RESIDENCY AND DEMOCRACY: DURATIONAL RESIDENCY REQUIREMENTS FROM THE FRAMERS TO THE PRESENT

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ABSTRACT

After years of struggle, we no longer require property ownership, employ poll taxes, or force citizens to take literary tests to vote. The franchise is now also open to women, African Americans, and other groups that were previously disenfranchised. However, our states still prevent citizens from voting if they fail to meet a durational residency requirement. The states also impose lengthy durational residency requirements on candidates seeking public office. This Article examines the history of America's durational residency requirements. It looks at the debates of the framers at the Constitutional Convention, at how state durational residency requirements were broadened in response to migration in the 1800s, and at how durational residency requirements were narrowed by the federal government and the Supreme Court in the 1970s. The result left a system in which durational residency requirements impact voters and candidates differently, and in which these requirements differ at the state and federal levels. In most states, durational residency requirements for voters have been substantially curtailed, while they remain on the books for candidates. To show how this impacts politics, this Article examines several high-profile durational residency contests. It also probes whether these requirements may ever be justified in American democracy.

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I. INTRODUCTION

In American democracy today, most historic restrictions on voting have been removed. The states no longer require their citizens to own property, pay a poll tax, or take a literary test before they can vote. The franchise has also been broadened to include women, African Americans, and other groups that were previously disenfranchised. Our country's democratic self-image has long been firmly rooted in the belief that the United States has continually expanded suffrage for all of its citizens who desire the right to vote. As the Congressional Quarterly's *Guide to U.S. Elections* explained thirty years ago, with only a touch of hyperbole, "[B]y the 200th anniversary of the nation the only remaining restrictions [on the franchise] prevented voting by the insane, convicted felons and otherwise eligible voters who were unable to meet short residence requirements."[1]

It is well known among scholars that many states disenfranchise the mentally unfit, those convicted of felonies, and a third group that often goes unmentioned, non-citizen aliens. The reasons these groups lack voting rights are rooted in American history. But who constitutes the group of "eligible voters" who are unable to vote because they fail to meet "short residence requirements"? It turns out that almost every state requires its new citizens to meet a short residence requirement before they can vote. Known as a *durational residency requirement*, the states also impose these qualifications on those who seek office. This is a phenomenon, however, that has not been adequately studied, and it remains widely under-theorized.

Geographical residency is part of democracy. Politicians are elected from geographical districts, and they represent the people of those districts in office. A United States Senator is elected to represent the people of his state. A Congressman represents the people of a particular district in that state. In turn, a citizen from a geographically bounded state votes for a Senator who will represent him, just as a resident of a geographically bounded district votes for that district's Congressman. No one would seriously advocate for the residents of a different state or district to vote for these government officials. What is less appreciated is that a *new* resident of the state who wishes to vote for his preferred candidate may often not be able to do so until he first meets a durational residency requirement. This means that a citizen not only has to reside in a certain geographical district to vote for its representatives, but that he must also demonstrate his legal residence there for a certain, set period of time.

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1. CONGRESSIONAL QUARTERLY, GUIDE TO U.S. ELECTIONS 324 (2d ed. 1985); *see also* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES, at xx (rev. ed. 2009) (quoting the *Congressional Quarterly* and positing that its statement was made with hyperbole).

Durational residency requirements exist for candidates as well. After all, democracy involves not only the right to cast a free vote, but also the right to run freely for elected office. Just as voters have to satisfy certain durational residency requirements before they can cast a ballot in a given state or district, so too do politicians have to meet durational residency requirements in most states and municipalities before they can run for office.[2] The durational residency hurdles that political candidates face, however, often look very different from those that voters encounter. The durational residency requirements for politicians are typically much longer in length, and they have not been subject to the same kinds of constitutional challenges as those for voters, other than in rare circumstances.

As a society, we take durational residency requirements for granted. Only a few scholars have ever examined durational residency requirements in any serious or systematic way. Even then, most scholars have argued against them.[3] Preventing citizens from voting because they live in the right district but have not lived there long enough is seen as being anti-democratic, while preventing candidates who do not meet a durational residency qualification from running for office is viewed as little more than an attempt to prevent carpetbagging. This, at least, is what the literature on durational residency requirements argues.[4] Yet states and municipalities have not always viewed things this way. Instead, they have advanced many reasons for preserving durational residency requirements. When one scratches the surface, durational residency requirements turn out to be more complicated than they appear. They also have a long history in American jurisprudence, one that dates all the way back to the colonies.

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2. For some offices, these durational residency requirements can be quite lengthy. This is particularly true for state governors. For example, Missouri and Oklahoma's state constitutions require ten years of residency for a governor. *See* MO. CONST. art. IV, § 3 (Missouri); OKLA. CONST. art. VI, § 3 (Oklahoma). Other states require seven years of residency. *See* MASS. CONST. pt. II, ch. 2, § 1, art. II (Massachusetts); N.H. CONST. pt. II, art. XLII (New Hampshire); N.J. CONST. art. V, § 1, para. 2 (New Jersey); PA. CONST. art. IV, § 5 (Pennsylvania); TENN. CONST. art. III, § 3 (Tennessee). Three states require six years. *See* DEL. CONST. art. III, § 6 (Delaware); GA. CONST. art. V, § 1, para. IV (Georgia); KY. CONST. § 72 (Kentucky); *see also* discussion *infra* Section III.A.

3. *See, e.g.*, Michael J. Pitts, *Against Residency Requirements*, 2015 U. CHI. LEGAL F. 341, 341 (2015) (stating that "residency requirements are one aspect of election law that does not serve the electorate and should be eliminated as a condition for obtaining and holding elected office"); Frederic S. LeClercq, *Durational Residency Requirements for Public Office*, 27 S.C. L. REV. 847, 914 (1976) ("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.").

4. *See, e.g.*, Pitts, *supra* note 3, at 353 (explaining how a "possible benefit of residency requirements . . . is to prevent carpet bagging").

This Article seeks to examine America's durational residency requirements in historical and comparative terms. In doing so, it aims to make the case that these requirements are not anti-democratic and that, in some circumstances, they are both necessary and essential for democracy. The few scholars who have examined durational residency requirements in the past have tried to argue against them, but without appreciating their place in our history. This Article seeks to blend history and modern law in a way that no one has. It argues that durational residency requirements have their place in democratic politics. Its purpose is to explain the origins of our durational residency requirements, to chronicle their history, and to probe the contours of when they may be justified in American democracy.

There are various kinds of durational residency requirements. They differ from one another in terms of their length, how they are imposed, and whom they affect. There are also different policies behind them. Perhaps the greatest distinctions among durational residency requirements concern whom they affect: voters or candidates. At one time, the durational residency requirements for voters were extensive, yet they have in recent years been severely curtailed. Meanwhile, the residency qualifications for political candidates, at least in the individual states, often remain lengthy to this day.

This Article proceeds as follows. Part II examines the history of our durational residency requirements, going all the way back to the colonies and the Constitutional Convention. Part III focuses on durational residency requirements for voters. It explains how these qualifications blossomed in the states in the 1800s before being severely narrowed by Congress and by the Supreme Court in the 1970s. Part IV turns to an examination of durational residency requirements for candidates. It highlights the mismatch that exists between the state level, where durational residency requirements persist, and the federal level, where durational residency requirements do not exist. It also examines several high-profile residency challenges, including those faced by Rahm Emanuel when he ran for mayor of Chicago, by Zephyr Teachout when she challenged Andrew Cuomo in the Democratic primary for governor of New York, and by Hillary Clinton when she ran for the Senate from New York. Part V examines the democratic justifications for durational residency requirements.

II. A HISTORY OF DURATIONAL RESIDENCY REQUIREMENTS

A. In the Colonies

The requirement that a person has to live in a state for a certain period of time before he can participate in the democratic process is so ingrained in the American psyche that most of us fail to question it. Durational residency requirements have a long history that can be

traced back to before the time of the country's founding. Indeed, these requirements were enshrined in many of our founding documents, including in many state constitutions. They were also hotly debated by the framers at the Constitutional Convention.

For more than a decade before the framers of the Constitution met in Philadelphia, the colonies had crafted their own unique voting rules. These laws were largely shaped by the knowledge that the colonists had of how representation worked in England.[5] The English system of democracy was initially designed to represent land. As Professor James Gardner explains, in feudal England landholders held estates under the condition that they would provide financial assistance to the crown.[6] Only those who owned land could be summoned to Parliament for the purpose of giving their consent to being taxed by the King. As the rise of commerce expanded, the English monarchs decided that it would be in their interest to invite representatives of various town and boroughs, where merchant wealth was located, to join them in Parliament. However, the system under which Parliament represented a taxed unit of land persisted.[7]

The English model was eventually adopted in the American colonies, where new colonial legislatures also initially allocated their seats to territorial units. In Massachusetts, the representatives who held seats in the colonial legislature represented towns; in Virginia, they represented plantations; and in South Carolina, they represented parishes.[8] By the time of the American Revolution, the Founding Fathers were familiar with this territorial system of representation and fully accepted it.[9] This is why only property owners, most of whom happened to be white and male, had the right to vote. Property owners were thought to have a "stake in society."[10] Like their English forbearers, they were considered to be committed members of the community with a vested interest in public policy, especially regarding matters of taxation.[11] Those who owned land were thought to have sufficient independence to make their own sound judgment on matters of governance.[12] The idea that some men were in "so mean a situation" that they "had no will of their own," a phrase attributed to Blackstone, was heard often during the Founding Era and applied to

5. *See* KEYSSAR, *supra* note 1, at 4.

6. James A. Gardner, *Partitioning and Rights: The Supreme Court's Accidental Jurisprudence of Democratic Process*, 42 FL. ST. U. L. REV. 61, 66-67 (2014).

7. *Id.* at 67.

8. *Id.*

9. *Id.* at 68.

10. KEYSSAR, *supra* note 1, at 4.

11. *Id.* at 4-5.

12. *Id.* at 5.

those who did not own land.[13] The colonists believed that the franchise should not extend to such persons. The fact that only landowners could vote was a natural consequence of this view.

During the Founding Era, suffrage was treated as a state constitutional issue. In all of the states, apart from one, the rules of voting were found in state constitutions, and not, as they would be hundreds of years later, in statutes or municipal codes. Early state constitutions were replete with durational residency requirements, not only for voting but also for seeking public office.[14] In many of the colonies, political candidates for office had to prove that they resided in the colony for a certain number of years before they could seek election.[15] Since the colonies were independent from one another, each sought to restrict its political community to those who held a true interest in the colony's affairs. A clause addressing each state's durational residency requirements was a common feature in state constitutions of the era, and it helped accomplish this goal. State durational residency requirements would later become more controversial, but early on, they were deeply rooted in the American colonial experience.[16]

B. At the Constitutional Convention

The records and debates of the Constitutional Convention provide us with some insight into what our Founding Fathers thought of durational residency requirements. During the debates that took place in Philadelphia in 1787, three distinct justifications were advanced for why these requirements were needed.[17] The first was to assure that candidates were knowledgeable about local matters.[18] The second was to prevent wealthy foreign nations from sending over emissaries to the United States and having them purchase their way to public office.[19] The third was to discourage wealthy men from neighboring states from seeking public office elsewhere after they had failed to secure election in their own state.[20] This last practice was

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13. *Id.* at 9.

14. *See* Frederic S. LeClercq, *The Emerging Federally Secured Right of Political Participation*, 8 IND. L. REV. 607, 612-13 (1975).

15. *See id.* at 613.

16. *See, e.g.*, A. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 135-36 (1905) (explaining that South Carolina imposed a durational residency requirement on suffrage as early as 1693).

17. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 216-19, 235-39 (Max Farrand ed., 1911) [hereinafter 2 RECORDS OF THE FEDERAL CONVENTION].

18. *Id.* at 216 (George Mason of Virginia); *id.* at 217 (John Rutledge of South Carolina).

19. *Id.* at 216 (George Mason of Virginia) ("It might also happen that a rich foreign Nation, for example Great Britain, might send over her tools who might bribe their way into the Legislature for insidious purposes.").

20. *Id.* at 218 (George Mason of Virginia).

known to be "the practice in the boroughs of England,"[21] and it was part of what led to that country's "rotten borough" system. England's boroughs were infamous for sending representatives to Parliament from districts that had few remaining residents. These "rotten boroughs" also sometimes elected wealthy non-residents to office who secured a seat in Parliament from neighboring or even isolated districts.[22] The Founding Fathers abhorred this practice, which they believed turned democratic representation into an illusion.[23]

The Founding Fathers understood that durational residency requirements applied separately to candidates and voters. But their debates concerned only how these rules applied to candidates. A complicated patchwork of state suffrage rules had proliferated in the individual states by the time the framers met in Philadelphia in 1787. This patchwork, as Virginia's delegate James Wilson explained, made it "difficult to form any uniform rule of qualifications [for voting] for all the states."[24] For the men who came together to write the new Constitution, voting was thought to be a state issue. Though not all of the framers held this view, many did. These men believed that questions regarding who got to vote should be left to the states, rather than dictated by the federal government.[25]

In Philadelphia, some delegates wanted the rules for voting to be regulated by the Constitution. Other delegates insisted that this was a matter best left to the states. A compromise had to be reached between the conflicting views. In the end, the new Constitution forged a link between the suffrage rules of the states and the right to vote in federal elections by allowing only those people in each state who had met the qualifications to vote for the "most numerous Branch of the[ir] state legislature" to vote for the members of the new House of

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21. *Id.*

22. *See* LeClercq, *supra* note 3, at 852 n.23; *see also generally* JOHN CANNON, PARLIAMENTARY REFORM, 1640-1832 (1972); EDWARD PORRITT, THE UNREFORMED HOUSE OF COMMONS: PARLIAMENTARY REPRESENTATION BEFORE 1832 (1903).

23. *See* LeClercq, *supra* note 3, at 852 n.23 (quoting G. Campion, *Parliament*, 17. ENCY. BRITANNICA 316 (1958)).

24. *See* KEYSSAR, *supra* note 1, at 18; *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 82, 224-25 (1997).

25. *See, e.g.*, 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 17, at 249 (John Rutledge of South Carolina) ("observing, that the Committee [on Detail] had reported no qualifications [should be included in the Constitution for membership in Congress] because they could not agree on any among themselves"); *id.* (Oliver Elseworth of Connecticut) ("The different circumstances of different parts of the U.S. and the probable difference between the present and future circumstances of the whole, render it improper to have either *uniform* or *fixed* qualifications. Make them so high as to be useful in the S. States, and they will be inapplicable to the E. States. Suit them to the latter, and they will serve no purpose in the former. . . . [I]t was better to leave this matter to the Legislative discretion than to attempt a provision for it in the Constitution.").

Representatives.[26] The U.S. House would become the only institution for which the Constitution demanded a popular electoral process of any kind.[27] Again, this was because of the need to placate the delegates who saw voting as a state issue. Whether a durational residency requirement applied to a person voting for the member of the U.S. House would ultimately be determined by the law of his state.[28]

However, the question of whether a political *candidate* seeking to become a member of the U.S. House should have to meet a durational residency requirement in the state from which he was being elected remained contested, and was hotly debated. This debate centered around how the country's new Constitution would guarantee mobility while protecting local interests. Questions concerning how durational residency requirements applied to political candidates were often intertwined in the minds of the framers with questions concerning a candidate's citizenship. On Wednesday, August 8, 1787, at the Constitutional Convention,[29] George Mason of Virginia explained that he "was for opening a wide door for emigrants; but did not chuse [sic] to let foreigners and adventurers make laws for us & govern us."[30] For this reason, the delegates suggested that a three-year citizenship requirement should be imposed on members of the new House of Representatives. George Mason, however, proposed that a member of the House of Representatives should have to be a citizen for seven years before his election, not three years.[31]

The seven-year citizenship requirement passed without objection, with every state but one agreeing to it.[32] But when the next part of the clause governing the requirements of electing the members of the House of Representatives was debated—it originally stated that every member "shall be, at the time of his election, a *resident* of the State in which he shall be chosen"[33]—consensus quickly broke down.

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26. U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *see also* KEYSSAR, *supra* note 1, at 18.

27. *See* KEYSSAR, *supra* note 1, at 18.

28. *See id.*

29. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 17, at 213-19.

30. *Id.* at 216 (George Mason of Virginia).

31. *Id.*

32. Connecticut was the one exception. *See id.*

33. *Id.* at 216 n.3 (emphasis added). Originally the draft read:

> Article 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 to which he shall be chosen."

See id. The three-year citizenship requirement was changed to "seven." *Id.* at 216. The word resident was changed to "inhabitant" after a somewhat lengthier debate. *Id.* at 216-18.

Roger Sherman of Connecticut argued that the word "resident" should be substituted by the word "inhabitant."[34] Madison found both terms vague, but he believed that at least the latter "would not exclude persons absent occasionally for a considerable time on public or private business" from holding office.[35] Gouverneur Morris was opposed to both terms. Imposing "[s]uch a regulation is not necessary," Morris argued, because "[p]eople rarely chuse [sic] a nonresident."[36] "Resident" had a certain meaning to the framers based on their understanding of residency requirements in the states. That meaning was tied to the legal period of time a person had to live in a state.

Some delegates continued to argue that a durational residency requirement for candidates should appear in the Constitution. John Rutledge of South Carolina, for instance, urged his fellow delegates to include a provision stating "that a residence of 7 years [should] be required in the State Wherein the Member [should] be elected."[37] This ensured knowledgeable candidates for public office. "An emigrant from [New] England to [South Carolina] or Georgia would know little of its affairs," Rutledge told the others, "and could not be supposed to acquire a thorough knowledge in less time."[38] George Mason agreed with him. "I am in favor of Residency—if you do not require it—a rich man may send down to the Districts of a state in [which] he does not reside and purchase an Election for his [Dependent]," Mason explained.[39] "This is the practice in the boroughs of England."[40] Other delegates agreed with the need for a durational residency requirement, but they urged a much shorter term. Oliver Ellsworth of Connecticut thought requiring seven years of residency was too much. He suggested that one year would be sufficient, though he also stated that he had no objection to making it three years.[41]

The arguments of those who opposed the residency requirement ultimately won out. John Mercer of Maryland argued that the durational residency requirement would discourage men who had once been inhabitants of a state, but had since moved elsewhere, from returning.[42] He believed that such a regulation would create "greater alienship among the States than existed under the old federal sys-

34. *Id.* at 216.

35. *Id.* at 217.

36. *Id.* (Gouverneur Morris of Pennsylvania).

37. *Id.* (John Rutledge of South Carolina); *id.* at 225 (Notes of Rufus King of Massachusetts) (explaining that Mr. Rutledge wanted the clause to require one to be a "[r]esident for seven years in the State where he is elected").

38. *Id.* (John Rutledge of South Carolina).

39. *Id.* at 225 (Notes of Rufus King of New York).

40. *Id.* at 218 (George Mason of Virginia).

41. *Id.* at 217-18 (Oliver Ellsworth of Connecticut).

42. *Id.* at 217 (John Francis Mercer of Maryland).

tem" of the Articles of Confederation, and that it would "interweave local prejudices & State distinctions in the very Constitution which is meant to cure them."[43] At the end of the day, the proposal for requiring a member of the House of Representatives to satisfy a three-year durational residency requirement in the state from which he was elected was defeated by a vote of nine to two.[44] The proposal for a one-year durational residency requirement was also defeated, this time six to four.[45] The view prevailed on the majority of the delegates that durational residency requirements did not belong in the federal Constitution: "[W]e are now forming a *National* Government," George Read of Delaware reminded his colleagues, "and such a regulation would correspond little with the idea that we are one people."[46]

Similar controversies over a durational residency requirement took place the next day, on August 9, 1787, when the qualifications for serving in the United States Senate were debated. Members of the Senate were originally to be chosen by their state legislatures.[47] (It was only 125 years later, after the Seventeenth Amendment was ratified in 1913, that U.S. Senators became popularly elected.[48]) But not all of the framers trusted the state legislatures to select a proper candidate, and some argued that a durational residency requirement, or at least a citizenship requirement, should be imposed. After fervent debate, the delegates to the Constitutional Convention agreed that a citizenship requirement would have to be met: members of the House already had to be citizens for seven years,[49] and a debate ensued over how long the qualification for Senators should be. Arguing against "the danger of admitting strangers into our public Councils," Gouverneur Morris insisted on a time period of fourteen years.[50]

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43. *Id.* (John Francis Mercer of Maryland).

44. *Id.* at 219. Only Georgia and South Carolina were in favor of the three-year requirement.

45. *Id.* Georgia, South Carolina, New Jersey, and North Carolina voted for the one-year requirement; *see also id.* at 225 (Notes of Rufus King) ("[A] question was put & negatived by 8 of 11 states to insert Inhabitant for 3 yrs. – afterwards the question for One yr. before Election was negatived by 6 of 11 . . . ."); *id.* at 226 (Notes of James McHenry of Maryland) ("It was proposed to add to the section 'at least one year preceding his election' [but this requirement for a member of the House was] negatived.").

46. *Id.* at 217 (George Read of Delaware).

47. *See* U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years . . . .").

48. *See* U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . . . The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

49. *See* U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States . . . .").

50. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 17, at 235 (Gouverneur Morris of Pennsylvania).

Charles Pinkney of South Carolina seconded this motion, adding that because "the Senate is to have the power of making treaties & managing our foreign affairs, there is peculiar danger and impropriety in opening its door to those who have foreign attachments."[51] George Mason suggested that membership in the new Senate might even be restricted to the native-born.[52]

During a vigorous debate, other delegates opposed these restrictions. Some, such as Oliver Ellsworth, saw them as "discouraging meritorious aliens from emigrating to this Country."[53] Benjamin Franklin was also against any durational residency or citizenship requirement. He tried to persuade his colleagues that the United States had many friends and allies in Europe, adding, "We found in the Course of the Revolution, that many strangers served us faithfully – and that many natives took part [against] their Country."[54] Franklin's view was that when "foreigners after looking about for some other Country in which they can obtain more happiness, give a preference to ours, it is a proof of attachment which ought to excite our confidence & affection."[55] He saw the fourteen-year citizenship proposal as an "illiberality inserted in the Constitution."[56]

Edmund Randolph of Virginia similarly argued that it would be unwise to prevent immigrants from participating in the public life of their new country for a period of fourteen years.[57] And James Wilson, who was born in Scotland, pointed to the irony that, under the proposed rules, he would not be able to hold office under the very Constitution that he had a hand in making. Wilson told his colleagues of how, when he arrived in Maryland, he found himself "from defect of residence, under certain legal incapacities, which never ceased to produce chagrin," even when he "did not desire . . . the offices to which they related."[58] To be incapable of being appointed to an office in one's country was "a circumstance grating, and mortifying."[59] Like Benjamin Franklin, James Madison also considered such a "restriction . . . in the *Constitution* unnecessary, and improper."[60] It was

51. *Id.* (Charles Pinkney of South Carolina).

52. *Id.* (George Mason of Virginia) ("Were it not that many not natives of this Country had acquired great merit during the revolution, he should be for restraining the eligibility into the Senate, to natives.").

53. *Id.* (Oliver Ellsworth of Connecticut).

54. *Id.* at 236 (Benjamin Franklin of Pennsylvania).

55. *Id.* at 236-37 (Benjamin Franklin of Pennsylvania).

56. *Id.* at 236 (Benjamin Franklin of Pennsylvania).

57. *Id.* at 237 (Edmund Randolph of Virginia).

58. *Id.* (James Wilson of Pennsylvania).

59. *Id.*

60. *Id.* at 235 (James Madison of Virginia).

unnecessary because Congress had already been given the power to regulate the rules for naturalization. It was improper because it would give "a tincture of illiberality to the Constitution."[61]

The idea of a fourteen-year citizenship requirement was ultimately defeated by a vote of seven to four. Periods of thirteen and ten years, respectively, were proposed and were also defeated at the Constitutional Convention.[62] To compromise, Edmund Randolph proposed that a period of seven years be considered, but John Rutledge countered by saying that since a period of seven years had been proposed for the House, a longer timeframe was required for the Senate, which would have more power. Randolph thus proposed a nine-year period. The motion to require Senators to be citizens for nine years passed by a vote of six to four. Less controversially, the requirement that a Senator be a "Resident" of his state when elected was replaced with the requirement that he be an "Inhabitant" of that state.[63] This, again, was done to avoid squabbling over the eligibility for holding federal office and to defeat efforts to adopt state durational residency requirements for members of the House and Senate.[64]

The delegates could not agree over whether to impose durational residency requirements on federal officeholders, and compromises had to be made to move forward. One of those compromises was that a durational *citizenship* requirement was imposed on the four elected offices listed in the Constitution: Representative, Senator, Vice President, and President.[65] Each person who held one of these offices would be required to hold United States citizenship for a certain number of years. Although the debate over this requirement was closely tied in the minds of the framers to their debates over durational residency requirements, there were also important differences. The durational citizenship requirements that the framers wrote into the Constitution did not foreclose the possibility of an individual with political aspirations for holding federal office from moving to a new state.[66] By contrast, a lengthy durational residency requirement would have surely put up barriers to a newcomer who was looking to run for office in a state that was not originally his own.

The framers' decision to link national suffrage to state suffrage laws meant that durational residency requirements would be preserved for the nation's new voters, given that these requirements al-

61. *Id.* at 235-36 (James Madison of Virginia).

62. *Id.* at 230.

63. *Id.* at 239.

64. *See* LeClercq, *supra* note 3, at 854.

65. *See* Derek Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 563 (2015) (noting there were four elected offices listed in the Constitution: President, Vice President, Senator, and Representative).

66. *Id.* at 563-72.

ready existed in most states. Durational residency requirements would also be preserved for candidates seeking state office, but they would not apply to those seeking federal office. This early divergence between state and federal practice concerning durational residency requirements would influence the political landscape for the next two hundred years. There was only one exception to this durational residency mismatch, and it concerned the offices of the President and Vice President. The new Constitution of 1787 called for a complex system of choosing "electors" in each state, who would cast ballots to fill these two offices. The electors' ballots were to be sent to Congress to count. The candidate who received the most ballots would become President, and the candidate with the second-most Vice President.[67] The Constitution left it up to the legislatures of the states, however, to determine how these electors would be chosen, specifying only the number that each state was allotted.[68] However, not everyone was eligible to be President: the Constitution designated both a citizenship *and* a durational residency requirement for that office.

When the delegates met on August 22, 1787, exactly two weeks after they had decided not to impose a durational residency requirement on candidates for the new Congress, they inserted language into their constitutional draft requiring that the country's new President be "a Citizen of the United States, and shall have been *an Inhabitant thereof for Twenty one years*."[69] It is not evident from the delegates' notes when this clause was debated.[70] However, by September 4, when the delegates discussed how the electors' votes would be counted, this language was changed to say that a person could not be elected to the office of President "who has not been in the whole, *at least 14 years a resident within the U.S.*"[71] The framers retained this fourteen-year requirement, and the Constitution, as ratified, specified that no person could be President unless he "[has] been fourteen Years a Resident within the United States."[72] The citizenship re-

67. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 164-69 (1913) (chronicling the debates of the framers about how the new President of the United States would be elected).

68. *See* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .").

69. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 17, at 367.

70. *See id.* at 369-79 (Journal of Mr. James Madison and Mr. James McHenry for August 22, 1787).

71. *Id.* at 494 (emphasis added).

72. U.S. CONST. art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, *and been fourteen Years a Resident within the United States*") (emphasis added); *see also* Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1 (1968); Jordan Steiker, Sanford

quirement was also strengthened, so that the President now not only had to be "a Citizen of the United States," but also could not serve unless he was actually "a natural born Citizen."[73]

When the Twelfth Amendment was ratified in 1804, it changed the way the electors selected the President and Vice President. That Amendment added that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."[74] This meant that the fourteen-year durational requirement for President would now apply to the office of the Vice President as well. At the federal level today, these are the only two offices for which a durational residency requirement is mandated. But this durational qualification, it is again important to note, is different from the state requirements, for it does not restrict a candidate from moving among the states or around the country.

By contrast, the Constitution does not impose a durational residency requirement for the House or Senate. It only requires that a representative for the House from any state be "an Inhabitant of that State" at the time "when elected."[75] A similar requirement applies to candidates for the U.S. Senate.[76] Beyond these requirements, the Supreme Court has held that the states do not have the power to add additional qualifications for federal candidates.[77] However, most states have the power to impose such requirements on their own state officials. As such, durational residency rules at the state and municipal level became common. Many states imposed some form of a durational residency requirement on their elected state officials, including their governors, legislators, judges, and mayors. Equally, they imposed durational residency requirements on their voters.

Levinson & J. M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995).

73. *Compare* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 17, at 367, *with id.* at 494; *and* U.S. CONST. art. II, § 1, cl. 5 ("No Person except a *natural born* Citizen . . . shall be eligible to the Office of President.") (emphasis added).

74. U.S. CONST. amend. XII.

75. *See* U.S. Const. art. I, § 2, cl. 2. Indeed, there have been times in American history when a candidate elected to federal office happened to be an inhabitant of another state immediately before his election. *See, e.g.*, Tex. Democratic Party v. Benkiser, 459 F.3d 582, 589 (5th Cir. 2006) (noting one instance when an elected representative actually moved into his new state of residence two weeks before his election).

76. U.S. CONST. art. I, § 3, cl. 3 ("No person shall be a Senator . . . who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

77. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (holding that states have no power to add electoral qualifications for candidates to federal offices beyond those enumerated in the Constitution); Dillon v. Fiorina, 340 F. Supp. 729 (D.N.M. 1972) (holding additional state two-year residency requirement imposed by the state of New Mexico for a federal candidate to be unconstitutional).

C. *In the States*

The laws governing the right to vote, according to Professor Alexander Keyssar, were "elaborated and significantly transformed" throughout the country between 1790 and 1850.[78] Many of the individual states held constitutional conventions during this time, sometimes more than once. How political power would be allocated in the young but quickly growing republic became a subject of intense debate in many state and local communities. Among other things, even the physical act of voting began to take a different shape. At the time of the founding, according to Professor Keyssar, the procedures used for voting differed "from state to state and even from town to town."[79] In some counties, voting had been an oral act. Men assembled before election judges and cast their vote when their name was called.[80] In other counties, voting took place through written ballots. These were at first printed by political parties, but as abuses arose and vote rigging becamé more commonplace, the states eventually took over the printing of election ballots and running of elections.[81]

As the states began to play an increasingly dominant role in elections, new laws developed to govern these contests. Suddenly, states had to define what it meant to be a "resident" or "inhabitant," how one satisfied this requirement, and what documents a voter had to show to prove his citizenship and residency qualifications before casting his ballot.[82] The states also had to develop the administrative capacity to deal with running elections, not to mention the judicial ability to resolve election disputes. At the time of the Revolution, property ownership had nearly universally been a qualification for suffrage. But by 1790, this requirement that only freeholders could vote began being dismantled.[83] Sometimes the property qualification was replaced with other economic qualifications for suffrage.[84]

The gradual elimination of property qualifications for voting did not mean that all economic qualifications were eliminated. Rather, as the right to vote expanded in the nineteenth century, poll taxes and other economic qualifications would be substituted, often in pernicious ways, to restrict the franchise. Still, the demise of the property qualification was significant. It meant that society no longer thought voters needed "Blackstonian independence"[85] to exercise the right to

78. KEYSSAR, *supra* note 1, at 23.
79. *Id.* at 23-24.
80. *Id.* at 24.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 25.
85. *Id.*

vote, and it meant that individual states could no longer restrict the franchise to a small, select group of men. Soon people would find that they did not have to put down roots in order to vote, or at least the kind of deep roots that property ownership signified.

Out of fear that the polls would be open to a large number of vagrants and migratory individuals, the states increasingly began to turn to durational residency rules to define and control their electorates. To be sure, some states welcomed newly eligible voters, and many passed legislation making it easier for those from the poorer classes who did not own land, and who were previously disenfranchised, to vote. Yet in many states, durational residency requirements were designed to prevent migrants from voting or from influencing the composition and functioning of the government in a place where they were temporarily located and did not intend to stay. As durational residency requirements were refined by state governments, local municipalities often copied what happened in state capitals, moving to match the new state-mandated requirements.

Where state governments played with their residency rules, the tinkering depended on whether the state was in need of new workers and new labor, or whether, instead, it wanted to keep newcomers out. Delaware, Pennsylvania, South Carolina, Indiana, and Michigan shortened their durational residency requirements.[86] Some states that were in need of more people, particularly those in the Midwest, not only relaxed their durational residency requirements but also even went as far as to extend the franchise to non-citizen aliens.[87] By the 1830s, most state governments had rules regulating their durational residency requirements for voting. What the proper length for these rules should be was often the subject of heated debate.[88] According to Professor Keyssar, the average length of a state durational residency requirement for a new voter was one year in the state and three to six months in his town or county.[89] But the length also varied by region, usually depending on whether the political entity in question wanted to welcome newcomers to its borders or not.

When newcomers were desired, durational residency requirements were shortened. Extending the suffrage to new arrivals encouraged migration. Especially in the newly settled states of the Midwest, where labor was in demand, short durational residency requirements became the norm. On the other hand, in many of the states located along the eastern seaboard, where immigrants were plentiful and where they increasingly settled in urban areas with large popula-

86. *Id.* at 26.
87. *Id.* at 27.
88. *Id.* at 51.
89. *Id.* at 51-52.

tions, longer durational residency requirements became much more commonplace. Table 1, which is based on calculations originally made by Professor Keyssar, illustrates the residency requirements that existed in each state between 1870 and 1923.[90]

In addition to regulating the duration of their residencies, states also attempted to define who qualified to be a "resident" for purposes of voting. A number of states attempted to regulate their suffrage rules by preventing certain classes of inhabitants from qualifying for residency status entirely, regardless of their duration in the state. For instance, military personnel who happened to be locally stationed were excluded from voting by a number of the states.[91] Between 1850 and 1900, more than thirty states included a provision in their state constitutions that prevented voting rights from being extended to resident soldiers temporarily stationed within the state's borders.[92] Oklahoma added this requirement to its state constitution in 1907, Michigan did so in 1908, and Arizona followed suit in 1910. The goal of these provisions was to prevent transients from influencing a community. Not until 1965, when the Supreme Court decided *Carrington v. Rash*, were these provisions struck down.[93]

90. Table 1 is based on information originally gathered in ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 346-55 tbl. A.14 (2009). Keyssar's tables have been altered for my purposes. Table 1 provides information about the length of durational residency requirements in the states but omits other pertinent information about these requirements, such as whether the durational residency requirement was imposed constitutionally or by statute; whether categories of persons temporarily in the state, such as military personnel or students, were excluded from claiming residency; and whether voters relocating within the state who did not meet local county, municipality, or precinct requirements were still eligible to vote in their old counties, municipalities, or precincts.

91. *Id.* at 396 n.20.

92. *Id.* at 346-55.

93. Carrington v. Rash, 380 U.S. 89, 96-97 (1965) (holding that a state could not deny the right to vote to a bona fide resident merely because he is a member of the armed services).

TABLE 1:
STATE DURATIONAL RESIDENCY REQUIREMENTS FOR SUFFRAGE, 1870 TO 1923

STATE	REQ.	STATE	REQ.	STATE	REQ.	STATE	REQ.	STATE	REQ.
AL	**1867:** 6 mos. (state), 6 mos. (county) **1901:** 2 yrs. (state), 1 yr. (county)	HI	N/A	MA	**1821:** 1 yr. (state), 6 mos. (district)	NM	**1910:** 1 yr. (state), 90 days (county), 30 days (precinct)	SD	**1889:** 1 yr. (U.S.), 6 mos. (state), 30 days (county)
AK	N/A	ID	**1889:** 6 mos. (state), 30 days (county)	MI	**1850:** 6 mos. (state), 20 days (town) **1908:** 6 mos. (state), 30 days (town)	NY	**1846:** 1 yr. (state) (for "man of color," 3 yrs.), 4 mos. (county), 30 days (district) **1874:** 1 yr. (state), 4 mos. (county), 30 days (district)	TN	**1870:** 1 yr. (state), 6 mos. (county)
AZ	**1910:** 1 yr. (state)	IL	**1870:** 1 yr. (state), 90 days (county), 30 days (district)	MN	**1857:** 6 mos. (state), 30 days (district) **1874:** 3 mos. (ward)	NC	**1868:** 1 yr. (state), 30 days (county) **1876:** 2 yrs. (state), 6 mos. (county), 4 mos. (precinct)	TX	**1869:** 1 yr. (state), 60 days (county) **1876:** 1 yr. (state), 6 mos. (county)
AR	**1868:** 6 mos. (state) **1874:** 12 mos. (state), 6 mos. (county), 1 mo. (precinct)	IN	**1851:** 6 mos. (state), 60 days (township), 30 days (precinct), 1 yr. (U.S.)	MS	**1868:** 6 mos. (state), 1 mo. (county) **1890:** 2 yrs. (state), 1 yr. (district)	ND	**1889:** 1 yr. (state), 6 mos. (county), 90 days (precinct) **1923:** 1 yr. (state), 90 days (county), 30 days (precinct)	UT	**1895:** 1 yr. (state), 4 mos. (county), 60 days (precinct)

CA	**1849:** 6 mos. (state), 30 days (county) **1894:** 1 yr. (state), 30 days (precinct)	IA	**1857:** 6 mos. (state), 60 days (county)	MO	**1870:** 1 yr. (state), 60 days (city or town) **1917:** 1 yr. (state), 60 days (county)	OH	**1851:** 1 yr. (state) **1857:** 1 yr. (state), 30 days (county), 20 days (town)	VT	**1793:** 1 yr. (state) **1913:** 3 mos. (town)
CO	**1876:** 6 mos. (state) **1877:** 30 days (county) **1903:** 1 yr. (state), 90 days (county), 30 days (city), 10 days (precinct)	KS	**1859:** 6 mos. (state), 30 days (township)	MT	**1889:** 6 mos. (state), 30 days (county) **1893:** 1 yr. (state), 30 days (county)	OK	**1907:** 1 yr. (state), 6 mos. (county), 30 days (precinct)	VA	**1870:** 1 yr. (state), 3 mos. (county) **1902:** 2 yrs. (state), 1 yr. (county), 30 days (precinct)
CT	**1845:** 1 yr. (state), 6 mos. (town)	KY	**1850:** 2 yrs. (state), 1 yr. (county), 60 days (precinct) **1891:** 1 yr. (state), 6 mos. (county), 60 days (precinct)	NE	**1866:** 6 mos. (state), 20 days (county), 10 days (precinct) **1869:** 30 days (county)	OR	**1857:** 6 mos. (state)	WA	**1889:** 1 yr. (state), 90 days (county), 30 days (precinct)
DE	**1831:** 1 yr. (state), 1 mo. (county) **1897:** 1 yr. (state), 3 mos. (county), 30 days (district)	LA	**1868:** 1 yr. (state), 10 days (parish) **1921:** 2 yrs. (state), 1 yr. (parish), 4 mos. (town), 3 mos. (precinct)	NV	**1864:** 6 mos. (state), 30 days (county)	PA	**1838:** 1 yr. (state), 10 days (district) **1873:** 1 yr. (state), 2 mos. (district)	WI	**1863:** 1 yr. (state), 30 days (county) **1872:** 1 yr. (state), 60 days (county)

FL	**1868:** 1 yr. (state), 6 mos. (county)	ME	**1819:** 3 mos. (state)	NH	**1860:** 6 mos. (town)	RI	**1842:** 1 yr. (state), 6 mos. (town or city) if owning real estate worth $134 or more; otherwise, 2 yrs. (state), 6 mos. (town) **1896:** 1 yr. (state), 6 mos. (town or city)	WV	**1848:** 1 yr. (state) **1898:** 1 yr. (state), 10 days (district)
GA	**1868:** 6 mos. (state), 30 days (county) **1877:** 1 yr. (state), 6 mos. (county)	MD	**1867:** 1 yr. (state), 6 mos. (legislative district or county)	NJ	**1844:** 1 yr. (state), 5 mos. (county)	SC	**1868:** 1 yr. (state), 60 days (county) **1895:** 2 yrs. (state) (6 mos. for ministers, school teachers), 1 yr. (county), 4 mos. (precinct)	WY	**1889:** 1 yr. (state), 60 days (county) **1911:** 1 yr. (state), 60 days (county), 10 days (district)

In the 1890s, durational residency requirements were also used in the Southern states—along with poll taxes and literacy tests—to disenfranchise African Americans, whom many southern whites unfairly considered to be "nomadic."[94] African Americans often had a harder time proving their residency and the length of their stay in a certain area, and durational residency requirements were used to discriminate against them.[95] Wherever they existed, state durational residency qualifications penalized mobility and reinforced parochial perspectives. In the South, where states had a special affection for long residency requirements, their length served "to promote [the] acquiescence of public officeholders to the status quo interests of a slave-owning . . . society."[96] In 1875, Alabama increased the length of its state residency requirement for voting from sixth months to one year; in 1901, it increased it to two years. North Carolina increased its requirement to two years in 1876. Mississippi followed suit in 1890, South Carolina in 1895, Louisiana in 1898, and Virginia in 1902.[97]

By the turn of the twentieth century, durational residency requirements were commonplace in most of the states. The prevalence of these laws suggests that they played an important role in many states. One scholar has argued that the proliferation of these requirements "reflect[ed] xenophobic tendencies" and that they were "out of spirit with the idea of [a] national union."[98] But this view is probably extreme. Though it is hard to doubt that, in many instances, states increased the length of their durational residency requirements when they wanted to make it harder for outsiders to settle within their borders, it may also be the case that mandating a durational period of residence before giving one the vote resulted from inertia. In the meantime, county, township, district, and precinct durational residency requirements patterned themselves after the state models. American society was not especially mobile at this time, and those who picked up and moved to a different state comprised a small percentage of the country's growing population. As such, it is likely that the lengthy durational residency requirements that existed in the 1800s reflected the negative attitude of some communities in the country toward newcomers, outsiders, and mobility.

94. *See* KEYSSAR, *supra* note 1, at 89.

95. *Id.* at 88-90.

96. *See* LeClercq, *supra* note 3, at 854.

97. *See* KEYSSAR, *supra* note 1, at 346-55 tbl.A.14.

98. LeClercq, *supra* note 3, at 855.

III. THE DEMISE OF DURATIONAL RESIDENCY REQUIREMENTS FOR VOTERS

Durational residency requirements are not a monolithic phenomenon. Both in theory and in practice, it is important to distinguish between two different types of durational residency requirements. The first is the one the framers wrestled with at the time of the Constitutional Convention: their debates concerned whether a residency requirement should be imposed on political candidates and those seeking to hold public office. The second type of durational residency requirement concerns those seeking to cast a ballot—in other words, voters. These two types of durational residency requirements are conceptually distinct and deserve to be analyzed separately.[99]

Most states impose durational residency requirements on both voters and political candidates, but the individuals affected, the period of duration required, and the justifications given for each of these distinct durational residency requirements differ significantly. As the democratic theorist Robert Dahl has explained, democracy involves both the freedom to vote and the freedom to run for office.[100] It thus makes sense that the durational residency requirements enacted by the states would target each activity separately. For decades, lengthy durational residency requirements existed for both voters and candidates in the states. However, in the 1970s, the durational residency requirements for voters began to be extensively cut back. This Part examines what happened to the durational residency requirements that the states imposed on voters and how they were curtailed.

A. The Federal Challenge

All states had some kind of durational residency qualifications that they maintained by the 1930s and 1940s. These usually restricted voting for a new resident until the person lived in the state for one year, although there were cases where the durational period was both longer and shorter. In rural areas and in the Midwest, the residency period was often only six months. The state constitutions of Idaho, Iowa, Kansas, Nebraska, Nevada, and Oregon all required only a six-month residency for suffrage. Indiana and South Dakota also required six months of residency, although it had to be preceded by a

99. *But see* Bullock v. Carter, 405 U.S. 134, 143 (1972) (explaining that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters").

100. *See* ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 5 (1971). Dahl plots the freedom to vote and the freedom to run for office on a two-dimensional matrix. He calls the right to vote "the right to participate in elections and office" and right to run for office "public contestation." Each right can be plotted on Dahl's two-dimensional matrix on a scale from "none" to "full." *Id.*

year's residency in the United States. In many southern states and in Rhode Island, the durational requirement was two years.[101]

There were also important exceptions to these durational residency requirements. One important exception applied to those serving overseas. When servicemen could not be around to satisfy a durational residency requirement, absentee voting laws had to be fashioned to account for this. Before the Civil War, absentee voting was rare. As the United States became entangled in overseas conflicts, however, and men who were serving their country could not return home to vote in its elections, absentee voting became more prominent.[102] During World War I, nearly three million men were sent overseas. Their absence meant these voters could not satisfy the long durational residency requirements that some of their states imposed. As a result, by 1918, nearly all of the states crafted provisions to exempt servicemen from durational residency requirements during times of war.[103] The exceptions created for servicemen eventually began to be applied to other kinds of workers, including those who had to be absent from their state on official government business.[104]

Until World War II, durational requirements spanning months and even years continued to be an accepted prerequisite to voter registration. Multiple factors—including the limited textual support for the right to vote in the Constitution, and the relatively small levels of interstate migration—ensured that there was little opposition to these laws. However, the sharp increase in interstate travel and migration that followed World War II, combined with the Supreme Court's interest in protecting the right to vote during the Warren Court era, soon put durational residency qualifications on the national agenda, in the crosshairs of Congress, and on court dockets.

As voting rights cases made their way to the Supreme Court in the 1960s, voting rights issues began to seep deeper into the American consciousness. The large number of citizens who were ineligible to vote because of a state's durational residency requirement soon began to draw the public's attention.[105] To respond to pubic pressure,

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101. *See* KEYSSAR, *supra* note 1, at 183, 352.

102. *Id.* at 122.

103. *Id.*; *see generally* Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CINCINNATI L. REV. 1345 (2003) (examining the effect of war on the right to vote and finding that to mobilize the necessary support for a war the franchise has often been extended to groups that were previously excluded).

104. *See* KEYSSAR, *supra* note 1, at 122.

105. They also drew the attention of legal scholars. In the late 1960s and 1970s, an increasing number of law reviews devoted space to addressing issues surrounding the imposition of durational residency requirements. *See, e.g.*, Lawrence P. Bemis, *Age and Durational Residency Requirements as Qualifications for Candidacy: A Violation of Equal Protection*, 1973 U. ILL. L.F. 161 (1973); David Cocanower & David Rich, *Residency Requirements for Voting*, 12 ARIZ. L. REV. 477 (1970); James R. Fisher, *Durational Residency Re-*

many state legislatures adopted "return-to-vote" legislation. These laws were designed to make it easier for residents who relocated within the state's borders to vote, often by lowering precinct or county durational residency rules or else providing a way for residents who had moved to a different county within the same state to cast a ballot in their old precincts.[106] These rules lacked uniformity from state to state, and they also did little to solve issues facing interstate movers. Although many people during this time felt that the status of durational residency requirements for voting should remain a states' rights issue, pressure also began mounting for Congress to enter the fray and play a much larger national role in these matters.[107]

By the 1960s, in most states, a one-year durational residency requirement had become the norm. A survey conducted in 1962 found that a one-year residency was required by 34 states. In another twelve states, the in-state residency period was six months. In four states, it was two years.[108] The impact of these laws on an American society that had become increasingly more mobile was starting to take its toll. In every decade since 1900, geographic mobility in the United States had steadily increased. Nonetheless, durational residency rules continued to impede voting for many of those who may have desired to exercise this right. In the early 1960s, a study commissioned by the American Heritage Foundation examined the causes of nonvoting in presidential and congressional elections. It found that of the country's 104 million voting-age citizens in 1960, eight million were adults who had recently moved and were disqualified from voting by state, county, and precinct durational residency requirements.[109] In 1964, according to another source, durational residency laws prevented fifteen million people from voting.[110]

Congress soon realized that it had to take action. Under the Constitution, the states set "[t]he [t]imes, [p]laces, and [m]anner" of holding elections for federal officials.[111] But Congress has the power, un-

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quirements in State Elections: Blumstein v. Ellington, 46 IND. L.J. 222 (1971); Edward Tynes Hand, *Durational Residence Requirements for Candidates*, 40 U. CHI. L. REV. 357 (1973); Mable A. Minor, *State Durational Residence Requirements as a Violation of the Equal Protection Clause*, 3 N.C. CENT. L.J. 233 (1972); Ronald L. Rowland, *Voter Residency Requirements in State and Local Elections*, 32 OHIO ST. L.J. 600 (1971); Comment, *Residence Requirements for Voting in Presidential Elections*, 37 U. CHI. L. REV. 359 (1970).

106. *See* John R. Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 MICH. L. REV. 823, 832 (1963).

107. *Id.* at 833.

108. *See id.* at 829.

109. *Id.*

110. *See* KEYSSAR, *supra* note 1, at 223 (citing *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 107 n.21 (1972)).

111. *See* U.S. CONST. art, I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature

der Article I, Section 4, to pass a federal law "at any time" that could alter the rules set by the states.[112] In 1970, Congress sought to regulate durational residency requirements when it passed its first amendments to the Voting Rights Act of 1965.[113] Aimed at ending the system of mass disenfranchisement that had kept many African Americans from the polls, particularly in the southern states, the Voting Rights Act of 1965 was one of President Lyndon Johnson's greatest legislative achievements. The law would become so monumental that scholars would later come to view it as a "sacred symbol" of American democracy.[114] But not all sections of the original Voting Rights Act were permanent. Given the unprecedented scope of federal power that was granted by this statute, President Johnson and Congress decided to make some of its most far-reaching provisions temporary.[115] Section 5 of the VRA, which required all of the states in the South to seek federal "preclearance" for any changes made in their voting practices or procedures, came with a sunset provision.[116]

In 1965, Congress had designed Section 5 to ensure that voting changes in "covered jurisdictions," which encompassed all of the states of the Deep South, could not be implemented until a favorable determination has been made by the U.S. Attorney General or the U.S. District Court for the District of Columbia that minority voting rights were not being negatively affected. The provisions of Section 5 were enacted as temporary legislation and set to expire in five years. In 1970, however, Congress recognized the need for these special provisions to continue in force, and it moved to renew them for an additional five years. It was while holding its hearings on reauthorizing Section 5 that Congress decided to amend the Voting Rights Act in other ways as well, and one of these included adding an amendment that targeted durational residency requirements.[117]

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thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.").

112. *Id.*; *see also* Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159 (2015).

113. Voting Rights Act of 1970, Pub. L. No. 91-285, 84 Stat. 314, 316 (codified as amended at 42 U.S.C. § 1973 (2012)).

114. *See* Richard Pildes, *What Does the Court's Decision Mean?*, 12 ELECTION L.J. 317, 317 (2013) (calling the Voting Rights Act a "sacred symbol" of American democracy); *see also* Eugene D. Mazo, *The Voting Rights Act at 50 and the Section on Election Law at Birth: A Perspective*, 14 ELECTION L.J. 282, 283-85, 287-89 (2015) (assessing the history of the Voting Rights Act on the occasion of its fiftieth anniversary).

115. *See* Mazo, *supra* note 114, at 288; *see also* STEVEN ANDREW LIGHT, "THE LAW IS GOOD": THE VOTING RIGHTS ACT, REDISTRICTING, AND BLACK REGIME POLITICS, at xii (2010).

116. Mazo, *supra* note 114, at 288.

117. Voting Rights Act of 1970, Pub. L. No. 91-285, 84 Stat. 314, 316 (codified as amended at 42 U.S.C. § 1973 (2012)); *see also* CONGRESSIONAL QUARTERLY ALMANAC 192-93 (1971).

Using its constitutional power to alter the rules pertaining to federal elections, Congress added a new Section 202 to the Voting Rights Act in 1970. It was aimed at regulating how the states conducted their presidential elections. So that no mistake was made as to the intent of Section 202, its very first paragraphs stated the following:

> Section 202(a). The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—
>
> (1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;
>
> (2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;
>
> . . .
>
> (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 reasonable relationship to any compelling State interest in the conduct of presidential elections.[118]

To guarantee and protect the right to vote, Congress found that it was necessary to abolish the durational residency requirement as a precondition to voting for the President and Vice President, as well as to establish nationwide standards relative to absentee registration and absentee balloting for future presidential elections.[119]

Under Section 202, Congress moved to accomplish these goals in several ways. First, it prohibited individual states from imposing a durational residency requirement on any U.S. citizen who was otherwise qualified to vote in a presidential election and who wanted to register and vote for the President or Vice President of the United States.[120] Second, it prohibited the states from denying a citizen the right to vote in a presidential election if that person was validly registered to vote but happened not to be physically present in his state at the time of the election.[121] If the citizen was absent, the state now

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118. Voting Rights Act Amendments of 1970, Title II, § 202 (a)(1)-(6), 84 Stat. 314, 316.

119. *Id.* § 202(b).

120. *Id.* § 202(c) ("No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision . . .").

121. *Id.* ("[N]or shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such elections because of the failure of such citizen to be physically present in such State or political

had to provide him with the opportunity to cast an absentee ballot to vote for the President or Vice President.[122] Third, Congress mandated that the states had to allow a citizen to vote in a presidential election if he was registered to vote thirty days before the election took place.[123] Finally, if the citizen moved to his new state within thirty days of a presidential election, he had to be given the right to vote by absentee ballot in his or her former state of residence.[124]

In addition to extending the coverage of Section 5 the Voting Rights Act and changing the way that Americans vote for the President and Vice President with the addition of Section 202, the 1970 Amendments suspended the use of literary tests as a prerequisite to voting in all states.[125] The 1970 Amendments also mandated that states lower their voting age to eighteen for all federal, state, and local elections.[126] Senator Edward Kennedy of Massachusetts pushed for this last provision to be added to the 1970 Amendments, knowing that his colleagues in Congress would find it impossible to deny the right to vote to young people, many of whom were fighting and dying for their country in Vietnam.[127] Although durational residency requirements presented too minor of an issue to capture the imagination of most American citizens, they did receive some attention among the constellation of voting rights issues that were on the national stage. The fact that they were presented as part of a pack-

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subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.").

122. *Id.* § 202(d) ("[E]ach State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held . . . .").

123. *Id.* ("[E]ach State shall provide by law for the registration of other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President . . . .").

124. *Id.* § 202(e).

125. The Voting Rights Act's new section 201 imposed a ban on literacy tests and devices as conditions for voter registration in all jurisdictions until August 6, 1975. *See* 42 U.S.C. § 1973b(a) (1970). Section 4(a) of the Act, passed in 1965, had already suspended literacy tests in "covered jurisdictions" until August 6, 1975. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438.

126. Section 302 granted the right to vote at age eighteen in every primary and general election. *See* GARRINE P. LANEY, CONG. RESEARCH SERV., THE VOTING RIGHTS ACT OF 1965, AS AMENDED: ITS HISTORY AND CURRENT ISSUES 16 (2008), http://fpc.state.gov/documents/organization/109556.pdf. Although the Supreme Court invalidated this provision for state and local elections, the 26th Amendment, ratified in 1971, later would guarantee the right of eighteen-year-olds to vote in all elections. *See* U.S. CONST. amend. XXVI.

127. *See* GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY 206-07 (2013) (noting how Kennedy campaigned to reduce the national voting age and quoting him as saying that "half of the deaths in Vietnam are of young Americans under twenty-one").

age, together with the other voting rights reforms included in the 1970 Amendments, ensured they could pass through Congress.

Though voting rights occupied center stage in the American consciousness in the early 1970s, it has not always been evident to scholars why the conservative Nixon administration offered the 1970 Amendments. Professor Keyssar suggests that the new rules constituted "safe, uncontroversial means of responding to a resurgence of public concern about low electoral turnout," and that they may have "buttressed the Republican Party's presentation of itself as an advocate of universal suffrage."[128] The new changes called for by the 1970 Amendments also could have been influenced by the shift in thinking about the nature of American society, which had become more geographically mobile after World War II.[129] In the nineteenth century, when most of the states' durational residency requirement were enacted, most Americans were born, raised, and spent the bulk of their lives living in a single community.[130] By contrast, the "mobile" part of the population was comprised of unskilled workers and migrants.[131] But, as Professor Keyssar points out, this pattern shifted in the twentieth century, with the middle and upper classes becoming much more mobile and workers becoming much less so.[132]

President Richard Nixon had expressed doubts about the constitutionality of some of the new voting provisions that had been passed with the 1970 Amendments, especially the lowering of the voting age to eighteen. Vetoing Congress's bill, however, was not in the cards for Nixon. Although doing so would appease the South, the prospect of limiting the franchise after a proposal had been made to expand it would have put him at odds with public opinion, not to mention many members of his own Republican Party who had voted for these changes. Thus on June 22, 1970, Nixon quietly signed the 1970 Amendments into law.[133] At the same time, he instructed his Attorney General, John Mitchell, to challenge them in court.[134]

Nixon's challenge resulted in *Oregon v. Mitchell*,[135] the case in which the Supreme Court considered the constitutionality of the Voting Rights Act Amendments of 1970. The Court examined whether Congress could lower the voting age, ban literacy tests, and forbid durational residency requirements from disqualifying voters, each as

128. KEYSSAR, *supra* note 1, at 223.

129. *See id.*

130. *See id.*

131. *Id.*

132. *Id.*

133. *See* MAY, *supra* note 127, at 208.

134. Statement on Signing the Voting Rights Act Amendments of 1970, 1970 PUB. PAPERS 512 (June 22, 1970).

135. 400 U.S. 112, 117 (1970).

separate issues. The Supreme Court held it unconstitutional for Congress to lower the voting age for state elections, while it upheld its right to do so in *federal* elections.[136] Justice Hugo Black found that the Elections Clause allowed Congress to regulate federal elections,[137] though no such provision in the Constitution also allowed it to regulate the election of state officials.[138] The Twenty-Sixth Amendment, which lowered the voting age to eighteen years of age throughout the country, including in the states, was ratified a year later, in reaction to *Oregon v. Mitchell*.[139] In addition to finding that Congress could regulate the vote age for federal elections, the case also upheld Congress's ban on literacy tests under the Fifteenth Amendment.[140]

In finding that Congress had the power to regulate federal though not state elections, *Oregon v. Mitchell* was important for another reason: the case also upheld Congress's imposition of the "30-day" registration rule on the states for presidential elections.[141] Though there were different allegiances of Justices for other parts of the opinion, the vote finding that Congress had the power to impose a thirty-day registration deadline for federal presidential elections was eight to one.[142] Justice Black based his reasoning on the power that Congress had to regulate federal elections under Article I, Section 4.[143] Justice Douglas wrote separately to explain that he would uphold the requirement under Congress's power to enforce the Fourteenth Amendment.[144] Justices Brennan, White, and Marshall found yet other justifications for upholding this requirement, including the Privileges and Immunities Clause and the guarantee that citizens should have the right to travel freely across state lines.[145] Only Justice Harlan dissented, arguing that none of these constitutional provisions should have been availing in this case.[146]

After *Oregon v. Mitchell* upheld the 1970 Amendments and their prohibition on durational residency requirements, the states were

136. *Id.* at 117-18.

137. *Id.* at 119-24 (citing U.S. CONST. art. 1, § 4).

138. *See id.* at 124-29.

139. U.S. CONST. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

140. *Oregon*, 400 U.S. at 132.

141. *Id.* at 134.

142. *See id.* at 213-16 (Harlan, J., dissenting) (explaining that it is "inconceivable" that the language of the Constitution can be understood to abolish state durational residency requirements).

143. *Id.* at 119-24.

144. *Id.* at 150.

145. *Id.* at 237-38, 264-67 (Brennan, J., joined by White, J., and Marshall, J., dissenting in part and concurring in part).

146. *Id.* at 213-14.

essentially forced to make a choice: they could now either shorten their durational residency requirements for electing state officials to approximately thirty days, or they could waste state resources to administer two different durational residency or registration deadlines for voting. Many states that would otherwise have preferred a period of duration longer than thirty days suddenly found it to be more trouble than it was worth to maintain one deadline for registering their citizens to vote for the U.S. President and another deadline to register the same individuals to vote for other state offices.[147] In many states, this brought a swift end to the lengthy durational residency requirements that the states had previously imposed.

B. The Judicial Challenge

Despite the mandate that came from Congress for the states to shorten the registration period for presidential elections to thirty days, there were places where lengthy durational residency requirements for *state* electoral contests continued to persist. Not all states, after all, were interested in applying the 30-day registration period required for presidential elections to their state elections. Then, in the early 1970s, several cases regarding state durational residency requirements began to wind their way to the Supreme Court. These cases sought to challenge the durational residency laws of the states on constitutional grounds. Eventually, the Supreme Court's decisions in these cases worked in tandem with the 1970 Amendments to curtail the ability and authority of the states to impose long durational residency requirements on their new voters.

The most important of these cases was *Dunn v. Blumstein*.[148] Decided in 1972, this case held that Tennessee's one-year residency requirement for voting in state elections violated the Equal Protection Clause of the Fourteenth Amendment.[149] James Blumstein had moved to Tennessee on June 12, 1970, to begin employment as an assistant professor of law at Vanderbilt University.[150] With a view toward voting in the upcoming August and November elections, he went to register to vote on July 1, 1970.[151] The county registrar refused to register him, however, because Tennessee law authorized the registration of only those people who were residents of the state for a year and residents of their county for three months.[152]

147. *See* DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, ELECTION LAW: CASES AND MATERIALS 37 (2012).

148. 405 U.S. 330 (1972).

149. *Id.* at 331-33.

150. *Id.* at 331.

151. *Id.*

152. *Id.* at 331.

Blumstein did not challenge Tennessee's power to restrict the vote to bona fide residents of the state.[153] Nor did Tennessee dispute that Blumstein was a bona fide resident.[154] Rather, Tennessee insisted that in addition to being a resident, a would-be voter had to satisfy its durational residency laws.[155] In *Dunn*, the Supreme Court had to determine, for the first time, what level of scrutiny to apply to state durational residency requirements. Noting that these laws penalize people who travel from one place to another, the Supreme Court explained how such laws end up dividing a state's legitimate residents into two classes: old residents and new residents.[156] Both classes are legitimate, from the state's view, but the state discriminates against the latter class of people by denying them the opportunity to vote.[157] Framing the problem in this way, the Court proceeded to analyze whether the Constitution allows this kind of discrimination.[158]

Never had durational residency laws been viewed through the lens of discrimination. Now the Supreme Court scrutinized the fact that these laws prevented some legitimate residents from voting, thus depriving a class of citizens of "a fundamental political right, [that is] preservative of all rights."[159] Tennessee urged the Supreme Court to uphold its one-year durational residency requirement under the Court's own precedents—in 1965, the Court had summarily affirmed *Drueding v. Devlin*,[160] upholding a durational residency law in Maryland against a constitutional challenge. But in *Dunn*, the Supreme Court distinguished *Drueding* on the grounds that *Drueding* was a summary affirmance of a district court decision that was decided without the benefit of oral argument.[161] Moreover, the sufficiency of Maryland's durational residency law had been tested in *Drueding* under the standard that would typically be applied to ordinary state regulations, not under the more exacting standard that had been developed for voting rights cases in the ensuing years.

In several important voting rights cases, the Supreme Court had decided that strict scrutiny should be applied to laws that discrimi-

153. *Id.* at 334.

154. *Id.*

155. *Id.*

156. *Id.* at 334-35.

157. *Id.*

158. *Id.* at 335.

159. *Id.* at 336 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)); *see also* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143 (2008) (explaining that although courts have always said that the right to vote is a "fundamental right," they have sometimes applied strict scrutiny to laws that challenge that right and have at other times inconsistently applied a lower level of review).

160. 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965).

161. *Dunn*, 405 U.S. at 337.

nated between different classes of a state's citizens. In the most important of these cases, *Kramer v. Union Free School District No. 15*,[162] decided in 1969, the Supreme Court applied strict scrutiny to a state law that prevented residents from voting in the local school board if they did not own property or have children enrolled in the local schools. *Kramer* held that if a state law granted the right to vote to some citizens and denied it to others, the courts had to determine whether such exclusions were necessary "to promote a compelling state interest."[163] In *Dunn*, the Supreme Court found that Tennessee's residency statutes impinged on a fundamental right—the right to vote—and thus should be subject to strict scrutiny.[164] In addition, the Court found that Tennessee's residency rules also directly impinged on a second fundamental right, "the right to travel."[165] Having determined that strict scrutiny was mandated, the Court went on to distinguish durational residency requirements from bona fide residency requirements that ensure that voters are actually citizens of the state and county in which they register, and that "may be necessary to preserve the basic conception of a political community."[166]

Tennessee had offered two justifications for its residency qualifications. The first was to "[i]nsure [the] [p]urity of [the] [b]allot [b]ox."[167] State officials feared that non-residents would cross state lines, falsely swear allegiance to Tennessee, and vote by fraud to sway its elections.[168] The Supreme Court dismissed this justification.[169] Residence in Tennessee was established by taking an oath, and there was no evidence that the state took any actions beyond requiring an oath to check that a person was a bona fide resident.[170] It was not clear to the Court how a longer durational residency period would prevent a corrupt non-resident from fraudulently registering and voting.[171] In addition, the Court found it difficult to justify Tennessee having two different duration periods.[172] If only a three-month period was needed to determine a person's legitimate residency in his county, it was unclear why a one-year period was required to legitimate a voter's resi-

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162. 395 U.S. 621, 626 (1969). For the history of this case, see Eugene D. Mazo, *The Right to Vote in Local Elections: The Story of* Kramer v. Union Free School District No. 15, *in* ELECTION LAW STORIES (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

163. *Kramer*, 395 U.S. at 627.

164. *Dunn*, 405 U.S. at 336.

165. *Id.* at 338.

166. *Id.* at 344.

167. *Id.* at 345.

168. *Id.*

169. *Id.* at 345-46.

170. *Id.* at 346.

171. *Id.*

172. *Id.* at 347.

dency in the state.[173] The presence of two different durational requirements was illogical. Moreover, if Congress had already set the amount of time that a state had to register a new voter to cast a ballot in a federal presidential election at thirty days, with the 1970 Amendments, it was not entirely clear why a state needed more time than this to register the same person to vote in its state elections.

The second justification that Tennessee provided for its durational qualifications was to ensure a "knowledgeable voter."[174] Tennessee wanted to have voters who had become members of the community, were interested in matters of government, and were likely to vote intelligently.[175] But the Supreme Court dismissed this justification as well, for again it allowed the state to discriminate against different classes of citizens based on arbitrary criteria.

In *Kramer*, New York had tried to prevent a childless adult from voting in a school board election because the state argued that non-parents were "less informed" about school affairs than parents were. New York wanted to limit the franchise only to voters who were "interested" in the outcome of its school board elections.[176] The Supreme Court applied strict scrutiny and struck down the statute in question, finding that New York's classification, which excluded non-parents from voting, prevented some people from voting who were as substantially interested in what a local school board did as those allowed to vote.[177] Similarly, in *Dunn*, the Court struck down Tennessee's durational residency requirement because Tennessee's law proved to be a crude device for achieving the state's goal of assuring a knowledgeable electorate.[178] Tennessee allowed all longtime residents to vote regardless of their knowledge of the issues. At the same time, it excluded new residents who sought to educate themselves.[179]

Ultimately, *Dunn* held 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."[180] That finding suddenly threatened to place a significant burden on states to prove that their lengthy durational residency requirements were necessary and served a compelling state interest.

The very next year, however, the Court decided two related cases that seemed to extend the state durational residency period beyond

173. *Id.* at 347-48.

174. *Id.* at 345, 354-55.

175. *Id.* at 345.

176. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 (1969).

177. *Id.*

178. *Dunn*, 405 U.S. at 357-58.

179. *Id.* at 359.

180. *Id.* at 348.

what was allowed in *Dunn*. In *Marston v. Lewis*,[181] decided in 1973, the Court upheld a fifty-day durational residency requirement in Arizona. This time the Court relied on the state's legislative judgment that this period was "necessary to achieve the State's legitimate goals."[182] In particular, Arizona had relied on a volunteer deputy registrar system that was massive in scope and that resulted in a certain number of mistakes per registered voter, which the state needed more time to correct at each precinct.[183] Another factor that was unique in Arizona was the timing of the state's primary system. Arizonans held their primaries in the fall, and because of their work in the primary, country registrars and their staffs were often delayed in processing incoming applications to register Arizona voters for the general election.[184] As such, the Court accepted Arizona's judgment that a period of fifty days was necessary to promote the state's important interest in obtaining accurate voter lists.[185] However, Justices Marshall, Douglas, and Brennan dissented in *Marston*.[186] They thought that a thirty-day durational period should suffice for Arizona, especially since, under the 1970 Amendments, the state already had to use it to register those voters who wanted to vote in federal presidential—but not state—elections.[187]

On the same day in 1973 that *Marston* was handed down, the Court also decided *Burns v. Fortson*,[188] upholding a Georgia statute that required all registrars to close their voter registration books fifty days prior to the November general election, except regarding those persons who sought to vote for the President of the United States only. Georgia offered extensive evidence to establish the need for a fifty-day registration cut-off, given the numerous requirements and vagaries of its election laws. A registration cut-off, technically, is not the same thing as a durational residency requirement, and the distinction is important to explain. A durational residency requirement applies only to new residents, while a registration cut-off deadline applies to *all* state residents who seek to register to vote. However, in practice, the two requirements work similarly. Still, if *Dunn* held that the maximum permissible durational residency requirement was thirty days, the decisions in *Marston* and *Burns* seemed to challenge that. Should the limit be set at thirty days? Fifty days? Sixty days? In *Burns*, the Court held that "the 50-day registration period approach-

181. 410 U.S. 679 (1973).
182. *Id.* at 680.
183. *Id.* at 681.
184. *Id.*
185. *Id.* at 680.
186. *Id.* at 682-85.
187. *Id.* at 683-84.
188. 410 U.S. 686 (1973).

es the outer constitutional limits in this area,"[189] but it did not state exactly what those limits were. Scholars have since suggested that the maximum period is likely somewhere between the fifty days approved in *Burns* and the three months struck down in *Dunn*.[190]

C. *The Modern Durational Residency Requirement*

Ultimately, two factors led to the demise of lengthy durational residency requirements in the states—at least for voters. The first had to do with the intervention of the federal government in the form of the 1970 Amendments to the Voting Rights Act of 1965. The second had to do with the intervention of the Supreme Court. Both happened in the 1970s, on the heels of the voting rights struggles of the 1960s.

Today, given that the Supreme Court has declared lengthy residency requirements for voting in state and local elections unconstitutional, most of the states have changed or eliminated their durational residency requirements to comply with the Court's rulings. Instead, they have implemented registration cut-off deadlines by which voters have to register. In Hawaii, the registration cut-off deadline is thirty days.[191] In other states, such as Florida and Arizona, the cut-off is twenty-nine days.[192] In Kentucky, it is twenty-eight days.[193] Another set of states requires approximately three weeks for new registrations. The time period is twenty-four days in Oklahoma;[194] twenty-two days in Colorado;[195] twenty-one days in Maryland, Maine, Oregon, Virginia, and West Virginia;[196] and twenty days in Kansas, Massachusetts, and Minnesota.[197] Other jurisdictions close their registration periods approximately two weeks before an election. In Alabama and California the period is fourteen days,[198] and in Iowa it is eleven days.[199] Connecticut requires a new voter to be registered only seven

189. *Id.* at 687.

190. *See, e.g.*, LeClerq, *supra* note 3, at 862 ("The maximum constitutionally permissible durational residency requirement for voting is . . . apparently somewhere between the 3-*months intra*state requirement disapproved in *Dunn* and the *50-day* requirement approved in *Marston* and *Burns*.").

191. HAW. REV. STAT. ANN. § 11-24 (West 2015).

192. *See* ARIZ. REV. STAT. ANN. § 16-101(A)(2) (2015); FLA. STAT. § 97.055(1)(a) (2015).

193. KY. REV. STAT. ANN. § 116.045(2) (West 2015).

194. OKLA. STAT ANN. tit. 26, § 4-103 (West 2015).

195. COLO. REV. STAT. § 1-2-201(3)(b)(I) (2015).

196. MD. CODE ANN., ELEC. LAW § 3-302 (LexisNexis 2015); ME. REV. STAT. ANN. tit. 21-A, § 121-A (2015); OR. REV. STAT. ANN. § 247.025 (West 2015); VA. CODE ANN. § 24.2-416 (2015); W. VA. CODE ANN. § 3-2-6 (LexisNexis 2015).

197. KAN. STAT. ANN § 25-2311 (2012); MASS. GEN. LAWS ANN. ch. 51, § 26 (2015); MINN. STAT. ANN. § 201.054 (West 2015).

198. ALA. CODE § 17-3-50 (2015); CAL. ELEC. CODE § 3400 (West 2015).

199. IOWA CODE ANN. § 48A.9 (West 2015).

TABLE 2:
STATE DURATIONAL RESIDENCY REQUIREMENTS AND
STATE VOTER REGISTRATION CUT-OFF REQUIREMENTS FOR SUFFRAGE, 2015

STATE	REQ.	STATE	REQ.	STATE	REQ.	STATE	REQ.	STATE	REQ.
AL	No durational residency req., 14-day reg. cut-off req.	HI	No durational residency req., 30-day reg. cut-off req.	MA	No durational residency req., 20-day reg. cut-off req.	NM	No durational residency req., 28-day reg. cut-off req.	SD	No durational residency req., 15-day reg. cut-off req.
AK	30-day reg. cut-off req.	ID	30-day durational residency req., 25-day reg. cut-off req.	MI	30-day reg. cut-off req.	NY	30-day durational residency req.	TN	No durational residency req., 30-day reg. cut-off req.
AZ	29-day reg. cut-off req.	IL	30-day durational residency req., 27-day reg. cut-off req.	MN	21-day reg. cut-off req.	NC	30-day durational residency req., 25-day reg. cut-off req.	TX	No durational residency req., 30-day reg. cut-off req.
AR	No durational residency req., 30-day reg. cut-off req.	IN	30-day durational residency req., 29-day reg. cut-off req.	MS	30-day durational residency req., 30-day reg. cut-off	ND	30-day durational residency req., same-day reg.	UT	30-day durational residency req., 15-day reg. cut-off req.
CA	14-day reg. cut-off req.	IA	No durational residency req., 10-day reg. cut-off req.	MO	No durational residency req., 4-week reg. cut-off req.	OH	30-day durational residency req., 30-day reg. cut-off	VT	Reg. cut-off closes second Saturday before an election

CO	30-day durational residency req., 29-day reg. cut-off req.	KS	No durational residency req., 15-day reg. cut-off req.	MT	30-day durational residency req., 30-day reg. cut-off	OK	No durational residency req., 25-day reg. cut-off req.	VA	No durational residency req., 21-day reg. cut-off req.
CT	No durational residency req., 14-day reg. cut-off req. by mail or 7-day in person	KY	29-day durational residency req.	NE	No durational residency req., but registration cut-off closes third Friday before an election.	OR	21-day reg. cut-off req.	WA	30-day durational residency req., 30-day reg. cut-off req.
DE	No durational residency req., 20-day reg. cut-off req.	LA	No durational residency req., 30-day reg. cut-off req.	NV	30-day durational residency req., 30-day reg. cut-off	PA	30-day durational residency req., 30-day reg. cut-off	WI	10-day durational residency req., 15-day reg. cut-off req.
FL	No durational residency req., 29-day reg. cut-off req.	ME	No durational residency req., 21-day reg. cut-off req.	NH	No durational residency req., 10-day reg. cut-off	RI	No durational residency req., 30-day reg. cut-off	WV	No durational residency req., 21-day reg. cut-off req.
GA	No durational residency req., 30-day reg. cut-off req.	MD	No durational residency req., 21-day reg. cut-off req.	NJ	30-day durational residency req., 20-day reg. cut-off	SC	No durational residency req., 30-day reg. cut-off req.	WY	No durational residency req., 30-day reg. cut-off req.

days before an election,[200] and at least one state—North Dakota—uses same-day voter registration, so that a new voter could actually register to vote and cast his or her ballot on the same day.[201] Table 2 contains a fifty-state survey of durational residency periods and registration cut-off periods in the United States as of 2015.[202]

Two points deserve emphasis. First, some states have managed to retain registration periods that are longer than thirty days, although there are not many of them. Georgia currently requires a voter to register by the "fifth Monday . . . prior to the . . . election," which in practice puts the registration deadline out five to six weeks.[203] Second, it must be emphasized again that modern registration periods are not exactly the same as the durational residency qualifications that were challenged in *Dunn*. The justification for asking a citizen to register at least thirty days before an election is administrative efficiency.[204] States do not set up these registration deadlines to restrict the franchise, to control their community of voters, or to create more knowledgeable voters. Today, that would be unconstitutional. Rather, they do it because that is how long it takes them to process a voter's paperwork, verify his address, and communicate his eligibility to the municipality where the election will be held.[205]

Finally, though state durational qualifications for voting have withered, there is another sense in which state durational residency requirements have not disappeared. Even after it became illegal for the states to apply durational residency requirements to the right to exercise one's vote, the states continued to apply them to other areas of everyday life as a way of protecting their resources from newcomers and outsiders. Over the years, durational residency requirements have been applied to prevent newly-resident students from seeking in-state tuition,[206] to keep new residents from using a state's laws to file for divorce,[207] to restrict new residents from receiving a state's

200. CONN. GEN. STAT. ANN. § 9-23g (West 2015).

201. *See* N.D. CENT. CODE § 16.1-01-05.1 (2015).

202. Calculations made by author based on a 50-state survey of state statutes. Complete dataset of these statutes is on file with the author and available upon request.

203. GA. CODE ANN. § 21-2-224 (2015).

204. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 348 (1972) (noting "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").

205. *Id.*

206. *See* Lawrence J. Conlan, *Durational Residency Requirements for In-State Tuition: Searching for Access to Affordable Higher Learning*, 53 HASTINGS L.J. 1389 (2002); William S. Eubanks II, *North Carolina's Durational Residency Requirement for In-State Tuition: Violating the Constitution's Inherent Right to Travel*, 1 CHARLOTTE L. REV. 199 (2009); Susan L. Kanclier, *Stateless Students: Oregon's Durational Residency Requirement for Purposes of Tuition*, 74 OR. L. REV. 1319 (1995).

207. *See* Sosna v. Iowa, 419 U.S. 393 (1975) (upholding a one-year durational residency period in the state of Iowa for new residents to be able to file a petition for divorce); *see also*

welfare benefits,[208] to keep a new resident from becoming a municipal employee, and to make it harder to gain admission to the bar.[209] Where courts have determined that durational residency requirements impinge on a fundamental right, these requirements have been invalidated. For example, this has generally been the case when states have tried to link state benefits to a resident's length of residency in that state.[210] Some of the jurisprudence concerning these durational residency qualifications has been controversial. Yet there is one group of individuals to whom durational residency qualifications have been consistently applied less controversially: newly-resident political candidates seeking to get elected to a state office. At least at the state level, politicians generally continue to be barred by durational residency requirements, as we are about to see.

IV. THE STABILITY OF DURATIONAL RESIDENCY REQUIREMENTS FOR CANDIDATES

A different story emerges with respect to durational residency requirements for candidates. Durational residency qualifications continue to be imposed on many political office-seekers by state law and by state constitutional provisions. These requirements have been justified by the states as ensuring more informed and knowledgeable political candidates, guaranteeing the exposure of prospective candidates to voters, and assuring that a candidate running for office is a member of the political community he hopes to represent.

There have been many cases in the courts challenging durational residency requirements as they apply to candidates for office.[211] But whereas durational residency requirements for voters were struck down under such challenges, courts have largely upheld the durational residency requirements for candidates. In so doing, they have drawn a sharp distinction between the right to vote and the right to

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Doris Jonas Freed & Henry H. Foster, Jr., *Durational Residency Requirements as Prerequisites for Divorce Jurisdiction*, 9 FAM. L.Q. 555 (1975); William H. Luker, *Durational Residency Requirements for Divorce*, 29 ARK. L. REV. 415 (1975); David E. Pierce, *Durational Residency Requirements for Divorce*, 15 WASHBURN L.J. 149 (1976); Note, *Durational Residency Requirements for Divorce*, 123 U. PA. L. REV. 187 (1974).

208. *See* Saenz v. Roe, 526 U.S. 489 (1999) (invalidating a California welfare statute that imposed a one-year waiting period on new state residents); Shapiro v. Thompson, 394 U.S. 618 (1969) (striking down a one-year residency period imposed by a state as a prerequisite to receiving welfare payments on the basis that this would allow a state to discriminate between different classes of state residents); *see also* David A. Donahue, *Durational Residency Requirements for Welfare Benefits*, 72 ST. JOHN'S L. REV. 451 (1998).

209. Paul G. Gill, *Invalidation of Residency Requirements for Admission to the Bar: Opportunities for General Reform*, 23 U. RICH. L. REV. 231 (1989).

210. *See, e.g.*, Zobel v. Williams, 457 U.S. 55 (1982) (invalidating an Alaska statute that distributed the state's income from oil revenues among state residents based on each citizen's length of residence within the state).

211. *See* Pitts, *supra* note 3, at 347 n.22 (listing several such cases).

be a candidate for office. In part, the durational residency requirements for candidates have been more difficult to challenge because they have long been enshrined in state constitutions. At the same time, it is worth noting that the situation facing candidates for federal office differs from that facing candidates for state office. At the federal level, there are no durational residency requirements for candidates to satisfy, apart from those for the President and Vice President. However, at the state level, these requirements abound. Thus, durational residency requirements for candidates differ by office.

A. At the State Level

Durational residency requirements are common for state offices, such as the office of the governor or a member of the state legislature. Candidates for governor can expect to face some of the most stringent durational residency requirements in the nation. As Table 3 indicates, Missouri and Oklahoma impose a ten-year durational residency requirement on gubernatorial candidates.[212] A durational residency period of seven years is also not unheard of. Alabama, Alaska, Arkansas, Florida, Massachusetts, New Jersey, Pennsylvania, and Tennessee all require their candidates for governor to be a state resident for seven years before they can be elected to office.[213] Another seventeen states set the durational residency period for governor at five years.[214] In only a handful of states are these durational residency requirements almost entirely absent. Even in these states, a gubernatorial candidate must usually satisfy the same durational residency period as is required of a state elector or voter. Table 3, below, lists the length of the durational residency requirement for the office of the governor for every state as of 2015. In most states, these requirements are constitutionally mandated. By contrast, residency requirements for local office, such as mayor or city councilman, are often set by statutes or municipal codes. They also tend to have much shorter durational residency periods.

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212. *See* MO. CONST. art. IV, § 3 (Missouri); OKLA. CONST. art. VI, § 3 (Oklahoma).

213. *See* ALA. CONST. art. V, § 117 (Alabama); ALASKA CONST. art. III, § 2 (Alaska); ARK. CONST. art. VI, § 5 (Arkansas); FLA. CONST. art. IV, § 5 (Florida); MASS. CONST. pt. II, ch. 2, § 1, art. II (Massachusetts); N.H. CONST. pt. II, art. XLII (New Hampshire); N.J. CONST. art. V, § 1, para. 2 (New Jersey); PA. CONST. art. IV, § 5 (Pennsylvania); TENN. CONST. art. III, § 3 (Tennessee).

214. A five-year period seems to exist in the largest plurality of the states. *See, e.g.*, CAL. CONST. art. V, § 2 (California); HAW. CONST. art. V, § 1 (Hawaii); IND. CONST. art. V, § 7 (Indiana); LA. CONST. art. IV, § 2 (Louisiana); ME. CONST. art. V, pt. I, § 4 (Maine); MISS. CONST. art. V, § 117 (Mississippi); NEB. CONST. art. IV, § 2 (Nebraska); N.M. CONST. art. V, § 3 (New Mexico); N.Y. CONST. art. IV, § 2 (New York); N.D. CONST. art. V, § 4 (North Dakota); S.C. CONST. art. IV, § 2 (South Carolina); TEX. CONST. art. IV, § 4 (Texas); UTAH CONST. art. VII, § 3 (Utah); VA. CONST. art. V, § 3 (Virginia); WYO. CONST. art. IV, § 2 (Wyoming).

TABLE 3:
STATE DURATIONAL RESIDENCY REQUIREMENTS FOR GOVERNOR, 2015

STATE	REQUIREMENT	STATE	REQUIREMENT
AL	7 years	MT	2 years
AK	7 years	NE	5 years
AZ	5 years	NV	2 years
AR	7 years	NH	7 years
CA	5 years	NJ	7 years
CO	2 years	NM	5 years
CT	Candidate must be a qualified elector	NY	5 years
DE	6 years	NC	2 years
FL	7 years	ND	5 years
GA	6 years	OH	Candidate must be a qualified elector
HI	5 years	OK	10 years
ID	2 years	OR	3 years
IL	3 years	PA	7 years
IN	5 years	RI	Candidate must be a qualified elector
IA	2 years	SC	5 years
KS	†	SD	2 years
KY	6 years	TN	7 years
LA	5 years	TX	5 years
ME	5 years	UT	5 years
MD	5 years	VT	4 years
MA	7 years	VA	5 years
MI	4 years	WA	Candidate must be a qualified elector
MN	1 year	WI	Candidate must be a qualified elector
MS	5 years	WV	5 years
MO	10 years	WY	5 years

† = There are no formal residency qualifications for a gubernatorial candidate in the state of Kansas.

As mentioned, in some of the states—including Connecticut, Ohio, Rhode Island, Washington, and Wisconsin—the length of time that a candidate for governor has to reside in the state will be equivalent to the durational residency requirement for a voter in that state. This period will usually be around thirty days. But these exceptions are rare, and in most cases the durational residency requirement for a gubernatorial candidate is many years. Often, the long durational residency periods have been used to disqualify new challengers, especially those who have not recently lived in the state. To understand how candidate residency qualifications work, and how they have sometimes been used by politicians against their political opponents, we might examine some recent durational residency battles that have wound up in the courts. Not all state durational residency challenges concern gubernatorial candidates or candidates seeking statewide office. Many of these challenges are local in nature and arise during races to fill mayoral offices and city council seats as well.

We can compare the legal challenges brought against the candidacies of Rahm Emanuel and Zephyr Teachout on durational residency grounds. Both of these durational residency challenges attracted significant media attention when they occurred, even though the races were very different: Rahm Emanuel was running in a mayoral race to lead city hall in Chicago while Zephyr Teachout was running for the Democratic nomination to become governor of New York. We can also contrast the hurdles that Emanuel and Teachout faced in their races with those faced by Hillary Clinton in her race to become the U.S. Senator from New York in 2000. Hillary Clinton was not a New Yorker and had never lived in that state. However, unlike the state races, her qualifications could not be challenged on durational residency grounds because Clinton was running for a federal office.

1. Rahm Emanuel

Rahm Emanuel is a Democratic politician who was born and raised in Chicago.[215] He worked in the Clinton Administration through much of the 1990s, including as Assistant to the President for Political Affairs and as a Senior Advisor to the President for Policy and Strategy.[216] In 1998, Emanuel resigned from the Clinton

215. Maksym v. Bd. of Election Comm'rs, 950 N.E.2d 1051, 1053 (Ill. 2011) ("The candidate [Emanuel] was born in Chicago . . . ."). *See generally* EZEKIEL J. EMANUEL, BROTHERS EMANUEL: A MEMOIR OF AN AMERICAN FAMILY (2013) (chronicling Rahm Emanuel's Chicago birth and upbringing).

216. *See Clinton White House Appointments*, BALTIMORE SUN (Jan. 15, 1993), http://articles.baltimoresun.com/1993-01-15/news/1993015187_1_special-assistant-domestic-policy-president-and-deputy; Storer H. Rowley, *Mayor Rahm Emanuel to Speak on Campus*, NW. U. (Nov. 19, 2012), http://www.northwestern.edu/newscenter/stories/2012/11/mayor-rahm-emanuel-to-speak-on-campus.html.

White House, returned to Chicago, and pursued a career in finance. In 2002, he ran for the U.S. House of Representatives from Chicago, after Rod Blagojevich, who represented Illinois's 5th Congressional District, announced that he was vacating his seat to run for governor.[217] Blagojevich was elected governor, and Emanuel was elected to Blagojevich's old seat in the 5th Congressional District. Emanuel went on to represent that district in Congress from 2003 to 2009. When Barack Obama became President, Emanuel became his Chief of Staff.[218] On January 2, 2009, he resigned from Congress and returned to the White House, this time to work for President Obama.[219]

Emanuel went to great pains to maintain his Chicago residency during his time in the White House. From the time his house was first purchased in 1998 until he became White House Chief of Staff in 2009, his family continually resided in their Chicago home,[220] while Emanuel shuttled back and forth to Washington. During his first six months of work in the Obama Administration, Emanuel's family continued to remain in their Chicago home while Emanuel rented an "in-law apartment" in the nation's capital.[221] On June 1, 2009, however, Emanuel's family relocated to Washington. They began to receive their mail at the new house they rented in the District of Columbia.[222] In the meantime, they rented out their Chicago home to another family. Emanuel's family did leave several large household items at their Chicago home, including televisions, a piano, and a bed, in addition to books and various family heirlooms. Emanuel also continued to pay property taxes on his Chicago house, listed his Chicago address on his personal checks, and continued to list the address of his Chicago house as his official registered voting address.[223] He also always maintained a valid Illinois driver's license.

Richard M. Daley had been elected the mayor of Chicago in 1989 and re-elected on five separate occasions since. In 2010, Daley announced his plans to retire.[224] Daley had been leading America's third-largest city for twenty-one years.[225] Upon learning this news,

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217. *See* Jodi Wilgoren, *Ethnic Comments Rattle Race for Congress*, N.Y. TIMES (Mar. 6, 2002), http://www.nytimes.com/2002/03/06/us/ethnic-comments-rattle-race-for-congress.html.

218. *Maksym*, 950 N.E.2d at 1053.

219. *See id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 1054.

224. *See* Bob Secter, *Daley Won't Run for Record Seventh Election to Be Mayor*, CHI. TRIB. (Sept. 8, 2010), http://articles.chicagotribune.com/2010-09-08/news/ct-met-daley-legacy-0908-20100907_1_parking-meter-deal-richard-j-daley-seventh-term.

225. *Id.*

Emanuel resigned his position at the White House and announced that he would run to become the next mayor of Chicago.[226] While Emanuel's family had remained in Chicago when Emanuel served in Congress, residing in the house that Emanuel owned, Emanuel's spouse and children had been living in Washington, D.C. for several months by the time he announced his mayoral bid, and their Chicago home was being occupied by another family.[227] When Emanuel decided to run for mayor, the rental of his Chicago home became a major issue in the legal challenge that was brought to Emanuel's mayoral candidacy under Illinois' durational residency qualifications.[228]

Illinois maintains a durational residency requirement for mayoral elections. The Illinois Municipal Code states that a candidate for mayor has to reside in the city for at least one year preceding a mayoral contest.[229] In addition, the candidate himself has to be a "qualified elector" in Illinois.[230] This means that a mayoral candidate has to have been a resident of his voting district during the thirty days prior to the election.[231] After Emanuel resigned his position at the White House, he immediately made plans to return to Illinois. But as his Chicago home was now occupied by tenants, who were under contract there until June 30, 2011, Emanuel decided to lease an apartment on Milwaukee Avenue, starting on October 1, 2010.[232]

In November 2010, lawyer Burt Odelson filed a legal challenge to Emanuel's mayoral candidacy on behalf of Thomas L. McMahon, a retired Chicago police officer, and Walter P. Maksym Jr., a Chicago lawyer.[233] The challenge asserted that Emanuel did not meet the state's one-year municipal durational residency requirement and that his name could not be placed on the ballot for the mayoral election to take place on February 22, 2011. McMahon and Maksym took issue with Emanuel renting out his Chicago property while he lived in Washington, claiming that Illinois law required the mayoral candi-

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226. *See Maksym*, 950 N.E.2d at 1053.

227. *Id.* at 1054; Gavin J. Dow, Note, *Mr. Emanuel Returns from Washington: Durational Residence Requirements and Election Litigation*, 90 WASH. U. L. REV. 1515, 1526 (2013).

228. *Maksym*, 950 N.E.2d at 1066.

229. The relevant provision is Illinois Municipal Code § 3.1-10-5(a), which states: "A person is not eligible for an elective municipal office unless that person is a qualified elector of the municipality and has resided in the municipality at least one year next preceding the election or appointment . . . ." 65 ILL. COMP. STAT. ANN. 5/3.1-10-5(a) (West 2016).

230. *Id.*; *see also Maksym*, 950 N.E.2d at 1056-57.

231. 65 ILL. COMP. STAT. ANN. 5/3.1-10-5(a) (West 2016).

232. *Maksym*, 950 N.E.2d at 1054.

233. *See* Kristen Mack, *Rahm Emanuel's Residency Challenged in Race for Mayor*, CHI. TRIB. (Nov. 26, 2010), http://articles.chicagotribune.com/2010-11-26/news/ct-met-rahm-residency-challenge-20101126_1_residency-rules-ballot-challenge-lawyer-burt-odelson.

date to be physically present in Chicago for one year.[234] Emanuel contended that he met the requirement because he owned a home in Chicago, voted there, and always intended to return.[235] He also pointed to an exception in the state's election code that protected the residency status of persons who temporarily left "on business of the United States."[236] Emanuel argued that his years in the White House fell into this category. The challengers claimed that this exception applied only to those who left the state to serve in the military.[237]

McMahon and Maksym's complaint came before the Board of Election Commissioners of the City of Chicago, which, after holding an evidentiary hearing, dismissed it and ruled that Emanuel's name should be included on the ballot as a mayoral candidate.[238] The Board determined that Emanuel had met the qualifications of the Illinois Municipal Code.[239] The Board noted, and both sides agreed, that "residence" in the Municipal Code referred to "permanent abode," and that two elements were required to prove it: physical presence and the intent to remain permanently.[240] In the Board's view, once permanent abode was established, residence continued until it was "abandoned."[241] Emanuel's challengers failed to establish that he had abandoned his permanent residency in the City of Chicago.[242]

Emanuel's challengers sought judicial review of the Board's decision in the circuit court of Cook County, which affirmed the Board of Election Commissioners.[243] The circuit court agreed with the Board that the relevant question in the case was whether Emanuel had abandoned his Chicago residence when he became Chief of Staff to the President of the United States.[244] Finding that he had not abandoned it, the circuit court affirmed the Board's decision.[245] Emanuel's challengers did not give up, however. They appealed the circuit

234. *Id.*

235. *Id.*

236. *See id.*

237. *Id.*

238. Maksym v. Bd. of Election Comm'rs, 950 N.E.2d 1051, 1053 (Ill. 2011).

239. *Id.* at 1054.

240. *Id.*

241. *Id.*

242. *Id.*

243. Maksym v. Bd. of Election Comm'rs, No. 2010 COEL 020, 2011 WL 222521 (Ill. Cir. Ct. Jan. 4, 2011), *rev'd*, 942 N.E.2d 739 (Ill. App. Ct. 2011), *aff'd*, 950 N.E.2d 1051 (Ill. 2011).

244. *Maksym*, 950 N.E.2d at 1055.

245. *Id.*

court's decision to the Illinois Appellate Court.[246] There they received a more favorable ruling. By a two-to-one vote, the appellate court reversed the circuit court and set aside the decision of the Board.[247]

The Illinois Appellate Court focused on the meaning of the words "resided in" in the Illinois Municipal Code and specifically the requirement that a candidate must have "resided in the municipality at least one year next preceding the election."[248] It noted that the Board had used the definition of residence that was appropriate in voter qualification cases, but Emanuel's case was a candidate qualification case. The Illinois Appellate Court was not convinced that using the same definition of residence for voter qualification contests and candidate qualification contests was appropriate. The Illinois Supreme Court had never ruled on the matter.[249] Thus the Illinois Appellate Court determined that the phrase "resided in" in the Municipal Code did not refer to a permanent abode, but only to the place where the candidate "actually live[s]" or "actually reside[s]."[250]

The Illinois Appellate Court's decision of January 24, 2011 was quickly appealed to the Illinois Supreme Court, given that Chicago's mayoral election was less than a month away. Until the appellate ruling, Emanuel had been steamrolling his challengers in the polls. Then, within days of ballots being printed and early voting starting in Chicago, it seemed as if Emanuel's name was not going to appear on the ballot.[251] On January 27, 2011, however, the Illinois Supreme Court reversed the Illinois Appellate Court and held that Emanuel's name should appear after all.[252] To reach its decision, it relied on the 140-year-old case of *Smith v. People ex rel. Frisbie*.[253] When Smith, a longtime resident of Illinois, was appointed a circuit judge by the Illinois governor, an action was brought to remove him from that office on the grounds that he had not been a resident "for at least five years next preceding . . . his

246. Maksym v. Bd. of Election Comm'rs, 942 N.E.2d 739 (Ill. App. Ct. 2011).

247. *Id.*; *see* 65 ILCS 5/3.1-10-5(a); *see also* Monica Davey, *Court Says Rahm Emanuel Not Eligible to Run for Mayor*, N.Y. TIMES (Jan. 24, 2011, 1:27 PM), http://thecaucus.blogs.nytimes.com/2011/01/24/court-says-rahm-emanuel-not-eligible-to-run-for-mayor/.

248. *Maksym*, 942 N.E.2d at 743.

249. *Id.*

250. *Id.* at 745.

251. *See* Rick Pearson & Kristen Mack, *Emanuel Scrambles to Get Back on Mayoral Ballot*, CHI. TRIB. (Jan. 25, 2011), http://articles.chicagotribune.com/2011-01-25/news/ct-met-mayor-race-0125-rahm-20110124_1_residency-requirement-rahm-emanuel-mayoral-ballot.

252. *Id.*

253. 44 Ill. 16 (1867); *see also* Maksym v. Bd. of Election Comm'rs, 950 N.E.2d 1051, 1059 (Ill. 2011).

appointment," as the Illinois Constitution then required.[254] His challengers asserted that Smith had moved with his family to Tennessee for eight months during the five-year durational period.

In 1847, the Illinois Supreme Court found that Smith's time in Tennessee did not result in the abandonment of his Illinois residency. Once established, it found that "residence is lost . . . by a union of intention and acts," which are to "be inferred from the surrounding circumstances."[255] Smith had frequently declared that his move to Tennessee was an experiment, expressed a desire to return home to Illinois upon arriving in Tennessee, declined to vote in Tennessee out of fear of losing his Illinois citizenship, refused to sell his Illinois law books because he thought he would need them when he returned to his Illinois practice, and rented out his Illinois residence instead of selling it when he left.[256] Since *Smith* was decided, the Illinois courts had held that the question of whether a candidate abandoned his state residency was a question of intent.[257] A residency was established with physical presence and intent to remain indefinitely. Once established, the test of whether it was kept became abandonment.[258] Thus a person could be physically absent from his residence "for months or even years" without abandoning it.[259] And whether one abandoned his residency turned on what his intent was. Since Emanuel owned a house in Illinois while living in Washington, and had always said he intended to return to Chicago, the Illinois Supreme Court found he never abandoned his residency.

After the Illinois Supreme Court's decision, Emanuel's name was placed on the ballot for mayor of Chicago. On February 22, 2011, he won fifty-five percent of the vote and was elected mayor. He was reelected in 2015. Emanuel's durational residency battle attracted

254. *Maksym*, 950 N.E.2d at 1057.

255. *Smith*, 44 Ill. at 24.

256. *Id.* at 23-24.

257. Illinois case law bore this out. *See, e.g.*, People *ex rel.* Madigan v. Baumgartner, 823 N.E.2d 1144, 1150 (Ill. App. Ct. 2005) (" '[W]here a person leaves his residence and goes to another place, even if it be another [s]tate, with an intention to return to his former abode, or with only a conditional intention of acquiring a new residence, he does not lose his former residence so long as his intention remains conditional.' " (quoting Pope v. Bd. of Election Comm'rs, 18 N.E.2d 214, 216 (Ill. 1938))); Walsh v. Cty. Officers Electoral Bd., 642 N.E.2d 843, 845 (Ill. App. Ct. 1994) (whether candidate abandoned old residence in favor of new residence presents a question of intent, which is measured both by the "surrounding circumstances" and the candidate's declarations); Dillavou v. Cty. Officers Electoral Bd., 632 N.E.2d 1127, 1131 (Ill. App. Ct. 1994) (whether candidate abandoned established residence is a question of intent, and " 'an absence for months, or even years, if all the while intended as a mere temporary absence for some temporary purpose, to be followed by a resumption of the former residence, will not be an abandonment' " (quoting Kreitz v. Behrensmeyer, 125 Ill. 141, 195 (1888))).

258. *Maksym*, 950 N.E.2d at 1060.

259. *Id.*

widespread media coverage.[260] This coverage launched a debate about the wisdom of durational residency requirements generally.[261] The case generated commentary by non-lawyers and had an effect, according to Gavin Dow, a little like that which was felt in the aftermath of *Bush v. Gore*.[262] Dow argues that Emanuel's legal battle brought into sharp contrast "the inherent tension between protecting voter choice and promoting the rule of law when interpreting and enforcing a candidate qualification rule."[263] It also showcased some of the complexity that candidate qualification cases involve and some of the strain that they put on courts when they are required to make quick decisions in a complicated yet important area of the law on the eve of an election.[264] As Dow rightly explains, this can throw the impartiality of the courts into question.[265]

2. *Zephyr Teachout*

Like Emanuel's race to become mayor of Chicago, Zephyr Teachout's attempt to challenge Andrew Cuomo, a sitting governor, in New York's Democratic primary demonstrates how durational residency requirements can be used to attack a challenger at the state level. Teachout is a law professor and a scholar of election law. Born and raised in Vermont, she went to law school at Duke University and later was admitted to the North Carolina bar.[266] In 2004, she worked as Director for Internet Organizing for the presidential campaign of former Vermont governor Howard Dean.[267]

In 2009, Teachout moved to New York to take a position as an assistant professor of law at Fordham University.[268] In 2014, when the labor-backed Working Families Party of New York considered snubbing Andrew Cuomo and giving its ballot line to Teachout, the media began to focus on the previously unknown candidate.[269] The Working Families Party ultimately chose to stick with Cuomo as its candidate,

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260. *See* Dow, *supra* note 227, at 1533.

261. *Id*; *see also* Richard L. Hasen, *Let Rahm Run! The Illinois Courts Should Let the Voters Decide Whether He'll Be Chicago's Next Mayor*, SLATE (Jan. 24, 2011, 6:20 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/let_rahm_run.html.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. Weiss v. Teachout, No. 700014/14, slip op. at 4-5 (Sup. Ct. King's Cty. N.Y. Aug. 11, 2014) (on file with the author).

267. Samantha M. Shapiro, *The Dean Connection*, N.Y. TIMES (Dec. 7, 2003), http://www.nytimes.com/2003/12/07/magazine/the-dean-connection.html?pagewanted=all.

268. *Weiss*, slip op. at 5.

269. Thomas Kaplan, *Cuomo Contests New York Residency of Teachout Before Primary*, N.Y. TIMES (Aug. 6, 2014), http://www.nytimes.com/2014/08/07/nyregion/cuomo-to-challenge-teachout-over-alleged-new-york-residency-ineligibility-before-primary-vote.html.

but at that point, Teachout decided that she would run for governor of New York on her own. She managed to gather more than 45,000 signatures and filed paperwork to challenge Cuomo in the Democratic primary.[270] In response, Cuomo immediately challenged her candidacy, asserting that Teachout failed to meet the durational residency requirement of the state she wished to govern.

Like Illinois, New York maintains a durational residency requirement that candidates for the office of governor must meet. New York's constitution requires a candidate for the office of governor to have resided within the state for a five-year period immediately preceding the election.[271] Teachout, who moved to New York in June 2009 and announced plans to run for governor in July 2014, barely met the requirement.[272]

Teachout's situation differed from Rahm Emanuel's in several important respects. Unlike Emanuel, Teachout did not own her own home. Emanuel also had a career in Illinois and an established track record there prior to serving in the Obama Administration, whereas Teachout had never lived in New York before taking up her position at Fordham Law School.[273] To make matters more complicated, Teachout did not consistently *remain* in New York during the five qualifying years needed to satisfy her durational residency requirement.[274] As an academic, she held various visiting fellowships that took her for months at a time outside of the state.[275] Nor did Teachout always rent an apartment in New York, much less the same apartment.[276] She changed homes often. She also stayed with friends in New York for long stretches of time without paying any rent.

In most legal disputes over a person's residence, a distinction is made between the terms "residence" and "domicile." Domicile refers to the place where an individual has established a permanent home, one that he or she intends to return to even if the person may be temporarily located elsewhere. Residence, on the other hand, refers to a person's temporary, physical place of abode. However, under New York Election Law, the two terms both refer to the candidate's

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270. *Id.*

271. *See* N.Y. CONST. art. IV, § 2 ("No person shall be eligible to the office of governor or lieutenant-governor, except a citizen of the United States, of the age of not less than thirty years, and who shall have been five years next preceding the election a resident of this state.").

272. *See* Thomas Kaplan, *Cuomo Contests New York Residency of Teachout Before Primary*, N.Y. TIMES (Aug. 6, 2014), http://www.nytimes.com/2014/08/07/nyregion/cuomo-to-challenge-teachout-over-alleged-new-york-residency-ineligibility-before-primary-vote.html.

273. *Id.*

274. *See id.*

275. *See id.*

276. *See id.*

permanent home.[277] New York's election law defines the term "residence" as "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return."[278]

Two of Cuomo's supporters, Harris Weiss and Andrew Sternlicht, filed a court petition to challenge Teachout's candidacy for governor, arguing that Teachout did not meet the durational residency requirements set out in New York's constitution.[279] In New York, disputes over a candidate's residency are generally handled by the supreme court in one of New York's counties. As Teachout resided in Brooklyn at the time of this challenge, the supreme court—or trial court—in Brooklyn heard her case.[280] The court noted Teachout's peripatetic background. Though she was raised in Vermont, the court explained how Teachout had attended college in Connecticut and law school in North Carolina.[281] She clerked for a judge on the U.S. Court of Appeals for the Third Circuit in Pennsylvania, and then returned to North Carolina to work as a death penalty lawyer, all while claiming Vermont as her official state of residence.[282]

Once Teachout moved to New York, she resided in at least six different locations within New York City. From August to September 2009, Teachout sublet an apartment at 22 Irving Place in Manhattan. From September to November 2009, she rented an apartment at 228 West 25th Street in Manhattan. From December 2009 to March 2011, she resided with a friend at 241 East 7th Street in Manhattan. From April to October 2011, she lived in an apartment at 153 Roebling Street in Brooklyn. From November 2011 to November 2012, she resided in an apartment at 72 West 82nd Street in Manhattan.[283] In November 2012, Teachout began to reside at 171 Washington Park in Brooklyn, and she was living there at the time of her durational residency trial, which took place on August 7-8, 2014.[284]

Unlike Emanuel, who had always been registered to vote in Chicago, even when he lived in the District of Columbia,[285] Teachout registered to vote in New York only about eleven months after she

277. Charisma L. Miller, *Zephyr Teachout Case Explained by Brooklyn Court*, BROOKLYN DAILY EAGLE (Aug. 12, 2014), http://www.brooklyneagle.com/articles/2014/8/12/zephyr-teachout-case-explained-brooklyn-court.

278. N.Y. ELEC. LAW § 1-104 (McKinney 2016).

279. *Weiss*, slip op. at 1-2.

280. Miller, *supra* note 277.

281. *Weiss*, slip op. at 4.

282. *Id.* at 4-5.

283. *Id.* at 5.

284. *Id.* at 5-6.

285. Maksym v. Bd. of Election Comm'rs, 950 N.E.2d 1051, 1054 (Ill. 2011).

moved there for the first time.[286] And while Teachout did file tax returns in New York for the years 2009 through 2013,[287] the challengers to her gubernatorial candidacy made an issue of how often she was absent from the state during her years as a resident. Teachout spent several summers in Vermont, one summer at the Library of Congress in Washington, D.C. working on a book, and time in Arizona working with community organizers.[288] In 2010, she spent seven weeks in Massachusetts while she taught at Harvard, though she did not give up her New York apartment during this time and returned to it on weekends. In spring 2014, right before she decided to run for governor, Teachout spent another four months living in Washington, D.C. as a fellow of the New America Foundation.[289] During this time, she sublet her Brooklyn apartment to someone else.[290]

Teachout's challengers claimed that her many absences from the state meant she did not manifest the necessary intent to make New York her domicile for purposes of satisfying New York's Election Law,[291] which required physical presence and intent to remain indefinitely. They also pointed out how, despite living in New York since 2009, Teachout continued to use her parent's Vermont address on her driver's license and car registration. She also used the Vermont address as her address on file with the North Carolina bar, and for documents she had filed with the government, such as her W-4, employee wage withholding forms, and for a form she filed with the Federal Election Commission after contributing to President Obama's reelection campaign.[292] The challengers also showed that Teachout had registered to vote in New York only in May 2010, almost eleven months after she arrived, though she did not vote anywhere else since.[293]

At her trial on August 7–8, 2014, the supreme court of King's County, in Brooklyn, ultimately ruled in Teachout's favor.[294] The court explained that the challengers had the burden of proving by clear and convincing evidence that Teachout had not been a resident

286. *See Weiss*, slip op. at 6.

287. *Id.* at 6-7.

288. *Id.* at 7.

289. *Id.*

290. *Id.* at 8.

291. *Id.* at 9.

292. *Id.* at 9-10. Teachout countered by arguing that New York is a state filled with people who come from somewhere else and that she spent time in Vermont with family during holidays and summer vacations. Terri Hellenbeck, *Former Vermonter Stirring up NY Politics*, VT. FREE PRESS (Aug. 5, 2014), http://www.burlingtonfreepress.com/story/news/local/2014/08/05/former-vermont-challenges-cuomo/13589997/.

293. She also filed New York state income tax returns from 2009 to 2013. Miller, *supra* note 277.

294. *Weiss*, slip op. at 12.

of New York for five years prior to the election. They failed to meet that burden.[295] The court found that Teachout's multiple apartments in New York City were "all places where she lived, ate her meals, slept, kept her personal items/clothing, furnished and/or decorated, and where she occasionally entertained."[296] Regarding the Vermont address and not applying for a New York driver's license until May 5, 2014, the court accepted Teachout's explanation that she maintained the Vermont address as a mail drop because it was more reliable than her apartment address, and that she, like many New Yorkers, did not drive a car while in the city.[297] The court found that she continuously maintained a domicile and residence in New York. She was physically present there, and intended to remain indefinitely.

Cuomo's campaign continued its efforts to disqualify Teachout by appealing the ruling. But an appellate court affirmed the decision of the trial court, allowing Teachout's name to remain on the gubernatorial ballot.[298] As the appeals court explained: "Although Zephyr R. Teachout has resided in several different residences within the City of New York since 2009, while maintaining close connections to her childhood domicile of Vermont, that is nothing more than an ambiguity in the residency calculus."[299]

New York's durational residency requirement was used by Cuomo's campaign as a political tool to undermine his opponent, and it allowed Cuomo to avoid debating Teachout on the issues. Teachout told newspapers that the residency challenge was a blatant attempt to intimidate her and sap her campaign of time and resources.[300] When asked about Cuomo's decision to appeal, Teachout pointed out how Cuomo had refused to debate her. Teachout and Tim Wu, a professor at Columbia Law School who was running for lieutenant governor, had asked Cuomo to debate them. "It's time to take it out of the courtroom and into a debate," Teachout told the media.[301] But Cuomo, less than three weeks before the election, refused. Instead, he used the durational residency requirement to challenge Teachout's ability to run for governor in the first place. Though Teachout's name remained on the ballot in New York's Democratic primary for governor, she ultimately lost that primary to Cuomo on September 9, 2014. Still, Teachout received thirty-four percent of the vote. Given her lack

295. *Id.* at 4, 12.

296. *Id.* at 6.

297. *Id.* at 11.

298. Weiss v. Teachout, 991 N.Y.S.2d 654 (N.Y. App. Div. 2014).

299. *Id.*

300. Kaplan, *supra* note 269.

301. Laura Figueroa, *Cuomo Campaign Appeals Teachout Residency Ruling*, NEWSDAY (Aug. 19, 2014), http://www.newsday.com/news/new-york/gov-andrew-m-cuomo-s-campaign-appeals-zephyr-teachout-residency-ruling-1.9097078.

of name recognition and lack of experience in elected politics, this result clearly demonstrated the displeasure that many Democratic primary voters had with New York's sitting governor.

B. At the Federal Level

We have seen how durational residency requirements exist in almost all of the states. At the federal level, however, due to the unique compromise that the framers reached in 1787, the situation that political candidates face is quite different. According to the Constitution, a member of the House only has to be an "inhabitant" of the state from which he is chosen to serve "when elected."[302] There is no durational residency qualification to meet, and the term "inhabitant," which is looser than "resident," implies that the candidate only has to reside in the state on the day of his election. Similarly, a U.S. Senate candidate only has to be an "inhabitant" of the state from which he is chosen "when elected."[303] Whenever states have tried to add requirements, the Supreme Court has disallowed this.[304] Although we would not normally expect a candidate to run for a federal office in one state when the candidate happens to reside in another, this has actually happened several times in American history. Such situations put into stark contrast the mismatch between how the durational residency regimes function at the state and federal levels.

Hillary Rodham Clinton's race for the United States Senate in New York provides an example of what candidates for federal office can do in the absence durational residency requirements. In 1999, Senator Daniel Patrick Moynihan decided not to seek re-election from New York, announcing his decision to vacate the U.S. Senate seat that he had held since 1977. Almost immediately, longtime veterans of New York's politics began trying to convince Hillary Clinton, who was then the wife of the sitting U.S. President, to run for Moynihan's seat.[305] Representative Charles Rangel, who had long represented Harlem in Congress, first suggested the idea at a speech he gave in Chicago. Harold Ickes, a political advisor to the Clintons, later tried to convince Hillary Clinton in person to run for Moyni-

302. U.S. CONST. art. I, § 2, cl. 2.

303. *Id.*

304. *See, e.g.*, U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) (holding that states cannot impose qualifications for prospective members of the U.S. Congress stricter than those specified in the Constitution).

305. James Bennet, *The Next Clinton*, N.Y. TIMES (May 30, 1999), http://www.nytimes.com/1999/05/30/magazine/the-next-clinton.html.

han's seat.[306] One problem, however, was that Hillary Clinton was not from New York—in fact, she had never lived in the state.[307]

Born in 1947 in Park Ridge, Illinois, Clinton spent the first eighteen years of her life in the suburbs of Chicago, before leaving in 1965 for college in Massachusetts, in 1969 for law school in Connecticut, and in 1974 to begin her career in Arkansas.[308] For the next eighteen years, from 1974 until 1992, the Clintons lived in Arkansas, where they dominated the state's political scene, as Bill Clinton first served one term as Arkansas's attorney general and then five terms as the state's governor.[309] During this time, Hillary became a partner at a prominent Little Rock law firm and a high profile lawyer in the state.[310] When Bill Clinton was elected president in 1992, the Clintons moved to Washington, D.C. They resided in the White House from 1993 to 2000.

While Hillary Clinton could legitimately claim to be the daughter of Illinois or Arkansas, her claim to New York was more tenuous—or rather, it was non-existent. Yet Clinton, both as the wife of the President and in her own right, had widespread name recognition, and she worked hard to change her image and brand herself as a New Yorker even if she had, in fact, never been one. On November 1, 1999, she and her husband bought a $1.7 million, five-bedroom, Dutch Colonial house in Chappaqua, New York, a suburb located in Westchester County. She then announced that the family would move there after Bill Clinton's presidency ended. Hillary Clinton did not reside in this house immediately, as her official home remained in the White House. But the purchase of the Chappaqua home generated a great deal of media attention, and it allowed Hillary Clinton to begin planting New York roots, even when she was still registered to vote in Arkansas.[311] This was the first time the Clintons had owned a house in

306. *Id.*

307. *See* Dan Merica, *Hillary Clinton's Favorite Home State(s)*, CNNPOLITICS (Nov. 14, 2014), http://www.cnn.com/2014/11/14/politics/hillary-clinton-from/.

308. *Hillary Rodham Clinton*, WHITE HOUSE, https://www.whitehouse.gov/1600/first-ladies/hillaryclinton (last visited Mar. 22, 2016).

309. *See William J. Clinton*, WHITE HOUSE, https://www.whitehouse.gov/1600/presidents/williamjclinton (last visited Mar. 22, 2016).

310. The literature chronicling the Clintons' time in Arkansas is extensive. *See, e.g.*, CARL BERNSTEIN, A WOMAN IN CHARGE: THE LIFE OF HILLARY RODHAM CLINTON (2008); HILLARY CLINTON, LIVING HISTORY (2004); PATRICK S. HALLEY, ON THE ROAD WITH HILLARY: A BEHIND-THE-SCENES LOOK AT THE JOURNEY FROM ARKANSAS TO THE U.S. SENATE (2002). Books about Bill Clinton's life almost always also devote substantial space to Hillary's career. *See, e.g.*, CHARLES F. ALLEN & JONATHAN PORTIS, COMEBACK KID: THE LIFE AND CAREER OF BILL CLINTON (1992); ERNEST DUMAS, THE CLINTONS OF ARKANSAS: A INTRODUCTION BY THOSE WHO KNEW THEM BEST (1993); DAVID MARANISS, FIRST IN HIS CLASS: A BIOGRAPHY OF BILL CLINTON (1996); JIM MOORE WITH RICK IHDE, CLINTON: YOUNG MAN IN A HURRY (1997).

311. Phil Hirschkorn, *First Lady Looking Forward to New York Residency*, CNN.COM (Nov. 3, 1999, 2:03 PM), http://www.cnn.com/ALLPOLITICS/stories/1999/11/03/hrc.cnn/.

seventeen years.[312] Having a home in New York gave Hillary an aura of legitimacy and allowed her to present the appearance that she was campaigning from a base in New York State.

There were three reasons why Hillary's candidacy was ultimately successful and why she was not challenged as a carpetbagger. The first is that New Yorkers, unlike residents of other states, are especially forgiving of outsiders. Robert F. Kennedy, Jr. had already been elected to the U.S. Senate from New York as an out-of-state candidate in 1964.[313] That New Yorkers were not bothered by Clinton's out-of-state roots was shown in the polls.[314] As First Lady, Clinton was considered a national figure, and being from Illinois, or Arkansas, or Washington, D.C. seemed not to make much difference to the New Yorkers who elected her to the U.S. Senate in 2000.[315]

A second and more important reason for Hillary's success was that she faced very little opposition. After not having any serious Democratic challengers in the primary, Clinton expected to face New York City's popular mayor, Rudolph Giuliani, in the general election. Giuliani consistently attacked Clinton as a carpetbagger in the media.[316] Ultimately, however, he dropped out of the race.[317] His replacement, Rick Lazio, a Republican who represented New York's 2nd Congressional District in the U.S. House, hardly had Hillary Clinton's name recognition. Lazio proved to be a lackluster candidate.

The final reason that Hillary Clinton was successful was that she ran for a federal office. As we saw, the Constitution does not maintain a durational residency qualification for federal congressional office-seekers. The only requirement is that a Senate candidate must be an inhabitant of the state from which he is chosen "when elected."[318] Hence, while the residency issue in Hillary Clinton's race for the Senate may have been a political issue, it could not be turned into a legal issue by her opponents. A legal challenge based on the duration of Hillary Clinton's residency would have been frivolous. Clinton owned a house in New York on the day of the election, and on November 7, 2000, she beat Lazio with fifty-five percent of the vote.

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312. *Id.*

313. *See* Adam Nagourney, *In a Kennedy's Legacy, Lessons and Pitfalls for Hillary Clinton; Carpetbagger Issue Has Echoes of '64, but Differences Could Prove Crucial*, N.Y. TIMES (Sept. 10, 2000), http://www.nytimes.com/2000/09/10/nyregion/kennedy-s-legacy-lessons-pitfalls-for-hillary-clinton-carpetbagger-issue-has.html.

314. *Id.*

315. *Hillary Clinton Elected to Senate from New York*, N.Y. TIMES (NOV. 8, 2000), http://www.nytimes.com/2000/11/08/politics/08YORK.html?pagewanted=all.

316. Adam Nagourney, *Political Memo; Giuliani Takes Aim at Hillary Clinton's Out-of-State Address*, N.Y. TIMES (Apr. 25, 1999), http://www.nytimes.com/1999/04/25/nyregion/political-memo-giuliani-takes-aim-at-hillary-clinton-s-out-of-state-address.html.

317. *Hillary Clinton Elected to Senate from New York*, *supra* note 315.

318. U.S. CONST. art. I, § 3, cl. 3.

C. Comparing Candidate Residencies

The above case studies show how candidate residency requirements vary by state and by office. Residency requirements for federal legislative office do not exist. Within the states, durational residency requirements very much do exist. They differ greatly, however, depending on whether they affect statewide or municipal candidates. Within each state, municipalities will often have their own, unique durational requirements. Some of these durational residency requirements for state offices can be fairly long. In New Hampshire, for instance, a candidate has to be a resident of the state for seven years before he is eligible to run for a seat in the state senate, though only for two years if he wishes to serve in the state house.[319] In both cases, the candidate must also reside in the district from which he is elected.[320] Table 4 lists the durational residency requirements for each house of the state senate in all fifty states as of 2015. Table 5, which follows it, lists the durational residency requirements for the lower house of each state legislature in all fifty states.

New Hampshire's seven-year durational residency requirement to serve in that state's senate is the longest in the country.[321] However, there are other states that also possess relatively long requirements. In Massachusetts and New York, the durational residency requirement for the state senate is five years.[322] In Mississippi, New Jersey, and Pennsylvania, it is four years.[323] In many other states, a durational residency of two or three years is common.[324] For the lower house of the state legislature, the durational residency requirement is typically much shorter, but not universally so. In New York, it remains five years,[325] while in Mississippi and Pennsylvania it is four years,[326] and in a number of other states the durational requirement

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319. *See* N.H. CONST. pt. II, art. XXIX (New Hampshire State Senate); N.H. CONST. pt. II, art. XIV (New Hampshire State House).

320. N.H. CONST. pt. II, art. XXIX; N.H. CONST. pt. II, art. XIV.

321. *See* Table 4; *see also* Sununu v. Stark, 383 F. Supp. 1287, 1292-93 (D.N.H. 1974) (Campbell, J., concurring) (upholding New Hampshire's seven-year durational residency requirement for the state senate in light of a federal constitutional challenge and noting how "[s]even years, it is true, may come close to the maximum permissible" length of a required residency); *N.H. Residency Law Is Upheld by Court*, TELEGRAPH (Mar. 4, 1975), https://news.google.com/newspapers?nid=2209&dat=19750304&id=4bNKAAAAIBAJ&sjid=fJQMAAAAIBAJ&pg=4488,4946393&hl=en.

322. MASS. CONST. pt. II, ch. 1, § 2, art. V; N.Y. CONST. art. III, § 7.

323. MISS. CONST. art. IV, § 42; N.J. CONST. art. IV, § 1, cl. 2; PENN. CONST. art. II, § 5.

324. *See, e.g.*, CAL. CONST. art. IV, § 2.4(c) (California, three years); DEL. CONST. art. II, § 3 (Delaware, three years); HAW. CONST. art. III, § 6 (Hawaii, three years); KY. CONST. § 32 (Kentucky, two years); N.C. CONST. art. II, § 6 (North Carolina, two years); TENN. CONST. art. II, § 10 (Tennessee, three years); VT. CONST. ch. 2, § 15 (Vermont, two years).

325. N.Y. CONST. art. III, § 7.

326. MISS. CONST. art. IV, § 41; PENN. CONST. art. II, § 5.

TABLE 4:
STATE DURATIONAL RESIDENCY REQUIREMENTS FOR A STATE SENATE SEAT, 2015

STATE	REQUIREMENT	STATE	REQUIREMENT
AL	3 years in state (1 year in district)	MT	1 year in state
AK	3 years in state (1 year in district)	NE	1 year in district
AZ	3 years in state (1 year in county)	NV	1 year in state
AR	2 years in state	NH	7 years in state
CA	3 years in state (1 year in district)	NJ	4 years in state
CO	1 year in state	NM	Must be legal resident of district
CT	Same as state elector	NY	5 years in state (1 year in district)
DE	3 years in state	NC	2 years in state (1 year in district)
FL	2 years in state	ND	1 year in state
GA	2 years in state	OH	1 year in state
HI	3 years in state	OK	Same as state elector
ID	1 year in district	OR	1 year in district
IL	2 years in state (1 year in district)	PA	4 years in state (1 year in district)
IN	2 years in the state (1 year in the district)	RI	Same as state elector
IA	1 year in state (60 days in district)	SC	Must be legal resident of district
KS	Same as state elector	SD	2 years in state
KY	2 years in state (1 year in district)	TN	3 years in state (1 year in district)
LA	2 years in state (1 year in district)	TX	5 years in state
ME	1 year in state (3 months in district)	UT	3 years in state (6 months in district)
MD	1 year in state (6 months in district)	VT	2 years in state (1 year in district)
MA	5 years in state	VA	Same as state elector
MI	Same as state elector	WA	Same as state elector
MN	1 year in state (6 months in district)	WV	1 year in district
MS	4 years in state (2 years in district)	WI	1 year in state
MO	3 years in state (1 year in district)	WY	1 year in district

TABLE 5:
STATE DURATIONAL RESIDENCY REQUIREMENTS FOR A STATE HOUSE SEAT, 2015

STATE	REQUIREMENT	STATE	REQUIREMENT
AL	3 years in state (1 year in district)	MT	1 year in state (6 months in district)
AK	3 years in state (1 year in district)	NE	1 year in district
AZ	3 years in state (1 year in county)	NV	1 year in state
AR	2 years in state	NH	2 years in state
CA	3 years in state (1 year in district)	NJ	2 years in state
CO	1 year in state	NM	District resident
CT	Same as elector in district	NY	5 years in state (1 year in district)
DE	3 years in state	NC	1 year in state
FL	2 years in state	ND	1 year in state
GA	2 years in state (1 year in district)	OH	1 year in state
HI	3 years in state (1 year in district)	OK	Same as elector in district
ID	1 year in district	OR	1 year in district
IL	2 years in state (1 year in district)	PA	4 years in state (1 year in district)
IN	2 years in state (1 year in district)	RI	Same as elector in district
IA	1 year in state (60 days in district)	SC	Same as elector in district
KS	Same as elector in district	SD	2 years
KY	2 years in state (1 year in district)	TN	3 years in state (1 year in district)
LA	2 years in state (1 year in district)	TX	2 years in state
ME	1 year in state	UT	3 years in state (6 months in district)
MD	1 year in state (6 months in district)	VT	2 years in state (1 year in district)
MA	1 year in district	VA	Same as elector in district
MI	Same as elector in district	WA	Same as elector in district
MN	1 year in state (6 months in district)	WV	1 year in district
MS	4 years in state (2 years in district)	WI	1 year in state
MO	2 years in state (1 year in district)	WY	1 year in district

is three years.[327] (Note that Nebraska is listed in each table, even though that state has a unicameral legislature.) Given the high rates of relocation that exist among Americans, these requirements present significant impediments to running for office in many states.

V. THE WISDOM OF DURATIONAL RESIDENCY REQUIREMENTS

A. Judicial Justifications

Why do states continue to have durational residency requirements? One scholar who has recently examined this issue, Professor Michael Pitts, finds that there are three prevalent rationales that courts have invoked for these requirements. These include (1) the ability of candidates to understand the problem and needs of their constituencies; (2) the need for voters to have adequate time to assess the candidacies of the persons running for office; and (3) to prevent political carpet-bagging.[328] Professor Pitts only weighs the justifications given for residency requirements for candidates. As we saw, the courts have considered the wisdom of residency requirements for voters, too. But let us begin our examination of the justification for durational residency requirements by briefly looking at some of the rationales that Professor Pitts has found for candidates.

The first rationale for upholding durational residency requirements has to do with ensuring that candidates understand the needs and problems of their constituents. The assumption is that a candidate who lives in the district for a longer period of time will be more knowledgeable about that district's issues and its constituents' needs. "The purpose of residency statutes," a court in Missouri explained, "is to ensure that governmental officials are sufficiently connected to their constituents to serve them with sensitivity and understanding."[329] Other courts have determined that candidates should have the opportunity to "know the customs and mores of the people,"[330] to "understand all the local problems,"[331] and to "know the people of the community."[332] In short, durational qualifications allow a candidate

327. *See, e.g.*, ALASKA CONST. art. II, § 2 (Alaska); CAL. CONST. art. 4, § 2.4(c) (California); DEL. CONST. art. II, § 3 (Delaware); HAWAII CONST. art. III, § 6 (Hawaii); TENN. CONST. art. II, § 9 (Tennessee); UTAH CONST. art. VI, § 5(1)(d) (Utah).

328. Pitts, *supra* note 3, at 346; *see also, e.g.*, Sununu v. Stark, 383 F. Supp. 1287, 1290 (D.N.H. 1974) ("The three principle state interests served by the durational residency requirement are: first, to ensure that the candidate is familiar with his constituency; second, to ensure that the voters have been thoroughly exposed to the candidate; and third, to prevent political carpet-bagging.").

329. Lewis v. Gibbons, 80 S.W.3d 461, 466 (Mo. 2002).

330. State *ex rel.* Brown v. Summit Cty. Bd. of Elections, 545 N.E.2d 1256, 1259 (Ohio 1989).

331. Bolanowski v. Raich, 330 F. Supp. 724, 730 (E.D. Mich. 1971).

332. *Id.*

"the opportunity to become familiar with the issues and concerns that are important to the people he or she seeks to represent."[333]

Separately, another rationale often invoked is that durational residency requirements provide voters with more information about the candidate. Such requirements give voters, as the Alaska Supreme Court put it, "a period in which they may become familiar with the character, habits and reputation of candidates for political office."[334] They "ensure that voters have time to develop a familiarity with the candidate."[335] The requirements provide voters the "the opportunity to become acquainted with the candidate's ability, character, personality, and reputation."[336] While this justification is about educating voters, it concerns the need for having a durational residency requirement that restricts candidates.

Finally, a third reason that is often given for residency requirements is to prevent carpet-bagging. Following the Civil War, those from the North who moved to the South to take advantage of the unstable financial and political climate there were called "carpetbaggers."[337] The implication was that these were transient citizens who moved south with all of their possessions to take advantage of Southerners. A carpetbag referred to the form of luggage that these newcomers often carried; it was essentially a suitcase or satchel that was made out of carpet-like materials.[338] The term has since been used pejoratively to describe political candidates who move to a new geographic region where they have no previous ties, and quickly seek to get elected to political office there.[339] Candidate residency qualifications ostensibly protect communities from these types of people. As a federal district court in Michigan explained, durational residency qualifications serve citizens "in protecting [them] from 'raiders' who are not seriously committed to the interests of the community."[340]

In addition to these justifications given by courts, Professor Pitts argues that there are two other justifications for candidate durational residency requirements. The first of these is that these require-

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333. Robertson v. Bartels, 150 F. Supp. 2d 691, 696 (D. N.J. 2001); *see also* Pitts, *supra* note 3, at 347 n.22 (citing *Lewis*, *Summit Cty.*, *Bolanowski*, and *Robertson* for the proposition that residency requirements serve a government interest by guaranteeing that candidates are familiar with the issues present in their district and among constituents).

334. Gilbert v. State, 526 P.2d 1131, 1135 (Alaska 1974).

335. *In re* Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, 40 A.3d 684, 699 (N.J. 2012).

336. State *ex rel.* Brown v. Summit Cty. Bd. of Elections, 545 N.E.2d 1256, 1259 (Ohio 1989).

337. *See* RICHARD NELSON CURRENT, THOSE TERRIBLE CARPETBAGGERS, at xi (1988).

338. *Id.*

339. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 294-96 (1988).

340. Joseph v. City of Birmingham, 510 F. Supp. 1319, 1337 (E.D. Mich. 1981).

ments help lower the number of candidates in any given election by keeping "frivolous" candidates off the ballot.[341] Variations on the same theme have often appeared in other forms, including justifications that durational residency requirements also prevent "ballot crowding" and prevent an election from becoming too "unwieldy."[342] Separately, another justification that Professor Pitts finds for durational residency requirements is that they work to ensure geographic representation. The requirement that a person has to live in a certain geographic region of a state for a set period of time may work to better ensure that the region's needs and character receive adequate representation in the state's legislature.[343]

B. Scholarly Reactions

The scholarly community has long been strongly opposed to durational residency requirements. As Professor Pitts states emphatically, "Residency requirements should be eliminated."[344] He contends that durational residency qualifications neither hold up under close scrutiny, nor do the reasons for them seem to be empirically justified.[345] Several of the reasons that courts have given for these requirements are concerned with the need to protect the interests of voters.[346] Yet Professor Pitts and others argue that voters are not ignorant. They are perfectly capable of making good choices, and a candidate's lack of connection to a local community is something that voters should quickly understand and be able to judge for themselves.[347] If a candidate is new to a legislative district or a candidate's home is located outside the geographic region from which he is seeking election, this is a matter that voters should be able to detect and weigh in proper perspective on their own.[348]

Of course, whether Professor Pitts is correct on this point is open to debate. Much of the literature on the "political ignorance" of voters posits that one of the problems with modern democracy is precisely that most of the public is usually ignorant of politics and government.[349] Many people know that their votes are unlikely

341. Gilbert v. State, 526 P.2d 1131, 1135 (Alaska 1974).

342. *See* Pitts, *supra* note 3, at 359.

343. *Id.* at 360.

344. *Id.* at 342.

345. *Id.* at 356 & n.46, 378-79 & n.118.

346. *Id.* at 363.

347. *Id.* at 363-64.

348. *Id.* at 364.

349. *See generally, e.g.*, ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER (2013) (making the argument that one of the biggest problems with modern democracy is that most of the public is usually ignorant of politics and government); *see also* Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY.

to change the outcome of an election and thus do not see a benefit in educating themselves about political candidates, much less taking time out of their day to vote.[350] Some scholars have argued that while this may be rational, it creates a nation of people with little political knowledge and little ability to judge good policies for themselves.[351] To be fair to Pitts, his arguments only apply to durational residency requirements as they affect candidates. As Pitts explains, "My argument and perspective is that, at least *in relation to residency*, voters will likely get sufficient information [to] be able to process that information adequately."[352] In his view, durational residency requirements limit freedom of choice, limit competition, and limit the ideas and perspectives among which voters are able to choose.[353]

Gavin Dow points to other serious problems with durational residency requirements. One is that they force courts to get involved in ordinary politics. They often place courts in situations where the court has to make a decision quickly.[354] Courts that are faced with a durational residency challenge on the eve of an election do not have much information or good precedent on which to base their decisions, and they risk damaging their reputations and legitimacy when they are forced to resolve heated election contests.[355] Other scholars have also argued that durational residency requirements should be deemed constitutionally suspect, because they impinge on fundamental rights that deserve the judiciary's protection, including the right of an individual to vote, the freedom to travel, and perhaps even the First Amendment right of freedom of political association.[356]

L.J. 553, 555 (2013) (arguing that "the voters [are] ignorant of judicial decisions and misled by deceptive television advertising, [they] are unable to hold [judicial candidates or] judges accountable for erroneous decisions, clear bias, or even unethical conduct"); Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 365 (2012) (explaining that "[m]ost voters are astonishingly ignorant of the basic facts about government and politics.").

350. *See* SOMIN, *supra* note 349, at 5 (positing that "[a]n individual voter has little incentive to learn about politics because there is only an infinitesimal chance that his or her well-informed vote will actually affect electoral outcomes").

351. *See, e.g.*, BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES (2007); *cf.* Alan S. Gerber et al., *Why People Vote: Estimating the Social Returns to Voting*, BRITISH J. POL. SCI. (2014) (finding that people vote for social reasons and survey measures of social norms about voting are correlated with county-level voter turnout).

352. Pitts, *supra* note 3, at 367 (emphasis added).

353. *Id.* at 370-71.

354. Dow, *supra* note 227, at 1535.

355. *Id.* at 1537.

356. *See* LeClercq, *supra* note 3, at 914.

C. Democratic Underpinnings

Despite what other scholars have written, I believe that durational residency requirements are not uniformly irrelevant, and one could make the case that they have legitimate democratic underpinnings. In terms of democratic theory, durational residency requirements are not as perplexing as some scholars make them out to be. But before advancing this argument, we first have to return to the distinction between the two different kinds of durational residency requirements that this Article has highlighted. First, durational residency requirements have been applied to voters. Second, they have been applied to political candidates. Our framers were well aware of this important distinction, and it surfaced during their debates. Unfortunately, scholars have often collapsed this distinction when criticizing the justifications for these requirements.

Durational residency requirements for voters are difficult to justify in a democracy like the United States that is characterized by a high degree of mobility. In the 1970s, both Congress and the federal courts began to understand this and, as a result, severely curtailed durational residency requirements for voters. But importantly, durational residency requirements were not eliminated entirely. Short durational residency periods were still needed for administrative purposes, for instance. A state has to know who its voters are in order to run elections effectively, and it takes time to register new voters. Durational residency requirements for voters ensure that elections may be run smoothly. Such durational residency requirements are often functionally interchangeable with modern voter registration deadlines. In both cases, the requirements are designed to give states adequate time to sign people up to vote. Yet another justification for having short durational residency requirements for voters is to prevent voter fraud. Beyond these reasons, it is hard to see why durational residency requirements for voters need to exist.

The situation for candidates, however, is different. Some scholars believe that imposing durational residency restrictions on office-seekers is unnecessary if the purpose of an election is to permit a majority of voters to select a candidate who is the most qualified individual for the job. If voters are able judge for themselves who the best candidate to represent them is, they will place appropriate weight on the candidate's attributes that are relevant for the job, including the fact that the candidate may be from somewhere else. In this sense, durational residency requirements should be seen as being antidemocratic, the argument goes, because they could block the election of the candidate who would otherwise be the majority's choice.[357]

357. *See* Dow, *supra* note 227, at 1534.

However, this view of the matter does not take into account other aspects of democratic theory, for durational residency requirements could also themselves be viewed as a legitimate exercise of popular will.[358] When durational residency requirements are enacted by democratically-elected legislatures, their existence reflects a democratic judgment made by the people in the first place.[359] There is merit in respecting the wishes of the people, as articulated through the legislative process. From one of democracy's other vantage points, therefore, durational residency requirements may be legitimate. This is especially so when these requirements are enshrined in a democratically framed constitution.

There is yet another vantage point from which durational residency requirements can be justified in democratic theory. These requirements play an important role in democracy precisely because modern democratic practice involves electing representatives from distinct and diverse legislative *districts*. Those who oppose durational residency requirements often engage in what Professor Gardner describes as "a kind of democratic reductionism that equates democracy with raw, nationwide majoritarianism."[360] But most democracies do not work this way.[361] Because we live in a country comprised of different electoral districts, majoritarian sentiment cannot be translated perfectly into legislative representation.[362] In some cases, our legislative districts correspond with the boundaries of our states, which elect our Senators. In some cases, they consist of congressional districts within the states. Usually, these districts differ significantly from one another, not only in terms of their distinct populations but also in terms of other values and attributes. Reasonable durational residency requirements for candidates help to protect the interests of these districts and help steer both state and national legislative politics in the direction of championing local issues.

The framers understood that some qualifications had to be placed on candidates for office, and they created qualifications that ensured capable and loyal men would serve in Congress. No person could be a Representative unless he had "attained to the Age of twenty five Years,"[363] had "been seven Years a Citizen of the United States,"[364]

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358. *Id.*

359. *Id.*

360. E-mail from Professor James A. Gardner to author (Aug. 25, 2015) (on file with author). I thank Professor Gardner for sharing this idea with me.

361. *Id.*

362. As Alexander Hamilton explained, "Representation is imperfect in proportion as the current of popular favor is checked." 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott 1863).

363. U.S. CONST. art. I, § 2, cl. 2.

and "when elected, [was] an Inhabitant of that State in which he shall be chosen."[365] Similarly, no person could be a Senator unless he had "attained to the Age of thirty Years," had "been nine Years a Citizen of the United States," and "when elected, [was] an Inhabitant of that State for which he shall be chosen."[366] And if voters found the best political candidate for a House seat happened to be *twenty-four*, or the best candidate for a Senate seat happened to be *twenty-nine*, would the Constitution prevent these younger candidates from being elected? The answer is yes, it would.

Like these requirements, durational residency requirements serve an important purpose. Our democracy is constructed out of geographic regions. Senators represent the people of their states, and Congressmen represent the people of their districts. There is something so basically intuitive about forcing a district's representative to reside in the district that he or she represents that even the framers understood it. They did not want states to be represented by wealthy interests from neighboring states, and they were fearful of reproducing the "rotten borough" system that had developed in Britain. Though the framers ultimately did not include a durational residency qualification for members of the House and Senate, they did include one for the President, who had to reside in the United States for fourteen years prior to his election. And the framers were cognizant of the durational residency requirements that existed in the states. These qualifications allowed the states to maintain their distinct, individual, and often unique identities.

Reasonable durational residency qualifications for both voters and candidates are required for modern democracy. "While it's impossible to prove residency requirements provide absolutely zero benefit in every situation," Professor Pitts writes, "it seems likely that situations where residency requirements clearly benefit the electorate are outliers."[367] Professor Pitts's argument goes too far, and this Article disagrees with this assessment. Where voting is concerned, reasonable durational residency requirements are necessary for administrative efficiency. Where political candidates are concerned, durational residency requirements work to ensure that local interests are prized. In some states today, durational residency requirements may be too long, but it cannot be said that such requirements, to the extent they are reasonable, contravene democracy entirely.

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364. *Id.*

365. *Id.*

366. U.S. CONST. art. I, § 3, cl. 3.

367. Michael J. Pitts, Against Residency Requirements 15 (unpublished manuscript) (on file with author).

VI. CONCLUSION

The best way to understand durational residency requirements is to view them as a part of American history. These requirements were around at the time of the colonies and their merits were debated at the Constitutional Convention. The framers' debates resulted in a mixed blessing: they voted against imposing durational residency requirements on candidates for the House and Senate, while they allowed these requirements to continue to flourish in the states. That compromise was perhaps expected, given that the delegates could not agree among themselves on how the Constitution should regulate the right to vote. For a number of the delegates, voting was understood to be a state matter and that is how they preferred to leave it.

Lengthy durational residency requirements for voters were maintained by the states for nearly two hundred years. The increasing mobility of American society following the Second World War, together with the increasing consciousness concerning voting rights of the 1960s, eventually put durational residency requirements on Congress's agenda. Congress limited the amount of time that the states had to register voters for presidential elections to thirty days, and the states began to follow suit by limiting the registration and durational residency periods for their state election contests. The Supreme Court helped the states along when it held in *Dunn v. Blumstein* that onerous state durational residency requirements violated the Equal Protection Clause. Once again, the states had to conform, and one by one, they shortened the length of these requirements for voters.

The history of candidate requirements turned out differently. The federal government had no reason to infringe upon the election of state officials, and no constitutional basis for doing so. When candidates have challenged durational residency requirements for infringing upon their *own* equal protection rights, federal courts have turned these challenges away.[368] They have likewise turned away challenges brought under the theory that candidate durational residency requirements impinge on the rights of voters.[369] Over time, two different systems would develop regarding durational requirements for candidates seeking public office. Federal candidates had no dura-

368. *See, e.g.*, Sununu v. Stark, 383 F. Supp. 1287, 1292 (1974) (concluding that "the State has a compelling inteerst [sic] to impose durational residency requirements upon those who seek state-elective office and that such an imposition does not constitutionally interfere with plaintiff's right to interstate travel").

369. *Id.* ("[Plaintiffs] allege that the durational residency requirement infringes upon three constitutional rights: first, the right to vote for the candidate of their choice; second, the right to associate for the advancement of their political beliefs; and third, the right to interstate travel. Their contention that the residency requirement adversely affects their right to associate and travel interstate is without merit. . . . The compelling state interest in prescribing eligibility requirements [for candidates] clearly outweighs the minimal interference with their right to cast an effective vote.").

tional residency requirement to meet. Thus Robert F. Kennedy, Jr. and Hillary Clinton could run for Senate in New York while being residents of another state. On the other hand, the states maintained lengthy durational residency restrictions for their governors and legislators, not to mention their mayors and city council members.

Durational requirements are not necessarily antithetical to democracy, and they have been a part of American constitutional history for as long as that great experiment has lasted. The preferred and most effective way of gaining access to public office in a democratic society is the ballot box. When durational residency requirements for public office interfere substantially with the right of the people to vote for the candidates of their choice, they should be seen as being incompatible with a democratic government and inconsistent with the equal protection of its laws. But *reasonable* durational residency restrictions serve many important purposes. They promote a sense of democratic community and ensure that candidates are cognizant of local issues. They also help preserve the distinctions and characteristics of different legislative districts. Diversity in legislative districts is a phenomenon found in the legislature of almost every state. When the people choose who will govern them, they choose a representative who has demonstrated a commitment to their community and to their legislative district. In practice, our political communities are split into bounded geographic districts. These geographic districts elect politicians to serve in legislatures, which ultimately govern the greater country of which the district forms a part. Our geographically bounded political communities should have the power to determine, within reason, the candidates whom their people elect. Durational residency requirements in the United States further this goal.