey City was struck down on federal *and* state constitutional grounds.

3. Thompson v. Mellon, 9 Cal. 3d 96, 507 P.2d 628, 107 Cal. Rptr. 20 (1973) (2-year *city* residency for city councilmen); Camara v. Mellon, 4 Cal. 3d 714, 484 P.2d 577, 94 Cal. Rptr. 602 (1971) (3-year *city* residency for city councilmen); Zeilenga v. Nelson, 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971) (5-year *county* residency for county supervisor); Cowan v. City of Aspen, 181 Colo. 343, 509 P.2d 1269 (1973) (3-year *city* residency for municipal candidates); Bird v. City of Colorado Springs, 181 Colo. 141, 507 P.2d 1099 (1973) (5-year *city* residency for mayor and councilmen).

4. Lehman v. City of Pittsburgh, 474 F.2d 21 (3d Cir. 1973), *rev'g per curiam district court's order of dismissal* (2-year *city* residency for city employment); Wellford v. Battaglia, 343 F. Supp. 143 (D. Del. 1972), *aff'd,* 485 F.2d 1151 (3d Cir. 1973) (5-year *city* residency for mayor); Green v. McKeon, 335 F. Supp. 630 (E.D. Mich. 1971), *aff'd,* 468 F.2d 883 (6th Cir. 1972) (2-year *city* residency for city elective or appointive office).

5. Alexander v. Kammer, 363 F. Supp. 324 (E.D. Mich. 1973) (5-year *city* and 2-year *district* residency for city commission); McKinney v. Kaminsky, 340 F. Supp. 289 (M.D. Ala. 1972) (5-year *district* residency for county commissioner); Wellford v. Battaglia, 343 F. Supp. 143 (D. Del. 1972); Green v. McKeon, 335 F. Supp. 630 (E.D. Mich. 1971); Bolanowski v. Raich, 330 F. Supp. 724 (E.D. Mich. 1971) (3-year *city* residency for mayor). *Cf.* Stapleton v. Clerk for City of Inkster, 311 F. Supp. 1187 (E.D. Mich. 1970) (2-year *city* residency and city property ownership for city elective office); Landes v. Town of North Hempstead, 20 N.Y.2d 417, 231 N.E.2d 120, 284 N.Y.S.2d 441 (1967) (*city* property ownership requirement for city office).

6. Headlee v. Franklin Bd. of Elections, 368 F. Supp. 999 (S.D. Ohio 1973) (1-year *village* residency required by state law for village councilmen); Mogk v. City of Detroit, 335 F. Supp. 698 (E.D. Mich. 1971) (3-year *city* residency required by *state* law for charter commissioner).

7. Triano v. Massion, 109 Ariz. 506, 513 P.2d 935 (1973) (1-year *ward* residency for city councilmen); Hayes v. Gill, 52 Hawaii 251, 473 P.2d 872 (1970) (3-year *state* residency for members of the state House of Representatives); State *ex rel.* Gralike v. Walsh, 483 S.W.2d 70 (Mo. 1972) (1-year *district* residency for state senator). *Accord,* Cowan v. City of Aspen, 181 Colo. 343, 509 P.2d 1269 (1973) (1-year *state* residency for municipal office); DeHond v. Nyquist, 65 Misc. 2d 526, 318 N.Y.S.2d 650 (Sup. Ct. Albany Cty. 1971) (3-year *city* residency for city board of education). *Cf.* Bainum v. Kalen, 272 Md. 490, 325 A.2d 392 (1974) (held on state grounds that the appellant does not meet the 3-year durational residency requirement for state senator imposed by the Maryland constitu-

a district court,[8] and five times by three-judge federal panels.[9] This large volume of litigation is perhaps a fair measure of the importance of this question and the substantiality of the federal claims involved. These claims are further supported by the 16 cases in which federal and state courts have granted federal relief, and, additionally, by the stay granted by Mr. Justice Brennan in *Walker v. Yucht*.[10] The conflict in opinion of the lower courts over such an urgent question should lead, in the very near future, to plenary review of durational residency requirements by the United States Supreme Court. Several substantial federal constitutional questions are likely to be raised before the Court, and it is those questions that are of concern here.[11]

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tion); Ravenel v. Dekle, 265 S.C. 364, 218 S.E.2d 521 (1975) (held on state grounds that the Democratic nominee for governor does not meet the 5-year durational residency requirement of the South Carolina constitution). *Accord*, State *ex rel.* Sathre v. Moodie, 65 N.D. 340, 258 N.W. 558 (1935) (held on state grounds that Governor Moodie must surrender the office of governor of North Dakota to the lieutenant governor because Moodie did not satisfy the 5-year state durational residency requirement of the North Dakota constitution). *But cf.* Missouri *ex rel.* King v. Walsh, 484 S.W.2d 641 (Mo. 1972) (held on state grounds that the Republican nominee for governor met the 10-year durational residency requirement of the Missouri constitution). Durational residency requirements for public office were upheld in a number of older cases. *See, e.g.*, Lindsey v. Dominguez, 217 Cal. 533, 20 P.2d 327 (1933), and Sheehan v. Scott, 145 Cal. 684, 79 P. 350 (1905), *overruled by* Zeilenga v. Nelson, 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971).

8. Lehman v. City of Pittsburgh, 474 F.2d 21 (3d Cir. 1973).

9. Kanapaux v. Ellisor, Civil No. 74-1356 (D.S.C. Sept. 26, 1974), *aff'd mem.*, 419 U.S. 891 (1974) (5-year *state* residency for governor); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), *aff'd mem.*, 414 U.S. 802 (1974) (7-year *state* residency for governor); Walker v. Yucht, 352 F. Supp. 85 (D. Del. 1972), *stay granted*, (Brennan, Circuit Justice, 1972) (3-year *state* residency for state House of Representatives); Draper v. Phelps, 351 F. Supp. 677 (W.D. Okla. 1972) (6-month *district* residency for state House of Representatives); Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd. mem.*, 401 U.S. 968 (1971) (1-year *circuit* residency for state circuit judge).

10. 352 F. Supp. 85 (D. Del. 1972). The appeal was not perfected because plaintiff was defeated in his bid for election. Telephone conversation with F. Franklin Balotti, Esq., in Wilmington, Del., Nov. 5, 1974.

11. A search of the literature did not disclose any articles on this topic. There are, however, several articles examining durational residency requirements for voting. *See, e.g.*, Cocanower and Rich, *Residency Requirements for Voting*, 12 ARIZ L. REV. 477 (1970); Macleod and Wilberding, *State Voting Residency Requirements and Civil Rights*, 38 GEO. WASH. L. REV. 93 (1969); Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 MICH. L. REV. 823 (1963); Note, *State Residency Requirements and the Right to Vote in Presidential Elections*, 58 KY. L.J. 300 (1970); Note, *Voter Residency Requirements in State and Local Elections*, 32 OHIO ST. L.J. 600 (1971); Note, *Residence Requirements for Voting in Presidential Elections*, 37 U. CHI. L. REV. 359 (1970).

II. HISTORY AND PURPOSE OF DURATIONAL RESIDENCY REQUIREMENTS FOR PUBLIC OFFICE

A. The English Experience

Durational residency requirements as a condition precedent to holding public office are of ancient vintage. In England they date back to 1413 when Parliament provided that its members must have been resident "within the shire where they shall be chosen the Day of the Date of the Writ of the Summons of the Parliament."[12] The durational residency requirements for public office in early fifteenth century England are traceable to the anti-democratic sentiment existing at the close of the Wars of the Roses when large numbers of electors were disfranchised.[13] The purpose of the early fifteenth century English election laws was to restrict political participation "by the very great, outrageous and excessive Number of People . . . of small substance, and of no value . . . [who] pretended a voice equivalent . . . with the most worthy knights and squires . . . ."[14] Voting was thus restricted to those who had free land in the value of 40 shillings a year above all charges. Parliamentary elections during this period "either represented the will of the local magnate or took the form of small battles."[15]

B. The Early American Experience

Durational residency requirements are also deeply rooted in the American colonial experience.[16] The early state constitutions are replete with durational residency requirements for voting as well as for seeking public office.[17] The length of such requirements has been affected by factors as diverse as the influence of the frontier, changes brought by Reconstruction, hostility to immigration, and, simply, antipathy to "outsiders," foreign or domestic.[18]

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12. 1 Hen. V. c. 1. This act was confirmed and expanded in 1429 and again in 1444. *See* 8 Hen. VI. c. 7 (1429) and 23 Hen. VI. c. 14 (1444).

13. G. Campion, *Parliament*, 17 ENCY. BRITANNICA 311, 315 (1958).

14. 1 Hen. V. c. 1.

15. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 37 (5th ed. 1956).

16. For example, South Carolina imposed durational residency requirements upon suffrage as early as 1693. *See* A. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES OF AMERICA 135-36 (1905).

17. *See* LeClercq, *The Emerging Federally Secured Right of Political Participation*, 8 IND. L. REV. 607 (1975).

18. *See generally* 1-7 AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS (F.

The purpose of durational residency requirements for public office may generally be inferred from their effects. The records of the Constitutional Convention of 1787-89, however, provide valuable insight into the advantages and disadvantages of state durational residency requirements as perceived at that time. The rejection of state durational residency requirements as a qualification for federal office was responsive to the emerging nationalist interest in unrestricted interstate migration which would later be clothed in constitutional garb as the "right to travel."[19]

1. *Debates at the Constitutional Convention of 1787-89*

The debates at the Constitutional Convention disclose four purposes underlying state durational residency requirements:[20] to require that candidates be knowledgeable of local matters,[21] to prevent rich foreign nations from sending over their operatives who might bribe their way into public office,[22] to discourage wealthy men from neighboring states from seeking public office

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Thorpe, ed. 1906). In response to such factors, especially the diminishing influence of the frontier, California increased its residency requirement for governor from 2 years to 5 years in its Constitution of 1879. South Carolina, on the other hand, reflected the high value placed by Reconstruction framers on interstate migration by reducing the previous 10-year residency requirement to 2 years in the South Carolina Constitution of 1868. This effort was countered in 1895, however, when the requirement was increased again to 5 years which is the present standard.

The South Carolina Constitutional Convention of 1895:

> reflected a deep hostility to outsiders marked frequent condemnations of "aliens" and "foreign" rascals. [W]e should guard against the possibility of this flood, which is now dammed up, breaking loose; or, like the viper who is asleep, only to be warmed into life again and sting us whenever some more white rascals, native or foreign, come here and mobilize the ignorant blacks. Therefore the only thing we can do as patriots and as statesmen is to take from them every ballot that we can under the laws of our national government.

Brief to for Appellant at 13, Kanapaux v. Ellisor, Civil No. 74-1356 (D.S.C. Sept 26, 1974), *citing* THE CONSTITUTIONAL CONVENTION OF 1895, at 463-64 (Statement of Ben Tillman).

19. As early as 1823, Mr. Justice Bushrod Washington, while riding circuit, observed that citizens of the United States enjoy certain "privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments . . . ." Corfield v. Coryell, 6 F. Cas. 546, 551 (No. 3,230) (C.C.E.D. Pa. 1825). Among these fundamental rights was "[t]he right of a citizen of one state to pass through, or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise. . . ." *Id.* at 552. *See also* Shapiro v. Thompson, 394 U.S. 618, 630 n.8 (1969).

20. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 216-19, 235-39 (M. FARRAND, ED. 1966) [hereinafter cited as 2 RECORDS].

21. *Id.* at 216 (Mr. Mason of Virginia); *id.* at 217 (Mr. Rutledge of South Carolina).

22. *Id.* at 216 (Mr. Mason of Virginia).

elsewhere after having failed in their own state,[23] and to close the door on public officeholders who do not share "the wholesome prejudices which uphold all local governments."[24]

Significantly, state durational residency requirements were defeated by the Constitutional Convention.[25] The view prevailed that "we were now forming a *National* Government and such a regulation would correspond little with the idea that we were one people."[26] Moreover, the Convention substituted an "inhabitancy" requirement for the "residency" requirement of the original draft.[27] The word "inhabitant" Madison argued, "would not exclude persons absent occasionally for a considerable time on public or private business."[28] Madison was aware of the "[g]reat disputes [which] had been raised in Virginia concerning the meaning of residence as a qualification of Representatives which were determined more according to the affection or dislike to the man in question, than to any fixed interpretation of the word."[29]

One of the most convincing arguments against durational residency requirements as a qualification for holding public office was the *political* argument offered by Mr. Morris:

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23. *Id.* at 218 (Mr. Mason of Virginia). This was alleged to be "the practice in the boroughs of England." *Id.* For a treatment of the rotten borough system in England under which wealthy nonresidents, in effect, purchased office from isolated districts, *see, e.g.*, CANNON, PARLIAMENTARY REFORM, 1640-1832 (1972) and PORRITT, THE UNREFORMED HOUSE OF COMMONS (1903). The Founding Fathers understandably viewed with apprehension the British system under which

> representation had long become an illusion. The knights of the shire were the nominees of nobles and great landowners; the borough members were returned by the crown, by noble patrons or close corporations . . . . [A]fter the Restoration, the infamous system of bribing the members themselves became a recognized instrument of administration.

G. Campion, *Parliament*, 17 ENCY. BRITANNICA 316 (1958).

24. 2 RECORDS, *supra* note 20, at 238 (Mr. Morris of Massachusetts). Mr. Butler of South Carolina was apprehensive of "[foreigners'] ideas of Gov't so distinct from ours that in every point of view they are dangerous." *Id.* at 236.

25. A 3-year state durational residency requirement was defeated by a 9-2 vote and a 1-year requirement by a 6-4 vote (1 divided). *Id.* at 219.

26. 2 RECORDS, *supra* note 20, at 217 (Mr. Read of Delaware).

27. The original draft read:

> ART. IV, SECT. 2. "Every member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen of the United States for at least three years before his election; and shall be, at the time of his election, *a resident* of the State in which he shall be chosen."

Id. at 216 n.3. (emphasis added).

28. *Id.* at 217.

29. *Id.* Mr. Morris observed that great disputes had been initiated in New York by residency requirements and Mr. Mercer "mentioned instances of violent disputes raised in Maryland concerning the term 'residence.'" *Id.*

> [S]uch a regulation is not necessary. People rarely choose a nonresident—It is improper as in the first branch, *the people at large*, not the *States* are represented.[30]

Mr. Mercer of Maryland made two formidable arguments against state durational residency requirements as a qualification for holding federal office:

> Such a regulation would present a greater alienship among the States than existed under the old federal system. It would interweave local prejudices and State distinctions in the very Constitution which is meant to cure them.[31]

Mr. Mercer also responded to the "knowledgeable candidate" rationale frequently advanced by residency requirement advocates.

> It would certainly exclude men, who had once been inhabitants, and returning from residence elsewhere to resettle in their original State; although a want of the necessary knowledge could not in such case be presumed.[32]

Mr. Williamson of North Carolina argued against "requiring any period of previous residence . . . [because] [n]ew residents if elected will be most zealous to conform to the will of their constituents, as their conduct will be watched with a more jealous eye."[33]

A 14 year durational citizenship requirement for senatorial candidates, proposed by Mr. Morris and seconded by Mr. Pinckney, was opposed by Mr. Elseworth "as discouraging meritorious aliens from emigrating to this country."[34] Madison also responded to the argument that durational residency requirements were necessary to prevent outside economic or political interests from sending over their emissaries who might bribe their way into public office stating that the bribes of strangers "would be expended on men whose circumstances would rather stifle than excite jeal-

30. *Id.* (emphasis in original). In a similar vein, during debate on senatorial qualifications, Mr. Williamson argued for a longer residency requirement for Senators than for Representatives because "Bribery and Cabal can be more easily practiced in the choice of the Senate which is to be made by the Legislatures composed of a few men, than of the House of Representatives who will be chosen by the people." *Id.* at 239.

31. *Id.* at 217.

32. *Id.* at 218.

33. *Id.*

34. *Id.* at 235. Mr. Madison reasoned that the Morris proposal would "give a tincture of illiberality to the Constitution" and would discourage "respectable Europeans . . . [from] transfer[ring] their fortunes hither." *Id.* at 235-36.

ousy and watchfulness in the public."[35] Mr. Wilson of Pennsylvania, alluding to his nonnative status, attacked durational residency requirements as a "degrading discrimination" which heap "discouragement and mortification" upon "meritorious foreigners."[36] The Convention inserted the term "inhabitant" in lieu of "resident" in an effort to avoid squabbles over eligibility for federal office,[37] and defeated efforts to adopt *state* durational residency requirements for federal office.[38]

Thus, from the early days of the nation, federal practice has diverged sharply from state practice. State durational residency requirements have generally been a requirement for holding any major state public office, even though such requirements were deliberately rejected by the Founding Fathers for federal officeholders. There is an important distinction between state durational residency requirements and the federal constitution's durational United States citizenship requirements for President, Vice President, Senator, and Representatives. Durational United States citizenship requirements do not restrict the right of domestic travel; conversely, state and local durational residency requirements serve to penalize the rights of interstate and intrastate travel of persons with political aspirations.

Durational residency requirements penalize mobility and reinforce parochial perspectives. At the Federal Constitutional Convention there was evidence of special affection for lengthy durational residency requirements held by Deep South slave-state delegates such as Rutledge and Butler of South Carolina. This suggests that length of residency may have served to promote acquiescence of public officeholders to the status quo interests of a slave-holding, plantation society. A twentieth century analogue of the "peculiar institution" justification of state durational residency requirements for public office can easily be fashioned in the political context of the post-*Brown*[38.1] era in the South.

However, the prevalence of state durational residency requirements throughout the Union suggests the need for a more

35. *Id.* at 236.

36. *Id.* at 237. He recalled that on "his removal into Maryland, he found himself, from defect of residence, under certain legal incapacities, which never ceased to produce chagrin. . . ."

37. *Id.* at 239.

38. *See* note 26 *supra*.

38.1. *See* Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

universal explanation. The most plausible explanation is probably best expressed as follows: lengthy state durational residency requirements were favored most strongly by those with the slightest attachments to a national union. Such requirements have always accentuated tendencies destructive of the "more perfect union" which the Constitution was drafted to form. State durational residency requirements are most consistent with a "league-of-separate-nations" view of the federal union. Pressed to the extreme, state durational residency requirements reflect xenophobic tendencies, out of spirit with the idea of national union. Political units dominated by parochial interests have relied upon durational residency requirements to diminish advocacy of "different" or "foreign" ideas. The assumption here is that those who live in a place long enough will either espouse or, at the very least, tolerate its local political myths. Those who never travel are less likely to challenge commonly accepted myths.

Mobility in our society was a characteristic chiefly of the frontier. Consequently, frontier settlers whittled away at lengthy durational residency requirements. As frontier states became more settled, the emergence of parochial interests comparable to those which had existed in other states often manifested themselves in the lengthening of state durational residency requirements for public office. So long as interstate migration was an exceptional circumstance in the life of most families, durational residency requirements were politically tolerable. That is, there were too few people adversely affected by them to raise a substantial question.

County, municipal, and district durational residency requirements were patterned on the state models. Their length varies greatly and may reflect the role of imitation in the adoption of charters as much as negative attitudes toward mobility.

2. *A Teleology from Recent Cases*

The two-member majority of the three-judge district court in *Hadnott v. Amos*[39] (*Hadnott II*) declared that Alabama had a *compelling* state interest in imposing a durational residency requirement on candidates for circuit judge.[39.1] It was declared to

39. 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd mem.*, 401 U.S. 968 (1971).

39.1. Judge Johnson considered the court's arguments "superficial." *Id.* at 128 (Johnson, J., dissenting in part).

be of "urgent importance that the voter have an opportunity to observe, learn about and appraise" candidates for office.[40] After a recitation of some of the "innumerable qualities and qualifications that are relevant," the court emphasized the "particular significance of exposure by residence" in rural, sparsely populated areas.[41] The court surmised that our democracy may be sufficiently strong to withstand the strain of a few *voters* not qualified by residency requirements, but that when the *candidates*, as a result of brief residency, were not exposed to the voters, a much more serious threat occurs.[42] In a dissenting opinion in *Thompson v. Mellon*,[43] Judge Burke of the California Supreme Court emphasized an important variation on the voter exposure rationale of *Hadnott II*—that durational residency laws are valid because they "provide the *only* opportunity for voter-candidate contact in a *noncampaign* atmosphere."[44]

Proponents of state durational residency requirements at the Federal Convention of 1787-89 feared that, without such requirements, "rotten boroughs" would flourish in this country as they had in England. The contemporary analogue of the "rotten borough" rationale is the "carpetbagger" justification as expressed in *Draper v. Phelps*:[44.1]

> Absent a durational residency requirement "carpetbagger" candidates who have no desire as agents or representatives of the district, genuinely to acquaint themselves with the problems of a representative district and conscientiously strive for the solution thereof in the legislative halls, can be candidates.[45]

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40. *Id.* at 120.

41. *Id.* at 121. In the judicial circuit from which petitioner sought to be qualified as a candidate for judge, the

> three counties are rural and sparsely populated. There is no television station in the circuit, one radio station, no daily newspaper. Necessarily conmunication between candidate and voter is personal and personalized. Information which under other circumstances might be communicated by more formal means necessarily is communicated informally by personal acquaintance and observation, by word of mouth from neighbor to neighbor. The voters acquire general community knowledge about the candidate, while at the same time the candidate builds a community reputation concerning many of the traits to which we above referred. These are processes which cannot operate overnight. But they represent appropriate functioning of democracy.

Id. Compare id. at 130 (Johnson, J., dissenting in part).

42. *Id.* at 121-22.

43. 9 Cal. 3d at 112, 507 P.2d at 640, 107 Cal. Rptr. at 32 (1973).

44. *Id.* (emphasis added).

44.1. 351 F. Supp. 677 (W.D. Okla. 1972).

45. *Id.* at 683.

Another asserted state interest served by durational residency requirements for public office is the policy "that those who expect to stand for the office of state representative take the matter seriously and make plans for their candidacy in advance of the election date."[46] It has also been suggested that the state has an interest in securing public officers who have "more at stake in doing a good job," presumably because of their past ties with the community.[47] Durational residency requirements for public office have also been recognized as a "built-in device to prevent competition against the . . . oldtimers . . . ."[48] although this hardly justifies their continued use.

The role of imitation was probably a very substantial factor in the adoption of durational residency requirements for public office. Thus, when proposals were made to eliminate or reduce the state durational residency requirements for public office at the Hawaii State Constitutional Convention of 1968, the requirements were retained in accordance with the committee recommendation that "residency requirements, too, are important; all states include such provisions in their constitutions."[49] When one considers that the committees drafting proposed constitutions for each of the new states admitted into the Union probably began their work with a study of the constitutions of the other states, the probable force of imitation as an explanation of durational residency requirements for public office gains momentum. For example, the New Hampshire Constitution of 1784 "was modeled almost entirely after the Massachusetts Constitution of 1780,"[50] from whence the New Hampshire 7-year durational residency requirement for governor issued full grown. Thus, electicism may explain the proliferation of durational residency requirements for public office more adequately than reasoned decisionmaking. Constitutional provisions, like bureaucratic systems, once created, often acquire a life of their own and thrive independently of their reasons for being.

Once adopted, the role of tradition has been important in the

46. *Id.*

47. Wellford v. Battaglia, 343 F. Supp. 143, 146 n.5 (D. Del. 1972).

48. Zeilenga v. Nelson, 4 Cal. 3d 722, 484 P.2d 581, 94 Cal. Rptr. 602 (1971).

49. Hayes v. Gill, 52 Hawaii 251, 258, 473 P.2d 872, 877 (1970). Thus, the Hawaii Supreme Court was impressed that its "examination of state laws shows that every state, except Nevada, has residency requirement[s] of varying length." *Id.*

50. Chimento v. Stark, 353 F. Supp. 1211, 1217 (D.N.H. 1973), *aff'd. mem.*, 414 U.S. 802 (1974).

maintenance of state durational requirements for public office.[51] The presumption of constitutionality and judicial restraint have also played an important part in the maintenance of state durational residency requirements.[52]

In recapitulation, durational residency requirements for state public offices are as old as the Union itself, finding justification upon a multitude of diverse grounds. The traditional justifications for such requirements have been:

> (1) *knowledgeable candidates*—the need for a knowledgeable candidate to ensure the awareness and responsiveness of candidates to local problems.
> (2) *exposure*—exposure of the candidate to the voters to increase the opportunity for voters to acquire personal knowledge about the candidate, his experience, maturity, sensitivity, courtesy, family life, business affairs and social philosophy. Although generally conceived in a campaign context, the voter-exposure rationale has also been extended to apply to voter-candidate contact in a *precampaign context*.
> (3) *serious candidates*—the need to prevent frivolous candidates from filing for office and to encourage advance planning and preparation for political candidacy.
> (4) *direct personal interest*—the need to encourage candidates with substantial ties to the community and to restrict decision-making to those directly affected by such decisions.
> (5) *rotten borough*—the need to prevent wealthy men or "carpetbaggers" from migrating to the state to seek public office.
> (6) *parochialism*—the need to protect the wholesome local prejudices of local government.
> (7) *status quo*—the need to minimize competition against the political oldtimers.
> (8) *imitation*—a compulsion to defer to the traditions of other states which is often reinforced by procedural mechanisms and judicial attitudes of restraint.

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51. *Id.* The court observed that "something more than disappointment of one frustrated candidate is needed to erase a constitutional provision that goes back to 1784 and was never challenged until now." *See also* DeHond v. Nyquist, 65 Misc. 526, 318 N.Y.S.2d 650 (Sup. Ct. Albany Cty. 1971), where the court was apparently influenced in part by the fact that "[r]esidence has been a *traditional* qualification for holding public office in New York." (emphasis added).

52. *See, e.g.*, DeHond v. Nyquist, 65 Misc. 2d 526, 318 N.Y.S.2d 650 (Sup. Ct. Albany Cty. 1971), *and* Draper v. Phelps, 351 F. Supp. 677 (W.D. Okla. 1972).

III. The Constitutional Issues

A. *The Right of Political Participation*

Until recently, durational residency requirements for voting constituted "the single greatest impediment to voting by those desiring to do so."[53] The American Heritage Foundation systematically analyzed the causes of nonvoting in several recent presidential and congressional elections and estimated that 8 million of the 104 million citizens of voting age in 1960 were mobile adults disqualified by state, county or precinct residency requirements.[54]

Responding to the obvious inequities of denying the vote to mobile adults in federal elections, Congress, in the Voting Rights Act of 1970,[55] abolished state durational residency requirements of greater than 30 days for voting in all federal elections. Congress found that the imposition of durational residency requirements in federal elections:

> (1) denies or abridges the inherent constitutional rights of citizens to vote . . . ;
> (2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;
> (3) denies or abridges the privileges or immunities guaranteed to the citizens of each state . . . ;
> (4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;
> (5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the Fourteenth Amendment; and
> (6) does not bear a relationship to any compelling State interest in the conduct of presidential elections.[56]

The United States Supreme Court, in *Oregon v. Mitchell*,[57] upheld the constitutionality of such federal restrictions on state

53. Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 Mich. L. Rev. 823, 829 (1963).

The emerging, federally secured right of political participation has been considered at some length in another article. *See* LeClercq, *The Emerging Federally Secured Right of Political Participation*, 8 Ind. L. Rev. 607 (1975).

54. Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 Mich. L. Rev. 823, 829 (1963).

55. 42 U.S.C. §§ 1973aa-1(a) through (i)(1974).

56. 42 U.S.C. § 1973aa-1(a)(1974).

57. 400 U.S. 112 (1970).

durational residency requirements for voting in national elections and set the stage for a series of decisions establishing the parameters for similar restrictions. In *Dunn v. Blumstein*,[58] the Court, on equal protection grounds, invalidated the Tennessee durational residency requirement of one year in the state and three months in the county as a prerequisite to voting in state elections. Finding support in the congressional findings of fact in the Voting Right Act of 1970,[59] the Court observed that "30 days appears to be an ample period of time for the state to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much."[60] In two more recent companion cases, *Burns v. Fortson*[61] and *Marston v. Lewis*,[62] the Court stripped the 30-day requirement of its talismanic effect and approved Arizona and Georgia requirements that voters be registered for 50 days prior to an election. In *Burns* the Court declared that "the 50-day registration period approaches the outer constitutional limits."[63]

The decisions in *Burns* and *Marston* have clouded the issue apparently resolved by the dicta in *Dunn* which appeared to establish the maximum permissible limit of state durational residency requirements for voting. To date, the maximum length a durational residency requirement can be validly imposed as a precondition to voting has not been determined. The Court's reasoning in *Dunn* was more persuasive: "There is no reason to think that what Congress thought was unnecessary to prevent fraud in presidential elections should not also be unnecessary in the context of other elections."[64] The interest in the certainty of a 30-day maximum seems far more substantial than the marginal value of additional time. Indeed, the administrative burden of maintaining two separate standards—one for state or local and one for federal elections—would appear to justify a 30-day maximum from a logic of efficiency, absent some compelling state interest

58. 405 U.S. 330 (1972).

59. *Id.* at 348 n.19.

60. *Id.* at 348 (*dicta*). *Contra*, Dreuding v. Devlin, 235 F. Supp. 721, 724 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965). *Dunn* effectively overruled *Dreuding*.

61. 410 U.S. 686 (1973).

62. 410 U.S. 679 (1973).

63. *Id.* at 687. Justices Marshall, Douglas and Brennan dissented in both decisions. Mr. Justice Blackmun concurred in the result but indicated his dissatisfaction with a constitutionally imposed "arbitrary number of days figure." *Id.* at 688.

64. 405 U.S. at 348 n.19.

to the contrary. Of course, it is quite different for Congress to legislate a 30-day maximum than for the Court to impose such a maximum on constitutional grounds. Congress, of course, can alter its 30-day maximum at any time or for any reason when it appears politically expedient. It would be embarrassing for the Court, on the other hand, to retreat from a line constitutionally imposed. Although stare decisis does not apply with the same force to constitutional questions, we nonetheless expect, and have a right to expect, substantial predictability with regard to constitutional dispositions. Generally, the limitation of a decision to the precise issue or facts before the Court avoids locking the Court in on questions where future cases may require flexibility to effect a satisfactory result. However, in the instance of durational residency requirements for voting, the certainty of a constitutionally approved maximum—be it 30 days or some other figure—has great appeal. Otherwise, some state and local governments may be tempted to take a position just beyond a recently approved maximum. Unfortunately, neither *Burns* nor *Marston* established the *outer limit*; they only settled that 50 days *approaches* the outer limit.

Strict scrutiny of durational residency requirements for voting is appropriate whether we look to "the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel)."[65] *Dunn* emphasized that a "citizen has a constitutionally protected right to *participate in elections* on an equal basis with other citizens in the jurisdiction."[66] *Dunn* applied the standard of review established by *Williams v. Rhodes*:[67]

> [W]e look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.[68]

The Court reiterated that an "appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny."[69]

65. *Id.* at 335.
66. *Id.* at 336 (emphasis added).
67. 393 U.S. 23 (1968).
68. 405 U.S. at 335.
69. *Id.* at 343-44.

"To prevent dual voting, [states] simply have to cross-check lists of new registrants with their former jurisdictions."[70] The Court took judicial notice that "[o]bjective information tendered as relevant to the question of bona fide residence . . . places of dwelling, occupation, car registration, driver's license, property owned, etc.—is easy to doublecheck, especially in light of modern communications."[71]

The Court turned the two separate waiting periods of state and county residence against the state by arguing that if 3 months is enough time for the state to determine bona fide residence in the county, a 1-year period could not be " 'necessary' to fulfill the pertinent state objective."[72] Moreover, the job of detecting nonresidents who have registered is "a relatively simple one" and "hardly justifies prohibiting all newcomers from voting for even three months."[73] The maximum constitutionally permissible durational residency requirement for voting is, thus, apparently somewhere between the *3-months intra*state requirement disapproved in *Dunn* and the *50-day* requirement approved in *Marston* and *Burns*.

The state administrative interest in the prevention of fraud in voting is served by "a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared."[74] The prevention-of-fraud rationale would not appear relevant as applied to political candidacy because of the much greater public visibility of the candidate than the individual voter. Moreover, the states' burden of establishing bona fide residence of candidates for public office is far less formidable than the states' burden of establishing bona fide residence of voters, simply because of the limited numbers of persons who are candidates for public office.

The Court admits that durational residency requirements "in a crude way, exclude nonresidents . . . ."[75] But they also exclude many residents and, given the individual interests which are affected and the states' purpose, the "classification is all too imprecise."[76] This argument applies with equal force to political

70. *Id.* at 348.
71. *Id.*
72. *Id.* at 347.
73. *Id.* at 348.
74. *Id.* at 353.
75. *Id.* at 351.
76. *Id.*

candidacy as to voting. What justification can be offered for excluding seemingly interested and informed residents from candidacy for public office? Durational residency requirements for public office, like the property restriction on voting in *Kramer v. Union Free School District*[77] paint with too wide a brush. Such requirements permit political participation by many persons they are intended to exclude and they exclude many persons who satisfy the purpose of the requirements.

Dunn provides the strongest possible collateral authority that lengthy durational residency requirements for public office violate the equal protection clause. Such requirements for public office plainly restrict the right to vote. The voter is effectively denied the right to choose candidates who do not satisfy the applicable durational residency requirements. Because mobility may often be associated with differences in social and political perspective, the result is to deprive the entire electorate of the opportunity to vote for someone whose values and policy perspectives may have been influenced by recent travel.

States clearly have the right to limit political candidacy, as well as the suffrage, to bona fide residents.[78] However, lengthy *durational* residency requirements for public office bear no reasonable relationship to bona fide residence. These requirements capriciously divide bona fide residents into two discrete groups based upon the recency of their inhabitancy. A durational residency requirement invidiously discriminates against some bona fide residents upon the recency of interstate travel and arbitrarily fences off a portion of the electorate for whom voters cannot cast their ballots. Bona fide residents who have recently migrated to a state, county or city have an equal stake in future decisionmaking. By excluding recent migrants from public office, durational residency requirements fail to satisfy the equal protection test of *Kramer* that all those excluded by a statute be less interested or affected than those included. A *durational* residency requirement is not necessary to prevent absentee officeholding—a residency requirement is sufficient.

Durational residency requirements do not advance the state interest in limiting public office to those who have special knowl-

77. 395 U.S. 621 (1969). The New York statute in *Kramer* limited franchise in certain school districts to owners or lessees of taxable realty (or their spouses) and parents or guardians of children in public schools.

78. *Id.* at 625.

edge, awareness, or responsiveness regarding local problems. The requirements do not prevent election or appointment of persons who have been continuous residents of a state or community for their entire lives but are appallingly insensitive to or ignorant of community problems. At the same time, durational residency requirements for public office deprive voters of their right to vote for bona fide residents who have both a sophisticated understanding of local problems and a strong sense of social responsibility. The absurdity of lengthy durational residency requirements is nowhere more plainly evident than in the case of local residents who leave the state to obtain an education or pursue a livelihood and later return only to find themselves barred from seeking public office by lengthy durational residency requirements. Durational residency requirements for public office are overbroad in that they deny voters the opportunity to select recent migrants who may possess special skill, knowledge or understanding. The requirements conclusively disqualify some of the most knowledgeable and highly qualified members of the electorate—teachers, students, lawyers, clergymen, corporate executives and other highly mobile occupational groups. Fencing off such persons and restricting the right of the electorate to vote for them is a substantial dilution of the right to vote which bears no rational relationship to the legitimate state interest in promoting local knowledge and responsiveness among its public officers. To require a period of residence "sufficiently lengthy to impress upon its voters the local viewpoint" is "precisely the sort of argument . . . [the] Court has repeatedly rejected."[79] This argument applies with equal force to candidacy and voting.

The congressional findings in the Voting Rights Act of 1970[80] provide impressive collateral support for invalidating durational residency requirements for public office seekers in view of the overlapping nature of the rights of political association and voting. If the direct imposition of lengthy durational residency requirements upon voters is constitutionally impermissible, it is difficult to build a strong case for restricting access to public office by such requirements or diluting the derivative rights of voters to cast ballots for candidates of their choice.

79. Dunn v. Blumstein, 405 U.S. 330, 354-55 (1972). *Cf.* Carrington v. Rash, 380 U.S. 89, 95 (1965).

80. *See* note 56 and accompanying text, *supra*.

Williams established that the "number of voters in favor of a party . . . is relevant in considering whether state laws violate the Equal Protection Clause."[81] The substantial adverse impact of durational residency requirements on voters has been plainly demonstrated. Jesse Walker won the Republican primary for state representative in Delaware despite the fact that he did not meet the 3-year durational residency requirement.[82] Charles Ravenel won the 1974 Democratic primary election for governor of South Carolina and carried more than 187,000 votes, only to be disqualified by the state supreme court for failure to meet the 5-year durational residency requirement for governor.[83] An Ohio plaintiff was elected to a seat on her village council following a consent order that her name be placed on the ballot pending resolution of her challenge to the constitutionality of a 1-year durational residency requirement.[84]

Attempts have occasionally been made to distinguish office-holding from voting and to contend that the right to seek public office is less fundamental than the right to vote.[85] The Court observed in *Bullock v. Carter*[86] that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."[87] In approaching candidate restrictions, the Court examines "the extent and nature of their impact on voters."[88] The right to be a candidate is an important concept regardless of whether it originates in candidates or is derived indirectly from the impact of candidate restrictions on voters. In *Williams*, *Bullock* and later in *Lubin v. Panish*,[89] however, it was established that candidacy restrictions may be subject to judicial scrutiny for their impact on *candidates and voters*. Since the

81. Williams v. Rhodes, 393 U.S. 23, 34 (1968).

82. *See* Walker v. Yucht, 352 F. Supp. 85, 87 (D. Del. 1972).

83. *See* notes 215-24 and accompanying text *infra*.

84. *See* Headlee v. Franklin County Bd. of Elections, 368 F. Supp. 999 (S.D. Ohio 1973).

85. The State of Georgia made this argument in Turner v. Fouche, 396 U.S. 346, 362 (1970). Some courts have accepted this line of reasoning. *See, e.g.*, Chimento v. Stark, 353 F. Supp. 1211, 1218 (D.N.H. 1973); Draper v. Phelps, 351 F. Supp. 677, 682 (W.D. Okla. 1972); Hayes v. Gill, 52 Hawaii 251, 259, 473 P.2d 872, 879 (1970); State *ex rel.* Gralike v. Walsh, 483 S.W.2d 70, 75-76 (Mo. 1972). *But see*, Alexander v. Kammer, 363 F. Supp. 324, 326 (E.D. Mich. 1973), and the cases cited therein.

86. 405 U.S. 134 (1972).

87. *Id.* at 143.

88. *Id.*

89. 415 U.S. 709 (1974).

voter hopes "to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues,"[90] laws which substantially restrict voters' preferences are suspect. Likewise, state practices impinging upon the first amendment's right of association—a *candidate* right—may, when the infringement is sufficient, be subject to strict scrutiny.[91]

The idea that durational residency requirements for public office are necessary to assure voter exposure presents insuperable constitutional deficiencies. In most elections, substantial portions of the electorate are never personally associated with candidates for public office. One can also question the value to the voter of minimal candidate contact derived through "pressing the flesh." The "voter exposure" rationale is overbroad in that the voter will not have personal contact with many candidates who have always lived in his state or city, and, conversely, in that the voter may have personal contact with some candidates who do not satisfy lengthy durational residency requirements.

The "parochialism" and "pro-establishment" arguments for durational residency requirements for public office are virtually self-refuting. *Carrington v. Rash*[92] effectively prevents states from protecting the "wholesome prejudices of local government" or "minimizing competition for oldtimers" by "fencing out" persons who may vote, or, by inference, conduct public offices, in a particular fashion.

The most offensive aspect of durational residency requirements for public office, however, is the artificial, undemocratic restrictions such requirements impose upon the political process. Implicit in such requirements is the assumption that the voters are incapable of exercising proper judgment in the selection of public officers. Durational residency requirements are " 'too crude' and the price simply too high in terms of the number of otherwise qualified candidates excluded."[93] As Judge Stapleton of Delaware wisely observed: "Reliance must be placed on the cornerstone of representative government, the collective judgment of the electorate, rather than on a legislative solution which substantially restricts that electorate in its choice of leadership."[94]

90. *Id.* at 716.

91. *See, e.g.*, Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972).

92. *See* Carrington v. Rash, 380 U.S. 89 (1965).

93. Wellford v. Battaglia, 343 F. Supp. 143, 150 (D. Del. 1972).

94. *Id.*

B. *The Right to Travel*

> The right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger union the Constitution created.[95]

The importance of the right to travel was impressed upon the colonists as a part of our British legacy. It is implicit in Locke's state of nature which was "a state of perfect freedom . . . [in which people] order their actions and dispose of their . . . persons as they think fit . . . ."[96] Likewise, for Blackstone, personal liberty consisted in

> the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint. . . .[97]

The respect accorded the right to travel by the courts, therefore, far antedates the Constitution itself.

The debates at the Constitutional Convention strongly support the claim that the right to travel was, in fact, considered by the framers to be a necessary concomitant of the stronger union the Constitution created. The Supreme Court has not attempted to ascribe the "right to travel interstate to a particular constitutional provision."[98] In *Shapiro v. Thompson*[99] the Court held that states could not fence out recently migrated indigents from access

95. United States v. Guest, 383 U.S. 745, 757-58 (1966).

96. J. LOCKE, *Of the State of Nature*, in READINGS IN POLITICAL PHILOSOPHY 530 (F. Coker ed. 1942). The influence of John Locke on American political philosophy and constitutional history is well established. *See, e.g.*, C. BECKER, THE DECLARATION OF INDEPENDENCE (1942).

97. 1 W. BLACKSTONE, COMMENTARIES *134 (Wendell ed. 1847) (emphasis added). *Cf.* Bonham's Case, 77 Eng. Rep. 652 (1609). Blackstone's lectures, originally delivered in 1753, have had an enormous influence on our constitutional history because they arrived at a critical psychological moment. The literature is replete with authority of the influence of Blackstone on the Founding Fathers. *See, e.g.*, W. Holdsworth, *Aspects of Blackstone and his Commentaries*, 4 CAMB. L.J. 261 (1932). Sixteen of the original subscribers to the first American edition of BLACKSTONE'S COMMENTARIES afterwards became signers of the Declaration of Independence and six were members of the Constitution Convention. D. LOCKMILLER, SIR WILLIAM BLACKSTONE 170 (1938).

98. Shapiro v. Thompson, 394 U.S. 618, 630 n.8 (1968).

99. 394 U.S. 618 (1968).

to welfare benefits through 1-year durational residency requirements. The *Shapiro* majority observed that "in moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."[100]

In *Dunn v. Blumstein*[101] the Court grounded its decision invalidating durational residency requirements for voting upon the right to travel as well as the right to vote.[102] Tennessee's durational residency laws, according to the Court, "classify bona fide residents on the basis of recent travel, penalizing those persons, who have gone from one jurisdiction to another during the qualifying period."[103] The Court found that "the durational residency requirement directly impinges on exercise of a . . . fundamental personal right, the right to travel."[104] Again, in *Oregon v. Mitchell*,[105] the Court held that the "[f]reedom to travel from State to State—freedom to enter and abide in any State in the Union—is a privilege of United States citizenship."[106] In invalidating an *intra*state Tennessee durational residency requirement of 3-months for voting, the *Dunn* Court secured important political rights for *intra*state as well as *inter*state movers. *Intra*state migration from San Diego or San Francisco to Los Angeles is equally deserving of constitutional protection vis-a-vis political participation as *inter*state migration from Atlanta or New York to Los Angeles.

To infringe upon the constitutionally protected right to travel it is not necessary to show that a particular law "actually deterred travel."[107] *Shapiro* explicitly states that only *compelling* state interests could justify "any classification which serves to *penalize* the exercise of that right [to travel]. . . ."[108] Thus, it is the *penalty* on the exercise of the right to travel rather than

100. *Id.* at 634 (emphasis in original).

101. 405 U.S. 330 (1972).

102. *Id.* at 338-39. Durational residency laws "single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly." *Id.* at 338.

103. *Id.*

104. *Id.*

105. 400 U.S. 112 (1970).

106. *Id.* at 285.

107. 405 U.S. at 340.

108. 394 U.S. at 634 (emphasis added).

actual deterrence of travel which offends the constitutionally protected right. Durational residency requirements for public office permit travel, but only at a price; candidacy for public office is prohibited. The right to travel is penalized while the right to seek public office—a first amendment right of association—is absolutely denied. *Shapiro* accepted the premise already established by the Court:

> that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution . . . . 'Constitutional rights would be of little value if they could be . . . indirectly denied . . . .'[109]

Relying upon *Shapiro*, the Court stated in *Dunn* that the right to travel is an " . . . *unconditional* personal right; a right whose exercise may not be conditioned."[110]

The effect of durational residency requirements for public office is the same as the effect of durational residency requirements for voting struck down in *Dunn*. Such laws force persons who wish to travel and change residences to choose between travel and their rights of voting and association. Just as the states may not force citizens to choose between travel and voting, so should states be powerless to force citizens to choose between travel and candidacy for public office.

Durational residency requirements in some circumstances may be justified.[111] However, in *Vlandis v. Kline*,[112] the Court invalidated a permanent, irrebutable presumption of nonresidency of any married person who applied for admission to a state college from out of state or any unmarried person who had a legal address for any part of the 1-year period immediately prior to application. Such a durational residency requirement erects an absolute bar to candidacy. A conclusive presumption is equally offensive as applied to candidacy as to payment of tuition. The Court relied primarily upon the authority of cases such as *Bell v. Burson*[113] and *Stanley v. Illinois*,[114] but recognized that a "statu-

109. Harmon v. Forssenius, 380 U.S. 528, 540 (1965).

110. 405 U.S. at 341.

111. *See, e.g.*, Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971), where a durational residency requirement of 1 year was upheld as a condition of qualifying as a resident for tuition purposes.

112. 412 U.S. 441 (1973).

113. 402 U.S. 535 (1971).

114. 405 U.S. 645 (1972).

tory scheme [which] operates to apportion tuition rates on the basis of old and new residence . . . [would] give rise to grave problems under the Equal Protection Clause . . . ."[115]

More recently, in *Memorial Hospital v. Maricopa County*,[116] the Court invalidated an Arizona statute requiring a year's residence in a county as a condition of nonemergency hospitalization or medical care at county expense. The Court reasoned that importance of the benefit deprived by exercise of the right to travel is relevant to the constitutionality of the deprivation.[117] While the right to seek public office is not as basic to life as the need of indigents for medical attention or welfare assistance, it is a *fundamental* right nonetheless. Moreover, the Court, for good reason, has shown considerably less reluctance to overturn state legislation impinging upon political rights than upon state fiscal policies.[118] Judicial deference to state allocations of scarce economic resources is far more easily justified than deference to state legislation intruding upon fundamental political rights. Thus, whatever the "ultimate parameters of *Shapiro* penalty analysis,"[119] its applicability to deprivations of fundamental constitutional rights is well settled.

In the latest right to travel case, *Sosna v. Iowa*,[120] the Supreme Court upheld the constitutionality of an Iowa 1-year durational residency requirement for divorce. Mr. Justice Rhenquist, writing for a six member Court, distinguished *Shapiro*, *Dunn* and *Maricopa County* as cases where state "budgetary or record keeping considerations . . . were held insufficient to outweigh the constitutional claims of the individuals."[121] According to the

115. 412 U.S. at 450 n.6.

116. 415 U.S. 250 (1974).

117. *Id.* at 259. The Court observed that "medical care is as much 'a basic necessity of life' to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Id.*

118. *Compare, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972), *with* Dandridge v. Williams, 397 U.S. 471 (1971) *and* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

119. 415 U.S. at 259. The Court reiterated that "the *Shapiro* Court cautioned that it meant to 'imply no view of the validity of waiting period or residence requirements determining eligibility [*inter alia*] to obtain a license to practice a profession, to hunt, or fish, or so forth.'" *Id.* at 259 n.13.

120. 419 U.S. 393 (1974).

121. *Id.* at 406. Justice White dissented on the ground that once the appellant satisfied the residency requirement about which the complaint was originally made, the case was moot in that it did not satisfy the threshhold case or controversy requirement of

Court, Iowa's interest in "avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack" outweigh the individual interest in divorce on demand virtually upon arrival in the state.[122] The *Sosna* court narrowly read *Boddie v. Connecticut*[122.1] as applying to claims of total deprivation of access to the courts, and not merely to claims of delay.

Sosna can be distinguished from cases involving durational residency requirements for voting or political candidacy. State regulation of domestic relations has long been regarded "as a virtually exclusive province of the States."[123] In contrast, individual access to the political process touches upon vital, national interests and, since the early 1960's, has been subject to close judicial scrutiny for conformity with constitutional guarantees. Durational residency requirements for public office cannot be justified by any state interest as substantial as the legitimate state interests in protecting its courts from becoming mills for "quickie" divorces and in minimizing the susceptibility of its divorce decrees to collateral attack. Nonetheless, the "delay-not-total-deprivation" rationale of *Sosna* is disturbing. Total deprivation was not involved in *Shapiro* or *Dunn*—only *delay*. In both *Shapiro* and *Dunn* the soughtafter privilege could be enjoyed following the delay which attended a 1-year durational residency requirement. The "mere delay" apologia of *Sosna* unnecessarily confused the Court's holding. The state interests in preventing its courts from becoming mills for "quickie" divorces and in diminishing the probability of collateral attack on its divorce decrees ostensibly justify the Court's holding.

It is too early to determine whether *Sosna's* substitution of an ad hoc balancing test for the compelling interest standard recently employed in right to travel cases justifies the concern of Justices Marshall and Brennan, over the implications of the majority's analyses " . . . for durational residency requirement cases

Article III. Justices Marshall and Brennan dissented on the ground that "the right to obtain a divorce is of sufficient importance that its denial to recent immigrants constitutes a penalty on interstate travel." *Id.* at 419.

122. *Id.* at 407.

122.1. 401 U.S. 371 (1971).

123. 419 U.S. at 404. *But cf. id.* at 420 (Marshall, J., joined by Brennan, J., dissenting); Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967).

in general."[124] Although it is difficult to accept the proposition that political rights are more fundamental than marital rights—one possible basis for distinguishing *Sosna* from other recent right to travel cases—*Sosna* involved substantial, countervailing state interests not present in *Shapiro*, *Dunn* or *Maricopa County*. The threatened subversion of the divorce laws of the several states by the divorce-mill policies of the most lenient states would be inconsistent with the state autonomy and diversity a federal system permits in matters primarily of state and local concern.

Lengthy durational residency requirements for public office are also inconsistent with the geographic mobility of the nation's population. We have become a nation of movers.[125] About one-fifth of the nation's population moves each year,[126] amounting to almost 37 million "movers" in 1970. Among the "movers," 7.1 million moved between states, 23.2 million moved intracounty and 6.3 million moved somewhere else in the same state.[127] Mobility is even greater over longer time periods.[128] The literature on migration is far too vast to be reviewed here, but two salient, empirically verified hypotheses from that literature deserve attention. First, geographers and urban sociologists have convincingly documented that internal migration is not a randomly based demographic phenomenon, but rather involves distinctive social, economic and ethnic subgroups.[129] Migration between and within cities, suburban and rural areas is an important, world-

124. 419 U.S. at 419 (Marshall, J., joined by Brennan, J., dissenting).

125. *See, e.g.*, H. ELDRIDGE, NET INTERCENSAL MIGRATION OF STATES AND GEOGRAPHIC DIVISIONS OF THE UNITED STATES, 1950-60 (1965); V. FULLER, RURAL WORKER ADJUSTMENT TO URBAN LIFE (1970); V. PACKARD, A NATION OF STRANGERS (1972); P. SCHWIND, MIGRATION AND REGIONAL DEVELOPMENT IN THE UNITED STATES, 1950-60 (1971); TAEUBER, CHIAZZE & HAENSZEL, MIGRATION IN THE UNITED STATES: AN ANALYSIS OF RESIDENCE HISTORIES, U.S.P.H.S. Pub. No. 1575 (1968).

126. Between March of 1969 and March of 1970, 18.4 percent of the persons over 1 year of age who live in the United States moved to a different residence. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-20, No. 210, *Mobility of the Population of the United States: March 1969 to 1970* at 1 (1971).

127. *Id.*

128. *See, e.g.*, U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-23, No. 25, *Lifetime Migration Histories of the American People* 5, Table 7 (1968).

129. *See, e.g.*, BEHAVIOR IN NEW ENVIRONMENTS: ADOPTION OF MIGRANT POPULATIONS (E. Brody ed. 1970); H. KARP & D. KELLY, TOWARD AN ECOLOGICAL ANALYSIS OF INTERMETROPOLITAN MIGRATION (1971); READINGS IN THE SOCIOLOGY OF MIGRATION (C. Jansen ed. 1970) [hereinafter JANSEN]; H. SHRYOCK, POPULATION MOBILITY WITHIN THE UNITED STATES (1964).

wide "process of self-regulating 'adjustment' to what would otherwise be an unbalanced distribution of population."[130]

Migration has been facilitated by federally aided interstate highways and federally subsidized air and rail transportation. Migration has been encouraged by the development of a national labor market and by national corporations. Occupational mobility, in many instances, has become almost a function of geographical mobility. The growth of nationally recognized universities has encouraged mobility among young persons whose increasing political awareness militates against nonparticipation in the political process. It was inevitable that the confluence of the demographic, educational and occupational trends of recent decades would legitimize interstate migration politically and exert heavy pressures upon traditional, parochial barriers to interstate migration such as state durational residency requirements for public office. As persons increasingly exercise their constitutional right to travel in order to pursue an education or to earn a livelihood, confrontations are bound to occur both in the places to which they have migrated and, upon their return, to their native communities.

Durational residency requirements for public office which fall disproportionately upon discrete subgroups, such as racial minorities and impoverished rural families who have moved to urban areas in search of a better life, may merit correspondingly closer judicial scrutiny.[131] Migration, itself, retards participation in the political structure.[132] However, political participation by migrants "tends to increase directly with length of time in the community within age, occupational and educational categories."[133] The behavioral predisposition against substantial political involvement by migrants generally serves as a natural barrier to political candidacy which is far more formidable than most

130. Research Comm. on Urban Sociology of the Int'l Sociological Ass'n, Report on a Meeting in Stockholm in Sept. 1969, 9 Soc. Sci. Info. 35, 43 (Dec. 1970) (remarks of T. Kuroda of Japan).

131. *See, e.g.*, Walker v. Yucht, 352 F. Supp. 85 (D. Del. 1972). *But cf.* Jefferson v. Hackney, 397 U.S. 821 (1971) (disproportionately larger percentage of minority groups in AFDC than in other categorical assistance programs not sufficient to trigger strict scrutiny of AFDC classifications on racial grounds because of absence of proof of racial motivation in the establishment of less favorable need allowances for AFDC than for recipients under other welfare programs).

132. Zimmer, *Participation of Migrants in Urban Structures* in Jansen, *supra* note 129, at 72.

133. *Id.* at 73.

durational residency requirements for public office. Behavioral factors influencing nonparticipation among migrants coming from culturally dissimilar environments are especially strong,[134] and, apparently, "younger persons are less affected by migration than older persons."[135] The data suggests that "in some types of behavior, migrants possessing low status characteristics never do attain the same level of participation as natives."[136] Since political participation is an important indicator of migrant adjustment to a new community, such participation should be affirmatively encouraged rather than disfavored by legal barriers such as durational residency requirements. Such requirements frustrate socially important interests such as facilitating migrant adjustment and affording a political escape valve for pressures which might otherwise be manifested in antisocial conduct or anomic social withdrawal.

As applied to urban, white-collar migrants moving between culturally similar environments, durational residency requirements artificially retard political participation without reasonable basis. Social scientists have recognized that there may be a

> standardized urban culture shared by white-collar workers which soon transcends the limiting influence of migration. That is to say, that, in preparing for or in the pursuit of white-collar work, persons learn at the same time an urban way of life, which is carried with them in their migration. This urban culture makes for a more rapid adjustment in the new community.[137]

IV. A REVIEW OF RECENT CASES CHALLENGING DURATIONAL RESIDENCY REQUIREMENTS FOR PUBLIC OFFICE

The Supreme Court has never given plenary consideration to the constitutionality of durational residency requirements for public office, although it has summarily affirmed three recent cases upholding residency requirements for public office.[138] Although summary affirmance technically affords a decision on the merits and has precedential value, docket pressures appear to be

134. *Id.*, *passim*.
135. *Id.* at 74.
136. *Id.* at 83.
137. *Id.* at 75.
138. Kanapaux v. Ellison, Civil No. 74-1356 (D.S.C. Sept. 26, 1974), *aff'd mem.*, 419 U.S. 891 (1974); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), *aff'd mem.*, 414 U.S. 802 (1974); Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd mem.*, 401 U.S. 968 (1971).

diminishing the distinction between denial of certiorari and summary affirmance to the extent that even several summary affirmances may not indicate how the Court will ultimately decide a question on plenary review.[139] Such cases, like the summary affirmances preceding *Dunn* and *Edelman*, offer vivid illustrative proof that summary affirmances by the Supreme Court are sometimes misleading. Summary affirmance "settles the issues for the parties" and affirms the district court's "judgment but not necessarily the reasoning by which it was reached."[140]

The lower courts have been groping for a resolution of the problem of durational residency requirements for public office for several years. Thus, when the Supreme Court eventually faces the question, it will not write on a clean slate. A systematic review of the previously decided lower court cases will enhance our understanding of the present state of the law, expose live issues which are likely to emerge in later Supreme Court adjudication and adumbrate the lines upon which a Supreme Court decision may ultimately be drawn.

A. State Court Decisions

The states of California, Colorado, New Jersey, Missouri, South Carolina, Hawaii, New York and Arizona have all recently been faced with challenges to their durational residency requirements for public office in their courts of last resort.[141] From these challenges a checkered pattern emerges.

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139. *See, e.g.*, Edelman v. Jordan, 415 U.S. 561, 670-71 (1974). The Court disingenuously attempted to reconcile *Edelman* with previous summary affirmances of contrary holdings by explaining that it is less constrained by the principle of stare decisis when it decides constitutional questions. The practice of the Court has been to bow to " 'the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' " *Id.* at 671 n.14 *quoting* Burnet v. Coronodo Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting). Brandeis' position on the limited applicability of stare decisis in constitutional litigation appears to contemplate a substantial lapse of time sufficient to generate experience indicating the need for a revised judicial policy. *Compare, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) *with* Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954) *and* Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), *aff'd mem.*, 380 U.S. 125 (1965), *with* the Court's decision 7 years later in Dunn v. Blumstein, 405 U.S. 330, 337 (1972).

140. Fusari v. Steinburg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring).

141. Additionally, the Maryland Court of Appeals recently affirmed a lower court decision, removing a candidate from the Democratic primary ballot for failure to satisfy a 3-year durational residency requirement of the Maryland constitution, on state grounds without considering the federal question. Bainum v. Kaler, 272 Md. 490, 325 A.2d 392

1. *California*

The California Supreme Court has been directly confronted with challenges to durational residency requirements no less than three times in the past 5 years. The ensuing decisions are indicative of a pattern that may be duplicated as the United States Supreme Court is forced to provide a definitive set of guidelines for evaluating residency requirements.

In 1971 the California Supreme Court heard the companion cases of *Camara v. Mellon*[142] and *Zeilenga v. Nelson.*[143] The court, sitting en banc, struck down the 3-year residency requirement in *Camara* as violative of the equal protection clause of the fourteenth amendment, and directed the city clerk to place Camara's name on the ballot for the upcoming election.[144] *Zeilenga*, however, involved an issue not present in *Camara* which is characteristic of most challenges to durational residency requirements. When the county clerk refused to issue nomination papers to Zeilenga for supervisor, he and six voters who supported his candidacy petitioned for a writ of mandamus in the superior court to compel his certification. The superior court denied the petition, and by the time the appeal had been perfected there was not time before the election for the court of appeals to decide the case. The court of appeals acknowledged that "[i]n a sense the problem is moot because . . . [the] election has already taken place."[145] However, the court of appeals concluded, and the California Supreme Court agreed, that the "issue is a vital one . . . of general public interest and should be determined before the

(1974). The construction of durational residency requirements on state constitutional grounds is beyond the scope of this article except in cases such as the Missouri court's decision in State of Missouri *ex rel.* King v. Walsh, 484 S.W.2d 641 (Mo. 1972), which may have been prompted by the court's attempt to avoid the federal question, and the South Carolina court's decision in Ravenel v. Deckle, 265 S.C. 364, 218 S.E.2d 521 (1975), in which federal claims subsequently asserted by third parties were waived. *See* notes 208-14, 223 and accompanying text *infra.*

142. 4 Cal. 3d 714, 484 P.2d 577, 94 Cal. Rptr. 601 (1971). *Camara* involved a provision of the Santa Cruz city charter which prohibited any person from being a member of the city council unless he had been a resident of the city for at least *3 years* preceding his election or appointment.

143. 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971). In *Zeilenga* petitioner challenged the constitutionality of a *5-year* residence requirement in the county charter for all candidates for county supervisor.

144. The court references the opinion in *Zeilenga* as the basis for its decision in *Camara. Id.* at 714, 484 P.2d at 577, 94 Cal. Rptr. at 601.

145. 4 Cal. 3d at 719, 484 P.2d at 579, 94 Cal. Rptr. at 603. The California Supreme Court adopted the language of the court of appeals in discussing the mootness issue.

next general election."[146] Obviously, the relief sought by Zeilenga would have been difficult to grant since the election had already taken place. A new election could have been ordered, and, in some contexts such an order may be appropriate.[147] Generally, however, state interest in the finality of elections and the strong social interest in avoiding the disruption of the electoral process occasioned by a court ordered second election would considerably outweigh the competing interest in the candidacy of an individual, whether that interest is asserted by the candidate or by the voters. Upon finding the residency requirement in *Zeilenga* invalid the court granted prospective relief only: the county clerk was ordered "in future elections to disregard the residence requirement of candidates for the county board of supervisors set forth in the Butte County Charter."[148]

Turning to the merits of the two cases, the court noted that "[t]he right to hold public office, either by election or appointment, is one of the valuable rights of citizenship";[149] that it is a "fundamental right"[150] which "the First Amendment protects against infringement,"[151] and emphasized that there is "a federal constitutional right to be considered for public service without

146. *Id.* Under California law, an "issue does not become moot merely because the question is of no further interest to the person who raised it." *Accord*, Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) (" 'capable of repetition, yet evading review' "). *Cf.* Liner v. Jafco, 377 U.S. 301, 304 (1964) (mootness, as applied to federal questions, is itself a question of *federal* law).

The court also pointed out that

> [i]n an additional sense the matter is not moot since the charter provision, if valid, will prevent petitioner Zeilenga from being a candidate for the office of supervisor either by election or appointment, should there become a vacancy, until August 1973, as he will not have resided in Butte County for the necessary five years before that date.

4 Cal. 3d at 720, 484 P.2d at 580, 94 Cal. Rptr. at 604.

147. *See, e.g.*, Hadnott v. Amos, 394 U.S. 358, 367 (1969), where the Supreme Court ordered a new election in Green County, Alabama, for various county offices for failure of state officials to comply with § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. *Cf.* Hamer v. Campbell, 358 F.2d 215 (5th Cir.), *cert. denied*, 385 U.S. 851 (1966).

148. 12 Cal. App. 3d at 786-87, 90 Cal. Rptr. at 924.

149. 4 Cal. 3d at 720, 484 P.2d at 580, 94 Cal. Rptr. at 604, *quoting* Carter v. Commission on Qualifications of Judicial Appointments, 14 Cal. 2d 179, 182, 93 P.2d 140, 142 (1939).

150. 4 Cal. 3d at 720, 484 P.2d at 580, 94 Cal. Rptr. at 604, *quoting* Fort v. Civil Service Comm'n, 61 Cal. 2d 331, 335, 392 P.2d 385, 38 Cal. Rptr. 625 (1964).

151. 4 Cal. 3d at 720, 484 P.2d at 580, 94 Cal. Rptr. at 604, *quoting* Johnson v. State Civil Service Dep't, 280 Minn. 61, 157 N.W.2d 747 (1968) and Minielly v. State, 242 Ore. 490, 411 A.2d 69 (1966).

the burden of invidiously discriminatory disqualifications."[152] In order to justify "any impairment" of these rights, the court argued, "[t]here must be present a compelling governmental interest."[153] The court could not, however, find a compelling interest which would save the restrictions in either case, commenting that

> [p]erhaps in the horse and buggy days the five year requirement could have been reasonable, but in these days of modern public transportation, the automobile, newspapers, radio, television and rapid dissemination of news throughout all parts of the county, the requirement is unreasonable.[154]

The court's real feelings about the requirements were quite apparent, however, as the opinion continued.

> It [the 5-year requirement] excludes certain citizens from public office by a classification which is unnecessary to promote a compelling governmental interest. It is a built-in device to prevent competition against the county's oldtimers for the office of supervisor. Nowhere is it shown that a candidate for the office of supervisor cannot acquire competent knowledge of the county's conditions in much less than five years to qualify him for the office, at least sufficiently to submit to the voters for their choice his knowledge thereof.[155]

Although the court did not speculate in *Zeilenga* or *Camara* as to what, if any, durational residency requirements for public

152. 4 Cal. 3d at 720-21, 484 P.2d at 580, 94 Cal. Rptr. at 604, *quoting* Turner v. Fouche, 396 U.S. 346, 362 (1970).

153. 4 Cal. 3d at 721, 484 P.2d at 580, 94 Cal. Rptr. at 604, *quoting* Huntley v. Public Utilities Comm'n, 69 Cal. 2d 67, 442 P.2d 685, 69 Cal. Rptr. 605 (1968). The "compelling interest" standard used here was derived from Shapiro v. Thompson, 394 U.S. 618 (1969), where the United States Supreme Court held that discriminatory classifications which affect a fundamental right must be supported by a compelling governmental interest. *Id.* at 634. In recent years, the California Supreme Court has occasionally extended the fundamental right/compelling interest rationale further than the federal courts. *Compare, e.g.*, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *with* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). Although the United States Supreme Court's holdings on the reach of the federal law are controlling under the supremacy clause, the door is open in election cases, as elsewhere, for state courts to go further than the Supreme Court is willing in the protection of fundamental rights. Such state holdings would be insulated against federal review because they are supported by independent state grounds. The California Supreme Court did just that in *Serrano*, but not in *Zielenga*.

154. 4 Cal. 3d at 722, 484 P.2d at 581, 94 Cal. Rptr. at 605.

155. *Id.*

office could validly be imposed, it conclusively established that durational residency requirements of 3 years or more were not reasonably related to any *compelling* interest of the political subdivisions of the nation's largest state. While making reference to federal authority supporting the propriety of bona fide residency as qualification for holding public office,[156] the court followed the path of the three-judge federal district court in *Hadnott v. Amos*[157] in declining to decide whether or not *some* preelection durational residence was necessary in the absence of a case presenting such a question. The *Zeilenga* majority did find some guidance, however, in dicta from the New Jersey decision in *Gangemi v. Rosengard*.[158] The New Jersey Supreme Court felt that "far from being unrestricted, the power to prescribe qualifications for elective office is sharply limited by the constitutional guaranty of a right to vote . . ."[159] and that "a prescribed qualification for office must relate to the needs of officeholding as such or the special needs of the particular office involved . . . ."[160] Finding no such relationship, the California court could not justify "such a heavy burden" as the 5-year *Zeilenga* requirement or the 3-year residency required in *Camara*.[161]

The compelling interest standard was further developed in the third California case, *Thompson v. Mellon*.[162] The validity of that standard, however, was sustained by a somewhat different line of reasoning. Expressly reaffirming its belief that " 'the right to run for public office is as fundamental as the right to vote,' "[163] the *Thompson* court proceeded to reconcile *Bullock v. Carter*[164] with the California court's commitment to strict scrutiny in the evaluation of "restrictions upon candidacy for public office which [exclude] a significant group of potential candidates from the ballot . . . ."[165] Although *Bullock* dealt with the unconstitu-

156. *See* Dusch v. Davis, 387 U.S. 112, 116 (1967).

157. 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd mem.*, 401 U.S. 968 (1970).

158. 44 N.J. 166, 207 A.2d 665 (1965).

159. *Id.* at 171, 207 A.2d at 667.

160. *Id.*

161. 4 Cal. 3d at 722, 484 P.2d at 581-82, 94 Cal. Rptr. at 605-06. The California Supreme Court thus expressly overruled its earlier holding in Sheehan v. Scott, 145 Cal. 684, 79 P. 350 (1905), in which a 5-year durational residency requirement for the office of tax collector of San Francisco was approved—a "horse and buggy case." *See* note 154 and accompanying text *supra*.

162. 9 Cal. 3d 96, 507 P.2d 628, 107 Cal. Rptr. 20 (1973).

163. *Id.* at 99, 507 P.2d at 631, 107 Cal. Rptr. at 23.

164. 405 U.S. 134 (1972). *See* notes 86-88 and accompanying text *supra*.

165. 9 Cal. 3d at 100, 507 P.2d at 631, 107 Cal. Rptr. at 23.

tionality of restrictive filing fees, the *Thompson* court, nevertheless, found the analysis applied in that case to be analagous. Thus, the court noted that although durational residency requirements for public office differ from filing fees in that the latter " 'fall more heavily on minority economic and political groups,' " this distinction, " 'while significant, does not render . . . *Bullock* inapplicable [since] the grounds asserted for utilizing the "compelling interest" test were *alternative,*' "[166] The analysis in either instance proceeds from the premise that " 'where the law in question poses an absolute barrier to the candidacy of a not insubstantial segment of the community and, to that degree, limits the voters in their choice of candidates, the more strict standard of review must be applied.' "[167]

In light of the factual context of *Thompson*, the California court's conclusion is especially appealing. Thompson was a lawyer who had resided in Santa Cruz *County* for 7 years, yet had resided in the *city* of Santa Cruz for less than a year. While recognizing that "the state has a legitimate interest in requiring 'a reasonable knowledge by a proposed candidate of the general requirements' of the public entity in which he seeks office,"[168] the court found this justification inappropriate as a practical matter in the *Thompson* case.[169] In the thicket of overlapping city, county, precinct, and special district boundaries of urbanized California, and, for that matter much of the United States, it would be awkward to suggest that new city residents who have long resided in the county are less knowledgeable about the problems of city government than recent migrants from culturally dissimilar environments who satisfy durational residency requirements. Thus, it would be patently absurd to suggest that Thompson, an attorney and resident of Santa Cruz County for 7 years, knew less about the problems of the city of Santa Cruz than a blue-collar worker who had moved to the city 2 years previous from rural Oklahoma.[170] Accordingly, the *Thompson* court relied heavily on the authority of *Dunn v. Blumstein*[171] and concluded that a 2-year durational residency requirement did not serve a

166. *Id.* at 101, 507 P.2d at 632, 107 Cal. Rptr. at 24.
167. *Id.*
168. 9 Cal. 3d at 102, 507 P.2d at 633, 107 Cal. Rptr. at 25.
169. *Id.* at 105, 507 P.2d at 635, 107 Cal. Rptr. at 27.
170. *See* JANSEN, *supra* note 129, at 75.
171. 405 U.S. 330 (1972). *See* notes 58-60, 64-76 and accompanying text *supra.*

compelling state interest.[172]

The *Thompson* case poses an additional consideration often overlooked in the maze of constitutional arguments concerning durational residency requirements. In Justice Sullivan's plurality opinion, it was declared that all durational residency requirements for public office in excess of 30-days preceding the deadline for filing nomination papers or an equivalent declaration of candidacy were invalid.[173] There arises immediate difficulty with this finding in that the United States Supreme Court's decision in *Burns* and *Marston*, upholding the 50-day Arizona and Georgia durational residency requirements to voting, suggests that the talismanic effect accorded the *Dunn* 30-day period by the California court may be misplaced, at least as a matter of *federal* law. But more importantly, this illustrates the difficulty of deciding precisely where the line should be drawn on durational residency requirements for public office. As the length of the requirements diminishes, it seems apparent that judicial consensus becomes

172. 9 Cal. 3d at 105, 507 P.2d at 635, 107 Cal. Rptr. at 27. In essence, the plurality in *Thompson* saw the purposes served by durational residency requirements for public office in excess of 30 days as provincial and inconsistent with the ethical postulates of a democratic society. The pulse of Judge Sullivan's opinion can be measured from his observation that

> [p]erhaps there may be some communities which in their desire to preserve the *status quo*, will attempt to impose political silence on the newcomer until he has accommodated himself to the local "scene." But new arrivals shed none of their fundamental rights by exercising their right to travel and may not be arbitrarily excluded from either a voice or a role in the affairs of their newly selected home. In these times of political and social ferment, intensified by an extraordinarily movable population, the *status quo* of the community, if worthy of preservation, must justify its continued acceptance through the free exercise of the ballot box.
>
> . . . The hallowed belief in the wisdom and power of the electorate must not be sold short and may not be circumscribed by artificial residence barriers fencing in the right to vote or the right to be a candidate for public office.

9 Cal. 3d at 105, 507 P.2d at 635, 107 Cal. Rptr. at 27.

173. Tobriner, J., concurred. Wright, C.J., and Molinari, J., concurred in the judgment only "insofar as it holds that the two-year durational residence requirement . . . is invalid." *Id.* at 107, 507 P.2d at 636, 107 Cal. Rptr. at 28. Mosk, J., concurred, but would have based the holding on *state* constitutional grounds and would have had the 30 day durational residency period run from the date of the election rather than from the time for filing nominating papers or other declaration of candidacy. *Id.* at 110, 507 P.2d at 638, 107 Cal. Rptr. at 28. Burke, J., joined by McComb, J., dissented on the ground that a 2-year requirement was reasonable and necessary. *Id.* at 110, 507 P.2d at 640, 107 Cal. Rptr. at 28. *Cf.* Young v. Gnoss, 7 Cal. 3d 18, 27, 496 P.2d 445, 101 Cal. Rptr. 533 (1972) (state durational residency requirements for voting in excess of 30 days held invalid under *Dunn*.)

more difficult.[174] This is not surprising since such questions are subject to resolution only on a judgmental basis, and reasonable differences of opinion are to be expected.

The difficulty which this lack of judicial consensus presents was squarely confronted by Justice Mosk in his concurring opinion to *Thompson*. Expressly noting the "absence of objective criteria" for deciding the reasonableness of durational residency requirements of any particular length,[175] Justice Mosk reasoned that it is difficult to avoid the conclusion that the holdings were "apparently reached via a visceral route."[176] Since vagueness of permissible limits "only assures future litigation" and is adverse to the principle that "predictability is the hallmark of a responsible judicial system," his concurrence concludes that "any citizen qualified to vote in a jurisdiction should be entitled to seek public office in that jurisdiction, assuming in appropriate instances he possesses the required professional qualifications."[177] In this context, the Mosk proposal is appealing because of its simplicity and its consistency with a democratic decisionmaking process. Most significantly, as contended by Justice Mosk, it is "naive . . . to believe that the absence of durational residence requirements will automatically catapult uninformed candidates into public office."[178] The ballot box, he suggests, affords the people all the protection they need.[179]

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174. No better example of this premise could possibly be found than the divergence of opinions presented by the *Thompson* court. Sullivan and Peters, J.J., presumably would invalidate requirements of greater than 30 days before filing for nomination. Mosk, J., would invalidate requirements in excess of 30 days prior to the election. Tobiner and Molinari, J.J., and Wright, C.J., consider 2-year requirements unreasonable and would either disagree with the 30 day dictum of the plurality opinion or be unwilling to reach the question until presented with a case or controversy.

175. 9 Cal. 3d at 108, 507 P.2d at 637, 107 Cal. Rptr. at 29 (Mosk, J., concurring).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 108-09, 507 P.2d at 637, 107 Cal. Rptr. at 29. Justice Mosk's argument on this premise deserves careful consideration:

> Inevitably time in the jurisdiction will be a significant issue in local political campaigns. The "life-long resident" of a community will tout his superior familiarity with the problems of the area. The recent settler will assuredly be faced with the charge he is an interloper or carpetbagger. In most instances the candidate well tutored in community problems will be better known by the electorate and will prevail. But if the voters exercise their franchise to reject the life-long resident, and prefer to be represented by the newcomer, restraints imposed by a past citizenry, presumably to prevent future folly, should not be permitted to thwart such democratically determined result.

Id.

The dissenting opinion of Justice Burke raises some provocative questions. In sum, he adheres to a more narrow view of *Bullock* than that of the majority and raises questions concerning the applicability of the strict scrutiny standard to qualifications imposed on candidacy for public office, absent discrimination based on wealth, or some other suspect qualification.[180] Hence, the dissent contends that, even assuming the applicability of the strict scrutiny standard, a durational residency requirement of 2-years, given "the lack of feasible alternative provisions, . . . [is] *reasonably* necessary" to promote the legitimate state interest in assuring "that knowledgeable candidates appear on the ballot."[181]

The dissenters in *Thompson* posited several allegedly legitimate state interests underlying durational residency requirements for public office: the constitutional authority of municipalities to control their own affairs and to exercise "home-rule" powers;[182] the duty to afford voters "some firm basis for judging the character and ability of the candidates appearing on the ballot";[183] to "provide [what is often] the only opportunity for voter-candidate contact in a noncampaign atmosphere";[184] and to improve the quality of public decisionmaking by winnowing out candidates not sufficiently "responsible for managing civic affairs and making day-to-day decisions which municipal officials must face."[185] Of these, the only state interest asserted by the *Thompson* dissenters not previously considered is the "home-rule" interest. It may be that this particular interest is premised on the values of "democratic decisionmaking," approved by the

180. *Id.* at 111-12, 507 P.2d at 639, 107 Cal. Rptr. at 31 (Burke and McComb, J.J., dissenting). *Bullock* tacitly implied this since it was there held that the "existence of . . . barriers [to candidacy] does not of itself compel close scrutiny." 405 U.S. at 145. *But see* notes 165-69 and accompanying text *supra*.

181. 9 Cal. 3d at 111, 507 P. 2d at 639, 107 Cal. Rptr. at 31 (emphasis in original) (footnote omitted). Although Judge Burke admits that "a new resident/candidate conceivably could gain familiarity with local problems by intensive study and research of his locale, and a long-time resident/candidate may lack such familiarity altogether," he, nevertheless, alleges that "the residence requirement is *generally* the most practical assurance of a candidate's minimum qualifications in this regard." *Id.* at 111, 507 P.2d at 639, 107 Cal. Rptr. at 31 (emphasis in original). The dissenters clearly see this approach as justifiable since the standard of analysis deemed controlling by them is one of "reasonable necessity" which does not attain the level of "[p]erfect precision." *Id.* at 112, 507 P.2d at 640, 107 Cal. Rptr. at 32.

182. *Id.* at 111, 507 P.2d at 639, 107 Cal. Rptr. at 31.

183. *Id.* at 112, 507 P.2d at 640, 107 Cal. Rptr. at 32.

184. *Id.*

185. *Id.* at 113, 507 P.2d at 640, 107 Cal. Rptr. at 32.

Supreme Court in *James v. Valtierra*,[186] which emphasized the importance of giving "all the people of the community a voice in decisions that will affect the future development of their own community."[187]

Considering the general posture of restraint taken by the present Supreme Court, the reasonable basis test may be the appropriate standard, and, accordingly, the less restrictive durational residency requirements could be acceptable. Admittedly, the present Court has disfavored a number of substantial claims to extend the scope of strict scrutiny in light of the concomitant increase in judicial intervention in the legislative process which that analysis entails.[188] However, political claims are readily distinguishable from the "affirmative and reformatory" claims which would involve the courts in the essentially legislative function of allocating scarce state resources. That is, challenges to durational residency requirements for public office seek relief which is essentially negative in character and clearly falls within the range of questions appropriate for judicial resolution, although the question of precisely where the line should be drawn is both vexing and essentially arbitrary. Additionally, it may be important that judicial disapproval of durational residency requirements for public office does not drain judicial resources nor require continuing supervision of the legislative process, as have the legislative apportionment and redistricting decisions.

2. *Colorado*

In *Bird v. City of Colorado Springs*[189] the Colorado Supreme Court invalidated a 5-year durational residency requirement for the position of Colorado Springs city councilman.[190] In a brief opinion, the Colorado court based its holding on the authority of *Zeilenga v. Nelson*[191] and *McKinney v. Kaminsky*,[192] both of

186. 402 U.S. 137, 143 (1971).

187. *Id.*

188. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (strict scrutiny not applicable to school financing); Lindsey v. Normet, 405 U.S. 56 (1972) (strict scrutiny not applicable to housing); Dandridge v. Williams, 397 U.S. 471 (1970) (strict scrutiny not applicable to welfare).

189. 507 P.2d 1099 (Colo. 1973).

190. *Id.* According to his affidavit, petitioner would have resided in the city for 4 years, 6 months on the date of the election. *Id.*

191. 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971).

192. 340 F. Supp. 289 (M.D. Ala. 1972).

which invalidated 5-year requirements. The following month, in *Cowan v. City of Aspen*,[193] the Colorado Supreme Court invalidated a 3-year *city* durational residency requirement for mayor and councilman.[194] However, the *Cowan* court approved a 1-year *state* durational residency requirement for municipal candidates which became applicable upon invalidation of the city charter requirement.[195]

To support its finding that a 3-year durational residency requirement for public office is unreasonable, the *Cowan* court relied upon *Camara v. Mellon*.[196] Additionally, the court adopted the compelling interest standard of *Zielenga* and *Camara* as appropriate "[since] the right to hold public office, by either appointment or election, is one of the valuable and fundamental rights of citizenship."[197] Upon the authority of the New York Court of Appeals in *Landes v. Town of North Hempstead*,[198] the *Cowan* court went further to imply that a 3-year durational residency requirement for public office, like the property ownership qualifications for public office in *Landes*, bore no "reasonable relation to . . . [its] object."[199] This poses an interesting consideration since the lack of a reasonable relationship between a classification and its object is, of course, sufficient reason for invalidity under the rational basis test. Accordingly, if a 3-year durational residency requirement bears no reasonable relationship to its object, the application of a compelling interest standard by the *Cowan* court was premature.

The interests asserted by the city of Aspen were to insure "a mayor and council of high quality . . . well acquainted with the issues and problems; . . . to prevent frivolous candidacies by persons who have little interest in the conditions and needs of the City of Aspen," and to "insure that an individual would have greater contact with other members of the community and would . . . be in a better position to administer the needs of the community as a public officer."[200] The Colorado court concluded that the asserted interests fell "far short of . . . [the required] clear

193. 509 P.2d 1269 (Colo. 1973).
194. *Id.*
195. *Id.* at 1273.
196. 4 Cal. 3d 714, 484 P.2d 577, 94 Cal. Rptr. 601 (1971).
197. 509 P.2d at 1272.
198. 20 N.Y.2d 417, 231 N.E.2d 120, 284 N.Y.S.2d 441 (1967).
199. 509 P.2d at 1272.
200. *Id.*

and precise showing" because of the difficulty of "draw[ing] the line between *basic needs of the office* which may be determined for the voters by candidacy requirements, and the *individual fitness* of a candidate which must be left to the choice of the voter if voting is to mean anything."[201]

3. *New Jersey*

In *Gangemi v. Rosengard*[202] the New Jersey Supreme Court invalidated a 2-year durational residency requirement for mayor of Jersey City. *Gangemi* poses two interesting considerations. First, it was decided in 1965, a full 5 years before the spate of other state and federal cases involving durational residency requirements for public office. Second, the court's holding rested on independent state as well as federal constitutional issues.

With regard to the specific case before it, the *Gangemi* court observed that the 2-year durational residency requirement was "unusual" in that the state constitution made "no such demand even of a candidate for Governor . . . or for Senator or Assemblyman . . . ."[203] The court admitted the reasonableness of special qualifications for certain public offices which may call for the skill of a lawyer, physician or engineer. But the court did not blindly accept the assumption that candidates for office in a democratic society must possess special knowledge:

> to measure qualifications for elective office by the depth of a candidate's interest in or understanding of public matters whether the test be the length of his registration record or some sophisticated quiz . . . [opens the door to] knavery. . . . [I]ndividual fitness is something the voters decide and the intensity of a candidate's interest is part and parcel of that subject. The Legislature cannot take that issue from [the voters]. . . .[204]

Thus, the New Jersey court concluded that the 2-year durational residency requirement violated the federal guarantee of equal protection of the laws. Since *Gangemi* was decided *before* the strict scrutiny test was applied to some voting cases, the court's decision is authority for the proposition that a 2-year durational

201. *Id.* at 1272-73 (emphasis added).
202. 44 N.J. 166, 207 A.2d 665 (1965).
203. *Id.* at 173, 207 A.2d at 669.
204. *Id.* at 174, 207 A.2d at 669.

residency requirement for mayor has no rational basis and is wholly unrelated to any legitimate state interest.

4. *Missouri*

In *State ex rel. Gralike v. Walsh*[205] the Missouri Supreme Court upheld a 1-year, *state senate district* durational residency requirement.[206] The court's opinion in this case evidences two interesting aspects of analysis. First, the Missouri court distinguished *Dunn* on the ground that it pertained to *voting*, not candidacy, a distinction incompatible with the trend of recent federal authority.[207] Secondly, the court applied the rational basis rather than the compelling interest standard to determine the constitutional validity of the challenged durational residency requirement.

In *Missouri ex rel. King v. Walsh*,[208] the Missouri Supreme Court held that now governor Kit Bond met the 10-year durational residency requirement of the Missouri constitution,[209] and thus qualified for a position on the ballot as Republican nominee for governor. Bond was in the mainstream of the increasingly mobile, educated and politically active segment of the American population. During the 10 years preceding his candidacy, Bond, for substantial periods of time, resided in and had been admitted to the bars of Georgia and the District of Columbia, as well as Missouri. In addition, he had been admitted to the bar of Virginia, where he had attended law school, and had been employed briefly in New York City. During some of the years Bond was absent from Missouri he had paid Missouri taxes and voted in that state. Additionally, his wife had joined his hometown church in 1967. Bond urged that he secured out-of-state "temporary employments for the sole purpose of continuing his education and

205. 483 S.W.2d 70 (Mo. 1972).

206. Like *Camara*, *Gralike* involves the right of intrastate travel. *See* notes 150-52 and accompanying text *supra*.

207. *Compare, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) *with* Lubin v. Parrish, 415 U.S. 709 (1974). In striking a cadence much more closely atuned to *Dunn*, the dissenting opinion in *Gralike* accused the court of being out of step with the "direction in which the law is progressing" and, further, noted that "[a]ll the one year residence requirement does is to serve provincialism and prejudice the newcomer and those who would support him politically." 483 S.W.2d 70, 80 (Silver, J., dissenting).

208. 484 S.W.2d 641 (Mo. 1972).

209. *Id.* at 642. The Constitution of Missouri art. 4, § 3 provides: "The governor . . . shall have been . . . a resident of this state at least ten years next before election."

training by actual experience in the profession he intended to practice in his home state and that he at all times intended to return to Missouri,"[210] and, as a citizen of that state, to "practice law and engage in partisan politics."[211] Interpreting the question of residence or domicile as "one of fact . . . often difficult to determine . . . [and] largely a matter of intention,"[212] the Missouri court put a gloss on the 10-year durational residency clause of the Missouri constitution and held that it does not "require actual, physical presence continuous and uninterrupted for ten years."[213] The Missouri court obviously appears to have given the benefit of the substantial doubt to Bond to avoid the federal constitutional question. On the basis of admittedly authentic documentary evidence and Bond's own testimony, it is difficult not to agree with the dissenters that, as a matter of fact, Bond did not meet the 10-year durational residency requirement of the Missouri constitution.[214]

5. *South Carolina*

In *Ravenel v. Dekle*[215] the South Carolina Supreme Court upheld the state's 5-year durational residency requirement for Governor[216] and enjoined the state election commission from placing the name of the winner of the Democratic primary, Charles Ravenel, on the general election ballot.[217] In *Ravenel*, it had been

210. 484 S.W.2d at 643.

211. *Id.* at 644.

212. *Id.*

213. *Id.*

214. *Id.* (Donnelly, J., dissenting); *id.* at 649 *Bardgett, J., dissenting.*

215. 265 S.C. 364, 218 S.E.2d 521 (1975).

216. *Id.* The South Carolina Constitution of 1895 art. 4, § 3 provides: "No person shall be eligible to the office of Governor . . . who shall not have been . . . a citizen and resident of this state for five years next preceeding the day of election."

217. The South Carolina court summarized the key facts of the case:

> Mr. Ravenel is a native of Charleston and during his many years away from South Carolina, there is abundant evidence that he intended to some day return to and resume an actual residence in South Carolina. He did return in March, 1972. In November, 1969, five years prior to the upcoming election, he was an actual resident of and working in the State of New York where he had returned to work in 1967 after a year's residency in Washington, D.C. He continued to actually reside in New York until 1972. In May, 1968, he registered to vote in the State of New York, certifying to the authorities that by the time of the General Election in 1968, he would have been a resident of that state for one year and one month. He thereafter voted, apparently regularly in New York, having voted in five different elections in that state before returning to his home city and state in March, 1972.

stipulated, allegedly for political reasons,[218] that the sole issue involved was:

> Was Charles D. Ravenel a citizen and resident of the State of South Carolina for a period of five years next preceding the date of the General Election . . . within the meaning of Article IV, Section 2 of the Constitution of South Carolina?[219]

The South Carolina court held, in contrast to the Missouri court's holding in *King*, that the South Carolina constitution's durational residency requirement for governor requires actual residence in the state for the five-year period[220] and denied a place on the ballot to Ravenel who had won the votes of approximately 187,000 state voters in the run-off primary. The ill-fated Ravenel candidacy emphasizes the urgency for plenary consideration of lengthy durational residency requirements for public office by the United States Supreme Court, although the egregious errors of Ravenel's legal strategy makes sympathy difficult.

Ravenel, in effect, got two bites at the apple. On March 27, 1974, the South Carolina Democratic Party permitted Ravenel to file for Governor pending the outcome of a court suit concerning his eligibility.[221] On April 29, 1974, State Circuit Judge John Grimball ruled in a "friendly" suit that Ravenel was eligible to run for the party's nomination.[222] Although a definitive interpretation of Ravenel's eligibility under state law could have come *only* from the South Carolina Supreme Court, no appeal was taken from the circuit court ruling and no request was made for the state supreme court to assume original jurisdiction in the case. Had an appeal been taken, or original jurisdiction assumed, there would have been ample time for a state court decision and a federal appeal, if appropriate. Then, in *Ravenel v. Dekle*, Ravenel's counsel unmistakably waived Ravenel's federal claims:

> He filed his first income tax return in South Carolina in the year 1973 for the fiscal year 1972. Therein he certified that he had been a resident of the State of South Carolina for only a portion of the year 1972 and that he had not filed a tax return for the year 1971 because he was not a legal resident of South Carolina in that year.

22 Smith's Advance Reports 17-18 (1974).

218. Telephone conversation with Heyward Belser, Esq., Columbia, S.C., (counsel for Mr. Ravenel in Ravenel v. Dekle), September 25, 1974.

219. 265 S.C. at 367, 218 S.E.2d at 522.

220. *Id.* at 377, 218 S.E.2d at 527.

221. The State, Oct. 1, 1974, at 1-A, col. 1.

222. *Id.*

The Court: Is there any contention on your part of the unconstitutionality of any statute or anything?

Mr. Belser (Mr. Ravenel's attorney): We have not raised any such contention and have no intention of it.

The Court: No constitutional question.

Mr. Belser: No Federal Constitutional question. Is that what you are asking?

The Court: I'm asking about State or Federal.

Mr. Belser: We say we comply with the terms of the Constitution. We are not seeking to attack the validity of the South Carolina Constitution.

The Court: All right, sir. I'll put down no constitutional questions, not attacking validity of South Carolina Constitution. Is that correct?

Mr. Belser: We are not intending to do that, that's correct.[223]

Even conceding that *political* as well as *legal* considerations are relevant to political litigation, the legal strategy of the Ravenel candidacy proved as ruinous as the political strategy was brilliant. Whatever the political unpopularity of federal constitutional claims in South Carolina, the fact remains that the vindication of his federal claims afforded Ravenel his *only* route to the governorship in the 1974 elections. Whether the decision to waive Ravenel's federal claims was occasioned by the candidate's lack of sensitivity to the *critical federal question* affecting his candidacy or by unfortunate choice of legal strategy is unknown, but it seems clear that in so doing Ravenel neglected grounds for contesting the validity of durational residency requirements which might ultimately have been decided in his favor.[224]

223. Record at 48, Ravenel v. Dekle, 265 S.C. 364, 218 S.E.2d 521 (1975), *quoted in* Appellees' Motion to Affirm at 3 n.2, Kanapaux v. Ellison, Civil No. 74-1356 (D.S.C. Sept. 26, 1974).

224. The South Carolina Supreme Court's holding in *Ravenel* was a valid, final personal judgment. As such, it extinguished Ravenel's original claim or cause of action. *See* RESTATEMENT OF JUDGMENTS § 48 (1942). Ravenel would have been barred by prior judgment from subsequently maintaining an action on the same claim or cause of action, although he presented grounds for relief not presented in the original action, *id.* § 63, for example, federal constitutional grounds. The effect of this rule is salutary—it coerces the plaintiff to present all of his grounds for recovery in the first proceeding. *See* Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 320-21 (1927). A subsequent voter suit raising Ravenel's original claim or cause of action would likewise be precluded since the voter would be in no better position than a transferee. RESTATEMENT OF JUDGMENTS § 90 (1942). "If the unsuccessful party were able by a transfer to release from the effect of the judgment . . .

6. *Hawaii*

The Hawaii Supreme Court upheld a 3-year residency requirement for membership in the state legislature in *Hayes v. Gill.*[225] The Hawaii court observed that the "different considerations . . . involved in a right to vote and a right to run or to hold office . . . [are] indicated by *Turner v. Fouche*[225.1] . . . where the court resolved the issue of discrimination under the pre-*Kramer*[225.2] test and declined to rule on the applicability of the compelling state interest test."[226] The Hawaii court was not responsive to the real thrust of *Turner*—that some restrictions upon candidacy may be so demonstrably unreasonable that they fail to satisfy even the less stringent reasonable basis standard. The Hawaii court believed that a 3-year residency requirement satisfied the reasonable basis standard but declined to state whether it would pass strict scrutiny.

7. *New York*

In *DeHond v. Nyquist*[227] the Supreme Court of Albany County, New York, upheld a 3-year residency requirement for holding office on the county Board of Education. The court found that "[residence] has been a traditional qualification for holding public office in New York"[228] and that there is a "strong presumption of constitutionality" of such legislative enactments.[229]

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claims which in his hands would be adversely affected by the judgment because of the rules of collateral estoppel, the rules would have substantially no value to the successful party." *Id.*

225. 52 Hawaii 251, 473 P.2d 872 (1970).

225.1. 396 U.S. 346 (1970).

225.2. *See* note 77 and accompanying text *supra.*

226. 52 Hawaii at 259-61, 473 P.2d at 879.

227. 65 Misc. 2d 526, 318 N.Y.S.2d 650 (Sup. Ct. Albany Cty. 1971).

228. *Id.* at 529, 318 N.Y.S.2d at 654.

229. *Id. But cf.* Landes v. Town of North Hempstead, 20 N.Y.2d 417, 231 N.E.2d 120, 284 N.Y.S.2d 441 (1967). In *Landes*, the New York Court of Appeals invalidated a property ownership requirement on candidacy for town office and took note of "changes in the pattern of town and suburban living" which have resulted in a society characterized by "mobility" and "anonymity". *Id.* at 419-21, 231 N.E.2d at 120-21, 284 N.Y.S.2d at 443-44, *quoting* Cox, The Secular City 33 (rev. ed. 1966). Although the New York Court of Appeals based its holding in *Landes* on *state* as well as *federal* constitutional grounds, the court recognized the "viewpoint of the person seeking office" and denied that legislative authority to prescribe qualifications for office authorized "arbitrary exclusions from office." *Id.* at 419-20, 231 N.E.2d at 121, 284 N.Y.S.2d at 443.

8. *Arizona*

In *Triano v. Massion*[230] the Arizona Supreme Court upheld the validity of a 1-year, *city-voting-ward* durational residency requirement for city council candidates on the authority of Judge Burke's dissent in *Thompson v. Mellon*[231] and the three-judge federal court's holding in *Draper v. Phelps*.[232]

B. *Federal Courts of Appeals Decisions*

Two circuits have affirmed district court orders invalidating durational residency requirements for public office. In *Wellford v. Battaglia*[233] the Third Circuit upheld the district court's order invalidating a 5-year durational residency requirement for mayor of Wilmington, Delaware. Both courts agreed that the city's asserted interest in a chief executive officer who is knowledgeable of its problems and resources constitutes a legitimate government interest. Moreover, neither court was willing to say that there is "no rational connection between this interest and the five-year residency requirement."[234] The district court ruled, and the Third Circuit agreed, that the compelling interest test was the appropriate standard of review, as opposed to the reasonable basis test, because of the requirement's infringement of the fundamental rights to vote and to travel.[235] *Wellford* involved *intrastate* movement, and the district court reasoned that the right to travel includes *intrastate* as well as *interstate* migration.[236]

In *Green v. McKeon*[237] a divided Sixth Circuit panel affirmed the district court order invalidating a 2-year, *city* durational residency and property ownership requirement. It is clear that the property ownership requirement is invalid under the Supreme Court's holdings in *Kramer* and *Cipriano*. The district court concluded that "the compelling interest standard is the proper yardstock [*sic*] for judicial scrutiny"[238] because of the dilution of the

230. 109 Ariz. 506, 513 P.2d 935 (1973).
231. *See* notes 180-85 and accompanying text *supra*.
232. *See* notes 307-24 and accompanying text *infra*.
233. 343 F. Supp. 143 (D. Del. 1972), *aff'd*, 468 F.2d 1151 (3d Cir. 1973).
234. *Id.* at 145-46.
235. *Id.* at 147.
236. *Id.*
237. 335 F. Supp. 630 (E.D. Mich. 1971), *aff'd*, 468 F.2d 883 (6th Cir. 1972).
238. *Id.* at 632.

fundamental rights to vote and to travel.[239] The Sixth Circuit declined to "pass on the question of whether the impact of Plymouth's charter provision on the exercise of the franchise is sufficient to satisfy the criteria of *Bullock* to trigger application of the more stringent standard" of review. But the Sixth Circuit thought that strict scrutiny was appropriate in view of the classification's penalty on the "basic constitutional right to travel."[241] Candidate familiarity with "local . . . government and the problems peculiar to the municipality" may be desirable, but the Sixth Circuit considered a 2-year residency requirement "too broad for the achievement of that objective . . . [because the] restriction is in no way 'tailored' to achieve the stated municipal goal."[242] The classification was held invalid because it

> permits a two year resident of Plymouth to hold public office regardless of his lack of knowledge of the governmental problems of the city. On the other hand, it excludes more recent arrivals who have had experience in local government elsewhere or who have made diligent efforts to become well acquainted with the municipality.[243]

The ethical premise of the Sixth Circuit holding is that "in our representative form of government, the voters are the arbiters of the suitability of candidates for public office."[244] The question of "[w]hether a candidate has the ability to carry out the duties of a particular city office"[245] should be left to the voters. The political campaign is the appropriate forum for discussing the deficiencies of the respective candidates.

In his dissent in *Green*, Judge O'Sullivan disapproved of the court's use of the strict scrutiny test and stated that the durational residency requirement was not "invidiously discriminating."[246] He asserted a tenth amendment bar to federal review of state durational residency qualifications[247] and voiced apprehension over the "growing public concern arising from the

239. *Id.* at 634-35.
240. 468 F.2d at 884.
241. *Id.*
242. *Id.* at 885.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 886 (O'Sullivan, J., dissenting).
247. *Id.*

ever-increasing taking over by the United States Courts of the prerogatives of the State Legislatures."[248] Judge O'Sullivan declared that if "revision of the law [is needed] such can and should be accomplished by the people through their elected legislative representatives, and not summarily ordered by judicial command."[249]

But, as long ago as 1938, Mr. Justice Stone observed that there "may be a narrower scope for operation of the presumption of constitutionality when . . . statutes . . . [tend] seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a correspondingly more searching scrutiny."[250] It would be unrealistic to expect recent migrants to look to the political process for the abolition of durational residency requirements for public office. Except in a few, highly mobile communities, recent migrants are as incapable of obtaining political relief as were urban voters attempting to escape rural political domination.[251]

Most of the recent cases challenging durational residency requirements have involved *elective* office. However, in *Lehman v. City of Pittsburgh*,[252] the Third Circuit reversed and remanded the dismissal of a complaint challenging the validity of a 2-year durational residency requirement as a condition precedent to application for city employment on the authority of *Dunn*, *Shapiro* and several other lower court cases.

C. *Federal District Court Decisions*

Challenges to the validity of durational residency requirements for public office have been heard 11 times since 1970 in federal district courts by single judges and by specially constituted three-judge panels.

1. *Single-judge cases*

In *Stapleton v. City of Inkster*[253] a *city* charter provision establishing a 2-year durational residency and property ownership

248. *Id.*
249. *Id.*
250. United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).
251. *See* Baker v. Carr, 369 U.S. 186 (1962).
252. 474 F.2d 21 (3d Cir. 1973).
253. 311 F. Supp. 1187 (E.D. Mich. 1970).

requirement for membership on the city council was challenged with the property ownership requirement being invalidated because of its failure to meet either the compelling interest or the rational basis standard.[254]

In *Bolanowski v. Raich*[255] a 3-year durational residency requirement for mayoral candidates in Warren, Michigan was invalidated for failure to satisfy a "compelling municipal interest."[256] The asserted municipal interests were to assure that candidates "understand all the local problems, know the people of the community, and demonstrate local leadership to solve the problems";[257] to give voters "a chance to know . . . [the] character and reputation" of candidates;[258] and to meet the special knowledge requirements associated with Warren's " 'strong Mayor' form of Government."[259] The court believed that the compelling interest standard of review was appropriate because of the qualification's incursion on the right to vote.

When presented with the dual question of whether the asserted municipal interests are legitimate and whether the classification is tailored with sufficient precision, courts first should determine "if the exclusions are necessary to promote the articulated state interest."[260] Only if the court concludes that exclusions are precisely tailored to achieve the articulated state goal, need the court reach the question of "whether the interest promoted [by the classification] . . . constitutes a compelling state interest."[261] Many courts confuse the *Kramer* test by attempting to establish *both* that a classification is overly broad *and* that it fails to meet a compelling state interest. The court in *Bolanowski* correctly applied the *Kramer* test and decided that the 3-year durational residency requirement for public office did not satisfy the exacting standard of precision required of statutes which selectively distribute the franchise.[262] The 3-year dura-

254. Although the charter provision was invalidated under *Kramer*, *Cipriano* and *Turner*, the 2-year durational residency provision was not at issue since it was conceded that plaintiff met "all of the requirements except that of 'being a property owner of the City for two years.' " *Id.* at 1189, *quoting* § 5.1(a) of the Charter of the City of Inkster.

255. 330 F. Supp. 724 (E.D. Mich. 1971).

256. *Id.* at 726.

257. *Id.* at 730.

258. *Id.*

259. *Id.*

260. Kramer v. Union Free School Dist., 395 U.S. 621, 632 n.14 (1969).

261. *Id.*

262. 330 F. Supp. at 731.

tional residency requirement was not " 'tailored so that the exclusion of [plaintiff] and members of his class is necessary to achieve the articulated [municipal] goal.' "[263] Many adult citizens of the city may have lived their entire lives in Warren "without taking any interest whatsoever in municipal problems . . . [and would] not fit the articulated qualifications."[264] Others "may have lived in the City for 2½ years and gathered sufficient knowledge to be able to have a good understanding of all aspects of the municipality's difficulties."[265] Since the law failed for imprecision, the court did not need to question whether the asserted state interests were legitimate.

In *McKinney v. Kaminsky*[266] the district court invalidated a 5-year *district* durational residency requirement for *county commissioner*. At the time plaintiff sought election, he had been a resident of Montgomery County for almost 25 years but had lived for only 2 years in the Southwestern District from which he sought to be a candidate. Plaintiff was a resident and qualified elector of the district from which he sought election. The court concluded that the "right to seek and hold public office . . . is a property right . . . [and that] questions . . . of eligibility . . . should be resolved in favor of the candidate."[267] The court relied on *Shapiro*,[268] *Kramer*[269] and *Cipriano*[270] to support its position that although the "state's right to prescribe qualifications of one seeking public office [citation omitted] is a police power reserved to the states under the Tenth Amendment," invasion of the individual interest to equal protection of the laws requires "a showing of a compelling state interest. . . ."[271] Two state interests were asserted: the need for a county commissioner to be particularly knowledgeable concerning the geography and the roads in the part of the county in which he is to serve; and the need to prevent "unfair political competition from persons who have resided primarily in the more populous areas of the

263. *Id.*, *citing* Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969).
264. *Id.*
265. *Id.*
266. 340 F. Supp. 289 (M.D. Ala. 1972).
267. *Id.* at 294.
268. Shapiro v. Thompson, 394 U.S. 618 (1968). *See* notes 99-100 and accompanying text *supra*.
269. Kramer v. Union Free School Dist., 395 U.S. 621 (1969).
270. Cipriano v. City of Houma, 395 U.S. 701 (1969).
271. 340 F. Supp. at 294.

county."[272] The court took judicial notice of the fact that "other counties contain urban and rural areas of unequal population, and the Legislature has not seen fit to place residence requirements of several years in the district for which the commissioner offers for election in those counties."[273] The court also attached significance to the fact that of 13 major types of elective offices in Alabama, only four had *county* or *district* durational residency requirements.[274] Relying on the authority of *Stapleton*,[275] *Hadnott II*[276] and *Bolanowski*,[277] the district court concluded that the 5-year, *district* residency was repugnant to the equal protection clause as not justified by a compelling state interest.[278]

In *Alexander v. Kammer*[279] the district court invalidated city requirements that a candidate reside in the city for 5 years as a precondition of candidacy to the city commission. The governmental interests asserted in support of the classification were to "provide the electorate with the opportunity to become better acquainted with the candidate,"[280] and to "insure the candidate's familiarity with the city and its needs."[281] Although the asserted governmental interests were considered "worthwhile and even laudable," the court concluded that "the instruments chosen by the city to effectuate these goals are far too imprecise to justify their continued use."[282]

2. *Three-judge cases*[283]

Of the seven three-judge courts considering the constitution-

272. *Id.* Although commissioners were elected from each of three districts, they were elected by the "electorate of the whole county." The commissioner districts in *McKinney* were apparently malapportioned and could not have withstood scrutiny under Baker v. Carr, 369 U.S. 186 (1962).

273. 340 F. Supp. at 295.

274. *Id.* State durational residency requirements in Alabama range from 3 years for state senator or representative to 5 years for other offices, except governor and lieutenant governor which have 7-year residency requirements.

275. Stapleton v. City of Inkster, 311 F. Supp. 1187 (E.D. Mich. 1970).

276. Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd mem.*, 401 U.S. 968 (1971).

277. Bolanowski v. Raich, 330 F. Supp. 724 (E.D. Mich. 1971).

278. 340 F. Supp. at 296.

279. 363 F. Supp. 324 (E.D. Mich. 1973).

280. *Id.* at 326.

281. *Id.* at 326-27.

282. *Id.* at 327.

283. 28 U.S.C. § 2281 provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer

ality of durational residency requirements for public office, the holdings of three have been summarily affirmed by the United States Supreme Court. However, special circumstances involved in each of these three cases make the Supreme Court's disposition appropriate on grounds other than the constitutional merits. Only two of the seven three-judge courts have invalidated the challenged state durational residency requirements for public office.

The first three-judge court to dispose of a challenge to durational residency requirements for public office was *Hadnott v. Amos* (*Hadnott II*)[284] which, in dicta, and over the strong dissent of Judge Johnson, declared that states have a "compelling state interest in imposing a substantial pre-election residence requirement for circuit judges."[285] The three-judge court did "not decide whether the period of one year is too long" since the plaintiff "has at no time become a resident of the judicial circuit" and *non-residency* is clearly sufficient to deny a candidate access to the ballot.[286] The Supreme Court's summary affirmance of *Hadnott II*, thus, is precedential authority for the constitutional validity of requirements that candidates or officeholders be bona fide residents of their electoral districts, not for the validity of *durational* residency requirements.

Judge Johnson's dissent from the court's dicta with respect to the validity of durational residency requirements for the office of judge was premised on his solicitude for the "constitutionally protected right [of qualified citizens] to vote and to have their votes counted."[287] He reasoned that the "right of the candidate to seek public office is . . . so inextricably intertwined with the right of the voter to vote effectively that an infringement on one

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of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

For comprehensive treatment of the history and role of three-judge courts, *see* HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 967 (P. Bator, P. Meshkin, D. Shapiro & H. Wechsler ed. 1973) [hereinafter cited as HART & WECHSLER] *and* R. STERN & E. GROSSMAN, SUPREME COURT PRACTICE (1969).

284. 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd mem.*, 401 U.S. 968 (1971) [hereinafter cited as HADNOTT II].

285. *Id.* at 119.

286. *Id. Accord*, Kramer v. Union Free School Dist., 395 U.S. 621, 636-37 (1969).

287. 320 F. Supp. at 127 (Johnson, J., dissenting and concurring).

right will necessarily have a deleterious effect on the other."[288] Durational residency requirements in a *judicial district* make no sense when there are no comparable requirements for equally sensitive positions such as county sheriff and when the chief justice of the state supreme court regularly assigns circuit judges to circuits in which they have never resided.[289] Other safeguards are sufficient to protect the voters from dishonest candidates. For example, judges must be members of the Alabama Bar and "must have satisfied the strict standards of the Bar's ethics committee."[290] Second, most judicial candidates "will have been nominated by an established political party which will . . . have screened the candidate before nominating him."[291] Third, the election process itself provides sufficient safeguards to protect legitimate state interests. Opponents will be "only too pleased to publicize the fact that the candidate is a 'stranger' to the community" and the local media will be "only too willing to 'expose' . . . unfit [candidates]."[292] Judge Johnson also objected to the durational residency requirement because it established a "nonrebuttable presumption" which is "unsupportable" in fact.[293]

In *Mogk v. City of Detroit*[294] the three-judge court unanimously invalidated a Michigan law imposing a 3-year durational residency requirement on candidates for members of charter revision commissions.[295] The court declined to dismiss for mootness because the " 'problem is capable of repetition, yet evading review and the need for its resolution thus reflects a continuing controversy in the federal-state area.' "[296] The court questioned the continuing validity of *Snowden v. Hughes*[297] and *Pope v. Williams*[298] on which the defendants relied, stating that "vast changes have taken place in our way of living between the turn

288. *Id.* at 128.
289. *Id.* at 128-29.
290. *Id.* at 129.
291. *Id.*
292. *Id.* at 129-30.
293. *Id.* at 130.
294. 335 F. Supp. 698 (E.D. Mich. 1971).
295. During the pendency of the proceeding, the primary election was held and Mogk was defeated. Plaintiffs, as voters, thereafter amended their complaint to seek declaratory relief.
296. 335 F. Supp. at 699.
297. 321 U.S. 1 (1944).
298. 193 U.S. 621 (1904).

of the century and 1971."[299] The three-judge court found the 3-year durational residency requirement for membership on charter commissions unjustifiable in the context of the divergent durational residency requirements imposed on other state officers.[300] The great differences between durational residency requirements among officers of comparable responsibility and for the same offices over time provide little support for the rationality of such requirements. The *Mogk* court believed that the right to be a candidate was "inextricably intertwined" with the right to vote—that "a citizen has a right to vote effectively and . . . to support a candidate of his choice—including himself."[301] The court saw a "strange inconsistency" in the fact that a voter could move *intrastate* to a community in Michigan and vote in a charter election after 30-days durational residency. The court asked: "Does this mean that voters can learn in thirty days what a prospective candidate can learn in not less than three years?"[302] Moreover, the court challenged the tenuous assumption that mere residence in a community makes a person "more aware of its problems" or possessed of "better solutions" to community problems.[303] The court additionally questioned, "[W]ho is to say that a late arrival in the community is not best qualified to fill the office here in question?", noting that the "problems of one large city are basically no different from the problems of another."[304] The court admitted that a durational residency requirement for public office may have been rational in 1909 when the "rurally-oriented legislature conceived of cities as larger towns . . . in which most of the inhabitants knew each other."[305] A 3-year durational residency requirement, however, "has neither

299. 335 F. Supp. at 699.

300. When *Mogk* was decided, Michigan required only a 6-month residency for voting. A 2-year residency had been required for governor and lieutenant governor by the state constitutions of 1835, 1850 and 1908, but the 1963 constitution increased the residency requirement to 4 years. The Michigan secretary of state and attorney general are in the line of gubernatorial succession but the residential requirement for both offices is only *6 months*. All other offices in the state require only a *6 month* residency, whether township or state wide, legislative or judicial. And, of course, no state durational residency is required for election to the United States Senate or House of Representatives from Michigan. *Id.* at 699-700.

301. *Id.* at 700.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 701.

logic, reason nor experience to support it" in the contemporary urban context in which "tenants in a high-rise . . . building know very few of their fellow tenants, and . . . even in single-family dwelling neighborhoods, acquaintanceship rarely encompasses more than persons living within the city block."[306]

In *Draper v. Phelps*,[307] the three-judge court upheld the validity of a 6-month, *legislative district* durational residency requirement for membership in the Oklahoma House of Representatives. The *Draper* court adopted the strict scrutiny standard and proceeded to apply the *Dunn*[308] equal protection formulae advanced by Mr. Justice Marshall. However, the court did not agree with the contention that *Dunn's* holding on *voting* rights was dispositive of the asserted right of *candidacy* in *Draper*.[309] The *Draper* court asserted that it is "irrefutable that the likelihood of harm to the state interest is greater at the candidacy level than at the voter level."[310] But this factor would be relevant *only* if there were a clearly demonstrable relationship between candidate ability and durational residency—a relationship often asserted but never proved.

The *Draper* court posited a "compelling [state] interest in preventing frivolous and fraudulent candidacy . . . ."[311] But this admittedly compelling interest can be protected by means less intrusive upon the rights of voting, candidacy and travel.[312] Durational residency requirements discourage some candidacies which are neither frivolous nor fraudulent. Moreover, the state interest in discouraging frivolous or fraudulent candidacies is far *better* served by devices other than durational residency requirements.

The *Draper* court asserted that the state has a "compelling interest in requiring that those who expect to stand for . . . office . . . take the matter seriously and make plans for their candidacy in advance of the election date."[313] Here, too, the weakness of the

306. *Id.*

307. 351 F. Supp. 677 (W.D. Okla. 1972).

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

309. The "right to form political parties" under *Williams* and the "right of suffrage" under *Dunn* were declared "not [to] relate to impositions upon the *right of candidacy*." 351 F. Supp. at 680 (emphasis added).

310. *Id.* at 682.

311. *Id.* at 683.

312. *See, e.g.*, American Party of Texas v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 402 U.S. 431 (1971).

313. 351 F. Supp. at 683.

Draper court's position arises from the absence of proof of a relationship between the asserted state interest and the means chosen to effectuate the interest—in this instance, between a well-planned campaign and durational residency of the prescribed length. The court did not demonstrate that *residency* is essential to the early planning stages of a political campaign or that a well-planned legislative campaign can not be executed in less than 6 months, apparently failing to consider the fact that most successful political campaigns today peak in the weeks immediately preceeding the election. Moreover, it is plain that durational residency requirements for public office, in and of themselves, do not advance the state interest in well-planned, serious campaigns.

Relying extensively upon the *Hadnott II* decision that durational residency requirements are essential to allow "personal contacts" between candidates and voters,[314] the *Draper* court again failed to identify a necessary relationship between "voter contacts" and length of residency. Candidates with less time in the community may be more inclined to operate a highly personalized campaign, in part to overcome their lack of previous contacts. However, personalized political campaigns—for better or worse—have been undermined by the effectiveness of mass media technology. *Draper* and *Hadnott II* assume that personalized campaigns are essential in rural areas where there is allegedly a "paucity of television and radio stations and a lack of daily newspapers."[315] One must question whether, in fact, there remain areas of this country not served by television, radio and newspapers. If there be such areas, the personalized campaign would be an exigency of *political* life, and *legal* reinforcement through durational residency requirements would appear superfluous.

Whether there exists a legitimate state interest in affording voters the opportunity to acquire knowledge of the reputation of candidates in a nonpolitical, precampaign context is a more difficult problem. Such an interest was implied in *Draper*, *Hadnott II*, and in the dissent in *Thompson*.[316] This, perhaps, is the *one* state interest which can be served *only* by a durational residency requirement in excess of the probable campaign time frame. Absent a durational residency requirement, it is possible that voters would not know the candidate, except in a political context in

314. *Id.* at 683-85.
315. *See* notes 182-87 and accompanying text *supra*.
316. *Id.* at 685.

which the candidate's "true-self," presumably, could be concealed. Here, there is assuredly a rational relationship between the asserted state interest and the means chosen to implement that interest. At this point, it may be necessary to decide "whether the interest promoted by limiting the franchise constitutes a compelling state interest."[317] Unless the state interest in exposing voters to an opportunity to acquire knowledge of a prospective candidate's personal reputation in advance of the campaign is a compelling interest, it could not override the presumably compelling interests in the right to vote, to be a candidate or to travel. In any event, the balance should be struck in favor of the right to be a candidate. The ballot box provides an adequate remedy for any voter who doubts the integrity of or lacks sufficient knowledge regarding the reputation of a particular candidate.

The *Draper* court distinguished *Mogk*,[318] *Green*[319] and *McKinney*[320] because those cases involved durational residencies of 3, 2 and 5 years in contrast to Oklahoma's 6-month durational residency for the state House of Representatives. *Draper* relied on the Missouri court's approval of the 1-year durational residency for state senator in *Gralike*[321] and on New Mexico's approval of a filing fee of 6 percent of the first year's salary as a requirement of candidacy,[322] a holding of dubious authority after *Lubin v. Panish*.[323] The court also pointed to the fact that "[c]ounsel have not directed attention to any reported case in which a candidacy requirement of six months for those who covet election to state office has been held violative of the Equal Protection of the Law."[324]

In *Walker v. Yucht*[325] the court applied the reasonable basis

317. Kramer v. Union Free School Dist., 395 U.S. 621, 632 n.14 (1969).

318. *See* notes 294-306 and accompanying text *supra*.

319. *See* notes 237-51 and accompanying text *supra*.

320. *See* notes 266-78 and accompanying text *supra*.

321. *See* notes 205-07 and accompanying text *supra*.

322. *See* State *ex rel.* Apodaca v. Fiorina, 83 N.M. 663, 495 P.2d 1379 (1972).

323. 415 U.S. 709 (1974). In *Lubin* the Supreme Court held that

> in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.

Id. at 718.

324. Draper v. Phelps, 351 F. Supp. 677, 686 (W.D. Okla. 1972). *Draper* was decided before *Thompson v. Mellon*, which would have provided at least *dictum* for the requested authority. *See* notes 162-87 and accompanying text *supra*.

325. 352 F. Supp. 85 (D. Del. 1972).

test in upholding the validity of a 3-year *state* durational residency requirement for public office. Unlike *Hadnott II*, *Mogk* and *Draper* which involved *intrastate* migration only, *Walker* clearly involved the right of *interstate* migration, the plaintiff having moved to Delaware from Georgia less than 3 years prior to the election. The plaintiff in *Walker won* his political party's primary although he had lived in Delaware for only 17 months. The question of whether, under these circumstances, the case was moot was not before the district court since the court's decision was rendered from the bench on the day of argument when the controversy involving plaintiff was "clearly 'live.' "[326] The *Walker* court narrowly construed the Supreme Court holding in *Turner*[327] as pivoting upon "the nature of the *criterion* by which the state chose to classify—property ownership—not from the nature of the particular *interest* burdened—political candidacy."[328] The *Walker* court felt that its position was consistent with a careful reading of *Bullock*.[329] The *Walker* court concludes, as does this writer, that the appropriate analysis is, consistent with *Bullock*, to " 'examine in a realistic light the extent and nature of [the] impact on voters' "[330] of such requirements.

The *Walker* court examined the relationship between voting and candidacy and distinguished *Harper*[331] and *Dunn*[332] from the factual situation in *Walker* because in both *Harper* and *Dunn* "the state denies, completely, the right to vote to those failing to fulfill a prescribed condition—payment of a fee or length of residency."[333] In contrast, what is "*directly* restricted here is essentially candidacy, not voting."[334] However, the *Walker* court's interpretation of *Dunn* appears far too restrictive when one considers the reciprocal relationship between voting and candidacy. For

326. *Id.* at 88 n.3.

327. Turner v. Fouche, 396 U.S. 346 (1970). *See* note 85 and accompanying text *supra*.

328. 352 F. Supp. at 90 (emphasis in original).

329. The court quotes Chief Justice Burger's opinion in Bullock v. Carter, 405 U.S. 134, 142-43 (1972), stating that " 'the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review,' . . . and . . . that '[the] existence of [candidacy] barriers does not of itself compel close scrutiny.' " 352 F. Supp. at 90.

330. 352 F. Supp. at 91, *quoting* Turner v. Fouche, 396 U.S. 346 (1970).

331. Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

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

333. 352 F. Supp. at 91.

334. *Id.*

example, voting rights established by *Harper*[335] were soon applied to candidacy in *Bullock* and *Lubin*. The court in *Walker* erroneously restricted the *Williams v. Rhodes*[336] decision to those situations involving "the right to vote 'effectively,' "[337] and ignored the right of candidacy established by that decision. The court recognized that "the right to vote effectively is [not] burdened, in any constitutionally relevant sense, by *all* candidacy restrictions,"[338] but the weakness of its rationale results in part from a failure to explore durational residency requirements in the context of *Williams'* "right to vote effectively." It did not engage in the deliberative reasoning demanded by *Bullock*[339] but concluded "simply, that . . . the 'right to vote effectively' . . . does not mean . . . what the plaintiff asserts."[340] The only support for this conclusion was that durational residency requirements prejudice "no discrete class of voters."[341] The court asserted that the impact of durational residency requirements for public office is "unrelated to the wealth of the aspiring candidate or that of the voters supporting him," and was, thus, "[u]nlike *Bullock*."[342]

The alleged economic and ethnic heterogeneity of migrants is misleading.[343] In fact, the "movers" comprise discrete subgroups, among which are included poor, rural, Southern blacks moving to urban areas in the South, North and West; poor Southern urban blacks moving to the urban North and West; and poor Southern whites moving to the urban North and West. Jesse Walker's migration from Georgia to Delaware presents the problem in *economic* and *ethnic* terms similar to the context in which the *Walker* court interpreted *Bullock*—namely, as "merely a new application of the general axiom that statutory arrangements col-

335. In *Harper* the Supreme Court held that the equal protection clause forbids states from placing a price tag on the right to vote.

336. 393 U.S. 23 (1968). In *Williams* the Supreme Court struck down Ohio's election laws under the fourteenth amendment concluding that

> the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.

393 U.S. at 30.

337. 352 F. Supp. at 92.

338. *Id.*

339. *See* note 329 and accompanying text *supra*.

340. 352 F. Supp. at 92.

341. *Id.* at 93.

342. *Id.*

343. *See* notes 125-37 and accompanying text *supra*.

liding with the right to vote in such way as to burden the voting power of discrete minority groups must be closely scrutinized."[344]

The *Walker* court's conclusion that the issue is one of "determining *who* should make the adjustment"—popularly elected legislative bodies or federal courts which as "non-representative bodies . . . do not, and are not designed to, reflect democratic society."[345] The persuasiveness of the rational basis standard of review depends upon alternative access of adversely affected interests to the legislative process. However, the absolute barrier to the political candidacy of those not satisfying durational residency requirements for public office blocks a vital means of the affected group's access to the legislative process. The inhibition on political association coupled with limited access to the political process suggests the need for correspondingly more searching judicial scrutiny of durational residency requirements for public office.

The *Walker* court expressed a "disinclination to accept a reading of *Dunn* that would strike down all state statutes 'penalizing,' no matter how slightly, the right to travel interstate."[346] But the invalidation of durational residency requirements for public office is a logical extension of *Dunn* and would in no way strike down *all* state durational residency statutes affecting substantially different state interests such as divorce or hunting and fishing licenses. Nor does the willingness of the Supreme Court to approve a 30 or 50-day durational residency for voting when justified by legitimate state *administrative* interests afford any support whatever for the validity of a 3-year requirement as the *Walker* court implied.[347] The "candidate knowledge"[348] and "voter exposure"[349] interests were considered rationally related to legitimate state goals, although they admittedly produced a classification "both underinclusive and overinclusive."[350] But the court suggested that state classification is "not unconstitutional under the traditional equal protection test merely because it is not 'right on target.' "[351]

344. 352 F. Supp. at 93.
345. *Id.* at 99 (emphasis in original).
346. *Id.* at 97.
347. *Id.*
348. *Id.* at 98.
349. *Id.*
350. *Id.* at 99.
351. *Id.*

The *Walker* court's holding seems especially inconsistent with recent decisions in *Bullock* and *Lubin*. It is unwarranted to construe *Lubin* as narrowly as the *Walker* court did, since such a construction plainly contradicts the *Lubin* court's apparent concern with prohibitive candidate qualifications which "do not, in and of themselves, test the genuineness of a candidacy or the extent of voter support of an aspirant for public office."[352] Durational residency requirements for public office are constitutionally very similar to prohibitive filing fees because they "can effectively exclude serious candidates."[353] Durational residency requirements for public office also share the vice of prohibitive filing fees in that they are an absolute barrier to some aspirants who are denied "any alternative means of gaining access to the ballots."[354]

In *Chimento v. Stark*[355] a three-judge district court upheld a 7-year durational residency requirement of the New Hampshire state constitution for the office of governor. The critical factor in *Chimento* was that plaintiff's name *appeared* on the ballot in his party's primary where he failed to obtain the nomination. The plaintiff then decided to run as an independent and the Secretary of State declined to accept his filing papers as an independent candidate. There were adequate alternative, independent state grounds to justify exclusion of Chimento from the 1972 New Hampshire general election ballot. (1) States have a legitimate interest in preserving the integrity of their electoral system by excluding defeated primary candidates such as Chimento from running as independents in the general election.[356] (2) Chimento's declared intention to run in the 1974 election was not ripe and could not properly have been considered,[357] although the state indicated it would not allow Chimento to file in 1974 since he would still not have met the 7-year residency requirement.[358]

The *Chimento* court concluded that a 7-year durational residency requirement was only "a minimal infringement upon the ability of the plaintiff to participate in the election process . . .

352. Lubin v. Panish, 415 U.S. 709, 717 (1974).
353. *Id.* at 718.
354. *Id.*
355. 353 F. Supp. 1211 (D.N.H. 1973).
356. *See* Storer v. Brown, 415 U.S. 724 (1974).
357. *See* Zwickler v. Koota, 389 U.S. 241 (1967).
358. 353 F. Supp. at 1213.

[since it only] *delays* . . . eligibility . . . [and] is not a complete barrier."[359] Although *some* minimal durational residency requirement for public office may be consistent with legitimate state interests, the approval of a 7-year requirement appears to impose an altogether intolerable and unreasonable burden upon voting rights and the right to be a candidate. The fact that the durational residency requirement for governor of New Hampshire dated from "the very beginning of this nation [,] . . . goes back to 1784 and was never challenged until now,"[360] obviously influenced the court's holding. But the traditional argument is no stronger as applied to durational residency for public office than other archaic but recently challenged electoral practices concerning voting, filing fees for candidacy, legislative apportionment, and property restrictions on suffrage. Long continued practice, alone, affords no proof of rationality. The state interests allegedly served by the 7-year durational residency requirement were the "knowledgeable candidate" and "voter exposure" interests. The three-judge court also concluded that the relationship between the residency requirement and the right to travel was too "indirect and remote . . . [and] far too attenuated" to constitute an infringement on the right to travel.[361] In approving a 7-year durational residency requirement, the *Chimento* court is seriously out of step with the recent trend of state and federal jurisprudence. Although *Chimento* ostensibly applied the strict scrutiny standard, the court's opinion lacks the careful balancing of interests contemplated by *Kramer*[362] and *Dunn*.[363]

In *Headlee v. Franklin County Bd. of Elections*[364] the three-judge court invalidated a 1-year *city* durational residency requirement for public office in the village of Dublin, Ohio, thereby allowing plaintiff to occupy the seat she had won in a recent municipal election. In *Headlee*, plaintiff had not moved to, but lived on, land annexed to the village less than 1 year prior to the village election. Thus, the three-judge court's decision could not have been predicated on the right to travel since annexation of additional land by municipal corporations can hardly be said to

359. *Id.* at 1215-16.
360. *Id.* at 1216-17.
361. *Id.* at 1218.
362. Kramer v. Union Free School Dist., 395 U.S. 621 (1969).
363. Dunn v. Blumstein, 405 U.S. 330 (1972).
364. 368 F. Supp. 999 (S.D. Ohio 1973).

involve a right to travel. However, the three-judge court concluded that strict scrutiny of the challenged exclusion was appropriate because of the adverse impact of the candidate residency requirement on the exercise of the franchise.[365] The court believed that the challenged residency requirement infringed first amendment freedoms of expression and association and "unnecessarily restrict[ed] voter choice."[366] The state asserted an allegedly compelling interest in "preventing frivolous, fraudulent or unqualified candidacies for election,"[367] but the court concluded that the means of regulation were fatally overinclusive and underinclusive in that they "exclud[ed] both legitimate as well as frivolous candidates . . . [and] fail[ed] to insure that only qualified candidates seek public office."[368] The court premised its decision on the ethical norm that whether a candidate has "the necessary skill and knowledge of the community is a question ultimately for the voters to decide."[369]

On September 24, 1974—only 1 day after the South Carolina Supreme Court's decision in *Ravenel*—the complaint in *Kanapaux v. Ellisor*[370] was filed in federal district court by a voter seeking declaratory and injunctive relief against the enforcement of the 5-year durational residency requirement for governor on federal constitutional grounds.[371] A three-judge court denied relief,[372] and the United States Supreme Court summarily affirmed.[373] *Kanapaux* provides no more authority for the validity of durational residency requirements for public office than do *Chimento*[374] or *Hadnott II*.[375] The court in *Kanapaux* thought that

365. *Id.* at 1003.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. Civil No. 74-1356 (D.S.C. Sept. 26, 1974), *aff'd mem.*, 419 U.S. 891 (1974).

371. Complaint at § 12(e), Kanapaux v. Ellisor, Civil No. 74-1356 (D.S.C. Sept. 26, 1974), *aff'd mem.*, 419 U.S. 891 (1974).

372. The three-judge court in *Kanapaux* convened and granted an expedited hearing on September 26, 1974 due to the "importance of time in relation to the electoral process of the State of South Carolina." The defendants moved to dismiss the complaint upon the grounds that the South Carolina Constitution of 1895 art. IV, § 2, was not repugnant to the federal constitution and was justified by a "compelling state interest." The court treated defendant's motion as one for summary judgment and in a brief order granted summary judgment to defendants.

373. 419 U.S. 891 (1974).

374. *See* notes 355-63 and accompanying text *supra*.

375. *See* notes 284-93 and accompanying text *supra*.

the Supreme Court's summary affirmance of *Chimento* was "substantially conclusive" of the issue before it.[376] The district court declared that the 5-year requirement was reasonable since its "impact is not to say he [Ravenel] cannot serve in the . . . highest office; it simply means he may not serve now."[377] The deferred time frame within which the district court measured the impact of durational residency requirements for public office is inconsistent with *Williams*[378] and ignores the critical existential significance of time in a political context. The district court attempted to justify the 5-year durational residency requirement on the ground that "an able man with a winning way about him can move from one place to another when he had a bad reputation in the place he came from, [and] it sometimes takes quite some time for that reputation to catch up with him."[379] Although durational residency requirements may serve that state interest in a crude way, the state interest might be equally served by a requirement far less restrictive than 5 years. The 5-year requirement is unacceptable because it is not precisely tailored to achieve the asserted state interest in a manner least disruptive of fundamental political and associational rights. The district court's decision in *Kanapaux*, however, can be justified on other grounds. Ravenel's failure to assert his federal claims in *Ravenel v. Dekle*[380] could properly be regarded as a waiver of those claims,[381] as the state attorney general argued.[382]

The abstention cases help illuminate the fatal legal errors

376. Order at 1(a), Kanapaux v. Ellisor, Civil No. 74-1356 (D.S.C. Sept. 26, 1974), *aff'd mem.*, 419 U.S. 891 (1974). The district court concluded that the 5-year durational residency requirement was not unconstitutional because of "the guidance that we get from what the Supreme Court has said, and because they did so recently, and on the merits of the case itself." *Id.* at 3(a).

377. *Id.* at 2(a) (emphasis added).

378. Williams v. Rhodes, 393 U.S. 23 (1968).

379. Order at 2(a), Kanapaux v. Ellisor, Civil No. 74-1356 (D.S.C. Sept. 26, 1974), *aff'd mem.*, 419 U.S. 891 (1974).

380. 265 S.C. 364, 218 S.E.2d 521 (1975).

381. *See* note 223 and accompanying text *supra*.

382. The state attorney general contended in the Supreme Court:

> the opportunity to assert such [federal] claims was expressly afforded by the [South Carolina Supreme] Court but Ravenel elected not to pursue them . . . . Neither he nor any other voter supporting his candidacy should now be heard to complain about the alleged unconstitutionality of South Carolina's gubernatorial durational residency requirement.

Appellees' Motion to Affirm at 8-9, Kanapaux v. Ellisor, Civil No. 74-1356 (D.S.C. Sept. 26, 1974).

made in *Ravenel v. Dekle* and the deficiencies of the federal complaint in *Kanapaux*. The failure to apprise a state court of a claimed federal right, so that the state court may render a decision upon state law in the light of the federal claim, precludes subsequent assertion of the federal right in the federal courts.[383] In *Government & Civic Employees Organizing Committee, CIO v. Windsor*[384] the Supreme Court vacated a district court decision because the

> bare adjudication by the Alabama Supreme Court . . . does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court. If appellants' freedom of expression and equal protection arguments had been presented to the state court, it might have construed the statute in a different manner.[385]

The Missouri Court's construction of the 10-year durational residency requirement for governor in *Missouri ex rel. King v. Walsh*,[386] in the light of the federal constitutional issues, strongly suggests the vitality of the *Windsor* court's logic. Where a party "selects to seek a complete and final adjudication of his rights in the state courts,"[387] as Ravenel did in *Ravenel v. Dekle*, then jurisdiction of the federal district court to hear federal questions would be "purely formal,"[388] and federal review is cognizable in the Supreme Court which has jurisdiction "to review directly . . . [a] final state court judgment."[389] The only way to preserve a right to litigate a federal claim in the district court subsequent to a final judgment by a state court of last resort is by

> making on the state record the "reservation to the disposition of the entire case by the state courts." . . . That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions.[390]

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383. *See* Government & Civic Employees Organizing Comm., CIO v. Windsor, 353 U.S. 364, 366 (1957).

384. *Id.*

385. *Id.*

386. *See* notes 208-14 and accompanying text *supra*.

387. NAACP v. Button, 371 U.S. 415, 427 (1963).

388. *Id.*

389. *Id.*

390. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 421-22 (1964).

In the absence of such a reservation by Ravenel in *Ravenel v. Dekle*, it would have been proper for the federal district court in *Kanapaux* to have dismissed the complaint upon *Windsor* grounds. Ravenel's failure to make the reservation in *Ravenel v. Dekle*, or to assert his federal claims and seek direct review in the Supreme Court, in effect, made *Ravenel v. Dekle* res judicata with respect to Ravenel's federal claims.[391]

The summary affirmance by the Supreme Court in *Kanapaux* could also have been compelled by the mootness doctrine. Application of that doctrine to election cases is not new.[392] Upon the decision of the South Carolina Supreme Court in *Ravenel v. Dekle*, Ravenel became "otherwise . . . disqualified" within the meaning of South Carolina law,[393] thereby authorizing the state Democratic executive committee to fill the vacancy. Whatever federal claims Ravenel could have asserted to remain on the ballot were thereby mooted, since there is no federal constitutional right to nomination of candidates for public office by a primary election; selection of party nominees by democratically constituted conventions or state party executive committees is constitutionally sufficient.

Consideration of comity and federalism may also explain the

391. Voters unquestionably have standing to assert the rights of a candidate to ballot access. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968); HART & WECHSLER at 184 (1973). *Williams* is distinguishable from *Kanapaux* in that Governor Wallace did not waive *his* federal claims.

392. *See, e.g.*, Hall v. Beals, 396 U.S. 45 (1969) *and* Golden v. Zwickler, 394 U.S. 103 (1969). *But cf.* the "capable of repetition yet evading review" doctrine of Dunn v. Blumstein, 405 U.S. 330, 333 n.2. (1972) *and* Moore v. Ogilvie, 394 U.S. 814, 816 (1969).

393. S.C. CODE ANN. § 23-266 (Cum. Supp. 1975) provides:

> If a party nominee dies, withdraws or otherwise becomes disqualified after his nomination and sufficient time does not remain to hold a convention or primary to fill the vacancy or to nominate a nominee to enter a special election, the respective State or county party executive committee may nominate a nominee for such office, who shall be duly certified by the respective county or State chairman. *Provided*, that where such a party nominee is unopposed each political party registered with the Secretary of State shall have the privilege of nominating a candidate for the office involved. If the event occurs forty-five days or more prior to the election such nomination must be certified not less than thirty days prior to the election. If the event occurs less than forty-five days prior to the election such office shall not be voted on until the first Tuesday in the month following such election and such nomination must be certified not less than fifteen days prior thereto.

Rep. W.J. Bryan Dorn, whom Ravenel had beaten in the primary, became the Democratic nominee for governor of South Carolina. He subsequently lost the general election to the Republican nominee, James Edwards, who became the first Republican governor of South Carolina in this century.

Court's summary affirmance of *Kanapaux*. Comity involves "a proper respect for state functions, a recognition of the fact that the entire country is made of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions . . . ."[394] The concept of "Our Federalism" presupposes a "sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[395] The doctrine of equitable restraint developed in *Younger* and reflecting federal reluctance to intervene in a historically recognized state sphere of interest—criminal prosecution—is, likewise, applicable to federal judicial intervention in the state electoral process. Writing for the Court in *Oregon v. Mitchell*,[396] Mr. Justice Black observed that "[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine . . . the nature of their machinery for filling local public offices."[397] State power over state elections, although admittedly very great,[398] is nonetheless subject to considerable federal regulation as this writer has attempted to point out. State power over state elections, however, is limited only by forms of discrimination prohibited by the constitution.

The state interest in the stability of its electoral process is quite substantial.[399] Federal judicial policy in election cases is strongly influenced by the concern that court orders should not have "a serious disruptive effect" upon the election process.[400]

394. Younger v. Harris, 401 U.S. 37, 44 (1971). Courts of equity have traditionally shown less reluctance to intervene in civil cases than in criminal cases since the "offense to state interests is likely to be less in a civil proceeding." *Id.* at 55 n.2 (Stewart, J., joined by Harlan, J., concurring).

395. 401 U.S. at 55 n.2 (Stewart, J., joined by Harlan, J., concurring). Since the "offense to state interests is likely to be less in a civil proceeding," the equitable restraint called for may be less than in criminal cases. *Id.*

396. 400 U.S. 112 (1970).

397. *Id.* at 156.

398. *See, e.g.*, Lassiter v. Northampton Election Bd., 360 U.S. 45 (1959) (literacy requirement on suffrage upheld).

399. *See, e.g.*, American Party of Texas v. White, 415 U.S. 767 (1974) *and* Storer v. Brown, 415 U.S. 724 (1974).

400. Matthews v. Little, 366 U.S. 1223, 1224 (1969). *Accord*, Williams v. Rhodes, 393 U.S. 23 (1968).

The Court wishes to avoid "the confusion that would attend . . . a last-minute change [which] poses a risk of interference with the rights of other . . . citizens, for example, absentee voters."[401] The closer the decision is to the election the greater must be the courts' concern for the "extremely difficult . . . [state burden] to provide still another set of ballots."[402] Election cases often strain judicial resources sorely because they leave too little operating time for the multifarious time limits and time consuming functions of the judicial process.

It would be difficult to conceive of a more serious disruption of the state electoral process than the South Carolina Supreme Court's decision in *Ravenel.* Had Ravenel asserted his federal claims in the state court, he would have had a right to Supreme Court review under 28 U.S.C. § 1257. There would have been adequate time for docketing an appeal, oral argument and a decision on the merits, especially in view of the fact that state law fortuitously provided for a month extension of the election when the disqualifying event occurs within 45 days of the election, as it did in Ravenel.[403] Once a successor was lawfully nominated by the state executive committee and certified by the state chairman, a federal decree granting the relief sought in *Kanapaux* may have had a serious disruptive effect upon the state electoral process. Federal intervention would appear especially inappropriate in view of Ravenel's stipulation in the state court limiting his claims to state issues and thereby waiving his federal claims. In contrast, had Ravenel asserted his federal claims in a timely manner, the United States Supreme Court could have reached the merits of his claim on appeal from the state supreme court without serious disruption of the electoral process.

CONCLUSION

Durational residency requirements for public office significantly dilute fundamental rights which deserve, and have received, judicial protection: the right to vote, the right of political association and the right to travel. Such requirements can and should be invalidated whenever they interfere with the exercise of these fundamental constitutional rights. The states are better

401. Williams v. Rhodes, 393 U.S. 23, 35 (1968).
402. *Id.*
403. *See* Jenness v. Fortson, 403 U.S. 431 (1971).

served by directing their attention to the prevention of electoral fraud and campaign "dirty tricks" than to restricting access to the ballot for new residents.

The proscription of lengthy durational residency requirements would not jeopardize the states' "legitimate interest in regulating the number of candidates on the ballot."[403] The state interest, if not the state duty, "to protect the integrity of its political processes from frivolous or fraudulent candidates"[404] would not be compromised. The legitimate state interest in "the stability of its political system" and the integrity of its primary elections and political party system[405] would remain inviolate.

There may be no need for the Supreme Court to invalidate residency requirements for public office per se, since the substantiality of the constitutional claim generally varies with the length of durational residency required. The type of public office may also be relevant to the length of acceptable durational residency requirements. At the threshhold level—for example, 50 days or less—the constitutional claims against durational residency requirements may be de minimis since most serious candidates would meet such minimal requirements.[406]

Just as the Court's decision invalidating the patently excessive filing fees in *Bullock* was not dispositive of a challenge to the more modest fees in *Lubin*, a decision invalidating a 5 or 7-year durational residency requirement for public office would not be dispositive of challenges to far less restrictive requirements—for example, the 6-month durational residency requirement for membership in the Oklahoma House of Representatives recently upheld by a three-judge federal court.[407] The states have a *compelling* interest in obtaining the names of candidates in sufficient time to accommodate the printing and distribution of ballots. The states also have a substantial interest in the residency of the candidate during the brief time preceding the election rea-

404. Bullock v. Carter, 405 U.S. 134, 145 (1972).

405. Storer v. Brown, 415 U.S. 714, 736 (1974). Approval by the Court of the 1-year disaffiliation provision in *Storer* does not provide authority for the constitutionality of durational residency requirements for public office because the 1-year waiting period in *Storer* was "expressive of a general state policy aimed at maintaining the integrity of the *various routes to the ballot*"—not with a blanket exclusion from the ballot. *Id.* at 733 (emphasis added).

406. Consider, however, the case of the returning veteran or college graduate who may not even satisfy a 90-day durational residency requirement for candidacy.

407. Draper v. Phelps, 351 F. Supp. 677 (W.D. Okla. 1972).

sonably necessary for the conduct of a political campaign. Any additional durational residency should be closely scrutinized because of its adverse consequences on voting rights and the associational rights of prospective candidates.[408]

Two factors are relevant to the validity of a durational residency requirement—its length and the character of the right or privilege affected. In *Sosna* the Court affirmed the validity of a 1-year state durational residency requirement as a condition precedent to filing for divorce. Conversely, the Court has invalidated 1-year state durational residency requirements for welfare (*Shapiro*), voting (*Dunn*) and medical services (*Maricopa County*). The length of a durational residency requirement is a critical factor in determining its validity because length has a significant impact on the severity of the penalty on the burdened substantive right and on the right to travel. Thus, considerations which led the Supreme Court to uphold the validity of the 1-year durational residency requirement in *Sosna* may well be insufficient to uphold the validity of a 2-year state durational residency requirement for divorce.[409] The character of the right or privilege burdened by a durational residency requirement is equally important. Judicial acceptance of the reasonableness of 1-year durational residency requirements for divorce is hardly persuasive regarding the validity of similar requirements for political candidacy. A penalty on the right to travel affecting access to the courts in divorce actions may be offset by countervailing legitimate state interests not present in cases involving political rights, welfare or medical services.

Recent litigation contains important messages for legal counsel in election cases. Federal rights *can* be waived by candidates. The *timely* assertion of claims may be essential to avoid mootness, yet claims will not be entertained until ripe. The federal courts have concurrent jurisdiction over federal challenges to the validity of durational residency requirements for public office under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4). Absent a lack of clarity in state law sufficient to support federal abstention, counsel can elect between state or federal forums. The Rave-

408. *Compare* Burns v. Fortson, 410 U.S. 686 (1973) *and* Martson v. Lewis, 410 U.S. 675 (1973), *with* Dunn v. Blumstein, 405 U.S. 330 (1972). *Cf.* Storer v. Brown, 415 U.S. 714 (1974), *and* Rosario v. Rockefeller, 410 U.S. 752 (1973).

409. 2 ELLIOT'S DEBATES 257 *quoted in* Powell v. McCormack, 395 U.S. 486, 547 (1969).

nel candidacy in South Carolina demonstrates the folly of the expenditure of large sums of money or the equally immense involvement of the time and energy of thousands of supporters with a legal cloud hanging over a political candidacy.

The impact of durational residency requirements for public office is obviously sufficient to evoke strict scrutiny. It is difficult to imagine a law with a more devastating impact on the political process than one which denies ballot access to the gubernatorial nominee of a major political party democratically elected by thousands of state voters. Strict scrutiny of durational residency requirements for public office in excess of 1 or 2 years may not be necessary since such laws may fail to satisfy even the less stringent, reasonable basis test. The more demanding test should be employed, nevertheless.

The preferred and most effective means of limiting access to public office in a democratic system is the ballot box. Whenever durational residency requirements for public office interfere substantially with the right of the people to vote for candidates of their choice, then such requirements are incompatible with democratic government and inconsistent with equal protection of the laws. The absence of state durational residency requirements for the United States Senate and House of Representatives for the past 184 years should offer sufficient proof that such requirements do not serve a compelling governmental interest. When the Supreme Court eventually gives plenary consideration to a case involving the constitutionality of durational residency requirements, it would do well to recall Hamilton's words "that the people should choose whom they please to govern them."[410] As Madison observed at the Constitutional Convention, "this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself."[411]

410. *Id.*
411. *Id.*