RESIDENCY REQUIREMENTS FOR VOTING*

DAVID COCANOWER** AND DAVID RICH***

> There is no more invariable rule in the history of society: the further electoral rights are extended, the greater is the need for extending them; for after each concession the strength of the democracy increases, and its demands increase with its strength . . . . [C]oncession follows concession, and no stop can be made short of universal suffrage.[1]

The relatively low percentage of Americans who vote[2] is attributable to psychological and legal causes.[3] Durational residency and registration requirements are probably the major legal barriers to universal suffrage in the United States, although absentee voting laws, age and literacy requirements all take their toll.[4] While originally developed to prevent voter fraud, registration has had the effect of deterring voter participation,[5] as a study based upon the 1960 election has concluded.[6]

---

* The authors of this article are counsel of record in Cocanower v. Marston, 318 F. Supp. 402 (D. Ariz. 1970), *appeal docketed*, No. 799, 39 U.S.L.W. 3151 (U.S. Oct. 13, 1970). Although objectivity has been pursued, it is an illusive quarry and the reader is cautioned to examine the conclusions carefully for the taint of advocacy.

This article is premised upon the philosophical assumption that maximum voter eligibility is the ideal to which voting laws should conform unless necessary to preserve the integrity of elections. Realizing the impossibility of purging the effect of this assumption, the authors have chosen to declare their prejudice openly.

** B.S., 1967, J.D., 1970, Indiana University. Associate, Lewis & Roca, Phoenix, Arizona. Member, Arizona Bar.

*** B.A., 1966, University of Colorado; J.D., 1969, University of Chicago. Associate, Lewis & Roca, Phoenix, Arizona. Member, Arizona Bar.

1 A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 57 (P. Bradley ed. 1960).

2 REPORT OF THE PRESIDENT'S COMMISSION OF REGISTRATION AND VOTING PARTICIPATION 8 (1963) [hereinafter cited as VOTING PARTICIPATION].

3 *Id.* at 9-10. Although psychological causes for the failure to vote, such as feeling of anomie, may be the largest single reason for low voter turnout, legal requirements prevent millions of people from voting. This article is limited to the question of the validity of one of these legal requirements—durational residency. For a discussion of the psychological factors causing low voter participation, see A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, THE AMERICAN VOTER, ch. 4 (1960). *See also* P. CONVERSE, NON-VOTING AMONG YOUNG ADULTS IN THE UNITED STATES (1963); C. MERRIAN & H. GOSNELL, NON-VOTING, CAUSES AND METHODS OF CONTROL (1924); Connelly & Field, *The Non-Voter—Who He Is, What He Thinks*, 8 PUB. OPINION Q. 175 (1944); Hastings, *The Non-Voter in 1952: A Study of Pittsfield, Massachusetts*, 38 J. PSYCHOL. 301 (1954); Hastings, *The Voter and the Non-Voter*, 62 AM. J. SOC. 302 (1956); Kitt & Gleicher, *Determinants of Voting Behavior*, 14 PUB. OPINION Q. 393 (1950); Levin & Eden, *Political Strategy for the Alienated Voter*, 26 PUB. OPINION Q. 47 (1962).

4 Note, *Election Laws as Legal Roadblocks to Voting*, 55 IOWA L. REV. 616 (1970).

5 VOTING PARTICIPATION, *supra* note 2, at 11-12 n.4.

6 Kelley, Ayres & Bowen, *Registration and Voting: Putting First Things First*, 61 AM. POL. SCI. REV. 359 (1967). The authors suggest that the size and nature of the electorate may be controlled by manipulating registration requirements. *Id.* at 367. For a discussion of the effects of registration requirements on voting, with emphasis upon voting in Iowa, *see* Note, *Election Laws as Legal Roadblocks to Voting*, 55 IOWA L. REV. 616, 639-49 (1970).

State durational residency requirements disenfranchise more persons over the age of 21 than any other legal restriction.[7] Between three and eight million Americans were unable to vote in the 1968 general election solely because of their failure to meet these requirements.[8] This article will examine the relationship between asserted state interests in durational residency requirements and the constitutionality of the disenfranchisement they cause.

TABLE OF CONTENTS

The impetus for this article was *Cocanower v. Marston*[9] which upheld the constitutionality of Arizona's one-year residency requirement for voting in nonpresidential elections.[10] In *Cocanower*, a newly arrived

---

[7] Arizona is typical among the states. The requirements for exercise of the franchise in Arizona are United States citizenship, age, residency, and absence of legal disability. ARIZ. REV. STAT. ANN. § 16-101 (Supp. 1969-70). *See* note 76, *infra.*

[8] Estimates vary widely, both in quantity and in scientific precision. *See, e.g.*, Gallup Poll of Dec. 11, 1968 (5 million); 115 CONG. REC. S2113 (daily ed. Feb. 28, 1968) (Library of Congress estimate of between 5 and 8 million); 115 CONG. REC. H12156 (daily ed. Dec. 11, 1969) (Bureau of Census estimate of 5.5 million); BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS 47 (1969) (3 million); Morris K. Udall, Congressman's Report, July 23, 1970, Vol. IX, No. 2 at p. 2 (estimate of between 2 and 8 million).

It was estimated that 8 million people were disenfranchised by residency requirements in the 1960 presidential election. *Hearings on Nomination and Election of President and Vice President and Qualifications for Voting Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., at 467, 849 (1961); 110 CONG. REC. 14662 (1964).

[9] 318 F. Supp. 402 (D. Ariz. 1970), *appeal docketed*, No. 799, 39 U.S.L.W. 3151 (U.S. Oct. 13, 1970).

[10] It should be noted that *Cocanower* did not attack any other residency provision of Arizona's voting laws. *E.g.*, the 60-day residency requirement for voting in presidential elections [ARIZ. REV. STAT. ANN. § 16-172 (Supp. 1969-70)], the 30-day county residency requirement [ARIZ. REV. STAT. ANN. § 16-101 (Supp. 1969-70)], the statute permitting a former Arizona resident to cast an absentee ballot in presidential elections until the mover qualifies to vote in his new state of residence [ARIZ. REV. STAT. ANN. § 16-171 (Supp. 1969-70)], or the Arizona absentee voting provi-

Arizona resident sought injunctive, declaratory and monetary relief in federal district court for the Maricopa County Recorder's refusal to permit her to register for the 1970 general election. The plaintiff alleged that she had been denied her constitutional rights to equal protection and due process,[11] her constitutional privileges and immunities,[12] her constitu-

---

sions [ARIZ. REV. STAT. ANN. § 16-925 (1956)]. For a discussion of the problems involved in residency requirements for presidential elections, *see* Macleod & Wilberding, *State Voting Residency Requirements and Civil Rights*, 38 GEO. WASH. L. REV. 93 (1969); Stone, *Residence Requirements for Voting in Presidential Elections*, 37 U. CHI. L. REV. 359 (1970); Note, *State Residency Requirements and the Right to Vote in Presidential Elections*, 58 KY. L.J. 300 (1970); Note, *Voting Rights—Residence Requirements for Voting in Presidential Elections*, 18 VAND. L. REV. 337 (1967). For a discussion of the problems encountered by intrastate movers, *see* Note, *The Impact and Constitutionality of Voter Residence Requirements as Applied to Certain Intrastate Movers*, 43 IND. L.J. 901 (1968). For a discussion of problems encountered by the approximately 750,000 American civilians currently residing abroad who are barred by the laws of the states of which they are citizens from participating in both national and state elections, *see* Brief for Bipartisan Committee on Absentee Voting as Amicus Curiae, Hall v. Beals, 396 U.S. 45 (1969).

[11] The court in *Cocanower* recognized that "[a]ny justification for Arizona's one-year requirement is considerably eroded by the fact that no systematic or even cursory attempt was made to verify representations on the registration form." 318 F. Supp. at 409. The court nevertheless went on to find that the due process requirement was satisfied. Because the federal courts passing on the constitutionality of durational residency requirements in the last six months have preferred to base their opinions on either equal protection or right to travel grounds, the due process argument will be set out only briefly below.

A durational residency requirement for voting is, in effect, a conclusive presumption that the newly-arrived resident is unable to make intelligent use of the franchise. *See* Hall v. Beals, 396 U.S. 45, 51 (1969) (Marshall, J., dissenting); Carrington v. Rash, 380 U.S. 89 (1965); *cf.* Harman v. Forssenius, 380 U.S. 528 (1965). To satisfy due process, a statute must fulfill two tests: (1) where matters close to the core of our constitutional system are involved, the presumption must achieve the purported objective in the least restrictive manner possible, *see* United States v. Robel, 389 U.S. 258 (1967); Zemel v. Rusk, 381 U.S. 1 (1965); Shelton v. Tucker, 364 U.S. 479 (1960), and (2) there must exist a rational connection between the fact proved and the fact presumed, *see* Leary v. United States, 395 U.S. 6 (1969); Nebbia v. New York, 291 U.S. 502 (1934).

If a state's only rational justification for retaining a durational residency requirement is its desire to promote the intelligent use of the ballot, the state has selected an arbitrary group (new residents) upon which to impose a knowledgeability standard. No showing can be made that interstate movers, as a group, are less informed about election issues than nonmovers, nor that residents of less than one year, as a group, actually know less about the issues or candidates involved in an election.

The introduction of radio and television has facilitated the flow of information in a manner unforeseeable in 1875 and 1893 when Arizona's one-year statewide waiting period was adopted and readopted. In discussing this problem in the context of the California Constitution of 1879 which created that state's one-year residency requirement, the California Court of Appeals recently commented:

> It is hardly necessary to make reference to the immense growth of higher education and secondary education in the ninety-one year period.
>
> It is to be noted, too, that voters of whatever length of residency in the state cannot have information about some important issues until a time much less removed than one year from the election. They learn who are the candidates for state election (and sometimes for other offices, including judgeships) only after the primary election. Keane v. Mihaly, — Cal. App. —, —, 90 Cal. Rptr. 263, 266 (1970).

If no nexus between the length of residency and ability to cast an intelligent vote can be demonstrated, durational residency requirements may be unconstitutional as a violation of due process. In addition to the lack of rational connection between the length of residency required and the presumption, the fact remains that a state can achieve any of its legitimate objectives by less drastic means.

tional right to freedom of travel, and her first amendment rights of freedom of speech, assembly and petition. The plaintiff asked for a declaration that Arizona's durational residency requirement for voting was unconstitutional on its face as applied to all nonpresidential elections or, alternatively, for a declaration that the plaintiff was entitled to vote for the candidates for United States Senator and Representative.[13]

The defendants in *Cocanower* relied upon *Pope v. Williams*[14] and *Drueding v. Devlin*.[15] *Pope* held that a state statute requiring a voter to declare his intent to become a state citizen one year prior to registering did not involve a federal question. The holding in *Pope* was a narrow one:

> We . . . hold that there is nothing in the statute in question which violates the Federal rights of the plaintiff in error *by virtue of the provision for making a declaration of his intention to become a citizen* before he can have the right to be registered as a voter and to vote in the state.[16] (emphasis added).

Although *Pope* only decided the validity of a state requirement of declaration of intent to become a citizen, the opinion contained language widely cited as authoritative precedent for requiring actual durational residency: "[T]he privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution."[17]

Pope conditioned the power of the state to limit the franchise on the absence of unconstitutional discrimination. Whether this discrimination exists *vel non* is the precise issue in all of the recent cases attacking state durational residency requirements. In discussing *Pope*, the *Cocanower* court suggested that its value may be largely historical: "The [*Pope*] Court noted that the law in question '. . . is neither an unlawful discrimination against . . . the plaintiff . . . nor does it deny him the equal protection of

---

Finally, residency requirements force potential immigrees from other states to choose between the right to vote and the right to travel. Such whipsawing of an individual affronts the dictates of due process. Aptheker v. Secretary of State, 378 U.S. 500 (1964).

12 It was not the plaintiff's position that by virtue of the privileges and immunities clauses she should be enfranchised in state elections irrespective of Arizona's durational residency requirement. *Compare* United States v. Arizona, 39 U.S.L.W. 4027, 4057 (U.S. Dec. 21, 1970) (Harlan, J., concurring in part and dissenting in part), *with id.* at 4066 (Douglas, J., concurring in part and dissenting in part). Rather, plaintiff was relying upon the privileges and immunities clauses as one basis for her constitutional right to travel. *E.g., id.*; Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Truax v. Raich, 239 U.S. 33 (1915); Twining v. New Jersey, 211 U.S. 78 (1908); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

13 The Supreme Court's decision in United States v. Arizona, 39 U.S.L.W. 4027 (U.S. Dec. 21, 1970), affirming the validity of portions of the 1970 Voting Rights Act now gives any new resident the right to vote for President and Vice President. See note 54, *infra*.

14 193 U.S. 621 (1904).

15 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965).

16 193 U.S. at 634.

17 *Id.* at 632.

the laws . . . nor [is it] a violation of any implied guarantees of the Federal Constitution.' "[18] Although "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change,"[19] *Pope* was recently relied upon by Justice Black to support the proposition that

> [n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.[20]

In the other case principally relied upon by the defendants, *Drueding v. Devlin*, the State of Maryland had asserted that a state durational residency requirement was necessary to identify the voter, protect against fraud, and to insure that the voter would "become in fact a member of the community, and as such have a common interest in all matters pertaining to its government."[21] The *Drueding* court applied the traditional equal protection standard of reasonableness[22] and in a unanimous decision granted a motion to dismiss because no irrational or unreasonable discrimination was shown.[23] But five years later, in *Cornman v. Dawson*,[24] a three-judge district court on which two of the three *Drueding* judges sat applied the compelling state interest test and unanimously held that a state residency requirement violated the equal protection clause.

Most courts which have considered *Drueding* recently have limited it severely. In *Burg v. Canniffe*,[25] for example, *Drueding* was rejected in

---

[18] 318 F. Supp. at 405-06.

[19] Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966). As one commentator has observed: "*Pope* was decided seventeen years before political thinking had advanced to the point of granting the franchise to women." Note, *The Impact and Constitutionality of Voter Residence Requirements as Applied to Certain Intrastate Movers*, 43 IND. L.J. 901, 909 (1968).

In an opinion striking down a one-year residency requirement for voting, the California court of appeals noted that in *Pope* "the concept of equal protection of the law was so far removed from the suffrage laws that the court remarked that a state could limit constitutionally, voting to native citizens." Keane v. Mihaly, — Cal. App. —, —, 90 Cal. Rptr. 263, 265 (1970).

[20] United States v. Arizona, 39 U.S.L.W. 4027, 4029-30 (U.S. Dec. 21, 1970). *See also* Fitzpatrick v. Board of Election Comm'rs, 39 U.S.L.W. 2356 (N.D. Ill. filed Dec. 12, 1970).

[21] 234 F. Supp. 721, 724 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965).

[22] The court keenly felt that the restraints imposed by the reasonableness standard:

> The judges of this Court, personally, are of the opinion that those objectives could probably be obtained by shorter residency requirements than those contained in the provisions of the Maryland Constitution and statutes now under attack . . . . But we cannot substitute our personal views for those of the Legislature and people of Maryland, unless there has been an unreasonable discrimination. 234 F. Supp. at 724.

[23] *Id.* at 725.

[24] 295 F. Supp. 654 (D. Md. 1969), *aff'd sub nom.*, Evans v. Cornman, 398 U.S. 419 (1970).

[25] 315 F. Supp. 380, 385 (D. Mass. 1970), *appeal docketed*, No. 811, 39 U.S.L.W. 3168 (U.S. Oct. 6, 1970):

> Any lingering doubts that the compelling interest test must be used in

favor of later Supreme Court cases applying the compelling state interest test. Similarly, in *Blumstein v. Ellington*,[26] the court stated, "It has lately become apparent that the *Drueding* standard is no longer viable law."[27] In *Bufford v. Holton*,[28] which arose in the same circuit as *Drueding*, the three-judge court distinguished *Drueding* because at the time it was decided, "[t]he doctrine of the necessity for a compelling State interest to support any restriction on the voting franchise had not matured and been engrafted upon the criteria used to weigh the validity of such State action."[29] Finally, the three-judge court in *Affeldt v. Whitcomb*[30] said, "We think *Drueding* is no longer good law since the residency requirements were upheld on the basis of the former standard in voting cases—whether the provision unreasonably discriminated against any class of persons."[31] *Drueding* still rules from the grave, however, as the *Cocanower* court's reliance on it indicates.[32]

In addition to the substantive difficulties which are encountered in challenging state voter residency requirements, various procedural obstacles also must be overcome. For example, the dark cloud of mootness hovers over every case since the pending election may take place before the judicial machinery can produce a final decision.[33] Mootness, how-

---

determining the validity of state voting statutes attacked on equal protection grounds would appear to be permanently put to rest by two decisions of the Supreme Court handed down within the fortnight . . . Evans v. Cornman, 398 U.S. 419 . . . [and] City of Phoenix v. Kolodziejski, 399 U.S. 204.

[26] Civil No. 5815 (M.D. Tenn. Aug. 31, 1970), *appeal docketed*, No. 769, 39 U.S.L.W. 3146 (U.S. Oct. 13, 1970).

[27] Civil No. 5815, at 9. "Moreover, it is obvious that the 'irrational or unreasonable' test for the constitutionality of voting rights statutes enunciated in *Drueding, supra*, has been superceded by the 'compelling state interest' test." *Id.* at 11.

[28] Civil No. 371-70-A (E.D. Va. Oct. 27, 1970).

[29] *Id.* at 6.

[30] Civil No. 70-H-220 (N.D. Ind. Sept. 25, 1970).

[31] *Id.* at A-11.

[32] 318 F. Supp. at 407, 409:

> [I]t appears that insofar as state requirements for state elections are concerned the reasoning of [*Drueding*] is still valid. Absent a clearer indication from Congress [than the Voting Rights Amendments of 1970] or the Supreme Court, we can find no equal protection violation warranting the invalidation of Arizona's one-year residency requirements for state elections.
>
> . . . .
>
> . . . [I]n finding *Drueding* and the rationale therein to be still binding as to state elections, we cannot say that Arizona's durational residency requirement violates the Due Process Clause of U.S. Const. Amends. V and XIV.

[33] *See* Hall v. Beals, 396 U.S. 45 (1969), where the Court held the case to be moot when by the time of appeal the election was over and the Colorado legislature changed its residency requirement from six months to two months and plaintiff had resided in the state for over two months. The recent cases attacking state durational residency requirements brought in federal courts have requested injunctive relief to meet the statutory requirement for the convening of a three-judge panel [28 U.S.C. § 228 (1964)] and the right of direct appeal to the United States Supreme Court. 28 U.S.C. § 1253 (1964). Only one case to date has succeeded in state court. Keane v. Mihaly, — Cal. App. —, 90 Cal. Rptr. 263 (1970).

ever, probably can be avoided either by bringing a class action[34] or by seeking damages under section 1983.[35] An action under section 1983 theoretically avoids mootness since nominal damages are presumed from a showing of the deprivation of a civil right.[36]

The importance of a clear definition of exactly what disenfranchisement is being complained of is demonstrated by a recent Massachusetts

---

[34] *Cf.* Hall v. Beals, 396 U.S. 45 (1969). The question remains whether persons who become residents of the state after an election can be included within the class of potentially disenfranchised electors.

The notice requirement in class actions may create difficulties. *See* FED. R. CIV. P. 23 (c)(2). But a class action need not take more time than a non-class action. *See* Burg v. Canniffe, 315 F. Supp. 380 (D. Mass. 1970), *appeal docketed*, No. 811, 39 U.S.L.W. 3168 (U.S. Oct. 20, 1970).

[35] 42 U.S.C. § 1983 (1964). Of the durational residency cases, the method has been utilized only in *Cocanower*. Whether it will avoid mootness remains to be seen. 42 U.S.C. § 1983 (1964) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Constitution of the United States guarantees to its citizens freedom from discriminatory deprivation of the right to vote in Congressional elections [*e.g.*, United States v. Classic, 313 U.S. 299 (1941)], in elections for state legislators [*e.g.*, WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962)], in municipal elections [*e.g.*, Glisson v. Mayor & Councilmen, 346 F.2d 135 (5th Cir. 1965)], and even in school district elections. Kramer v. Union Free School Dist., 395 U.S. 621 (1969). It is clear that section 1983 is intended to afford relief for the unconstitutional deprivation of voting rights. *See, e.g.*, Nixon v. Herndon, 273 U.S. 536 (1926); Paynes v. Lee, 377 F.2d 61 (5th Cir. 1967); Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967).

Voting officials act under the color of state law when registering voters. Their actions in refusing to register new residents who are otherwise qualified to vote deprives these new residents of their right to vote. While the right to vote in state elections may not be *granted* expressly by the United States Constitution [*cf.* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959); Smith v. Allwright, 321 U.S. 649 (1944); Breedlove v. Suttles, 302 U.S. 277 (1937); Twining v. New Jersey, 211 U.S. 78 (1908); United States v. Cruikshank, 92 U.S. 542, 588 (1875); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874), "[i]t has been repeatedly recognized that all qualified voters have a constitutionally *protected* right to vote." Reynolds v. Sims, *supra*, at 554 (emphasis added). *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Yick Wo v. Hopkins, 118 U.S. 356 (1886); United States v. Reese, 92 U.S. 214 (1875).

The Supreme Court has consistently recognized the right to monetary damages in cases involving deprivation of the right to vote. *See*, Smith v. Allwright, *supra*; Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, *supra*; Myers v. Anderson, 238 U.S. 368 (1915). Proof of violation of section 1983, without more, entitles a plaintiff to nominal damages and no jurisdictional amount is needed to obtain a federal forum under this section. *See, e.g.*, Hague v. C.I.O., 307 U.S. 496 (1939).

A further advantage of section 1983 is that the federal abstention doctrine is seldom, if ever, applied to cases arising under it. *See, e.g.*, Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968) (unless a plain, complete and adequate remedy exists in the state courts). The Second Circuit has held that these cases are the least likely matters for application of the abstention doctrine. Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

[36] *See* Basista v. Weir, 340 F.2d 74, 87 (3d Cir. 1965); Marshall v. Sawyer, 301 F.2d 639, 646 (9th Cir. 1962); Tracy v. Robbins, 40 F.R.D. 108, 113 (D.S.C. 1966), *appeal dismissed* 373 F.2d 13 (4th Cir. 1967).

case. In *Burg v. Canniffe*,[37] the court invalidated a one-year residency requirement and enjoined the Board of Registrars of the Town of Marblehead from "denying plaintiff and all others similarly situated the right to vote in *Congressional elections*."[38] Armed with the *Burg* judgment, two new Massachusetts residents attempted to register with the Boston Board of Election Commissioners to vote in the November, 1970 general election. Much to their chagrin, they were informed by the Board that "the ruling in *Burg* did not apply to them or to the forthcoming elections."[39]

Rather than requesting a clarification of the *Burg* judgment,[40] a separate suit[41] was brought asking for declaratory and injunctive relief for residents of Massachusetts seeking to register and vote "in primaries and general elections for candidates to state, local, congressional and other federal offices."[42] To date, no decision has been rendered in this action.

HISTORY AND PURPOSE OF DURATIONAL RESIDENCY REQUIREMENTS FOR VOTING

Durational residency requirements for voting date back in English legal history at least as far as 1413.[43] The colonists brought the concept of durational residency requirements to America. In 1693, a durational residency requirement was established in South Carolina, apparently out of the fear that otherwise pirates would be qualified to vote for representatives in the state legislature.[44] The historical purpose of residency requirements seems to have been to deny the vote to undesirables, immigrants and outsiders with different ideas. In the eastern states, such requirements were aimed primarily at immigrants.[45] In southern states, many such requirements apparently were enacted in an attempt to keep out northern influences as a response to the abuses of the Reconstruction Era.[46] The

---

[37] 315 F. Supp. 380 (D. Mass. 1970), *appeal docketed*, No. 811, 39 U.S.L.W. 3168 (U.S. Oct. 6, 1970).

[38] 315 F. Supp. at 386 (emphasis added).

[39] Verified Complaint, Zarr v. Board of Election Comm'rs, Civil No. 70-947-F (D. Mass., filed July 17, 1970).

[40] Letter from Harvey M. Burg to authors, Sept. 22, 1970.

[41] Zarr v. Board of Election Comm'rs, Civil No. 70-947-F (D. Mass., filed July 17, 1970).

[42] Verified Complaint in Zarr v. Board of Election Comm'rs, Civil No. 70-947-F (D. Mass., filed July 17, 1970).

[43] A statute of that date provided: "[T]he knights and esquires and others which shall be *choosers* of these rights of the shires, be also resident within the same shires in manner and form as aforesaid; that is, 'at the day of the date of the writ of the summons of the parliament.'" C. BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 69 (1893), *quoted in* Note, *State Residency Requirements and the Right to Vote in Presidential Elections*, 58 KY. L.J. 300, 302 (1970).

[44] A. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 133 (1905).

[45] R. LANE, POLITICAL LIFE: WHY PEOPLE GET INVOLVED IN POLITICS 13 (1958).

[46] Immediately following the Civil War, the Tennessee legislature enacted a series of laws enfranchising the recently emancipated blacks and disenfranchising confederate officeholders, confederate army officers, and confederate sympathizers.

midwestern and western states generally enacted shorter residency requirements, perhaps because of their eagerness to attract sttlers.[47]

Arizona's first act governing territorial elections established a six-month residency requirement and extended the vote to any white male citizen of the United States, or citizen of Mexico who had elected to become a United States citizen.[48] The residency requirement was changed to one-year on February 9, 1875,[49] then changed back to a six months on March 12, 1881.[50] The legislature changed its mind again on April 1, 1893, and reinstated the one-year requirement[51] which has continued to the present day. Unfortunately, there is no legislative history available to indicate the reasons for these changes.

Despite early reliance upon durational residency requirements, they "are rapidly falling into greater and greater disfavor as an undue stricture on the 'scope of the right of suffrage' of American citizens."[52] The Voting Rights Act Amendments of 1970[53] abolished state durational residency requirements for voting for the offices of President and Vice President.[54] Congress had found that the imposition and application of du-

---

See ACTS OF TENN. ch. 16 (1865); ACTS OF TENN. ch. 33 (1865-66); ACTS OF TENN. ch. 26 (1866-67). The Tennessee constitution adopted in 1870 repealed these laws and established a one-year statewide durational residency requirement for voting which endured until struck down by a three-judge federal panel in 1970. Blumstein v. Ellington, Civil No. 5815 (M.D. Tenn. Aug. 31, 1970), *appeal docketed*, No. 769, 39 U.S.L.W. 3146 (U.S. Oct. 13, 1970).

The Alabama constitutions of 1819 and 1861 had required residency within the state for one year as a prerequisite for voting. ALA. CONST. art. III, § 5 (1819); ALA. CONST. art. III, § 5 (1861). In 1868, the state residency requirement was reduced to six months. ALA. CONST. art. VII, § 2 (1868). It has been suggested that the Reconstructionists designed this change to permit carpetbaggers and blacks to become candidates for the legislature. M. MCMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO AND SECTIONALISM 138 (1955). By 1874, the carpetbaggers' influence had waned, and the 1875 Constitution restored the pre-1868 one-year state residency requirement for voting. That one-year residency requirement still stands, although the three-month county and 30-day precinct or ward residency requirements contained in the same constitutional provision have been struck down recently as unconstitutional. Hadnott v. Amos, 39 U.S.L.W. 2263 (M.D. Ala. Oct. 19, 1970).

47 K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES (1918).

48 ARIZ. COMP. LAWS 1864-1871, ch. 24, § 6, Nov. 9, 1864 (1871).

49 ARIZ. COMP. LAWS 1864-1877, ch. 24, §§ 1 & 5(3), Feb. 9, 1875 (1877).

50 Amendment No. 97, [1881] Laws of Ariz. 169. Though the portion of the statute dealing with voter qualifications was amended in 1889, the six months' residency requirement was retained. *See* Act No. 17, [1889] Laws of Ariz. 20.

51 Act No. 32, [1893] Laws of Ariz. 23. The one-year residency has been retained ever since.

52 Blumstein v. Ellington, Civil No. 5815, at 10 (M.D. Tenn. Aug. 31, 1970), *appeal docketed*, No. 769, 39 U.S.L.W. 3146 (U.S. Oct. 13, 1970).

53 Pub. L. No. 91-285, 84 Stat. 314.

54 *Id.* § 202(c) provides *inter alia*:

> 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.

In United States v. Arizona, 39 U.S.L.W. 4027 (U.S. Dec. 21, 1970), section 202(c) was held to be constitutional. Only Justice Harlan dissented from this

rational residency requirements 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;
>
> (3) denies or abridges the privileges and immunities guaranteed to the citizens of each State . . .;
>
> (4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;
>
> (5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and
>
> (6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.[55]

The three-judge panel in *Blumstein v. Ellington*[56] declared that "these findings reflect the current trend of the law."[57] The *Cocanower* panel, however, was less willing to embark upon a new judicial course in state elections:

---

portion of the opinion due to his belief "that the Fourteenth Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit and therefore that it does not authorize Congress to set voter qualifications in either state or federal elections." *Id.* at 4038. After a perceptive historical analysis, Justice Harlan concluded that the fourteenth amendment was designed to remedy racial discrimination and stated that it would "be frivolous to contend that requiring States to allow new arrivals to vote in presidential elections is an appropriate means of preventing local discrimination against them in other respects, or of forestalling violations of the Fifteenth Amendment." *Id.* at 4057.

But it is not clear that durational residency requirements are unrelated to voting discrimination based on race or color. *Cf.* Jones, *Constitutional Convention of 1901 and Poll Taxes*, 4 ALA. LAW. 319-20 (1943):

> The three stumbling blocks in the path of those who would give the privilege of voting to practically everyone, are, in Alabama, provisions for payment of poll taxes, educational qualifications, and residence requirements.
>
> If those who favor the abolition of the poll tax are successful in their efforts, then the next step to give votes to 'America's voteless millions' will be the removal of our wise provision as to residence—two years in the state ward or beat.
>
> . . . .
>
> . . . So, if we abolish the poll tax requirement, then we must be prepared to fight to maintain our residence requirements which means [sic] so much to the stability of our citizenship.

55 Pub. L. No. 91-285, § 202(a). In upholding the maximum 30-day requirement, Justice Black relied upon Congress' "broad authority to create and maintain a national government" including the power to regulate federal elections. 39 U.S.L.W. at 4032. Justices Douglas, Brennan, White and Marshall arrived at the same conclusion based upon section 5 of the fourteenth amendment. *Id.* at 4066, 4069. Justices Stewart and Blackmun and Chief Justice Burger concurred based upon the constitutional right to travel. *Id.* at 4035. Justice Harlan would find section 202 unconstitutional based upon his historical analysis of the fourteenth amendment, the right to travel, and the privileges and immunities clauses. *Id.* at 4057.

56 Civil No 5815 (M.D. Tenn. Aug. 31, 1970), *appeal docketed*, No. 769, 39 U.S.L.W. 3146 (U.S. Oct. 13, 1970).

57 Civil No. 5815, at 11.

> Without intimating any opinion whatsoever as to the constitutionality of Title II [of the Voting Rights Act Amendments], suffice it to say that its mandate is not determinative of the issues in this case. The question of state durational residency requirements insofar as they precondition registration and voting in *state* elections remains.[58]

In *Cocanower*, Maricopa County and the State of Arizona asserted six interests to justify Arizona's one-year residency requirement:

> for the purpose of insuring the purity of its elections; for the purpose of insuring that voters are, in fact, members of the state community; for the purpose of protecting its parochial interests; for the purpose of insuring that voters have had time to gain knowledge of local issues; or for the purpose of providing sufficient time to prepare for an election, or to provide an objective standard for the determination of such residency.[59]

The plaintiff argued that these interests were not sufficiently compelling to justify disenfranchisement of new residents and that the one-year durational residency requirement was not necessary to protect any legitimate interests of the state. The plaintiff also alleged that the equal protection test applied in *Drueding*—whether there is a reasonable relationship between what the state seeks to accomplish and how the state seeks to accomplish it—has been abandoned where the right involved is fundamental. The equal protection clause of the fourteenth amendment and the right to travel require that the "compelling state interest" standard be applied if a classification is based upon "suspect" criteria or if the result of the classification may be to affect a fundamental right.[60] The nature, application, and effect of the compelling state interest test will be discussed in the following sections.

"Compelling State Interest"

The Emergence of a New Standard

The constitutional standard requiring governmental action to be justified by a compelling state interest first appeared in a case challenging a statute enforced discriminately on the basis of race.[61] More recently, the

---

[58] 318 F. Supp. at 407.

[59] Pretrial Statement at 3, Cocanower v. Marston, 318 F. Supp. 402 (D. Ariz. 1970).

The State of Maryland in Drueding v. Devlin, 234 F. Supp. 721, 724 (D. Md. 1964), asserted two state interests: "(1) 'identifying the voter, and as a protection against fraud;' and (2) to insure that the voter will 'become in fact a member of the community, and as such have a common interest in all matters pertaining to its government.' "

[60] For a discussion of the compellinng state interest test, *see* Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting). For examples of the application of the compelling state interest test to durational residency requirements for voting, *see* Bufford v. Holton, Civil No. 371-70-A (E.D. Va. Oct. 27, 1970); Affeldt v. Whitcomb, Civil No. 70-H-220 (N.D. Ind. Sept. 25, 1970); Blumstein v. Ellington, Civil No. 5815 (M.D. Tenn. Aug. 31, 1970), *appeal docketed*, No. 769, 39 U.S.L.W. 3146 (U.S. Oct. 13, 1970).

[61] Yick Wo v. Hopkins, 118 U.S. 356 (1886). There is dicta in *Yick Wo* that,

test has been applied to the infringement of first amendment rights,[62] and has been extended to cases where the right to travel and the right to vote are at issue,[63] as well as a wide spectrum of other endangered rights.[64]

A state can no longer assert that some interest justifies a challenged classification and then force the plaintiff to show that the classification is unreasonable.[65] It is now confronted with a bifurcated test[66] and must show that the particular classification is the optimum means of protecting its interests.[67] On the one hand, a classification may be "inherently suspect" if it is based upon race,[68] wealth,[69] or political allegiance.[70] Alter-

"[t]hough [the political franchise of voting is] not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless, it is regarded as a fundamental political right, because preservative of all rights." *Id.* at 370.

[62] *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234 (1964); Gibson v. Florida Legislative Investigative Comm., 372 U.S. 539 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Schneider v. New Jersey, 308 U.S. 147 (1939). *See also* Williams v. Rhodes, 393 U.S. 23, 31 (1969).

[63] On the right to travel, *see* Shapiro v. Thompson, 394 U.S. 618 (1969); Vaughan v. Bower, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd* 39 U.S.L.W. 3199 (U.S. Nov. 10, 1970). On the right to vote, *see* City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Evans v. Cornman, 398 U.S. 419 (1970); Hall v. Beals, 396 U.S. 45, 51 (1969) (Marshall, J., dissenting); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Carrington v. Rash, 380 U.S. 89 (1965); Reynolds v. Sims, 377 U.S. 533 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[64] Williams v. Rhodes, 393 U.S. 23 (1969) (political allegiance); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote without discrimination on the basis of wealth); Sherbert v. Verner, 374 U.S. 398 (1963) (freedom of religion); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (freedom of association); Skinner v. Oklahoma, 136 U.S. 535 (1942) (procreation).

[65] *See* Williams v. Rhodes, 393 U.S. 23, 31 (1969), where the Court said:

> In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind [to form a new political party and have it placed on the ballot] are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms' [citation omitted].
>
> The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate.

[66] *See* Shapiro v. Thompson, 394 U.S. 659 (1969) (Harlan, J. dissenting); Affeldt v. Whitcomb, Civil No. 70-H-220 (N.D. Ind. Sept. 25, 1970); Blumstein v. Ellington, Civil No. 5815 (M.D. Tenn. Aug. 31, 1970), *appeal docketed*, No. 769, 39 U.S.L.W. 3146 (U.S. Oct. 13, 1970); Hammerstrom, *Residency Requirements*, 21 CASE W. RES. L. REV. 571, 579 *et seq.* (1970).

[67] Governmental action burdening the exercise of a constitutional right

> may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest. [citations omitted]. And once it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect compelling state interests is upon the party seeking to justify the burden. United States v. Arizona, 39 U.S.L.W. 4027, 4070 (U.S. Dec. 22, 1970) (Brennan, White & Marshal, JJ., concurring in part and dissenting in part).

See also Shelton v. Tucker, 364 U.S. 479, 488 (1960), where the Court said, "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

[68] *See* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). It is arguable from these two cases that a classification based on race is not only suspect but is unconstitutional per se. *But cf.* Hunter v. Erickson, 393

natively, a classification may impinge upon the enjoyment of fundamental rights in which event it may be sustained only if the manner of distribution serves a compelling interest.[71] Of course, if neither a fundamental right nor a suspect classification is involved, the statute is presumed reasonable and plaintiff must show the classification to be an "invidious discrimination" under the traditional equal protection standard. Unfortunately, the cases do not always fall neatly into one of the two categories. For example, a statute infringing upon the right to travel may employ a suspect classification, or could be said to trespass on a fundamental right.[72] Courts have had similar difficulty characterizing the right to vote.[73]

"Suspect" classifications are difficult to define with precision, although the majority opinion in *Shapiro v. Thompson*,[74] can be read to imply that any classification penalizing a constitutional right is "suspect." The attempt to define a fundamental right is even more perplexing. Because of the inherent ambiguity, it appears that the distinction between "fundamental" and other more ordinary rights is often arbitrary. Whatever problems have emerged with the adoption of the new standard in the traditional area of equal protection, the test in action is somewhat easier to live with.

U.S. 385, 393-396 (1969) (Harlan, J., concurring) (Incidental discrimination based on neutral principles may be constitutionally permissible. For instance, the requirement that 10 percent of the population sign a petition for referendum may put a heavy burden on Blacks whose proportion of the population is only 10 percent, but such is a classification based on some neutral principle rather than on race.)

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

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

71 Fundamental rights include the right to participate in the democratic process, to equal political representation, to vote and to exercise first amendment rights. *See* Williams v. Rhodes, 393 U.S. 23 (1968); Reynolds v. Sims, 377 U.S. 533 (1964); Yick Wo. v. Hopkins, 118 U.S. 356 (1886); cases cited in note 62, *supra*; respectively.

72 Dissenting in *Shapiro*, Justice Harlan was of the opinion that the majority had held a statute challenged as infringing on the right to travel as employing a suspect classification. 394 U.S. at 659.

73 The three-judge panel in Affeldt v. Whitcomb, Civil No. 70-H-220, at A-12 to -13 (N.D. Ind. Sept. 25, 1970), was of the opinion that the right to vote was a fundamental right. On the other hand, the court in *Blumstein v. Ellington* felt that Tennessee's one-year residency requirement employed a suspect classification and also invaded a fundamental right:

> In short, since there is no question (1) that the classification of *bona fide* residents on the basis of recent arrival in Tennessee, as made by the Tennessee durational residency requirements, is 'suspect' and (2) that those requirements otherwise infringe upon one of the fundamental civil and political rights of the citizens of Tennessee—the right to vote—the Tennessee durational residency requirement must be held to be constitutionally invalid, unless they [sic] are shown to be necessary to promote a compelling state interest. Civil No. 5815, at 13. *Accord*, Bufford v. Holton, Civil No. 371-70-A (E.D. Va. Oct. 27, 1970).

74 394 U.S. 618, 634 (1969):

> The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.

> [W]hen exclusions from the franchise are challenged as violating the Equal Protection Clause, judicial scrutiny is not confined to the question whether the exclusion may reasonably be thought to further a permissible interest of the State. . . . In such cases, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'[75]

Prior Case Law on Voting

In recent years, the Court has struck down state acts disenfranchising residents by the use of literacy tests,[76] poll taxes,[77] and discrimination on the basis of military service,[78] residence in a federal enclave,[79] and purported lack of economic interest in the matters voted upon.[80] An analysis of these cases is applicable to the problem of durational residency requirements.

In *Lassiter v. Northampton County Board of Elections*,[81] the Court upheld a literacy test which it found to be applied in a non-discriminatory manner, saying:

> The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised [citations omitted], absent of course the discrimination which the Constitution condemns. . . .

---

[75] United States v. Arizona, 39 U.S.L.W. 4027, 4071 (U.S. Dec. 21, 1970) (Brennan, White & Marshall, JJ., concurring in part and dissenting in part), *quoting* Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

[76] In United States v. Arizona, 39 U.S.L.W. 4027 (U.S. Dec. 21, 1970), the judgment of the Court upheld Pub. L. No. 91-285, § 201 extending until August 6, 1975, the selective ban contained in the Voting Rights Act of 1965 against the use of "tests or devices" to all states and political subdivisions in which it was not already in force by virtue of the 1965 Act. In so doing, the Court held that ARIZ. REV. STAT. ANN. §§ 16-101(A)(4) & (5) (Supp. 1969-70), were superseded by the supremacy clause. 39 U.S.L.W. at 4032. Arizona had argued that

> it is and has been providing education of equal quality for all its citizens; that its literacy test is both fair and fairly administered; and that there is no evidence in the legislative record upon which Congress could have relied to reach a contrary conclusion. It urges that to the extent that any citizens of Arizona have been denied the right to vote because of illiteracy resulting from discriminatory governmental practices, the unlawful discrimination has been by governments other than the State of Arizona or its political subdivisions. Arizona, it suggests, should not have its laws overridden to cure discrimination on the part of governmental bodies elsewhere in the country. *Id.* at 4068 (Brennan, White & Marshall, JJ., concurring in part and dissenting in part).

Justices Brennan, White and Marshall did not question Arizona's assertions concerning its educational system but took the position that:

> Five years of experience with the 1965 Act persuaded Congress that a nationwide ban on literacy and other potentially discriminatory tests was necessary to prevent racial discrimination in voting throughout the country. That conclusionn is amply supported in the legislative record and § 201 of the 1970 Amendments is accordingly well within the scope of congressional power. *Id.* at 4069.

[77] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[78] Carrington v. Rash, 380 U.S. 89 (1965).

[79] Evans v. Cornman, 398 U.S. 419 (1970).

[80] City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

[81] 360 U.S. 45 (1959).

. . . .

> We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record [citation omitted], are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.[82]

Six years after *Lassiter*, the Court, in *Carrington v. Rash*,[83] struck down a Texas statute which disenfranchised anyone who moved into the state while in the military for as long as he remained a member of the armed forces. The patent form of discrimination present in *Carrington* was more repugnant to constitutional standards than durational residency requirements since the Texas statute constituted an absolute denial of the privilege of voting to servicemen.[84] The Court established two propositions which would play an important part in the later examination of durational residency: "states may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State,"[85] and " 'fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[86]

The next year, the Court considered the constitutionality of poll taxes under the equal protection clause in *Harper v. Virginia Board of Elections*.[87] The Court struck down the poll tax reasoning that its imposition was unrelated to voter qualification and that it discriminated in favor of the affluent.

In *McDonald v. Board of Election Commissioners*[88] the Court stated

---

82 *Id.* at 50-51.

83 380 U.S. 89 (1965). Like *Lassiter*, the opinion in *Carrington* contained dicta that the states have "unquestioned power to impose reasonable residency requirements on the availability of the ballot." *Id.* at 91.

84 *Id.* at 91-2. Indeed, the three-judge panel in *Cocanower v. Marston*, distinguished all prior Supreme Court decisions applying the compelling state interest standard in voting cases on the basis that permanent exclusion from the franchise was involved in those cases. 318 F. Supp. at 405.

85 380 U.S. at 96.

86 *Id.* at 94.

87 383 U.S. 663 (1966). In the now familiar pattern established by *Lassiter* and *Carrington*, the opinion in *Harper* contained dicta that states have the power to impose reasonable residency requirements. *Id.* at 666-67.

In Katzenbach v. Morgan, 384 U.S. 641 (1966), however, the Court upheld section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973 6(e) (Supp. I, 1965). The section provides that no person who has successfully completed the sixth primary grade in a public or accredited private school of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. The Court held that section 4(e) was ennacted under Congress' power granted by section 5 of the fourteenth amendment and that New York's English literacy requirement for voting could not be enforced to the extent that it was inconsistent with section 4(e).

At one point the Court stated, "[T]he States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened." 384 U.S. at 654 n.15, *citing, e.g.*, Carrington v. Rash, 380 U.S. 89, 96 (1965); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); Thomas v. Collins, 323 U.S. 516, 529-30 (1945).

88 394 U.S. 802 (1969).

in dicta that the right to vote is a "fundamental right"[89] and that the compelling state interest test should be applied to alleged discriminations in restrictions upon that right. Because the discrimination did not affect the appellant's ability to exercise his vote, the Court had no need to apply the test.

In *Kramer v. Union Free School District*,[90] an otherwise qualified voter was denied the right to vote in a local school district election because he had neither children nor an interest in taxable real property. The Court found that the state statute defining the qualified electorate[91] was overly broad in limiting the franchise in school elections and upheld the appellant's right to vote. Whatever the state's interest was in limiting the franchise of the school elections, the language used was too broad a protection of that interest.

The majority went beyond the specific holding and adopted the test enunciated in *Reynolds v. Sims*[92] that " 'any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized' . . . because statutes distributing the franchise constitute the foundation of our representative society."[93] The majority in *Kramer* strongly endorsed the compelling state interest test. "[I]f a challenged state statute grants the right to vote to some *bona fide* residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."[94] The dissenters favored the traditional "rational" test.[95] Although its reasoning is apposite, *Kramer* is not an authoritative precedent for the application of either standard in durational residency cases. The Court did not reach the question of standards in voting since it found the challenged state statute unconstitutionally imprecise. Moreover, the Court never considered the validity of durational residency requirements.[96]

---

[89] The Court had declared voting to be a fundamental right as early as 1886. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). In 1964, the Court had extended Constitutional protection to all citizens qualified to vote in state as well as federal elections. Reynolds v. Sims, 377 U.S. 533 (1964).

[90] 395 U.S. 621 (1969). Like previous cases, *Kramer* stated that states could impose reasonable residency requirements for voting. *Id.* at 625. *Accord*, Coffee v. Commissioner, 62 Misc. 2d 315, 308 N.Y.S.2d 660 (Sup. Ct. 1970).

[91] 395 U.S. at 632. *See* N.Y. EDUC. LAW § 2012 (McKinney 1969), *amended* (Supp. 1970-71).

[92] 377 U.S. 533 (1964).

[93] 395 U.S. at 626, *quoting* Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[94] *Id.* at 627.

[95] *Id.* at 636.

[96] *Id.* at 625-26:

> At the outset, it is important to note what is *not* at issue in this case. . . . Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot. [citations omitted] The sole issue in this case is whether the *additional* requirements of § 2012 . . . violate the Fourteenth Amendment's command that no State shall deny persons equal protection of the laws.

It has been suggested that restrictions of the franchise based upon age, citizenship, and residency may be justified by section 2 of the fourteenth amendment and are traditionally and logically separable from "special restrictions" such as poll

The sole 1969 case testing the constitutionality of durational residency requirements for presidential elections was vacated *per curiam* as moot.[97] The district court in *Hall v. Beals*,[98] following *Drueding v. Devlin*, rejected the analogy to the congressional redistricting and legislative reapportionment cases[99] and adopted the asserted state interests almost verbatim from *Drueding*.[100] The court expressed approval for shorter residency requirements but declined to substitute the views of the bench for those of the legislature.[101] By the time the case reached the Supreme Court, the state had reduced its durational requirement from six to two months, thereby removing the appellant from the class of voters disenfranchised by the statute and in the eyes of the majority rendering the case moot.[102]

Cipriano v. City of Houma[103] was a *per curiam* reversal of a three-judge district court decision which had upheld the constitutionality of a state statute restricting the right to vote in municipal bond elections to property taxpayers. The Court stated that the issue presented was similar to that present in *Kramer*, and that the compelling state interest standard was to be applied. The state advanced only a "rational basis" justification for the statute and the Court had no difficulty in finding that argument insufficient to meet the standard set forth in *Kramer*.

In *Evans v. Cornman*,[104] the Court held that otherwise qualified individuals who live on a federal enclave are entitled to vote in state elections. The issue in *Evans* was residency rather than durational resi-

---

taxes or the requirements involved in *Kramer*. Comment, *Limitations on the Voting Franchise and the Standard of Kramer v. Union Free School District No. 15*, 1970 UTAH L. REV. 143. That commentator feels that age, residency and citizenship requirements are "good methods of limiting the franchise," *id.* at 151 n.44, while special requirements "[t]raditionally have not accurately reflected the responsible voting potential of the groups they classify and are not as neutral in application as the more general requirements. *Id.* at 152. The court in *Cocanower* distinguished *Kramer* as (1) being a "special purpose election" case, (2) as striking down legislation which had the "effect of completely denying the franchise," and (3) as dealing with disenfranchisement "on grounds *other than* age annd residence." 318 F. Supp at 404.

97 Hall v. Beals, 396 U.S. 45 (1969).

98 292 F. Supp. 610 (D. Colo. 1968), *vacated per curiam as moot*, 396 U.S. 45 (1969).

99 292 F. Supp. at 613-4:

> The plaintiffs attempt to draw an analogy between the issue they present and the issues involved in the congressional redistricting and legislative reapportionment cases. [Citations omitted] However, we find, as did the Three-Judge Court in Drueding v. Devlin, 234 F. Supp. 721, 725 (D. Md. 1964), that those cases are not analogous to the issues presented here.

A footnote at this point in the text stated: "The Court in Drueding v. Devlin, supra stated that 'it may be noted that the Supreme Court declined to intervene in such cases until it was convinced that there was little hope that the several state legislatures would take remedial action.' " 292 F. Supp. at 614 n.6.

100 *Id.* at 614.

101 *Id.*

102 There were vigorous dissents by Justices Brennan and Marshall who would have reached the merits. 396 U.S. at 51-52.

103 395 U.S. 701 (1969).

104 398 U.S. 419 (1970).

dency, and the interest asserted by the state was to limit the electorate to those primarily or substantially interested in or affected by the electoral decisions.[105] Without deciding whether "such an interest could be sufficiently compelling to justify limitations on the suffrage,"[106] the Court held that in nearly every election the residents of the federal enclave had a stake equal to that of other Maryland residents. In *City of Phoenix v. Kolodziejski*,[107] the Court distinguished *Cipriano* on the basis that it involved a revenue bond election while *Kolodziejski* arose in the context of a general obligation bond election. The Court concluded, however, "that the principles [of *Cipriano* and *Kramer*] dictate a like result."[108] *Cipriano*, *Kramer*, *Evans*, and *Kolodziejski* evaluate the constitutionality of state disenfranchisement by determining the interest of the disenfranchised group in the electoral decision from which they are barred. If this is in fact the direction of judicial development in voting cases, it is difficult to see how a resident of one year or six months has less of an interest than a resident of a longer period in electing state officials who will hold office for the next two, four or six years.[109]

In *United States v. Arizona*,[110] the Court upheld the constitutionality of a federal statute forbidding states from disqualifying voters in presidential elections because they have not met state residency requirements.

---

105 90 S. Ct. at 1755.
106 *Id.*
107 399 U.S. 204 (1970).
108 90 S. Ct. at 1994.
109 On the other hand, Justice Black has observed recently:

> It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States. Amendments Fourteen, Fifteen, Nineteen, and Twenty-Four, each of which has assumed that the States had general supervisory power over state elections, are examples of express limitations on the power of the States to govern themselves. And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-Fourth Amendments superfluous. United States v. Arizona, 39 U.S.L.W. 4027, 4030 (U.S. Dec. 21, 1970) (Black, J. announncing the judgments of the Court).

Justice Black continued:

> Our judgment today gives the Federal Government the powers the Framers conferred upon it, that is, the final control of the elections of its own officers. Our judgment also saves for the States the power to control state and local elections which the Constitution originally reserved to them and which no subsequent amendment has taken from them. The generalities of the Equal Protection Clause of the Fourteenth Amendment were not designed or adopted to render the States impotent to set voter qualification in elections for their own local officials and agents in the absence of some specific constitutional limitations. *Id.* at 4032-33.

110 39 U.S.L.W. 4027 (U.S. Dec. 21, 1970). The Court also declared that the provisions of the Voting Rights Amendments of 1970 enfranchising 18-year-olds are constitutional and enforceable when applied to federal elections but are unconstitutional and unenforceable when applied to state and local elections. Secondly, the Court upheld Congress' power to prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and federal elections. Finally, the Court upheld Congressional power to provide for absentee balloting in presidential elections.

The scope of Congress' constitutional power to supersede state durational residency requirements presents different questions than the constitutionality of such requirements.[111] Thus, the dicta in *United States v. Arizona* directed to these state requirements are inapposite to the question of their constitutionality. It would bd unwise, therefore, to read *United States v. Arizona* as an indication of how the Court would dispose of the questions raised in challenges to state voter residency requirements in cases such as *Cocanower.*

The New Standard in Voting Cases

The examination of an interest asserted by a state to justify a residency requirement for voting involves two steps. The first is to determine exactly what the interest portends, and the second is to determine whether it justifies a residency requirement of a particular duration.[112]

The State of Arizona and Maricopa County asserted six interests in *Cocanower*: purity of elections, protection of parochial concerns, administrative convenience, prevention of fraud, objective standard of residency and voter education. These interests, though inclusive of all interests in the cases challenging residency requirements for voting to date, will be considered in the context of *Cocanower.*

1. *Purity of Elections.* The asserted interest in purity of elections has never been defined clearly.[113] If the state's interest in "purity of elections" means that it has a stake in having only long-time residents of the

---

111 "Whether a particular State's durational residency requirement for voters may violate the Equal Protection Clause of the Fourteenth Amendment presents questions which are for me quite different from those attending the constitutionality of § 202." *Id.* at 4037 n.9 (Stewart, J.).

112 States presently require the following durational periods of residency within the state as a prerequisite to voting in nonpresidential elections:

New York and Pennsylvania require 90 days.

Fourteen states require six months: Colorado, Connnecticut, Idaho, Iowa, Kansas, Maine, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oklahoma and Oregon.

Twenty-seven states require one year: Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Missouri, Montana, New Mexico, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

The present situation in Massachusetts is unclear in light of Burg v. Canniffe, 315 F. Supp. 380 (D. Mass. 1970), *appeal docketed*, No. 811, 39 U.S.L.W. 3168 (U.S. Oct. 20, 1970), and Zarr v. Board of Election Comm'rs, Civ. No. 70-947-F (D. Mass., filed July 17, 1970).

Mississippi has a two-year residency requirement.

State residency requirements for voting have been struck down as unconstitutional in California [Keene v. Mihaly, — Col. App. —, 90 Cal. Rptr. 263 (1970)], Indiana [Affeldt v. Whitcomb, Civil No. 70-H-220 (N.D. Ind. Sept. 25, 1970)], Tennessee [Blumstein v. Ellington, Civil No. 5815 (M.D. Tenn. Aug. 31, 1970), *appeal docketed* No. 769, 39 U.S.L.W. 3146 (U.S. Oct. 13, 1970)], Vermont [Kohn v. Davis, 39 U.S.L.W. 2253 (D. Vt. Oct. 26, 1970)], and Virginia [Bufford v. Holton, 39 U.S.L.W. 2253 (E.D. Va. Oct. 27, 1970)].

113 The phrase can be traced to Arizona's constitution. ARIZ. CONST. art. 7, § 12: "There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise."

state (those residing within the state at least six months or a year) vote, and that the vote of newer residents might make the state's elections impure, than this interest is the same as a "parochial interest." Defining a state's interest in purity of elections in this manner makes the interest constitutionally impermissible.[114] The alternative to this characterization is to treat the asserted interest as a desire on the part of the state to prevent dual voting and fraud.[115] This is a valid state interest and will be discussed in connection with the state's interest in preventing fraud.

2. *Parochial Interest.* Vested interests frequently wish to maintain their political control at the expense of newcomers whose political attitudes may not conform to those prevailing in the community. This alleged interest is based upon what the members of the existing community would like the prospective voters' political interests and social values to be, not upon the newcomers' intelligence or ability to perceive and understand political issues. Two assumptions underlying the use of durational residency requirements to protect this parochial interest should be clarified.

The first assumption is that a state indeed has a parochial interest to be protected—that the people living within the borders of the state are politically, economically or socially different from its new residents, and there is one identifiable state creed on any given political issue. Given the lack of unanimity of presently qualified voters as evidenced in political party registration and election returns,[116] it seems clear that this assumption

---

[114] Carrington v. Rash, 380 U.S. 89, 94 (1965). In *United States v. Arizona*, the states attempted to justify their exclusion of 18- to 21-year-olds from the voting rolls solely on the basis of the state's interests in promoting the intelligent and responsible exercise of the franchise. 39 U.S.L.W. at 4071. Justices Brennan, White, and Marshall disposed of the argument:

> There is no reason to question the legitimacy and importance of these interests. But standards of intelligence and responsibility, however defined, may permissibly be applied only to the means whereby a prospective voter determines how to exercise his choice, and not to the actual choice itself. Were it otherwise, such standards could all too easily serve as mere epithets designed to cloak the exclusion of a class of voters simply because of the way they might vote. *Cf.* Evans v. Cornman, 398 U.S. at 422-423. Such a state purpose is, of course, constitutionally impermissible. Carrington v. Rash, 380 U.S. at 94. We must, therefore, examine with particular care the asserted connection between age limitations and the admittedly laudable state purpose to further intelligent and responsible voting. 39 U.S.L.W. at 4071 (Brennan, White & Marshall, JJ., concurring in part and dissenting in part).

The Justices found that the dispute was centered in the "conflict between state and legislative determinations of the factual issues" and held that "the primacy of federal power requires that the federal finding of fact control." *Id.* at 4073.

[115] *E.g.*, Blumstein v. Ellington, Civil No. 5815 (M.D. Tenn. Aug. 31, 1970), *appeal docketed*, No. 769, 39 U.S.L.W. 3146 (U.S. Oct. 13, 1970). *See also* Act No. 64, [1891] Laws of Ariz. 83, enacting safeguards to protect Arizona's ballot box from fraud and entitled "To Promote Purity of Elections . . . ."

[116] In every election from 1936 to 1964, the voter returns from Maricopa County were almost exactly three percent more Republican than were statewide returns. L. BEAN, HOW AMERICA VOTES IN PRESIDENTIAL ELECTIONS 34 (1968). While voters with higher income and education are more likely to vote Republican [J. FRIEDHEIM, WHERE ARE THE VOTERS? 86, 190 (1968)], the younger the voter, the more likely he is to vote Democratic. *Id.* at 138. Thus the effect on political party registration if Arizona's one-year residency requirement was to be declared

is false. The second assumption is that during the required residency period new residents shed whatever beliefs they may have which are antagonistic to the state's parochial interests and acquire views which are in sympathy with the long-time residents of their new state. To what extent one's views would be antagonist to any interests of a newly acquired residence or would change to conform with any local views which are themselves not singular is at best problematical.

Spectulation is unnecessary, however, because a state may not constitutionally deprive its new citizens of the vote merely because they may vote differently than residents who have resided in the state for a longer period. " 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[117]

---

unconstitutional would seem to be conjectural, at best.

> The impact of the residency requirements falls upon those seeking advancement in a new community such as educators, lawyers, clergymen, and business executives. Disenfranchisement may have a greater affect on non-professionals such as those who must move constantly because of occupational necessity. Affeldt v. Whitcomb, Civ. No. 70-H-220, at A-21 (N.D. Ind. Sept. 25, 1970).

Mention also should be made of the "roaming band of electorate theory" advanced by the State of Indiana in *Affeldt v. Whitcomb*. If applied to Arizona, the theory would be that a rather small group of individuals could gain control of the governing bodies of many Arizona localities within the span of a few years. According to the theory, it could happen something like this:

> Early in the summer, a group could come into a county, declare their residency and register to vote in the upcoming general election. Once registered, this group could draft and sign petitions organizing a new political party [A new political party may be placed on the ballot in Arizona by filing a petition signed by qualified electors equal to two percent of the votes cast for governor at the last preceding general election. ARIZ. REV. STAT. ANN. § 16-202 (Supp. 1969-70). The petition must be filed between 60 and 90 days prior to the primary election. *Id.* § 16-204. *But, cf.* Williams v. Rhodes, 393 U.S. 23 (1968)], setting forth several individuals within the group as candidates for the major offices to be voted upon [For the number of signatures required on nomination petitions for various offices, *see* ARIZ. REV. STAT. ANN. § 16-305 (Supp. 1969-70). The aspirant to office must file a nomination paper between 60 and 90 days prior to the primary election. Id. § 16-301.], and thereby legally gain a position on the upcoming general election ballot. . . . Then, if this politically motivated group was of any size, they could elect their slate and gain control of the local governmental unit. Once gaining control, they could fold up their tents and move to the next community, leaving their elected slate behind to run the local unit for two to four years. This process could be repeated each year and thus permit a very small group of individuals to control a very large section of territory. Motion to Dismiss, *id.*, at 9.

Amazing as it may seem, such a colonization effort has been threatened in California. *See* TIME, Nov. 2, 1970, at 12. Such an attempt would be likely to fail in Arizona although it could create havoc temporarily in small communities. ARIZ. CONST. art. 8, § 1, subjects all elective officers in the state to recall. If a group did try to colonize a small Arizona town, the permanent residents could recall the officials so elected as soon as the colonists moved on, leaving their elected members behind. Some disruption would result, however, since a recall petition cannot be circulated until an elected official has held his office for a six-month period. ARIZ. CONST. art. 8, § 5.

[117] Carrington v. Rash, 380 U.S. 89, 94 (1965). *Accord*, United States v. Arizona, 39 U.S.L.W. 4027, 4071 (U.S. Dec. 21, 1970) (Brennan, White & Marshall, JJ., concurring in part and dissenting in part). *Cf.* Hall v. Beals, 396 U.S. 45, 53-54 (1969) (Marshall, J., dissenting).

Voter restrictions for the purpose of ensuring that the electorate has the capacity to understand and familiarize itself with the candidates and issues have been upheld when applied in a nondiscriminatory fashion.[118] This justification for durational residency requirements will be discussed in the following section.

3. *Education of the Voter.* The state has a legitimate interest in insuring that the electorate is "enlightened" by requiring that new residents become acquainted with local and state political issues before they are allowed to vote.[119] On the other hand, a durational residency requirement cannot be justified by an alleged need on the part of the state to indoctrinate or impress the local viewpoint upon newcomers.[120] Even assuming that the state's interest in an "enlightened" electorate is compelling and that a state may limit the franchise to those residents who are familiar with local issues in a general election, a lengthy durational residency require ment does not accomplish that objective with sufficient precision to justify the denial of the right to vote.[121]

The asserted reason for a six-month or one-year residency requirement before a new resident is allowed to vote is that it takes the new resident that amount of time to digest and understand the political issues of his community. The assumption that residents who have lived in the state for the required period are better informed about the issues and candidates in the election than those who have lived in the state for less than the required period is subject to criticism in light of heavy local news coverage of any election during the 30-day period before the election.[122] The identity of the candidates frequently does not become known until after contested primary races. The saturation coverage of election issues by all news media during the last weeks before an election, would suffice to educate most potential voters about the current issues and candidates.[123]

Even if it can be assumed that new residents know less about local issues than old residents, when

---

118 *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959) (literacy requirement).

119 Affeldt v. Whitcomb, Civil No. 70-H-220, at A-18 (N.D. Ind. Sept. 25, 1970). The state's interest in an electorate knowledgeable of local and state issues in a general election is greater than would be present in an election for President and Vice President. *Id.* at A-17; 116 CONG. REC. S3538 (daily ed. March 11, 1970) (Senator Goldwater).

120 Carrington v. Rash, 380 U.S. 89 (1965); Affeldt v. Whitcomb, Civil No. 70-H-220, at A-17 (N.D. Ind. Sept. 25, 1970); *cf.* United States v. Arizona, 39 U.S.L.W. 4027, 4071 (U.S. Dec. 21, 1970) (Brennan, White & Marshall, JJ., concurring in part and dissenting in part).

121 Affeldt v. Whitcomb, Civil No. 70-H-220, at A-18 (N.D. Ind. Sept. 25, 1970); *see* Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

122 Affeldt v. Whitcomb, Civil No. 70-H-220, at A-18 (N.D. Ind. Sept. 25, 1970). *See* ARIZ. REV. STAT. ANN. § 16-107(B) (Supp. 1969-70).

123 Moreover, Arizona law permits voter registration for less than one week after the primary. ARIZ. REV. STAT. ANN. § 16-107(B) (Supp. 1969-70). Thus, a resident, whether long-time or new, must be registered during most of the period of heavy election news coverage or he may not vote.

> the State's sole justification for [disenfranchisement] is that the classification provides a 'rational basis' for limiting the franchise to those voters with a 'special interest' the statute clearly does not meet the 'exacting standard of precision we require of statutes which selectively distribute the franchise.'[124]

At best, it can be said only that there may be some reasonable relationship between the state interest in an "enlightened" electorate acquainted with local issues and denying new residents the right to vote until they have been in the state for one year. Such an interest is not, however, compelling.[125]

4. *Prevention of Fraud.* A state has a legitimate interest in preventing dual voting and other election frauds.[126] Assuming *arguendo* that this interest is compelling, a state still has the burden of showing that the means which it has chosen to protect that interest are both necessary[127] and constitutionally precise.[128]

Means other and better than residency requirements exist to prevent voter fraud. The most effective of these is voter registration which provides ample opportunity for ascertaining the identity and eligibility of those seeking to vote.[129] "Ghost-voting" (the registration of deceased or fictitious persons; and "colonization" (the transportation of out-of-state residents into the state for the purpose of affecting the result of the election) were nineteenth century forms of election fraud largely eradicated by widespread registration requirements.[130] Durational residency requirements cannot aid directly in detecting such frauds, which can be discovered only by a cross-check or independent verification of voting lists.[131] The residency requirement itself provides no sanctions for such double voting; the only available sanction, that of prosecution for perjury, would apply even without the residency requirement.

---

124 Cipriano v. City of Houma, 395 U.S. 701, 706 (1969).

125 *Cf.* Hall v. Beals, 396 U.S. 45, 53-54 & n.1 (1969) (Marshall, J., dissenting). There is no merit to the assertion that a durational residency requirement is a *sine qua non* for the enlightenment of voters. Affeldt v. Whitcomb, Civil No. 70-H-220, at A-18 (N.D. Ind. Sept. 25, 1970).

126 Blumstein v. Ellington, Civil No. 5815 (M.D. Tenn. Aug. 31, 1970), *appeal docketed*, No. 769, 39 U.S.L.W. 3146 (U.S. Oct. 13, 1970); Burg v. Canniffe, 315 F. Supp. 380, 385 (D. Mass. 1970), *appeal docketed*, No. 811, 39 U.S.L.W. 1368 (U.S. Oct. 6, 1970).

The Maricopa County Recorder has testified that he has no personal knowledge of any instances of dual voting or voter fraud in Arizona elections during his term of office. Transcript 29, Cocanower v. Marston, 318 F. Supp. 402 (D. Ariz. 1970). This, of course, does not negate the possibility that fraud may have occurred.

127 *E.g.*, Affeldt v. Whitcomb, Civil No. 70-H-220, at A-13, A-15 (N.D. Ind. Sept. 25, 1970); Blumstein v. Ellington, Civil No. 5815, at 14 (M.D. Tenn. Aug. 31, 1970).

128 Carrington v. Rash, 380 U.S. 89 (1965); Affeldt v. Whitcomb, Civil No. 70-H-220 (N.D. Ind. Sept. 25, 1970).

129 *See* Blumstein v. Ellington, Civil No. 5815, at 14 (M.D. Tenn. Aug. 31, 1970).

130 Macleod & Wilberding, *supra* note 10, at 93.

131 *Id.* at 113. A voter's falsification of his residency affidavit is unlikely to be detected.

In *United States v. Arizona*, the State of Idaho asserted that its 60-day durational residency requirement[132] was necessary to protect against dual voting,[133] even though new residents may register to vote in presidential elections within ten days of balloting.[134] The Court upheld the federal statute abolishing all state durational residency requirements for presidential elections and establishing a national 30-day maximum requirement. Justices Brennan, White, and Marshall noted that

> Idaho has provided no evidence beyond the mere assertion that the [federal durational residency requirement] is inadequate to protect against fraud. But the only kind of fraud asserted is the possibility of dual voting, and Idaho has provided no explanation why the 30-day period between the closing of new registrations and the date of election would not provide, in light of modern communications, adequate time to insure against such frauds.[135]

Of course, the Court was not faced with the question whether a durational residency period of even less than thirty days would suffice.

In Arizona, residency is determined by the applicant's oath at registration.[136] In Maricopa County, at least, the information in the affidavit is never investigated to determine if it is false.[137] Because the truth of the applicant's affidavit is presumed, no cross-check is made to determine whether the applicant is registered elsewhere. The durational residency requirement as presently administered in Arizona, therefore, adds no real protection against dual voting or colonization.[138]

Not only are durational residency requirements ineffective in preventing fraud, they are also unnecessary to identify the voter. Voter identification can be achieved by means less drastic than disenfranchisement such as by a check of birth certificates, automobile registration cards, selective service cards, drivers' licenses, photographs or fingerprints. Thus, durational residency requirements are not necessary to promote the interests asserted by the state and therefore do not meet the requirements of the compelling state interest standard.[139]

---

132 IDAHO CONST. art. 6, § 2.
133 39 U.S.L.W. at 4070.
134 IDAHO CODE § 34-409 (1969).
135 39 U.S.L.W. at 4070.
136 ARIZ. REV. STAT. ANN. § 16-143(A)(13) (Supp. 1969-70); Pretrial Statement 3, Cocanower v. Marston, 318 F. Supp. 402 (D. Ariz. 1970).
137 Transcript 26, Cocanower v. Marston, 318 F. Supp. 402 (D. Ariz. 1970); Deposition of D.J. Nicol 14, *id.*
138 *See* Affeldt v. Whitcomb, Civil No. 70-H-220, at A-16 (N.D. Ind. Sept. 25, 1970). *See also* Hall v. Beals, 396 U.S. 45, 54 (1969) (Marshall, J., dissenting):

> The nonresident, seeking to vote, can as easily falsely swear that he has been a resident for a certain time, as he could falsely swear that he is presently a resident. The requirement of the additional element to be sworn—the duration of residency—adds no discernible protection against 'dual voting' or 'colonization' by voters willing to lie.

139 *See* Affeldt v. Whitcomb, Civil No. 70-H-220, at A-17 (N.D. Ind. Sept. 25, 1970):

> Fraud could be prevented by other means less drastic than the denial of the right to vote . . . ; for example, a certification from a new

In all recent cases challenging state durational residency requirements, the plaintiffs met every requirement for voting except the durational residency requirements.[140] The assertion by the state that the prevention of fraud was a justification for the residency requirement had no direct relevance to the factual situations in those cases. No state has set up procedures for preventing dual voting which would require the full residency period to effectuate, though the State of Arizona and Maricopa County in *Cocanower* did propose use of telephone books to spot-check voter registrants for actual physical presence in the county.[141] The conclusion must be made in speaking of prevention of fraud that "at best, the length of residence in Arizona by itself has a marginal relationship to the suggested state objective."[142]

5. *Administrative Necessity.* Any state has an interest in providing for some period of time between the close of voter registration and the subsequent election[143] to add late registrants to the voting rolls and to distribute the voting list to the precincts.[144] The question is what relationship a residency requirement has to this administrative necessity.[145] The closing dates for registration before an election vary between a period of zero days in Alaska to nine months and three days in Texas.[146] The Maricopa

---

residents' former election district to insure that the new voter has not retained registration in his former district may be 'necessary' under the compelling interest test.

See also Brief for the United States 28, Hadnott v. Amos, 394 U.S. 358 (1969); Note, *Residence Requirements for Voting in Presidential Elections*, 37 U. CHI. L. REV. 359, 364 n.34 (1970).

140 Bufford v. Holton, 39 U.S.L.W. 2253 (E.D. Va. Oct. 27, 1970); Affeldt v. Whitcomb, Civil No. 70-H-220, at A-3 (N.D. Ind. Sept. 25, 1970); Blumstein v. Ellington, Civil No. 5815, at 2 (M.D. Tenn. Aug. 31, 1970); Burg v. Canniffe, 315 F. Supp. 380, 381 (D. Mass. 1970); Keane v. Mihaly, — Cal. App. —, 90 Cal. Rptr. 263 (1970).

141 Mountain States Telephone and Telegraph Company publishes its directory once a year. The Maricopa County Recorder testified that the phone directory and other yearly directories could be used to verify addresses if a voter's residency were ever challenged. The recorder's office had never had occasion to use the directories for this purpose, however. Transcript at 17-29.

142 Vaughn v. Bower, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd*, 39 U.S.L.W. 3199 (U.S. Nov. 10, 1970) (striking down Arizona's residency requirement for welfare benefits). *See also* Shapiro v. Thompson, 394 U.S. 618 (1969), where the Court stated that since less drastic means of preventing fraud were available by merely sending a letter or making a phone call, and that the blunderbuss method of preventing most new citizens from qualifying for welfare benefits was unconstitutionally overbroad.

143 *E.g.*, Affeldt v. Whitcomb, Civil No. 70-H-220 (N.D. Ind. Sept. 25, 1970). The plaintiff in *Cocanower v. Marston* did not dispute this interest. For an argument that the de facto residency requirements presented by even these short periods may be unconstitutional, *see* Note, *Residence Requirements for Voting in Presidential Elections*, 37 U. CHI. L. REV. 359, 380 n.114 (1970).

144 *Cf.* Burg v. Canniffe, 315 F. Supp. 380, 385 (D. Mass. 1970), *appeal docketed*, No. 811, 39 U.S.L.W. 3168 (U.S. Oct. 20, 1970).

145 Arizona provides for a seven-week period between the close of voter registration after the primary and before the general election. ARIZ. REV. STAT. ANN. § 16-107(B) (Supp. 1969-70).

146 116 CONG. REC. S3543 (daily ed. March 11, 1970). Forty states presently allow registration until thirty days or less prior to election. United States v. Arizona, 39 U.S.L.W. 4027, 4070 (U.S. Dec. 21, 1970).

County Election Director stated that two weeks was a sufficient period to update the voter rolls with all late registrations and to ready the local precincts for voting in Arizona's most populous county.[147]

The three-judge federal panel in *Blumstein v. Ellington*[148] stated that the Tennessee statute[149] providing for a 30-day cutoff period

> reflects the judgment of the Tennessee Legislature that thirty days is an adequate period in which Tennessee's election officials can effect whatever measures may be necessary, in each particular case confronting them, to insure purity of the ballot and prevent dual registration and dual voting. It is clear that, in actuality, Tennessee's interest in these matters is protected by the thirty-day period, and not by that State's durational residency requirements.[150]

It seems clear that the one-year residency requirement in Arizona does not serve any administrative *necessity*. Rather, it establishes an arbitrary waiting period for purposes of administrative *convenience*. But while administrative convenience may be sufficient to justify some legislative discrimination,[151] when fundamental constitutional rights are denied or inhibitd, necessity rather than mere convenience is the correct standard.[152] Further, the discrimination must "be necessary to promote not merely a constitutionally permissible state interest, but a state interest of substantial importance."[153] Arizona's one-year residency requirement is not supported by such a substantial administrative interest.

6. *Objective Standard of Residency.* Because Arizona officials rely so heavily on a sworn affidavit in registering voters, the state's asserted interest in providing an objective standard of residency will not withstand scrutiny.[154] As Mr. Justice Marshall stated dissenting in *Hall v. Beals*:

> [A] conclusive presumption that a recently established resident is not a resident at all for voting purposes is simply an overbroad burden upon the right to vote. In most cases, it is no more difficult to determine whether one recently arrived in the community has sufficient intent to remain to qualify as a resident than it is to make a similar determination for an older inhabitant. That there are borderline cases among the new arrivals is not a constitutionally sufficient reason for denying the vote to those who have settled in good faith.[155] (footnote omitted).

---

147 Deposition of D.J. Nichol 17, Cocanower v. Marston, 318 F. Supp. 402 (D. Ariz. 1970).

148 Civil No. 5815 (M.D. Tenn. Aug. 31, 1970), *appeal docketed*, No. 769, 39 U.S.L.W. 3146 (U.S. Oct. 13, 1970).

149 TENN. CODE ANN. § 2-304 (Supp. 1970).

150 Civil No. 5815, at 14.

151 *E.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

152 *E.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Carrington v. Rash, 380 U.S. 89 (1965).

153 United States v. Arizona, 39 U.S.L.W. 4027, 4073 n.31 (U.S. Dec. 21, 1970) (Brennan, White & Marshall, JJ., concurring in part and dissenting in part).

154 *See* Carrington v. Rash, 380 U.S. 89, 96 (1965), where the Court held that "states may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state."

155 396 U.S. at 55-56.

The crucial determination, then, is whether a one-year requirement is compelled or whether a 30-day period, or some other length of time, is a sufficiently objective determination of a potential voter's residency.[156] Presumably, the purpose of the affidavit would be served just as well if the traditional "physical presence" and "intent to remain indefinitely" standard[157] of residency were the basis for the objective standard.[158]

CONCLUSION

The Right to Travel

Although the right to travel is not specifically mentioned in the Constitution,[159] its status as a constitutionally protected right has long been rec-

---

[156] This is especially true since there are no publicized cases where a person has moved only for the purpose of voting in another state. *Cf.* Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Sherrer v. Sherrer, 334 U.S. 343 (1948); Williams v. North Carolina, 317 U.S. 287 (1942).

If the question is phrased as in the text it becomes impossible for a state to demonstrate a compelling state interest in any given period of residency. In discussing voting requirements based upon age, Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, has pointed out that:

> to test the power to establish an age qualification by the 'compelling interest' standard is really to deny a State any choice at all, because no State could demonstrate a 'compelling interest' in drawing the line with respect to age at one point rather than another. Obviously, the power to establish an age qualification must carry with it the power to choose 21 as a reasonable voting age, as the vast majority of the States have done. United States v. Arizona, 39 U.S.L.W. 4027, 4037 (U.S. Dec. 21, 1970) (Stewart, J., concurring in part and dissenting in part).

In a footnote, Justice Stewart added:

> If the Government is correct in its submission that a particular age requirement must meet the 'compelling interest' standard, then, of course, a substantial question would exist whether a 21-year-old voter qualification is constitutional even in the absence of congressional action, as my Brothers point out. . . . Yet it is inconceivable to me that this Court would ever hold that the denial of the vote to those between the ages of 18 and 21 constitutes such an invidious discrimination as to be a denial of the equal protection of the laws. The establishment of an age qualification is not state action aimed at any discrete and insular minority. *Id.* n.14.

In contrast, durational residency requirements for voting can be viewed as aimed at a "discrete and insular minority"—recent movers.

[157] *See* McClean, *The Meaning of Residence*, 11 INT'L & COMP. L.Q. 1153 (1962); Reese & Green, *That Elusive Word, 'Residence'*, 6 VAND. L. REV. 561 (1953).

[158] At the minimum, this would prevent a challenge on the basis of "unconstitutional overbreadth." *See* Shapiro v. Thompson, 394 U.S. 618 (1966).

[159] In Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969), the Court said:

> [T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land . . . .
>
> We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.

In *United States v. Arizona*, Justices Brennan, White and Marshall again declined to ascribe the right to travel to any specific constitutional provision. 39 U.S.L.W. at 4070. Justice Black did not state his view expressly but his citations to *Shapiro v. Thompson* and United States v. Guest, 383 U.S. 745, 757-58 (1966), would indicate that he favors the same interpretation. The Chief Justice and Justices Stewart and Blackmun seem to prefer the privileges and immunities clauses. 39 U.S.L.W. at 4034. *Accord, e.g.*, Edwards v. California, 314 U.S. 160 (1941) (Jackson, J., concurring); Twining v. New Jersey, 211 U.S. 78 (1908); Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869). Justice Douglas did not reach the question, 39 U.S.L.W. at 4062, and

ognized[160] The Court recently held in *Shapiro v. Thompson* that state residency requirements denying welfare benefits to residents of less than one year were unconstitutional. Prior to *Shapiro*, state statutes which created only indirect infringements on the right to travel were sustained.[161] A residency requirement does not infringe as directly upon the right to travel as does a state tax imposed upon persons leaving the state,[162] a state statute making the transportation of indigents into the state a criminal offense,[163] or physical abuse and arrest of minorities engaged in interstate travel.[164] While a residency requirement may deter travel, the source of deterrence is not an imposition on the act of travelling itself.[165] *Shapiro* thus may represent a significant extension of the right to travel to protect not only interstate travel itself but also the right of travelers to governmental benefits in their new states of residence.

Shapiro also represents the first application of the compelling state interest test to an infringement of the right to travel. "[I]n moving from State to State . . . [a person exercises] a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* government interest, is unconstitutional.[166] Assuming *arguendo* that there is no compelling interest in lengthy residency requirements for voting, the question becomes whether a residency requirement for voting constitutes a "penalty" on the right to travel.[167]

Justice Harlan felt the right to travel to be a "nebulous judicial construct" insufficient to support Congressional action forbidding states from disqualifying voters in elections for President and Vice President. *Id.* at 4058. *See also* Zemel v. Rusk, 381 U.S. 1 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958) (due process clause of the Fifth Amendment); Edwards v. California, *supra* (Jackson, J., concurring); Passenger Cases, 48 U.S. (7 How.) 283 (1829) (commerce clause).

160 The Supreme Court has said that the right to travel

> finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concommitant of the stronger Union the Constitution created. In any event, freedom to travel through the United States has long been recognized as a basic right under the Constitution. United States v. Guest, 383 U.S. 745, 757 (1966).

For a discussion of the history and constitutional development of the right to travel, *see* Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution,* 44 N.Y.U.L. REV. 989, 989-1000 (1969).

161 *E.g.*, New York v. O'Neill, 359 U.S. 1 (1959) (state statute compelling residents to travel to other states to testify in judicial proceedings when subpoenaed upheld); Williams v. Fears, 179 U.S. 270 (1900) (state occupation tax imposed upon employers hiring persons to be employed outside the state upheld.

162 Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

163 Edwards v. California, 314 U.S. 160 (1941).

164 United States v. Guest, 383 U.S. 745 (1966).

165 Shapiro v. Thompson, 394 U.S. 618, 650 (Warren, C.J., dissenting), 674 (Harlan, J., dissenting). The rejection of a direct-indirect standard by the majority in *Shapiro* is in accordance with the evolution of other constitutional provisions where the application of such a standard has also been abandoned, *e.g.*, interstate commerce and the area of discriminating state actions.

166 *Id.* at 634.

167 In sustaining Congress' power to establish a uniform durational residency requirement for voting for the offices of President and Vice President, Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, stated, "Congress could

All residency requirements temporarily deprive new residents of certain governmental privileges and benefits as a consequence of their exercise of the constitutional right to travel. Because the new state resident is in political limbo for the length of time he is disenfranchised, residency requirements may constitute a penalty on the right to travel.[168] The free exercise of the right to travel causes the new resident to lose the right to vote. Thus, he is forced to choose between two fundamental rights even though that choice as a practical mater is not forced into the open until the right to travel has already been exercised.[169] "By definition, the imposition of a durational residence requirement [for voting in federal elections] operates to *penalize* those persons, and only those persons, who have exercised their constitutional right of interstate migration."[170]

Although the Court in *Shapiro* spoke in terms of penalties, it approached the question of the constitutionality of residency requirements by analyzing their deterrent effects. The Court found both a statutory purpose to deter and a deterrent effect,[171] notwithstanding the fact that apparently none of the appellees had moved to their new state for the purpose of receiving higher welfare benefits.[172] Available studies indicate that there is little if any consideration placed upon welfare residency requirements by interstate movers.[173] Undoubtedly, the finding in *Shapiro* that the primary purpose of the residency requirements was to inhibit the migration of indigents into the state[174] contributed to its findings of unconstitutionality.[175]

---

rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State." United States v. Arizona, 39 U.S.L.W. 4027, 4035 (U.S. Dec. 21, 1970) (Stewart, J., concurring in part and dissenting in part).

168 *Cf.* United States v. Jackson, 390 U.S. 570 (1968).

169 Since a choice must be made, a waiver of the right not chosen is coerced. Such coercion is impermissible and cannot operate as a waiver. *See* Garrity v. New Jersey, 385 U.S. 493 (1967). There is a presumption against the waiver of a constitutional right. For a waiver to be effective, it must be clearly established that there was an intentional relinquishment or abandonment of a known right. Brookhart v. Janis, 384 U.S. 1 (1966). On the assumption that the interstate mover does not know he will be unable to vote for some period of time in his new state of residency, the mover has not waived his right to vote through the exercise of the right to travel. Since the new state forces this waiver, then it must be a penalty. Aptheker v. Secretary of State, 378 U.S. 500 (1964).

170 United States v. Arizona, 39 U.S.L.W. 4027, 4070 (U.S. Dec. 21, 1970) (Brennan, White & Marshall, JJ., dissenting in part and concurring in part) (emphasis added).

171 394 U.S. at 629. Use of a deterrence standard was not required by precedent. *See, e.g.*, Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 46 (1867) (A tax on the exercise of the right to travel was stated to be unconstitutional regardless of its actual deterrent effect).

172 394 U.S. at 624-27.

173 Note, *Residence Requirements in State Public Welfare Statutes*—I, 51 IOWA L. REV. 1080 (1966); Note, *Durational Residency Requirements and the Mass Migration Theory: Getting to the Heart of the Current Welfare Dilemma*, 11 WM. & MARY L. REV. 472 (1969).

174 394 U.S. at 629.

175 *Cf.* Edwards v. California, 314 U.S. 160 (1941). United States v. Jackson, 390 U.S. 570, 581 (1968): "If a law has no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional."

Most potential interstate movers probably never consider durational residency requirements for voting before moving. The *Shapiro* Court, however, rejected the relevance of a similar contention in regard to welfare payments,[176] and found that durational residency requirements for welfare benefits had a chilling effect on the right to travel.[177] A similar chilling effect would seem to be present in voting cases unless disenfranchisement is of no concern to the mover—a proposition offensive to the concept of representative democracy. It is arguable that while deprivation of the right to vote may have less immediate effect than the deprivation of the right to welfare benefits, its chilling effect is of no less constitutional significance.[178] The Court in *Shapiro* made it quite clear that they were not deciding the point:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.[179]

---

[176] 394 U.S. at 624-27. Of course under a penalty standard the question would not be whether the "average" interstate mover considers residency requirements for voting before he moves, but whether there is any effect at all on interstate movement because of state residency requirements.

[177] *Id.* at 650.

[178] In *Kramer v. Union Free School District* and *Reynolds v. Sims*, the Court described the right to vote as "fundamental" and as "the right preservative of other basic civil and political rights." Speaking on the subject of federal vis-à-vis state power to establish durational residency requirements for voting for the offices of President and Vice President, Justice Stewart stated:

> Although the matter is not entirely free from doubt, I am persuaded that . . . Congress [may protect] a person who exercises his constitutional right to enter and abide in any State in the Union from losing his opportunity to vote, when Congress may protect the right of interstate travel from other less fundamental disabilities. The power of the States with regard to the franchise is subject to the power of the Federal Government to vindicate the unconditional personal rights secured to the citizen by the Federal Constitution. United States v. Arizona, 39 U.S.L.W. 4027, 4036 (U.S. Dec. 21, 1970) (Stewart, J., concurring in part and dissenting in part).

On the other hand, "it takes little logic to conclude that the need for food, clothing and lodging has an aspect of immediacy which differentiates it in kind from the right to vote." Green v. Department of Pub. Welfare, 270 F. Supp. 173, 178 (D. Del. 1967). For a discussion concluding that state residency requirements for voting do not infringe upon the right to travel, see Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N.Y.U.L. REV. 989, 1005-08 (1969).

[179] 394 U.S. at 638 n.21. The *Cocanower* court referred to this footnote as a "strong indication" that "within the context of the constitutional right to travel, the compelling state interest test should not be applied to invalidate state durational residency requirements for voting." 318 F. Supp. at 408. The court, however, went on to state that it saw more than an "indication":

> Although it is arguable that this footnote implicitly recognizes the compelling state interest test as applicable in determining the constitutionality of state voting residency requirements, it can be more definitely asserted that in the context of a constitutional right to travel the Court recognized a distinction between state-imposed residency requirements as a condition to receiving welfare benefits and those durational residency requirements imposed as a qualification to vote. While this Court has not hesitated to apply the *Shapiro* rationale in an appropriate case, see *Vaughn v. Bower*,

The First Amendment

The guarantees of freedom of speech, press, assembly and petition are designed to protect the political freedoms of citizens from erosion by governmental action. Such guarantees are "cognate" rights having a common origin in the political freedom of the people.[180] If the right to vote were not constitutionally guaranteed, the rights of speech, press, assembly and petition could be diluted until they were mere rights to engage in feeble rhetoric. But the first amendment protects not only the right to speak and assemble, but also the right to do so effectively,[181] the opportunity to persuade to action,[182] the ability to bring about desired political and social changes,[183] the right to persuade elected officials to enact legislation,[184] and the right to use ballots to express political views about public officials.[185]

Although the right to vote is not specifically mentioned in the first amendment, it is within the penumbra of that amendment and is essential for the preservation and effectiveness of those rights which are specifically enumerated. Voting is the final and authoritative act of political expression which gives the exercise of the rights of speech, press, assembly and petition their potential for effectiveness, and thus invests them with their political character. The right to vote would seem to be implicit in the first amendment protection of political freedom and expression.[186]

Peaceful assemblies have long been protected from abridgement by the state,[187] and the developing constitutional right of association has extended protection to group interests whether or not the members of the group actually congregated in a given location.[188] The notion that the state

313 F. Supp. 37 (D. Ariz. 1970), we feel the above-mentioned distinction, however, artificial, is nevertheless binding and accordingly cannot find Arizona's one-year residency requirement to be an unconstitutional penalty on the right of freedom of travel in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 408-09 (footnote omitted).

Thus, the *Cocanower* court found in the *Shapiro* Court's mere disclaimer a "binding distinction" which precluded a decision invalidating Arizona's residency requirement.

180 Thomas v. Collins, 323 U.S. 516 (1945); De Jonge v. Oregon, 299 U.S. 353 (1937).

181 Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 397 U.S. 308 (1968).

182 Thomas v. Collins, 323 U.S. 516 (1945).

183 Roth v. United States, 354 U.S. 476 (1957); Stromberg v. California, 283 U.S. 359 (1931).

184 Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

185 New York Times v. Sullivan, 376 U.S. 254, 297 (1964) (Goldberg, J., concurring).

186 In Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the Court declined to consider the relation between voting and political expression, thereby saving the issue for future consideration.

187 De Jonge v. Oregon, 299 U.S. 353 (1937).

188 *See* Williams v. Rhodes, 393 U.S. 23 (1968); United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1

is an assembly of sovereign individuals has existed in this country since the Mayflower Compact of 1620.[189] The Declaration of Independence states the fundamental premise of American politics that "governments are instituted among Men, deriving their just powers from the consent of the governed," a premise repeated in the Constitution of Arizona.[190]

Other forms of political association are protected by the Constitution, and are inhibited and chilled by the denial of the right to vote. These include the association of individuals for the purpose of promoting the passage of legislation[191]or for supporting political parties.[192] Membership in a political party is a form of association protected from being stifled even to promote arguably valid state interests.[193] Freedom of association also protects the efforts of a political party to seek the votes of the public by requiring that the name of the party's presidential candidate be placed on the ballot.[194]

Voting is the institutionalized means for the people to express their consent, and it is, therefore, the continuous process by which the people participate in the legitimization of government and in the peaceable assembly and association of individuals in the body politic. The assembly of votes together is a means of association, involving elements of speech, assembly and petition and demonstrating the cognate nature of these rights and their function, in practice, of giving effect to political expression. When persons who move into a state are denied the right to vote for a period longer than that required by administrative necessity, their first amendment protections seem hollow.

Although the right to vote is not explicitly set out in the Constitution, it has "long been recognized as a 'fundamental political right because preservative of all rights.' "[195] "Any unjustified discrimination in determining who may participate in political affairs undermines the legitimacy of representative government,"[196] and the discrimination against new residents should not be allowed merely because it can be considered to be

(1964); Gibson v. Florida Legislative Investigative Committee, 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

189 Mayflower Compact, in 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 106-07 (Z. Chaffee, ed. 1963).

190 ARIZ. CONST. art. 2, § 2.

191 *E.g.*, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (by implication); Herndon v. Lowry, 301 U.S. 242 (1937).

192 Carroll v. Princess Anne, 393 U.S. 175 (1968); Fields v. City of Fairfield, 375 U.S. 248 (1963); Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937).

193 *See* Shelton v. Tucker, 364 U.S. 479 (1960); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Thomas v. Collins, 323 U.S. 516 (1945).

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

195 United States v. Arizona, 39 U.S.L.W. 4027, 4071 (U.S. Dec. 21, 1970) (Brennan, White & Marshall, JJ., concurring in part and dissenting in part), *quoting* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

196 Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969).

temporary.[197]

That durational residency requirements are of ancient vintage does not mitigate against their probable unconstitutionality, particularly in light of the recent application of the compelling state interest standard to other limitations upon the franchise. Though the juridicial future of the new standard is difficult to predict, it is clear that the interests asserted by the states to justify lengthy durational residency requirements for voting barely stand muster under the earlier equal protection standard. Since there is a conflict between lower court decisions, it is likely that in the near future the Supreme Court will review the cases challenging durational residency requirements.

---

[197] *Cf.* Spriggs v. Clark, 45 Wyo. 62, —, 14 P.2d 667, 672 (1932):
'The right here involved [of petition], and the voting franchise, are the only means by which peaceful changes in our laws and institutions may be sought or brought about, and they cannot, with safety to the state, or the whole body of the people, be gathered into the hands of the few for any purpose whatsoever. Therefore, on principle, the law will not sanction their delegation. *We may add that a temporary giving up or denial of an inalienable right such as the one in hand is as void as though permanent in character.*' (emphasis added) (*quoting* Spayd v. Ringing Rock Lodge No. 665, 270 Pa. 67, 72, 113 A. 70, 73 (1921).