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Against Residency Requirements

Michael J. Pitts†

INTRODUCTION

The topic for discussion at this Forum is “Does Election Law Serve the Electorate?” Were I pressed to answer this question from a global perspective, my answer would be “generally, no.” There are a myriad of ways in which election law does not serve the electorate, most of which relate back to what may be the biggest flaw with American democracy—the fact that it is predominantly structured by political partisans whose primary interest seems to be to their own (or their parties’) well-being rather than an obligation to developing a system that works best for the overall electorate.1

My goal in this article is to establish that residency requirements are one aspect of election law that does not serve the electorate and should be eliminated as a condition for obtaining and holding elected office. What I mean by a “residency requirement” is any law (whether it be a federal or state constitutional provision, a state statute, or a local ordinance) that requires a candidate or officeholder to be a resident of a particular geographic area (whether it be a political entity, such as a state, county, or city, or whether it be a particular electoral district—e.g., a single-member district—within a political entity). In a nutshell, my view is that such requirements represent barriers to electoral competition that only minimally benefit the electorate and instead primarily serve the interests of incumbent politicians of all stripes.

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1 I include judicial actors in the mix of political partisans—though they tend to be less overtly partisan than other actors in our democratic system.
In this article, I will proceed as follows. Part I discusses various types of candidate residency requirements, explores the possible benefits of such requirements, examines the costs, and generally contends that residency requirements should be eliminated because the costs outweigh the benefits. Part II theorizes about why residency requirements persist as part of the electoral landscape and briefly discusses ways in which residency requirements might be eliminated or scaled back.  

I. BENEFITS AND COSTS OF RESIDENCY REQUIREMENTS

Residency requirements should be eliminated. In this part, I define what I mean when using the term “residency requirement.” Importantly, my critique of residency requirements goes beyond requirements for candidates running for office and encompasses residency requirements for candidates actually serving in office. After defining the scope of my critique, this part examines the potential benefits of residency requirements that have been recognized by courts dealing with challenges to these requirements as a condition for running for office (which are also commonly known as “durational residency requirements”). This part then evaluates a few other potential benefits of residency requirements before considering who residency requirements are primarily meant to protect—the electorate—and whether the electorate needs such protection. Finally, this part discusses the costs of residency requirements and also tackles special considerations related to residency requirements as a condition for continuing to hold elected office.

A. Defining “Residency Requirements”

As this is The University of Chicago Legal Forum, it makes sense to begin a discussion of what constitutes a residency requirement with one of the most recent prominent examples of...
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a dispute as to the residence of a candidate—Rahm Emanuel’s bid to become Mayor of Chicago in 2011. The Illinois Municipal Code required a municipal candidate to reside in the municipality for at least one year prior to election. Some Chicago residents alleged that Emanuel did not meet the one-year residency requirement because he had moved from Chicago to Washington, DC to be Chief of Staff for President Obama. At one point in the proceedings, an Illinois appellate court determined that Emanuel did not meet the residency requirement. Ultimately, though, the Illinois Supreme Court held that Emanuel complied with the statutory requirement of a one-year residency prior to the election.

The ordinance involved in the Emanuel case is not unique—requirements for candidates to be residents of a particular jurisdiction exist throughout the country. The United States Constitution mandates that members of Congress be “an inhabitant of that state” when elected. The Constitution also renders a citizen ineligible to be President unless that person has “been fourteen years a resident within the United States.” To be eligible to serve as Governor of Indiana, a person must have been a resident of the State for five years prior to election. To be eligible to serve as a member of the Georgia General Assembly, a person must have been a citizen of Georgia for at least two years. To be eligible to serve as a Supreme

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4 65 ILCS 5/3.1-10-6(a) (2013).
5 Maksym v. Bd. of Election Comm’rs of the City of Chi., 950 N.E.2d 1051, 1053–54 (Ill. 2011).
6 Id. at 1055 (citing Maksym v. Bd. of Election Comm’rs of the City if Chi., 942 N.E.2d 739 (Ill. App. 2011)).
7 Maksym, 950 N.E.2d at 1066 (reversing appellate court judgment).
8 U.S. CONST. art. I, § 2, cl. 2 (House of Representatives); U.S. CONST. art. I, § 3, cl. 3 (Senate). See generally Derek T. Muller, Scrutinizing Federal Electoral Qualifications, 90 IND. L.J. (forthcoming 2015) (discussing constitutional residency requirements for federal office). The United States Constitution also mandates that members of Congress be citizens of the United States for a certain amount of time before being elected. U.S. CONST. art. I, § 2, cl. 2 (House of Representatives); U.S. CONST. art. I, § 3, cl. 3 (Senate). This article takes no position on whether United States citizenship should be a requirement for holding office at any level of government.
9 U.S. CONST. art. II, § 1, cl. 5.
10 IND. CONST. art. 5, § 7.
11 GA. CONST. art. III, § II, para. 3. In addition, members of the Georgia General Assembly must have been “legal residents of the territory embraced by the district from
Court Justice in Kentucky, a person must have been a resident of that Commonwealth for two years prior to taking office.\textsuperscript{12} To be eligible to serve as Mayor of Oakland, California, a person must have been a city resident for at least thirty days prior to the issuance of nomination papers.\textsuperscript{13} Suffice to say, that whether it be at the federal, state, or local level, requirements that elected officials reside in a particular jurisdiction for some amount of time prior to assuming office (a.k.a. "durational residency requirements") are widespread.\textsuperscript{14}

The previous examples all involve a requirement that elected officials reside in a particular jurisdiction, but my definition of residency requirements for purposes of this article is more broad-based. For instance, the Illinois Municipal Code requires a candidate for municipal office to be a qualified voter of the municipality—which amounts to a residency requirement because there is usually a durational residency requirement to qualify to vote.\textsuperscript{15} Moreover, the Illinois Municipal Code also requires candidates for alderman of a ward to be resident of their ward for at least a year.\textsuperscript{16} In addition, Illinois municipal officials can vacate their office by a "more than temporary removal of residence from the municipality."\textsuperscript{17} And Illinois is not unique in these requirements, as many of the cases cited which elected for at least one year." Id. See also N.J. Const. art. IV, §1, para. 2 (requiring members of the New Jersey Senate to have been a resident of the state for four years and members of the General Assembly to have been a resident of the state for two years).

\textsuperscript{12} KY. CONST. § 122.


\textsuperscript{14} Dow, supra note 2, at 1516 (noting that durational residency requirements are not “unique” and that “[m]any states impose some form of durational residence requirement for at least some elected state officials, including governors, legislators, judges, and mayors”); In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, 40 A.3d 684, 693 (N.J. 2012) ("[a]lmost every state has enacted durational residency requirements for state legislators" (quoting In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, 48 A.3d 1164, 1188 (N.J. Super. Ct. 2012)).

\textsuperscript{15} 65 ILCS 5/3.1-10-5(a) (2013). See also Frami v. Ponto, 255 F. Supp. 2d 962, 967 (W.D. Wis. 2003) ("A registration requirement is a de facto residency requirement."). To be clear, my only concern with a person being required to be a qualified voter as a condition of running for office in a particular place relates to any geographic requirement rather than with, say, the age or citizenship requirements necessary to be a qualified voter. However, while beyond the scope of this article, my general inclination is that we should dispense with all candidate qualifications.

\textsuperscript{16} 65 ILCS 5/3.1-10-5(c) (2013).

\textsuperscript{17} 65 ILCS 5/3.1-10-50(c)(1) (2008).
throughout this article involve, for example, the continuing need to reside in a particular district within a jurisdiction.  

In essence, the concern for purposes of this discussion is any law (constitutional, statutory, or otherwise) that either explicitly requires or implicitly requires (such as the requirement to be a qualified voter) a candidate or officeholder to reside in a particular geographic area as a condition of running for office, attaining election, or continuing to hold office. My basic argument will be that such requirements, while widespread, are of little utility and their enforcement likely only stifles electoral competition to the detriment of voters.

One last point before deconstructing residency requirements. It may seem like residency requirements are not much of a problem. You might reasonably ask how often a residency requirement prevents a viable candidate from running for office. The answer to the question is, in many ways, unknowable, but there seem to be plenty of cases (see the ensuing discussion) where residency requirements play a role in excluding otherwise qualified candidates. In addition to the

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19 There is a concomitant issue as to how residency requirements should be implemented. Put differently, various potential legal standards exist for determining who is or who is not a resident of a particular geographic area. The concern of this article, however, lies in the predecessor question of whether to have residency requirements at all. For a discussion of various legal standards for determining residency, see Dow, supra note 2, at 1517–19.

actual cases involving residency requirement challenges, it is likely many candidates are deterred from even filing papers because of their failure to meet residency requirements. Put simply, a potential candidate’s knowledge of a lack of compliance with a residency requirement will lead that potential candidate to not even attempt to run. In short, residency requirements are not trivial.

B. Assessing Benefits and Costs of Residency Requirements

Courts routinely uphold residency requirements against federal and state constitutional challenges. In doing so, they most often invoke three benefits of residency laws. In this section, the benefits most frequently cited by the courts are discussed first. Then, other benefits of residency requirements are considered. Finally, after discussing the benefits of residency requirements, I evaluate their costs.

1. Benefits of residency requirements frequently identified by courts.

The courts often articulate three benefits of candidate residency requirements: the ability of candidates to understand the problems and needs of their constituencies, the need for voters to have adequate time to assess the candidates, and the prevention of political carpetbagging.21

Before discussing these three justifications, it’s helpful to present a concrete hypothetical involving residency requirements to aid as a springboard for discussion. Let’s say Jack Donaghy is a Republican corporate executive from New York City. Donaghy, though, is disenchanted with New York

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21 See, e.g., Sununu v. Stark, 383 F. Supp. 1287, 1290 (D.N.H. 1974) (“The three principal state interests served by the durational residency requirement are: first, to ensure that the candidate is familiar with his constituency; second, to ensure that the voters have been thoroughly exposed to the candidate; and third, to prevent political carpetbagging.”). See also Barrow v. City of Detroit Election Comm’n, 836 N.W.2d 498, 510 (Mich. App. 2013).
City and desires to enter local politics elsewhere. So he decides to run for city council in Pawnee, Indiana, a predominantly rural, Republican, farming community in west-central Indiana where his opponent will be long-time Pawnee resident Leslie Knope. Pawnee, though, has a city ordinance that prohibits Donaghy from running in Pawnee’s next city council election because Pawnee has a one-year residency requirement that Donaghy cannot meet. What would be the benefit of the Pawnee ordinance that prohibits Donaghy from running?

a. Candidate understanding of constituency.

One possible benefit of Pawnee’s residency requirement is that it helps ensure candidates are familiar with the problems and needs of Pawnee’s people—a government interest (i.e., a benefit) frequently cited by courts.22 In our hypothetical example, Donaghy has been living in New York where the primary issue may be racial profiling.23 In Pawnee, however, the primary concern may be whether to build a public park called Pawnee Commons.24 If this is the case, Donaghy’s lack of an

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22 Mobley v. Armstrong, 978 S.W.2d 307, 310 (Ky. 1998) (“The state has an interest in ensuring that a judge [running for election] is familiar with the problems and needs of the people of his district.”); Robertson v. Bartels, 150 F. Supp. 2d 691, 696 (D.N.J. 2001) (acknowledging argument that a residency requirement “allows a candidate the opportunity to become familiar with the issues and concerns that are important to the people he or she seeks to represent”); In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, 40 A.3d 684, 699 (N.J. 2012) (“[residency requirements] ensure that the candidate can become familiar with the constituency and the issues facing the people to be represented.”); Gilbert v. State, 526 P.2d 1131, 1132 (Alaska 1974) (noting that residency requirements assure that candidates “reside in the state a sufficient time to gain an understanding of the history and geography of the state and the needs and problems of its residents”); MacDonald v. City of Henderson, 818 F. Supp. 303, 305 (D. Nev. 1993) (noting that residency requirements “foster[] candidates who better understand the issues and problems” of the jurisdiction); Lewis v. Gibbons, 80 S.W.3d 461, 466 (Mo. 2002) (“The purpose of residency statutes is to ensure that governmental officials are sufficiently connected to their constituents to serve them with sensitivity and understanding.”); State ex rel. Brown v. Summit County Bd. of Elections, 545 N.E.2d 1256, 1259 (Ohio 1989) (noting that the purpose of a residency requirement is so that candidates “have the opportunity to know the customs and mores of the people”); Bolanowski v. Raich, 330 F. Supp. 724, 730 (E.D. Mich. 1971) (“[C]andidates for ... office must ... understand all the local problems, [and] know the people of the community ...”); Woodward v. City of Deerfield Beach, 538 F.2d 1081, 1082 (5th Cir. 1976) (residency requirements are “necessary to guarantee the election of responsible, knowledgeable city commissioners”).


24 See generally Parks and Recreation: Season 5 (NBC television broadcast 2012–
immediate geographic connection to Pawnee may lead to his having only limited knowledge of the issues facing those he seeks to represent. Put simply, the Pawnee ordinance will provide the benefit of better-qualified candidates because candidates who have resided in Pawnee will have more knowledge about the issues facing Pawnee.

Let me concede that such a benefit exists—that candidates who reside in closer geographic proximity are likely to better understand the issues of that geographic area. Put more concretely, that long-time Pawnee resident Leslie Knope would have more knowledge of the issues facing Pawnee than long-time New York resident Jack Donaghy. But the question is not whether any benefit exists. The question is how much of a benefit exists and whether such a benefit outweighs the costs of a residency requirement.\textsuperscript{25} The benefit of a more knowledgeable candidate due to a residency requirement is slight and does not outweigh the costs of a residency requirement.

The first reason why the benefit is slight is that residency is being used as a proxy for knowledge of the issues, but residency is an imperfect proxy. An intrepid Jack Donaghy from New York may have just as much, if not more, knowledge of (and the capacity to resolve) the issues facing Pawnee than persons who have lived there for several years (or at least as long as mandated by the residency requirement).\textsuperscript{26} As one federal appellate court noted:

\textit{[A] two year resident of... [the city can] hold public office regardless of his lack of knowledge of the governmental problems of the city. On the other hand, [the residency requirement] excludes more recent arrivals who have had experience in local government elsewhere or who have made diligent efforts to become well acquainted with the municipality.}\textsuperscript{27}
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In short, while some connection may exist between durational residency requirements and knowledge, it's a tenuous connection.

Moreover, in modern society a candidate seeking office can easily obtain information. Indeed, the notion that a person residing in one geographic area cannot have knowledge about the issues in another geographic area seems to come from an antiquated notion of how information can be obtained. Perhaps in a bygone era, it was necessary to hang out at the local barbershop or have the newspaper boy deliver the local paper to your home to acquire knowledge of issues facing a community. However, in the Internet era, it's far, far, far easier to gather information and knowledge about a polity than ever before. If Donaghy wants to know what's happening in Pawnee, the Pawnee Journal and Pawnee Sun are likely only a few Internet clicks (and perhaps a paid subscription) away, information about Pawnee's government can probably be found on its website, and he can probably easily become Facebook friends with local community organizers. In short, it's hard to believe that in our current information age, geography matters all that much in terms of a candidate's understanding of the issues and needs of a constituency.

qualifications sought to be insured by the [three-year residency] requirement. It is also easy to conceive of a person who may have lived in the City for two and one-half years and gathered sufficient knowledge to be able to have a good understanding of all aspects of the municipality's difficulties.

43) Thompson v. Mellon, 507 P.2d 628, 635 (Cal. 1973) ("The imprecise nature of a durational residence requirement which includes uninformed old time resident candidates but excludes well informed new resident candidates is clear. It is simply too crude and imprecise an instrument to effectuate this state interest."). Or, as a Michigan state court judge colorfully wrote, "Mere presence in a community is no more indicative of civic consciousness than mere presence at a crime scene is indicative of guilt." Barrow v. City of Detroit Election Comm'n, 836 N.W.2d 498, 515 (Mich. App. 2013) (Stephens, P.J., concurring in part and dissenting in part).

28 Cf. Wellford v. Battaglia, 343 F. Supp. 143, 150 (D. Del. 1972) (noting in 1972 that "the available news coverage in the community is clearly sufficient to provide a would-be mayor with the resource material necessary to become relatively well informed in substantially less than [the residency requirement of] five years").


30 A website for the fictional City of Pawnee, Indiana, from the television show Parks and Recreation can be found here, available at http://www.pawneeindiana.com/home.shtml, archived at http://perma.cc/4BQR-JHHW.
Additionally, a campaign will serve to inform the candidate about the issues. Even if Donaghy initially lacks any knowledge of Pawnee and lacks the ability to easily gather information about Pawnee prior to entering a campaign for city council, the campaign itself will help acquaint him with the problems and needs of Pawnee’s populace. Indeed, an election campaign can serve as much as a bottom-up dialogue from constituents to candidates as it can serve as a top-down delivery of solutions to constituent problems from candidates. If Donaghy truly wants to get elected, he’s going to have to spend some time learning about the issues that impact the electorate and, in doing so, will undoubtedly become educated about the problems and needs of Pawnee’s electorate.\(^{31}\) If Donaghy does not become properly acquainted with the issues, that will be a liability in his campaign.\(^ {32}\)

In fairness, there’s no question that, on average, a person who resides geographically closer to an area for a bit of time is likely to have a higher knowledge of issues in that area than a person who resides further away. But candidates are not average persons. Candidates are a select group of persons who have opted to pursue political office. When a person opts to pursue political office, they are going to apprise themselves of the issues—or else they will not be able to effectively campaign. While there could be a slight incremental advantage to candidates who have resided in a jurisdiction for a longer time—that incremental advantage would be just that, slight. Moreover, any incremental advantage garnered from knowing the issues could be negated by the notion that a person from outside the geographic area might bring a fresh perspective to the issues at hand. Finally, if the incremental advantage is more than slight, presumably such a sizeable advantage will come to the fore during a campaign and the unknowledgeable candidate will be defeated, which makes a residency requirement irrelevant.

\(^{31}\) Cf. Thompson v. Mellon, 507 P.2d 628, 635 (Cal. 1973) (rejecting a residency requirement of two years and noting the government “failed to demonstrate that the election process is inadequate to weed out incompetent, unknowledgeable candidates, insensitive to, and unaware of, the best needs of the community”).

b. Voter knowledge of candidates.

In addition to ensuring candidates have knowledge of their constituency, another potential benefit of residency requirements is that they provide voters with the ability to gain knowledge about a candidate’s abilities and character—and, again, this is a benefit of residency requirements frequently invoked by courts.33 As the Alaska Supreme Court once wrote:

[I]t is most important that electors have a period in which they may become familiar with the character, habits and reputation of candidates for political office. Modern media campaigns and “packaged” candidates permit political hopefuls to campaign for office with little or no direct contact with the public they seek to serve. It is essential that voters have at least the opportunity to have some direct knowledge of their candidates in order to judge their sincerity and the truth of the claims which these aspirants for public office press forward through the media. It is a minimal requirement at best to ask a candidate to spend one year as a part of the community he hopes to represent in order to satisfy this need.34

33 Mobley v. Armstrong, 978 S.W.2d 307, 310 (1998) (noting that a residency requirement “enables the people of the district to gain knowledge about the candidate’s abilities and character”); Robertson v. Bartels, 150 F. Supp. 2d 691, 696 (D.N.J. 2001) (noting how New Jersey’s one-year residency requirement for state legislative districts could allow “the people of New Jersey the necessary opportunity to become familiar with a potential candidate”); In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, 40 A.3d 684, 699 (N.J. 2012) (noting that residency requirements “ensure that voters have time to develop a familiarity with the candidate”); MacDonald v. City of Henderson, 818 F. Supp. 303, 305 (D. Nev. 1993) (noting that residency requirements “allow[] the voters to become familiar with the ability, views, and character of a prospective candidate”); Chimento v. Stark, 353 F. Supp. 1211, 1215 (D.N.H. 1973) (noting residency requirements “give[] the voters of the State an opportunity to gain by observation and personal contact some firsthand knowledge of the candidates”); State ex rel. Brown v. Summit County Bd. of Elections, 545 N.E.2d 1256, 1259 (Ohio 1989) (noting that residency requirements “insure the voters the opportunity to become acquainted with the candidate’s ability, character, personality, and reputation”); Walker v. Yucht, 352 F. Supp. 85, 98 (D. Del. 1972) (three judge panel) (noting residency requirements “provide[] the electorate an opportunity to become acquainted with a would-be lawmaker and to observe his intelligence, responsiveness, judgment, sense of responsibility, temperament, character, and other qualities reasonably believed necessary for effective leadership”).

34 Gilbert v. State, 526 P.2d 1131, 1135 (Alaska 1974). As another court put it:

[I]t is true that during the course of a modern campaign candidates are exposed to public scrutiny by the mass media. Yet even as modern communications systems have allowed more people to be informed about a
It is undoubtedly true that residency does provide some additional opportunity for voters to judge the character and abilities of a candidate. Returning to the hypothetical, the voters of Pawnee would have had more opportunity to judge the character and ability of long-time resident Leslie Knope than of non-resident Jack Donaghy. This opportunity could lead to Pawnee voters electing better candidates. But again, the benefits would seem to be slight and do not outweigh the costs of residency requirements.

The benefit will be slight because very few persons in the electorate are likely to have personal knowledge (what the Alaska Supreme Court passage above refers to as "direct knowledge") of a candidate. In a different era of politics, voters were perhaps more likely to have personal knowledge of candidates. At one point, maybe almost everyone did know the governor of the state or his or her local representative or even city council member. But the fact is that in the vast majority of elections—even local ones for the veritable dogcatcher—voters will have no prior personal knowledge of the candidates based on residency.

candidate in a shorter period of time, the techniques of advertising and public relations have also enabled candidates to manipulate and control their public image. One who lives among city residents for a substantial period of time will usually reveal himself to his neighbors in ways which will not appear in newspaper advertisements or televised debates. And it can safely be assumed that his neighbors will talk to others about him. Knowing the character of a candidate may be as important as knowing his publicly-stated views on the issues. And of course the election process itself cannot insure that voters will be informed about the candidates.


Cf. Draper v. Phelps, 351 F. Supp. 677, 685 (W.D. Okla. 1972) (upholding a residency requirement for the Oklahoma legislature and noting "a paucity of television and radio stations and a lack of daily newspapers in a large number of the rural representative districts" such that "exposure of candidates to voters in these representative districts must necessarily be personal and personalized").

As one district court noted in the 1970s:

The [residency requirement] here involved was perhaps a rational one for 1909, when the predominantly rural-oriented legislature conceived of cities as larger towns—towns in which most of the inhabitants knew each other. We take judicial notice of what any city dweller knows, that tenants in a high-rise dwelling building know very few of their fellow tenants, and that even in single-family dwelling neighborhoods, acquaintanceship rarely encompasses more than persons living within the city block. Taking into account the realities of city life and the problems of the cities we can only conclude that the
To some extent it's possible that instead of direct knowledge of a candidate, voters will obtain indirect knowledge—through friends and neighbors or through local media—if the candidate has been a resident of the community. However, such indirect knowledge is secondhand and differs little in substance from the "[m]odern media campaigns" derided by the Alaska Supreme Court. Finally, the vast majority of information about character and ability acquired by voters will come from the campaign. At that point, voters will presumably receive messages both pro and con in relation to a candidate's abilities and character.

Let's put all this in the context of our hypothetical involving Jack Donaghy's bid for Pawnee City Council. Even if Donaghy resided for a year in Pawnee prior to campaigning for office, it's unlikely that he's going to personally know a large number of residents and that many are going to know very much about his habits, ability, and character. Instead, what will presumably happen is that Donaghy will meet many people through his campaign. Moreover, voters are likely to get their information and form their opinion of Donaghy through his campaign materials and other campaign events (e.g., public forums). Finally, if Donaghy has flaws in his character and reputation, his opponent will likely highlight those flaws to the electorate. Put simply, it's unlikely a residence requirement provides much more information about a candidate's character and abilities than a campaign does.

c. Prevent carpet bagging.

A third possible benefit of residency requirements—and another widely cited justification courts recognize—is to prevent carpet bagging.37 Now, apart from being a slur that stops all

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Mogk v. City of Detroit, 335 F. Supp. 698, 700–01 (E.D. Mich. 1971). Allow me to indulge in a personal reflection on this point. I live in Zionsville, Indiana, a town with a population of approximately 24,000 persons. Rarely do I personally know a candidate on the ballot. And the few candidates who I have known, I have only had a most perfunctory knowledge of.

conversation and counterargument, the term “carpetbagger” would seem in this context to mean that we are trying to prevent a person from running for office and manipulating that office for private gain.\(^{38}\) Perhaps put into the context of our hypothetical, Pawnee’s ordinance helps prevent Jack Donaghy from running in Pawnee and then steering all of the city contracts to Kabletown—a business Donaghy works for. Or, perhaps, Pawnee’s ordinance prevents Donaghy from using Pawnee as a stepping-stone to furthering his own political career. In this way, Pawnee’s ordinance seems to prevent the use of Pawnee’s government for the private gain of Donaghy and/or Kabletown.

But yet again, the benefits of using a residency requirement as a proxy for the prevention of misappropriating political office for private gain would seem to be slight. For starters, one would presume that a political campaign would typically bring to light issues related to carpet bagging. During the course of a campaign, Donaghy’s opponent for Pawnee City Council would presumably alert the electorate that Donaghy is an outsider seeking office for impure motives. Indeed, one suspects that Donaghy’s opponent will use the term carpetbagger during the campaign. In essence, a campaign seems likely to bring issues of carpet bagging to the electorate’s attention.\(^{39}\)

The notion of carpet bagging might also serve as a proxy for the argument that an “outsider” will just buy his or her way to political office against an underfunded resident and that the

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\(^{38}\) Merriam-Webster defines carpetbagger as a “nonresident or new resident who seeks private gain from an area often by meddling in its business or politics.” Carpetbagger, Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/carpetbagger, archived at http://perma.cc/PX3Z-E3FK.

\(^{39}\) For instance, in the 2014 New Hampshire Senate race between Jeanne Shaheen (D) and Scott Brown (R), one of the Democrats’ primary campaign messages was that Brown, who had recently moved to New Hampshire, was a carpetbagger. Sabrina Siddiqui, Scott Brown Tackles New Hampshire Geography in Final Debate, HUFFPOST POLITICS (Oct. 30, 2014, 8:52 PM), available at http://www.huffingtonpost.com/2014/10/30/scott-brown-new-hampshire_n_6079418.html, archived at http://perma.cc/F4CN-PUBY (noting that “Brown’s campaign has been dogged by charges of carpet-bagging”).
outsider will not serve the interests of the electorate as well as the “insider” would. Assuming voters are not smart enough to see through this (more on the competency of the electorate in this realm later), the assumption underlying this type of objection is that the person from outside with a lot of money is inherently not as likely to serve the electorate’s interest as the less-monied resident. But, in this scenario, is it the money or the geography that is the problem? In other words, nothing prevents a well-resourced resident from tricking the electorate into thinking that the candidate actually has the polity’s best interests at heart. And there’s no reason to think that an under-funded resident would not similarly use electoral office for his or her own personal gain.

One might construct a “worst-case” scenario where an outside interest runs a candidate (or a slate of candidates for a governing body) who is a highly-funded non-resident who will not have the electorate’s best interests in mind. But how often is this going to occur? Will it occur more often than situations where incumbent politicians use residency requirements to stifle legitimate opposition? In addition, the same scenario could occur with resident candidates. In other words, a wealthy outside interest could sponsor a candidate or slate of candidates of residents who do not have the best interests of the polity in mind. Indeed, one suspects that the latter strategy would be much better for achieving the desired result because of a general hostility that would likely exist against non-resident candidates—especially non-resident candidates funded by outsiders.

Moreover, the post-Reconstruction period—from which the term carpetbagger emanates—lies in the distant past. While corruption and profit from political office may occur—for instance, consider the two former Attorneys General of Utah who were recently arrested on corruption charges or the recent

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40 My sense is that this objection only comes to the fore where there is an imbalance of resources. Where candidates have the same resources, it seems all voters will be equally well informed of the carpet bagging issue.

41 To the extent a residency requirement prevents carpet bagging because it provides the ability of voters to know the character of the candidate, then prevention of carpet bagging does not add more to the mix.

42 See discussion infra Parts I.B.3. and I.I.A.

43 Infra notes 83–85.

44 Matt Pearce, Two Former Utah Attorneys General Arrested on Bribery Charges,
track record of Illinois governors— I don’t know why corruption would be higher among non-resident candidates and officeholders. What is it about being a resident in a geographic area that would make a particular candidate less likely to manipulate office for political gain? One could presume that a geographic resident might have to live with policies and decisions that do not serve the electorate (e.g., high crime rates or poor educational systems). But it does not seem to me that being geographically situated amounts to a strong proxy for being a politician who will not engage in outright corruption or even softer forms of self-dealing.

To some extent the empirical question is this: Would a world without residency requirements be a world in which more political corruption would occur or where more candidates will be elected who do not have the best interests of their constituents at heart? I don’t think a world without residency requirements would lead to a statistically significant increase in either of these negative results. Moreover, there does not appear to be any support for the proposition that residency requirements reduce corruption.

2. A more realistic assessment of the benefits identified by the courts.

So far, I have discussed the benefits of residency requirements primarily through the lens of the hypothetical involving Jack Donaghy and the City of Pawnee, but the hypothetical is probably far-fetched and does not represent the


45 Claire Suddath, A Brief History of Illinois Corruption, TIME (Dec. 11, 2008), available at http://content.time.com/content/nation/article/0,8599,1865681,00.html, archived at http://perma.cc/7V3B-UV8G.

46 Speaking of empiricism, one of the common links of all three benefits frequently cited by courts is that no empirical evidence exists to support the notion that residency requirements actually achieve these benefits. Having read numerous judicial opinions involving challenges to residency districts as unconstitutional, I have yet to encounter any empirical support for the notion that residency requirements actually accomplish the ends governments hope to achieve through their use. Indeed, a 2011 federal court opinion implies that little, if any, empirical support exists for any of these rationales. Lewis v. Guadagno, 837 F. Supp. 2d 404, 414 (D.N.J. 2011) ("Central to the resolution of the question of whether residency requirements violate the Equal Protection Clause is not whether [the government has] . . . articulated a sufficient empirical justification for the provision's existence and application.") (emphasis added).
likely scenario where residency requirements prevent a candidacy. The hypothetical posits a situation where a person (Jack Donaghy) with seemingly no connection at all to a community (the City of Pawnee) seeks office. Yet the more likely scenario is that a candidate with some past or pre-existing connection to a community would seek to run and get excluded by a residency requirement. For instance, take a situation in Missouri where a candidate who grew up in Knox County, still had parents and siblings who worked there, and had visited on holidays and weekends was precluded from running for county judge due to a one-year residency requirement. Indeed, it makes intuitive sense that it will likely be the extremely rare instance where a candidate will offer his or herself to a constituency to which he or she does not at least have some loose roots or connection.

I envision that there are generally (though not exclusively) four types of persons who would want to run for office but would be precluded by residency requirements. First would be a person who does not reside within the geographic area but has strong name recognition within the area either because they are famous or used to reside there. Second would be a person who

47 Lewis v. Gibbons, 80 S.W.3d 461, 463–67 (Mo. 2002). As another example of a residency requirement blocking a candidate with a strong connection to a community, consider the case of John Sununu, who later became Chief of Staff to President George H. W. Bush. Sununu attempted to run for State Senator after having been Chairman of the Salem, New Hampshire, Water and Sewer Planning Committee, Chairman of the Salem Planning Board, and having been elected to represent Salem in the New Hampshire General Court. Sununu v. Stark, 383 F. Supp. 1287, 1289 (D. N.H. 1974) (three-judge panel). However, Sununu was barred from appearing on the ballot as a State Senate candidate because he had resided in New Hampshire for a little less than five years and New Hampshire had a seven-year residency requirement for State Senators. Id. at 1288–89.

48 Even though there is no requirement that candidates for British Parliament reside in their constituencies (i.e., single-member districts), less than 10% of these constituencies do not have any candidates who reside within their boundaries. Kai Arzheimer & Jocelyn Evans, Geolocation and Voting: Candidate-Voter Distance Effects on Party Choice in the 2010 UK General Election in England, 31 POL. GEOGRAPHY 301, 303 (2012).

49 One scenario where residency requirements seem to play a role is when celebrities try to return home or find a favorable locale to run for office. See, e.g., Roger Alford, Can Ashley Judd Represent Kentucky with a Tennessee Address?, CHRISTIAN SCIENCE MONITOR (March 19, 2013), available at http://www.csmonitor.com/USA/Latest-News-Wires/2013/0319/Can-Ashley-Judd-represent-Kentucky-with-a-Tennessee-address, archived at http://perma.cc/N7BM-Y93H. See also Lewis v. Guadagno, 837 F. Supp. 2d 404 (D. N.J. 2011) (durational residency requirement operating to exclude nine-time Olympic gold medalist Carl Lewis from running for the New Jersey Senate). This might be caused, at least in part, by the notion that only persons with some renown (broadly
does not reside in the geographic area but who resides close to the area—for example, a person who wants to run for Mayor of Indianapolis but resides in a suburb of the city. Third would be a person who lives in the geographic area but has not lived there for long enough to meet a durational residency requirement. Fourth would be a person who does not reside in the geographic area but who has the resources (i.e., money and time) to create name recognition and effectively campaign.

In all these examples, it’s not clear that residency adds much to the mix in securing knowledgeable candidates, giving voters the ability to judge candidates’ character and ability or preventing carpet bagging. For instance, when it comes to, say, the ability of voters to judge a person’s ability and character, residency will likely do very little because: (1) a person who already has name recognition had to somehow acquire that name recognition; (2) a person who resides close to the geographic area provides pretty much the same opportunity to get a sense of the person’s character as someone within the geographic area; (3) a current resident provides some opportunity for judging character, though not quite as much as a residency requirement might provide; and (4) the purchasing of name recognition, in and of itself, tells voters something about the candidate’s character.

My point is that the more typical situation, where a person will be excluded from running because of a residency requirement, will involve someone who would not be much different than a resident candidate. The typical situation would seem to most likely involve a person who does have some understanding of the constituency and the issues facing it, is known by some persons in the community, and is not a carpetbagger. Otherwise, the person is unlikely to be a competitive candidate.

defined to, say, include the legendary high school football quarterback who wants to return to his hometown as mayor) think they can overcome what would seem to be the inherent disadvantage of lacking a current geographic connection with a jurisdiction.

While the hypothetical I have posed involving Jack Donaghy and the City of Pawnee more likely represents an outlier scenario than a common one, a wealthy Jack Donaghy might fall into this fourth category.

I take no position as to whether purchasing name recognition says something either positive or negative about a candidate’s character.

I suppose wealthy folks might seek office in places where they have no connection and attempt to buy their way into office. But it’s hard for me to think that there are going to be many candidacies like this. For instance, is Warren Buffet, the Oracle of
In sum, the three benefits of residency requirements (candidate familiarity with the constituency, opportunity for voters to appraise the candidate, prevention of carpet bagging) that courts identify would seem to only be very slight benefits in each of the four more realistic scenarios.

3. Other possible benefits of residency requirements.

While courts primarily focus on the three previously mentioned benefits of residency requirements, these are not the only benefits and justifications to consider. Residency requirements might have the benefit of limiting the number of candidates and preventing ballot crowding. Residency requirements might also provide geographic representation. Moreover, there is a long tradition of residency requirements. However, none of these benefits seem particularly compelling.

Residency requirements might help keep the number of candidates in a particular election from becoming too unwieldy. Presumably, without residency requirements, it might be possible for so many non-serious candidates to appear on a ballot that campaigns cannot get their voice heard and voters cannot possibly gather information about the election. Returning to the hypothetical involving the City of Pawnee, the problem might be that if we let Jack Donaghy run without having established residency, then Liz Lemon, Tracy Jordan, Jenna Maroney, and Kenneth Parcell will run as well and create too much confusion.

But residency requirements probably do little to prevent ballot crowding in the paradigmatic scenario. It seems unlikely that candidates from far and wide are going to descend upon particular offices to the point of ballot crowding. Moreover,
other more effective ways exist to prevent ballots from becoming overly crowded. For most elected offices, prospective candidates need to generate some level of grassroots support, such as by gathering signatures of registered voters, or by putting their money where their mouth is and paying a filing fee. These laws, rather than residency requirements, should be used to prevent scrums of candidates running for office.

Residency requirements also provide the benefit of geographic representation. For instance, a requirement that a person reside in a single-member district within a particular state can ensure that a particular geographic area receives descriptive representation in the legislature. Put into more concrete terms, requiring a candidate (or elected official) for the Nebraska State Legislature to reside in the Sand Hills region of Nebraska ensures that residents in that area receive representation.

electoral process to non-residents").

See, e.g., Bullock v. Carter, 405 U.S. 134 (1972) (filing fee); Jenness v. Fortson, 403 U.S. 431 (1971) (signature requirement). If one accepts the notion that residency requirements demonstrate a candidate's commitment to an electorate, I suppose it might be possible to consider that, instead of banning non-residents outright, non-residents demonstrate some higher commitment than resident candidates. For instance, maybe non-resident candidates would have to gather twice as many signatures to appear on the ballot.

It's possible that a prohibition on running for multiple offices in multiple jurisdictions would need to be adopted if residency requirements were eliminated. However, some democracies allow candidates to seek office in more than one district. LOUIS MASSICOTTE ET AL., ESTABLISHING THE RULES OF THE GAME 57 (Univ. of Toronto 2004) ("Some [democracies] go so far as to allow candidates to stand in more than one electoral district. Of course, if elected in two districts, they may keep only one seat, and a by-election has to be held for the other.").


It may be argued that residency requirements should be eliminated (or scaled back) for voters as well. Such a discussion is beyond the scope of this article. However, it seems that durational residency requirements for voters are distinct from residency requirements for candidates for at least a couple of reasons. First, durational residency requirements for voters tend to be shorter than those for candidates—generally no more than 30 days. Dunn v. Blumstein, 405 U.S. 330, 348 (1972) (implying that anything more than a 30-day durational residency requirement for voters would be unconstitutional). Second, it makes sense that the persons who are selecting the representatives for an area demonstrate a geographic fidelity to a jurisdiction—that is what representation is all about. In contrast, candidate residency requirements serve as a barrier to choice of the persons who seek representation. Put differently, voters are first-order deciders in a democracy and, therefore, it is useful to place some modest residency requirement on first-order deciders. However, beyond that, we should not limit the choices of first-order deciders with second-order residency requirements for candidates.
However, this argument brings to mind the famous musings of Chief Justice Earl Warren in *Reynolds v. Sims*:

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." The important thing in terms of geographic representation is that the *voters* of the geographic area achieve representation and, as will be discussed, it should be for them to decide whether (and how much) the geographic residence of the candidate matters to their representational needs.

One other possible justification for residency requirements would be tradition. The United States Constitution contains a residency requirement. Many state constitutions contain residency requirements. And many state laws containing residency requirements have been in existence for some time. Indeed, courts sometimes point to the longstanding nature of a residency requirement as a justification for denying an equal protection challenge to a residency requirement.

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60 377 U.S. 533 (1964).
61 Id. at 562.
62 An example of why the electorate should matter more than geography comes from a 1970 case in Alabama. In *Hdnott v. Amos*, a lawyer who had worked closely with the African-American community in Alabama was barred from running as a candidate in a particular judicial circuit because he could not meet the durational residency requirement. *Hdnott v. Amos*, 320 F. Supp. 107, 130 (M.D. Ala. 1970) (Johnson, J., dissenting). The particular judicial circuit was predominantly African American. Id. And the only other potential candidates who resided in the judicial circuit (because being a lawyer was a requirement for office) were lawyers who were white and did not have strong connections with the African-American community. Id. Thus, African-American voters lost a chance to elect a person who might well have represented their interests better even though that person did not live in perfect geographic proximity. All this is to emphasize that the important thing for an electorate, such as the one in *Hdnott*, may not be geographic representation but rather interest representation and, as will be argued soon, the voters should decide rather than electoral regulations making this decision for them.
64 Admittedly, there may actually be one flavor of residency requirements that makes sense from the perspective of providing geographic representation. This would be the use of residency districts with an at-large method of election. Such a method of election seems specifically targeted at ensuring candidates come from diverse geographical areas rather than ensuring representation of a particular geographic constituency because candidates elected from residency districts are elected at large by the entire polity.
65 *Supra* note 8.
66 *Supra* note 14.
I won't tarry too long in response to tradition as a justification for residency requirements for several reasons. First, this seems like a makeweight argument in favor of residency districts (at least from the perspective of the judicial decisions in the area). Second, my perspective is that tradition alone should not serve as a justification for an election law, and, more importantly, you can find language in Supreme Court opinions to support that notion. Or, as Oliver Wendell Holmes said, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." In other words, while tradition might serve as a partial justification for staying with a particular electoral regime, it should not be the sole (or even primary) reason for staying with a particular electoral regime.

Third, the United States Constitution and federal laws contain fairly weak residency requirements when it comes to candidates for some of the highest offices of the land. Senators and Representatives need only be an inhabitant of the State from which they are elected at the time of election. In other words, there is no durational residency requirement. Moreover, while members of the United States House are required to be elected from single-member districts, there is no requirement that those Representatives reside in the single-member district from which they are elected. In short, at the very least "the federal Constitutional traditions can only support arguments for limited residency requirements."

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68 Reynolds v. Sims, 377 U.S. 533, 579 (1964) (noting that disparities of population among legislative districts could not be justified by "history alone").
69 Oliver W. Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). See also Baskin v. Bogan, 766 F.3d 648, 666-67 (7th Cir. 2014) (Posner, J., quoting Holmes).
70 Interestingly, from a comparative perspective, it appears that "[t]he vast majority of democracies do not impose any such [residency] requirement." Louis Massicotte et al., Establishing the Rules of the Game 57 (Univ. of Toronto 2004).
71 2 U.S.C. § 2c (requirement of single-member districts); Mogk v. City of Detroit, 335 F. Supp. 698, 699 (E.D. Mich. 1971) ("For the office of representative in Congress there is . . . [no requirement] that he be a resident of the district he represents.").
72 In fairness, the United States Constitution does contain a fairly lengthy (14-year) residency requirement for President. U.S. Const. art. II, § 1, cl. 5.
So even if we look outside the primary benefits of residency requirements noted in judicial opinions to other potential justifications—reducing ballot crowding, geographic diversity, and tradition—the positive case for residency requirements remains quite weak.

4. Does the electorate need the slight benefits of residency requirements?

There are several possible benefits of residency requirements, but let’s think for a moment about the group of people whom residency requirements are designed to benefit—the electorate. (We’ll put aside for one moment the notion that residency requirements serve to protect incumbent political players—an idea to be developed later.) Here, it’s important to ask whether the electorate needs the slight benefits of residency requirements. The answer is no.

Ultimately, many, if not all, of the benefits of residency requirements seem to boil down to an attempt to protect the electorate. The “Big Three” benefits of residency requirements—familiarity with issues of the constituents, time to assess the character of the candidates, and prevention of carpetbagging—distill down to the notion that voters will be unable to do these things adequately without residency requirements. But is there good reason to think the electorate will be unable to perform these functions?

In arguing for the capability of the voters, I think it’s generally safe to assert the default position of American democracy that the voters should decide which candidate best

73 I suppose one could plausibly assert that residency requirements protect candidates from engaging in fruitless campaigns—that a candidate who does not reside in a particular geographic area cannot possibly learn the issues or get to know the electorate well enough to seriously contend for the office. Again, returning to our hypothetical election, Pawnee’s residency requirement protects Jack Donaghy from spending time, energy, and money on a campaign that is likely doomed from the outset. This seems silly, though. There may be instances where we want to protect individuals from their own poor choices, but this does not seem like one of them. If Jack Donaghy, or any other candidate, wants to seek elective office and it seems like a fruitless endeavor, why should a government regulation stop them? Political candidates always run at their own peril and there doesn’t seem to be a strong reason to protect fruitless long-distance candidacies as opposed to fruitless candidacies from those who meet residency requirements. To say that these laws protect candidates from themselves is, I suppose, plausible, but seems somewhat of a stretch.

74 Infra Part II.A.
represents their interests.\textsuperscript{75} Indeed, several courts in deciding the constitutional fate of residency requirements have recognized that the power to judge candidate qualifications should presumptively reside with the voters.\textsuperscript{76}

In general, voters determine the qualifications of candidates—their understanding of the issues, their character, and their sincerity—by learning about the candidates during campaigns. The question then becomes: Will a campaign be an inadequate method for voters to judge "outsider" candidates absent a residency requirement? Obviously, I think the answer is negative. A candidate's connection to a community, character, and sincerity due to a lack of geographical connection would seem to be something that voters could easily understand—unlike, say, a candidate's views on Middle East foreign policy or a health care law. Voters can put a candidate's physical location into proper perspective and do not need a residency requirement to assist in this understanding.

Of course, it's possible I am presenting too naive a view of politics in the way that courts somewhat naively presume jurors follow instructions.\textsuperscript{77} After all, some voters will be uninformed about the candidates for whom they are voting—particularly in a local election. And it's also possible the issue of residency could become muddied in an election such that voters lack complete information about the issue. But the fact that some voters may be totally uninformed about the candidates should not present much of a hurdle. Voters who are totally uninformed should,

\textsuperscript{75} Cf. Dow, supra note 2, at 1533–34 ("A candidate qualification restriction is something of a philosophical curiosity because it would seem that the purpose of a popular election is to permit a majority (or, in some cases, a plurality) of voters to select a candidate whom they believe is the most qualified individual interested in a particular office.").

\textsuperscript{76} Bolanowski v. Raich, 330 F. Supp. 724, 730 (E.D. Mich. 1971) ("The decision as to whether a candidate is sufficiently familiar with the city and its problems to effectively wield power as Mayor should be left to the voters."); Green v. McKeon, 468 F.2d 883, 885 (6th Cir. 1972) ("[I]n our representative form of government, the voters are the arbiters of the suitability of candidates for public office."); Headlee v. Franklin County Bd. of Elections, 368 F. Supp. 999, 1003 (S.D. Ohio 1973) ("Whether or not a candidate has the necessary skill and knowledge of the community is a question ultimately for the voters to decide."). See also Dow, supra note 2, at 1534 ("Theoretically, candidate qualifications are unnecessary because voters can judge for themselves the best candidate, affording appropriate weight to any fact that could be the subject of a candidate qualification law—and a durational residence requirement can block the most popular candidate.").

\textsuperscript{77} Krulewitch v. U.S., 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.").
essentially, be casting random votes, and there is no reason to think that random voters will systematically skew an election in favor of one candidate or another. Even in an election where two-thirds of the voters are totally uninformed and vote randomly, these random voters should cancel each other out and informed voters will ultimately be the deciders of the election.\(^7\)\(^8\) Moreover, the notion that local voters would tend to be less informed may be a myth. One study noted that voters at low-turnout suburban elections tended to be more issue-driven than voters in other types of elections.\(^7\)\(^9\)

Not only is a candidate's lack of geographic residency something voters can easily understand, it would likely be something that would not fall beneath the radar screen of a campaign. When a candidate lacks a geographic connection to a community, it seems likely that the candidate's opponent will make that an issue (and, perhaps, a cornerstone issue) in the campaign. Indeed, courts recognize that this is a likely outcome when a candidate lacks as much geographic connection with a place as her opponent.\(^8\)\(^0\) As one federal district court noted:

The basic scheme of any election system . . . is designed first, to identify and expose to public scrutiny those who come forward as candidates, and ultimately to select from

\(^7\)\(^8\) In partisan elections, it is possible voters will make decisions based upon partisan affiliation, but there is not anything wrong with that. Put more concretely, if a Republican constituency wants to elect a Republican "outsider", so be it. Presumably, a Republican "insider" could run in the primary and if informed Republican primary voters want to elect the outsider that should be their choice. Of course, in places without a primary system, the voters may not be able to decide on the candidate in a partisan primary. But, in that instance, the general electorate can opt for an "insider" Democratic or Independent candidate over the "outsider" Republican.

\(^7\)\(^9\) J. Eric Oliver & Shang E. Ha, *Vote Choice in Suburban Elections*, 101 AM. POL. SCI. REV. 393, 404 (2007) ("[S]uburban voters exhibit very high levels of interest and involvement in local affairs. Among this group of active participants, vote choice is driven more by specific issue concerns than either subjective impressions of candidates or knee-jerk adherence to party positions.") (emphasis in original).

\(^8\)\(^0\) Henderson v. Fort Worth Indep. School Dist., 526 F.2d 286, 292 (5th Cir. 1976) ("[T]he power to make necessarily subjective discriminations on the basis of background, experience, or political philosophy rests with the voters . . . . It can be assumed that opposing candidates will bring deficiencies in any of these areas to the attention of the voters."); Green v. McKeon, 468 F.2d 883, 885 (6th Cir. 1972) ("Whether a candidate has the ability to carry out the duties of a particular city office, even though he arrived in [the city] less than two years prior to election day, is a matter for consideration by the voters in choosing between candidates running for that office. Opposing candidates undoubtedly will bring this deficiency, if it be one, to the attention of the electorate in the course of campaigning.").
them those who shall hold public office. Generally the
time table of the state election machinery will suffice to
accomplish the first objective. It is a matter of common
knowledge that those who seek public office go to
considerable effort and expense to secure exposure, and it
may be safely assumed that opponents in an election race
will seek out and make known the shortcomings of their
opposition and assert their own superior qualifications
for a particular post. If a short sojourn in the community
is considered to be a disqualification the electorate may
voice its sentiment at the ballot box.81

Put simply, residency requirements are unnecessary because
information about a candidate's lack of geographic connection
will be forced out during the campaign.

Lack of information about residency could be a problem, but
so could irrational behavior in the face of information, as
humans do not always act rationally.82 However, it seems more
likely that voters will irrationally focus on a candidate's lack of
geographic connection as a reason to not support a candidate,
rather than the other way around. There is psychological
research to support the idea that intergroup bias—"the
systematic tendency to evaluate one's own membership group
(the in-group) or its members more favorably than a
nonmembership group (the out-group) or its members"—exists.83

In simple terms, persons within a particular group are more
likely to trust, positively regard, cooperate, and empathize with
members of that same group rather than members of an

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81 Mogk v. City of Detroit, 335 F. Supp. 698, 701 (E.D. Mich. 1971). See also
Thompson v. Mellon, 507 P.2d 628, 637 (Cal. 1973) (Mosk, J., concurring) ("We cannot be
so naive as to believe absence of durational residence requirements will automatically
catapult uninformed candidates into public office. Inevitably time in the jurisdiction will
be a significant issue in local political campaigns. The 'life-long resident' of the
community will tout his superior familiarity with the problems of the area. The recent
settler will assuredly be faced with the charge he is an interloper or carpetbagger. In
most instances the candidate well tutored in community problems will be better known
by the electorate and will prevail. But if the voters exercise their franchise to reject the
life-long resident, and prefer to be represented by the newcomer, restraints imposed by a
past citizenry, presumably to prevent future folly, should not be permitted to thwart
such democratically determined result [sic].")

82 See generally DAN ARIELY, PREDICTABLY IRRATIONAL (2008).

83 Miles Hewstone et. al., Inter group Bias, 53 ANN. REV. OF PSYCHOL. 575, 576
(2002).
outsider group. Moreover, such in-groups and out-groups are very easy to form, so it makes sense that residency in a jurisdiction would create such groups. Theorizing from intergroup bias to its potential impact on elections involving non-resident candidates, one might think that the electorate (the in-group) will generally already be biased against non-resident candidates (members of the out-group) and that the electorate does not need additional protections in the form of residency requirements to prevent the electorate from behaving irrationally.

Moreover, empirical evidence suggests that, all other things being equal, voters prefer candidates who reside in closer geographic proximity to themselves. A study of British Parliamentary elections, where residency is not required of candidates in constituencies (i.e., single-member districts), showed that voters preferred candidates who lived closer to them. Again, this suggests residency requirements provide less of a benefit than might be surmised because voters are already disinclined to support outsiders.

At bottom, the issue boils down to how much one trusts the electoral process both generally and specifically. In general, the question is whether one trusts the voters to get information and properly process that information. More specifically, the question is whether one trusts the voters to get information about a candidate's lack of residence and to properly process that information about non-residence. My argument and perspective is that, at least in relation to residency, voters will likely get sufficient information and be able to process that information adequately (or will process that information irrationally as a negative inference against a non-resident

84 Id. at 578.
85 Antony Page, Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B.U. L. REV. 155, 195 (2005) ("Grouping people, even on a completely arbitrary basis such as a coin toss, leads to strong biases regarding others' assessments of the people in the group and the way they behave toward them.")
86 Arzheimer & Evans, supra note 48, at 301 ("[I]n English constituencies, distance between a voter and candidates from the three main parties (Conservative, Labour, and Liberal Democrat) does matter, even when controlling for traditional predictors of voting, such as party feeling and incumbency advantage. This suggests that candidates living closer to their voters enjoy a small but significant electoral advantage over rivals living further afield, and provides further confirmation of previous research which has found that the localism of a candidate matters to voters.")
candidate). Thus, residency requirements are not needed for the benefit of protecting the electorate.

In many respects, the above analysis represents a markets-based approach to the regulation of elections. The voters are the consumers and residency requirements represent a barrier to entry for potential products (i.e., the candidates). While there may be legitimate and compelling reasons to create barriers to entry in a political market—say, for instance, to limit crowding on the ballot, to fix a lack of information, or to fix a market failure—residency requirements do not seem to have sufficient justification to create a barrier to entry. Indeed, we’ll talk more about the political market later in this article.

To sum up this section, one way to view the potential benefits of residency requirements is to consider the possible beneficiaries of such requirements. In this instance, voters could plausibly be considered the beneficiaries. However, it would seem residency requirements are not necessary to aid the electorate.

5. Costs of residency requirements.

So far, the focus has been on the benefits of residency requirements. But residency requirements come with costs. The costs of residency requirements will generally be borne by two groups—candidates and voters. In this section, we’ll first consider costs primarily borne by candidates and then consider costs primarily borne by voters.

One cost of residency requirements to candidates is the inability to run for a particular political office—even if they have longstanding ties to a particular region. For instance, a candidate might be a life-long resident of California, but if California has a one-year residency requirement to live in the state legislative district from which a candidate is elected, anyone who moves from one district to another within a year of the election automatically becomes ineligible to stand as a candidate. In short, candidates lose the ability to run even in

87 I write frequently in an area where I would submit that government regulation is necessary to correct a market flaw—voting rights litigation where proof of racially polarized voting exists.
88 Infra Part II.A.
89 Cf. Beil v. City of Akron, 660 F.2d 166, 167 (6th Cir. 1981) (candidate for city council met one-year requirement for residing in the city but could not meet one-year
areas where they might appear to have a significant connection. (Of course, the voters also lose an opportunity to elect that candidate—more on that soon.)

On the other hand, it can be argued that this is a minimal cost on a particular candidate. If a candidate cannot run for election because of a residency requirement, a candidate merely needs to remain in the same geographic area until the next election comes around. All a residency requirement does is require the candidate to be patient.

But the assumption here is that one election is just as good as the next, and that's not necessarily true. Candidates most likely run when they think the time is ripe for them electorally. Waiting even a few years can vastly change a candidate's prospects. Imagine, say, a Democratic candidate in 2006 versus 2010. Imagine also the not unlikely scenario that a candidate might fail to meet the residency requirement for an open seat and then have to face off against an incumbent several years later. In politics, timing can be everything—electoral opportunities are not necessarily fungible.

Another problem with residency requirements from the perspective of candidates is that residency requirements can be used as political weapons when it comes to redistricting. Here, the focus is on a particular brand of residency requirement—one that requires the candidate to reside in a particular single-member district (as opposed to residing in a particular jurisdiction, such as a state or city). For instance, take what Georgia's Democrats did with a state legislative redistricting plan passed just after the 2000 Census. Georgia has a requirement for residency in ward and was precluded from running for ward seat).

Cf. Chimento v. Stark, 353 F. Supp. 1211, 1216 (D.N.H. 1973) (noting that a residency requirement merely "delays the eligibility of a candidate" until later); State ex rel. Brown v. Summit County Bd. of Elections, 545 N.E.2d 1256, 1259 (Ohio 1989) (noting that a candidate subjected to a residency requirement "is not precluded from ever running for [office]"); Antonio v. Kirkpatrick, 579 F.2d 1147, 1149 (8th Cir. 1978) (noting that a residency requirement "does not irretrievably foreclose a person from running for the office").


I suppose a residency requirement could also be used as a political weapon through selective deannexation of territory in which a potential competitor lives. This would seemingly be a far less likely occurrence than the use of residency requirements as a political weapon in redistricting.

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requirement that state legislators reside in a particular single-member district to qualify for election.\textsuperscript{93} To retain their legislative majority in the face of increasing strength from Republicans, Democrats would place two Republican incumbents in the same district, thus ensuring that at least one Republican incumbent would not be returning to the legislature.\textsuperscript{94} Absent a residency requirement, one of these candidates could have stood for election in a different district.

At the end of the day, candidates bear the burden of residency requirements. However, in truth, costs borne by candidates should probably be secondary to costs borne by the electorate—and the biggest cost to the electorate is undoubtedly freedom of choice. Candidate residency requirements can limit the potential pool of choices for voters.\textsuperscript{95} And, as previously discussed in this part, there do not seem to be substantial benefits from limiting voter choice with residency requirements.

But what does a limitation on freedom of choice really mean? What's the harm of limiting freedom of choice for the electorate?

For starters, limiting freedom of choice means limiting competition. A problem with residency requirements is that they often seem to be wielded by political opponents as a means of stifling competition.\textsuperscript{96} Take, for example, a case from the 1970s in Oklahoma where an incumbent member of the State House used a residency requirement to prevent an opponent from appearing on the ballot.\textsuperscript{97} Or take, as another example, the loser of a judgeship election in Tennessee successfully challenging the residency status of the victor.\textsuperscript{98} Or, take, as a final example, an

\textsuperscript{93} See supra note 11.
\textsuperscript{94} CHARLES S. BULLOCK III, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA 160 (2010). Cf. In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, 40 A.3d 684, 704-05 (N.J. 2012) (holding open the possibility of a successful as applied equal protection challenge if a candidate had been drawn out of a legislative district by a redistricting that took effect less than one year prior to the general election where the state had a one year district residency requirement).
\textsuperscript{95} In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, 40 A.3d 684, 695 (N.J. 2012) (durational residency requirements "have a significant indirect effect on the voter's freedom of choice") (internal quotation marks omitted).
\textsuperscript{96} Cf. Zeilenga v. Nelson, 484 P.2d 578, 581 (Cal. 1971) ("[A five-year residency requirement] is a built-in device to prevent competition against the county's oldtimers for the office of supervisor.").
\textsuperscript{98} Hatcher v. Bell, 521 S.W.2d 799, 800 (Tenn. 1974); see also Barrow v. Detroit Election Comm'n, 836 N.W.2d 498, 501 (Mich. App. 2013) (residency challenge to
Arizona legislative candidate who hired a private investigator to trail an opponent to establish that the opponent did not actually reside in the legislative district. 99 One suspects that often when a challenge is made to a candidate's residency 100—whether it be at the national, state, or local level—the challenge emanates from political opponents who either have been defeated or are afraid that they might be defeated by the challenged candidate. 101

Limiting freedom of choice to those who have resided within the geographic area also means limiting ideas and perspectives. Persons who have resided in a place for a longer time are less likely to have the fresh perspective of an outsider. They also may be stuck in the established order of a locale.

Limiting freedom of choice also may mean a lower quality of candidates for the voters to choose from. For example, let's take the metropolitan area in which I reside—Indianapolis. Indianapolis is a city of a little more than 800,000 persons, 102 but lies in a Metropolitan Statistical Area more than double its size (1.75 million persons). 103 Indianapolis is electing a mayor in 2015, and it's conceivable that there are excellent candidates of all sorts of political persuasions who understand the people of Indianapolis, are of high character, reside in the greater-Indianapolis region, and would be excellent candidates for the...
mayor. Yet a residency requirement would prevent these candidacies from even getting out of the gate.

So not only do potential candidates suffer from residency requirements, but so does the electorate. And, again, this harm does not seem to be for any significant benefit.\textsuperscript{104}

6. Residency requirements while holding office: a similar analysis or a bridge too far?

Hopefully, I've managed to convince you that residency requirements as a condition for appearing on the ballot or being elected should be eliminated. Now I want to take the argument a step further and argue that residency requirements as a condition for holding office should be eliminated as well.

To set the table for this argument, let me posit a few areas that do not seem to merit concern. First, no concern (or at least no concern that has not been previously discussed) exists in this realm when a candidate who does not reside in the relevant geographic area before the election then moves into that geographic area. In this scenario, the candidate is meeting any residency requirement that would be a condition of holding office. Second, no concern exists (beyond what has been previously discussed) when a candidate does not reside in the relevant geographic area, the candidate makes no campaign promise to reside in the relevant geographic area upon election, and the electorate chooses that candidate. The voters knowingly elected an "outsider" who made no promise to become (geographically-speaking) an "insider," and here the voters' choice should be respected (unless something in the following discussion suggests otherwise).

The problem scenario in this realm would seem to be what one might term the "residency bait-and-switch." This can happen when a candidate was a resident of a geographic area

\textsuperscript{104} There are also potential systemic costs related to enforcement of residency requirements. In a world without residency requirements, election officials would not waste time ensuring that residency requirements are met or dealing with protests involving residency requirements. In addition, legal challenges regarding candidate residency requirements would go by the wayside, freeing up some civil litigation resources. Finally, there can be a problem with selective enforcement of residency requirements. Kerry Cavanaugh, \textit{Sen. Wright is Wrong on Racism, Right on Unfair Enforcement of Residency Law}, \textit{L.A. Times} (Sept. 16, 2014, 10:45 AM), available at \url{http://www.latimes.com/opinion/opinion-la/la-ol-sen-wright-is-wrong-on-racism-20140916-story.html}, archived at \url{http://perma.cc/4BJD-BXR8}. 
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prior to election but then decides to move out of the area after the election. This can also happen when a candidate promises during a campaign to move to the relevant geographic area upon election but then does not honor that promise.

Again, let's put this into a concrete hypothetical. Assume Leslie Knope is a life-long resident of Pawnee and wins election to the Pawnee City Council. A few months after the election, her husband, Ben, gets a great job in Washington, DC. Leslie wishes to move with her husband to Washington, but remain a member of the Pawnee City Council. However, Pawnee requires Leslie to reside in Pawnee while holding a city council position. Should Pawnee's requirement of residence while holding office be eliminated?

One reason to require residency during a term of office would be to prevent a candidate from reneging on either an implicit campaign promise (the most likely scenario) or an explicit campaign promise. With reference to our hypothetical involving Leslie Knope moving from Pawnee to Washington, one could view Leslie's residing in Pawnee prior to election as an implicit campaign promise along the lines of "I am one of you and I care about you." On the explicit promise side, let's return to our hypothetical involving Jack Donaghy and assume he campaigns on, in part, a promise to move to Pawnee after being elected, but fails to honor that promise after winning election and remains in New York City. In both scenarios, one might say that the candidates were elected under false pretenses.

But failing to honor an implicit or explicit campaign promise does not, in and of itself, constitute a reason for retaining residency requirements. Politicians renege on explicit campaign promises all the time. Think of the infamous phrase from George H. W. Bush: "Read my lips, no new taxes." Politicians willfully and negligently deceive all the time. And, presumably, if that person wants to run for re-election, his or her newfound lack of residency will be a possibly winning campaign issue for their opponent, just as any broken campaign promise would be. So, there must be some special reason to

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prevent a politician from backtracking on an implied or explicit promise of residency.\textsuperscript{106}

Other than preventing the reneging on an implied or explicit campaign promise, the biggest benefit of requiring officeholders to be a resident of the relevant jurisdiction might be to ensure that the officeholder does his or her job. On one level, there are the obvious public functions of an officeholder—attendance at legislative sessions or meetings, committee hearings, etc. On another level, there are the less publicly obvious functions of informal discussions with fellow officeholders, government officials, and constituents. One might assert that residency requirements serve as a useful proxy for ensuring that elected officials perform the duties of the office.

However, at least in a modern age of communications and travel, it doesn't seem all that necessary to reside in a particular place to be an effective public servant. Instead of requiring residence in a particular geographic area, create rules that require attendance at the relevant public meetings. And when it comes to public functions with a softer edge, much public business is likely to be done by phone, email, or other electronic communication in this day and age—things that can be done anywhere. While it's true that an officeholder who moves away might be a less adequate representative, an officeholder who is a resident could be just as inadequate, and such inadequacy should properly be a subject for the next election campaign, rather than using a residency requirement as a proxy for inadequate representation.

Now, it's possible that a candidate who moves away after an implicit or explicit promise of residency may be indicating that the candidate lacks concern for the needs and desires of the electorate. A candidate from outside the geographic area actively seeking office as a non-resident seems to be sending, at least implicitly, a message that the candidate cares about that electorate. In contrast, a candidate who leaves (or reneges on a promise to move there) seems to be sending the opposite message. So, I will concede that post-election residency requirements may make more sense as a proxy for candidate

\textsuperscript{106} We should not consider it a problem if an office-holder leaves the relevant geographic area while in office, the voters are aware of the move, and then the office-holder is re-elected. Presumably the electorate has made the decision that the candidate's residence does not matter to them.
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Concern for constituents than pre-election residency requirements. Moreover, at least pre-election voters can make an immediate choice about a candidate's fidelity to the electorate's interest whereas post-election voters may have to wait for too long to do so.

Eliminating residency requirements for officeholders may well take the argument too far for the comfort of most. And even I think there is a stronger argument for residency requirements for office holding when a candidate has made an explicit or implicit promise regarding residency than for pre-election residency requirements. For this reason, I urge readers not to reject the idea of eliminating pre-election residency requirements because of the argument in this section.

II. ELIMINATING RESIDENCY REQUIREMENTS

At this point, I hope to have convinced you that the costs of residency requirements outweigh any slight benefits. Assuming the correctness of this contention, a couple of questions seem worth developing in the remainder of this article. Why do residency requirements continue to exist? And what should be done to eliminate residency requirements?

A. Why Do We Still Have Residency Requirements?

There are at least several reasons why residency requirements persist in our electoral system: tradition, a lack of longstanding legal challenges, and, most prominently, a disincentive for elected officials to eliminate residency requirements.

Residency requirements have undoubtedly persisted because of tradition. As discussed previously, residency requirements of some form or another date back to the founding of the United States and are embedded in state constitutions. The notion that "it's always been done this way" can be a strong driving force against change.

Another reason why residency requirements have persisted is that legal challenges to residency requirements seem to be relatively new on the scene. In 1973, a federal three-judge panel noted that no court had considered the validity of a durational

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107 Supra Part I.B.3. And some constitutions, including the federal constitution, are difficult to amend.
residency requirement for the office of governor. In essence, challenges to residency requirements seemed to begin in earnest only after the seminal Supreme Court decisions in the 1960s and 1970s that marked the Court’s entry into the political thicket. Indeed, the Supreme Court has yet to provide definitive guidance on the subject of federal constitutional challenges to residency requirements. Thus, one might posit that a half-century is not a long time in the legal system and that future courts could be less solicitous of residency requirements.

Residency requirements also persist because no clear, well-organized constituency exists to put sustained pressure in opposition to residency requirements. The persons who would most ardently oppose residency requirements would typically be candidates who cannot qualify for the ballot due to the existence of such requirements. However, in many instances, such candidates will not even begin a campaign for office because they know they cannot meet the existing residency requirement. Moreover, it would seem in many instances, the electorate would reject non-resident candidates, and would view residency requirements as a non-issue. In essence, no critical mass of vocal opponents to residency requirements exists to push for their elimination.

And even if a person was once disqualified from running for office because of a residency requirement, once elected (after, perhaps, residing in the geographic area long enough to meet the requirement), little incentive exists to change the system. The residency requirement no longer serves as a barrier to that person’s ability to hold office. Why, then, would someone waste political energy on something that no longer impacts him or her and likely has an extremely low salience among the electorate?

110 Infra note 118.
111 In a way, these residency requirements are like photo identification laws. Photo identification laws likely enjoy widespread support among the public at least in part because most registered voters have photo identification. When it comes to residency requirements, most serious candidates probably meet those requirements.
112 To be fair, it’s possible that an incumbent officeholder would like to eliminate residency requirements after being elected so as to be able to reside wherever he or she wished. For instance, an incumbent officeholder might wish to move to a different neighborhood and yet retain office in his or her district. However, I suspect there would
Which brings us to what seems likely to be the primary reason why residency requirements persist: they do not impact incumbent politicians and, in fact, serve to protect incumbent politicians of all stripes from additional competition. The persons who would typically have the ability to change existing residency laws—whether they are constitutional or statutory—are incumbent politicians. But a change in residency requirements would increase the pool of potential challengers at the next election. And why would any incumbent officeholder want to increase the pool of potential challengers?

Moreover, it would seem not only that incumbent officeholders benefit from residency requirements, but also political elites who help work behind the scenes to elect candidates. For instance, the local political party chairs (and party apparatus) of both the Republican and Democratic parties in Indianapolis likely prefer a residency requirement for the office of mayor because it allows them to have greater control over the candidates for office. In essence, incumbents and other non-elected political actors of all parties prefer barriers to entry so that they can perpetuate their own political power.

The notion that residency requirements persist because they advantage incumbent politicians of all stripes leads to a potential theoretical argument against residency requirements: a "politics as markets" analysis. New York University's Sam Issacharoff and Rick Pildes have popularized the notion that judicial intervention in the political process should occur when incumbent political players have acted to impede political competition. They liken elected officials and dominant parties to a corporate managerial class and assert that those elected generally be too high of a political price to be paid at the next election if an officeholder tried to eliminate residency requirements for this reason. An officeholder who seems to spurn the place where he or she resides by attempting to change laws that would allow him or her to move away would likely face rejection by the voters at the next election. Instead, what probably happens when an incumbent officeholder wants to move away is that the incumbent officeholder attempts to retain some fig leaf of residency.

Cf. Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 GEO. L.J. 491, 522 (1997) (recognizing that "not only do incumbents have something to gain by restricting outsider competition; they may have little to lose").

Samuel Issacharoff & Richard H. Pildes, Politics As Markets: Partisan Lockups of the Democratic Process, 50 STAN. L. REV. 643, 648 (1998) ("Where there is an appropriately robust market in partisan competition, there is less justification for judicial intervention. Where courts can discern that existing partisan forces have manipulated these background rules, courts should strike down those manipulations in order to ensure an appropriately competitive partisan environment.")
officials and dominant parties use procedural devices to lock up control of a governing body.\textsuperscript{115}

Thus, residency requirements would seem to fit the underlying theory of politics as markets. Issacharoff and Pildes note that political lockups can take the form of "[i]ncumbent parties... deploy[ing] state authority to raise entry barriers against potential third-party challengers."\textsuperscript{116} Residency requirements—at least to the extent that they have been created by legislative enactment—would seem to be just that. Residency requirements create a barrier that partisans can use to prevent outsiders from challenging them.

In the end, residency requirements, despite the minimal benefits of such requirements, undoubtedly persist for several reasons, but the overarching reason is likely that these restrictions advantage incumbent political partisans.

B. What Should Be Done About Residency Requirements?

The discussion of residency requirements thus far raises the possibility of legal challenges to residency requirements. The most obvious challenge to a residency requirement would be one based on federal equal protection principles.\textsuperscript{117} While there might be some debate over the contours of the appropriate framework for assessing Equal Protection Clause challenges generally, and for assessing Equal Protection Clause challenges to residency requirements,\textsuperscript{118} I think few would doubt that any

\textsuperscript{115} As Issacharoff & Pildes note:

Like the managerial class well-known to the laws of corporate governance, these political managers readily identify their stewardship with the interests of the corporate body they lead. Like their corporate counterparts, they act in the name of the entity to protect themselves against outside challenges to their personal authority. Again, like their corporate counterparts, political managers use procedural devices, created in their incumbent capacity, to lock up their control.

\textit{Id.} at 647.

\textsuperscript{116} \textit{Id.} at 651.

\textsuperscript{117} It's also possible that residency requirements raise issues related to freedom of speech and the right to travel. See, \textit{e.g.}, Robertson v. Bartels, 150 F. Supp. 2d 691, 694 (D.N.J. 2001). See also Green v. McKeon, 468 F.2d 883, 884 (6th Cir. 1972) (discussing right to travel); Wellford v. Battaglia, 485 F.2d 1151, 1152 (3rd Cir. 1973) (same).

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state constitutional or statutory residency requirement would need to survive at least a rational basis review with the government needing to present a legitimate state interest for any residency requirement.

A court that was so inclined could undoubtedly manipulate an equal protection analysis to strike down residency requirements in their entirety. One could envision an opinion that piece-by-piece picked apart the theoretical underpinnings and rationales for residency requirements and declared them to be unsound. One could also envision an opinion that struck down residency districts using a politics-as-markets approach—after all, Issacharoff and Pildes' politics as markets theory generally aims at encouraging judicial intervention in the political marketplace to protect against lock-up activity.119

While I certainly would not be opposed to courts striking down residency requirements as a matter of federal constitutional law, this seems unlikely to be the best route to the elimination of residency requirements. For starters, the federal judiciary—particularly at the Supreme Court level—seems generally disinclined to strike down state election laws as violative of the United States Constitution except as they may relate to campaign finance law.120 Second, if one of the rationales

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119 Issacharoff & Pildes, supra note 114, at 648.

for eliminating residency requirements is that the voters can protect themselves from the evils that residency requirements prevent, one could take the view that residency requirements adopted by voters demonstrate that voters think they need prophylactic prevention. In other words, if voters, say, adopted a state constitution that provides for residency requirements, then judges perhaps should not stand in the way of the electorate.  

It's not my position that the judiciary should engage in a wholesale elimination of residency districts, but there are at least two things the judiciary should do in this realm. The first would be to create a canon of construction that limits the application of residency requirements and creates a strong presumption in favor of candidates meeting those requirements. The second would be that judges should not enforce residency requirements when it comes to residence within a particular single-member district of a redistricting plan. Residency requirements related to single-member districts within a jurisdiction can be used as a tool of partisan oppression and, thus, seem to be the least useful residency requirements of them all.

Instead of the courts, the agent for change could be the people. Places where popular initiative and referenda are

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Bennett, 131 S. Ct. 2806 (2011) (striking down portions of Arizona's campaign finance law). See generally Joshua A. Douglas, (Mis)Trusting States to Run Elections, 92 WASH. U. L. REV. (forthcoming 2015) (draft on SSRN) (discussing how the Supreme Court defers to state legislatures). I suppose it's possible that residency requirements could present an easier case for judges to intervene than other areas of election law because residency requirements would not seem to benefit one major political party at the expense of the other. For example, a court that strikes down voter identification laws would seem to be favoring the Democratic Party because voter identification laws are generally supported and adopted by Republicans. In contrast, both major political parties likely favor residency requirements equally. Of course, that could mean that judges appointed from both political parties would be generally inclined to uphold them.

121 See, e.g., Gilbert v. State, 526 P.2d 1131, 1136 (Alaska 1974) ("Nor can these interests be protected by relying solely upon the electoral process itself. Voters are, in a sense, 'consumers' of the product portrayed by the persons they elect to office. In those days of 'packaged' media candidates, they often cannot know what is in the package until they have made their selection and observed the utility of the product. In adopting their constitution, the voters of Alaska chose to protect themselves from unknown deficiencies in their candidates by imposing objective standards upon those who would hold legislative office.").

122 Cf. Dow, supra note 2, at 1534 ("A world in which no qualifications are placed on candidates for political office seems unlikely; however, the notion that voters should be permitted to judge the merits of the candidates themselves is reflected in the democracy canon, a rule of statutory construction that favors ballot access in order to enable greater voter choice.").

123 Supra notes 92–94 and accompanying text.
available might be used to eliminate candidate residency requirements to the extent possible. That said, referenda may well meet with failure because incumbent politicians will campaign against elimination of residency requirements and voters might instinctively support “tradition” and laws that keep “outsiders” at bay. Suffice to say, I am not bullish about the imminent demise of residency requirements.

CONCLUSION

Residency requirements have been around forever, but that does not mean they are worthy of retention. In general, residency requirements provide limited benefits to the electorate that do not outweigh their costs. Residency requirements should be eliminated and, if they were, election law would serve the electorate a little bit better.