02/3

1

ANNOTATION

VALIDITY, UNDER FEDERAL CONSTITUTION, OF STATE RESIDENCY REQUIREMENTS FOR VOTING IN ELECTIONS

by

Donald T. Kramer, J.D.

U.S. Supreme Court Reports, Lawyers Edition, 1972

I. PREFATORY MATTERS

§ 1. Introduction:
[a] Scope, 865
[b] Related matters, 865
§ 2. Summary and comment:
[a] Generally, 866
[b] Practice pointers, 870
[c] Relevant constitutional and statutory provisions, 871
§ 3. Mootness, 875
§ 4. Propriety of class action, 876

II. BONA FIDE RESIDENCY REQUIREMENTS

§ 5. Requirement that voter be resident of state or locality; generally, 879
§ 6. — Interests alleged to be served by bona fide residency requirement:
[a] Statute insures "purity of ballot box" and prevents fraudulent voting by nonresidents, 881
[b] Statute insures knowledgeable, informed, and interested voters, and intelligent exercise of franchise, 882
[c] Statute insures orderliness of elections and is administratively necessary, 883
§ 7. Particular classes of residents; students, 884
§ 8. — Military personnel, 887
§ 9. — Minors, 889
§ 10. — Residents of federal enclaves or of District of Columbia, 889

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

25 AM JUR 2d, Elections §§ 66–78
US L ED DIGEST, Constitutional Law § 334; Elections §§ 3–5
ALR DIGESTS, Constitutional Law § 270; Elections §§ 12–15
L ED INDEX TO ANNO (Rev ed), Constitutional Law; Domicil or Residence; Elections; Equal Protection of the Laws; Interstate Travel
ALR QUICK INDEX, Absentee Voters' Laws; Domicil or Residence; Elections
FEDERAL QUICK INDEX, Domicil or Residence; Elections

Consult L Ed 2d LATER CASE SERVICE for later cases

01-02476

III. DURATIONAL RESIDENCY REQUIREMENTS: CONSTITUTIONAL CONSIDERATIONS

A. DECISIONS BASED ON EQUAL PROTECTION OF THE LAWS AND THE RIGHT TO VOTE

§ 11. Standard to be used in reviewing validity of durational residency requirement:
[a] "Compelling state interest" test, 891
[b] "Rational relation" test, 894

§ 12. Interests alleged to be served by durational residency requirement:
[a] Statute insures purity of ballot box, prevents fraudulent voting by nonresidents, and eliminates colonization threat, 896
[b] Statute insures knowledgeable, informed, and interested voters, and intelligent exercise of franchise, 899
[c] Statute insures orderliness of elections and is administratively necessary, 903

B. DECISIONS BASED ON OTHER CONSTITUTIONAL RIGHTS

§ 13. Interstate travel:
[a] Statute held valid, 905
[b] Statute held invalid, 906

IV. DURATIONAL RESIDENCY REQUIREMENTS: WAITING PERIOD INVOLVED

§ 14. One year or more in state or locality:
[a] Held valid, 907
[b] Held invalid, 910

§ 15. Six months, but less than a year, in state or locality:
[a] Held valid, 911
[b] Held invalid, 913

§ 16. Less than 6 months in state or locality:
[a] Held valid, 914
[b] Held invalid, 914

INDEX

Administratively necessary, residency requirement as, §§ 6[c], 12[c]
Alabama residency requirement, §§ 11[a], 15[b], 16[b]
Analysis of equal protection of laws problems, practice pointers as to, § 2[b]
Arizona residency requirement, §§ 5, 11 [b], 13[a], 14[a]
Arkansas residency requirement, §§ 12[c], 16[a]
Bona fide residency requirements, §§ 5–10
Burden of proof, practice pointers as to, § 2[b]
California residency requirement, §§ 3, 9, 12[a, b], 16[b]
Certificate of residence, requiring filing of notarized certificate at least 6 months before election, § 6[c]
Class action, propriety of, § 4
College students—
class action by, § 4
requirements operating to disqualify, § 7
Colonization threat, residency requirement as method of eliminating, § 12[a]
Colorado residency requirement, §§ 3, 4
Comment, § 2
"Compelling state interest" test in reviewing validity of durational residency requirement, § 11[a]
Connecticut residency requirement, §§ 3, 13 [b], 15[b]
Constitutional provisions affecting validity, § 2[c]
District of Columbia residency requirement, §§ 11[a], 12[b]
District of Columbia, state residency requirement as applied to resident of, § 10

01- 02477

Due process, §§ 7, 14[a]
Durational residency requirements—
constitutional considerations, §§ 11–13
waiting period involved, §§ 14–16
Equal protection of the laws, §§ 6[a, b], 7–9, 11, 12, 13[a], 14, 15[b], 16
Federal constitutional and statutory provisions of relevant nature, general review of, § 2[c]
Federal enclaves, residents of, §§ 6[b], 10
Florida residency requirement, §§ 4, 12[c], 14[b]
Fraudulent voting by nonresidents, residency requirement as method of preventing, §§ 6[a], 12[a]
Indiana residency requirement, §§ 4, 12[a, b], 13[a], 15[b]
Indians living on government reservations, § 10
Intelligent exercise of franchise, residency requirement as method of insuring, §§ 6[b], 12[b]
Interests alleged to be served by residency requirement—
bone fide residency requirement, § 6
durational residency requirement, § 12
Interstate travel, durational residency requirement for voting as unconstitutional interference with right of, §§ 2[a, c], 13
Introduction, § 1
Justification for residency requirement, matters urged as, §§ 6, 12
Kentucky residency requirement as applied to students, § 7
Knowledgeable, informed, and interested voters, residency requirement as method of insuring, §§ 6[b], 12[b]
Legislative reduction of durational residency requirement during pendency of suit challenging validity of original requirement, § 3
Less than 6 months in state or locality, requiring residency of, § 16
Local elections, durational residency requirement as applied to, § 11[a]
Louisiana residency requirement, §§ 11[b], 12[a, b], 13[a], 14[a], 15[a]
Maryland residency requirement, §§ 6[b], 10, 11[a], 14[a]
Massachusetts residency requirement, §§ 11[a], 12, 14[b], 15[a]
Michigan provision concerning residence of students, § 7.
Military personnel—
Texas provision concerning voting by, §§ 6[a], 8
validity of requirement as applied to, § 8
Military reservation within boundary of state, residents of § 10
Minnesota residency requirement, §§ 4, 12 [a, b], 15[b]
Minors, requirement as applied to, § 9
Mississippi residency requirement, § 14 [b]
Mootness, § 3
Municipal election, residency requirement for voting in, § 5
New Hampshire statute disqualifying as voter one having firm intention to leave town at fixed time in future, § 7
New York residency requirement, §§ 7, 11 [b], 12[a, b], 16[a]
North Carolina residency requirement, §§ 11[a], 12[c], 14[b]
Notarized certificate of residence, requirement of filing at least 6 months before election, § 6[c]
Ohio residency requirement, §§ 11[b], 12 [a, b], 13[a], 14[a]
Ohio statute prescribing distinctive voter qualification requirements for students as a class, § 7
One year or more in state or locality, requiring residency of, § 14
Orderliness of elections, residency requirement as method of insuring, §§ 6[c], 12[c]
Particular classes of residents affected by requirement, § 7
Practice pointers, § 2[b]
Prefatory matters, §§ 1–4
President of United States, federal legislation prohibiting states from imposing durational residency requirement as to voting for, § 2[c]
Propriety of class action, § 4
Puerto Rico residency requirement, §§ 5, 12[a]
Purity of ballot box, residency requirement as method of insuring, §§ 6[a], 12[a]
"Rational relation" test in reviewing validity of durational residency requirement, § 11[b]
Related matters, § 1[b]
Relevant constitutional and statutory provisions, § 2[c]
Resident of state or locality, requirement that voter be, §§ 5–10
Right to vote—
as fundamental political right, § 2[a]
validity of durational residency requirements under constitutional protection of, §§ 11, 12
Scope of annotation, § 1[a]
Six months, but less than a year, in state or locality, requiring residency of, § 15
Standard to be used in reviewing validity of durational residency requirement, § 11
State or locality, requirement that voter be resident of, §§ 5–10

01-02478

Statutory provisions affecting validity, § 2[c]
Students—
class action by, § 4
Michigan statute concerning residence of, § 6[a, b]
validity of requirement as applied to, § 7
Summary, § 2
Tennessee residency requirement, §§ 3, 11[a], 12[a], 13[b], 14[b], 16[b]
Texas provision relating to voting by military personnel, §§ 6[a], 8
Texas residency requirement, §§ 7, 9
Threat of colonization, residency requirement as method of eliminating, § 12[a]
Twenty-Sixth Amendment, statute as conflicting with, § 9
Vermont residency requirement, §§ 4, 7, 11[a], 12[c], 13[b], 14[b]
Virginia residency requirement, §§ 4, 6[c], 7, 12[c], 13[b]
Voting Rights Act of 1970 provision forbidding state-imposed durational residency requirements for voting for offices of President and Vice President—
substantive provisions of statute, § 2[c]
validity of statute, § 2[c]
Waiting period prescribed by durational residency requirement, §§ 14–16
Wisconsin residency requirement, §§ 11[a], 15[a]

TABLE OF JURISDICTIONS REPRESENTED

Consult L Ed 2d LATER CASE SERVICE for later cases

Sup Ct—§§ 2–6, 8, 10, 11[a, b], 12[a, b], 13–16
First Circuit—§§ 4, 5, 6[b], 7, 11[a], 12[a–c], 14[a, b], 15[a]
Second Circuit—§§ 2[b], 3–5, 7, 11[a], 12[c], 13[b], 14[a, b], 15[b]
Fourth Circuit—§§ 4, 10, 11[a], 12[c], 13[b], 14[b], 15[a]
Fifth Circuit—§§ 2[b], 4, 5, 7–9, 11[a, b], 12[a–c], 13[a], 14[a, b], 15[a, b], 16[b]
Sixth Circuit—§§ 2[b], 5, 7, 11[b], 12[b], 13[a], 14[a]
Seventh Circuit—§§ 4, 5, 11[a], 12[a, b], 13[a], 15[a, b]
Eighth Circuit—§§ 2[b], 4, 5, 11[a], 12[a–c], 14[b], 15[b], 16[a]
Ninth Circuit—§§ 5, 11[b], 13[a], 14[a]
Dist Col Circuit—§§ 4, 5, 11[a], 12[b, c], 14[b]
Cal—§§ 3, 9, 10, 11[a], 12[a, b], 14[b], 16[b]
Colo—§ 10
Hawaii—§ 2[b]
Iowa—§ 5
Kan—§ 10
Md—§ 10
Mass—§ 10
Mich—§§ 2[b], 5, 6[a, b], 7
Mo—§ 10
Neb—§ 10
NM—§§ 5, 10
NY—§§ 7, 8, 10, 11[a]
Ohio—§ 10
SD—§ 10
Tenn—§ 10
Utah—§ 10
Va—§7
W Va—§ 10

01-02179

I. Prefatory matters

§ 1. Introduction

[a] Scope

This annotation collects those reported cases,[1] both federal and state,[2] which have examined the validity, under various provisions of the Federal Constitution, of state laws establishing residency requirements[3] for voting. The effect of Title II of the Voting Rights Act of 1970,[4] abolishing state durational residency requirements for voting for the offices of President and Vice President of the United States, is also discussed herein.

[b] Related matters

Racial discrimination in voting, and validity and construction of remedial legislation. 27 L Ed 2d 885.

Federal constitutional right of interstate travel—Supreme Court cases. 27 L Ed 2d 862.

Fourteenth Amendment as affecting nomination or election to state office. 11 L Ed 2d 1057, 23 L Ed 2d 782.

Constitutionality of discrimination as regards property qualification, or payment of tax, as condition of right to vote. 82 L Ed 257.

Residence of students for voting purposes. 44 ALR3d 797.

Elections: effect of conviction under federal law, or law of another state or country, on right to vote or hold public office. 39 ALR3d 303.

Construction and effect of absentee voters' laws. 97 ALR2d 257.

Validity of absentee voters' laws. 97 ALR2d 218.

State voting rights of residents of federal military establishment. 34 ALR2d 1193.

Voting by persons in military service. 140 ALR 1100, 147 ALR 1443, 148 ALR 1402, 149 ALR 1466, 150 ALR 1460, 151 ALR 1464, 152 ALR 1459, 153 ALR 1434, 154 ALR 1459, 155 ALR 1459.

Constitutionality of statutes in relation to registration before voting at election or primary. 91 ALR 349.

---

1. For informational purposes only, it should be noted that other decisions dealing with various aspects of state residency requirements for voting, which decisions were not reported at the time of the writing of this annotation, but which will appear in the Later Case Service for this annotation if and when they are published, were discussed by the courts in a number of reported decisions included herein. Inasmuch as an attorney might find them of value as controlling precedents insofar as a particular state's residency requirement is concerned, a list—quite possibly incomplete—of such cases follows, but these cases are not discussed elsewhere in the annotation:

First Circuit—Conti v Board of Registrars (1972, DC Me) Civil No. 12-67.

Second Circuit—Kennedy v Meskill (1971, DC Conn) Civil No. 14548.

Third Circuit—Fair v Osser (1971, DC Pa) Civil No. 71-2212.

Fifth Circuit.—Jefferson v Cook (1971, DC Miss) Civil No. 4982.

Sixth Circuit—Sirak v Brown (1970, DC Ohio) Civil No. 70-164; Wiltshire v Ferrell (1970, DC Tenn) Civil No. 5801.

Seventh Circuit—Johnson v Darrell (1971, DC Ind) Civil No. IP 71-C-543; Phillips v Bing (1972, DC Ill).

Ninth Circuit—Epps v Logan (1970, DC Wash) Civil No. 9137.

2. For purposes of this annotation, the word "state" is deemed to include the District of Columbia, Puerto Rico, and any territory or possession of the United States.

3. The annotation includes decisions involving both kinds of residency requirements, namely, bona fide residency requirements (state laws which require voters to be bona fide residents, but which do not impose a waiting period during which the franchise is lost to the newly arrived resident) and durational residency requirements (state laws which require voters to have been bona fide residents for a certain length of time before they are granted the right to vote).

4. Pub L 89-110, Title II § 202, as added Pub L 91-285 § 6, June 22, 1970, 84 Stat 316, now codified as 42 USCS § 1973aa—1(a-i). For the substantive provisions of the statute, see § 2[c], infra.

Validity of statute requiring information as to age, sex, residence, etc., as condition of registration or right to vote. 14 ALR 260.

✦

Cocanower and Rich, Residency Requirements for Voting. 12 Ariz L Rev 477.

MacLeod and Wilberding, State Voting Residency Requirements and Civil Rights. 38 Geo Wash L Rev 93.

Rentenback, Student Voting Rights in University Communities. 6 Harv Civ Rights—Civ Lib L Rev 397.

Sanftner, Serviceman's Legal Residence: Some Practical Suggestions. 26 JAG J 87.

Stone, State Residency Requirements and the Right to Vote in Presidential Elections. 58 Ky LJ 300.

Schmidhauser, Residency Requirements for Voting and the Tensions of a Mobile Society. 61 Mich L Rev 823.

Guido, Student Voting and Residency Qualifications: The Aftermath of the Twenty-Sixth Amendment. 47 NYU L Rev 32.

Comment, State Durational Residence Requirements as a Violation of the Equal Protection Clause. 3 NC Central LJ 233.

Rowland, Voter Residency Requirements in State and Local Elections. 32 Ohio St LJ 600.

Comment, Residence Requirements for Voting in Presidential Elections. 37 U Chi L Rev 359.

Note, Student Voting Rights. 6 Valparaiso U L Rev 49.

Thompson, Problem of College Student Voting: Proposed Solutions. 7 Wake Forest L Rev 398.

Antieau, Modern Constitutional Law.

§ 2. Summary and comment

[a] Generally

The United States Supreme Court, in Yick Wo v Hopkins (1886) 118 US 356, 30 L Ed 220, 6 S Ct 1064, said:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . . For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

"There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though 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."

Though this passage has been often quoted in subsequent Supreme Court decisions involving voting rights, the "fundamental political right" to vote to which the court referred was far from being one universally bestowed upon all citizens in 1886. It had been only 16 years since the nation had decided that the right to vote should not be abridged or denied "on account of race, color, or previous condition of servitude."[5] It would be 34 more years until women would be allowed to exercise this "fundamental political right,"[6] 75 years until residents of the District of Columbia would be given the right to vote for President and Vice President of the United States,[7] 78 years before those too poor to pay a poll tax would be guaranteed the right to vote,[8] and 81 years before

5. The Fifteenth Amendment was adopted March 30, 1870.

6. The Nineteenth Amendment was adopted Aug. 26, 1920.

7. The Twenty-Third Amendment was adopted April 3, 1961.

8. The Twenty-Fourth Amendment was adopted Jan. 23, 1964.

01-92481

the vote would be extended to the 18-to-21 age group.[9] Thus, it cannot with reason be said that the nation's founders had universal suffrage in mind when the Constitution was written, and while the country, by constitutional amendment, has gradually moved toward the goal of universal adult suffrage for all citizens 18 years of age or over, the founding fathers themselves were content in the original Constitution to leave the setting of voting qualifications to the states, reserving for the central government only the right to legislate in the area of the "Times, Places and Manner of holding Elections for Senators and Representatives,"[10] and the day for the casting of electoral votes for the offices of President and Vice President of the United States,[11] and providing only that the "House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of to-21 age group.[9] Thus, it cannot with the State Legislature."[12] Therefore, while the states are prohibited by the Constitution and its subsequent amendments from denying the right to vote to certain classes of people, the states have been generally left free to set voter qualifications, rules, and regulations.

The Federal Constitution contains no mention of residency requirements for voting. However, the imposition of such requirements for voting. However, the imposition of such requirements by state constitutions or statutes was not uncommon in the early days of the nation. As one commentator has amusingly noted, some South Carolina officials, as early as 1693, argued that a period of residence in the county as a requirement for voting was necessary, and they urged defeat of an act giving the privilege of electing state representatives to anyone worth 10 pounds, for ". . . not mentioning how long any person worth ten pounds must have been an inhabitant of the county before he be admitted to vote for members of the Assembly, it is so loose that by this Act all the Pyrates that were in the Shipp that had been plundering in the Red Sea had been qualified to vote for Representatives in Carolina, which being of dangerous consequence to the inhabitants we have thought fit to dissent to that act alone."[13] While "Pyrates" may not have been much in the minds of state governments, many commentators have noted that the desire to prevent immigrants from voting resulted in the early passage of residency requirements in many of the eastern states,[14] and a similar desire to prevent Negroes from voting apparently motivated many southern states to pass such requirements after the Civil War.[15] Whatever the reason for such requirements, all of the states and territories, as late as April 1972, required that prospective voters must have been residents of the respective states or territories for periods ranging from 30 days in Minnesota to a year in 29 of the states and territories. Thirty-five of the states or territories also required that prospective voters be residents of their respective counties for periods of up to one year, and 40 of them required varying periods of residency in districts, wards, towns, or precincts as prerequisites for voting.[16]

---

9. The Twenty-Sixth Amendment was adopted July 5, 1971.
10. US Const Art 1 § 4 cl 1.
11. US Const Art 2 § 1 cl 4.
12. US Const Art 1 § 2 cl 1.
13. Stone, State Residency Requirements and the Right to Vote in Presidential Elections, in 58 Ky LJ 303, citing a passage from A. McKinley, The Suffrage Franchise in the Thirteen English Colonies in America, at 133 (1905).
14. See, for instance, Stone, State Residency Requirements and the Right to Vote in Presidential Elections, in 58 Ky LJ at 303.
15. Emerson and Haber, Political and Civil Rights in the United States 2d ed, at p 199.
16. The Council of State Governments, The Book of the States for 1972–73, at pp 26, 37.

The imposition of residency requirements, particularly those of a durational nature,[17] on the right to vote was perhaps acceptable in the period of the nation's history before World War II, when interstate migration was the rare exception to the rule that one normally lived one's life where one was born, when communications were poor, and when informed voters were rare. However, after World War II it became obvious that the United States was a nation of migrants. Persons who formerly may have spent their entire lives in a single county were suddenly moving from New York to California, or from Washington to Florida. It also became obvious that these persons wanted to vote in their new homes, and were not content to have to wait a year or two before becoming enfranchised. Therefore, increasingly during the decade of the 1960's, residency requirements came under attack as unnecessary anachronisms of the past, no longer necessary in an age of migration and instant communications.

The United States Supreme Court, following a series of attacks upon durational residency requirements in the lower federal courts, held that because such requirements abridge the fundamental constitutional right to vote, this type of law cannot be held constitutional unless it satisfies a compelling state interest.[18] Although a few courts have continued to examine these statutes in light of the less stringent "rational relation" test,[19] under which a state statute is presumed to be constitutional, and will be held constitutional so long as it can be said to bear some rational relationship to a legitimate state concern, it is now clear that the "compelling state interest" test is the correct standard to use to test the constitutionality of durational residency requirements. Under this standard, no presumption of constitutionality attaches to a law, and the law will be declared unconstitutional (if it abridges a fundamental constitutional right) unless the state can prove that the law is necessary to satisfy some compelling state interest. Those states put to the necessity of defending their residency requirements have generally argued that the statutes were necessary to satisfy three interests which they styled "compelling": (1) the statutes insure the "purity of the ballot box" by preventing nonresidents from fraudulently voting, and they eliminate the threat of colonization, that is, the possibility of great masses of outsiders suddenly descending upon a state or one of its subdivisions solely for the purpose of influencing a particular election, and then just as suddenly returning after the election;[20] (2) the statutes insure that voters will be knowledgeable, informed, and interested, and that they will exercise their right to vote intelligently;[1] and (3)

17. These are discussed in Parts IV and V of the annotation.

18. § 11[a], infra.

19. § 11[b], infra.

20. § 12[a], infra. As will be noted by reference to that section, this argument has been generally unsuccessful, most courts having held that while the prevention of fraud is a legitimate state objective, durational residency requirements are either ineffective or unnecessary to accomplish such an objective. A few cases have concluded that durational residency requirements are permissible because they help to prevent fraud in elections.

1. § 12[b], infra. Again, although a few courts have held to the contrary, most courts have held that durational residency requirements are too crude an instrument to use in any attempt to restrict the ballot only to those voters who will vote "intelligently" (assuming such to be a legitimate state objective), for while such laws undoubtedly exclude many uninformed new residents from voting, they also exclude many well-informed new residents from voting, and they do nothing to prevent an uninformed longtime resident from voting. Furthermore, most courts have noted that durational residency requirements, particularly those of 6 months or more, are not necessary for the creation of an informed electorate in an age where newspapers, radio and television broadcasts, and other types of communications bring instant information to voters on a daily basis.

01- 02483

the statutes are administratively necessary to insure that elections will be carried out in an orderly fashion.[2] In addition to attacks made on these statutes under the equal protection clause of the Fourteenth Amendment, durational residency requirements for voting have been successfully attacked as deterrents to the fundamental constitutional right to travel interstate.[3] Thus, while a few courts have upheld the imposition of durational residency requirements of periods of less than 6 months,[4] 6 months or more but less than a year,[5] or a year or more,[6] many courts have held that durational residency requirements of 1 year or more are invalid,[7] and some have held statutes imposing periods of 6 months but less than a year,[8] and even periods of less than 6 months,[9] to be invalid under the Federal Constitution.

On the other hand, no court has held that a state may not require that its voters be bona fide residents of the state, or of a particular subdivision therein, and the imposition of bona fide residency requirements for voting has been universally upheld.[10] While not disputing the imposition of such requirements, courts have not always agreed, however, that bona fide residency requirements serve legitimate state purposes in particular factual situations. Thus, they may not be used to exclude certain classes of voters on the pretext that such persons must be excluded to prevent fraud.[11] While they may be justified because they help to insure that voters will be informed, they may not be directed against particular classes of persons on the ground that such persons are less likely to be informed than other classes of persons.[12] And while such statutes may be administratively helpful, states may not require prospective voters to go to unreasonable lengths to prove bona fide residency.[13] Thus, while it is permissible to refuse to allow students who are not residents to vote, it is not permissible to refuse to allow students to vote merely because they are students.[14] Military personnel who are residents of a particular state must be allowed to vote, although military personnel stationed in a particular state need not be given the right to vote if their domicils are elsewhere.[15] Similarly, minors,[16] and residents of federal enclaves, installations, or reservations,[17] may not be denied the right to vote if they are in fact residents of the state or locality in which they wish to vote.

Class actions on behalf of citizens similarly situated have been generally permitted in suits challenging the constitutionality of durational residency requirements for voting, although some courts, under the particular circumstances of the cases, have refused to permit class actions.[18] In many instances, the plaintiffs will have satisfied the residency requirement by the time the court hears arguments in the case or renders its decision, but this

2. § 12[c], infra. Again, though not disputing the necessity of some cut-off period before an election, during which prospective voters are not allowed to register and voting lists are made up, most courts have held that the imposition of lengthy durational residency requirements contributes little or nothing to the achievement of this goal. Congress has decreed that 30 days should be long enough to achieve this goal in federal elections for President and Vice President. See Title II § 202, of the Voting Rights Act of 1970, 42 USCS § 1973aa–1(a–i), set out in § 2[c], infra.

3. § 13[b], infra. Some courts, on the other hand, have concluded that such statutes do not deter or abridge the right to travel interstate, and have refused to hold them invalid on that ground. See § 13[a], infra.

4. § 16[a], infra.
5. § 15[a], infra.
6. § 14[a], infra.
7. § 14[b], infra.
8. § 15[b], infra.
9. § 16[b], infra.
10. § 5, infra.
11. § 6[a], infra.
12. § 6[b], infra.
13. § 6[c], infra.
14. § 7, infra.
15. § 8, infra.
16. § 9, infra.
17. § 10, infra.
18. § 4, infra.

01-02484

does not make the case moot, unless the state law has been changed in the meantime in such a way that the plaintiffs would have satisfied the new requirement prior to filing the suit, and would thus not have been aggrieved parties.[19]

[b] Practice pointers

From an analysis of the cases contained in this annotation, the attorney will doubtlessly note that an outline questionnaire can be developed for use in predicting his role in any case, including those involving the right to vote, wherein the principal issue is whether or not a particular statute which creates classifications among citizens is violative of any particular citizen's rights, under the Fourteenth Amendment, to equal protection of the laws. (1) *What classification has been created?* The attorney must first determine what classifications have been created by the statute in question. Thus, for instance, a state statute may create two classes of citizens: students and nonstudents;[20] citizens who have paid poll taxes, and citizens who have not;[1] citizens of Japanese ancestry, and citizens who are not of Japanese ancestry;[2] and those who have been residents of a state for a year or more, and those who have not been residents of a state for as long as a year.[3] Obviously, an infinite variety of classifications among state citizens is possible. (2) *Is the classification based on some inherently suspect or invidious discrimination?* The attorney must next consider whether the classification is based on some traditionally disfavored classification, such as wealth or property, sex, race, religion, creed, color, or some other distinction not usually germane to one's ability. (3) *Alternatively, or sometimes additionally, does the classification affect or involve the assertion of a fundamental constitutional right?* The attorney should consider, in connection with answering this question, not only those fundamental rights mentioned in the Constitution, such as freedom of religion and speech,[4] the right not to have one's private property taken for public use without just compensation,[5] and the right, in criminal prosecutions, to a speedy and public trial by an impartial jury,[6] but also the latter-day constitutional rights not specifically mentioned in the Constitution, such as the right to interstate travel,[7] the right to privacy,[8] and the developing concept of the right of a woman to choose whether or not to bear children.[9]

The answers to questions (2) and (3) determine what standard of review or test is to be applied in determining whether or not the statute in question is constitutional. If the answer to either question or to both questions is "yes," then an attorney, knowing that the "compelling state interest" test will be applied, will know that the burden of proof will be upon the government to prove that the classification created by the statute is necessary to promote a compelling state interest,

---

19. § 3, infra.

20. Wilkins v Bentley (1971) 385 Mich 670, 189 NW2d 423, 44 ALR3d 780, discussed in § 7, infra.

1. Harper v Virginia State Board of Elections (1966) 383 US 663, 16 L Ed 2d 169, 86 S Ct 1079.

2. Korematsu v United States (1944) 323 US 214, 89 L Ed 194, 65 S Ct 193, reh den 324 US 885, 89 L Ed 1435, 65 S Ct 674.

3. Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, discussed, inter alia, in §§ 11[a], 12 [a, b], and 14[b], infra.

4. US Const First Amendment.

5. US Const Fifth Amendment.

6. US Const Sixth Amendment.

7. Shapiro v Thompson (1969) 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322. As to the federal constitutional right of interstate travel generally, see the annotation at 27 L Ed 2d 862. With regard to the right of interstate travel as it is affected by residency requirements for voting, see § 13, infra.

8. Griswold v Connecticut (1965) 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678. On the right to privacy generally, see the annotation at 14 ALR2d 750.

9. See § 5 of an annotation dealing with the validity, under the Federal Constitution, of abortion laws, at 28 L Ed 2d 1053, 1076.

02485

and he will further know that the court will give the statute a "close and exacting examination."[10] Thus, if the government fails to prove that the classification is necessary to promote a compelling state interest, the statute will be declared unconstitutional as a violation of the equal protection of the laws.[11]

On the other hand, if the answer to both questions (2) and (3) is "no," then the attorney will know that the burden of proving the invalidity of the statute will rest upon the one asserting the unconstitutionality of the classification. He will also know that in such cases courts will apply a much less exacting standard, for except in cases where classifications are based on some inherently suspect or invidious discrimination, or affect or involve the assertion of fundamental constitutional rights, the Fourteenth Amendment permits the exercise of a wide scope of discretion; he will know that the statute will be presumed valid; and he will know that it will be declared unconstitutional only if it bears no rational relationship to a legitimate state end and is based on reasons totally unrelated to the pursuit of a legitimate state goal.[12]

✦

The attorney will probably have observed that once a new constitutional doctrine is applied to a particular factual situation, then, like spreading wildfire, it is only a matter of time before the same new doctrine is applied to other factual situations. Thus, once the concept that state residency requirements might violate a citizen's right to travel interstate was established, as it was in Shapiro v Thompson (1969) 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322, wherein it was held that the denial of welfare assistance to residents of various states or the District of Columbia who had not resided within their jurisdictions for at least 1 year immediately preceding their application for such assistance violated the applicants' rights to travel freely from state to state, an increasing number of both state and federal courts have applied, or at least considered the applicability of, the same doctrine to various other factual situations. Without pretext of completeness, a list of such situations would include:

— the right to vote. See, for example, Oregon v Mitchell (1970) 400 US 112, 27 L Ed 2d 272, 91 S Ct 260, reh den 401 US 903, 27 L Ed 2d 802, 91 S Ct 862; Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995.

— the right of aliens to enter and abide in any state on an equality of legal privileges with all citizens. Graham v Richardson (1971) 403 US 365, 29 L Ed 2d 534, 91 S Ct 1848.

— the right to get a divorce. Whitehead v Whitehead (1972, Hawaii) 492 P2d 939.

— the right to become a candidate for public office. McKinney v Kaminsky (1972, DC Ala) 340 F Supp 289; Bolanowski v Raich (1971, DC Mich) 330 F Supp 724.

— the right to receive preference under a state veterans' employment preference statute. Carter v Gallagher (1971, DC Minn) 337 F Supp 626.

[c] Relevant constitutional and statutory provisions

The right to vote is not absolute, and states have the power to impose voter qualifications and to regulate

10. Kramer v Union Free School Dist. (1969) 395 US 621, 23 L Ed 2d 583, 89 S Ct 1886; Kohn v Davis (1970, DC Vt) 320 F Supp 246, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1305, discussed in § 12[c], infra.

11. See, for example, Harper v Virginia State Board of Elections (1966) 383 US 663, 16 L Ed 2d 169, 86 S Ct 1079.

12. An interesting comparison can be obtained by contrasting McDonald v Board of Election Comrs. (1969) 394 US 802, 22 L Ed 2d 739, 89 S Ct 1404, with Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, both of which involve various aspects of voting. See also Wilkins v Bentley (1971) 385 Mich 670, 189 NW2d 423, 44 ALR3d 780, which supports the view that the burden of proof, if the "rational relation" test is applied, is upon the one who assails the classification created by the law.

02486

access to the franchise in a number of ways, so long as such restrictions serve compelling state interests.[13] Nevertheless, the United States Constitution provides that no state may—

— abridge the privileges or immunities of any citizen of the United States. *Art 4 § 2; Fourteenth Amendment § 1.*

— deprive any person of life, liberty, or property, without due process of law. *Fourteenth Amendment § 1.*

— deny to any person the equal protection of the laws. *Fourteenth Amendment § 1.*

— deny, or abridge in any way, the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the state legislature, to any male inhabitant of the state, who is a citizen of the United States and is at least 21 years old, except for participation in rebellion or other crime. *Fourteenth Amendment § 2.*[14]

— deny or abridge the right to vote on account of race, color, or previous condition of servitude. *Fifteenth Amendment § 1.*

— deny or abridge the right to vote on account of sex. *Nineteenth Amendment.*

— deny or abridge the right to vote in any primary or election for a *federal* official because of failure to pay any poll or other tax. *Twenty-Fourth Amendment § 1.*[15]

— deny or abridge the right to vote of citizens who are 18 years of age or older on account of age. *Twenty-Sixth Amendment § 1.*

Furthermore, a state may not establish different qualifications for voting for members of the House of Representatives *(Art 1 § 2 cl 1)* or for members of the Senate *(Seventeenth Amendment)* than are established for voting for members of the most numerous branch of its state legislature.

In addition, no state may any longer impose a durational residency requirement as a precondition to voting for the offices of President and Vice President of the United States, as a result of the passage by Congress of Pub L 89–110, Title II § 202, as added Pub L 91–285 § 6, June 22, 1970, 84 Stat 316, now codified as 42 USCS § 1973aa—1 (a–i) and commonly known as Title II, § 202, of the Voting Rights Act of 1970. The substantive provisions of that law are as follows:

1973aa–1. Residence requirements for voting.—(a) The Congress hereby finds that the imposition and application of the durational residency re-

13. Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, discussed, inter alia, in §§ 11[a], 12 [a, b] and 14 [b], infra.

14. This particular prohibition is not absolute, but any state which does so deny or abridge the right to vote is subject to having the basis for its representation in Congress reduced in the proportion which the number of such male citizens bears to the whole number of male citizens 21 years of age in such state. Since the number of congressmen allocated to each state is clearly determined solely by the number of the state's inhabitants (Wesberry v Sanders (1964) 376 US 1, 11 L Ed 2d 481, 84 S Ct 526), and recent arrivals would undoubtedly have been included in determining the number of a state's inhabitants or citizens, it is interesting to note that apparently the argument was never made, based on § 2 of the Fourteenth Amendment, that (1) residency requirements for voting constitute a denial or abridgment of the right to vote to citizens of the states for reasons other than participation in rebellion or other crimes, (2) residency requirements for voting therefore constitute a denial of the right to vote "to any of the male inhabitants of such State," and (3) states having such statutes should therefore have the basis of their representation in Congress reduced in the proportion which the number of such citizens bears to the whole number of citizens 21 years of age or over in such state.

15. The Supreme Court concluded, in Harper v Virginia State Board of Elections (1966) 383 US 663, 16 L Ed 2d 169, 86 S Ct 1079, that requiring the payment of a poll or other tax in a *state* election also violated the Fourteenth Amendment.

02487

quirements as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

(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.

(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political

02488

subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration.

(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

(h) The term "State" as used in this section includes each of the several States and the District of Columbia.

(i) The provisions of section 11(c) [§ 1973i(c) of this title] shall apply to false registration, and other fraudulent acts and conspiracies, committed under this section.[16]

The United States Supreme Court, in Oregon v Mitchell (1970) 400 US 112, 27 L Ed 2d 272, 91 S Ct 260, reh den 401 US 903, 27 L Ed 2d 802, 91 S Ct 862, upheld the right of Congress to enact Title II of the Voting Rights Act of 1970 (42 USCS § 1973aa—1(a–i)). Although there was no majority opinion in the case, eight of the nine justices agreed that Title II of the Voting Rights Act of 1970 was constitutional. Mr. Justice Black observed that in enacting such regulations, Congress was merely attempting to insure a fully effective voice to all citizens in national elections, and that Congress unquestionably had power under the Constitution to regulate federal elections, for such was essential to the survival and the growth of the national government. Mr. Justice Douglas was of the opinion that the judgment which Congress had made respecting the ban on durational residency requirements in presidential elections was plainly a permissible one in Congress' efforts to "enforce" the Fourteenth Amendment, since no parochial interests of states, counties, or cities are involved in presidential elections, and since the right to vote for national officers is a privilege and immunity of national citizenship. Mr. Justice Brennan, joined by Justices White and Marshall, was of the opinion that Congress had the authority to set qualifications for voting in federal elections insofar as residence requirements were concerned, because the imposition of such residence requirements operated to penalize those persons who had exercised their constitutional right of interstate migration, and because no compelling or substantial governmental interest had been shown which would justify placing such a burden on interstate travel. Mr. Justice Stewart, joined by the Chief Justice and Mr. Justice Blackmun, expressed the view that Congress could protect a person who exercises his constitutional right to enter and abide in any state in the United States from losing his opportunity to vote, and that the power to facilitate a citizen's exercise of his constitutional privilege to change residence was one that could not be left for exercise by the individual states without seriously diminishing the level of protection available. (Mr. Justice Harlan, dissenting, ex-

16. It is interesting to note that in spite of Congress' findings, expressed in 42 USCS § 1973aa—1(a), supra, that state durational residency requirements imposed as preconditions for voting for President and Vice President violated various constitutional rights of United States citizens, it had previously provided by law that no one could vote for such offices in the District of Columbia until they had been residents of the District for 1 year or more. 2 DCCE § 1-1102.

C2489

pressed the view that Congress was without constitutional authority to abolish the durational residency requirements of the states for voting for the offices of President and Vice President.) It should therefore be noted that superimposed upon all of the decisions cited and discussed in this annotation is the understanding that all statutes or other requirements imposing durational residency requirements as prerequisites for voting are now invalid insofar as they impose a durational residency requirement for voting for the offices of President and Vice President of the United States, regardless of whether such statutes or requirements may be justified under provisions of the United States Constitution.

§ 3. Mootness

Where a statute imposing a durational residency requirement for voting has been replaced by a different state statute imposing a shorter durational residency requirement, then a suit brought under the older statute by a plaintiff challenging the validity of the requirement will be dismissed as moot if the plaintiff, at the time the court renders its decision, would have satisfied the new requirement and would have been able to vote if the new law had been in effect when he originally brought his suit.

Having moved from California to Colorado in June 1968, the appellants in Hall v Beals (1969) 396 US 45, 24 L Ed 2d 214, 90 S Ct 200, sought to register to vote in the ensuing November presidential election, but were refused permission because on election day they would not have satisfied the 6-month residency requirement that Colorado then imposed as a prerequisite for voting in the election. They then commenced a class action against the electoral officials of the county in which they resided, complaining that the 6-month residency requirement was a violation of the equal protection, due process, and privilege and immunities clauses of the Constitution. After a three-judge District Court entered judgment upholding the 6-month requirement as constitutional, resulting in the appellants not voting in the 1968 presidential election, they took a direct appeal to the Supreme Court. Subsequently, Colorado reduced its residency requirement for voting in a presidential election from 6 months to 2 months. Vacating the judgment of the District Court and remanding it with directions to dismiss the cause as moot, the Supreme Court held that the 1968 election was history, and that it was now impossible to grant the appellants the relief they had originally sought. Furthermore, the court continued, the appellants had now satisfied the former 6-month residency requirement of which they complained, and apart from such considerations, the amendatory action of Colorado in reducing its residency requirement to 2 months had operated to render the case moot. Pointing out that it had to review the judgment below in light of the Colorado statute as it "now stands, not as it once did," the court noted that under the statute as currently written, the appellants could have voted in the 1968 presidential election, and the case had therefore lost its character as a present, live controversy of the kind that must exist if the court is to avoid advisory opinions on abstract propositions of law.

✦

Where a state statute imposing a durational residency requirement for voting has not been repealed or amended by the time a court renders its decision involving a suit brought by a plaintiff challenging the constitutionality of the requirement, then the suit will not be dismissed as moot, even though the plaintiff may have satisfied all or part of the residency requirement in the meantime. Furthermore, a suit will not be dismissed as moot merely because the court-ordered registration of a voter would offend a state law prohibiting the registration of voters during a designated period before elections, where the voter can show that he had attempted to register before the deadline and had been unlawfully denied the right to do so.

02490

An action for declaratory and injunctive relief was brought, after state administrative remedies were exhausted, by an assistant professor of law at Vanderbilt University who had moved to Tennessee and had thereafter been denied permission to vote when he attempted to register, because Tennessee law authorized the registration of only those persons who at the time of the next election would have been residents of the state for a year and residents of the county for 3 months. Following a decision by a three-judge Federal District Court that the durational residency requirement was unconstitutional, the Supreme Court, on direct appeal in Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, held that the case was not moot, even though at the time the next election was to be held, the professor would have met the 3-month part of Tennessee's durational residency requirement. Saying that the District Court properly rejected the state's position that the alleged invalidity of the 3-month requirement had been rendered moot, the court observed that the problem to voters posed by the Tennessee residency requirement was capable of repetition, yet would evade review. Furthermore, said the court, unlike in Hall v Beals (1969) 396 US 45, 24 L Ed 2d 214, 90 S Ct 200, the law in question remained on the books, and the professor therefore had standing to challenge it.

A similar result was reached in Nicholls v Schaffer (1972, DC Conn) 344 F Supp 238, where the court refused to hold a challenge to Connecticut's 6-month town residency requirement moot, on the premise that the plaintiffs would have become eligible for admission as electors in the town in which they resided prior to any impending elections.

In Keane v Mihaly (1970) 11 Cal App 3d 1037, 90 Cal Rptr 263, the plaintiffs, who were graduates of a law school outside California, but who were admitted to practice law in California, alleged that they had come to San Francisco on November 29, 1969, had immediately established residence in California, and had remained residents continuously since that date. They further alleged that they met every requirement for voting in California except that they would not have been residents of the state for 1 year preceding the November 3, 1970, election. In July 1970, well within the deadline for registering for the upcoming election, the court pointed out, the petitioners had appeared in the office of the registrar of voters, had attempted to register, and were refused registration solely on the ground that they did not meet the residency requirement. The registrar of voters contended that the plaintiffs' petition was moot inasmuch as the deadline for registration, September 10, 1970, a date 53 days immediately prior to the election, had passed, and that mandate would not lie because he had no legal authority to discharge an alleged duty after the time for so doing had expired. However, the court held that the case was not moot. Pointing out that the petitioners had attempted to register within the deadline, and that, if their challenge to the residency requirement was meritorious, they then had been unlawfully denied the right to register, the court stated that the purpose of the 53-day period was to facilitate the orderly and accurate preparation of voting lists, and to prevent illegal voting by providing in advance of an election an authentic list of qualified electors. However, said the court, neither purpose would be served by interpreting the statutory period to be an absolute prohibition against registration less than 53 days before an election, where a qualified voter could show that he had been unlawfully denied the opportunity to register before the deadline.

§ 4. Propriety of class action

Under Rules 23(b)(1)(A) and 23(b)(2) of the Federal Rules of Civil Procedure, a class action to test the validity of a state statute imposing a residency requirement on the right to vote is proper where there are common questions of law or fact, and where the interests of the class are fairly

02491

represented by those instituting the action.

In Shivelhood v Davis (1971, DC Vt) 336 F Supp 1111, five students at a Vermont college brought an action against the town clerk and members of the Board of Civil Authority of the town where the college was located, on behalf of themselves and all students who attended institutions of learning in Vermont and who wished to register and vote in the communities where they attended school, for the purpose of requiring the town election officials to register them as voters. Although the court stated that the suit could properly be maintained as a class action pursuant to Rules 23(b)(1)(A) and 23(b)(2), the court said that the class should be limited to those students physically residing in the same town as the named plaintiffs and who desired to register and vote therein, for only in a class so limited would there be common questions of law or fact. Even with such a limitation, the court commented, the class was still quite broad, but it held that the class should not be narrowed further because the broad class definition might be necessary to insure the efficacy of prospective injunctive relief relating to procedures to be followed by the election board in examining voter applications. Furthermore, said the court, although some of the relief which might be granted would not apply to all members of the class, Rule 23 provided sufficient flexibility to enable the court to limit various types of relief to various class members.

Where the plaintiff, a United States citizen and a former resident of New Jersey who had moved to Florida, where she was employed and where she intended to remain permanently, attempted to register to vote, but was advised by the county election supervisor that, although she was qualified to vote in all other respects, she could not vote because she had not been a resident of Florida for 1 year and of her county for 6 months, the court, in Woodsum v Boyd (1972, DC Fla) 341 F Supp 448, upheld plaintiff's right to bring a class action to test Florida's durational residency requirements, the court noting that the class consisted of, and was limited to, those bona fide residents of Florida who did not fulfil the durational residency requirements for voting in Florida, but who were otherwise qualified to register and vote in primary and general elections in that state.

Class actions involving residency requirements as prerequisites for voting in elections were also permitted by the courts in the following cases, although the courts did not discuss the propriety of such class actions:

First Circuit—Burg v Canniffe (1970, DC Mass) 315 F Supp 380, affd 405 US 1034, 31 L Ed 2d 575, 92 S Ct 1303; Newburger v Peterson (1972, DC NH) 344 F Supp 559.

Second Circuit—Nicholls v Schaffer (1972, DC Conn) 344 F Supp 238.

Fourth Circuit—Bufford v Holton (1970, DC Va) 319 F Supp 843, affd 405 US 1035, 31 L Ed 2d 576, 92 S Ct 1304.

Fifth Circuit—Mabry v Davis (1964, DC Tex) 232 F Supp 930, affd 380 US 251, 13 L Ed 2d 818, 85 S Ct 936; Hadnott v Amos (1970, DC Ala) 320 F Supp 107, affd 401 US 968, 28 L Ed 2d 318, 91 S Ct 1189, and also affd 405 US 1035, 31 L Ed 2d 576, 92 S Ct 1304; Graham v Waller (1972, DC Miss) 343 F Supp 1.

Eighth Circuit—Smith v Climer (1972, DC Ark) 341 F Supp 123.

Dist Col Circuit—Lester v Board of Elections (1970, DC Dist Col) 319 F Supp 505, app dismd 405 US 949, 30 L Ed 2d 819, 92 S Ct 992, and vacated 405 US 1036, 31 L Ed 2d 575, 92 S Ct 1318 (see footnote as to subsequent history of this case in § 11[a], infra).

✦

Class actions to test the validity of state statutes imposing residency requirements on the right to vote have been held inappropriate where different facts and circumstances would have controlled the right of various members of the class to register to vote, where the election process would have been seriously disrupted, and

02492

where other class members, unlike the plaintiffs, did not attempt to register.

In an action challenging Virginia laws requiring that prospective voters satisfy certain residence and domicil requirements, which action was filed by students of voting age attending a college in Virginia, the court, in Manard v Miller (1971, DC Va) 53 FRD 610, affd 405 US 982, 31 L Ed 2d 449, 92 S Ct 1253, held that a class action was inappropriate under Rule 23, the court saying that the facts and circumstances controlling the rights of applicants to register could vary in respect to each of them, especially in such matters as residence and domicil, as well as in regard to the nature and content of the questions propounded to them by their respective registrars at the time they first sought registration. Therefore, said the court, the plaintiffs could not necessarily be said to be representative of other students desiring registration.

In Affeldt v Whitcomb (1970, DC Ind) 319 F Supp 69, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304, two persons who had recently moved into Indiana from another state filed a class action challenging the constitutionality of the Indiana 6-month durational residency requirement for voting. The plaintiffs defined the class which they sought to represent as "those residents of the State of Indiana who will have lived in the State for less than six months on the day of the next following general or city election." The suit, filed on September 25, 1970, was heard by the court on October 13, 1970. The relief sought by the plaintiffs, who had previously attempted to register and who had exhausted their administrative remedies, was permission to register to vote in the upcoming general election to be held on November 3, 1970. Under the circumstances of the case, the court held that a class action was inappropriate, and limited the relief granted to the named plaintiffs. Although the court declared that the 6-month residency requirement violated the plaintiffs' rights to equal protection of the laws and was therefore unconstitutional, the court pointed out that the plaintiffs had not attacked another Indiana statute providing that registration of voters should cease following the 29th day before each election. The state has a legitimate interest in closing registration at that time in order to prepare for an election, said the court, and the 29-day requirement for registration is still valid and unaffected. The court stated that since no one in the class which the plaintiffs sought to represent had registered or would at the time of the action be able to satisfy the 29-day requirement for registration, only the named plaintiffs should be granted relief because of their previous good-faith efforts to register, for to allow, at a time so close to an upcoming election, an undetermined class to register would unduly delay the preparation of voting lists for the precincts and work havoc on an orderly election process.

Similarly, two plaintiffs who ultimately proved successful in getting a Minnesota 6-month durational residency requirement for voting declared unconstitutional, in Keppel v Donovan (1970, DC Minn) 326 F Supp 15, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304, nevertheless were not permitted to maintain their action as a class action, the court entering an order permitting only the named plaintiffs to vote. Both plaintiffs had moved to Minnesota in June 1970, had taken and passed the state bar examination, had become associated with a law firm in the state, and intended to remain permanently as residents of the state, but when they sought to register in the November general election, they were not permitted to do so because of the 6-month residency requirement. Thereafter, they brought suit on behalf of themselves "and all those similarly situated, i. e., those residents of Minnesota who were denied the franchise because they had not resided in the state for six months next preceding the election." A temporary restraining order was issued 20 days before the election—which was the last day on which any citizen of Minnesota could register to vote in an election under Minnesota law—enjoining the voter registration officials from refus-

ing to permit the named plaintiffs to register. Since the named plaintiffs were the only members of the class for whom the granting of immediate relief was proper, said the court, the named plaintiffs could not properly maintain a class action. However, said the court, inasmuch as the relief granted[17] was declaratory in nature, the decision would in fact benefit a large class of persons who in the future would be similarly situated.[18]

Of course, the named plaintiffs in a class action must be members of the class which they seek to represent, and it naturally follows that a class action is inappropriate where the named plaintiffs purport to represent a class of which they are not a part.

Thus, in Halls v Beals (1969) 396 US 45, 24 L Ed 2d 214, 90 S Ct 200, where the named plaintiffs, who had moved from California to Colorado, and who had been denied the right to register to vote in a presidential election because they would not have satisfied the 6-month residency requirement imposed by Colorado for voting in such an election, brought an action seeking to have the 6-month requirement declared unconstitutional, the court, noting that Colorado had changed its law in the interim and now required only a 2-month residency, held that, interpreting the statute as it was currently written, as the court was required to do, the appellants could have voted in the presidential election in which they first sought to register, that their opposition to residency requirements in general could not alter the fact that so far as they were concerned nothing in the Colorado legislative scheme as now written adversely affected either their present interests or their interests at the time the litigation was commenced, and that no different result was called for merely because the plaintiffs had styled their suit a class action on behalf of disenfranchised voters, for the plaintiffs had never been part of the class which they sought to represent, that is, the class of voters disqualified in Colorado by virtue of the new 2-month requirement.[19]

II. Bona fide residency requirements

§ 5. Requirement that voter be resident of state or locality; generally

Nothing in the Federal Constitution prohibits the states from denying the right to vote to any person who is not a bona fide state, county, or district resident.

Fifteen plaintiffs filed a complaint for declaratory judgment and injunctive relief, in Sola v Sanchez Vilella (1967, DC Puerto Rico) 270 F Supp 459, affd (CA1) 390 F2d 160, alleging that they were citizens of the United States, were presently citizens of the states of New York, New Jersey, or Massachusetts, had previously migrated from Puerto Rico, were native inhabitants of that commonwealth, had an interest in the solution to the political status of Puerto Rico, possessed all of the qualifications necessary to vote in Puerto Rico except for the requirement that they be residents, and desire to vote in a scheduled plebiscite to determine the future political status of Puerto Rico, namely, whether Puerto Rico should retain commonwealth status based on a common citizenship with the United

17. The 6-month residency requirement was subsequently declared unconstitutional by the court.

18. The court estimated that approximately 34,000 persons in Minnesota had been denied the right to vote in the 1968 general election because of the state's 6-month residency requirement.

19. Attention is called to the fact that durational residency requirements as prerequisites for voting for the offices of President and Vice President have been abolished by § 202 of the Voting Rights Act of 1970, 42 USCS § 1973aa-1(a-i), which may be found in § 2[c], supra, which statute was held constitutionally permissible in Oregon v Mitchell (1970) 400 US 112, 27 L Ed 2d 272, 91 S Ct 260, reh den 401 US 903, 27 L Ed 2d 802, 91 S Ct 862.

02494

States should become a state equal to the other 50 states, or should become an independent republic. The court sustained the defendants' motion to dismiss the complaint, saying that although the plaintiffs might eventually decide to return to Puerto Rico to live, and although they had an interest in any solution to the political status of Puerto Rico and possessed property there, they were not citizens or residents of that commonwealth, and because of that fact, they lacked requisite standing to bring the suit. The plaintiffs, explained the court, were in no different a position from that of a citizen and resident of New York, or New Jersey, or Massachusetts, who might have been born, for example, in Missouri, who moved to another state to economically better himself, who became a citizen and resident of that other state, and who, although continuing to own property in Missouri and having nostalgia for that state, could not meet the citizenship and residency requirements for voting in a Missouri election, even though such election might be on such fundamental matters as amending the state constitution or adopting a new one. A state has power to impose reasonable residency restrictions on the availability of the ballot, said the court, and state constitutions and statutes generally require as a prerequisite to the right to vote that an elector in a state election must be a resident of the state. Thus, the court held that the plaintiffs had no standing to challenge the constitutionality of the plebiscite and had no right to vote therein.

In Kollar v Tucson (1970, DC Ariz) 319 F Supp 482, affd 402 US 967, 29 L Ed 2d 133, 91 S Ct 1665, the plaintiffs sought to vote in a municipal water-revenue bond election, but they were denied such privilege because (1) they were not residents of the city of Tucson, and (2) an Arizona statute limited the franchise in such elections to "qualified electors of the municipality." Although the plaintiffs were residents of the county in which the city was located and were served by the city's water system, they were not permitted to vote, even though the plaintiffs argued that if the bonds were issued, their water rates would increase and they would have less adequate service. Holding that residency within municipal boundaries is a constitutionally valid restriction on the right to vote in municipal water bond elections, even when measured by the "compelling state interest" test, the court said that the plaintiffs had chosen to live outside the municipality and to contract for their needed water, and that they should not receive the benefits of city dwelling, such as city utility services and the privilege of voting in bond elections involving those services, without also accepting the burdens, such as living within the municipal boundaries and paying municipal taxes. To give the municipal franchise to all persons with a pecuniary interest in an election result would not permit of a manageable standard or adequately define a cohesive, interested group of electors, said the court. The necessity of a boundary restriction in municipal elections, the generally greater stake of residents in local elections, and the necessity to define the electorate in advance of an election date and to properly administer the elections, said the court, are sufficiently compelling interests for the state's limitation on an absolute right to vote.

As also supporting the view that states may properly and constitutionally require persons who desire to vote in such states to be bona fide residents thereof, see the following cases:

Sup Ct—Carrington v Rash (1965) 380 US 89, 13 L Ed 2d 675, 85 S Ct 775; Evans v Cornman (1970) 398 US 419, 26 L Ed 2d 370, 90 S Ct 1752; Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995.

Second Circuit—Kohn v Davis (1970, DC Vt) 320 F Supp 246, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1305.

Fifth Circuit—Harris v Samuels (1971, CA5 Ala) 440 F2d 748, cert den 404 US 832, 30 L Ed 2d 62, 92 S Ct 77.

Davis v Gallinghouse (1965, DC La) 246 F Supp 208; Gray v Main (1968, DC Ala) 309 F Supp 207; Hadnott v Amos (1970, DC Ala) 320 F Supp 107, affd 401 US 968, 28 L Ed 2d 318, 91 S Ct 1189, and also affd 405 US 1035, 31 L Ed 2d 576, 92 S Ct 1304; Wilson v Symm (1972, DC Tex) 341 F Supp 8.

Sixth Circuit—Bright v Baesler (1971, DC Ky) 336 F Supp 527.

Seventh Circuit—Affeldt v Whitcomb (1970, DC Ind) 319 F Supp 69, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304.

Eighth Circuit—Keppel v Donovan (1970, DC Minn) 326 F Supp 15, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304.

Dist Col Circuit—Lester v Board of Elections (1970, DC Dist Col) 319 F Supp 505, app dismd 405 US 949, 30 L Ed 2d 819, 92 S Ct 992, and vacated on other grounds 405 US 1036, 31 L Ed 2d 575, 92 S Ct 1318.

Iowa—Adams v Ft. Madison Community School Dist. (1970, Iowa) 182 NW2d 132.

Mich—Wilkins v Bentley (1971) 385 Mich 670, 189 NW2d 423, 44 ALR3d 780.

NM—Raton v Sproule (1967) 78 NM 138, 429 P2d 336.

The Supreme Court in dicta has also recognized the unquestioned power of states to require voters or prospective voters to be bona fide residents in the following cases, all of which dealt with voting, but not with residency requirements for voting: Lassiter v Northampton County Board of Elections (1959) 360 US 45, 3 L Ed 2d 1072, 79 S Ct 985; Harper v Virginia State Board of Elections (1966) 383 US 663, 16 L Ed 2d 169, 86 S Ct 1079; Kramer v Union Free School Dist. (1969) 395 US 621, 23 L Ed 2d 583, 89 S Ct 1886; Cipriano v Houma (1969) 395 US 701, 23 L Ed 2d 647, 89 S Ct 1897.

§ 6. —Interests alleged to be served by bona fide residency requirement

[a] Statute insures "purity of ballot box" and prevents fraudulent voting by nonresidents

Though not disputing the right of a state to impose a uniform bona fide residency requirement as a prerequisite for voting, the courts in the following cases held that such statutes cannot be directed against certain classes of persons on the pretext that the exclusion of such persons from voting is necessary in order to preserve the "purity of the ballot box" or to prevent fraud.

In Carrington v Rash (1965) 380 US 89, 13 L Ed 2d 675, 85 S Ct 775, the court held that a Texas state constitutional provision which denied the right to vote to a member of the Armed Forces who moved his home to Texas during the course of his military duty, until he or she ceased being a member of the Armed Forces, even though such person might in fact be a resident of Texas, was a violation of the equal protection clause. The state argued that the provision fulfilled two legitimate purposes, namely, it immunized state elections from the concentrated balloting of military personnel, whose collective voices might overwhelm a small local civilian community, and it protected the franchise from infiltration by transients. The state argued that the provision was necessary to prevent the danger of a "takeover" of civilian communities resulting from concentrated voting by large numbers of military personnel in bases placed near Texas towns and cities. The state also argued, inter alia, that local bond issues might fail and property taxes might stagnate at low levels because military personnel were unwilling to invest in the future of the area. The court held, however, that if such service personnel were in fact residents, they had to be given the same right to an equal opportunity for political representation as other residents, for "fencing out" from the franchise a sector of the population because of the way it might vote was constitutionally impermissible. As for the state's argument that the provision was justified because of the transient nature of service in the Armed Forces, the court pointed out that many other categories of citizens

02496

who were as transient as military personnel were allowed to vote. Furthermore, the court noted, it was only in the area of voting that Texas imposed such a ban, for it had been able to winnow successfully from the ranks of the military those whose residence in the state was bona fide when, inter alia, in divorce cases the residency requirement for jurisdictional purposes had to be determined.

A Michigan statute which provided that no voter should be deemed to have gained or lost his residence while a student at any institution of learning was held to be a violation of the equal protection clause, in Wilkins v Bentley (1971) 385 Mich 670, 189 NW2d 423, 44 ALR3d 780. Although a lower court had held that the statute was an aid in preserving the purity of elections by insuring that students would not vote twice, the appellate court held that such a consideration was insufficient to justify the statute's constitutionality, even though it might be true that the provisions of the statute, as applied to students, did to some minor extent aid in such purpose. The court noted that laws which actually affect the exercise of such a vital right cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil, saying, in addition, that the state legislature had provided numerous sanctions which insured the sanctity and purity of elections, and that in view of such safeguards, the residency statute, as applied to students, was not necessary to insure against voting fraud.

[b] Statute insures knowledgeable, informed, and interested voters, and intelligent exercise of franchise

It has been noted that the imposition of a bona fide residency requirement on the right to vote may provide protection against voters uninformed on local issues.

In Sola v Sanchez Vilella (1967, DC Puerto Rico) 270 F Supp 459, affd (CA1) 390 F2d 160, the court said, in dictum, that a state has power to impose reasonable residence restrictions on the availability of the state ballot, and that state constitutions and statutes, which generally require as a prerequisite to the right to vote that an elector in the state election shall have been a resident of the state for a specified period prior to the election, afford some protection against those who have been living in the state only a short time or who have ceased to be residents of the state, and who have no reasonable or current interest or opportunity to be informed voters on particular local matters, because they do not personally reside there.

+

Presumptions against bona fide residency directed at denying the vote to certain classes of persons, such as students or residents of federal enclaves, cannot be justified on the theory that such persons are less likely than other voters to be informed about the issues or are less likely to cast their votes intelligently.

Holding that residents of the National Institutes of Health, a federal enclave, were entitled to vote in Maryland elections, and that they were residents of Maryland and satisfied that state's bona fide residency requirement, the court, in Evans v Cornman (1970) 398 US 419, 26 L Ed 2d 370, 90 S Ct 1752, said that the sole interest or purpose asserted by the state to justify the limitation on the vote was that the limitation insured that only those citizens who were primarily or substantially interested in or affected by electoral decisions had a voice in making them. Assuming that such an interest could be sufficiently compelling to justify limitations on the suffrage, the court said, such a claim nevertheless cannot lightly be accepted. Reviewing the common interests of the enclave residents with those of other Maryland residents, the court noted (1) that Maryland had been granted numerous rights within the enclave, (2) that state spending and taxing decisions affected enclave residents

02497

the same as other state residents, for the state levied and collected its income, gasoline, sales, and use taxes within the enclave, (3) that state unemployment laws and workmen's compensation laws applied to persons living in the enclave, (4) that enclave residents were required to register their automobiles in Maryland and obtain drivers' permits and license plates from the state, (5) that they were subject to process and jurisdiction of the state courts, (6) that they could resort to state courts in proceedings for divorce and child adoption, and (7) that they sent their children to Maryland public schools. Thus, commenting that the differences between Maryland residents who live on federal enclaves and those who do not were more theoretical than real, the court held the enclave residents to be entitled under the Fourteenth Amendment to protect their interests in Maryland affairs by exercising an equal right to vote.

In Wilkins v Bentley (1971) 385 Mich 670, 189 NW2d 423, 44 ALR3d 780, the state argued that one of the compelling interests served by a state statute which provided that no voter should be deemed to have gained or lost a residence by reason of his being a student at any institution of learning was that the statute promoted a concerned and interested electorate. However, the court held the statute to be unconstitutional under the equal protection clause, saying that it was not "sufficiently drawn to insure that only voters who are primarily interested are allowed to vote." The general voter registration statute of the state, said the court, would allow many disinterested persons, by any criteria, to vote, while the statute under consideration, as applied to students, disenfranchised many interested and concerned citizens. Moreover, the court concluded, there were other groups of persons more transient than students who were not required to meet the provisions of this particular statute, such as operative and kindred workers, craftsmen and foremen, and professionals. Thus, the court held, the state had failed to show that the statute was necessary in order to promote an informed and concerned electorate.

[c] Statute insures orderliness of elections and is administratively necessary

Although states may require voters to be bona fide residents, they may not impose a requirement that voters must file certificates of residence far in advance of an election, where such a requirement is in no sense necessary to the proper administration of a state's election laws.

In Harman v Forssenius (1965) 380 US 528, 14 L Ed 2d 50, 85 S Ct 1177, the Supreme Court, following passage of the Twenty-Fourth Amendment to the United States Constitution, which amendment eliminated payment of poll taxes as a prerequisite for voting, held unconstitutional a Virginia statute, passed subsequently to the enactment of the Twenty-Fourth Amendment, providing that in order to qualify to vote in federal elections a prospective voter either had to pay a poll tax voluntarily or had to file a witnessed or notarized certificate of residence not later than 6 months prior to the election. Holding the statute to be nothing more than an unconstitutional penalty upon those who exercised or attempted to exercise a right guaranteed by the Constitution, the court said that the state had not demonstrated that the alternative requirement in the statute was in any sense necessary to the proper administration of its election laws. Noting that the great majority of other states did not require the payment of poll taxes, yet had apparently found no great administrative burden in insuring that the electorate was limited to bona fide residents, the court said that numerous devices to enforce valid residence requirements were available, the court pointing out that registration, use of the criminal sanction, purging of registration lists, challenges and oaths, public scrutiny by candidates and other interested parties, and other methods, could be used to insure that only bona fide residents voted in federal elections.

02498

§ 7. Particular classes of residents; students

It is impermissible under the Federal Constitution to refuse to register persons who otherwise fulfil state-imposed bona fide residency requirements for voting, merely because such persons are students at institutions of learning.[20]

A student at Dartmouth College, whose parents lived in Hawaii and who had been denied the right to register as a voter in New Hampshire solely because he had stated to voter registration officials that he intended to leave Hanover, New Hampshire, following his graduation from college in another 2 years, challenged the constitutionality of New Hampshire's law disqualifying a citizen from voting in a town if he has a firm intention of leaving that town at a fixed time in the future, in Newburger v Peterson (1972, DC NH) 344 F Supp 559. Applying the "compelling state interest" test to determine the constitutionality of the state law, the court concluded that the "indefinite intention requirement is too crude a blunderbuss to pass muster." On the one hand, said the court, New Hampshire excludes from the franchise a student candid enough to say that he intends to move on after graduation, while on the other hand, those persons who are less precise in their planning or less confident that their plans will be realized at a time certain are allowed to vote. It is impossible, said the court, to see how the latter group would possess any greater knowledge, intelligence, commitment, or responsibility than those with more precise time schedules. Holding that the state had not shown that the "indefinite intention" requirement was necessary to serve a compelling interest, the court held the statute unconstitutional, saying that in a day of widespread planning for change of scene and occupation, it could not see how denying the franchise to the plaintiff because he did not intend to stay permanently in New Hampshire was relevant to responsible citizenship.

Five students at a Vermont college were ordered enrolled as voters in the town where they attended college, in Shivelhood v Davis (1971, DC Vt) 336 F Supp 1111. The Board of Civil Authority, which was charged with registering new voters, had refused to register the students on the ground that a Vermont statute, which required voters to be bona fide residents and to be registered as voters in a town only if they were domiciled in such town as their permanent dwelling place "with the intention of remaining there indefinitely, or returning there if absent from it," prohibited the registration of college students. The court, pointing out that the board had interpreted the provision as requiring that applicants needed to have the intention to remain in the town permanently in order to be granted the right to vote therein, said that such an interpretation was erroneous, because the statute required only an intent to remain in the town "indefinitely." Thus, the court pointed out, an individual's knowledge that he would graduate from an institution of learning and might possibly thereafter leave the town would not of itself preclude him from obtaining domicil in the town if he had no definite plans to leave the town and move elsewhere. Similarly, said the court, an individual's present intention to attend graduate school outside the town would not of itself preclude him from obtaining domicil in the town if he presently intended to return to the town after graduation from graduate school. Setting forth certain factors as guides for the board to use in determining whether a student was in fact domiciled in the town, the court said that the mere facts that a student lived in a dormitory, was unmarried, was supported financially by his parents, would be considered a minor in the state in which his parents lived, and occasionally visited his parents

20. For an annotation dealing generally with the subject of the residence of students for voting purposes, see 44 ALR3d 797. See also 25 Am Jur 2d, Elections § 71.

at their residence, would not alone be sufficient to preclude domicil in the town in which the student attended school, although such factors might be considered together with other relevant evidence. Furthermore, the court noted, the lack of a Vermont driver's license or car registration would be irrelevant unless the individual had a car licensed or registered in another state. Finally, said the court, the facts that college students might have no close nexus with the town, and might be more transitory as a group than any other segment of the population therein, could not be considered as valid reasons for denying them registration. Times have changed and mobility has greatly increased, said the court, and many students have few ties with the communities in which their parents live. They may care little about the political issues in their parents' communities, said the court, but may be well aware of and concerned about the political issues in the communities in which they reside while attending school. Students, as well as other members of the population, are directly and importantly affected by the legislators, executive officials, and laws that govern the communities in which they reside while attending school; and thus, the court concluded, those students who have their bona fide residences in such communities should be permitted to vote there.

Where nine student plaintiffs attacked the constitutionality of an Ohio statute which required the application of different voter qualification tests to students as a class than to all other persons over the age of 18 as a class, the court, in Anderson v Brown (1971, DC Ohio) 332 F Supp 1195, held the statute to be unconstitutional as contravening the equal protection clause of the Fourteenth Amendment. The test applicable to all other persons under the statute was simply "residence," said the court, whereas the test applicable under the statute to a student was not "residence" alone, but was "residence" plus "the establishment of or acquisition of a home for permanent residence." Thus, said the court, two factors were added to the test, namely, "home" and "permanent," which factors were added only to a determination of residence in the case of students and which bore no rational relationship between the classification and any legitimate state purpose or compelling need. Thus, the court ordered the County Board of Elections to apply to the plaintiffs "the exact same tests uniformly applied by the board to nonstudents."

In Bright v Baesler (1971, DC Ky) 336 F Supp 527, the court was asked to determine whether the defendants, who were county and state election officials, had denied students at the University of Kentucky equal protection of the laws, by conditioning their right to register to vote upon overcoming a presumption that the students were domiciliaries of their parents' homes. Noting that the evidence had shown that no group of individuals except students was required to undergo extensive examination as to proof of domicil in order to vote, the court said that the creation of such a discriminatory classification called for application of the "compelling state interest" test in deciding the constitutionality of such a restriction on a fundamental right. The state had conceded that it was possible for a student to establish domicil at the university community, said the court, and there is no reason why the state should, as a policy matter, doubt the veracity of every student who claims to have satisfied the registration requirement. Moreover, said the court, there is no reason to believe that students who have established domiciliary status within the university community will not take a keen and serious interest in the political issues of that area, nor is there any reason to believe that they will not exercise their franchise in a responsible manner. The court said that it could not conceive of any reason why it should not be presumed that student applicants for voter registration, like other applicants, have made their applications to register in good faith. While admittedly a student may not be able to state with certitude that he

C2500

intends to permanently live in the university community, said the court, such a declaration is not necessary to establish domicil, it only being necessary to show that one's former domicil has been abandoned and that there exists no present intention of returning to it. Although concluding that election officials could ask each voter applicant a series of questions directed at proving domicil, the court held that each applicant, including students, must be asked the same questions, and that students could not be required to meet more stringent criteria of domicil than other voter registration applicants.

It is no longer constitutionally permissible to exclude students from the franchise because of fear of the way they may vote, said the court, in Wilkins v Bentley (1971) 385 Mich 670, 189 NW2d 423, 44 ALR3d 780. Students are included in the census determination of a state's congressional apportionment, said the court, and they are subject to the state's laws and regulations, pay state income and other taxes, frequently have children enrolled in the public school system, and have numerous other interrelationships with their local communities and the state. The fear that students will vote radically different from the rest of the electorate is problematical, said the court, and in any event, the right to vote means the right to vote for the candidate of one's choice, regardless of ideology. Thus, the court held that the Michigan statute, which provided that no voter should be deemed to have gained or lost a residence as a result of his being a student at any institution of learning, was unconstitutional because it was a violation of the equal protection clause and did not satisfy any compelling state interest. The court further held that the statute violated the due process clause of the Fourteenth Amendment, and observed that while the law defining voter residence for other citizens was clear and unequivocal, the effect of the law, as applied to students, varied from city to city and from local clerk to local clerk. Thus, the court noted that it had been conceded that the city clerk in Ann Arbor, the city in which the plaintiff University of Michigan students sought to register, used an elaborate questionnaire before allowing students to register, whereas the city clerk of Detroit, where Wayne State University and several colleges are located, did not ask any special questions of student registrants. Holding the statute invalid on due process grounds, the court said that the statute was overly broad and granted a constitutionally prohibited discretion to local clerks in Michigan. The ability to exercise the precious right to vote, the court said, cannot depend on whether a student attends school in a large city or in a smaller town.

For New York decisions ordering the registration, as voters, of students who established the requisite qualifications as, inter alia, bona fide residents of New York, see the following: Robbins v Chamberlain (1947) 297 NY 108, 75 NE2d 617; Reiner v Board of Elections (1967) 54 Misc 2d 1030, 283 NYS2d 963, affd 28 App Div 2d 1095, 285 NYS2d 584, affd 20 NY2d 865, 285 NYS2d 95, 231 NE2d 785.

✦

Where a state has imposed a bona fide residency requirement on the right to vote, it is perfectly proper to deny students the right to vote in their college or university communities if, by applying the same indicia to determine bona fide residency to them as are applied to others seeking to vote, it is determined that such students are not bona fide residents of their college or university communities.

In Gorenberg v Onondaga County Board of Elections (1972) 38 App Div 2d 145, 328 NYS2d 198, mod on other grounds 31 NY2d 36, 334 NYS2d 860, 286 NE2d 247, the court held constitutional a New York statute which provided that for "the purpose of registering and voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence . . . while a student of any institution of learning; . . ." The statute is neutral, said the court,

requiring only that a student who seeks to register in his educational community must present evidence of a bona fide residence there. The statute is not unconstitutionally discriminatory and does not leave the right to vote to the whim of the individual election official, said the court.

In Whittington v Board of Elections (1970, DC NY) 320 F Supp 889, the court refused to convene a 3-judge court to hear a challenge by the plaintiffs, all of whom were at least 21 years old and were students at a university in New York, to a provision of which the statute involved in the Gorenberg Case, supra, was modeled and which provided that, for the purpose of voting, "no person shall be deemed to have gained or lost a residence by reason of his presence or absence [in New York] . . . while a student in any seminary of learning. . . ." The court noted that the plaintiffs' contention that the constitutional provision precluded a student from changing his voting residence to New York, and prevented a student from qualifying to vote in New York, was plainly erroneous, the court saying that the provision was in fact neutral. Observing that a student who sought to register to vote in his university community had to present indicia of bona fide residence therein, apart from his presence as a student, just as a construction worker who might come into the community to work on a new construction project would be required to establish a bona fide residence apart from his presence as a construction worker, the court held the students' contention to be without merit, the court saying that New York courts had in fact previously ordered the registration of large numbers of students who had established the requisite qualifications as bona fide residents of New York, apart from their status as students in a university.

In Wilson v Symm (1972, DC Tex) 341 F Supp 8, five students who were enrolled at a college in Texas sought to compel the proper county official to register them as voters, the official having declined to register the plaintiffs to vote after reaching a determination that they were not residents of the county within contemplation of the state residency statute, which statute created a rebuttable presumption that the residence of a student "in a school, college, or university shall be construed to be where his home was before he became such student unless he has become a bona fide resident of the place where he is living while attending school or of some other place." Noting that it is perfectly proper for a state to require voters to be bona fide residents of the community in which they seek to vote, the court held that the application of a controvertible presumption of nonresidency to certain inherently transient classes did not offend the United States Constitution. It is still the law that a state may enforce a valid local residency requirement, said the court, and when confronted by a class of persons which presents special problems in determining residency, it may employ inquiry procedures reasonably related to that end.

In Kegley v Johnson (1966) 207 Va 54, 147 SE2d 735, a married student at the University of Virginia, who alleged that he had previously been registered to vote at an address in Florida, but that he was no longer so registered, claimed that his right to equal protection of the laws was violated by a section of the Virginia Constitution which provided that no student in any institution of learning should be regarded as having either gained or lost a residence, insofar as the right of suffrage was concerned, by reason of his location in such institutions. The provision referred to, said the court, was not an absolute prohibition against a student's establishing residence in Virginia. Therefore, it held that since students could establish residence in Virginia, although the plaintiff had in fact not done so, his right to equal protection of the laws had not been violated.

§ 8. — Military personnel

No state may deny the right to vote to one of its bona fide residents merely

02502

because that person is a member of the Armed Forces of the United States.[1]

A provision of the Texas Constitution, which prohibited "[a]ny member of the Armed Forces of the United States" who moved his home to Texas during the course of his military duty from ever voting in any election in that state "so long as he or she is a member of the Armed Forces," was held unconstitutional in Carrington v Rash (1965) 380 US 89, 13 L Ed 2d 675, 85 S Ct 775. In argument, the state conceded that the petitioner, a sergeant in the United States Army, had been domiciled in Texas since 1962, that he intended to make his home there permanently, that he had purchased a house in El Paso where he lived with his wife and two children, that he was also the proprietor of a small business there, that he paid property taxes in Texas and had his automobile registered there, and that he would have been eligible to vote but for the state constitutional provision. Texas has unquestioned power to impose reasonable residency restrictions on the availability of the ballot, said the court, but states may not casually deprive a class of individuals of the right to vote because of some remote benefit to the state. It is true, the court continued, that special problems might be involved in determining whether a serviceman has actually acquired a new domicile in a state for the purpose of voting, and Texas is free to take reasonable and adequate steps to see that all applicants for the vote actually fulfil the requirements of bona fide residence. However, the court said, Texas is not free to create a presumption that all servicemen, no matter how long they may have lived in Texas and no matter how much proof to the contrary might be deduced, are not and never can be residents of Texas.

A provision of the Texas Constitution which provided that "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces," was declared unconstitutional as violative of the equal protection clause of the Fourteenth Amendment, in Mabry v Davis (1964, DC Tex) 232 F Supp 930, affd 380 US 251, 13 L Ed 2d 818, 85 S Ct 936. All of the plaintiffs were members of the United States Armed Forces who had lived for more than a period of 1 year in housing owned by them located outside military reservations in Texas. The plaintiffs had all come to Texas from outside the state, and, following their establishment of residences there, they were denied the right to vote solely because they were members of the Armed Forces, even though they had satisfied all of the other requirements of Texas law. Though not disputing that some military personnel stationed in Texas could no doubt be said to have retained their domicils elsewhere, the court held that any attempt to segregate all persons in military service as a class to be treated differently from other persons in regard to the right to vote was arbitrary and unreasonable. Any fear of a military takeover of the ballot box, whether real or imagined, said

1. Included in this section are cases involving the denial of the right to vote in state elections to members of the Armed Forces *because of their status* as military personnel. For decisions involving the denial of the right to vote in state elections to members of the Armed Forces because they resided on military reservations (but not because of their status as military personnel), see § 10, infra, where such cases are included with others involving denial of the right to vote to residents of various types of federal enclaves, reservations, or installations. For annotations dealing generally with voting by persons in military service, see 140 ALR 1100, 147 ALR 1443, 148 ALR 1402, 149 ALR 1466, 150 ALR 1460, 151 ALR 1464, 152 ALR 1459, 153 ALR 1434, 154 ALR 1459, 155 ALR 1459. See also 25 Am Jur 2d, Elections § 75.

the court, would not justify such a wholesale discrimination against military personnel; nor would any supposition that servicemen may think differently from others in the community in which they seek to vote constitute any reason to deny them the right to vote, said the court, for implicit in the concept of full citizenship under the Federal Constitution in a free society is the right to think as one pleases, and then, if he is a qualified elector under reasonable standards imposed by the state, to vote as his conscience dictates.

For New York decisions granting the right to vote in state elections to members of the Armed Forces living outside military reservations, see Application of Seld (1944) 268 App Div 235, 51 NYS2d 1, and Re Cunningham (1904) 45 Misc 206, 91 NYS 974.

§ 9. — Minors

Under the Federal Constitution, a state must apply the same tests or standards for determining bona fide residency to prospective voters who are under the age of 21 as it applies to prospective voters who are 21 years of age or older.

Confronted with a Texas election law which provided for a determination of voting residency of persons under 21 years of age on a different basis than for persons over 21 years of age, the court, in Ownby v Dies (1971, DC Tex) 337 F Supp 38, held that the statute violated the equal protection clause of the Fourteenth Amendment and abridged the right to vote of persons who were 18 but not yet 21, in violation of the Twenty-Sixth Amendment to the United States Constitution. The court therefore decreed the statute to be null and void, and declared the plaintiffs to be entitled to register as voters under the same terms and conditions generally applicable to persons 21 years of age and older.

In Jolicoeur v Mihaly (1971) 5 Cal 3d 565, 96 Cal Rptr 697, 488 P2d 1, nine individual unmarried minor plaintiffs, after passage of the Twenty-Sixth Amendment to the United States Constitution, sought writs of mandate directed to various California registrars ordering them to register the plaintiffs according to the same procedures and qualifications that the registrars followed with respect to adult registrants. One of the plaintiffs, whose parents lived in Argentina, was told that he could not vote in local elections unless he became a married minor. Among the other plaintiffs, at least two who were fully self-supporting and worked full-time were told that those facts were irrelevant to their capacity to establish a legal residence for voting purposes. One of the plaintiffs, who had never lived at his parents' current domicil and who was not familiar with any political issues pertinent to that area, was told that he had to vote where his parents lived, and not where he lived. Concluding that the different treatment received by such minor citizens from state officials, who applied different standards to them than were applied to adults seeking to vote, was a violation of the Twenty-Sixth Amendment, the court held that strong state policies required that voters should usually participate in elections where they reside, and that the minor plaintiffs should be treated as emancipated and as adults for voting purposes in light of the Twenty-Sixth Amendment.

§ 10. — Residents of federal enclaves or of District of Columbia

Prospective voters who, but for the fact that they reside on a federal enclave located within the geographical boundaries of a state or one of its political subdivisions, meet all of the requirements established by the state as prerequisites for voting, including bona fide residency requirements, may not be denied the right to vote in such state on the untenable ground that as residents of a federal enclave they are not residents of the state.[2]

2. Included in this section are, inter alia, cases involving the denial of the right to vote in state elections to residents of military installations. For decisions involving denial of the right to vote to members of the Armed

02504

The appellees, who lived on the grounds of the National Institutes of Health, a federal reservation or enclave located within the geographical boundaries of Montgomery County, Maryland, were declared by the County Board of Registry to be nonresidents of Maryland, and accordingly not entitled to vote in Maryland elections; and thereafter, in Evans v Cornman (1970) 398 US 419, 26 L Ed 2d 370, 90 S Ct 1752, following the issuance by a three-judge District Court of a permanent injunction and decision holding that denying the appellees the right to vote in Maryland elections constituted a violation of the equal protection clause, and the granting of a motion by the appellants to intervene as additional defendants in the District Court, a direct appeal was taken to the Supreme Court. Affirming the judgment of the District Court, the court noted that Congress had constitutional power to exercise exclusive jurisdiction in all places purchased for needed federal facilities with the consent of the legislature of the state in which the facility was located, and, the court observed, the National Institutes of Health, a medical research facility owned and operated by the Federal Government, was one of the places subject to that congressional power. The appellees clearly live within the geographical boundaries of Maryland, the court noted, and they are treated as state residents in the census and in determining congressional apportionment. They are not residents of Maryland, the court continued, only if the enclave grounds ceased to be a part of Maryland when the enclave was created. However, the fiction of a "state within a state" was specifically rejected in Howard v Commissioners of Sinking Funds (1953) 344 US 624, 97 L Ed 617, 73 S Ct 465, the court noted, and it cannot now be resurrected to deny the appellees the right to vote.

In Arapajolu v McMenamin (1952) 113 Cal App 2d 824, 249 P2d 318, 34 ALR2d 1185, it was held that the petitioners, some of whom were civilian employees of the United States, some of whom were in the Armed Forces of the United States, some of whom were spouses of persons in those two classes, and one of whom was a civilian postmistress, and all of whom resided on military reservations in California, were residents of California for the purpose of voting, the court holding that the military reservations in question were not "foreign" to California, but were a part thereof, since Congress had receded jurisdiction to the states, in substantial particulars, over federal lands as to which the United States previously had exclusive jurisdiction.

For other state decisions granting residents of federal enclaves the right to vote in state elections, see the following cases:

Ariz—Harrison v Laveen (1948) 67 Ariz 337, 196 P2d 456 (holding that Indians living on government reservations have the right to vote in state elections).

Kan—Cory v Spencer (1903) 67 Kan 648, 73 P 920.

Mo—Lankford v Gebhart (1895) 130 Mo 621, 32 SW 1127 (by inference).

Neb—State ex rel. Valentine v Griffey (1876) 5 Neb 161.

NY—Re Application for Removal of Voters' Names from Registry List (1928) 133 Misc 38, 231 NYS 396.

Ohio—Renner v Bennett (1871) 21 Ohio St 431.

Utah—Rothfels v Southworth (1960) 11 Utah 2d 169, 356 P2d 612.

Forces because of their status as military personnel (without regard to the location of their homes), see § 8, supra. For an annotation dealing generally with the subject of the state voting rights of residents of federal military establishments, see 34 ALR2d 1193. For an annotation dealing with the right of persons living in an area acquired by the Federal Government for housing facilities for persons engaged in national defense activities to register and vote at state elections, see 142 ALR 430. See also, as to the residence qualifications of voters living on government reservations or federal lands, 25 Am Jur 2d, Elections § 76.

02505

W Va—Adams v Londeree (1954) 139 W Va 748, 83 SE2d 127.

For state decisions holding that residents of federal enclaves are not residents of the state and may not vote in state elections (although apparently no longer good authority in view of the decision in Evans v Cornman (1970) 398 US 419, 26 L Ed 2d 370, 90 S Ct 1752, supra, see the following cases:[3]

Colo—Merrill v Shearston (1923) 73 Colo 230, 214 P 540; Kemp v Heebner (1925) 77 Colo 177, 234 P 1068.

Kan—Herken v Glynn (1940) 151 Kan 855, 101 P2d 946.

Md—Royer v Board of Election Supervisors (1963) 231 Md 561, 191 A2d 446, cert den 375 US 921, 11 L Ed 2d 165, 84 S Ct 267.

Mass—Commonwealth v Clary (1811) 8 Mass 72 (recognizing rule); Opinion of Justices (1841) 42 Mass 580.

NM—Arledge v Mabry (1948) 52 NM 303, 197 P2d 884; Langdon v Jaramillo (1969) 80 NM 255, 454 P2d 269.

NY—Re Highlands (1892, Sup) 48 NYSR 795, 22 NYS 137.

Ohio—Sinks v Reese (1869) 19 Ohio St 306; State ex rel. Wendt v Smith (1951, App) 63 Ohio L Abs 31, 103 NE2d 822.

SD—McMahon v Polk (1897) 10 SD 296, 73 NW 77.

Tenn—State ex rel. Lyle v Willett (1906) 117 Tenn 334, 97 SW 299.

✦

The District of Columbia is not a federal enclave, but is a separate entity, and residents of the District have no right to vote in Maryland elections.

In Albaugh v Tawes (1964, DC Md) 233 F Supp 576, affd 379 US 27, 13 L Ed 2d 173, 85 S Ct 194, reh den 379 US 940, 13 L Ed 2d 351, 85 S Ct 325, an unsuccessful candidate for the Republican nomination for United States Senator from Maryland challenged the validity of the primary election because residents of the District of Columbia had not been permitted to vote in the Maryland election, which the plaintiff claimed should have been permitted. However, the court dismissed the complaint, saying that while it was clear that the District of Columbia had, at one time, been part of the state of Maryland, it had been uniformly recognized by the executive, legislative, and judicial branches of the United States Government and of the state of Maryland, since passage of the Organic Act of 1801, 2 Stat. 103, ch 15, that residents of the District of Columbia were no longer citizens of the state of Maryland.

III. Durational residency requirements: constitutional considerations

A. Decisions based on equal protection of the laws and the right to vote

§ 11. Standard to be used in reviewing validity of durational residency requirement

[a] "Compelling state interest" test

In the following cases, it was held that the proper yardstick by which to measure the validity, under the Federal Constitution, of durational residency requirements imposed by the states as preconditions on the right to vote is the "compelling state interest" test, under which the state must justify any restriction upon the fundamental right to vote by a showing that it serves some compelling state interest.

Reviewing the constitutionality of a Tennessee statute which required 1 year's residency in the state and 3 months' residency in the county as a

---

3. In the Evans Case, supra, the Supreme Court specifically mentions a number of the following cases, but discounts them by saying: "We need not consider, however, whether these early cases would meet the requirements of the Fourteenth Amendment, for the relationship between federal enclaves and the States in which they are located has changed considerably since they were decided."

prerequisite to voting, the court, in Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, said that durational residency requirements completely bar from voting all residents not meeting fixed durational standards, and that by denying some citizens the right to vote, such laws deprive them of a fundamental political right. Citizens have a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction, said the court, and while this "equal right to vote" is not absolute, the states having the power to impose voter qualifications and to regulate access to the franchise in other ways, nevertheless before the right to vote can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny. Although it recognized that it had tested such requirements by the equal protection standard applied to ordinary state regulations in the past,[4] that is, that it had tested such requirements by inquiring whether they were reasonably related to a permissible state interest, the court said that "it is certainly clear now that a more exacting test is required for any statute which 'places a condition on the exercise of the right to vote,' " the test being that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.' "[5]

Where a 1-year residency requirement in a Massachusetts law was attacked as being unconstitutional and violative of the equal protection clause, the court, in Burg v Canniffe (1970, DC Mass) 315 F Supp 380, affd 405 US 1034, 31 L Ed 2d 575, 92 S Ct 1303, said that the major issue for resolution in the case was to determine the yardstick by which the statute under attack had to be "meticulously scrutinized" by the court. Noting that the defendants contended that the test that should be applied to resolve whether or not the equal protection clause had been violated was the so-called "rational legislative purpose" test used in a series of Supreme Court decisions which had examined attacks on state legislation under the equal protection clause of the Fourteenth Amendment, the court held that in light of a number of subsequent decisions by the same court, and because of the importance of the right to vote, the fact that a state statute which discriminates against some portion of a state's electorate may serve a rational state purpose, or can be shown to have a "rational basis," no longer would suffice to sustain its validity in the face of a claimed violation of the equal protection clause. The "compelling interest" test must be used in determining the

---

4. The court specifically referred to Drueding v Devlin (1965) 380 US 125, 13 L Ed 2d 792, 85 S Ct 807, where it had affirmed per curiam and without an opinion a three-judge District Court decision upholding Maryland's durational residency requirement, which the lower court had tested by the usual equal protection standard applied to ordinary state regulations (234 F Supp 721). Although the Supreme Court did not specifically say so, the Drueding Case should clearly no longer be cited as controlling authority on the proper standard of review to be applied in determining the constitutionality of residency requirements for voting.

5. It should be noted that the Supreme Court emphasized the difference between bona fide residence requirements and durational residence requirements by saying that "[w]e have in the past noted approvingly that the States have the power to require that voters be bona fide residents of the relevant political subdivision," and by further saying: "An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny. But *durational* residence requirements, representing a separate voting qualification imposed on bona fide residents, must be separately tested by the stringent standard."

02507

validity of state voting statutes attacked on equal protection grounds, said the court, for any legal restriction which curtails the civil rights of a single group is immediately suspect, and courts must subject such restrictions to the most rigid scrutiny.

Governmental classifications which create a disparity in treatment are the foundation of all violations of the equal protection clause, said the court, in Kohn v Davis (1970, DC Vt) 320 F Supp 246, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1305. Thus, confronted with a challenge to a Vermont law which required voters to have resided in the state for 1 year prior to the election of "representatives," the court said that the applicable statute created a discriminatory treatment differential, namely, that Vermonters who had resided in the state for 1 year could vote, while those who had not resided in the state for 1 year could not. Before such a classification and its necessary effects could rise to the level of an equal protection violation, the court continued, it would have to be shown that the discriminatory classification was unjustified in terms of its governmental purpose under the applicable standard of review. Noting that the United States Supreme Court had frequently characterized the right to vote as a "fundamental" right, the court said that a discriminatory classification abridging a fundamental right must be measured by the stringent "compelling state interest" test, which standard defines a more active judicial posture under which a discriminatory classification can be upheld only when it is necessary in the service of some compelling state interest.

In holding invalid a North Carolina 1-year residency requirement as it related to the right to vote in local elections, the court, in Andrews v Cody (1971, DC NC) 327 F Supp 793, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1306, noted that a threshold question to be answered was what test should be applied in determining whether the durational residency requirement violated the equal protection clause. The court further noted that, generally speaking, those decisions which had adopted the "reasonableness" test had upheld similar durational residency requirements, while those courts which had adopted the "compelling state interest" test had generally struck down, at least in part, such state requirements. Although finding that the "compelling state interest" test was supported by the greater weight of authority, and although it said that it would apply such test if it were necessary, the court concluded that under either test, the 1-year durational residency requirement was violative of the equal protection clause as it related to local elections in North Carolina.

Declaring an Alabama law which required prospective voters to have resided in the state at least 1 year, in the county 6 months, and in the precinct or ward 3 months, immediately preceding the election at which they offered to vote, to be a violation of the equal protection clause, the court, in Hadnott v Amos (1970, DC Ala) 320 F Supp 107, affd 401 US 968, 28 L Ed 2d 318, 91 S Ct 1189, and also affd 405 US 1035, 31 L Ed 2d 576, 92 S Ct 1304, noted that the "cherished right to vote" is close to the core of "our constitutional system," and that it is a right so fundamental that any state restriction of it must be justified by some compelling interest. Observing that the state had shown no compelling interest in such a residency requirement for voting in county and precinct elections, the court declared, insofar as such elections were concerned, that the state law requiring residence in a county for 6 months and in a precinct or ward for 3 months was unconstitutional.

In Lester v Board of Elections (1970, DC Dist Col) 319 F Supp 505, app dismd 405 US 949, 30 L Ed 2d 819, 92 S Ct 992,[6] the plaintiffs claimed

6. This case has a curious history. Although the three-judge District Court held that the District of Columbia's 1-year durational residency requirement for voting was unconstitutional for substantially the same reasons as the United States Supreme Court held that Tennessee's 1-year

02508

that a 1-year residency requirement imposed by Congress as a prerequisite for voting in the District of Columbia created an arbitrary classification which restricted the exercise of their fundamental right to vote, without a showing of a compelling governmental interest, in violation of the equal protection clause. Agreeing with the plaintiffs that the constitutionality of the law had to be measured by the "compelling state interest" test, the court noted that such a test had two branches, the first branch requiring that classifications based on "suspect" criteria be supported by a compelling state interest, and the second branch requiring that statutory classifications which affect a "fundamental right" be supported by a compelling state interest. It is clear, said the court, that voting questions fall under the second branch, and that any governmental action which limits, restricts, or denies the right to vote must meet the closest constitutional scrutiny.

As also supporting the view that the "compelling state interest" test is the proper test to be applied in determining whether a state's durational residency requirement, imposed as a prerequisite on the right to vote, violates the equal protection clause, see the following cases:

Second Circuit—Nicholls v Schaffer (1972, DC Conn) 344 F Supp 238.

Fourth Circuit—Bufford v Holton (1970, DC Va) 319 F Supp 843, affd 405 US 1035, 31 L Ed 2d 576, 92 S Ct 1304.

Fifth Circuit—Woodsum v Boyd (1972, DC Fla) 341 F Supp 448; Graham v Waller (1972, DC Miss) 343 F Supp 1.

Seventh Circuit—Affeldt v Whitcomb (1970, DC Ind) 319 F Supp 69, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304; Piliavin v Hoel (1970, DC Wis) 320 F Supp 66 (court assumed, for purposes of deciding motion for preliminary injunction, that the "compelling state interest" test was the proper standard by which to judge Wisconsin's 6-month durational residency requirement for voting).

Eighth Circuit—Keppel v Donovan (1970, DC Minn) 326 F Supp 15, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304.

Cal—Young v Gnoss (1972) 7 Cal 3d 18, 101 Cal Rptr 533, 496 P2d 445.

Keane v Mihaly (1970) 11 Cal App 3d 1037, 90 Cal Rptr 263.

NY—Atkin v Onondaga County Board of Elections (1972) 30 NY2d 401, 334 NYS2d 377, 285 NE2d 687.

[b] "Rational relation" test

The courts in the following cases held that the proper test to apply in determining the validity of state durational residency requirements for voting was the "rational relation" test, under which the one challenging the requirement has the burden of proving that the requirement bears no rational relationship to any legitimate state interest. (It should be noted that, in view of the Supreme Court's holding in Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, discussed in § 11[a], supra, that the "compelling state interest" test, rather than the "rational relation" test, is the proper standard for reviewing such requirements, the following cases are of doubtful validity on this point of law.)

In Fontham v McKeithen (1971, DC La) 336 F Supp 153 (US App Pending), the court, confronted with a challenge to a Louisiana law that required prospective voters to satisfy the requirements of having lived in the state 1 year and in the parish 6 months, held that the plaintiffs' attacks on the statute in question failed to overcome the presumption of constitutionality af-

---

durational residency requirement for voting was unconstitutional, in Dunn v Blumstein, supra, the Lester Case, upon direct appeal to the Supreme Court, was vacated and remanded for reconsideration in light of the Dunn Case, 405 US 1036, 31 L Ed 2d 575, 92 S Ct 1318. Upon remand, the United States District Court for the District of Columbia, on August 14, 1972, entered a one-line order reading as follows: "The District of Columbia residency requirement is unconstitutional."

forded the statute, and it therefore denied the relief sought by them. A resident of a state does not have a right to vote in state elections, said the court. There is no inherent right to vote, but a privilege to vote, the court continued, which privilege is granted by the state and is not derived from citizenship of the United States, nor granted by the Federal Constitution or any of its amendments. Of course, said the court, state standards regulating the rights of voters in state and local elections are not immune from challenges that they offend federally protected rights, but restraint has traditionally been exercised in reviewing state legislation creating classifications of voters in order to promote legitimate state interests, the general standard for reviewing such legislation being known as the "rational relation" test. There being no federal constitutional right to vote in state and local elections, said the court, the constitutionality of the residency requirements must be tested by application of the "rational relation" test rather than by the "compelling state interest" test.

In Howe v Brown (1970. DC Ohio) 319 F Supp 862, the plaintiffs, having satisfied every requirement for voting in Ohio except the requirement imposed by an Ohio law which required prospective voters to have resided in Ohio for 1 year preceding the election in which they first seek to vote, brought suit alleging that the Ohio durational residency requirement deprived them of equal protection of the laws. As a general rule, said the court, where a state legislates within areas of its competence, where its legislation is nondiscriminatory on its face and as applied, and where its legislation does not impinge upon the federal constitutional rights of any citizen, any classification created by the legislation survives scrutiny under the equal protection clause so long as the classification is rationally related to promoting a legitimate state interest and is reasonable. The general rule, the court continued, is not without exception, for implicit in the concept of federalism is the principle that the states surrender certain of their powers to the Federal Government, and one obvious limitation on a state's power to enact valid laws is that its legislation must not create classifications that impinge upon federally secured constitutional rights. Where such a case exists, the court said, the classification must come under exacting scrutiny, and is tested by the "compelling state interest" test. However, since no one has a federal constitutional right to vote in state and local elections, the court explained, the state may create reasonable nondiscriminatory classifications among those to whom it will grant the franchise. Since reasonable conditions of suffrage do not impinge upon a federal constitutional right to vote in state and local elections, the court said, the "rational relation" test should be applied. Recognizing a line of cases which held that the "compelling state interest" test rather than the "rational relation" test should be applied to determine the constitutionality of state residency requirements, the court explained that the more exacting test, when carefully analyzed, should be reserved to test only those state voter classifications which impinge upon the constitutional right of *all* qualified voters to vote in *all* state and local elections in which they have an interest. In the instant case, said the court, there is no allegation that the residency requirement has the purpose or effect of disenfranchising individuals or classes of individuals because of the way they might vote, there is no allegation whatever that persons who have lived within the state for less than 1 year tend to vote the same way on any issues, the requirement applies uniformly, and there is no suggestion that it has been applied unconstitutionally. Furthermore, the court continued, while the statute admittedly creates a classification, the classification created is no more invidious than those classifications created by state statutes requiring voters to be of a certain age, or to be literate, or to be citizens. Until "the Supreme Court sees the need to apply the 'compelling state inter-

02510

est' test in all voting rights cases, or applies it across the board in equal protection cases," said the court, "it is not within this Court's province to declare every inequality, every inconvenience, every burden a state places upon one class of citizens and not on another, and every distinction created by legislatures violative of the Equal Protection Clause."

The following Supreme Court decisions applied the "rational relation" test as the correct standard for reviewing state statutes imposing residency requirements on the right to vote, but, as previously noted, since the decisions antedated Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, discussed in § 11[a], supra, they would almost certainly appear to no longer represent controlling authority as to that point: Pope v Williams (1904) 193 US 621, 48 L Ed 817, 24 S Ct 573; Carrington v Rash (1965) 380 US 89, 13 L Ed 2d 675, 85 S Ct 775 (dictum); and Drueding v Devlin (1965) 380 US 125, 13 L Ed 2d 792, 85 S Ct 807.[7]

See also Cocanower v Marston (1970, DC Ariz) 318 F Supp 402, holding that the "rational relation" test was the proper measure to use in determining the constitutionality of Arizona's 1-year durational residency requirement for voting, which case, however, was vacated and remanded for reconsideration (405 US 1036, 31 L Ed 2d 575, 92 S Ct 1303) on the basis of Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995.

§ 12. Interests alleged to be served by durational residency requirement

[a] Statute insures purity of ballot box, prevents fraudulent voting by nonresidents, and eliminates colonization threat

In the following cases, it was held that the imposition of durational residency requirements on the right to vote was either unnecessary or ineffective to achieve the desirable goal of maintaining the "purity of the ballot box" by preventing fraud in elections.

In Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, the court declared unconstitutional a Tennessee residency requirement that prospective voters must have been residents of Tennessee for 1 year and of their respective counties for 3 months before they could vote. Concluding that the statute had to be declared invalid unless it served some compelling state interest, the court examined the state's contention that its durational residency requirement insured the "purity of the ballot box" and afforded protection against fraud through colonization and the inability to identify persons offering to vote. While the prevention of fraud in elections is a legitimate and compelling governmental goal, said the court, it is impossible to view durational residency requirements as necessary to achieve that state interest. Preventing fraud, which is the asserted evil allegedly justifying state lawmaking in this area, means keeping nonresidents from voting, said the court, but by definition, a durational residency law bars newly arrived residents from the franchise along with nonresidents. Given a system of state voter registration, said the court, it is difficult to see why durational residency requirements are in fact necessary to identify bona fide residents. Noting that the qualifications of a would-be voter in Tennessee were not determined until he registered to vote, which he could do until 30 days before an election, and that these qualifications, including bona fide residency, were established then only by oath, the court said that

7. The Supreme Court noted, in the Dunn Case, supra, as follows: "Drueding was a decision upholding Maryland's durational residence requirements. The District Court tested those requirements by the equal protection standard applicable to ordinary state regulations: whether the exclusions are reasonably related to a permissible state interest. . . . We summarily affirmed per curiam without the benefit of argument. But if it was not clear then, it is certainly clear now that a more exacting test is required for any statute which 'places a condition on the exercise of the right to vote.'"

02511

it would appear that a durational residency requirement is no more effective to stop fraud than a simple residency requirement, because a nonresident intent on committing election fraud will as quickly and effectively swear that he has been a resident for the requisite period of time as he will swear that he is simply a resident. Furthermore, said the court, although there is no indication in the record that the state routinely investigates a would-be voter's statements to determine if he is actually a bona fide resident, any argument that a durational residency requirement is necessary in order to give the state time to verify claims of bona fide residents would seem illogical in view of the fact that the state permits registration up to 30 days before an election. A lengthy durational residency requirement therefore would not necessarily increase the amount of time the state would have to carry out an investigation into a claim by a would-be voter that he is in fact a resident, said the court. Thus, it is clear, the court observed, that while a durational residency requirement creates a classification which may, in a crude way, exclude nonresidents from voting, it also excludes many bona fide residents, and given the state's legitimate purpose in excluding from voting nonresidents and the individual interests which are affected, the classification is all too imprecise.

In Affeldt v Whitcomb (1970, DC Ind) 319 F Supp 69, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304, the court said that one of the principal interests presented by the state to justify its imposition of a 6-month durational residency requirement upon persons moving into the state as a prerequisite to being allowed to register to vote was the preservation of the purity of elections. However, said the court, the 6-month requirement is, for all practical purposes, no guaranty of a "pure" election, since the qualifications of an Indiana voter are established by oath at the time of registration, which may take place up to and including the 29th day before an election. A nonresident who wants to vote can falsely swear that he is an Indiana resident, explained the court, and the 6-month residency requirement as presently administered in Indiana added no real protection against dual voting or colonization, even if such an interest could be labeled "compelling." Fraud, said the court, could be prevented by other means less drastic than the denial of the right to vote because of failure to meet a 6-month durational residency requirement. For example, the court explained, a certification from a new resident's former election district that the new voter had not retained registration in his former district may be "necessary" under the compelling interest test to insure against dual voting, but a 6-month requirement imposes an overbroad burden upon the right to vote.

Concluding that the "compelling state interest" test had to be applied to determine whether or not a Minnesota durational residency requirement of 6 months violated the equal protection of the laws guaranteed to the plaintiffs, the court in Keppel v Donovan (1970, DC Minn) 326 F Supp 15, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304, examined the contention of the state that the requirement promoted the compelling state interest of identifying voters and protecting against fraud. Noting that Minnesota law also required that prospective voters be residents of their election districts or precincts for 30 days next preceding an election, which law was not being challenged in the instant suit, the court said that it was unable to determine how the 6-month residency requirement promoted the prevention of voting fraud. If it were to be argued that the 6-month requirement helped in the small communities where voting is permitted upon personal recognition rather than upon registration, said the court, such an argument would be specious, for if a person were to move from one part of the state to a small community in a distant part of the state, he would be eligible to vote after having lived in his new community for only 30 days. Such a person could conceivably have moved from a point

02512

in the state 300 miles away, said the court, and there is no way that the 6-month residency requirement would make identification of him any easier. On the other hand, the court continued, in those parts of the state where new voters are required to register, they are merely asked to certify that they have been residents of the state for 6 months. No showing was made that any investigation is made into the actual length of their residency, or that the 6-month period is needed for determining eligibility or detecting fraud, said the court, and since voting officials have 20 days after registration closes in which to compile a list of voters, there also appears to be no practical relation between the 6-month residency requirement and the administrative needs of the state.

In Keane v Mihaly (1970) 11 Cal App 3d 1037, 90 Cal Rptr 263, the court held that a California 1-year residency requirement for voting did not meet the standard of necessity to enforce a compelling state interest, and that it therefore violated the equal protection clause of the Fourteenth Amendment, in spite of the state's argument that the 1-year requirement was necessary to prevent fraudulent use of the electoral machinery and to reduce the number of additional deputy registrars that would be needed if no residency requirement were imposed. Insofar as actual fraud is concerned, said the court, no evidence had been presented that the registrars had any need for, or did in fact accomplish, any check of the voters' declarations of residency. Furthermore, said the court, while the intent to make one's home in California indefinitely might more surely be determined to exist the longer one has resided in the state, a whole year would seem unnecessary.

As agreeing with the views expressed by the United States Supreme Court in Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, supra, and by the California Court of Appeals in Keane v Mihaly (1970) 11 Cal App 3d 1037, 90 Cal Rptr 263, see the opinion of the Supreme Court of California in Young v Gnoss (1972) 7 Cal 3d 18, 101 Cal Rptr 533, 496 P2d 445, where the court, in declaring that the desirable goal of preventing election fraud was not served by a California law imposing a durational residency requirement of 90 days in the county and 54 days in the precinct as a prerequisite to voting, held the California law to be unconstitutional as a violation of the equal protection clause.

✦

In the following cases, the courts held that the desirable goals of preventing colonization and fraud in elections were aided by the imposition of durational residency requirements, and that such requirements were permissible.

Although the court in Burg v Canniffe (1970, DC Mass) 315 F Supp 380, affd 405 US 1034, 31 L Ed 2d 575, 92 S Ct 1303, held that a Massachusetts statute which required, as a prerequisite for voting in elections, that a voter seeking to register must be able to prove that he had resided within the borders of Massachusetts for the preceding 12 months, violated the equal protection clause and was unconstitutional, it permitted another Massachusetts requirement that all voters be able to show that they had resided for 6 months in the towns in which they sought to register as voters to continue in effect, the court saying that it was aware that states have a legitimate interest in requiring their voters to establish that they have satisfied a durational residency requirement of some length, for such a requirement serves to protect the state against fraud and to insure the so-called "purity" of the electorate.

See also Sola v Sanchez Vilella (1967, DC Puerto Rico) 270 F Supp 459, affd (CA1) 390 F2d 160, where the court, though not confronted directly with the necessity of deciding the validity of a Puerto Rican statute requiring that, in order to vote in a plebiscite on the future status of Puerto Rico, an elector had to be a resident of Puerto Rico for 1 year prior

02513

to the plebiscite, nevertheless stated that a state possesses power to impose reasonable residency restrictions on the availability of the ballot, and that state constitutions and statutes which generally require as a prerequisite to the right to vote that the elector in the state election shall have been a resident of the state for a specified period prior to the election are permissible, since such provisions help to identify voters and protect against fraud.

A Louisiana statute which required prospective voters to have resided in the state for 1 year and in the parish for 6 months preceding any election in which they sought to register to vote was held constitutional in Fontham v McKeithen (1971, DC La) 336 F Supp 153, the court saying that the residency requirement was not unreasonable and was rationally related to promoting the legitimate state interest, inter alia, of preventing individuals motivated only by a desire to affect the state's election results from moving into the state shortly before an election is to be held, voting, and then returning to their foreign domicils.

Upholding Ohio's 1-year durational residency requirement for voting, the court, in Howe v Brown (1970, DC Ohio) 319 F Supp 862, said that the statute should be tested by the "rational relation" test, which required a showing that some legitimate state interest was served by the statute, and that such an interest could legitimately be found in the fact that the statute prevented individuals motivated only by a desire to affect the state's election results from "moving" into the state shortly before the election is held, voting, and then returning to their foreign domicils.

[b] Statute insures knowledgeable, informed, and interested voters, and intelligent exercise of franchise

It has been held that durational residency requirements for voting may not be justified on the ground that they insure knowledgeable voters or the intelligent casting of votes, either (1) because the right to vote may not be denied because of the possibility that it might not be intelligently exercised, or (2) because such requirements exclude large numbers of recent arrivals who would be knowledgeable voters, but do not exclude large numbers of longtime residents who may be totally uninformed as to the issues.

Examining the state's argument that its durational residency requirement for voting satisfied the compelling state interest of having "knowledgeable voters," the court in Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, said that the state appears to make three separate claims. The first, said the court, is that the residency requirement affords some surety that a voter has in fact become a member of the community. Such an argument confuses bona fide residency requirements with durational residency requirements, the court explained, saying that while a state does have an interest in limiting the franchise to bona fide members of a community, it is not justified in excluding from the franchise persons who are bona fide residents, but who are merely recent rather than longtime residents. The second branch of the "knowledgeable voters" justification, the court continued, is that durational residency requirements assure that voters have a common interest in all matters pertaining to a community's government. By this, said the court, the state presumably means that it may require a length of residence sufficiently lengthy to impress upon its voters the local viewpoint; however, the court continued, differences of opinion may not be the basis for excluding any group of persons from the franchise, and the fact that newly arrived residents may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they come, is a constitutionally impermissible reason for depriving them of their chance to influence the electoral votes of their new home state. Finally, said the court, the state attempts to justify the statute on the ground that a longtime resident is likely to exercise his right to vote more intelligently. However, the court explained, durational residency requirements cannot be justified on such

02514

a basis, and even if it be assumed that a state could bar less knowledgeable or intelligent citizens from voting, durational residency requirements founder because of their crudeness as a device for achieving the articulated state goal of assuring knowledgeable exercise of the franchise. The classifications created by durational residency requirements, the court commented, permit any longtime resident to vote, regardless of his knowledge of the issues, and obviously many longtime residents do not have any; on the other hand, said the court, the classifications bar from the franchise many other, admittedly new, residents who may have become minimally, and often fully, informed about the issues. In any event, the court said, given modern communications and the clear indication that campaign spending on voter education occurs 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 3 months in the county in order to be minimally knowledgeable about congressional, state, or even purely local elections. The court therefore declared the statute unconstitutional.

Where two recent arrivals in Indiana sought permission to register to vote for President and Vice President, but were denied such permission, and thereafter brought suit to have the state's durational residency requirement of 6 months declared invalid, the court in Affeldt v Whitcomb (1970, DC Ind) 319 F Supp 69, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304, held that the statute was unconstitutional. Noting that one of the principal interests said by the state to underlie the 6-month durational residency requirement was the need to have an "enlightened electorate," the court said that while it is true that a state does have a greater interest in attempting to have an electorate which is knowledgeable of local and state issues in a general election than is the case where the plaintiffs seek only to vote for President and Vice President, the argument that a 6-month durational residency requirement insures that voters have had the opportunity to become acquainted with local issues has little persuasion in relation to voting for President and Vice President, since local issues play such a small part in such an election. On the other hand, the court continued, it is not sufficient to justify the 6-month requirement by pointing to an alleged need on the part of the state to indoctrinate or impress upon newcomers the local viewpoint, and it is not permissible for a state to "fence out" from the franchise a sector of the population because of the way it might vote. Assuming arguendo that the state's interest in insuring that the electorate is "enlightened" is compelling, and that the state legitimately may limit the franchise to those residents who are familiar with local issues in a general election, said the court, a close scrutiny of the 6-month requirement nevertheless reveals that such an objective is not accomplished with sufficient precision to justify denying the nine plaintiffs in this case the right to vote, for the very basis of the interest itself, namely, the assumption that residents who have lived in the state for more than 6 months are better informed about the issues and candidates in the upcoming election than persons who have lived in the state for less than 6 months, is subject to criticism in light of modern communication methods, and in no event could the 6-month residency requirement be said to be a sine qua non for the enlightenment of voters.

In Keppel v Donovan (1970, DC Minn) 326 F Supp 15, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304, the state argued that a 6-month residency requirement was necessary as insurance that a prospective voter had in fact become a member of the community and had therefore developed a common interest in matters pertaining to its government; but the court held the statute unconstitutional, noting that the state's argument was not definitive. For instance, said the court, a person could move from International Falls, Minnesota, to Minneapolis 30 days prior to an election and vote, even though he had moved from a city

about 300 miles distant. On the other hand, the court noted if a person were to move from Hudson, Wisconsin, to Minneapolis, a distance of only 30 miles, he would be ineligible to vote. There is no showing, said the court, that the person from International Falls is any more cognizant of the local issues, or has any more of a "nexus" with the community, than the person from Hudson, Wisconsin. It must be presumed that a person who is interested enough to vote will inform himself sufficiently to make his choices, said the court, and this is a presumption that is made with regard to all voters, whether they are long-term residents or relatively recent arrivals. Admittedly, said the court, there is a risk to the state that voters will not be adequately informed when they cast their ballots, but again this is a risk that is true of all voters, and not just recent arrivals. Even if the risk is greater for the category of recent residents, the court concluded, the risk is not so great that it justifies a denial of their right to vote, for there is no justification for fencing out a significant sector of the electorate because of an irrebuttable presumption that they will be uninformed.

Upholding § 202(b) of the Voting Rights Act of 1970, 42 USCS § 1973aa-1 (a-i), the court in Christopher v Mitchell (1970, DC Dist Col) 318 F Supp 994, vacated and remanded on other grounds 401 US 902, 27 L Ed 2d 801, 91 S Ct 892, said that a state's interest in attempting to guarantee that every voter be familiar with local issues before he votes for President cannot be described as compelling, when measured against the importance of the right to vote to the transient citizen.

In Lester v Board of Elections (1970, DC Dist Col) 319 F Supp 505, app dismd 405 US 949, 30 L Ed 2d 819, 92 S Ct 992,[8] two married couples who were denied permission to register as voters in the District of Columbia brought suit to have the District's 1-year residency requirement declared unconstitutional, the plaintiffs arguing that the requirement denied them equal protection of the laws by restricting their right to vote without a showing of a compelling governmental interest. Agreeing with the plaintiffs, the court invalidated the requirement. Although the board of elections stated that the requirement was necessary because, as the seat of the national government, the District of Columbia's population was highly transient in nature, and that because of that fact, a certain period of time was necessary for a voter to acquaint himself with local issues, problems, and candidates, the court disagreed with the board's position, the court noting that the particular election in which the plaintiffs desired to vote was one in which District residents were going to choose a delegate to represent them in Congress. The delegate's responsibility, inter alia, said the court, would be to represent the views of all the citizens of the District while participating in national affairs. Thus, the election was not local in the sense that a school board election might be local, said the court. In any event, the court observed, such a lengthy period is no longer necessary for voters to become familiarized with candidates and issues. An explosion in mass communications undreamed of 50 years ago has occurred, said the court, and the District is serviced by three newspapers, seven television stations, and over 40 radio stations, and if prior elections could serve as a guide, the communications media would, in the critical weeks of a campaign immediately prior to an election, review many times the important issues and the varying attitudes of the candidates toward those issues.

Invalidating California's 1-year residency requirement for voting in elections, the court in Keane v Mihaly (1970) 11 Cal App 3d 1037, 90 Cal Rptr 263, said that one of the compelling state interests cited by the state as justification for the residency requirement was the need for having an informed electorate. Though not disputing the state's interest in hav-

8. See footnote as to curious subsequent history of this case in § 11[a], supra.

02516

ing an informed electorate, the court held that a period of 1 year was totally unnecessary to accomplish such an objective. Observing that the 1-year requirement had been created in 1879, the court said that formal channels for the education of voters had become immeasurably wider and more numerous than they were almost a century ago, and that the wealth of information available from newspapers, as well as that presented by radio and television, exceeded beyond description that which was available in 1879. Furthermore, said the court, it should be noted that voters of whatever length of residency in the state cannot have information about some important issues until a time much less removed than 1 year from an election. Voters learn who are the candidates for state election only after the primary elections, all of which are held only a matter of months before a general election, the court observed, and county clerks, under California law, are prohibited from mailing ballot informational pamphlets to voters until 40 days before an election. Thus, in contrast to the state's argument, said the court, it would appear that the legislature recognized the need for presenting to the voters information on measures which might require some examination for intelligent voting at a time not too far removed from an election.

The goal of restricting the franchise to those voters who will make an informed use of the ballot because they are knowledgeable about the issues may be a compelling state interest, but a durational residency requirement for voting which excludes new residents from voting, and yet permits all long-time residents to vote, is much too crude a tool for insuring that those who vote will be informed about the issues, said the court in Young v Gnoss (1972) 7 Cal 3d 18, 101 Cal Rptr 533, 496 P2d 445, wherein the court, expressing its agreement with the opinion of the United States Supreme Court in Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, supra, voided a California law requiring 90 days' residency in the county and 54 days' residency in the precinct as a prerequisite for voting in California elections.

Other courts have held that the imposition of durational residency requirements upon the right to vote may be justified on the ground that such requirements insure that voters are informed about, and have a genuine interest in, community affairs.

In Burg v Canniffe (1970, DC Mass) 315 F Supp 380, affd 405 US 1034, 31 L Ed 2d 575, 92 S Ct 1303, the court invalidated a Massachusetts statute which required that in order to register to vote, a person must show that he had resided in Massachusetts for a period of 1 year, although the court did not invalidate another part of the same durational residency requirement statute which required all persons registering to vote to be able to show that they had resided for the 6 months preceding the registration date in the town or district in which they sought registration as voters, the court noting that the latter requirement applied not only to persons moving interstate, but also applied equally to persons moving from one town in Massachusetts to another town in Massachusetts. Holding the latter requirement not to be a violation of the equal protection clause of the Fourteenth Amendment, the court said, inter alia, that such a requirement might well serve the legitimate state interest of insuring that voters have at least a minimum of interest in the community and its affairs, and of providing a better-informed electorate.

In Fontham v McKeithen (1971, DC La) 336 F Supp 153 (US app pending), the court upheld a Louisiana statute requiring 1-year's residency in the state and 6 months' residency in the parish as a prerequisite to voter eligibility, the court saying that the statute had to be tested only by the "rational relation" test, and that when such yardstick was used, it could easily be seen that the statute served the legitimate state interests, inter alia, of insuring that those who vote for state and local representatives are familiar with the political candidates and issues by having been given maximum

exposure to the problems of the locality through the media of local communication, and of insuring that the electors have a genuine interest in community affairs.

A 1-year state residency requirement for voting was upheld in Howe v Brown (1970, DC Ohio) 319 F Supp 862, the court saying that the statute served the legitimate state interests of, inter alia, insuring that those who vote for state and local representatives are familiar with the political candidates and issues and have been given maximum exposure to the problems of the locality through the media of local communication, and of insuring that the electors have a genuine interest in community affairs. While the lines drawn by such distinctions are not infallible, said the court, they need not be so long as they are rationally related to these interests.

[c] Statute insures orderliness of elections and is administratively necessary

In the following cases, the courts held that the imposition on the right to vote of durational residency requirements of various lengths of time could not be justified, in view of the proof adduced in the cases, on the ground that the requirements were administratively necessary or that they insured orderly elections.

Where a Vermont statute requiring that a voter must have resided within Vermont for a period of 1 year next preceding any election in which he seeks to register to vote was challenged by (1) a member of the Vermont bar who, though certified to practice in the state court, had only lived in Vermont for about 6 months prior to his attempted registration, and (2) his wife, who was employed as a teacher at a Vermont state college and who had moved to Vermont at the same time as her husband, the court, in Kohn v Davis (1970, DC Vt) 320 F Supp 246, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1305, noted that the defendants, who were state officials, attempted to justify their discriminatory treatment of recent Vermont arrivals by a plea of administrative hardship. Observing that the defendants had presented testimony that it would be difficult to make allowance for the plaintiffs to vote in the upcoming general election, the court said that the evidence presented did not demonstrate that any substantial administrative hardship would result, since the testimony showed only that 200,000 ballots had been printed for each of the state offices and an assistant secretary of state had testified that he could not remember any off-year election when over 125,000 votes were cast for governor. Under these circumstances, it was difficult to see how the casting of two more votes for state offices would cause any hardship to accrue to the defendants, the court said.

Where two prospective voters who possessed all of the qualifications to vote in Virginia except for the 1-year state residency requirement, challenged the Virginia law requiring a 1-year residency, the court in Bufford v Holton (1970, DC Va) 319 F Supp 843, affd 405 US 1035, 31 L Ed 2d 576, 92 S Ct 1304, held that no justification existed for a period of as much as a year's residence, because the length of stay in the state could not be defended as needed for exploring the bona fides of the applicant's residence, nor for any other administrative objective. Indeed, said the court, the concept of 12 months for a canvass of the applicant's residence was refuted by the acknowledgment that the state only required 6 months as sufficient to satisfy the county or city residence, and, the court concluded, the state had not established that it needed any longer time to prepare for elections.

In declaring a North Carolina statute which required a prospective voter to have resided in the state for a period of 1 year before he could vote in local elections to be a violation of the equal protection clause, the court in Andrews v Cody (1971, DC NC) 327 F Supp 793, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1306, said that no administrative reason could be advanced which would bring the 1-year requirement within any test of reasonableness for voting in local elections. The court

02518

expressed no opinion as to the validity of such a requirement as it related to state or national elections.

In a challenge to a Florida statute requiring that prospective voters be residents of the state for a period of 1 year and residents of the county for a period of 6 months preceding any election in which they first seek to vote, the court, in Woodsum v Boyd (1972, DC Fla) 341 F Supp 448, held that the "compelling state interest" test, rather than the older, moer traditional standard of the "rational relation" test, should be applied to determine the constitutionality of the statute. Noting that the only evidence which had been submitted by the defendants as a "compelling" justification for the statute was the testimony of the supervisor of elections for one of the counties in Florida that the time was needed to comply wth the administrative procedures used in registering prospective voters and in supervising elections generally, the court said that the evidence of administrative inconvenience or hardship presented was insufficient under the compelling interest standard to justify the discriminatory classification created by the durational residency requirement. The supervisor of elections had testified, the court noted, that occasionally it took longer than 30 days to process the registration of a prospective voter, but that under no circumstances did it take 6 months or a year. Pointing out that another Florida statute provided that the registration books for voters were to close 30 days prior to any election, and that therefore the Florida legislature had statutorily determined that the administrative burden of registering voters could be met by closing the books 30 days prior to the election, the court concluded that the same 30-day period had been legislatively determined to be the period in which local election offices should be able to determine whether a prospective voter is or is not a bona fide resident of the state. The court said that under such circumstances it was forced to conclude that the durational residency requirement of 1 year was not justified as a protection against nonresident voting, and that neither could it be justified as an administrative necessity.

In Christopher v Mitchell (1970, DC Dist Col) 318 F Supp 994, vacated and remanded on other grounds 401 US 902, 27 L Ed 2d 801, 91 S Ct 892, the court concluded that § 202(b) of the Voting Rights Act of 1970, 42 USCS § 1973aa–1(a–i), was constitutional, the court saying, inter alia, that the argument that durational residency requirements serve the valid state interest of administrative convenience seems weak when a substantial majority of the states permit registration by at least some classes of citizens up to the 30th day prior to a presidential election. The scheme devised by Congress, said the court, to be applied uniformly throughout the country, is an obviously rational means of insuring that unnecessarily long residency requirements are not put into effect by the states, and of simplifying for the voter the task of determining where he is permitted to vote.

✦

Other courts have held that the imposition of reasonable durational residency requirements on the right to vote are administratively necessary to insure the orderliness of the election process.

Considerations of an administrative ntaure may require a time period to allow for the paperwork involved in registering new voters and for establishing a time for closing voting lists prior to any given election, said the court, in Burg v Canniffe (1970, DC Mass) 315 F Supp 380, affd 405 US 1034, 31 L Ed 2d 575, 92 S Ct 1303, and time is also required to allow voting officials to determine the number of registered voters and the number of ballots that must be provided, and to enter into a contract for the printing of the requisite number of ballots. Therefore, while the court invalidated a state statute requiring that persons be able to prove that they had resided in the state for a period of 12 months preceding the date on which they attempted to register to vote, it allowed to remain in effect a statute requiring all voters to show that they had resided

in the towns in which they attempted to register for 6 months preceding the registration date, the court saying that such a statute was not a violation of the equal protection clause since it applied equally to interstate movers and intrastate movers, and was reasonable.

In Smith v Climer (1972, DC Ark) 341 F Supp 123, the court held unconstitutional and violative of the equal protection clause an Arkansas statute which required that persons be residents of the state for 1 year and of the county for at least 6 months prior to the time in which they seek to vote, although the court did not rule unconstitutional a further requirement that voters be residents of their precincts for 30 days preceding an election. The court said that a state may have a compelling and legitimate interest in providing for a closing of voter registration books a reasonable time in advance of an election, as an administrative measure or as a measure to prevent fraud, particularly, as in the instant case, where the state legislature has been recently reapportioned, where the eminence of the primaries and problems incident to legislative reapportionment could give very serious problems to registrars if they were to be required to register voters without regard to any durational residency requirement whatsoever, and where, in view of the 1970 federal statute permitting voters to vote for President and Vice President if they register to vote not later than 30 days immediately prior to any presidential election, it might be possible for an individual newly moved to Arkansas to cast two votes in the presidential election by casting an absentee ballot in the state of his original residence and then registering to vote in the Arkansas general election within the period prescribed by the Arkansas statute.[9]

B. Decisions based on other constitutional rights

§ 13. Interstate travel

[a] Statute held valid

The courts in the following decisions held that the imposition of durational residency requirements on the right to vote could not realistically be said to act as an inhibition on a citizen's right to travel interstate.

The plaintiffs' right to travel interstate was held not to be abridged by a Louisiana statute which prohibited persons from voting if they had not resided in Louisiana for a period of 1 year, or for a period of 6 months in the parish in which they sought to register to vote, in Fontham v McKeithen (1971, DC La) 336 F Supp 153 (US app pending). Much of the thrust behind the assertion that durational residency statutes impinge upon the right to travel interstate is derived from Shapiro v Thompson (1969) 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322, said the court, in which case the Supreme Court invalidated a 1-year residency requirement as a prerequisite for the receipt of welfare payments. However, the court said, that case was not controlling, for it was decided on the ground that the specific objective of the residency legislation was to "fence out" poor people who had recently moved to the jurisdiction. Such was not the case in Louisiana, said the court, where the durational residency requirement for voter eligibility could not realistically be regarded as an attempt to penalize the free movement of voters; nor, the court concluded, could it believe that voters were dissuaded or deterred from interstate travel on the basis of the statute in question.

The plaintiffs, who satisfied all requirements for voting in state and local elections in Ohio except for that state's 1-year durational residency requirement, attacked the statute as im-

9. The court referred to an Arkansas election statute (1) which provided that a prospective voter must have resided in his precinct for at least 30 days prior to the election in which he sought to vote, but (2) which further provided that new voters could be registered until a period 20 days immediately prior to the election in which they sought to vote.

02520

pinging upon their constitutional right to move from state to state, in Howe v Brown (1970, DC Ohio) 319 F Supp 862. Noting that the plaintiffs principally relied upon Shapiro v Thompson (1969) 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322, to support their allegation, the court explained that the legislation under consideration in the case relied on, which legislation denied welfare assistance to persons who had met all other eligibility requirements except for the requirement of residing within the jurisdiction for at least 1 year immediately preceding their application for welfare assistance, had the express purpose and effect of impinging upon those persons' constitutional right to move freely interstate, because the specific objective of the legislation was to "fence out" poor people from the jurisdictions. On the other hand, said the court, there is no allegation whatever in the instant case that the 1-year residency requirement for voting in state elections was intended to "fence out" anyone from Ohio, or had that effect. The court said that without clear proof that a person having the intention of moving to Ohio and living in that state indefinitely had been inhibited from doing so because he would not be granted the franchise until he had lived in the state for 1 year, it could not be said that the requirement impinged upon the constitutional right of anyone to move freely interstate.

Although the court, in Affeldt v Whitcomb (1970, DC Ind) 319 F Supp 69, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304, held that an Indiana statute which required residents to have resided in the state for a period of 6 months preceding any election in which they seek to vote was unconstitutional because it was a violation of the equal protection clause, it nevertheless refused to hold the statute unconstitutional on the ground that it was a violation of the plaintiffs' right to travel interstate. Courts have not struck down durational residency requirements for voting on that basis, said the court, though it recognized that welfare residency requirements had been invalidated as penalties on the right to travel. If "penalty" connotes deterrence, said the court, it is doubtful whether Indiana's 6-month residency requirement for voting would deter anyone from the exercise of his right to travel interstate.

See also Cocanower v Marston (1970, DC Ariz) 318 F Supp 402, holding that Arizona's 1-year durational residency requirement for voting could not be invalidated on the ground that it unlawfully interfered with the plaintiff's right to travel interstate, which case, however, was vacated and remanded (405 US 1036, 31 L Ed 2d 575, 92 S Ct 1303) by the Supreme Court in light of Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995.

[b] Statute held invalid

It was held in the following cases that durational residency requirements for voting were unconstitutional because they unlawfully deterred citizens from exercising their fundamental constitutional right to uninhibited interstate travel.

Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution, said the court in Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, and it is clear that the freedom to travel includes the freedom to enter and abide in any state in the union. Obviously, the court continued, durational residency laws single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly, and such laws thus impinge upon a constitutionally protected right and may be justified only if they serve some compelling state interest. It is true, said the court, that durational residency requirements for voting may not actually deter anyone from changing his domicil to another state. However, the court added, the "compelling state interest" test is applicable not only in cases of deterrence, but also in cases where the right to travel is merely penalized. The right to travel is an unconditional personal right, the exercise of which may not be conditioned, said the court, and durational resi-

02521

dency laws impermissibly condition and penalize the right to travel by imposing their prohibitions only on those persons who have recently exercised that right, such laws forcing these persons who wish to travel and change their residences to choose between traveling and voting. Thus, the court held that a Tennessee durational residency law which required, as a prerequisite for voting in Tennessee, that a voter must have been a resident of the state for 1 year and a resident of the county for 3 months, to be unconstitutional, since the statute served no compelling state interest.

Like the right to vote, the right to travel interstate is a fundamental right, said the court in Kohn v Davis (1970, DC Vt) 320 F Supp 246, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1305. There can be little dispute, the court continued, that a Vermont law imposing a 1-year durational residency requirement before voter eligibility is conferred penalizes recent arrivals from other states who have not fulfilled the required residency period, even if they have in fact become bona fide residents, and this affects the rights of recent arrivals adversely and hampers their right to travel interstate. Holding that various state officials had the burden of justifying the restriction by the "compelling state interest" standard, and that they had failed to do so, the court declared the state constitutional provision and the state statute unconstitutional.

In Nicholls v Schaffer (1972, DC Conn) 344 F Supp 238, the court invalidated Connecticut's 6-month residency requirement for voting in town elections. Although recognizing that the 6-month requirement effectively prevented people from changing their residences from one town to another when the election dates were different and then taking part in all of the election processes in different towns, the court said that such did not constitute a compelling reason why a bona fide new resident should not be permitted to vote in municipal elections in the town to which he has recently moved. Such laws force a person who wishes to travel and change his residence to choose between travel and the basic right to vote, said the court, and absent a compelling state interest, it is constitutionally impermissible to burden the right to travel in this way.

Holding a Virginia law which required prospective voters to have resided in Virginia for at least 1 year prior to any election in which they seek to register to vote, the court, in Bufford v Holton (1970, DC Va) 319 F Supp 843, affd 405 US 1035, 31 L Ed 2d 576, 92 S Ct 1304, said, inter alia, that the state's difference in treatment of residents, regardless of the state's intentions, was clearly an arbitrary discrimination, and could without more be seen as an obstruction or deterrent to uninhibited interstate travel, the latter admittedly being a constitutional prerogative.

IV. Durational residency requirements: waiting period involved

§ 14. One year or more in state or locality

[a] Held valid

In the following cases, the imposition of residency requirements of 1 year or more upon the right to vote were held permissible under the Federal Constitution.[10]

In Pope v Williams (1904) 193 US 621, 48 L Ed 817, 24 S Ct 573, the petitioner had moved on June 7, 1902, from Washington, D. C., to Montgomery County, Maryland, where he established a permanent domicil for himself and his family. Thereafter, on Sep-

---

10. Attention is called to the fact that durational residency requirements as prerequisites for voting for the offices of President and Vice President have been abolished by § 202 of the Voting Rights Act of 1970, 42 USCS § 1973aa-1(a-i), which may be found in § 2[c], supra, which statute was held constitutionally permissible in Oregon v Mitchell (1970) 400 US 112, 27 L Ed 2d 272, 91 S Ct 260, reh den 401 US 903, 27 L Ed 2d 802, 91 S Ct 862.

02522

tember 29, 1903, he presented an application to the County Board of Registry to be registered and entered as a qualified voter on the registry of voters in his election district, which application was refused for the sole reason that he had failed to comply with a Maryland law which made it necessary for a person coming into the state with the intention of residing therein to register his name with the clerk of the circuit court of the proper county, and thereby to indicate his intent to become a citizen and resident of Maryland. The law provided that only those persons who had been so registered for a period of 1 year or more could thereafter be registered as voters. The Supreme Court upheld the validity of the statute, saying that it did not violate any of the petitioner's federal rights. The simple matter to be determined, said the court, was whether, with reference to the exercise of the privilege of voting, the Maryland legislature had the legal right to require that a person coming into the state to reside had to make a declaration of his intent a year before he is given the right to register as a voter. The privilege of voting in any state is not given by the Federal Constitution, said the court, and it is not a privilege springing from citizenship of the United States. While it may not be refused on account of a federally prohibited reason, such as race, the court observed, it does not follow from mere citizenship of the United States. The statute, so far as it provides conditions precedent to the exercise of the elective franchise within the state by persons coming therein to reside, is neither an unlawful discrimination against anyone in the petitioner's situation, said the court, nor a denial of the equal protection of the laws. It is also not repugnant to any fundamental or inalienable rights of citizens of the United States, the court continued, nor is it a violation of any implied guaranties of the Federal Constitution. The right of a state to legislate upon the subject of the elective franchise, limited only by the prohibitions in the Federal Constitution, is unassailable, said the court, concluding that the statute violated no right protected by the Federal Constitution. The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, said the court, and "this court has no concern with them."[11]

In Drueding v Devlin (1965) 380 US 125, 13 L Ed 2d 792, 85 S Ct 807, the Supreme Court affirmed, in a short per curiam opinion, the judgment of a three-judge District Court upholding the validity of a Maryland statute requiring 1 year's residency in the state

---

11. Pope v Williams, supra, is of doubtful continuing validity. Although the case has not been overruled at the time of the writing of this annotation, it was stated by Mr. Justice Marshall, in his opinion for the court in Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, that "[c]arefully read, that case simply holds that federal constitutional rights are not violated by a state provision requiring a person who enters the state to make 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.' . . . In other words, the case simply stands for the proposition that a State may require voters to be bona fide residents. . . . To the extent that dicta in that opinion is inconsistent with the test we apply or the result we reach today, that dicta is rejected." Mr. Justice Blackmun, though concurring in the result in Dunn v Blumstein, supra, said that he could not "so blithely explain Pope v Williams away . . . [for] [t]he requirement was that [the plaintiff] make the declaration *a year* before he registered to vote; . . . [and] therefore, the Court today really overrules the holding in Pope v Williams . . . ." The case has also been much criticized and largely ignored by recent decisions in the lower federal courts. See, for instance, Hadnott v Amos (1970, DC Ala) 320 F Supp 107, affirmed 401 US 968, 28 L Ed 2d 318, 91 S Ct 1189, and also affirmed 405 US 1035, 31 L Ed 2d 576, 92 S Ct 1304. But see Fontham v McKeithen (1971, DC La) 336 F Supp 153 (US app pending), infra, where the case was held controlling.

C2523

as a precondition to voting in presidential elections. The District Court noted (234 F Supp 721) that the state had alleged that the statute's purposes were (1) "identifying the voter, and as a protection against fraud," and (2) insuring 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." Although the lower court commented that the "judges of this Court, personally, are of the opinion that those objectives could probably be obtained by shorter residence requirements than those contained in the provisions of the Maryland Constitution and statutes now under attack," it added that it could not "substitute our personal views for those of the Legislature and people of Maryland, unless there has been an unreasonable discrimination." Concluding that the requirement was not so unreasonable that it amounted to an irrational or unreasonable discrimination, the court granted the board of election supervisors' motion to dismiss, saying that the plaintiffs "may take some comfort, however, in the fact that they have set in motion the procedures for what appears to be a desirable reform."[12]

In Fontham v McKeithen (1971, DC La) 336 F Supp 153 (US app pending), the plaintiffs attacked a statute imposing a 1-year state residency requirement as a prerequisite in Louisiana to voter eligibility, the plaintiffs alleging that the state had no compelling interest in imposing the requirement and that the statute violated their rights to equal protection, due process, and interstate travel. However, the court sustained its validity, saying that state residents do not have a right, but merely have a privilege, to vote in state elections, which privilege is not derived from citizenship of the United States, but from a grant by the state. Thus, the applicable test, said the court, was not the "compelling state interest" test, but was the "rational relation" test. Concluding that the statute did serve a legitimate state interest, the court held it to be constitutional.

In Howe v Brown (1970, DC Ohio) 319 F Supp 862, the plaintiffs had moved from outside Ohio to a new home in Ohio with the intention of residing there indefinitely, and, with the sole exception of failing to meet a 1-year durational residency requirement for voting, the plaintiffs were admittedly qualified to vote under the Constitution and laws of that state. Challenging the 1-year durational residency requirement, the plaintiffs alleged that it deprived them of equal protection of the laws and impinged upon their constitutional right to move freely interstate; but the court held the requirement to be valid. Noting that the classification created by the legislation survived scrutiny under the equal protection clause because it was rationally related to promoting the legitimate state interests, inter alia, of insuring that those who vote for state and local representatives are familiar with the political candidates and issues, and insuring that such persons have been given maximum exposure to the problems of the locality through the local communications media, the court, applying the "rational relation" test, held that the statute did not violate the equal protection clause and that, in the absence of a clear showing that the plaintiffs had been deterred from moving into Ohio because of the inhibition to voting inherent in the statute, it could not believe that the statute infringed upon the right to travel interstate.

An Arizona statute imposing a 1-year durational residency requirement

12. Although the case has not been formally overruled, it has been said to be "no longer viable" in a number of lower federal court decisions. See, for example, Burg v Canniffe (1970, DC Mass) 315 F Supp 380, affd 405 US 1034, 31 L Ed 2d 575, 92 S Ct 1303, and Kohn v Davis (1970, DC Vt) 320 F Supp 246, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1305. See also the comments of the Supreme Court concerning this case in Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, which comments are set out in footnote 7, § 11[b], supra.

02524

on the right to vote was upheld in Cocanower v Marston (1970, DC Ariz) 318 F Supp 402, but that decision was vacated and remanded (405 US 1036, 31 L Ed 2d 575, 92 S Ct 1303) for reconsideration in light of Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, discussed in §§ 12 [a, b], supra, and in 14[b], infra.

[b] Held invalid

Durational residency requirements of 1 year or more imposed upon the right to vote in elections were held to violate various provisions of the Federal Constitution in the following cases.

In Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, discussed more fully in § 12[a, b], supra, the Supreme Court declared a Tennessee statute imposing, inter alia, a residency requirement of 1 year in the state to be unconstitutional.

A section of a state constitution and a state statute based on that constitutional section, both of which required that, in order to vote in state, city, or town elections, a voter must have resided within the state for a period of 12 months preceding any election in which he seeks to vote, were invalidated by the court, in Burg v Canniffe (1970, DC Mass) 315 F Supp 380, affd 405 US 1034, 31 L Ed 2d 575, 92 S Ct 1303. As to the 1-year requirement, the court held that while states may have a legitimate interest in requiring voters to establish that they have satisfied a durational residency requirement of some length, the 1-year requirement could not stand the rigid scrutiny required of any restriction or infringement on a fundamental right, such as the right to vote, the court saying that it was not persuaded that any compelling state interest was served by singling out interstate movers as a class of persons for whom an additional 6 months' residency requirement should be mandatory.[13]

A Vermont statute requiring voters to have resided in the state for 1 year preceding any election in which they seek to register to vote was declared unconstitutional in Kohn v Davis (1970, DC Vt) 320 F Supp 246, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1305. The statute, said the court, obviously created a discriminatory treatment differential between those persons who had resided in the state for 1 year and those who had not. Applying the "compelling state interest" test, and concluding that the defendants, who were state officials, had not shown any compelling state interest which would justify imposing such a precondition on recent arrivals in the state, the court held the statute to be unconstitutional and violative of two fundamental rights, namely, the right to vote and the right to travel interstate.

As applied to the right to vote in local elections, the court in Andrews v Cody (1971, DC NC) 327 F Supp 793, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1306, concluded that a 1-year durational residency requirement, satisfaction of which was necessary in order to be allowed to register to vote in local North Carolina elections, violated the equal protection clause of the Fourteenth Amendment. Whether the "reasonableness" test or the "compelling state interest" test was applied, said the court, such a law could not be upheld as a valid concern of the state for voting in local elections in which the primary concern of the state is whether or not a registrant is a resident of the local election district. When viewed along with another requirement contained in the same state law that the registrant also must have resided in the precinct in which he votes for 30 days preceding the ensuing election, said the court, the imposition of an additional requirement that one moving to the locality from outside of North Carolina be required to wait 1 year before he could vote in a local election was unreasonable. It is not reasonable, said the court, to say that a person who comes to a locality

13. Under the Massachusetts law, all new residents of towns or districts, whether interstate or intrastate movers, had to satisfy a 6-month residency requirement in the town or district before they could vote, and interstate movers also had to satisfy the 1-year state residency requirement.

from another state and stays for longer than the 30-day period is less likely to be a resident of the locality than a person who has lived in another town in North Carolina for 11 months and then moves to the same locality and stays for 30 days. Neither is it reasonable, the court continued, to say that a person moving to one locality in North Carolina from another would be better informed about the local political issues than a person who moves from out of state to the locality and remains for the same 30-day period.

In Woodsum v Boyd (1972, DC Fla) 341 F Supp 448, the court held unconstitutional a Florida statute which required persons desiring to vote to have been residents, inter alia, of the state for a period of 1 year. The result of the durational residency requirement, said the court, was the creation of a discriminatory classification among bona fide residents of the state, namely, those residents who have lived in the state for a period of 1 year are allowed to register and vote in the state's primary and general election, while bona fide residents who have not lived within the state for the requisite period are not enfranchised in state and local elections. Deciding that the "compelling state interest" test had to be applied because the subject matter of the discriminatory classification was in itself a fundamental and constitutionally protected right, the court held that the evidence presented by the defendants was insufficient under such standard to justify the discriminatory classification, the court noting that another Florida statute provided that the registration books for voting were to close only 30 days prior to any election, and that consequently the Florida legislature must have determined that the same 30-day period would be sufficient to determine whether or not a prospective voter was a bona fide resident of the state.

In Graham v Waller (1972, DC Miss) 343 F Supp 1, a class action seeking invalidation of Mississippi's durational residency requirements for voting was instituted by the named plaintiff, who attempted to register to vote in a general election only 4 days after she had moved to Jackson, Mississippi, but who was denied that right because she had not been a resident citizen of the state and county for 1 year or of her election precinct for 6 months. Saying that the case was "not distinguishable in any phase or aspect" from the Supreme Court's decision in Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, the court held that the state law clearly violated the equal protection clause of the Fourteenth Amendment and clearly was not justified by any compelling state interest.

As also holding unconstitutional state laws which denied the right to vote to persons who had lived in the particular states for less than 1 year, see the following cases:

Fourth Circuit—Bufford v Holton (1970, DC Va) 319 F Supp 843, affd 405 US 1035, 31 L Ed 2d 576, 92 S Ct 1304.

Eight Circuit—Smith v Climer (1972, DC Ark) 341 F Supp 123.

Dist Col Circuit—Lester v Board of Elections (1970, DC Dist Col) 319 F Supp 505, app dismd 405 US 949, 30 L Ed 2d 819, 92 S Ct 992.[14]

Cal—Keane v Mihaly (1970) 11 Cal App 3d 1037, 90 Cal Rptr 263.

§ 15. Six months, but less than a year, in state or locality

[a] Held valid

The courts in the following cases held that state laws requiring prospective voters to satisfy a 6-month residency requirement before being allowed to vote in state elections were not violative of the Federal Constitution.[15]

---

14. Although this decision was subsequently vacated and remanded, 405 US 1036, 31 L Ed 2d 575, 92 S Ct 1318, the same judgment, without an opinion, was later re-entered. See the footnote as to the curious history of this case in § 11[a], supra.

15. Attention is called to the fact that durational residency requirements as prerequisites for voting for the offices of President and Vice President have been abolished by § 202 of the Voting Rights Act of 1970, 42 USCS § 1973aa-1(a-i), which may be found

02526

In Burg v Canniffe (1970, DC Mass) 315 F Supp 380, affd 405 US 1034, 31 L Ed 2d 575, 92 S Ct 1303, although the court invalidated Massachusetts' requirement that a voter must have been a resident of the state for 1 year before he could be declared eligible to vote in any state, city, or town election, the court did not invalidate a similar provision which additionally required that voters must have resided within their respective towns or districts for 6 calendar months preceding the election in which they sought to vote, the court saying as to the latter requirement that it did not violate the equal protection clause, because it applied not only to persons moving to a Massachusetts town from outside the state, but also to persons moving to one Massachusetts town from another Massachusetts town. Since the statute applied equally to both interstate and instrastate movers, the court held it to be nondiscriminatory.

A Louisiana statute which required, inter alia, that a person could not vote in state elections until he had been a resident of the parish in which he lived for 6 months was held valid in Fontham v McKeithen (1971, DC La) 336 F Supp 153 (US app pending), the court concluding that the plaintiffs' attacks on the statute had failed to overcome the presumption of constitutionality afforded the statute. The matter to be determined, said the court, was whether the Louisiana legislature had the legal right to provide that a person moving from one parish to another should wait for a period of 6 months before becoming eligible to vote in state and local elections. A state resident does not have a right to vote in state elections, said the court. There is no inherent right to vote, but a privilege to vote, the court commented, which privilege is granted by the state, not by the Federal Government. Absent any discrimination which the Federal Constitution condemns, the states have broad powers to determine the conditions under which the right of suffrage may be exercised, said the court. Since the statute in question did not permanently "fence out" from the voting populace any Louisiana residents, but merely suspended their rights to vote until they had fulfilled the 6-month residency requirement, the court held the statute not violative of the plaintiffs' right to vote.

In Piliavin v Hoel (1970, DC Wis) 320 F Supp 66, the court refused to issue an interlocutory injunction ordering the registration of the plaintiffs, who were over 21 and had become residents of Wisconsin on July 4, 1970, as voters. Although the court noted that the plaintiffs had become permanently employed in Wisconsin, owned a home there, were liable for local real-estate taxes and state income taxes, had motor vehicle operators' licenses issued by Wisconsin, had their automobile registered there, and had a child enrolled in the public schools of Wisconsin, the court refused the interlocutory injunction they sought, because it concluded that there was an insufficient chance that the plaintiffs would ultimately prevail in their contention that Wisconsin's 6-month durational residency requirement as a prerequisite to voting was unconstitutional. Although the court said that the right to vote was a fundamental right and that it would assume, for purposes of the motion, that the proper standard by which to judge the law was the "compelling state interest" test, the court nevertheless stated that in the face of the Supreme Court's decision in Pope v Williams (1904) 193 US 621, 48 L Ed 817, 24 S Ct 573, in which a 1-year residency requirement was held valid, and also in the face of the fact that 48 states continued to impose state residency requirements of 6 months or more for voting purposes, it was unlikely that the plaintiffs would ultimately prevail in their contention that the waiting period required by Wisconsin was unconstitutional.

---

in § 2[c], supra, which statute was held constitutionally permissible in Oregon v Mitchell (1970) 400 US 112, 27 L Ed 2d 272, 91 S Ct 260, reh den 401 US 903, 27 L Ed 2d 802, 91 S Ct 862.

02527

See also Drueding v Devlin (1964, DC Md) 234 F Supp 721, affd 380 US 125, 13 L Ed 2d 792, 85 S Ct 807, discussed more fully in § 14[a], supra, where the court held constitutional a Maryland statute which imposed, inter alia, a 6-month county residency requirement on the right to vote. However, see also § 202 of the Voting Rights Act of 1970, 42 USCS § 1973aa—1, eliminating residency requirements for voting in presidential elections.

[b] Held invalid

Six-month residency requirements imposed upon the right to vote in state elections were held by the courts in the following cases to violate the Federal Constitution and were thus declared invalid.

In Nicholls v Schaffer (1972, DC Conn) 344 F Supp 238, a three-judge District Court declared Connecticut's 6-month town residency requirement to be unconstitutional. In view of Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 91 S Ct 995, said the court, it is frivolous for the defendants to contend that the constitutional and statutory requirements of 6 months' residence in a town as a condition on the right to be admitted as an elector are not unconstitutional.

In Hadnott v Amos (1970, DC Ala) 320 F Supp 107, affd 401 US 968, 28 L Ed 2d 318, 91 S Ct 1189, and also affd 405 US 1035, 31 L Ed 2d 576, 92 S Ct 1304, the court held, inter alia, that an Alabama law requiring prospective voters to have resided in the county in which they seek to vote for a period of 6 months was unconstitutional as being a violation of the equal protection clause of the Fourteenth Amendment. Measuring the constitutionality of the statute by the "compelling state interest" test, the court noted that the state had not offered any compelling interest that would necessitate such a requirement, nor, said the court, did it perceive any on the basis of its own judicial knowledge and experience. Unquestionably, the court continued, a state can limit its franchise to bona fide residents, but with this legitimate end in mind, a state may not use means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.

A state durational residency requirement of 6 months as a condition precedent to being allowed to vote was held unconstitutional in Affeldt v Whitcomb (1970, DC Ind) 319 F Supp 69, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304. The plaintiffs, who had moved into the state and who had sought to register to vote, claimed that the registrar's refusal to register them violated their right to equal protection of the laws, since the durational residency requirement could not be said to achieve any of the objectives purportedly furthered by such a requirement. Concluding that the constitutionality of the statute had to be measured by the "compelling state interest" test, the court noted that the two principal interests said by the state to underlie the requirement were (1) the preservation of the purity of elections and the orderly administration of elections, and (2) the promotion of an "enlightened electorate." However, said the court, neither one of these interests, even if they could be said to be "compelling," were furthered by the statute. The court thus declared the law unconstitutional. However, it was careful to point out that the state did have a legitimate interest in closing the registration books at some reasonable period before an election, which the court fixed at 29 days, so that proper voting lists could be made out and so that elections could be carried out in an orderly fashion.

The plaintiffs, both of whom were former residents of Wisconsin and Massachusetts, respectively, moved to Minnesota, became members of the state bar association and associates in a Minneapolis law firm, intended to remain permanently as residents of the state, sought to register to vote in the general election, and were not permitted to register because they had not been citizens of the state for 6 months preceding the election; and they thereafter brought an action for

02528

injunctive and declaratory relief in Keppel v Donovan (1970, DC Minn) 326 F Supp 15, affd 405 US 1034, 31 L Ed 2d 576, 92 S Ct 1304. Concluding that the constitutionality of the statute had to be determined by applying the "compelling state interest" test, since the statute created discriminatory classifications involving the exercise of fundamental constitutional rights, the court queried whether such durational residency requirements were necessary to promote compelling state interests. The state argued that the requirement permitted identification of the voter and protected against fraud, and also insured that voters had become members of the communities in which they wished to vote and would have a common interest in matters pertaining to its government; but the court found neither argument persuasive, saying that since voters could register as late as 20 days before an election, it was difficult to see how a 6-month residency requirement protected against fraud. Furthermore, said the court, since a risk also existed that even longtime members of communities would not be adequately informed when they cast their ballots in elections, there was no justification for fencing out new arrivals because of an irrebuttable presumption that they would also be uninformed voters. Although the court would not state the length of time a citizen of the state would have to reside therein to justify the state's alleged compelling interest in having an informed electorate on state and local issues, it did hold that the 6-month period of residency bore no reasonable relationship to any compelling state interest in the conduct of elections, and the statute was therefore declared unconstitutional as a denial of equal protection.

As also holding unconstitutional 6-month county durational residency requirements for voting, see the following cases: Woodsum v Boyd (1972, DC Fla) 341 F Supp 448, and Smith v Climer (1972, DC Ark) 341 F Supp 123.

§ 16. Less than 6 months in state or locality

[a] Held valid

Residency requirements of less than 6 months, imposed by state laws as preconditions to being granted the right to vote in state elections, were held to be permissible under the Federal Constitution in the following case.[16]

Although the court, in Smith v Climer (1972, DC Ark) 341 F Supp 123, did not specifically rule that an Arkansas statute which required, inter alia, that a prospective voter have been a resident of his precinct for at least 30 days immediately prior to any election in which he might seek to vote was constitutional, the court did not enjoin the enforcement of the statute, saying that a strong showing had been made that it should not be "scrapped with respect to this year" and that a very serious problem would confront voting registrars if they were to be required to register voters without regard to any durational residency requirement whatever.

[b] Held invalid

In the following cases, it was held that residency requirements of less than 6 months, the fulfilment of which was a prerequisite for voting in state elections, violated various provisions of the Federal Constitution.

A Tennessee statute requiring that prospective voters satisfy a 3-month county residency requirement before being allowed to vote was held unconstitutional in Dunn v Blumstein (1972) 405 US 330, 31 L Ed 2d 274, 92 S Ct 995, discussed more fully in § 12[a, b], supra.

16. Attention is called to the fact that durational residency requirements as prerequisites for voting for the offices of President and Vice President have been abolished by § 202 of the Voting Rights Act of 1970, 42 USCS § 1973aa-1(a-i), which may be found in § 2[c], supra, which statute was held constitutionally permissible in Oregon v Mitchell (1970) 400 US 112, 27 L Ed 2d 272, 91 S Ct 260, reh den 401 US 903, 27 L Ed 2d 802, 91 S Ct 862.

02529

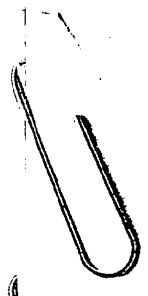
An Alabama statute which required, inter alia, that a prospective voter shall have been a resident of his precinct or ward for a period of 3 months was held unconstitutional as a violation of the equal protection clause, in Hadnott v Amos (1970, DC Ala) 320 F Supp 107, affd 401 US 968, 28 L Ed 2d 318, 91 S Ct 1189, and also affd 405 US 1035, 31 L Ed 2d 576, 92 S Ct 1304.

A California election law imposing a 90-day county residency requirement and a 54-day precinct residency requirement on the right to vote was held unconstitutional as a violation of the equal protection clause, in Young v Gnoss (1972) 7 Cal 3d 18, 101 Cal Rptr 533, 496 P2d 445. The court noted that while the prevention of electoral fraud is a compelling governmental interest, a durational residency requirement is not a necessary means of achieving it. That purpose is adequately served, said the court, by an oath requirement of the state's voter registration system, coupled with the threat of prosecution for violation of penal statutes prohibiting voter fraud. In addition, the court commented that while it might well be true that new residents as a group know less about state and local issues than old residents, a durational residency requirement is much too crude a tool for separating the knowledgeable from the unknowledgeable voter. Finally, said the court, such a requirement cannot be justified on the grounds of administrative necessity, the court concluding that a period of 30 days before an election for suspending registration of voters would be adequate for insuring that the election could be conducted in an orderly fashion.

Consult L Ed 2d LATER CASE SERVICE for later cases

Roland A. Paul

Under this agreement also the American air defense role in Spain will be coordinated more closely with Spanish forces, increased in capability, and more fully integrated into the overall European air defense network.



The quid pro quo under this agreement includes F-4 aircraft, equipment for the Spanish army, machine tools, several naval vessels, and the turnover of the existing American military pipeline in Spain. This military equipment will be provided to Spain through the utilization of Export-Import loans (which bear commercial interest rates and must be repaid), excess equipment, and grant assistance. The total of such assistance requiring current expenditures by the United States averages about $14 million per year, for each of the five years of the agreement, which is less than the amount for Greece, slightly more than the amount for Ethiopia, and about fourteen times the amount provided to Portugal or Morocco.

The Administration claimed that the present agreement, like its predecessors, represented no defense commitment to Spain. To reinforce this proposition, the Senate adopted on December 11, 1970, a resolution introduced by Senator Church, stating it to be the sense of the Senate that nothing contained in the present agreement "be construed as a national commitment by the United States to the defense of Spain."

Whether this new agreement is tantamount to a defense commitment or something less, what it provides, as outlined above, is still so important that it should have been submitted as a treaty. Senator Javits was the leading exponent of this position on the Foreign Relations Committee. The State Department suggested that to submit the agreement to the Senate for ratification might have implied a defense commitment that was never intended. To avoid this result, it would seem that a senatorial understanding expressed in the legislative history or appended to the ratification itself making clear that no such defense commitment was intended would have sufficed. The language could have been very similar to that of the Church resolution.

01-02531

Both the Symingt
Foreign Relations ti
the American bases i
a conclusion: that t
Soviet naval strengt
elaborate and, it seem
about the enormous
cease to have those b

With respect to th
that to lose it would
to procure more Pola
ber of boats on statio
Deputy Secretary of
Committee:

If we could base the s
[deleted] more subma
tances from the Sovie
would cost more and
lation to figure out wh

There are two impo
Polaris base is essen
that could be station
Azores. Second, and
survivability of these
them on station as
absolutely necessary.
degree of readiness i

Turning to the F-4
mittee was told by th
Europe that these ai
defending themselves
forward positions in

arises with respect to the use of American military assistance in putting down the Eritrean rebels. Would more people die, or fewer, if this country were not providing such equipment and training? The United States refused to get involved in the Nigerian civil war, and more than 1,000,000 people died. It did aid the Congo government in 1964, and the insurgency there collapsed. The question is a hard one, and initial assumptions are not always well founded.

Excessive American military assistance for Ethiopia may have interfered with its economic development in two ways. First, to the extent that the United States has provided military assistance instead of economic aid, Ethiopia has failed to receive funds which it otherwise could have obtained for needed development. Second, any augmentation in a country's military forces as a result of military assistance requires that country to devote some of its own assets, human resources if no others, in order to support such an expanded force. These resources could otherwise have been devoted to economic development.

MOROCCO

In 1950, when Morocco was still a French protectorate, the United States received permission from the French to construct four SAC bases and a naval station there. Following Moroccan independence in 1956, the presence of these bases appeared to be inconsistent with the country's neutralist foreign policy, and President Eisenhower and King Mohammed V agreed in 1959 that the United States would evacuate all the bases by the end of 1963. The SAC bases were evacuated on schedule, but by an informal agreement in 1963 American forces were allowed to stay at the naval station, Kenitra. At that time it was not expected that they would be allowed to stay there long. Therefore, a duplicate communications facility was built in southern Spain at Rota.

But contrary to this expectation the United States was never

01-02532

asked to leave Kenitra, and it still operates the station there. The station provides the Moroccans training in various aspects of aviation and provides the United States an additional communications capability in the Mediterranean and eastern Atlantic. This base has 1,700 military personnel, operating expenses of about $9 million a year, and foreign exchange costs of $5.6 million. Besides the training provided to the Moroccans at Kenitra, they currently receive $1.8 million a year in military assistance grants and are allowed $9.5 million in military credit sales each year. There is a 33-man American military advisory mission in Morocco.

The Russians and Czechs have provided the Moroccans with some military and economic assistance. However, there are no Soviet military advisors in Morocco. A few Czech advisors are there. The French have provided the Moroccans about half as much military and economic assistance as the United States has since independence.

In 1963 this country agreed to train Moroccans at Kenitra to preserve its communications capability for the United States. With the establishment of an alternative installation in Spain the need for the communications site in Morocco has decreased, but the value of the training presence has increased, since this training provides the United States a convenient (although certainly not necessary) liaison with this politically moderate Arab state. If the Americans at the base became endangered, it is likely the United States would withdraw from the facility, as it did from Wheelus Air Base in Libya.

01- 02533

represented only two and one-half percent of the total area of the bases covered by the proposal.

By 1970 it had become increasingly obvious that the United States had far too many active bases in Japan for this relatively quiet period in that part of the Far East. If the Japanese or some other foreign power had had forces in the United States equivalent to those the United States had in the Tokyo area that year, it would have been as if there were in the New York metropolitan area 30,000 foreign troops and their dependents on seventy foreign military facilities, including three air bases, one naval base, three large depots, four golf courses reserved for foreign military personnel, and an exclusive downtown hotel.

Finally in December, 1970, the two governments announced plans to reduce the American military presence by 12,000 men and to turn over to Japan a number of major bases, some entirely and some only in part. Most of the American air bases are affected by this decision. Two of the three F-4 squadrons at Misawa will go to South Korea and the other one will return to the United States, greatly reducing American air operations at that base. The F-4 wing at Yokota will relocate to Kadena Air Base on Okinawa. The Southeast Asia air transportation terminal at Yokota will, however, continue there, and the facility will stay as an American base. With the relocation of Yokota's F-4s the Mito Bombing Range will doubtless revert to Japan. Itazuke Air Base will cease being an American air base. Operations at Atsugi Naval Air Facility will become predominantly Japanese. Repair work on American aircraft there will continue.

The naval facilities will also be greatly affected. The United States will cease to use Yakosuka as a naval base, moving the Seventh Fleet headquarters formerly there to Sasebo. It will also change its exclusive rights to the ship repair facilities at Yakosuka to those of priority use in times of emergency. This relocation away from Yakosuka will also eliminate much of the need for the large

01- 02534

than twice that of equivalent Japanese assistance to these countries. Many Americans feel shortchanged when they compare the Japanese defense budget and Japanese foreign aid with American efforts in these fields. Since the Japanese already provide the conventional defense for their homeland, further Japanese security efforts would have to relate to the defense of the region as a whole instead of to the home islands alone. Certain steps in this direction can be made without unduly alarming the other countries of the Far East, which still remember World War II. For instance, the Japanese could give more military and economic assistance in the form of equipment and training, operation of the military communications system in Japan, electronic intelligence gathering, and perhaps tripartite military planning with the United States and certain of Japan's neighbors in the Far East.

OKINAWA

The United States has used Okinawa as a stationing, training, and logistics base ever since World War II. American authority there, which ended May 15, 1972, derived not from the Mutual Security Treaty with Japan but from the provision in the 1952 Peace Treaty that gave the United States the "powers of administration, legislation and jurisdiction" over the Ryukyu Islands. Such authority has now ceased, and the American military presence on Okinawa will be governed by the Mutual Security Treaty just as the bases in Japan proper are today.

The November, 1969, communiqué of President Nixon and Prime Minister Sato on the reversion of Okinawa stated:

> . . . the two governments would immediately enter into consultations regarding specific arrangements for accomplishing the early reversion of Okinawa without detriment to the security of the Far East including Japan. They further agreed to expedite the consultations with a view to accomplishing the reversion during 1972 subject to the conclusion of these specific arrangements with the necessary legislative support.

01- 02535

The communiqué added in effect that nuclear weapons would not be stored on Okinawa without prior consultation with the Japanese government (which, as mentioned above, is tantamount to requiring its consent). The document further stated, however, that reversion would not interfere with the United States' use of its bases on Okinawa for carrying on the war in South Vietnam, and implied that most of the bases there could remain.

The gradual Japanese assumption of responsibility for the immediate defense of the Ryukyus after reversion will include internal security, air defense, coastal surveillance, and sea lane security, for all of which in the home islands the Japanese are now responsible.

In 1970 the United States had 120 military facilities in the Ryukyu Islands, of which nineteen were classed as major, including three air bases, two maneuver areas, two Marine Corps camps, a very large logistics depot and adjoining port facility, and a small naval base. American military installations occupied twenty-six percent of the entire area of Okinawa. Stationed at Kadena Air Base, one of the largest bases in the world, were tactical aircraft, B-52 bombers and KC-135 aerial refueling tankers. Upon reversion the Japanese took over the Naha Air Base on Okinawa for their Air Self Defense Forces on the island. American operating costs on Okinawa in the fiscal year 1970 were $538 million. Foreign exchange costs were $261 million. Stationed on Okinawa in 1970 were almost 45,000 American servicemen with almost 30,000 dependents. These servicemen included about 19,000 Marines, comprising two Marine regiments and some of their support units.

Some of the first American units to deploy to South Vietnam in 1965 were based on Okinawa. Other units sent to Vietnam during that period were supplied with equipment pre-positioned on Okinawa. This was one of the first significant demonstrations of the effectiveness of the pre-positioning concept under wartime circumstances.

The reversion to Japan of the administrative rights over the Ryukyus, as an amendment to an existing treaty, the Peace Treaty

01-02536

of 1952, was properly submitted to the Senate for its ratification, and the Senate quite properly voted for the reversion. Japan is too important to this country and the diminution in military value of Okinawa under reversion is too insignificant for such an issue to divide the two countries.

The absence or presence of nuclear weapons on Okinawa has little bearing on the strategic value of American installations there. Lieutenant General James B. Lampert, the High Commissioner of the Ryukyu Islands, testified before the Symington Subcommittee:

> Reversion itself will not basically alter the strategic importance of our Okinawan bases which are a tremendously valuable investment of the United States. Our Okinawan bases will continue to be a key element in the deterrence of aggression.

In view of the relative importance of Japan in comparison with other American interests in the Far East, there should be no discontent over the requirement for prior consultation with the Japanese before launching military operations from bases on Okinawa and before making major changes in the American military presence there.

a- 02537

Laos*

In 1961–62 there
whom more than
of about 500 Sovie
port for the local
Vietnamese allies.

Neither the Uni
continue this conf
to disengage. Neg
and elsewhere. Th
in rather unambig
trality of Laos a
thirteen communi
commonly known

Under the ma
established a trip
ist elements unde
under Prince Sou

* Part of this chap