Durational Residence Requirements for Candidates

In the summer of 1972, the Democratic party of Missouri charged that the Republican candidate for governor, Christopher S. Bond, failed to satisfy the provision of the state constitution requiring the governor to have been "a resident of this state at least ten years next before election." Although Bond had maintained substantial ties to his home state of Missouri, he had spent five of the previous ten years outside the state as a student, law clerk, and lawyer, and there was some question whether his contacts with Missouri were such as to make him a resident for the required period. The Missouri Supreme Court, which was asked to settle the dispute, had recently ruled that a similar durational residence requirement for state legislators was valid. In Bond's case, however, the Court avoided the constitutional issue by finding that Bond had been a resident of Missouri for the statutory period. Bond was elected governor in November, 1972.

Almost all state constitutions contain durational residence requirements, which provide that a citizen must have lived in the polity for a defined period before he may either vote or be a candidate for public office. These requirements are commonly justified on three grounds: first, they are designed to discourage election fraud by voters and candidates; second, they assure voter and candidate identification with community interests; and third, they ensure that voters are knowledgeable about candidates and issues and that candidates are aware of the problems and attitudes of the community. In the 1968 general election, durational residence requirements for voting denied the franchise to between five and eight million otherwise qualified citizens. Congress subsequently provided in the Voting Rights Act of 1970 that, for voting in presidential elections, these requirements must be limited to a thirty-day registration period. Between 1968 and 1972, durational residence requirements for voting in state and local elections were challenged in the courts, and in March, 1972, the Supreme Court, in Dunn

1 Mo. Const. art. 4 § 3.
2 State ex rel. Gralike v. Walsh, 483 S.W.2d 70 (Mo. 1972).
3 State ex rel. King v. Walsh, 484 S.W.2d 641 (Mo. 1972).
6 See note 54 infra.
v. Blumstein,\(^7\) declared that the requirements are unconstitutional restrictions on the rights to vote and travel. The Court held that bona fide residence and a minimal registration period are the only permissible residence limitations on the franchise.\(^8\)

There has also been a series of cases in both federal and state courts challenging durational residence requirements applicable to candidates for public office. Some courts have extended to the candidacy problem the reasoning and analysis of Dunn and the voting rights cases on which it was based, and have held durational residence requirements for candidates to be unconstitutional. Other courts have upheld the requirements, drawing a sharp distinction between the right to vote and the right to be a candidate for office.\(^9\) This comment discusses the origins of the right to vote and the attack on durational residence requirements for voting that culminated in the Dunn decision. It reviews the history of the right to vote, the right to be a candidate, and the right to travel. It concludes that the right to vote and the right to run for office are so closely interconnected that the Supreme Court's decision in Dunn necessarily implies that the restrictions imposed on the right to be a candidate are unconstitutional as well.

I. THE RIGHT TO VOTE

The suffrage has traditionally been, as the word implies, a matter of legislative grace. Although James Madison argued in 1787 that "the right of suffrage is . . . a fundamental article of republican government,"\(^10\) the states at that time limited the franchise to white male freeholders\(^11\) or to males possessing property of a specified value.\(^12\) Article I, section 2 of the Constitution guaranteed the right to vote only in federal elections; even then, the states were allowed to define the scope of the federal right, since the electors were required to have "the qualifications requisite for electors of the most numerous branch of the state legislature."\(^13\) The right of suffrage was commonly held

\(^7\) 405 U.S. 330 (1972).
\(^8\) The Supreme Court has recently ruled that a fifty-day registration period is permissible, Marston v. Lewis, 93 S. Ct. 1211 (1973); Burns v. Fortson, 93 S. Ct. 1209 (1973).
\(^10\) The Federalist No. 52, at 326 (C. Rossiter ed. 1961). As early as 1702, Chief Justice Holt stated that "the right of voting . . . is a thing of the highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it . . . ." Ashby v. White, 92 Eng. Rep. 126, 136 (Q.B. 1702).
\(^11\) E.g., N.C. Const. art. VII (1776).
\(^12\) E.g., N.J. Const. art. IV (1776) (£50 required).
to be a concommitant of state, but not of federal, citizenship. The
great reluctance of Congress and the federal courts to intervene in mat-
ters of states' rights effectively barred federal regulation of state elec-
toral laws.\textsuperscript{14}

The phrase "right to vote" was not specifically mentioned in the
Constitution until the ratification, in 1868, of the fourteenth amend-
ment, which articulated a constitutional concept of national citizen-
ship.\textsuperscript{15} The ramifications of the amendment on state power to limit the
franchise, however, were long held in abeyance.\textsuperscript{16} For fifty years, courts
invoked either article I, section 2\textsuperscript{17} or the fifteenth amendment\textsuperscript{18} to
protect the franchise of black citizens. They continued to hold that the
states had the power to define electoral qualifications so long as the laws
were not racially discriminatory.\textsuperscript{19} In \textit{Pope v. Williams}, for example,
the Supreme Court ruled that the right to vote "in a state is within the
jurisdiction of the State itself, to be exercised as the State may direct,
and upon such terms as to it seem proper . . . ."\textsuperscript{20} The Court stressed
that "the Federal Constitution does not confer the right to vote upon
any one."\textsuperscript{21}

The "white primary cases" of 1927 and 1932, \textit{Nixon v. Herndon}\textsuperscript{22}
and \textit{Nixon v. Condon},\textsuperscript{23} marked a decisive change in the Supreme
Court's theories concerning protection of the franchise. In \textit{Herndon},
Justice Holmes invoked the fourteenth, rather than the fifteenth,
 amendment to invalidate Texas laws that prevented blacks from voting
in the state's Democratic primary. Employing the traditional notion that

\textsuperscript{13} U.S. Const. art. I, § 2.
\textsuperscript{14} In \textit{Barron v. Baltimore}, 32 U.S. (7 Pet.) 242 (1833), Chief Justice Marshall held that
the Bill of Rights was inapplicable to the states, citing the states' rights disputes in the
Constitutional Convention. Although the franchise was one of the "privileges and im-
munities" protected by article IV, section 2 of the Constitution, according to \textit{Corfield v. Coryell}, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1825), two other early cases specifically
excluded the franchise from constitutional protection, \textit{Abbot v. Bayler}, 23 Mass. (6 Pick.)
89 (1827); \textit{Campbell v. Morris}, 3 H. & McH. 535 (Md. 1797).
\textsuperscript{15} U.S. Const. amend. XIV, § 1; see H. \textit{Wechsler}, \textit{The Nationalization of Civil
Liberty and Civil Rights} (1968).
\textsuperscript{16} The decision in \textit{The Slaughter-House Cases}, 83 U.S. (16 Wall.) 36 (1870), that the
fourteenth amendment applied only to racial discrimination was instrumental to this
narrow interpretation of the amendment.
\textsuperscript{17} \textit{Swafford v. Templeton}, 185 U.S. 487 (1902); \textit{Wiley v. Sinkler}, 179 U.S. 58 (1900); \textit{Ex
parte Yarbrough}, 110 U.S. 651 (1884).
\textsuperscript{18} U.S. Const. amend. XV, \textit{Ex parte Yarbrough}, 110 U.S. 651 (1884).
\textsuperscript{19} \textit{McPherson v. Blacker}, 146 U.S. 1 (1892); \textit{United States v. Reese}, 92 U.S. 214 (1876);
\textsuperscript{20} 193 U.S. 621, 632 (1904).
\textsuperscript{21} \textit{Id.} at 633.
\textsuperscript{22} 273 U.S. 536 (1927).
\textsuperscript{23} 286 U.S. 73 (1932).
The amendment was directed, in particular, to racial discrimination, the Court held that the Texas statutes violated the equal protection clause. Subsequently, in *United States v. Classic*, the Court was asked to apply an equal protection rationale to protect against an infringement of the right to vote that was not based on racial considerations. The Court continued to look, however, to article I, section 2 as the source of Congress's authority to regulate elections to federal offices, and held that this authority extended to congressional primary elections. Perhaps more importantly, the Court remarked that "the rights of voters . . . to have their votes counted is . . . a right secured by the Constitution," and indicated that under article I, section 2, vote fraud would not be allowed to dilute the effectiveness of the franchise. In 1958, however, the Court reaffirmed the states' power to regulate the franchise subject to specific constitutional limitations. In *Lassiter v. Northampton County Board of Elections*, it upheld a state statute requiring prospective voters to qualify for the franchise by passing a literacy test, because the test was "neutral" with regard to race.

Since *Lassiter*, the Court's notions about constitutional limitations on the franchise have changed considerably. The two decades after *Classic* saw a vigorous academic discussion of the equal protection doctrine in many areas of the law, and in *Baker v. Carr*, the Supreme Court for the first time indicated that it would invalidate a nonracial restriction on the right to vote. The Court reasoned that if dilution of votes by a false tally was impermissible in *Classic*, so also was the effective dilution of votes that occurred when counties with greatly varying populations elected the same number of representatives to the state legislature.

*Baker's* protection of the right to vote for state officers was expanded by the Court in *Reynolds v. Sims*, which enunciated the one-man one-vote concept and declared Alabama's post-*Baker* plans for reapportionment to be constitutionally infirm. The progressive expansion of the

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24 313 U.S. 299 (1941).
25 Id. at 329.
26 Id. at 315.
27 In this spirit, the Texas Democratic primary system was once again invalidated in *Smith v. Allwright*, 321 U.S. 649 (1944). In that case, and in yet another Texas white primary case, *Terry v. Adams*, 345 U.S. 461 (1953), the Court renewed its commitment to protecting the right to vote.
suffrage in the fifteenth, seventeenth,\textsuperscript{32} nineteenth,\textsuperscript{33} twenty-third,\textsuperscript{34} and twenty-fourth\textsuperscript{35} amendments led the \textit{Reynolds} Court\textsuperscript{36} to declare that "every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies ... ."\textsuperscript{37} In previous cases, the Court had not enunciated an affirmative right to vote; the equal protection clause applied only when the state granted the right to vote to some citizens, but denied it to others in an impermissible fashion. In \textit{Reynolds}, however, the Court ruled that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government . . . ."\textsuperscript{38} and that the right to vote had attained a constitutional stature that entitled it, under the fourteenth amendment, to protection against abridgement by the states. Finally, \textit{Reynolds} announced that the rational basis test, which had long prevented close scrutiny of the validity of state action under the equal protection clause, is not applicable in voting rights cases. Seizing upon the celebrated dictum in \textit{Yick Wo v. Hopkins}\textsuperscript{39} that voting is "a fundamental political right because preservative of all rights,"\textsuperscript{40} the Court declared that because voting is such a "fundamental matter in a free and democratic society, . . . any alleged infringement thereof must be carefully and meticulously scrutinized."\textsuperscript{41}

The right to vote rationale and the strict scrutiny test that \textit{Reynolds} announced were first applied to voter residence requirements in \textit{Carrrington v. Rash}.\textsuperscript{42} In that case, an army sergeant who had been stationed in Texas for more than a year challenged the constitutionality of a Texas law that denied the franchise to members of the armed forces who were not residents of Texas at the time of their induction. The state

\textsuperscript{32} U.S. Const. amend. XVII.
\textsuperscript{33} U.S. Const. amend. XIX.
\textsuperscript{34} U.S. Const. amend. XXIII.
\textsuperscript{35} U.S. Const. amend. XXIV.
\textsuperscript{36} 377 U.S. at 555 n.28.
\textsuperscript{37} Id. at 555. This tendency toward expansion of the suffrage was noted by Toqueville: Once a people begins to interfere with the voting qualification, one can be sure that sooner or later it will abolish it altogether ... . The farther the limit of voting rights is extended, the stronger is the need felt to spread them still wider; for after each new concession the forces of democracy are strengthened, and its demands increased with its augmented power. The ambition of those left below the qualifying limit increases in proportion to the number of those above it. ... [T]here is no halting place until universal suffrage has been attained.
\textsuperscript{38} A. de Toqueville, \textit{Democracy in America} 60 (J. Mayer ed. 1969).
\textsuperscript{39} 377 U.S. at 555.
\textsuperscript{40} 118 U.S. 356 (1886).
\textsuperscript{41} Id. at 370.
\textsuperscript{42} 380 U.S. 89 (1965).
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defended the statute on the ground that the measure prevented bloc voting by servicemen and protected the local electorate from irresponsible transients. The Court found this justification insufficient: "'Fencing out' from the franchise a sector of the population because of the way they might vote is constitutionally impermissible." In *Reynolds*, equal protection had been held to prevent dilution of the vote; in *Carrington*, it was held to limit the state's power to determine the extent of the franchise.

Since *Carrington*, the Court has further strengthened the right to vote in state and local elections. *Harper v. Virginia Board of Elections* invalidated Virginia's poll tax for state and local elections on the ground that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause." Although it recognized that the equal protection clause historically had not been applied to laws regulating the franchise, the Court explained that "[n]otions of what constitutes equal treatment for the purpose of the Equal Protection Clause do change." In *Williams v. Rhodes*, the Court continued to ignore the rational basis test in voting rights cases. Since Ohio could not demonstrate the "compelling interest" necessary to support an abridgement of voting rights, the state's nominating petition requirements and write-in prohibitions were overturned. Soon after *Williams*, the Court explained that the rational basis test is predicated upon an assumption that in a republican form of government, institutions of state government are structured to represent all the people fairly. Where, however, it is just this assumption that is contested, only a compelling state interest can justify the imposition of voting restrictions.

In this series of cases—*Baker, Reynolds, Carrington, Harper*, and *Williams*—the majority of the Court was prepared to place the individual's right to vote above the state's right to regulate and limit

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43 Id. at 94.
45 Id. at 665.
46 Id. at 669 (emphasis in original).
47 393 U.S. 23 (1968).
48 Id. at 31. In *Williams* the Court examined three factors in order to determine whether a law violates the equal protection clause: (1) the facts and circumstances behind the law, (2) the interests that the State claims to be protecting, and (3) the interests of those disadvantaged by the classification. Id. at 30.
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During the same period, in the Voting Rights Acts of 1965 and 1970, Congress acted to protect and to expand the franchise, placing statutory limitations upon the traditional authority of the states. It would be wrong, however, to suggest that the constitutional basis of the right to vote and of the power of Congress to regulate the franchise has thus far been clearly defined. In 1970, in *Oregon v. Mitchell*, the Supreme Court upheld that part of the Voting Rights Act of 1970 limiting state durational residence requirements in presidential elections to a thirty day registration period. In their several opinions, the Justices revealed a wide divergence of views as to the basis and extent of the federal right to vote and of Congress's power to protect that right. Justice Black found the power of Congress to originate in article I, section 4 and the necessary and proper clause, and to be limited by article I, section 2 to federal elections. Justice Harlan found congressional power, under the fourteenth and fifteenth amendments, only to regulate racially discriminatory election laws. Justices Brennan and Douglas found that Congress's power was grounded on the fourteenth amendment and that the right to vote applied to all elections, state and federal.

Even before *Oregon* was decided, cases involving durational residence requirements for voters began to enter the federal courts. During the period 1968-1971, nineteen cases involving these provisions were decided: nine courts held the laws unconstitutional; ten courts held them constitutionally sound. The issue reached the Supreme Court in

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51 Id. at 119-20, 125.
52 Id. at 215.
53 Id. at 139, 278. For extended discussions of the legislative history of the fourteenth amendment, see C. Fairman, VI HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1207-1300 (1971); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Van Alstyne, The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 S. Ct. Rev. 33. The Court has not demanded that each vote for a given office be absolutely equal to every other such vote. In *Mahan v. Howell*, 93 S. Ct. 979 (1973), the Court determined that a reapportionment plan for the Virginia state legislature was constitutional, even though the population of the most underrepresented district exceeded that of the most overrepresented district by 16.4 percent. The Court relied extensively on the language of *Reynolds* for its conclusion that while "substantial equality" of population is necessary in state legislative districts, "absolute equality" of representation is not compelled by the Constitution.

Dunn v. Blumstein, a suit initiated by a Vanderbilt University law professor who moved to Tennessee in June, 1970. Blumstein was not allowed to register to vote in the August primary election because of a Tennessee requirement that a resident live in the state for one year and in the county for three months in order to be eligible. In a suit for declaratory and injunctive relief, the district court held that the Tennessee durational residence requirements violated the equal protection clause.

By a vote of six to one, the Supreme Court affirmed. Justice Marshall's majority opinion began by noting that millions of citizens were affected by durational residence requirements for voting simply because they were newcomers, and then discussed the action and intent of Congress when it abolished these requirements in presidential elections. Citing Yick Wo and Reynolds, the Court said that the right to vote in state and local elections is a fundamental right. According to the Court, Tennessee's laws infringed not only this right to vote, but also the constitutional right to travel. When such fundamental rights have been infringed, the Court stated, "it is not sufficient for the State to show that durational residency requirements further a very substantial state interest;" a compelling interest is required. And because the state's asserted interests—assuring the purity of the ballot box and a well-informed electorate—were, in the Court's opinion, insufficient, the state's requirements violated the equal protection clause.

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57 405 U.S. at 337.

58 Post-Dunn decisions that have held durational residence requirements for voters to be unconstitutional include: Hinnant v. Sebesta, 346 F. Supp. 913 (M.D. Fla. 1972); Nichols
The Court in *Dunn* did not, of course, discuss the issue of the validity of durational residence requirements for candidates. In holding similar laws impermissible when applied to voters, however, the Court clarified three issues vital to the question of candidate durational residence requirements. First, the decision indicated that the Supreme Court continues to oppose unnecessary restraints on the exercise of political rights; second, the decision further developed the right to travel, which may invalidate some residence restrictions on candidacy; and third, the Court again demonstrated that the compelling interest test is to be applied to laws infringing the right to vote.

II. The Right to Be a Candidate for Public Office

Just as many courts held before *Dunn* that the right to vote in state and federal elections was neither federal nor fundamental, several courts have recently held that there is neither a federal right nor a fundamental right to be a candidate for public office. It can be contended, however, that the right to be a candidate and the right to vote are, in fact, two aspects of the same general political right. At the Constitutional Convention of 1787, James Wilson argued "agst. abridging the right of election in any shape. It was the same thing whether this were done by disqualifying the objects or the persons chusing." Alexander Hamilton, defending the Congress against those who feared it would be "aristocratic," stressed that "the true principle of a republic is that the people should choose whom they please to govern them . . . . This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed." Whether the people chose to elect an aristocrat or a poor tradesman was a matter for the people to decide. James Madison, responding to a similar objection to Congress—fear of oligarchical control—said: "Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country." Congress would not become an oligarchy because its members would be drawn from all the people.

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59 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 375 (1937 ed.).
60 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (1836 ed.).
The makers of the Constitution recognized that the nexus between voter and candidate was practical as well as theoretical, that the state could restrict the scope of the franchise by simply imposing severe qualifications for candidacy.

During the debates of the fourteenth and fifteenth amendments, the right to vote and the right to be a candidate were frequently treated not as distinct constitutional concepts, but rather as a single broad political right—"the right to vote and hold office." Although both the Senate and House versions of the fifteenth amendment originally contained a prohibition against denial or abridgement of the "right to vote and hold office" on racial grounds, the final version returned from conference extended constitutional protection only to the franchise. This radical change was accepted by many Republicans only because, had they rejected it, action on the amendment would have been postponed until the next session of Congress, and postponement, in turn, would have given the forces opposing the amendment more time in which to solidify opposition to the racial policies of the Radical Republicans. Some Senators were undisturbed by the alteration because they thought that protection of the right to vote would effectively protect the right to hold office as well.

Other senators were less optimistic about the deletion from the amendment of the "essential republican principle" of the right to hold office. Senator George F. Edmunds, for example, remarked: "If you give [a citizen] the right to have a voice in the government, that voice cannot have any live expression unless it enables him to choose . . . the man who suits him for his representative, instead of confining him, as this amendment does, to a chosen aristocratic class." Black men were guaranteed the right to vote, but not the right to vote for black men. By removing the right to be a candidate from the scope of the fifteenth amendment, Congress enabled southern states to subvert the intent of the amendment by restricting to a class hostile to his interests the candidates for whom the black man could vote. Thus, at least some of the Radical Republicans were aware that the right to be a candidate is not less fundamental than the right to vote and that the

63 Id. at 1318 (Senate version), 1428 (House version).
64 U.S. Const. amend. XV, § 1.
66 Id. at 1629.
67 Id. at 1628.
68 Id. at 1626.
one may not be subjected to harsh restriction if the other is to escape similarly harsh restriction. 69

In several of its recent voting rights cases, the Supreme Court has recognized, at least implicitly, the complementary nature of the two rights, and in the process of protecting the right to vote, the Court has given substantial protection to the right to be a candidate. In Williams v. Rhodes, 70 the Court was concerned with state requirements that denied to some parties and candidates equal access to the general election ballot. The requirements were found to infringe two kinds of rights. First, the Court held that Ohio's system of qualifying petitions and its prohibition of write-in candidates stifled the growth of minor political parties, a result that violated the freedom of speech and association guaranteed by the first amendment. The Court also found that the Ohio system infringed the rights of voters to "cast their votes effectively." 71

Although the Court did not explicitly discuss the right to be a candidate, it recognized that the right to vote is functionally dependent upon the ability of candidates to place their names before the electorate. By depriving some parties and candidates of equal access to the ballot, Ohio was held to have deprived hundreds of thousands of voters of their right to an effective exercise of the franchise.

More recently, in Turner v. Fouche, 72 the Court explicitly recognized that there exists a right to be a candidate, a right protected, in some measure at least, against infringement by the state. Turner involved a challenge to a requirement that all members of a Georgia county schoolboard be freeholders; the requirement effectively excluded from the office most of the county's black majority. In striking down the requirement, the Court assumed that no person has a right to be appointed to public office. It went on to say, however, that "the appellants and members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications . . . ." 73 Thus, the Court did not specifically identify

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69 In the early debates on the fifteenth amendment, for example, Senator Edmund G. Ross discussed the Georgia constitution, which allowed black men to vote, but denied them the right of candidacy: "Black men are denied the right to hold office now, the next step will be to take from them the ballot, and the next their freedom." Id. at 983.
70 393 U.S. 23 (1968).
71 Id. at 30. The Williams philosophy effectively replaced that of Snowden v. Hughes, 321 U.S. 1 (1944), in which the Court held that the right to be a candidate was not a federal right, but a concomitant of state citizenship, and thus susceptible to extensive state regulation.
73 Id. at 362.
the right of candidacy as a fundamental right, but described it as "federal" and "constitutional." And since it found the freeholder requirement constitutionally impermissible under the rational basis test, the Court did not need to decide whether the compelling state interest test ought to be applied to state restrictions on candidacy. In subsequent cases dealing with freeholder requirements, the lower courts have cited Turner for the proposition that candidacy is a fundamental right. These courts have, therefore, applied the strict equal protection standard to the requirements in question and have uniformly held them invalid.\[^{74}\]

Finally, both the Supreme Court and lower courts have dealt with the right to be a candidate in cases involving challenges to the filing fees that many state and local governments exact from candidates who want to have their names appear on the ballot. The courts have upheld such fees so long as there is provided a reasonable alternative means, such as a nominating petition, by which a candidate's name may be placed on the ballot.\[^{75}\] But where no reasonable alternative is available, the courts have consistently intervened to protect the right of candidates to run and of voters to vote.\[^{76}\] Thus, the Supreme Court in Bul-


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lock v. Carter held unconstitutional Texas laws that imposed filing fees for local offices, without alternative means of getting on the ballot; the fees, which ranged to a maximum of $8,900, represented major portions of the salaries that the candidates would receive if elected. The plaintiff, who did not have $8,900 to invest in a filing fee for the primary, obtained declaratory relief from a unanimous Supreme Court. The Court concluded that the huge size of the fees gave the system a "patently exclusionary character." Texas argued that the fees assured the seriousness of candidates. The Court rejoined that even poor candidates can be serious ones, and that poor voters have a right to vote for one of their own: "the rights of voters and the rights of candidates do not lend themselves to neat separation." The Court found that the avowed revenue-raising rationale for the legislation was impermissible, since the state could raise money otherwise than by burdening the franchise and could regulate the ballot in a more reasonable or less exclusionary manner.

Williams, Turner and Bullock imply that the right to be a candidate for public office is as fundamental as the constitutional right to vote.

III. THE RIGHT TO TRAVEL

Durational residence requirements arguably conflict not only with the right to run for office that has been developed, but also with the right to travel, a right to which the Supreme Court has given increasing

77 405 U.S. 134 (1972).
78 Id. at 143.
79 Id.
80 In Zapata v. Davidson, 24 Cal. App. 3d 823, 101 Cal. Rptr. 438 (1972), the court relied on Bullock to void a filing fee of $300. Even this fee, according to the court, was "patently exclusionary" with respect to poor candidates. In Brown v. Chote, 41 U.S.L.W. 4548 (U.S. May 7, 1973), the Court unanimously affirmed and remanded for a trial on the merits a preliminary injunction forbidding California from imposing a $425 filing fee on a prospective candidate for Congress.
81 In addition, Williams indicates that the freedom of an individual to gather supporters and declare himself a candidate derives, not only from the right to vote, but also from the rights of free speech and association guaranteed by the first amendment, since there would be little substance to a right to form political parties if no member of the party had a constitutionally guaranteed right to represent his party as a candidate. Williams v. Rhodes, 393 U.S. 23 (1968). See also Mancuso v. Taft, — F.2d — (1st Cir. 1973); Miller v. Bartunek, 349 F. Supp. 251 (N.D. Ohio 1972); Socialist Workers Party v. Martin, 345 F. Supp. 1182 (S.D. Tex. 1972); Ducantell v. City of Houston, 383 F. Supp. 973 (S.D. Tex. 1971). In Rosario v. Rockefeller, 93 S. Ct. 1245 (1973), however, the Court held that a New York statute requiring voters who wish to vote in a party primary to declare their party affiliation eight to eleven months before the primary, did not abridge the freedom of association protected by the first amendment.
recognition and protection. The right to travel from state to state has long been thought to be a fundamental American liberty, in part because geographical mobility has been a continual and significant characteristic of the American people. The Magna Carta faintly alluded to a right to conduct commerce freely within the Kingdom, and by the time the Pennsylvania constitution was ratified in 1776, this notion had expanded into a “natural inherent right to emigrate from one state to another . . . whenever citizens think that thereby they may promote their own happiness.” During the Constitutional Convention of 1787, James Madison and Alexander Hamilton, proponents of the federalist idea of national citizenship, opposed all residence and long citizenship requirements for Congressmen because such laws would discourage men of intelligence and merit from moving from state to state, or from Europe to the United States. With the victory of the Jeffersonian Republicans, however, notions of states’ rights crippled the federal right to travel—as well as the federal right to vote.

Although the right to travel is nowhere specifically mentioned in the Constitution, it has been thought to inhere in the nature of the Union, to be a fundamental personal right, or to be a privilege and immunity of national citizenship guaranteed by the fourteenth amendment or by article IV, section 2. The Supreme Court has maintained the right in a line of cases including Crandall v. Nevada in 1867, Shapiro v. Thompson in 1969, and the abortion cases of the current term. The nature of the Union interpretation was expounded by Chief Justice Taney in his dissent in the Passenger Cases: “For all the great purposes for which the Federal government was founded, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass

84 Pa. Const. ch. I art. XV (1776).
85 2 M. Farrand, supra note 59, at 268. The right to travel was listed as a constitutionally protected “privilege and immunity” in Corfield v. Coryell, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1825). The first major “right to travel” case did not come down until the post-Civil War period of nationalism. Crandall v. Nevada, 73 U.S. (6 Wall.) 48 (1867).
89 73 U.S. (6 Wall.) 35 (1867).
92 48 U.S. (7 How.) 283 (1849).
and repass through every part of it without interruption, as freely as in our own States.”

The Supreme Court in Dunn found the freedom to travel to be a fundamental personal right, and applied the compelling state interest to durational residence requirements for voters. The Court declared that “such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote.” By classifying residents on the basis of recent travel, the requirements in effect penalized the exercise of the fundamental right to travel; the loss of political rights made more costly the assertion of the right to move from one place to another. Since one right was conditioned on the loss of the second right, the Court held that both were infringed; this infringement was unconstitutional since the state could not demonstrate a substantial interest in support of its laws.

In Green v. McKeon, the Sixth Circuit, relying on the reasoning in Dunn, found that durational residence requirements for candidates, like durational residence requirements for voters, burdened the right to travel by forcing potential travelers to choose between moving to the polity and participating as a candidate in the political process. The court held that the requirements were incapable of serving the state’s asserted interest—assuring knowledgeable candidates—and that, therefore, the state’s interest could not justify the burden on the right to travel that the requirements imposed. Furthermore, the Green court concluded that the “voters are the final arbiters of a candidate’s ability to carry out the duties of a particular office, and the matter should be left to their consideration.” These arguments, made in defense of the right to travel, also drew upon the principles of the right to vote and the right to be a candidate cases in order to hold durational residence requirements for candidates unconstitutional.

IV. Durational Residence Requirements for Candidates: Equal Protection and Policy

The disagreement among the lower courts as to whether durational residence requirements for candidates are constitutionally permissible centers on two issues: whether the state’s requirements burden fundamental rights and, if they do, whether the state can demonstrate an interest sufficiently compelling to justify the burden.

93 Id. at 492.
94 405 U.S. 330, 342 (1972).
95 468 F.2d 883 (6th Cir. 1972).
96 Id. at 885.
97 The cases holding durational residence requirements for candidates unconstitutional
A. Burdens on Fundamental Rights

Because they discern a qualitative difference between the right to vote and the right to be a candidate, some courts have refused to denominate the right to be a candidate a fundamental right.\textsuperscript{98} They have argued that while the right to vote, as enunciated in \textit{Dunn}, is a doctrine vital to maintaining the legitimacy of government and the freedom of the individual, deprivation of the right to be a candidate does not deny the citizen a choice in government, and so does not raise questions of legitimacy or individual liberty. On the other hand, courts that have condemned durational residence requirements either have followed \textit{Turner} and considered the right to run for office "as fundamental a right as the right to vote,"\textsuperscript{99} or have interpreted the right of candidacy as a necessary adjunct to the right to vote.\textsuperscript{100}

The courts have differed, in particular, as to whether durational residence requirements unconstitutionally burden either the right to be a candidate or the right to vote. It has been argued that the right to vote is not abridged by a durational residence requirement for candidates because the requirement does not prejudice a discrete class of voters. If members of the Socialist Workers' party, for instance, were disqualified as candidates, there would be some question that they would be elected in any event, but there is little question that, if elected, they would pursue different courses of action than the Democrats.


\textsuperscript{100} Mogk v. City of Detroit, 335 F. Supp. 698, 700 (E.D. Mich. 1971).
or Republicans elected in their place. To deny Socialist Workers the right to be candidates would be to deny any sort of meaningful vote to a member of the party. There is, however, no discrete class of transients or new residents for which denial of the right to be a candidate would be outcome-determinative. There is no indication that new residents, as a class, vote differently from longtime residents, or that citizens excluded from office by a durational residence requirement would act differently from native citizens actually elected.

According to this argument, the Supreme Court was concerned in *Williams* and *Bullock* with state restrictions that significantly affected the quality of the franchise. Where, however, as in the requirement of nominating petitions in *Jenness v. Fortson*, the state law has no "real or appreciable" effect upon voters, the Court has upheld the legislation. By the same token, since durational residence requirements for candidates have no real or appreciable effect on the outcome of an election, they cannot be held to infringe the right to vote.

The answer to this argument cannot be based on empirical data demonstrating that, had certain potential candidates not been excluded from the ballot by durational residence requirements, so many voters favored them that they would have been elected. But the lack of such empirical data is not dispositive of the issue. If a state were to deny the right to vote to all residents whose surnames began with the letter *A*, few courts would hesitate to condemn the legislation as a violation of the equal protection clause. The denial of the franchise on the basis of recent interstate travel, although less arbitrary, is no more outcome-determinative than is the denial of the franchise on the basis of one's surname. Unless there is some correlation between surnames beginning with *A* and a given political issue or philosophy, the same candidates should be elected whether or not these people vote.

Basing a right to vote or a right to be a candidate on outcome-determination is constitutionally unsound. These rights are derived from principles of democracy that have been found to inhere in the Constitution; they should not depend on the utility of their exercise. Durational residency requirements exclude a class of citizens from candidacy for public office, and by excluding this class from candidacy, the requirements may exclude another class from a full and efficacious exercise of the franchise. There should be a presumption that both of these exclusions are constitutionally significant and constitutionally forbidden. When the Supreme Court has approved a state requirement that the

candidate submit a nomination petition demonstrating a modicum of voter support, the Court has dealt with the problem of allocation of places on the printed ballot.\textsuperscript{102} A candidate who fails to satisfy the petition requirement may continue as a write-in candidate: to hold otherwise would be to deny the "right to vote freely for the candidate of one's choice" enunciated in \textit{Reynolds} and \textit{Williams}. Durational residence requirements for candidates absolutely deny voters the right to vote for a class of candidates; the analogy is not only to nominating petitions, but to a ban on write-in votes as well.

It has also been argued that electoral restrictions based on length of residence in a locality are not permanent disqualifications inflicted on those concerned. Unlike classifications based on race or sex, restrictions based on residence can last only for a few months or years. The citizen need do nothing to free himself from the disability except reside in the locality for the requisite period. Durational residence requirements for candidates do not, therefore, affect the exercise of political rights sufficiently to render the requirements constitutionally impermissible.

This argument ignores, however, the Court's conclusion in \textit{Dunn} that even the temporary deprivation of political rights is constitutionally significant. When a candidate is excluded because of a durational residence requirement, his right to be a candidate is absolutely denied for the purposes of that election. When a voter cannot vote for the candidate of his choice, \textit{Williams} indicates that his right to vote in that election has been absolutely abridged.

Durational residence requirements for candidates restrict the right to vote, the right to travel, and the right to be a candidate. Insofar as they restrict the former two rights, they abridge liberties commonly acknowledged to be fundamental in nature. Insofar as they restrict the right to be a candidate, the requirements infringe upon a right widely held to be fundamental in itself, as well as through its relation to the suffrage. Once it has been established that durational residence requirements affect fundamental rights, the question becomes whether the laws are useful and effective legislation, and if so, whether they are sufficiently necessary to justify the restriction of important political rights.

B. Justifications for Durational Residence Requirements

The courts use three standards for evaluating state legislation that allegedly violates individual liberties.\textsuperscript{103} The first standard, the "tradi-

\textsuperscript{102} Id. at 431.
tional equal protection standard" or the "rational basis test," is invoked when the individual right involved is not deemed to be fundamental in nature. In order to satisfy this test, the state must show that its laws are intended to serve a legitimate state interest, such as assuring knowledgeable candidates for public office, and that the laws are a rational means to achieve the state's permissible ends. During the 1960s, the Supreme Court developed a second standard—the "compelling interest test"—to apply when state legislation conflicts with fundamental rights. In order to satisfy this stringent standard of review, the state must demonstrate that its laws serve a compelling public interest and that they conflict as little as possible with fundamental rights. The Court has recently begun to develop a third equal protection standard, the "reasonably necessary" test of Bullock v. Carter. This test, a middle ground between the two standards described above, was applied by the Court in Bullock to a law affecting the right to be a candidate. The new standard assumes the validity of the state's goals, and instead looks to whether the state's action is an efficient means of attaining them; if it is not, then there is no justification for abridging individual liberties.

The justifications for candidate durational residence requirements can be categorized as follows: (1) tradition—durational residence requirements are found in almost every state constitution and have been an integral part of the American political system since the founding of the Republic; (2) candidate knowledge—the state must ensure that candidates are knowledgeable with regard to the issues, the problems, and the desires of their prospective constituents; (3) assimilation—the candidate must live in the community long enough to feel himself a member thereof, if he is to represent his constituents adequately.

Tradition has frequently been cited as a justification for retention of the durational residence requirement. Nearly every state constitution contains such provisions, and these provisions have been retained and even extended in recent constitutional revisions. The work of so many capable legislators should not be undone precipitously.

The tradition rationale must be refuted on its own terms, by invoking tradition. Although most state constitutions contain durational residence requirements, the United States Constitution does not; it requires only that senators and representatives be of a minimum age and be citizens of the United States for a given period, and that they be bona

104 405 U.S. 134, 144 (1972).
105 See Appendix.
106 See, e.g., ILL. Const. art. 5, § 3 (1965); MICH. Const. art. 5, § 22 (1963).
107 State ex rel. Gralike v. Walsh, 483 S.W.2d 70, 76 (1972).
fide residents of their states on the date of election. During the discussion of article I, section 2 at the Constitutional Convention of 1787, John Rutledge of South Carolina moved that a durational residence requirement of seven years be included in the article, as "[a]n emigrant from N. England to S. C. or Georgia would know little of its affairs and could not be supposed to acquire a thorough knowledge in less time." George Mason of Virginia agreed that "[i]f residence be not required, Rich men of neighbouring States, may employ with success the means of corruption in some particular district and thereby get into the public Councils after having failed in their own State." Thus, both the "knowledgeable candidate" and the "assimilation" arguments were advanced to the convention.

In the debate that followed these proposals, some delegates opposed the motions on the ground that they would "interweave local prejudices & State distinctions in the very Constitution which is meant to cure them." Although most delegates said nothing on the subject, the motions were soundly defeated. And as noted above, in another session of the convention both Madison and Hamilton strenuously opposed such residence requirements because such legislation would discourage capable men from moving from state to state or from Europe to the United States.

It is possible to argue that, despite the actions of the convention and the attitudes of the Founding Fathers, the Constitution in fact contains the federal equivalent of the states' durational residence requirements—the citizenship requirement of seven and nine years. It can be argued that durational residence requirements are needed to insure that, for example, an Illinois candidate is an Illinoian and not a Californian or a New Yorker. But a Californian is not a "foreigner" in Illinois in the same way that a Swede is a "foreigner" in the United States; the problems of knowledge, acculturation, and loyalty are very different. This distinction, which both Madison and Hamilton recognized, was strengthened by the fourteenth amendment's definition of national citizenship. In Dunn the Supreme Court struck down durational residence requirements for voters even though such requirements are as traditional as similar requirements for candidates. The defense

109 2 M. Farrand, supra note 59, at 217.
110 Id. at 218.
111 Id. at 217.
112 Id. at 219.
113 See text at note 85 supra.
of candidate residence requirements on the basis of tradition should similarly be rejected.

The most frequent and most compelling justification for durational residence requirements for candidates is that they insure the candidate's knowledge of the problems and desires of his constituency.\(^{115}\) Closely related to this is the assimilation argument—that residence requirements insure that candidates' attitudes conform to those of the community. Courts that have upheld the requirements have relied primarily on the theory that if states have any power at all to regulate the electoral process, they should be able to set candidate qualifications so that a candidate can be presumed to possess a working knowledge of his constituency in order to represent it adequately.

The durational residence requirement has been held, on this ground, to satisfy the rational basis test because, even if some long-resident candidates may not be as well-informed as some new arrivals, the law is nevertheless reasonably related to its legitimate purpose of candidate knowledge.\(^{116}\) Many migrants will not possess sufficient knowledge or identification with the community to fulfill the function of public office if they were elected; durational residence requirements successfully exclude these unfit people from candidacy.

In *Turner v. Fouche*,\(^{117}\) however, the Supreme Court determined that Georgia's freeholder requirement for county school board candidates was not only unnecessary to any compelling state interest, but also was wholly irrelevant to the achievement of a valid state objective. Georgia could not demonstrate a rational basis for the law because it could not demonstrate that a nonfreeholder who is also a parent with children in the local schools, or a tenant who pays the landlord's property taxes with his rent would discharge his responsibilities as an elected official in a less responsible manner than a freeholder. The same argument might be applied to durational residence requirements for candidates. The requirements create, in effect, a nonrebuttable presumption that, if elected, a new resident, because he is new, cannot be a responsible

\(^{115}\) The constitutionality of durational residence requirements for candidates has also been defended on the ground that they are necessary to insure voter knowledge of the candidate. Draper v. Phelps, 351 F. Supp. 677 (W.D. Okla. 1972); Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970). *Hdnott* involved a candidate for circuit judge in rural Alabama. The court concluded that, in such circumstances, if the voters did not know the candidate personally or by word of mouth, they were not likely to know him at all. It held that a durational residence requirement is a reasonable tool to ensure that voters can make informed use of their franchise.


public official. The state presumes that, once elected, the migrant would not possess knowledge of the area sufficient to make him an effective official and that he would fail to demonstrate the identification with the polity necessary to protect its interests adequately. In order to be elected, however, a candidate, migrant or native, must demonstrate some knowledge of his electorate and some identification with its political beliefs—at least knowledge and identification greater than that of his opponents. It can be argued, therefore, that it is irrational for the state to conclude that a candidate who gains the support of the electorate is ignorant of the problems and attitudes of the community.

Under the rule of Turner, durational residence requirements for candidates may therefore fail to satisfy the traditional rational basis test. It has been argued that the knowledgeable candidate rationale satisfies the compelling state interest test since it protects the public, not against a few ill-considered votes, but against the much more serious consequences that could result from the election of ignorant or incompetent public officials. But it seems clear that durational residence requirements for candidates fail to satisfy either of the strict equal protection standards. The compelling interest standard demands not only that the state's goal be compelling, but also that the state use the least restrictive means of achieving it.118 The requirement that a candidate live in the state or district for a given period, however, excludes some informed and capable newly domiciled citizens from even the opportunity for public office; at the same time, the requirement does not prevent the candidacy of longtime residents who have heretofore taken no interest in local problems. The law is, therefore, at once overbroad and underinclusive: competent men are excluded from candidacy, while ignorant men may offer themselves for election free of restraint.119 If the fundamental rights to vote and to be a candidate are to be denied to some citizens, the state must employ a more efficient means of attaining its ends.

The policy argument against durational residence requirements for candidates, whether they are tested under the traditional rational basis test or the new stricter standards, rests on the assumption that the voter is better able than residence requirements to discriminate among candidates on the basis of their knowledge, ability and attitudes. A candidate with no knowledge of local problems has little chance at the polls,

whether he is a newcomer or a native. A candidate who is newly arrived in the area will almost certainly be branded a "carpetbagger" by his opponents and must demonstrate his expertise and interest to a skeptical electorate if he is to be elected.

The failure to include a durational residence requirement in article I, sections 2 and 3 has enabled a number of recent migrants to be elected to Congress from their new home states. In recent years, the outstanding result of this omission is the candidacy and election, in 1964, of Robert F. Kennedy as Senator from New York. Kennedy, who had hitherto lived in Virginia and voted in Massachusetts, decided to seek the Democratic nomination for the Senate sometime in the summer of 1964. He leased a house on Long Island on August 24, declared his candidacy on August 25, won the nomination on September 1, and defeated incumbent Senator Kenneth Keating in the November election.

Kennedy's nomination resulted, a New York Times editorial pointed out, from a combination of his own attractiveness as a candidate and the absence of such attractiveness in native New York Democrats. This seems to be the situation that Madison had in mind—the able outlander coming to offer himself as a candidate in a locality where capable men are needed. Senator Keating made it clear that his opponent was not a native New Yorker, and attempted to show Kennedy's ignorance of New York problems and his basic lack of interest in the state, except as a steppingstone to the presidency. Kennedy answered that he had long been interested in national issues—poverty, race relations, urban problems—that were relevant to the basic problems of New York. He stressed that although he had previously lived in Virginia, New York was now his home and that he would defend the interests of his home state.

The force of the knowledgeable candidate argument depends on what a "representative" is. If the representative is to be guided primarily by his own views of the national interest, he needs to know less about his particular constituency than he would if he is to reflect faithfully the opinions or particular interests of those who elected him. Even if

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120 For example, the first senator from New York, Rufus King, was a resident of Massachusetts until shortly before his election. N.Y. Times, Sept. 2, 1964, at 25, col. 7.
the latter interpretation is accepted, however, it is doubtful that a potential candidate is necessarily lacking in the knowledge and attitudes required to represent a community's interests simply because he has only recently come to reside there. In our society, problems and attitudes are seldom limited to a single community. For example, all large cities have similar problems, so that a man moving from Chicago to Detroit, who studied these problems in Chicago, could well be a more desirable and informed candidate than a migrant to Detroit from rural Michigan with little experience of the city, and more desirable yet than a native of Detroit who had previously been interested only in the Detroit Tigers. Yet state and local durational residence requirements operate to treat each of these three hypothetical candidates differently. The question is where to draw the line: at the Detroit city limits, at the Michigan state line, or at the United States border.

C. An Alternative: Bona Fide Residence

Although the Court in Dunn declared durational residence requirements for voters to be unconstitutional, the Court also held that the state could impose a brief registration period—in effect, a brief durational residence requirement—for the purpose of determining whether a voter is a bona fide resident.127 Durational residence requirements for candidates should be treated in similar fashion. If bona fide residence were not required, a political hopeful could be a candidate in a promising constituency, and if defeated, immediately go elsewhere. This sort of abuse is obviated by the requirement of bona fide residence, a requirement that courts have universally approved.128 Since states and cities have the power to demand that a candidate be a bona fide resident, they should be allowed sufficient time to ensure that the qualification has been satisfied. The maximum of time allowable for such certification should be the minimum period that the administrative process requires. Other administrative details, such as the printing of ballots with the candidate's name, must be considered. Although some flexibility might be in order, allowing a state to require four months or six months residence would subvert the principles that support abandoning durational residence requirements.

127 405 U.S. 330, 343 (1972); see note 8 supra.
V. CONCLUSION

It is the spiritual outsider, the person with new ideas, whom states and cities often exclude through durational residence requirements. In *Williams*, Ohio attempted to exclude all but the Republican and Democratic parties from the political process. *Williams* invalidated those laws because they stifled the right of the voters to choose how the political system should evolve. *Turner* and *Bullock* turned back attempts by states to make legal participation in the political system a function of wealth. Durational residence requirements have the same effect, if not the same form, as freeholder requirements and large filing fees. They limit the choice of candidates as far as possible to those who are "safe," or as the states themselves might prefer, "proven," rather than leaving judgment on the relative merits of candidates to the electorate. Durational residence requirements for candidates for public office are not only poorly designed to further legitimate state interests in assuring competent public officials, but they also infringe on the right to vote, the right to travel, and the right to be a candidate. The bona fide residence requirement *assures* sufficient identification of an individual with a given polity and should be the maximum constitutional limitation that may be placed on both the fundamental political rights to vote and to be a candidate.

*Edward Tynes Hand*

APPENDIX

DURATIONAL RESIDENCE REQUIREMENTS

This table lists in years each state's durational residence requirement for governor and for the lower house of the state legislature. Where the qualification "elector" appears, a citizen was required, until *Dunn*, to be a resident in the state for periods of six months to one year before he could register to vote in that state.
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<th>State Representative in district</th>
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