CARPETBAGGER BATTLE CRY: SCRUTINIZING DURATIONAL RESIDENCY REQUIREMENTS FOR STATE AND LOCAL OFFICES

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I. INTRODUCTION

Senator Ted Kennedy was more Massachusetts than clam chowder. Robert La Follette inspired more Wisconsin pride than Packers football. These favorite sons, and countless others like them, were able to translate the trust and admiration of their home states into illustrious careers in the U.S. Congress.[1] In contrast, former New York Senators Robert Kennedy and Hillary Clinton were famously labeled political "carpetbaggers" during their successful Senatorial campaigns.[2] From its roots in the Reconstruction Era South,[3] to its prominence in today's political

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[1] *See generally* NANCY C. UNGER, FIGHTING BOB LA FOLLETTE: THE RIGHTEOUS REFORMER 7 (2000) ("No real understanding of La Follette or his life's work can come without an appreciation of his diverse and complex home state."); *The Life of Ted Kennedy*, TEDKENNEDY.ORG, http://tedkennedy.org/biography (last visited Mar. 19, 2014) ("Edward M. Kennedy was the third longest-serving member of the United States Senate in American history. Voters of Massachusetts elected him to the Senate nine times—a record matched by only one other Senator.").

[2] See Adam Nagourney, *In a Kennedy's Legacy, Lessons and Pitfalls for Hillary Clinton; Carpetbagger Issue Has Echoes of '64, But Differences Could Prove Crucial*, N.Y. TIMES (Sept. 10, 2000), http://www.nytimes.com/2000/09/10/nyregion/kennedy-s-legacy-lessons-pitfalls-for-hillary-clinton-carpetbagger-issue-has.html ("For Robert Kennedy in 1964, and for Mrs. Clinton today, the label 'carpetbagger' was really shorthand for a general condemnation, expressed in startlingly similar terms . . . ."); *see also* David Greenberg, The Out-of-Towners, SLATE (Mar. 24, 1999), http://www.slate.com/articles/news_and_politics/history_lesson/1999/03/the_outoftowners.html ("[C]ritics blast her status as a carpetbagger—an Illinoisan, by way of Arkansas and Washington, D.C., who would exploit New York's lax residency requirements for personal glory."). For an example of a current "carpetbagger" controversy, that of former Massachusetts Senator Scott Brown, *see generally* Mark Leibovich, What Would Scott Brown Do?, N.Y. TIMES MAG. (Mar. 18, 2014), http://www.nytimes.com/2014/03/23/magazine/scott-brown.html?_r=0 ("Scott Brown, the short-time Massachusetts senator and shorter-time political celebrity, has relocated to New Hampshire, where he might run for the Senate again.").

[3] After the American Civil War, a wave of Northern businessmen and politicians moved into the South and became targets of local outrage. Native Southerners largely saw these new residents as outsiders, dishonest, and exploitative. *See, e.g.*, Scott v. Moore, 680 F.2d 979, 993 n.11 (Former 5th Cir. 1982), *rev'd sub nom.* United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott, 463 U.S. 825 (1983) ("[T]he hostility directed toward the carpetbaggers appears to have arisen because of the carpetbaggers' association with the policies of Reconstruction . . . ."); Charles McClain, *California Carpetbagger: The Career of Henry Dibble*, 28 QUINNIPIAC L. REV. 885, 945 (2010) ("In the eyes of most

discourse, the pejorative term "carpetbagger" generally refers to a political candidate who runs for office in a state or district where he has not lived for an extended period of time.[4] Politicians identified as carpetbaggers have long been a source of local distrust and hostility, often perceived by long-time residents as having ulterior motives and being power-hungry.[5] While *U.S. Term Limits, Inc. v. Thornton*[6] made clear that states cannot alter or add to the Constitution's list of qualifications for U.S. Congressional candidates,[7] states retain the right to—and often do—codify qualifications for state and local offices that reflect this anti-carpetbagger sentiment.[8] However, not all of these

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white southerners, [carpetbaggers] were pariahs or outcasts, ostracized almost completely from southern business and social life for committing the unforgivable sin of treating blacks as equals.").

[4] *See Carpetbagger*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/carpetbagger (last visited Mar. 19, 2014) ("Outsider; *especially*: a nonresident or new resident who seeks private gain from an area often by meddling in its business or politics.").

[5] *See*, *e.g.*, *Scott*, 463 U.S. at 852 (Blackmun, J., dissenting) ("Many of the Democratic opponents of the [Civil Rights Act of 1871] saw the Act's protection of Negroes and carpetbaggers as just another facet of the Reconstruction policies of economic exploitation."); Keating v. Carey, 706 F.2d 377, 387 n.17 (2d Cir. 1983) ("This nonracially related hostility towards carpetbaggers, those of Republican persuasion, was greatly enhanced by the Northern occupation. Much of the South regarded as vindictive and corrupt the radical Republican Reconstruction governments . . . ."); Robertson v. Bartels, 150 F. Supp. 2d 691, 696 (D.N.J. 2001) (explaining that one of New Jersey's stated interests in maintaining a one-year residency requirement for state congressional offices was "preventing 'political carpet bagging'"); *see generally* OTTO H. OLSEN, CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE (1965).

[6] 514 U.S. 779 (1995).

[7] *Id.* at 822, 837-38; *see also* U.S. CONST. art. I, § 2, cl. 2.

[8] The Constitution grants state legislatures the power to regulate elections and determine candidate qualifications. U.S. CONST. art. I, §§ 2, 4; *id.* art. II, § 1. Nearly every state election code contains durational residency requirements for at least some state and local public offices. *See* Gavin J. Dow, Note, *Mr. Emanuel Returns from Washington: Durational Residence Requirements and Election Litigation*, 90 WASH. U. L. REV. 1515, 1516 (2013) ("Many states impose some form of durational residence requirement for at least some elected state officials, including governors, legislators, judges, and mayors."); *Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1217 (1975) (same). For examples of durational residency requirements, s*ee*, *e.g.*, KY. CONST. § 32 (state legislature);

"durational residency requirements" placed on candidates are created equally. While some less restrictive requirements seem to further potentially legitimate state interests, others are far more draconian and discriminatory than justifiable.[9] But how are courts to separate those measures that are invidious from those that are not? The consensus of courts, absent a suspect classification, now views analysis under the Equal Protection Clause's "intermediate scrutiny"[10] standard as the proper means

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KY. REV. STAT. ANN. § 83A.040(1) (LEXIS through 2015 legislation) (mayor); MO. CONST. art. III, §§ 4, 6 (state legislature); MO. REV. STAT. § 77.230 (LEXIS through 98th General Assembly) (mayor); N.Y. CONST. art. III, § 7 (state legislature); OR. CONST. art. IV, § 8(1) (same). For an example of litigation focused on the validity of such a requirement, *see* Dillon v. Fiorina, 340 F. Supp. 729, 730-31 (D.N.M. 1972) (per curiam) (invalidating a state election law that required a candidate for U.S. Senate to pay a filing fee of six percent of their annual salary and be a state resident for at least two-years prior to running).

[9] *Compare* City of Akron v. Bell, 660 F.2d 166, 169 (6th Cir. 1981) (upholding one-year durational residency requirement for candidacy), and Lawrence v. City of Issaquah, 524 P.2d 1347, 1350 (Wash. 1974) (same for city councilman), *with* Wellford v. Battaglia, 485 F.2d 1151, 1152 (3d Cir. 1973) (five-year durational residency requirement for mayor), *and* Sununu v. Stark, 383 F. Supp. 1287, 1292 (D.N.H. 1974), *aff'd*, 420 U.S. 958 (1975) (seven-year durational residency requirement for state senator).

[10] The Equal Protection Clause applies through U.S. CONST. amends. V, XIV. For examples of the intermediate scrutiny standard being applied, *see*, *e.g.*, Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 662 (1994) (explaining that to pass intermediate scrutiny, "an important or substantial" government interest must be served); Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (requiring a "substantial" governmental interest and a "reasonable fit" between the regulation and that interest); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980) ("The State must assert a substantial interest to be achieved by restrictions . . . . [T]he regulatory technique must be in proportion to that interest."). Intermediate scrutiny is more demanding than the "rational basis" test, but easier to satisfy than "strict scrutiny" analysis. For strict scrutiny's requirements, s*ee*, *e.g.*, F.E.C. v. Wis. Right to Life, Inc., 551 U.S. 449, 465 (2007) (for a law to pass muster under strict scrutiny, it must be "narrowly tailored to serve a compelling [state] interest"); Finch v. Commonwealth Health Ins. Connector Auth., 959 N.E.2d 970, 975 (Mass. 2012) (quoting Commonwealth v. Weston W., 913 N.E.2d 832 (2009) for the proposition that to pass strict scrutiny, a law "must be narrowly tailored to further a legitimate and compelling governmental interest and must be the least restrictive means available to vindicate that interest"); *see also* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 358 (2006) ("The compelling state interest test, and the doctrine of strict scrutiny of which it is a part, are only two of a host of techniques by which the Supreme

of doing so.[11] This article argues that under this test, most durational residency requirements should fail.

The remainder of this article focuses on the legitimacy of state durational residency requirements for state and local candidates under the Equal Protection Clause. First, in order to make the discussion more concrete, I use competing federal and state court cases from New Jersey as case studies.[12] These decisions, ruling on the validity of the same provision of the New Jersey Constitution,[13] provide conflicting views of durational residency requirements for candidates and articulate the common arguments advanced by proponents of both perspectives. Second, I advance affirmative arguments for why durational residency requirements for state and local offices violate the Equal Protection Clause. By analyzing the effects and outcomes of these requirements when operationalized, their mismatch with the state interests they are meant to serve becomes apparent.

Court, since the New Deal, has bifurcated judicial review into heightened protection for favored rights and minimal protection for the rest.").

[11] *See* In re Contest of Nov. 8, 2011 Gen. Election of Off. of N.J. Gen. Assembly (*Mosquera*), 40 A.3d 684, 698 (N.J. 2012); *see also Bell*, 660 F.2d at 169 (applying a "lesser standard" than strict scrutiny); Joseph v. City of Birmingham, 510 F. Supp. 1319, 1335 (E.D. Mich. 1981) (applying intermediate scrutiny); Matthews v. City of Atlantic City, 417 A.2d 1011, 1019-20 (N.J. 1980) ("[W]e hold that a requirement or restriction for candidates for elective office must be reasonably and suitably tailored to further legitimate governmental objectives.").

[12] For an excellent and thorough discussion of New Jersey's durational residency requirement, including proposed reforms and an in-depth analysis of these two cases, *see* Kevin R. Miller, *New Jersey's Constitutional Residency Requirement for State Legislature Candidates: A Roadmap for Challengers and A Cry for Reform During Re-Districting Years*, 67 RUTGERS U.L. REV. 283 (2015). The article also provides a useful history of New Jersey's residency requirement. *See Id.* at 286-92.

[13] N.J. CONST. art. IV, § 1, ¶ 2 ("No person shall be a member of the Senate who shall not . . . have been a citizen and resident of the State for four years, and of the district for which he shall be elected one year, next before his election. No person shall be a member of the General Assembly who shall not . . . have been a citizen and resident of the State for two years, and of the district for which he shall be elected one year, next before his election.").

II. SATISFYING EQUAL PROTECTION – THE MOSQUERA CASE[14]

On November 8, 2011, Gabriela Mosquera was one of two Democratic candidates elected to represent New Jersey's Fourth Legislative District in the General Assembly.[15] Although she had only lived in the district for seven months, she received the second highest vote total and a seat in the Legislature.[16] But before the cake could be sliced at her election-night celebration, her eligibility to serve was challenged by the Republican candidate who finished in third place.[17] The challenge questioned Mosquera's eligibility to serve as a candidate because it asserted that Mosquera could not satisfy the one-year durational residency requirement of Article IV, Section 1, Paragraph 2 of the New Jersey Constitution.[18] However, this one-year district residency requirement for General Assembly candidates had not been enforced since a federal court enjoined its application in 2001.[19]

In the New Jersey Supreme Court, the durational residency requirement was tested under the Equal Protection Clause's intermediate scrutiny standard.[20] The court analyzed the character of the requirement, the individual interests affected, and the governmental interests served.[21] For its part, the State set forth three interests served by the requirement: (1) providing

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[14] In re Contest of November 8, 2011 General Election of Office of New Jersey General Assembly, Fourth Legislative District (*Mosquera*), 40 A.3d 684 (N.J. 2012).

[15] *Mosquera*, 40 A.3d at 687.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* For the original 2001 case in the District of New Jersey, *see* Robertson v. Bartels, 150 F. Supp. 2d 691 (D.N.J. 2001) (finding that New Jersey's one-year durational residency requirement violated the Equal Protection Clause of the Fourteenth Amendment and enjoining its enforcement in future elections).

[20] *Mosquera*, 40 A.3d at 688.

[21] *Id.* at 696 (quoting Dunn v. Blumstein, 405 U.S. 330, 335 (1972)).

voters with the necessary "time to develop a familiarity" with candidates; (2) providing candidates with an opportunity to become "familiar with the constituency and the issues" of voters; and (3) curbing "carpetbagging."[22] In the eyes of the court, these interests outweighed the "reasonable, and minimal . . . restriction on who may hold office," and the "minimal burden on the right of voters to vote for the candidate of their choice."[23] As a result, the court held the one-year requirement to be constitutional and disregarded the 2001 federal injunction.[24]

III. VIOLATING EQUAL PROTECTION—ROBERTSON V. BARTELS

In opposition to *Mosquera* stands *Robertson v. Bartels*.[25] Shortly after the *Mosquera* opinion—which effectively disregarded the 2001 federal injunction and concluded that the state durational residency requirement was constitutional—the District of New Jersey addressed the constitutionality of Article IV, Section 1, Paragraph 2 for a second time. While both the state and federal courts addressed the same question, their opinions could not have been more different.

After *Mosquera*, New Jersey's Attorney General moved for relief in federal district court from the 2001 federal injunction.[26] The court first denied the requested relief under Federal Rule of Civil Procedure 60, finding that the New Jersey Supreme Court had no power to "collateral[ly] attack[]" the final judgment of a federal court.[27] Second, and more important, Article IV, Section 1, Paragraph 2 was again held to be unconstitutional as an Equal

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[22] *Id.* at 699.

[23] *Id.* at 702-03.

[24] *Id.* at 688.

[25] 890 F. Supp. 2d 519 (D.N.J. 2012).

[26] *Id.* at 526.

[27] *Id.* at 526-27. *See also* FED. R. CIV. P. 60(b), (b)(6) ("On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . any other reason that justifies relief.").

Protection violation.[28] In direct opposition to the *Mosquera* holding, the federal decision reasoned that the one-year durational residency requirement posed far more than a "minimal" threat to two fundamental rights.[29] Relying heavily on the example of reapportionment years, the court found that the one-year requirement severely burdened the "[fundamental] right of persons to run for public office and the right of voters to vote for candidates of their choice."[30]

Although the district court maintained that only "heightened" scrutiny was necessary,[31] the opinion seemed to apply strict scrutiny. The previously enjoined durational residency requirement was found to be not narrowly tailored enough to serve the State's declared interests in a permissible way.[32] Therefore, because the rights affected by Article IV, Section 1, Paragraph 2 were so fundamental, and the state interests served were so tenuously related to the means chosen, the court reaffirmed that the residency requirement was unconstitutional.[33] The opinion made clear that regardless of whether strict or intermediate scrutiny should apply, the requirement satisfied neither.[34]

IV. WHY DURATIONAL RESIDENCY REQUIREMENTS VIOLATE EQUAL PROTECTION

Durational residency requirements on state and local offices impermissibly prevent both new and old residents from

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[28] *Id.* 530-32.

[29] *Robertson*, 890 F. Supp. 2d at 529-30.

[30] *Id.* at 529 (citation omitted).

[31] *Id.* at 530.

[32] *Id.* at 531-32.

[33] *Id.* at 533. Importantly, while the one-year durational residency requirement was again found to be unconstitutional, the scope of the 2001 injunction was narrowed to bar Article IV, Section 1, Paragraph 2's enforcement during reapportionment year elections. *Id.* at 534.

[34] *Robertson*, 890 F. Supp. 2d at 530-31.

participating fully in the democratic process.[35] Whether through limiting voters' choice of candidates or barring one's potential candidacy, these requirements operate as a source of unjustifiable discrimination under the Fourteenth Amendment.[36] This discrimination can take many forms, however, often disguised by intuitive justifications or appealing simplicity. Therefore, a meaningful testing of the state interests purportedly served by a durational residency requirement, as well as an evaluation of the fit between those interests and the chosen means, is necessary to separate legitimate measures from invidious barriers. The following discussion examines only some of the many reasons why, after such testing, durational residency requirements for candidates fail under the Equal Protection Clause.

Before entering into this discussion, however, a number of preliminary issues must be addressed. First, under which level of scrutiny should durational residency requirements be analyzed? After all, the level of scrutiny under which individual courts decide to test the merits of a specific requirement will dramatically influence their holdings. This article is meant as a general critique of durational residency requirements for candidates, however, regardless of the level of scrutiny applied. Because most courts to opine on the constitutionality of these requirements use "intermediate scrutiny,"[37] this study begrudgingly accepts that test.

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[35] *See generally* Jeffrey A. Babener, *Durational Residence Requirements for State and Local Office: A Violation of Equal Protection?*, 45 S. CAL. L. REV. 996, 1024 (1972) (questioning whether durational residency requirements could withstand strict scrutiny).

[36] *See*, *e.g.*, Edward Tynes Hand, *Durational Residence Requirements for Candidates*, 40 U. CHI. L. REV 357, 373 (1973) ("Durational residency requirements exclude a class of citizens from candidacy for public office, and by excluding this class from candidacy, the requirements may exclude another class from a full and efficacious exercise of the franchise.").

[37] Satisfying the Equal Protection Clause's intermediate scrutiny standard requires that the legislation in question be substantially related to an important governmental interest. *See supra* note 10 and accompanying text; In re Contest of Nov. 8, 2011 Gen. Election of Off. of N.J. Gen. Assembly (*Mosquera*), 40 A.3d 684, 698 (N.J. 2012); *see also* City of Akron v. Bell, 660 F.2d 166, 169 (6th Cir. 1981) (applying "lesser standard" than strict scrutiny); Joseph v. City of

Second, the governmental objectives articulated by New Jersey in *Mosquera* and *Robertson* are generally representative of those provided by most states to justify durational residency requirements for state candidates.[38] While the persuasiveness and legitimacy of these interests should not be accepted at face value,[39] the remainder of this article will not discuss their merits in great detail. The focus of the following sections is instead to analyze whether the means chosen to advance these interests—barring new residents from serving as candidates—can serve them in a manner that is consistent with the Equal Protection Clause. For the reasons stated below, the answer to this inquiry is an emphatic "no."

Birmingham, 510 F. Supp. 1319, 1335 (E.D. Mich. 1981) (applying intermediate scrutiny).

[38] *See, e.g.*, *Joseph*, 510 F. Supp. at 1336 ("The one year residency requirement serves . . . (1) the interest in exposing candidates to the scrutiny of the electorate . . . (2) the interest in protecting the community from outsiders who are interested only in their own selfish ends . . . and (3) the interest in having officeholders who are familiar with the problems, interests, and feelings of the community."); Cowan v. City of Aspen, 509 P.2d 1269, 1272 (Colo. 1973) ("It is argued on behalf of the City that the three-year residency requirement is of importance in assuring a mayor and council of high quality . . . well acquainted with the issues and problems of the City of Aspen . . . . [And preventing] frivolous candidacies by persons who have little interest in the conditions and needs of the City of Aspen."); Walker v. Yucht, 352 F. Supp. 85, 98 (D. Del. 1972) ("Delaware has attempted to . . . (1) provid[e] the electorate an opportunity to become acquainted with a would-be lawmaker and to observe his intelligence, responsiveness, [and] judgment . . . and (2) insur[e] that candidates be familiar with the needs and hopes of the state and its citizens.").

[39] *See* John D. Perovich, Annotation, *Validity of Requirement that Candidate or Public Officer Have Been Resident of Governmental Unit for Specified Period*, 65 A.L.R.3d 1048, §8 (1975) (listing cases in which the interests provided by a state were held to be insufficient); Babener, *supra* note 35, at 1015-23 (opining that the state interests traditionally offered for durational residency requirements for state and local offices cannot satisfy strict scrutiny); *see also* McKinney v. Kaminsky, 340 F. Supp. 289 (M.D. Ala. 1972) (rejecting that the state had an interest in a candidate's familiarity with his district); Headlee v. Franklin Cty. Bd. of Elections, 368 F. Supp. 999 (S.D. Ohio 1973) (questioning the legitimacy of a state's interest in having "quality candidates" and its connection to the length of time of one's residency in a district).

A. DURATIONAL RESIDENCY REQUIREMENTS IN REAPPORTIONMENT YEARS

The scenario in which durational residency requirements for candidates appear least justifiable involves legislative reapportionment. Because reapportionment of a state's legislative districts can occur less than one year before an election, it becomes impossible for many potential candidates to satisfy the residency requirements through no fault of their own.[40] When legislative districts shift, often resulting in district maps that reflect political rather than common-sense considerations, new boundaries can cut through streets and neighborhoods.[41] In this scenario a candidate who has lived in a district for decades can find himself unable to satisfy a durational requirement, and as a result, unable to serve as a candidate in an upcoming election.[42]

This possibility is neither rare nor hypothetical. Indeed, the events leading up to the *Mosquera* and *Robertson* decisions

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[40] *See, e.g.* Robertson v. Bartels, 890 F. Supp. 2d 519, 530 (D.N.J. 2012). A one-year period here is used as an example because most modern durational residency requirements do not exceed one year. However, reapportionment would affect a potential candidate's candidacy even if the requirement was longer than one year.

[41] *See* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 100 (1985); Bernard Grofman & Howard A. Scarrow, *Current Issues in Reapportionment*, 4 Law & Pol'y Q. 435 (1982); *see also* Latino Pol. Action Comm., Inc. v. City of Boston, 609 F. Supp. 739 (D. Mass. 1985) (challenging a reapportionment plan because it divided city neighborhoods and diverged dramatically from established boundaries).

[42] *See*, *e.g.*, Campbell v. Tunny, 764 N.Y.S.2d 163, 167-68 (Sup. Ct. 2003) (invalidating a durational residency requirement that blocked the candidacy of a thirty-nine year resident that was redistricted out of his district less than one year prior to an election); Brief for Appellant at *5, Wright-Jones v. Nasheed, No. ED98456 (Mo. Ct. App. June 6, 2012), 2012 WL 2594521 ("Rep. Nasheed . . . is not a resident of District 5 . . . since . . . new District 5 was not established until March 12, 2012 or in less than one year next before the November 6, 2012 general election . . . ."); *see also Robertson*, 890 F. Supp. 2d at 530 ("Furthermore, because the reapportionment process occurs approximately seven months prior to the election, candidates who are displaced from their pre-apportionment electorate do not even have the opportunity to satisfy the one-year residency requirement for that electorate's district."); *cf.* N.Y. CONST. art. III, § 7 (containing a durational residency requirement exception during reapportionment years in order to avoid this scenario).

demonstrate just how real and pronounced the effects of redistricting can be on a potential candidate's eligibility.[43] The 2010 legislative reapportionment that gave rise to those cases "affected more than one-third of New Jersey's 566 towns. As a result, not a single adult resident in roughly one-third of the State's localities could run for the General Assembly, or vote for a neighbor who wanted to run, under the strict terms of the residency requirement."[44] Recognizing the possibility of this unjust and clumsy result, a limited number of states either enjoin or alter the operation of durational residency requirements for candidates during reapportionment years.[45] For the remaining majority of states, however, durational residency requirements imposed on candidates just after redistricting are overly broad at

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[43] *See also* Brief for Appellant, *supra* note 42.

[44] In re Contest of Nov. 8, 2011 Gen. Election of Off. of N.J. Gen. Assembly (*Mosquera*), 40 A.3d 684, 715-16 (N.J. 2012) (Rabner, J., dissenting); *see also* James Thomas Tucker, *Affirmative Action and (Mis)representation: Part II—Deconstructing the Obstructionist Vision of the Right to Vote*, 43 How. L.J. 405, 453 n.294 (2000) (discussing examples of where state legislators were excluded from their districts as a result of partisan gerrymandering).

[45] *See*, *e.g.*, LA. CONST. art. III, § 4 ("[A]t the next regular election for members of the legislature following legislative reapportionment, an elector may qualify as a candidate from any district created in whole or in part from a district existing prior to reapportionment. . . ."); N.Y. CONST. art. III, § 7 ("[I]f elected a senator or member of assembly at the first election next ensuing after a readjustment or alteration of the senate or assembly districts becomes effective, a person, to be eligible to serve as such, must have been a resident of the county in which the senate or assembly district is contained for the twelve months immediately preceding his or her election."); *see generally Robertson*, 890 F. Supp. 2d 519 (enjoining New Jersey's durational residency requirement placed on candidates for state and local offices during reapportionment years); *cf.* Commissioner Living Outside District, Op. Fla. Att'y Gen. 88-11 (Apr. 12, 1988), http://www.myfloridalegal.com/ago.nsf/Opinions/FD5D1DD1602A14EA852565720051ECD5 ("A[n] [official] whose residence is no longer within the district from which he was elected due to the redrawing of district lines or redistricting may change residence to a location within the newly drawn district prior to the expiration of his term without creating a vacancy in office."). *But see*, *e.g.*, GA. CONST. art. III, § 2, ¶ III (providing no exception for reapportionment years). A more common exception to state durational residency requirements for candidates is for military service, allowing a former serviceman or woman to appear on the ballot directly after returning home. *See*, *e.g.*, FLA. CONST. art. III, § 2 (setting forth mandatory factors to be used in evaluating one's residency and providing an exception for military members).

best.[46] At worst, these requirements provide those already in power with a potent political tool in reapportionment years, available to suppress the voices of candidates and voters alike.[47]

Most damning, perhaps, is the very real possibility that a durational residency requirement could make the achievement of articulated state interests more difficult during reapportionment years. The *Robertson* court was very concerned about this possibility, warning that redistricting could result in,

> a substantial portion of an incumbent's constituents [being] reapportioned into a different district. She cannot follow her constituents to their new district to represent them because she will not satisfy the one-year residency requirement in time for the upcoming election. As a result, they may very well be represented by someone less familiar in their new district. At the same time, if she runs for office in her current district, she would represent a constituency with which she is unfamiliar. And the same holds true for an incumbent whose residence is placed in a different legislative district from that of her constituents.[48]

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[46] *Cf.* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008) (articulating the First Amendment doctrine of "overbreadth," under which "a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep'"), *noted in Mosquera,* 40 A.3d at 717 n.2 (Rabner, J., dissenting). The *Mosquera* dissent recognized that "the overbreadth doctrine does not apply here," but maintained that "the sweep of the restriction bears on whether it is suitably tailored." *Mosquera*, 40 A.3d at 717 n.2 (Rabner, J., dissenting).

[47] *See*, *e.g.*, Theriot v. Parish of Jefferson, 966 F. Supp. 1435, 1444, 1449 (E.D. La. 1997) (demonstrating redistricting abuse in which an entire series of districts was shifted in order to quell the "vocal political activism" of one voter against an incumbent); *Robertson*, 890 F. Supp. 2d at 531 n.9; *see also* ELENA COHEN & DANIEL L. SKOLER, CONGRESSIONAL REDISTRICTING: A PUBLIC INFORMATION MONOGRAPH, ABA SPECIAL COMM. ON ELECTION LAW AND VOTER PARTICIPATION, AM. BAR ASSOC. 5-6 (1981) (explaining the dangers of gerrymandering, including its threat to the integrity of the democratic process and protection of ineffective incumbents).

[48] *Robertson*, 890 F. Supp. 2d at 531.

Because the durational residency requirement itself would frustrate a state's interests in voter education and candidate familiarity, while concurrently promoting carpetbagging, such a measure is neither narrowly tailored nor substantially related to these state ends. As a result, these requirements violate the Equal Protection Clause in reapportionment years regardless of which level of scrutiny is applied.[49]

B. CREATING AN UNDERCLASS OF BONA FIDE RESIDENTS

The broad sweeping exclusionary effects of durational residency requirements extend beyond the reapportionment context. Even in its most straightforward application—during normal election years—a durational residence law for candidates threatens the rights of bona fide residents[50] in at least three ways. First, new residents are not able to serve as candidates until they satisfy a specific duration of bona fide residency. This requirement "impose[s] a severe obstacle to the exercise of the political franchise for new residents."[51] Second, even long-time residents have their voting rights limited through a reduction in the pool of potential candidates.[52] Restrictions placed on the

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[49] The least demanding level of scrutiny under Equal Protection analysis, "rational basis" review, is not considered here. This is because, as explained *supra* notes 10, 35, the vast majority of courts to decide on the constitutionality of durational residency requirements do not employ, let alone consider, this test.

[50] The term "bona fide resident" means an "actual residence." 159 A.L.R. 496; *see also Bona Fide Resident Law and Legal Definition*, USLEGAL.COM, http://definitions.uslegal.com/b/bona-fide-resident/ (last visited Jan. 5, 2016) ("A bona fide residency requirement asks a person to establish that he or she actually lives in a certain location. This can be established by the address listed on the driver's license, voter registration card, income tax return and the like. Some states in U.S[.] recognize a person who has conducted sufficient amount of business in a state as actual resident. Bona fide residence is not the same as domicile.").

[51] Babener, supra note 35, at 999; *see also* David J. Noonan, *The Durational Residency Requirement as a Qualification for Candidates for State Legislature: A Violation of Equal Protection?*, 22 SYRACUSE L. REV. 1079, 1081-82 (1971).

[52] *See Robertson*, 890 F. Supp. 2d at 529 ("[T]he requirement burdened the combined fundamental right of persons to run for public office and the right of voters to vote for candidates of their choice.") (internal quotation marks and brackets omitted).

right to serve as a candidate are closely related to the right to suffrage because "laws that affect candidates always have at least some theoretical, correlative effect on voters."[53] Finally, these measures restrict a potential candidate's right to travel.[54] The Supreme Court already identifies the right to interstate travel as a fundamental right,[55] and the right to intrastate travel threatened here is a recognized extension.[56] With the fundamental rights to vote and travel implicated, and all new residents barred from serving as candidates, durational residency requirements are repugnant to the "equal opportunity for political representation" on which our nation was founded.[57]

Here, it is worth pausing to emphasize the difference between durational residency requirements and *bona fide* residency requirements. The latter require only *actual* residency before participation in the political process, and reasonably reflect a community's expectation that its political candidates are part of their constituencies before shaping their policies.[58] Accordingly,

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[53] *Id.; see also* Hand, *supra* note 36, at 365 ("[T]he right to be a candidate and the right to vote are, in fact, two aspects of the same general political right.").

[54] *See* Babener, *supra* note 35, at 1010-11 ("A strong argument can be made that candidacy durational residence requirements must be scrutinized by the strict equal protection standard . . . because they penalize the candidate's fundamental right to travel."); Dunn v. Blumstein, 405 U.S. 330, 342 (1972) ("Absent a compelling state interest, a State may not burden the right to travel in this way.").

[55] *See, e.g.*, Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903 (1986) (Brennan, J., plurality opinion).

[56] *See* Lutz v. City of York, Pa., 899 F.2d 255, 256 (3d Cir. 1990) ("The appeal implicates an important and largely unexplained area of constitutional jurisprudence—whether there exists an unenumerated constitutional right of *intra*state travel. We conclude that such a right exists, and grows out of substantive due process.") (emphasis added); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971) (recognizing a right to intrastate travel). *But Cf.,* Keith E. Smith, *Constitutional Law—Cruising for A Bruising—An Attack on the Right to Interstate Travel*, 36 VILL. L. REV. 997, 1017 (1991) ("Given the rather incoherent logic in its rationale, it is doubtful that many other circuits, much less the United States Supreme Court, will fully adopt the rationale of the Third Circuit in *Lutz*.").

[57] Carrington v. Rash, 380 U.S. 89, 94 (1965).

[58] *Dunn*, 405 U.S. at 343-44 (approving of a state bona fide residence requirement for voting, but striking down a durational residency requirement);

the Supreme Court has repeatedly reaffirmed the legitimacy of such requirements.[59] Durational residency requirements, on the other hand, codify a much more restrictive policy that impermissibly treats "new" and "old" residents as separate classes.

The invidious nature of this distinction was recognized in *Dunn v. Blumstein,* where the Supreme Court struck down a Tennessee election law that required one year of state residency (and three months of county residency) before an individual was eligible to vote.[60] While recognizing that not every limitation on one's right to vote is impermissible,[61] the Court found that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."[62] Because the durational requirement "'divide[d] residents into two classes, old residents and new residents, and discriminate[d] against the latter,'" the measure was invalidated as a violation of the Equal Protection Clause.[63] The Court also found that the requirement constituted an infringement on the

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see also Hand, *supra* note 36, at 380 (arguing for the legitimacy of *bona fide* residency requirements, while claiming that durational residency requirements for candidates are unconstitutional); Notes and accompanying text of note 50, *supra*.

[59] *See* Amy G. Gore et. al., 25 Am. Jur. 2d Elections § 165 (LexisNexis 2015); *see also* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) (upholding state bona fide residency law); *Dunn*, 405 U.S. at 334 ("Appellee does not challenge Tennessee's power to restrict the vote to bona fide Tennessee residents."); Evans v. Cornman, 398 U.S. 419, 421 (1970) ("Maryland may, of course, require that 'all applicants for the vote actually fulfill the requirements of bona fide residence.'") (citing *Carrington*, 380 U.S. at 96); *Carrington*, 380 U.S. at 96 (holding that states may impose bona fide residency requirements on voting).

[60] *Dunn*, 405 U.S. at 332-35.

[61] *See, e.g.*, Bullock v. Carter, 405 U.S. 134, 143 (1972) ("Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.") (citing McDonald v. Board of Election, 394 U.S. 802 (1969)); Oregon v. Mitchell, 400 U.S. 112, 142 (1970) ("On any of these items the States, of course, have leeway . . . .").

[62] *Dunn*, 405 U.S. at 336 (citing *Cornman*, 398 U.S. at 421-22; Kramer v. Union Free School District No. 15, 395 U.S. 621, 626-28 (1969) and other cases).

[63] Babener, *supra* note 34, at 999 (citing Dunn v. Blumstein, 40 U.S.L.W. 4269, 4271 (U.S. Mar. 21, 1972); *see also* Hand, *supra* note 36.

fundamental right to travel.[64] This impermissible defect applied to all durational residence laws according to the Court, because the requirement imposed "prohibitions on only those persons who have recently exercised that right."[65] Although *Dunn* did address a complete denial of voting rights—not a prohibition on candidacy—the opinion's reasoning is equally powerful here.[66]

Just as in *Dunn*, durational residency laws placed on candidates create a dual class of residents. The Supreme Court has made clear that "a State, outside certain ill-defined circumstances, cannot classify its citizens by the length of their residence in the State."[67] But by permitting states to dramatically limit the candidate pool available to voters, while completely prohibiting new bona fide residents from serving as candidates, these requirements allow states to do indirectly what they cannot do directly.[68] Applying this reasoning to the New Jersey cases analyzed in Sections I and II of this article, Gabriela Mosquera was removed from office after being elected by the people of her district.[69] While the state could not directly prevent voters from casting votes for Mosquera, her status as a "new resident" under

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[64] *Dunn*, 405 U.S. at 342.

[65] *Id.*

[66] *Dunn* also addressed one's right to interstate travel, not intrastate travel, but I argue below that the latter is an extension of the former.

[67] Saenz v. Roe, 526 U.S. 489, 515 (1999) (Rehnquist, C.J., dissenting).

[68] *See, e.g.*, Harman v. Forssenius, 380 U.S. 528, 540 (1965) ("It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . . 'Constitutional rights would be of little value if they could be . . . indirectly denied.'") (citing Smith v. Allwright, 321 U.S. 649, 664 (1944)); Yousri Omar, *Plane Harassment: The Transportation Security Administration's Indifference to the Constitution in Administering the Government's Watch Lists*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 259, 279 (2006) ("The Supreme Court has continuously viewed the right to interstate travel as a fundamental liberty interest.") (citing United States v. Guest, 383 U.S. 745, 757-58 (1966)); Kathryn E. Wilhelm, *Freedom of Movement at A Standstill? Toward the Establishment of A Fundamental Right to Intrastate Travel*, 90 B.U. L. REV. 2461, 2465 (2010) ("United States v. Wheeler announced for the first time a fundamental right to interstate travel.") (citing United States v. Wheeler, 254 U.S. 281, 293 (1920)).

[69] *See* In re Contest of Nov. 8, 2011 Gen. Election of Off. of N.J. Gen. Assembly (*Mosquera*), 40 A.3d 684, 690-91 (N.J. 2012).

the New Jersey constitution rendered the votes of nearly 20,000 bona fide residents meaningless.[70] Mosquera owned a home in the district at the time of the election and was employed there for over one year.[71] Still, she was penalized for being a new resident by the state durational residence law, undoing the results of a democratic election and preventing the political will of the people in her district from being realized.

New Jersey's durational residency requirement for candidates also impinged on Mosquera's right to intrastate travel. Recognized by the Third Circuit in *Lutz*[72] and the Second Circuit in *King*,[73] the right is "'implicit in the concept of ordered liberty'" and "'deeply rooted in the Nation's history.'"[74] Penalizing a candidate for being a bona fide district resident for less than one year—as durational residence laws do—violates this constitutional right to intrastate travel and prevents the free movement of individuals within state borders.[75] Mosquera, who

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[70] *Id.*

[71] *Id.* at 689. An earlier case in the District of New Jersey indicated that work-experience in a district was relevant, and appeared to open the constitutionality of durational residency requirements to a case-by-case analysis. *See* Callaway v. Samson, 193 F. Supp. 2d 783, 789 (D.N.J. 2002).

[72] Lutz v. York, 899 F.2d 255, 267 (3d Cir. 1990). Although not critical to this article, the *Lutz* opinion found the right to intrastate travel to be rooted in the Due Process Clause, not the Equal Protection Clause.

[73] King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971).

[74] *Lutz*, 899 F.2d at 267 (citations omitted) (finding the right in the due process clause).

[75] *See* Kevin Maher, *Like A Phoenix from the Ashes: Saenz v. Roe, the Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment,* 33 TEX. TECH L. REV. 105, 141 (2001) ("[T]he Saenz Court's reading of the right to travel as protected by the Privileges or Immunities Clause would forbid a state to prescribe durational residency requirements for prospective candidates for office, even for nonfederal elected positions."); see also Brill v. Carter, 455 F. Supp. 172, 173-75 (D. Md. 1978) (holding that a four-year durational residency requirement to hold local office is unconstitutional because it infringes both the fundamental right to vote and to travel); Babener, *supra* note 35, at 1013 (citing *Donnelly v. Manchester* for its expansion of Shapiro in recognizing a right of every citizen to live where he chooses and travel both inter and intrastate).

worked in her district for over one year (as an assistant to a mayor, no less) and owned a home there months prior election day, was classified as ineligible simply because she exercised her right to intrastate travel more recently than other bona fide residents. Somewhat ironically, had Mosquera come to New Jersey from outside the state, she would have had a stronger argument that her right to interstate travel was infringed upon the residency requirement.[76] Instead, because her travel remained intrastate, she was removed from office after the voters made their intentions clear.

C. THE MEANS DO NOT SERVE THE STATE ENDS

There must be some convincing reason why a lifetime New Jersey resident would have a weaker case in her home state than if she crossed state borders. Surely the durational residency requirements that produce these results are closely tailored to meet some sort of substantial, or maybe even a compelling, state interest. But this does not seem to be the case. Even if the archetypical state interests advanced to justify such laws are assumed to meet the requisite threshold of importance under Equal Protection analysis,[77] durational residency requirements for candidates have outlived their utility as a means of achieving these interests. With each year that passes, the casket on their useful lives closes further.

States generally assert three interests in placing a durational residency requirement for candidates into their election codes: (1) voter education; (2) candidate familiarity; and (3) protection against carpetbagging.[78] Under heightened Equal Protection analysis, these durational residency laws must be at least

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[76] *Callaway,* 193 F. Supp. 2d at 786.

[77] This will, of course, depend on whether the court decides to use strict or intermediate scrutiny.

[78] *See, e.g.*, Chimento v. Stark, 414 U.S. 802 (1973); Dunn v. Blumstein, 405 U.S. 330, 345 (1972); *Callaway,* 193 F. Supp. 2d at 787; *In re* Contest of November 8, 2011 General Election of Office of New Jersey General Assembly, Fourth Legislative District (*Mosquera*), 40 A.3d 684, 699 (N.J. 2012); Robertson v. Bartels, 150 F. Supp. 2d 691, 696 (D.N.J. 2012); *see also* Hand, *supra* note 36, at 375.

"substantially related" to these three governmental interests.[79] In cases like *Mosquera*, where durational residency requirements were upheld, courts have found the length of a candidate's residency in a district to function as a proxy for the voters' knowledge of him, his own familiarity with the district, and his genuine concern for the district's best interests.[80] However, "in an era of modern communication and transportation," these requirements now present an absurd obstacle to the democratic process, rather than serving as a credible safeguard for state interests.[81]

Writing in the 1970s, Babener observed that "the advent of modern communication and transportation has made a long duration of residence unnecessary as a prerequisite to becoming an informed voter or candidate."[82] This argument was echoed by two 1971 California Supreme Court decisions that struck down durational residency requirements as failing to serve state interests.[83] Writing before the advent of the cell phone, the internet, or even Acela Express trains, the *Zeilenga* court reasoned that "[p]erhaps in the horse and buggy days the . . . [durational residency] requirement could have been reasonable, but in these days of modern public transportation, the automobile, newspapers, radio, television, and the rapid dissemination of news throughout all parts of the county, the

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[79] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985) (citing Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) and Craig v. Boren, 429 U.S. 190 (1976)).

[80] *See, e.g.*, *Mosquera*, 40 A.3d at 700 ("The one-year residency requirement establishes a fair and not unduly burdensome period for a new resident candidate to become familiar with the people and issues of the district and, conversely, for the people to become familiar with a new resident in the district.").

[81] Babener, *supra* note 35, at 1001.

[82] *Id.* at 1015.

[83] *See* Zeilenga v. Nelson, 484 P.2d 578, 581 (1971) ("Nowhere is it shown that a candidate for the office . . . cannot acquire competent knowledge of the county's conditions in much less than five years to qualify him for the office, at least sufficiently to submit to the voters for their choice his knowledge thereof."); Camara v. Mellon, 484 P.2d 577 (1971) (relying on the reasoning of *Zeilenga* to strike down a similar durational residency requirement).

requirement is unreasonable."[84] Unless the current state of mass communications and high-speed transportation somehow constitutes a regression from the developments of the 1970s, the California Court's argument against durational residency requirements now stands forty-years more convincing.[85]

Modern developments in communications and transportation technology, however, are not the only reasons to doubt whether durational residency requirements are necessary to achieve these state interests. Rather than writing "crude" classification systems into law,[86] the traditional election machinery alone can serve these interests equally well, while being far more inclusive.[87] Subjecting a candidate—including his knowledge and familiarity with the district—directly to the scrutiny of the voters provides a

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[84] *Zeilenga*, 484 P.2d at 581; *see also Dunn*, 405 U.S. at 358 ("Given modern communications, and given the clear indication that campaign spending and voter education occur largely during the month before an election, the State cannot seriously maintain that it is 'necessary' to reside for a year in the State and three months in the county in order to be knowledgeable about congressional, state, or even purely local elections.").

[85] *See, e.g.*, Robert W. Behrman, *Equal or Effective Representation: Redistricting Jurisprudence in Canada and the United States*, 51 AM. J. LEGAL HIST. 277, 281 (2011) ("[M]odern communications and transportation have rendered arguments about access in sparsely populated areas anachronistic."); Ashira Pelman Ostrow, Note, *Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change*, 102 COLUM. L. REV. 1954, 1955-56 (2002) ("In modern times a number of factors, including improved methods of transportation, increased mobility, modern communications technology, and growing lifespans, have enabled many individuals to qualify as legitimate residents of two communities . . . . For approximately forty-five percent of these households, the second residence had at one point been the household's primary residence."); *see also* Åse Dragland, *Big Data, for Better or Worse: 90% of World's Data Generated Over Last Two Years,* SCIENCE DAILY (May 22, 2013, 12:56 PM), www.sciencedaily.com/releases/2013/05/130522085217.htm (explaining the mass proliferation of information and data freely available on the internet); JEAN-PAUL RODRIGUE, HISTORICAL GEOGRAPHY OF TRANSPORTATION: THE SETTING OF GLOBAL SYSTEMS Ch. 2 (3rd ed. 2013) (identifying the 1970s and today as two entirely different eras in the history of transportation); M.G. Siegler, *Eric Schmidt: Every Two Days We Create as Much Information as We Did up to 2003*, TECH CRUNCH (Aug. 4, 2010), http://techcrunch.com/2010/08/04/schmidt-data/ ("Every two days now we create as much information as we did from the dawn of civilization up until 2003. . . .").

[86] *Dunn,* 405 U.S. at 351.

[87] *See, e.g.,* Babener, *supra* note 35, at 1018.

less paternalistic way to serve such interests while producing equally qualified candidates.[88] As *Callaway* demonstrated, the duration of one's residence is but one manner through which a candidate and voters can become familiar with each other.[89] Alternatively, a district may be the potential candidate's childhood home, his longtime place of employment, or located across the street from his current home in a gerrymandered district.[90] In these situations, voters themselves are far more capable of weighing the importance of relationships and geography than blanket exclusions of candidates. Instead of subjecting all candidates to the "several stages before the actual election" where their "qualifications and sincerity" are tested, durational residency requirements actually deprive voters of this screening function. [91]

In its place, durational residency requirements simply shut the door on a whole class of residents. Yet, those excluded may be the district's best candidates. Indeed, when a new resident is politically motivated enough to aspire to candidacy, it is probable that he is "the type of individual who is most likely to inform himself of community issues."[92] The focus of the New Jersey cases, Gabriela Mosquera, worked for a Fourth District mayor prior to her candidacy, and after many public debates and forums, she was reelected to the state's General Assembly by the

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[88] *See* J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (2d ed. 1836) (quoting Alexander Hamilton for the proposition that "the true principle of a republic is that the people should choose whom they please to govern them . . . . This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."); *see also id.* ("Perhaps the best test of the candidate's knowledge and interest in community issues is scrutiny by the voters in the election itself.").

[89] 193 F. Supp. 2d 783, 787 (D.N.J. 2002).

[90] *See* Robertson v. Bartels, 150 F. Supp. 2d 691 699 (D.N.J. 2001) ("District lines run down the middle of streets and through the heart of local neighborhoods.").

[91] *See, e.g.*, Hayes v. Gill, 473 P.2d 872, 884 (1970) (Levinson, J., dissenting) (opining that the "electoral process itself provides a more finely tuned method for filtering out unqualified candidates" than a durational residency requirement).

[92] *See* Babener, *supra* note 35, at 1018; *Dunn*, 405 U.S. at 357-58.

district's voters.[93] Just like Mosquera, any successful candidate must gain the trust and confidence of the electorate as a prerequisite to being selected. Rather than preventing new residents as a whole from even attempting to do so, state legislatures could "place a greater emphasis on the pre-filing screening process [or] require a greater number of signatures on nominating petitions" in order to place all district residents on equal ground.[94] By doing so, all residents of a district would have the opportunity to prove that they have the significant "modicum of support" necessary to run a meaningful campaign.[95] Instead, durational residency requirements for candidates limit that opportunity to a smaller pool of individuals, restricting the choice of voters and candidates in the process.

V. CONCLUSION

Durational residency requirements placed on state and local elected offices violate the Equal Protection Clause of the Fourteenth Amendment. First, during reapportionment years, these requirements prohibit even longtime residents from serving as candidates.[96] Instead of serving state interests, durational laws in this context actually create carpetbaggers and disrupt any familiarity between candidates and voters. Second, state durational residency requirements for candidates interfere with individuals' rights to vote, travel intrastate, and serve as

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[93] *See generally About*, GABRIELA MOSQUERA FOR ASSEMBLY, http://www.gabby2012.com/default.asp?c=507&p=1691(last visited Jan. 5, 2016); Matthew Kassel, *Incumbent Democrat Faces Familiar Foe in Assembly District 4* (Oct. 4, 2012), http://www.njspotlight.com/stories/12/10/03/incumbent-democrat-faces-familiar-foe-in-assembly-district-4/.

[94] *Babener*, *supra* note 35, at 1018.

[95] *See, e.g.*, Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986) (citing *Jenness v. Fortson* for the proposition that a state can require a showing of some "modicum of support" before placing a candidate's name on a ballot); Storer v. Brown, 415 U.S. 724, 765 (1974) (same); Jenness v. Fortson, 403 U.S. 431, 442 (1971) ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot . . .").

[96] *See supra,* section III.A.

candidates.[97] By separating bona fide residents into two classes, these restrictions become an overbroad barrier to the democratic process. Finally, in an era of modern communication and transportation, durational residency requirements exist as imprecise artifacts of the past.[98] These requirements deprive voters of meaningful choice, opting for exclusionary policies over the electoral process and its natural screening function.

No better example exists than the case study of Gabriela Mosquera that runs through this article. After the New Jersey Supreme Court removed the popularly elected Mosquera from the General Assembly, she chose to run again in the following cycle.[99] And again, the voters of her district elected her by a wide margin. After separate state and federal litigation, characterized by complex appeals and eleventh hour decisions, the New Jersey durational residency requirement produced only waste and confusion. While the Fourth District's voters did not change their minds at the ballot box—Mosquera remains their representative and a rising political star— states should change their minds about durational residence laws for candidates. The time has come to vote these clumsy remnants of the past out of state election codes for good.

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[97] *See supra*, section III.B.

[98] *See supra*, section III.C.

[99] *See* John Barna, *Gabriela Mosquera, Shelley Lovett to Square Off Once Again for Assembly Seat*, NJ.COM (Apr. 3, 2012, 12:27 PM), http://www.nj.com/gloucester-county/index.ssf/2012/04/gabriela_mosquera_shelley_love.html ("Democrat Gabriela Mosquera and Republican Shelley Lovett will square off this November for a second time in a year to be one of the two Assemblymen representing the state's fourth legislative district.").