1981

The Dimensions of the Newly Emergent, Quasi-Fundamental Right to Political Candidacy

Dennis W. Arrow, *Oklahoma City University School of Law*

OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 6 SPRING 1981 NUMBER 1

ARTICLE

THE DIMENSIONS OF THE NEWLY EMERGENT, QUASI-FUNDAMENTAL* RIGHT TO POLITICAL CANDIDACY

DENNIS W. ARROW**

I. INTRODUCTION

Perhaps no area of legislation is more susceptible to conflicts of interest than election law. For reasons which may be apparent, groups holding political power have often tended to resist both extensions of the franchise and efforts to facilitate candidate qualification and access.[1] Justice Miller, writing for the Court a century ago in *Ex Parte Yarbrough*, recognized that "[i]n a republican government, like ours, where political power is reposed in representatives of the entire body of the people, . . . the temptations to control these elections . . . is a constant source of danger. Such has been the history of all

* As used herein, a functionally recognized constitutional right (by virtue of the application of strict scrutiny) which courts have generally refrained from recognizing as "fundamental" *eo nomine*. *See also* note 121 *infra*.

** Professor of Law, Oklahoma City University School of Law. LL.M., Harvard Law School, 1975; J.D., California Western School of Law, 1974; B.A., George Washington University, 1970. The author gratefully acknowledges the valuable assistance of Mr. John Bouley and Mr. Douglas Gould in the preparation of this article.

1. *See* H. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 120 (1960). *See generally* J. ELY, DEMOCRACY AND DISTRUST 117 (1980); J. BLUM, V WAS FOR VICTORY 250 (1976); LeClercq, *The Emerging Federally Secured Right of Politican Participation*, 8 IND. L. REV. 607, 608-14 (1975).

republics."[2]

Empirical research has corroborated these observations. Donald Rae's comprehensive study of the political consequences of election laws concludes, for example, that "[i]f a single pattern emerges from this study, . . . it is the persistant bias of electoral laws in favor of strong parties as against their weaker competitiors. . . . [I]n many cases, legislative majorities are manufactured by electoral laws."[3]

A further equity favoring judicial intervention is the comparative twentieth century voter deficiency between United States voter participation and that of most of the other true democracies.[4] While the cause of this comparative deficiency is complex, normal cost-benefit analysis, as with all other decisions, is likely to be motivationally significant to the choice of the reasonable person to vote.[5] While quantification of the costs of voting in terms of time, effort, and inconvenience is beyond the scope of the present work, at least a cursory benefits analysis is not. What benefits does voting produce for the average voter? A single ballot is unlikely to affect an election outcome.[6] Few people are therefore brought to the polls by the belief that their vote will make the difference between a candidate's victory and defeat. What is likely to matter more to the individual voter is not the calculated effort of the vote on the outcome but rather the consequences of the act of voting to his or her personal well being.[7] While such considerations may include prospective patronage or economic benefits, loftier subliminal goals such as a sense of civic duty have been

---

2. *Ex Parte* Yarbrough, 110 U.S. 651, 666 (1884).

3. D. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS 134, 137 (1967). *See generally* Elder, *Access to the Ballot by Political Candidates*, 83 DICK. L. REV. 387, 406-09 (1979).

4. R. WOLFINGER & S. ROSENSTONE, WHO VOTES? 1 (1980) [hereinafter cited as R. WOLFINGER]. In the 1972, 1976, and 1980 Presidential elections, approximately 55% of nationally eligible voters went to the polls. For an exposition of traditional European voting patterns, see J. GOSNELL, WHY EUROPE VOTES (1930).

5. *See* A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 260 (1957).

6. Meehl, *The Selfish Voter Paradox and the Thrown-Away Vote Argument*, 71 AM. POL. SCI. REV. 11, 12-30 (1977).

7. R. WOLFINGER, *supra* note 4, at 7. Concerning the importance traditionally attached by many to the exercise of this right, John Stuart Mill would apparently have gone so far as to estop nonvoters from complaining about the type of government they received. J. MILL, ON LIBERTY (1978).

found to be significant as well. Voting both expresses and promotes the feeling that one has done one's duty to society, to a particular group of allegiance, and to oneself, and that has affirmed's one's allegiance to the political system as a whole.[8]

The level of voter interest in any particular election is also likely to affect the extent of voter turnout.[9] That interest, in turn, is likely to be magnified to the degree that a broad spectrum of candidates, which provides the voter with a choice closely reflective of his particular political approach, is made available.[10]

For these and other reasons, even those constitutional scholars who have taken the most restrictive approaches to the proper scope of judicial review have recognized the legitimacy of meaningful judicial participation in shaping the framework of election law. Professor Choper, whose suggestion that rigorous judicial review be focused on individual rights issues is well known, has recognized that effective majoritarianism is contingent on the enforcement of the two fundamental and correlative individual rights of voting and free expression.[11] Professor Ely, who has also expressed skepticism concerning natural law-oriented constitutional interpretations,[12] has nevertheless recognized that

---

8. *Id. See also* W. RIKER & P. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY 63 (1973).

9. R. WOLFINGER, *supra* note 4, at 8.

10. Concerning the possibility of a ballot so cluttered with candidates that resulting voter confusion either decreases the voter participation or renders suspect the intelligibility of the choice, see note 19 and text accompanying notes 21-33, *infra*, wherein the conclusion is drawn that the confusion factor is susceptible of at least partial amelioration through limiting the number of *offices* to be filled at any particular election and, in any case, must be balanced against the significant countervailing interests of voters, candidates, and the public in broadly-based participation in the electoral process.

11. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 4-5, 64, 71, 73 (1980); Choper, *On the Warren Court and Judicial Review*, 17 CATH. U.L. REV. 20, 38-41 (1967). *See also* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 37 (1970), *criticized in* Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 787-89 (1971).

12. For a thoughtful criticism of Professor Ely's restrictive approach to judicial review, see Gerety, Book Review, 42 U. PITT. L. REV. 35, 42 (1980), wherein the author states:

> The trouble with this is twofold: first, despite Ely, the judge as a textless value imposer is either a phantom or a strawman, either no one or everyone. Certainly Justice Douglas in *Griswold*, the great privacy decision,

> unblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage . . . other practices that go to the core of the right of the people to choose their representatives and express their preferences . . . include the denial of places on the ballot to minor parties. . . .[13]

In light of these considerations, the legitimacy — and necessity — of meaningful judicial review of voter and candidate access restrictions should be evident. Nevertheless, residual constitutional issues concerning both the existence and scope of the right to vote and the correlative right to run for public office still remain. This Article will attempt to explore three related issues concerning these asserted rights. First, the countervailing interests in limiting and promoting freer ballot access will be evaluated and balanced.[14] Next, the standards of review currently applicable to restrictive ballot access legis-

---

sweated ink to prove his adherence to the text and its "penumbras." And Wizard Black himself, as Ely recognizes, often changed textual lead into value-laden gold, most notably in his arguments for the incorporation of the first eight amendments through the fourteenth.

Second, the text itself invites a less than "strict" construction: there are besides the liberty, equality, and due process clauses of the Fourteenth Amendment, the two privileges and immunities clauses, and the rights reserved clause of the Ninth Amendment. A true "clause-bound" interpretivist would be hard put on his own grounds to deny these invitations to generosity — though to accept them is to leave his grounds altogether. Justice Black himself, as Ely points out, simply ignored the Ninth Amendment.

13. J. ELY, *supra* note 1, at 117. Concerning this same issue, Professor Tribe has added,

> Democracy envisions rule by successive temporary majorities. The capacity to displace incumbants in favor of the representatives of a recently coalesced majority is, therefore, an essential attribute of the election system in a democratic republic. Consequently, both citizens and courts should be chary of efforts by government officials to control the very electoral system which is the primary check on their power. Few prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which the voters, in theory, can register their dissatisfaction by choosing new leadership.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 774 (1978). Concerning the broad social values advanced by maximizing outlets for free expression generally, see A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 12, 13 (1948); Bloustein, *The Origin, Validity and Interrelationships of the Political Values Served by Freedom of Expression*, 33 RUTGERS L. REV. 372 (1981).

14. *See* text accompanying notes 18-94 *infra*.

lation will be defined.[15] The emergence of a constitutionally protected "quasi-fundamental"[16] right to candidacy from recent Supreme Court decisions will be traced in the context of exploring the applicable standards of review.[17]

II. Evaluating the Interests in Regulation

At a minimum, of course, a state could simply set a date, time, and place for elections, provide a mechanism to record and count the votes, and declare the candidate with the most votes the winner. Ballot access could be left unregulated, with printed ballots containing the names of all persons who had filed by a certain date, and write-in blanks provided for candidates who had not registered at all. Although this approach might well promote the most extensive democratic expression, most states have not adopted this least restrictive alternative.[18] Rather, states have asserted four governmental inter-

---

15. *See* text accompanying notes 95-136 *infra*.

16. *See* note * *supra*.

17. *See* text accompanying notes 124-30 *infra*.

18. Connecticut, Georgia, Mississippi, New Mexico and Vermont have required only that new parties file with the appropriate executive authorities. *See* Conn. Gen. Stat. Ann. § 9-374 (West Supp. 1981) (new parties must file the rules governing the selection of nominees and those regarding the selection of town committee members and delegates to conventions); Ga. Code Ann. § 34-901 (1980); Miss. Code Ann. §§ 23-1-5, 23-1-7 (1972); N.M. Stat. Ann. § 1-7-2 (Supp. 1980) (party must have 100 members and file its rules with the secretary of state); Vt. Stat. Ann. tit. 17, §§ 2103(23), 2318 (Supp. 1981).

Thirty-three states permit write-in voting at both the primary and general election stages. *See* Ala. Code tit. 17, § 8-20 (1975); Ariz. Rev. Stat. § 16-312 (Supp. 1980); Cal. Elec. Code § 56 (West Supp. 1980); Colo. Rev. Stat. §§ 1-4-207(7), 1-6-102(1)(i), 1-6-115(1)(b) (1973); Conn. Gen. Stat. Ann. § 9-265 (West Supp. 1980); Del. Code Ann. tit. 15, § 4502 (Supp. 1980); Fla. Stat. Ann. § 101.181, 101.191 (West 1973); Ga. Code Ann. § 34-1103 (1980); Idaho Code §§ 34-904, 34-906 (1981); Ill. Ann. Stat. ch. 46, §§ 17-11, 24A-6 (Smith-Hurd Supp. 1981); Ind. Code Ann. § 3-1-23-23 (Burns 1972); Iowa Code Ann. §§ 43.66, 49.30 (West Supp. 1981); Kan. Stat. Ann. §§ 25-213, 25-2903 (Supp. 1979); Ky. Rev. Stat. §§ 117.145(3), 117.265 (Supp. 1980); Me. Rev. Stat. Ann. tit. 21, §§ 921-22 (Supp. 1980); Mass. Gen Laws Ann. ch. 53, §§ 35, 35A, 40 (West 1975 & Supp. 1981); Mich. Comp. Laws Ann. §§ 168.576, 168.737 (1967); Miss. Code Ann. § 23-7-309 (1972); Mont. Rev. Codes Ann. §§ 13-10-302, 13-12-208 (1979); Neb. Rev. Stat. §§ 32-424(2), 32-428 (1978 & Supp. 1980); N.H. Rev. Stat. Ann. §§ 656.12, 659.88, 659.90 (Supp. 1979); N.J. Stat. Ann. §§ 19-15-28, 19-23-25 (West 1964); N.M. Stat. Ann. §§ 1-8-36, 1-12-19 (1978 & Supp. 1980); N.Y. Elec. Law §§ 6-158(4), 6-164, 7-104, 7-106(8) (McKinney 1978); N.D. Cent. Code §§ 16.1-11-35, 16.1-13-25 (Supp. 1981); Ohio Rev. Code Ann. § 3513.041 (Supp. 1980); Pa. Cons. Stat. Ann. §§ 2962-63 (Purdon Supp. 1981); S.C. Code § 7-13-1120

ests in justifying more restrictive ballot-access requirements.

(1976); TENN. CODE ANN. § 2-5-207 (1979); TEX. ELEC. CODE ANN. §§ 6.05(3), 13.09 (Vernon Supp. 1981); VT. STAT. ANN. tit. 17, §§ 2362(b), 2472(c) (Supp. 1981); WASH. REV. CODE ANN. §§ 29.30.010, 29.30.020 (Supp. 1981); WIS. STAT. ANN. §§ 5.62(5), 5.64 (Supp. 1980); WYO. STAT. §§ 22-6-119(a)(v), 22-6-120(a)(x) (1977).

At least six of these states also require write-in candidates to file a declaration of candidacy before the election. ARIZ. REV. STAT. ANN. § 16-312 (Supp. 1980); CAL. ELEC. CODE § 7300-01 (West Supp. 1980); COLO. REV. STAT. §§ 1-4-207(7), 1-6-110(6) (1973 & Supp. 1979); N.M. STAT. ANN. § 1-8-36 (1978); OHIO REV. CODE ANN. § 3513.04.1 (Supp. 1979); TEX. ELEC. CODE ANN. § 6.06(b) (Vernon Supp. 1980).

Several of these states require that successful write-in candidates notify election officials of their acceptance of the office within a certain period after the results are determined. *E.g.*, MASS. GEN. LAWS ANN. ch. 53, § 3 (1975) (write-in candidate nominated at the primary must within 13 days file an acceptance); N.H. REV. STATE. ANN. § 659.90 (Supp. 1979) (if nominated as a write-in, must accept within six days); WIS. STAT. ANN. § 8.16 (Supp. 1980) (successful write-in candidate must file acceptance within two days after notification); WYO. STAT. § 22-5-219 (1977) (the canvassing board must notify successful write-in nominee within forty-eight hours after it meets; nominee then has five days to respond).

Maine requires that the municipality of residence as well as the name of the write-in candidate be written in. ME. REV. STAT. ANN., tit. 21, § 702 (Supp. 1980).

Idaho, Kansas, Nebraska, Rhode Island, and Texas have all permitted write-in voting in some elections. *See* IDAHO CODE § 34-702 (1981); KAN. STAT. ANN. §§ 25-231A, 25-615, 25-2903 (Supp. 1979); NEB. REV. STAT. § 32-428 (Supp. 1980); R.I. GEN. LAWS ANN. § 17-19-31 (1969); TEX. ELEC. CODE ANN. § 13.09(b) (Vernon Supp. 1981).

Only six jurisdictions apparently preclude all write-in votes. *See* ALASKA STAT. §§ 15.25.060, 15.25.070 (1976); HAWAII REV. STAT. § 11-112 (Supp. 1979); NEV. REV. STAT. § 293.270 (1979); OKLA. STAT. tit. 26, § 7-127 (Supp. 1980); S.D. COMP. LAWS ANN. § 12-16-1 (Supp. 1980); D.C. CODE ANN. § 1-1108 (1973 & Supp. 1978). *See also* Stover v. Alfalfa County Election Board, 530 P.2d 1020 (Okla. 1975).

An attempt by the Florida legislature to repeal its former write-in vote provisions was held violative of the Florida Constitution in *Smith v. Smathers*, 372 So. 2d 427 (Fla. 1979). The Florida Supreme Court, citing *State ex rel. Lamar v. Dillon*, 32 Fla. 545, 579, 14 So. 383, 393-94 (1893), held that "the legislature cannot, in our judgment, restrict an elector to voting for some one of the candidates whose names have been printed upon the official ballot. He must be left free to vote for whom he pleases, and the constitution has guaranteed him that right." 372 So. 2d at 429.

The Federal Election Commission, with the assistance of the Congressional Research Service, now provides several publications which contain reasonably current synopses of the electoral machinery and rules of both the states and the federal government. The first series, entitled ELECTION LAW UPDATES, includes legal synopses of all federal and state election laws enacted each year. Topics have included contributions, excess campaign funds, expenditures, political committees, depositories, public financing, reporting requirements, taxation, voting devices, and absentee ballots, as well as the more directly relevant (to this Article) topics of registration and ballot access.

The second series, entitled ELECTION CASE LAW, includes legal synopses of major state and federal election cases each year. Finally, the Commission publishes an annual Election Directory which concerns itself with the administration agencies and mechanisms by which states seek to implement their chosen electoral processes.

A. Qualified Candidates

Laws requiring special qualifications of candidates for offices in which special expertise is required[19] have been justified by the indisputably compelling interest in securing qualified public servants. Such limitations, where rationally related to the performance of official duties, have generally been given favorable treatment by the courts.[20]

B. Full and Informed Voter Participation

Many states have further asserted interest in minimizing voter confusion and have maintained that shorter printed ballots[21] promote this interest *per se*.[22] The interest in minimizing confusion was deemed "compelling" by Justice White, writing in 1973 for the eight-member Supreme Court majority

---

19. *See, e.g.*, OKLA. CONST. art. 7, §§ 2, 3 (judges); OKLA. CONST. art. 6, § 19 (state auditor & inspector); OKLA. STAT. tit. 45, §§ 2, 3, 6, 31-42 (1971 & Supp. 1980) (mine inspector); OKLA. STAT. tit. 74, §§ 174-97 (Supp. 1980) (commissioner of corrections).

20. *See generally Developments in the Law: Elections*, 88 HARV. L. REV. 1217-33 (1975) [hereinafter cited as *Developments*]. The legitimacy of the analogous state interest in promoting a qualified general electorate was specifically recognized in *Lassiter v. Northhampton Election Board*, 360 U.S. 45 (1959).

21. Modern ballot restrictions are traceable historically as far as the early 1900's and gained prominence due to the agitation by various progressive groups after the turn of the century. In 1911, a "Short Ballot Organization" was formed, headed by Woodrow Wilson, which maintained, *inter alia*, that "very few *offices* should be filled by election at one time, so as to permit adequate and unconfused public examination of the candidates." R. CHILDS, THE SHORT BALLOT PRINCIPLES 170, vii (1911) (emphasis added). *See also* H. CROLY, PROGRESSIVE DEMOCRACY 289 (1914). Nonpartison ballots were also advocated in order to reduce the influence of the old political "trusts" and to promote freer competition among parties, new and old. Elder, *supra* note 3, at 389. Intrestingly enough, as Professor Elder has observed,

> [t]he original concept of the short ballot — restricting the number of electoral *offices* appearing on the ballot — was quitely translated into legislation to restrict the number of *candidates* appearing on the ballot for each office, although this was not advocated as part of the short ballot principle to any great degree.

Id. at 390. *See also* Lubin v. Panish, 415 U.S. 709, 712 (1973); R. CHILDS, *supra* note 21, at 135-36. Moreover, the Wilsonian progressives, who contemplated that freer third party competition would likely ensue, would undoubtedly be shocked to learn that the short-ballot principle is now invoked to justify the antithetical result.

22. *See, e.g.*, American Party of Texas v. White, 415 U.S. 767, 782 (1974); Lubin v. Panish, 415 U.S. at 715; Rosario v. Rockefeller, 410 U.S. 752, 761 (1973); Bullock v. Carter, 405 U.S. 134, 145 (1972); Dunn v. Blumstein, 405 U.S. 330, 345 (1972); Jenness v. Fortson, 403 U.S. 431, 442 (1971); Williams v. Rhodes, 393 U.S. 23, 32 (1968).

in *American Party of Texas v. White*.[23] One year later, in *Lubin v. Panish*, Chief Justice Burger amplified on the significance of the state's "unconfused voter" interest as follows:

> A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. . . . That "laundry list" ballots discourage voter participation and confuse and frustrate those who do not participate is too obvious to call for extended discussion. . . . Rational results within the framework of our system are not likely to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospect of success.[24]

While the confusing effect of "laundry list" ballots cannot be denied, more careful examination of this state interest will reveal that other related interests, both governmental and individual, as well as the inherent limitations of the interest itself, should temper any judicial inclination to regard it as individually dispositive or to carry it to its furthest possible extent. First, it should be noted that the dozen-candidate race hypothesized in *Lubin* seems unlikely to occur with great frequency.[25] Moreover, Justice Harlan, concurring in *Williams v. Rhodes*, refused to concede that the presence of eight candidiates in that electoral race could be said, "in light of experience, to carry a significant danger of voter confusion."[26] Given today's higher literacy rates and extensive media election coverage, Justice Harlan's empirical conclusion may well in fact be correct. Of course, voter confusion due to proliferating candidacies is ultimately a matter of degree; at a certain point, multiple candidacies *do* tend to confuse. Nevertheless, in light of both the paternalistic nature of the state interest

---

23. 415 U.S. at 782 n.14.

24. 415 U.S. at 715-16.

25. Elder, *supra* note 3, at 398. In the words of the Court in *Williams v. Rhodes*, "the experience of many States, including that of Ohio prior to 1948, demonstrates that no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required." 393 U.S. at 33 (footnote omitted).

26. 393 U.S. at 47 (Harlan, J., concurring).

involved,[27] and the significant countervailing interests of the candidate, the voter, and the state in free expression,[28] care must be taken that the limits not be drawn too restrictively.[29]

Chief Justice Burger has also apparently weighed in the detrimental effect of "laundry list" ballots discourage voter participation.[30] While this result might well obtain in elections in which the dozen or more candidates contemplated in *Lubin* actually materialized, empirical research has tended not to support the same conclusion in elections with three, four, or even five candidates. As Professor Elder has noted, "Voter apathy appears to be a widespread phenomenon today even where there are only two or three candidates in the running for very prominent offices. . . . This suggests that electorate apathy is a result of many complex factors not particularly related to the number of candidates appearing. . . ."[31] As has been indicated, among the critical factors influencing the choices of an individual to vote is the interest of that individual in the election. The interest of an individual in the election, in turn, tends to increase as candidate choices harmonious with that individual's personal and political viewpoint become increasingly available.[32] Thus, voter frustration and apathy may be at least as likely to result from limited choice as from choices which are unnecessarily broad. Since, the "voter apathy" interest appears to cut both ways, it should not be given great prospective weight, especially in those circumstances in which a true "laundry list" is not likely to result. In short, four-candidate elections and fourteen-candidate elections do not invoke the interest to the same degree.[33]

C. Political Stability

The third group of commonly invoked state interests in-

---

27. *See* Elder, *supra* note 3, at 398-99.

28. *See, e.g.*, Jardine, *Ballot Access Rights: The Constitutional Status of the Right to Run for Office*, 1974 UTAH L. REV. 290, 305. *See also* notes 75 and 109, and text accompanying notes 118-125, *infra*.

29. *See* Elder, *supra* note 3, at 398, and authorities cited therein.

30. Lubin v. Panish, 415 U.S. at 715.

31. Elder, *supra* note 3, at 398 (citations omitted).

32. *See* text accompanying notes 9 and 10, *supra*.

33. *See, e.g.*, Elder, *supra* note 3, at 398 n.40, and authorities cited therein.

volves attempts by states to promote the stabilitity of their political systems. While the general goal of stability has been recognized as compelling by the United States Supreme Court,[34] the states are not thereby invested with a constitutional license authorizing them to institutionalize the currently-existing two-party system.[35] The Court has recently emphasized that the fundamental first amendment right of political party association has diminished practical value if the party can subsequently be kept off the ballot.[36] More specifically, in evaluating Ohio's claim that it might validly promote a two-party system in order to encourage compromise and stability,[37] Justice Black, writing for the Court in the foundational case of *Williams v. Rhodes*, observed:

> The Ohio system does not merely favor a "two party system," it favors two particular parties — the Republicans and the Democrats — and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.[38]

The Court has recently reiterated its approach in *Illinois State Board of Elections v. Socialist Workers Party*,[39] in which it noted, in deciding to apply close scrutiny to the challenged statute

> the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not

---

34. *See, e.g.*, Storer v. Brown, 415 U.S. 724, 736 (1973).

35. Williams v. Rhodes, 393 U.S. at 31.

36. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979).

37. That extreme and uncontrolled factionalism can produce legislative deadlocks is indisputable and amply evidenced by history, including the recent example of the Fourth French Republic. *See generally*, D. RAE, *supra* note 3, at 136-37.

38. 393 U.S. at 31-32.

39. 440 U.S. 173.

> always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office. . . . Overborad restrictions on ballot access jeopardize this form of political expression.[40]

This reasoning is especially apposite in light of the significant historical impact which third parties have exerted on American political history;[41] pursuant to Ohio's reasoning, for example, the Republican Party might have been effectively impelled from emerging from third-party status in 1856.

Apart from the Court's hostility to attempts to freeze the political *status quo*,[42] it has recognized the interest in stabil-

---

40. *Id.* at 185-86.

41. Since the election of 1828, when the so-called two-party system coalesced in this country, only in the wartime election of 1864 did candidates from only two parties run for the office of President. Moreover, the Republican Party emerged as a third party with the candidacy of John C. Fremont in 1856, and the Whig Party, the pre-existent "second party" disappeared after the stunning electoral college defeat of Winfield Scott in 1952. The rapid demise of the Whigs occurred despite the triumph of Zachary Taylor, their candidate for President in the preceding election, thereby further evidencing the potentially fluid nature of the American democratic tradition left unemcumbered by restrictive ballot access limitations. In total, over thirty parties have advanced candidates for President since 1828, including the Nullification, Anti-Masonic, National Republican, Anti-Jackson, Free Soil, American, Constitutional Union, Independent Democratic, Straight Democratic, Greenback, Greenback-Labor, Prohibition, Union Labor, Socialist Labor, National Democratic, People's Independence, Socialist, Farmer-Labor, Bull Moose, Worker's Progressive, Liberty, Communist, Union, States' Rights, Constitution, National States' Rights, Libertarian, Peace and Freedom, and American Independent parties. Probably the most successful of these candidacies was Theodore Rossevelt's Bull Moose/Progressive candidacy of 1912, in which he achieved almost thirty percent of the popular vote, finishing ahead of the Republican candidate, William Howard Taft. *See* UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1073-1074 (1970). *See generally* 1-3 POLITICAL PARTIES IN AMERICAN HISTORY (M. Borden ed. 1973). In 1980 the Libertarian Party, founded ten years ago, appeared on fifty state ballots in 1980, and ran almost six hundred candidates for office nationwide. Canada's third-party experience has been much the same, with the recent electoral successes of the Social Credit Party and the Party Quebecois being among the most notable. *See, e.g.*, M. PINARD, THE RISE OF A THIRD PARTY: A STUDY IN CRISIS POLITICS 21-71 (1971). Excellent discussions of third party impacts and values may be found in V. KEY, POLITICS AND PRESSURE GROUPS 299-303 (1952); F. BONADIO, 2 POLITICAL PARTIES IN AMERICAN HISTORY (1974); Note, *Nominating Petition Requirements for Third Party and Independent Candidate Ballot Access*, 11 SUFFOLK L. REV. 974, 987 (1977) [hereinafter cited as *Nominating Petition Requirements*].

42. In *Jenness v. Fortson*, the Court approved Georgia's ballot restriction because it "in no way freezes the status quo, but implicitly recognizes the potential

ity[43] as justifying the subordinate goal of deterring frivolous candidacies[44] and interparty raiding.[45]

Although it is easier to recognize the legitimacy of deterring frivolous candidacies than to define what serious candidacy entails, clearly an essential prerequisite to recognized ballot status involves the demonstration of substantial support.[46] Legislative attempts to classify as frivolous the candidacies of individuals unable to pay required filing fees have been stricken as arbitrary and rationally unrelated to the purpose of the legislation,[47] as have property-ownership qualifications[48] and excessive durational residency requirements.[49]

---

fluidity of American political life." 403 U.S. at 439. *See also* text accompanying notes 37-40 *supra*.

43. There is, of course, an inherent tension between recognition of a compelling state interest in stability on one hand, while refusing to permit enshrinement of the *status quo* on the other. *Compare* Williams v. Rhodes, 393 U.S. at 31-32 *and* Jenness v. Fortson, 403 U.S. at 439 *with* Storer v. Brown, 415 U.S. at 736. Probably the least that can be said about the resolution of this tension is that it should involve balancing the state interest in stability with state and individual interests in preserving fluidity and evolution within the political system, with close cases decided with a bias to preferred freedoms. *See generally* Jardine, *supra* note 28, at 304. Moreover, barring third-party access to the polls may cause its supporters to turn to illegitimate means of expression that could actually undermine rather than enhance the stability of the political process. Elder, *supra* note 3, at 394. Thus, the stability interest, like the interest in precluding voter apathy, may also ultimately cut both ways. *See also* text accompanying notes 31-33 *supra*.

44. *See, e.g.*, Lubin v. Panish, 415 U.S. at 715; Storer v. Brown, 415 U.S. at 743; Jenness v. Fortson, 403 U.S. at 442.

45. *See* Rosario v. Rockefeller, 410 U.S. 752 (1973); Storer v. Brown, 415 U.S. at 735.

46. *See* Jenness v. Fortson, 403 U.S. at 442. While some commentators have suggested that weight be given to the candidate's presumed subjective intent, it is difficult to perceive how that intent would be evidenced. Moreover, would candidate motivations other than victory be cognizable by the courts? If not, how would the Supreme Court's recognition that "as the records of such [third] parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining policical office," Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. at 180, be reconciled? Primarily because of these condiserations, it is submitted that the current and more objective approach, which focuses on the quantity of demonstrable support, should be sustained. That the state should be limited to those means reasonably necessary to achieve the deterrance of frivolous or splinter candidacy is a proposition whose validity will be addressed in Section III-B, *infra*.

47. *See* Bullock v. Carter, 405 U.S. at 145-46; Lubin v. Panish, 415 U.S. at 715-16.

48. In *Turner v. Fouche*, the Supreme Court rejected Georgia's contention that its election code, which required school board candidates to be freeholders, was rationally related to promoting its interests in qualified office-holders and deterring

Interparty raiding may validly be precluded by a state through the imposition of disaffiliation requirements, which preclude a candidate from running in a general election unless disaffiliated from any previous political party association within a specified period of time. Justice White, writing for the majority in *Storer v. Brown*, defined the relevant state interest supportive of such requirements as follows:

> The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified.[50]

Though the interest be legitimate, measures taken pursuant to it are limited to those which bear substantial relation to its furtherance, and to those which do not unnecessarily intrude on first and fourteenth amendment interests in free association, voting, and new party formation.[51] Pursuant to this analysis, eleven[52] and twelve month[53] waiting periods have been sustained by the Supreme Court, while one of twenty-three months, in which the only way for a candidate to break the registration "lock" was to forego voting in any primary for that period, has been held violative of the right of "free politi-

---

frivolous candidates. The restriction there in question was consequently held violative of the equal protection clause. 396 U.S. 346, 362 (1970). *But see* Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973). *But see* Chappelle v. Greater Baton Rouge Airport District, 431 U.S. 159 (1977).

49. *See* Dunn v. Blumstein, 405 U.S. 330 (1972); Jardine *supra* note 28, at 325-28; Le Clercq, *Durational Residency Requirements for Public Office*, 27 S.C.L. REV. 847 (1976).

50. 415 U.S. at 735. *See generally* THE FEDERALIST No. 10 (J. Madison), in which the author elaborates on the dangers of unrestrained factionalism and splintered parties.

51. *See* notes 8-10 *supra*; Storer v. Brown, 415 U.S. at 732; Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973); Bullock v. Carter, 405 U.S. at 145.

52. Rosario v. Rockefeller, 410 U.S. 752 (1973).

53. Storer v. Brown, 415 U.S. 724 (1973).

cal association."[54]

D. Administrative Convenience

The final group of state interests in limiting ballot access may be brought together under the general rubric of "administrative convenience."[55] These interests include both logistical limitations, such as those concerning ballot or voting machine capacity,[56] and financial considerations, such as the state interest in securing a majority winner without bearing the cost of a run-off election.[57] The legitimacy of both logistical and financial state interests has been recognized in the voting and candidate rights context,[58] although "administrative convenience" rationales have not frequently been found compelling either within or without the area of election law.[59]

---

54. Kusper v. Pontikes, 414 U.S. at 61.

55. Concerning this group of interests generally, *see, e.g.*, Jardine, *supra* note 28, at 306-07.

56. *See* Wetherington v. Adams, 309 F. Supp. 318, 321 (N.D. Fla. 1970).

57. *See* Thomas v. Mims, 317 F. Supp. 179, 181 (S.D. Ala. 1970).

58. Bullock v. Carter, 405 U.S. at 145.

59. *See* Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 151-52 (1980) (widowers' workmen's compensation death benefits); Bates v. Arizona, 433 U.S. 350, 358 (1976) (lawyer advertising); Craig v. Boren, 429 U.S. 190, 198 (1976) (sale of alcoholic beverages); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 766-73 (1976) (pharmacist advertising); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 267 (1973) (emergency medical care residency requirements); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640-44 (1973) (teachers' maternity leaves); Frontiero v. Richardson, 411 U.S. 677, 688-91 (1973) (sex discrimination); Stanley v. Illinois, 405 U.S. 645, 656 (1972) (child custody); Reed v. Reed, 404 U.S. 71, 77 (1971) (sex discrimination); Shapiro v. Thompson, 394 U.S. 618, 633-38 (1968) (welfare residency requirements). *But see* Califano v. Boles, 443 U.S. 282, 291-93 (1978) (social security benefit eligibility provisions regarding mothers of wage earners' illegitimate children); Califano v. Jobst, 434 U.S. 47, 56-57 (1977) (social security benefit termination provisions burdening right to marry); Perez v. United States, 402 U.S. 146, 152-57 (congressional regulation of loan sharking as interstate commerce); Korematsu v. United States, 323 U.S. 214, 218-19 (1944) (racial discrimination during wartime). Perhaps this apparent discrepancy may be best explained in the words of Justice White, concurring in the Court's judgment in *Vlandis v. Kline*: "It must now be obvious, or it has been all along, that as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administration convenience . . . will be sufficient to justify what otherwise would appear to be irrational discriminations." Vlandis v. Kline, 412 U.S. 441, 459 (1973). Given the significance long attached by the Court to the fundamental interests of voting and free expression generally, it is submitted that granting even less weight to the administrative convenience rationale in the election law context than in other areas of law is most appropriate. Even should the rationale be found compelling, reg-

Logistical considerations have predominently been focused on preventing the clogging of the state's physical election machinery.[60] While the cognizability of this consideration is unquestionable, its application should be limited to situations in which there are actually likely to be more candidates than handles on the voting machine. Moreover, lest the tail of the machine be allowed to wag the electoral dog, election machines with capacities insufficient to monitor, three, four, or five candidate elections should simply be replaced, rather than used as justification for derogation from fundamental rights.

The cost of runoff elections, necessary if plurality winners are to be avoided, comprises the financial component of the "administrative convenience" rationale. Although the Supreme Court has recognized the legitimacy of this interest in *Bullock v. Carter*,[61] more recent decisions have at least questioned the sustainability of its future designation as "compelling."[62] Three policy considerations support this conclusion.

First, the necessity of securing a majority winner may not be as weighty an interest as has been supposed. Given the significance of the "expressive" function of voting,[63] an inflexibly restrictive ballot designed to insure a majority winner might well tend to ultimately damage rather than promote the sta-

---

ulatory means adopted pursuant to that rationale should nevertheless be required to constitute the least restrictive alternative to achieving that end. *See* Memorial Hosp. v. Maricopa County, 415 U.S. at 267. See note 119 *infra* and text accompanying notes 8-10, 51 *supra*.

60. Lubin v. Panish, 415 U.S. at 715; Bullock v. Carter, 405 U.S. at 145.

61. *Id.* at 145.

62. *See* Lubin v. Panish, 415 U.S. 709, in which a filing fee was deemed unconstitutional with little reference to the "savings" rationale. *Cf.* Jardine, *supra* note 28, at 306.

63. Elections serve three basic functions. The most obvious is the electoral function, by which the popular choice is expressed and effectuated. Second, elections promote an educational purpose by involving citizens, althoughly indirectly, in public life. Finally, elections provide an expressive outlet for citizen opinion, thereby further legitimating state authority. The significance of this expressive function has been recently underscored by the Supreme Court in *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. at 184. *See also* A. BICKEL, REFORM AND CONTINUITY 79-80 (1971); W. BINKLEY, AMERICAN POLITICAL PARTIES 181-205 (1959); *Developments*, *supra* note 20, at 1114. See A. MEIKLEJOHN, *supra* note 13, *passim*; Bloustein, *supra* note 13, *passim*, in which the societal values of free and informed public debate are considered at length.

bility of the political system as a whole.[64] Moreover, any electoral choice which resulted in plurality victory would have come from the voters themselves. As Professor Elder has noted, "if voters particularly feared a plurality outcome as undesirable, they could have responded differently with their vote, *i.e.*, by not "wasting" their vote on a candidate unlikely to win."[65]

Second, as Justice Harlan pointed out in his concurring opinion in *Williams v. Rhodes*, less restrictive alternatives to ballot access preclusion are available, even assuming *arguendo* the need to secure a majority winner:

> My Brother Stewart is, of course, quite right in pointing out that the presence of third parties may on occasion result in the election of the major candidate who is in reality less preferred by the majority of the voters. It seems clear to me, however, that many constitutional electoral structures could be designed which would accommodate this valid state interest, without depriving other political organizations of the right to participate effectively in the political process. A runoff election may be mandated if no party gains a majority. . . . Alternatively, the voter could be given the right, at the general election, to indicate both his first and his second choice for the Presidency—if no candidate received a majority of the first-choice votes, the second-choice votes could then be considered. . . .[66]

Finally, many states already provide for run-offs in primary election campaigns.[67] Although this process, if extended to the general election, would clearly require additional expense, the costs involved should not be allowed to outbalance the freer exercise of fundamental constitutional rights.[68] The

---

64. *See* Elder, *supra* note 3, at 394.

65. *Id.* at 395. It may also be observed at this juncture that the "plurality-take-all" approach currently controls the selection of the electoral college delegates within each state. Moreover, due to the expontential effect of the electoral college on popular vote pluarlities, several presidents, including Truman and Carter, have been elected by only a plurality of the popular vote. Their terms of office have not evidenced significantly greater dissention than would normally occur in the push and pull of presidential politics. *See Id.* at 393.

66. Williams v. Rhodes, 393 U.S. at 46 n.8.

67. *See* OKLA STAT. tit. 12, §§ 1-103, 6-103 to -104, 6-107 to -112, 6-115 to -119, 7-102 to -103 (1971 & Supp. 1981).

68. *See* Jardine, *supra* note 28, at 306. *See also* note 59 *supra*.

Constitution, in short, "recognizes higher values than speed and efficiency,"[69] and the Court has consequently recognized that the "process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars."[70] In any case, the "administrative convenience" rationale should not be deemed conclusive or compelling in light of the significance of the countervailing interests involved. The nature of those countervailing interests may now be addressed.

E. Interests Favoring Free Political Expression

The rights of voters to vote, candidates to run, and groups of voters to associate in political parties, are functionally inseparable.[71] Consequently, pursuant to social interests[72] analysis, the legal interests of voters, candidates, and even the state itself in free political expression also tend to merge. Among the most significant of these interests are, *first*, direct voter, candidate, and state interests in free and effective political expression, pursuant to both the free speech and associational guarantees of the first amendment, and the equal protection guarantee of the fourteenth;[73] *second*, the common interest of voters, candidates, and the states in promoting

---

69. Stanley v. Illinois, 405 U.S. at 656.

70. Lubin v. Panish, 415 U.S. at 716.

71. *See* note 109 *infra*. *See generally* Gordon, *The Constitutional Right to Candidacy*, 25 KAN. L. REV. 544, 557-62 (1977); notes 109 & 125 *infra*.

72. *See* R. POUND, JURISPRUDENCE 31 (1959).

> All the demands that press upon the legal order for recognition are to be recognized and secured so far as possible with the least sacrifice (i.e., claims, demands, desires) as a whole. We are to try to give effect to the whole scheme with the least sacrifice of the items of that scheme. We are to order the satisfaction of claims, demands or desires with the least friction and waste. To do this requires an appraising, a weighing or valuing of the items.

Id. See also Pound, *A Theory of Social Interests*, 15 PAPERS AND PROCEEDINGS OF THE AMERICAN SOCIOLOGICAL SOCIETY 16, 31 (1921): "[I]ndividual interests are capable of statement in terms of social interests and get their significance for the science from this fact."

73. The overwhelming importance of this interest was recognized in the case of *Yick Wo v. Hopkins*: "The . . . political franchise of voting . . . is regarded as a fundamental political right, *because preservative of all rights*." 118 U.S. 356, 370 (1886) (emphasis added). *See also* Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

equality of treatment among candidates;[74] *third*, the general state interest in preventing voter apathy, so as to optimize the legitimating and expressive electoral functions;[75] *fourth*, the general state interest in promoting the stability of its political system;[76] and *fifth*, the general social policy in preventing the operation of incumbent self-interest.[77] Since the last three interests have been considered earlier in the text, the first two may now be subjected to more detailed analysis.

The first group of considerations involves voter, candidate, and societal interests in free expression and association *per se*. The significance of this interest cannot be overstated. The electoral system itself, of course, is "preservative of all rights,"[78] in that its compromise would likely result in the compromise of the entire constitutional framework.[79] Apart from the obvious selective aspect of the process, however, elections provide the most common means of political expression in our society, in which most citizens are unwilling or unable to manage, run in, finance, or actively support a political campaign.[80] Voting is therefore the primary method of citizen participation in the governmental process, and the value of informed participation should not be open to dispute.[81] The essentiality of the election campaign to more broadly informing public opinion has been recognized by the Supreme Court in *Illinois State Board of Elections v. Socialist Workers Party*: "[A]n election campaign is a means of disseminating ideas as well as attaining political office. . . . Overbroad restrictions

---

74. *See generally* Elder, *supra* note 3, at 403-06.

75. *See* text accompanying notes 8-10 *supra*.

76. As has been indicated, this interest, often advanced by states in an attempt to justify ballot-access exclusions, in reality cuts both ways. While it is true that a complete Balkanization of the political fabric might tend to be destabilizing, barring third-party access to the ballot might prove even more destabilizing if the only residual recourse was to illegitimate, nondemocratic means of expression. *See* note 43 *supra*.

77. *See* text accompanying notes 10-11 & 26 *supra*; Elder, *supra* note 3, at 406-09; *Nominating Petition Requirements*, *supra* note 41, at 987.

78. Yick Wo v. Hopkins, 118 U.S. at 370. *See also* Wesberry v. Sanders, 376 U.S. at 17.

79. *See* text accompanying notes 2 - 3 *supra*.

80. Elder, *supra* note 3, at 402.

81. *See generally* A. MEIKLEJOHN, *supra* note 13.

on ballot access jeopardize this form of political expression."[82]

The significance of this educational interest to the affected parties should also not be underestimated. From the standpoint of the would-be candidate or party, its importance is evidenced by the time, energy, and expense which independent and third-party candidates have put forth simply to gather the signatures necessary for ballot position in electoral races in which most would conclude there was no reasonable prospect for victory.

From the standpoint of the voter, elections provide a forum for meaningful first amendment expression, thereby contributing to the legitimation of state authority.[83] As has been indicated, this expressive function, coupled with a related sense of duty, is, as has been indicated, the single most common general motivation for voting,[84] given the unlikelihood of a single vote being dispositive in any given election.[85] The fact that tens of millions of citizens regularly vote, under circumstances unlikely to result in either election disposition or other direct tangible benefit, should amply evidence the significance of the interest to that group.

From the standpoint of the state, voting provides a mandate without which governmental judgments would likely meet with greater grass-roots resistance. Moreover, as voters make increasingly sophisticated choices among candidates, the consequent choices made by those candidates, once elected, are likely to become more informed.[86] So stated, the state interests in broad ballot access and in securing competent elected officials again tend to merge.

Finally, the nature of the interest in equal candidate treatment must be addressed. These collective interests, protected by the fourteenth amendment's equal protection guar-

---

82. 440 U.S. at 186. That the framers of the Constitution considered broad ballot access to be essential to their democratic vision is partially evidenced by Federalist Paper number 57: "Who are to be the objects of popular choice? *Every citizen* whose merit may recommend him to the esteem and confidence of his country." THE FEDERALIST, No. 57 (A. Hamilton or J. Madison) 435 (J. Hamilton ed., Lippincott 1888) (emphasis added). *See also* Gordon, *supra* note 71, at 547-50.

83. *See* note 63 *supra* and authorities cited therein.

84. R. WOLFINGER, *supra* note 4, at 7.

85. Meehl, *supra* note 6, at 12-30.

86. *See generally* A. MEIKLEJOHN, *supra* note 13, at 25-26.

antee,[87] include judicial attempts to equalize treatment between the rich and poor,[88] urban and rural,[89] racial majorities and minorities,[90] and, insofar as they are "similarly situated,"[91] majority and minority parties, and party and independent candidates generally.[92]

While the "equal treatment" interests are relatively easy to describe, their application in the small party context has been problematic. Rather than focusing on the degree to which major and minor parties are functionally "similarly situated", judicial analysis of "demonstrated support" require-

---

87. Williams v. Rhodes, 393 U.S. at 29. Concerning the cumulative impact of the first amendment in creating an "equal liberty of expression," see Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

88. In *Bullock v. Carter* and *Lubin v. Panish*, the Supreme Court unanimously invalidated filing fee requirements for indigent candidates. The Texas scheme involved in *Bullock* required local office candidates to pay fees as high as $8900 to qualify for the primary ballot. 405 U.S. at 138 n.11. The California scheme in *Lubin* fixed filing fees at a percentage of the salary of the office sought. The petitioner there was unable to qualify for the primary ballot in a County Supervisor's race due to his inability to pay the required filing fee of about $700. 415 U.S. at 710.

Property qualifications for office have also frequently struck down as constituting invidious discrimination between rich and poor in violation of the equal protection clause. *See, e.g.*, Woodward v. Deerfield Beach, 538 F.2d 1081 (5th Cir. 1976); Davis v. Miller, 339 F. Supp. 498 (D. Md. 1972); Gonzales v. Sinton, 319 F. Supp. 189 (S.D. Tex. 1970).

89. In *Moore v. Ogilvie*, 394 U.S. 814 (1969), the Supreme Court invalidated an Illinois statute which provided that nominating petitions for independent candidates must have at least 200 signatures from each of at least fifty of the state's 102 counties. Given the fact that 93.4% of the state's population resided in only forty-nine counties, the statute was held violative of equal protection as discriminatory against the state's urban population in violation of the "one-man-one-vote" principle enunciated in *Baker v. Carr*, 369 U.S. 186 (1962). *See also* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. at 173.

90. In *Anderson v. Martin*, 375 U.S. 399 (1964), the Supreme Court invalidated a 1960 amendment to Louisiana's election laws which required a candidate's race to be printed beside his name on the ballot. This was held to operate as a racially discriminatory scheme and consequently to violate the equal protection clause of the fourteenth amendment. *Cf.* Georgia v. United States, 411 U.S. 526 (1973); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

91. *See generally* Barbier v. Connolly, 113 U.S. 27 (1885); Tussman & ten Brock, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

92. *See* American Party of Texas v. White, 415 U.S. at 767; Storer v. Brown, 415 U.S. at 724; Jenness v. Fortson, 403 U.S. at 431; Williams v. Rhodes, 393 U.S. at 23; Baird v. Davoren, 346 F. Supp. 515, 522 (D. Mass. 1972) (equal protection in the context of minority party and independent candidate equality); Crussel v. Okla. State Election Bd., 497 F. Supp. 646 (W.D. Okla. 1980) (equal protection in the context of legislative and executive candidate equality).

ments for party ballot status has tended to focus on a case-by-case examination of the causational nexus between the regulation and asserted state interest, and the comparative intrusiveness of the statute concerning the exercise of first amendment rights.[93] The "equal treatment" interest will therefore be addressed primarily in the context of applying the standards of review.[94]

III. Ascertaining the Standards of Review

A. The Countervailing Constitutional Considerations

The Constitution authorizes the states to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives."[95] The power of states to regulate nonfederal elections is reserved by them pursuant to the tenth amendment.[96] While states "have broad powers to determine the conditions under which the right of suffrage may be exercised,"[97] states' ballot access restrictions pursuant to these provisions, are not immune from constitutional scrutiny.[98] As the United States Supreme Court has noted when factoring in the countervailing first and fourteenth amendment interests of individual citizens,[99] "to be sure, the administration of the electoral process is a matter that the Constitution largely en-

---

93. *See* American Party of Texas v. White, 415 U.S. at 779-86; Storer v. Brown, 415 U.S. at 746; Jenness v. Fortson, 403 U.S. at 437; Williams v. Rhodes, 393 U.S. at 30.

94. *See* text accompanying notes 102 and 124-130 *infra*.

95. U.S. Const. art. I, § 2, cl. 1.

96. *See* Oregon v. Mitchell, 400 U.S. 112, 125 (1970).

97. Carrington v. Rash, 380 U.S. 89, 91 (1965).

98. *See* The Federalist No. 59 (A. Hamilton), 449 (J. Hamilton ed., Lippincott 1888), in which the author responded to criticisms of the cited constitutional provision:

> It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention.

99. *See* text accompanying notes 71-94 *supra*.

trusts to the States. But in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections."[100]

This same approach has been applied to presidential elections, in which states are constitutionally empowered to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . ."[101] In response to Ohio's contention that the resultant state power was plenary, the Court, in *Williams v. Rhodes*, declared,

> Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other consitutitonal provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that "No State shall . . . deny to any person . . . the equal protection of the laws."[102]

More comprehensive examination of the scope of equal protection review in ballot access cases necessitates a continuing awareness of the divergent sources of those rights. As the Supreme Court early recognized, ballot-access restrictions "place burdens on two different, although overlapping, kinds of rights — the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[103] Thus, the right to candidacy is derivative of the right to vote, which, in turn, derives from the rights of free association and speech protected from state infringement by the fourteenth amendment.[104] The right to candidacy, concomitant to the right to vote, is also derivative of first amendment gurarantees concerning "vigorous advocacy," which, in turn, protect "orderly group activity" within the political arena.[105] In addition, the fourteenth amendment's equal pro-

---

100. Kusper v. Pontikes, 414 U.S. at 57. *Accord*, Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 449 (1974).

101. U.S. CONST. art. II, § 1.

102. 393 U.S. at 29.

103. *Id.* at 30. *See also* note 109 *infra*.

104. *See* Storer v. Brown, 415 U.S. at 723 (Brennan, J., dissenting).

105. *See* NAACP v. Button, 371 U.S. 415, 429 (1963). *See generally* Elder, *supra*

tection guarantees have been applied in the candidate-right context as well.[106] Nevertheless, even though the Supreme Court has most often articulated equal protection analysis as the basis of its holdings in recent ballot access decisions,[107] the underpinnings of that analysis, especially insofar as it invokes the "fundamental rights" approach to support the application of a higher standard of review,[108] are generally derivative of the preferred first amendment freedoms described above.[109]

---

note 3, at 402-03; LeClercq, *supra* note 1, at 625-27; Note, *Admas v. Askew: The Right to Vote and the Right to be a Candidate—Analagons or Incongruous Rights?*, 33 WASH. & LEE L. REV. 243, 253-55 (1976) [hereinafter cited as *Adams v. Askew: The Right to Vote*].

106. *See* text accompanying notes 87-94 *supra*; text accompanying 124-30 *infra*; note 134 *infra*.

107. *See* Elder, *supra* note 3, at 402, and authorities cited therein.

108. *See* text accompanying notes 114-25 *infra*.

109. Buckley v. Valeo, 424 U.S. 1, 94 (1976); Bullock v. Carter, 405 U.S. at 143; Williams v. Rhodes, 393 U.S. at 30. Although the majority opinion in the seminal case of *Williams v. Rhodes* relied on equal protection analysis, Justice Douglas in his concurring opinion emphasized the cumulative effect of the first amendment in this area as well. *Id.* at 38 (Douglas, J., concurring). Justice Harlan, concurring, went still further, and "would rest this decision entirely on the proposition that Ohio's statutory scheme violates the basic right of political association assured by the First Amendment . . . ." *Id.* at 41 (Harlan, J., concurring). *But see* Adams v. Askew, 511 F.2d 700 (5th Cir. 1975) (rights of candidates and voters severed for purposes of ascertaining the standard of review). *See also* Duncantell v. City of Houston, 333 F. Supp. 973, 976 (S.D. Tex. 1971); Barnhardt v. Mandel, 311 F. Supp. 814, 824 (D. Md. 1970); Elder, *supra* note 3, at 402; LeClercq, *supra* note 1, at 627. The Fifth Circuit's position on this issue is criticized in *Adams v. Askew: The Right to Vote*, note 105 *supra*, wherein the author notes,

> The artificiality of the Fifth Circuit's distinction between the right to vote and the right to run for office is illiminated by the similarity between the two rights. The right to be a candidate is as integral a part of the First Amendment as the right to vote. The two rights are analogous and interdependent. Candidacy without voters would be worthless, and the right to vote would be meaningless were there no parties [or] candidates from which to choose. Consequently, the right to vote entails more than the ability to cast a vote for a candidate; rather, the right to vote is the right to cast one's vote in a meaningful way — to have a choice of candidate who represents the voter's views . . . . Thus, the right to vote, to form political parties, and to run for office are integrated in the system of representative government. The integral function of those three rights has led the Supreme Court to note that each of the three is fundamental to the entire system of civil and political rights.

Id. at 252-53 (citations omitted). *See generally L. Tribe, supra* note 13, at 737; Gordon, *supra* note 71, at 557-62; Jardine *supra* note 28, at 625. *See also* text accompanying notes 71-94; 103-05 *supra*.

Scrutiny more rigorous than the "rational relationship" approach has traditionally been applied by the Supreme Court both to statutes which burden the exercise of first amendment rights *per se*,[110] and to those which, when challenged on fourteenth amendment grounds, involve restrictions on the exercise of "fundamental" rights.[111] Whether the rights to vote, to associate in a political party, and to run for political office have achieved the status of constitutionally cognizable "fundamental rights" is therefore an essential preliminary subject for inquiry.

B. The Fundamentality of Voter and Candidate Rights

Since the beginning of the nineteenth century, almost half of the enacted constitutional amendments,[112] as well as substantial federal legislation,[113] have attempted to expand and solidify the right to vote.

Almost a century ago, the Supreme Court recognized the fundamental nature of the right to vote in the context of distinguishing governments of laws from governments of men:

> There are many illustrations . . . of this truth, which would make manifest that it was self evident in . . . our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as natural right, . . . nevertheless it is regarded as a fundamental political right, because preservative of all rights.[114]

In its modern incarnation,[115] the doctrine is traceable to

---

110. *See* Police Dep't v. Mosley, 408 U.S. 92, 99 (1971); Marsh v. Alabama, 326 U.S. 501, 509 (1945); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). *See also* Jones v. Opelika, 316 U.S. 584, 600, 608 (1942) (Stone, C.J., dissenting).

111. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958) (association); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (private education).

112. U.S. CONST. amends. XII, XIV, XV, XVII, XIX, XX, XXII, XXIII, XXIV, XXVI.

113. The most recent example of such legislation, of course, is contained in the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973dd-6 (Supp. 1979). The 1970 amendments to that Act, insofar as they precluded literacy tests on a nationwide basis, were sustained in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

114. Yick Wo v. Hopkins, 118 U.S. at 370.

115. Despite the Court's strong endorsement of voter rights in *Yick Wo*, the pur-

Reynolds v. Sims,[116] in which the Court reaffirmed the fundamental nature of the right to vote in the following language:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state, as well as in federal elections . . . . Undoubtedly, the right to suffrage is a fundamental matter in a free and democratic society . . . . The 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. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.[117]

Consequently, with an almost unwaivering consistency,[118] the

---

ported, "right to vote" languished (in all non-racial contexts) until resuscitated by *Baker v. Carr*, 369 U.S. 186 (1962), and its later companion, *Reynolds v. Sims*, 377 U.S. 533 (1964). *See generally* LeClercq, *supra* note 1, at 617. Earlier, a line of cases had declined to follow the *Yick Wo* lead, with *Minor v. Happersett* apparently enjoying the greatest precedential weight. In that case, the Court broadly proclaimed that the "Constitution of the United States does not confer the right of suffrage upon anyone." 88 U.S. (21 Wall.) 162, 178 (1874). *Minor* was followed in non-racial contexts in *Colgrove v. Green*, 328 U.S. 549 (1946), *Snowden v. Hughes*, 321 U.S. 1 (1944), and *Pope v. Williams*, 193 U.S. 621 (1904). As examples of the Court's pre-*Baker* approach to voting rights issues where *de jure* or *de facto* racial discrimination *was* alleged, see *Georgia v. United States*, 411 U.S. 526 (1973); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *United States v. Classic*, 313 U.S. 299 (1941); and *Nixon v. Herndon*, 273 U.S. 536 (1927).

116. 377 U.S. 544 (1963).

117. *Id.* at 554, 561-62. *See also* note 72 *supra*.

118. One arguable exception to the fundamental rights-strict scrutiny approach may be found in *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969), in which an otherwise qualified but incarcerated Cook County voter was denied an absentee ballot pursuant to ILL. REV. STAT. ch. 46, §§ 19-1 to -3, which permitted absentee ballots to be sent only to those "physically incapacitated", poll watchers, and persons physically absent from the county of their residence. Although the Court there declined to apply strict scrutiny, it distinguished the right to vote from the right to an absentee ballot, and concluded that only the latter interest was affected by the challenged statutory scheme. 394 U.S. at 807-08. The tenuous nature of this distinction has been recognized by later cases, in which the Court has indicated that the conclusion in *McDonald* resulted from a failure to proof concerning an absolute barrier to inmate voting, and not from a shift in the Court's perception of the applicable standards of review. *See* O'Brien v. Skinner, 414 U.S. 524 (1974); Goosby v. Osser, 409 U.S. 512 (1973). In any case, the *McDonald* holding has not enjoyed substantial precedential value in later decisions. American Party of Texas v. White, 415 U.S. at 794-95; Jardine, *supra* note 28, at 292 n.14.

Supreme Court has applied strict scrutiny[119] to legislative classifications which substantially[120] intrude on the right to vote.[121] Chief Justice Warren, writing for the Court in *Kramer v. Union Free School District*, described the rationale for applying strict scrutiny to such classifications as follows:

---

119. This approach, often referred to as the "second tier" of the two-tiered formula, requires that the legislative classification bear substantial relation to a compelling state interest, and that no less restrictive alternative be available to the legislature for effectuating its policy goals. The "lower tier" of review, also referred to as "minimal scrutiny", requires only that the legislative classification be rationally related to a legitimate governmental goal. While statutes reviewed pursuant to minimal scrutiny enjoy a presumption of constitutionality, those reviewed pursuant to strict scrutiny do not. *Compare* Harper v. Virginia Bd. of Elections, 383 U.S. at 670, *with* Williamson v. Lee Optical of Oklahoma, 348 U.S. 482 (1955).

That the "less restrictive alternative" aspect of strict scrutiny is also to be applied in voting and ballot-access cases is evidenced, *inter alia*, by *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. at 185-86 (geographically weighted votes); *American Party of Texas v. White*, 415 U.S. at 780-81 (demonstrated support requirements); *Lubin v. Panish*, 415 U.S. at 716, 718 (filing fees); *Kusper v. Pontikes*, 414 U.S. at 58-61 (disaffiliation requirements); *Dunn v. Blumstein*, 405 U.S. at 343 (durational residency requirements); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969) (property qualifications); *Williams v. Rhodes*, 393 U.S. at 31-33 (demonstrated support and party organization requirements); *NAACP v. Button*, 371 U.S. at 438 (political association). *See also* Democratic Party of the United States v. LaFollette, ___ U.S. ___, 101 S. Ct. 1010, 1026 n.14 (1981) (Powell, Blackmun & Rehnquist, JJ., dissenting); Communist Party of Indiana v. Whitcomb, 414 U.S. at 441 (Powell, Blackmun, & Rehnquist, JJ., & Burger, C.J., concurring). For a more extensive analysis of the strict scrutiny approach, see Barrett, *Judicial Supervision of Legislative Classifications — A More Modest Role for Equal Protection*, 1976 B.Y.U. L. REV. 89; Gunther, *The Supreme Court, 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1087 - 1131 (1969).

120. While the Court has cautioned that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review," Bullock v. Carter, 405 U.S. at 143, it has generally applied strict scrutiny to those statutes which have substantially and not merely incidentally burdened those rights. *See* Kusper v. Pontikes, 414 U.S. at 58; LeClercq, *supra* note 1, at 629.

121. Even assuming *arguendo* the existence of an *ad hoc*, case-by-case approach to voter and candidate rights review, strict scrutiny has specifically been applied at least to the following types of voter and ballot restrictions and interests: American Party of Texas v. White, 415 U.S. at 794-95 (absentee ballot status); Storer v. Brown, 415 U.S. at 780 (demonstrated support requirements); Kusper v. Pontikes, 414 U.S. at 58 (disaffiliation requirements); Dunn v. Blumstein, 405 U.S. at 336-37 (durational residency requirements); Bullock v. Carter, 405 U.S. at 143-44 (filing fees); Kramer v. Union Free School Dist., 395 U.S. at 627 (property qualifications to vote); Moore v. Ogilvie, 394 U.S. at 818-19 (signature weight variant with county); Harper v. Virginia Bd. of Elections, 383 U.S. at 663, 670 (poll tax); Anderson v. Martin, 375 U.S. at 403 (racial identification on ballot); Baker v. Carr, 369 U.S. at 207-08 (apportionment).

> The presumption of constitutionality and the approval given "rational" classifications in often types of enactments are based on an assumption that the institutions of . . . government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.[122]

A similar conclusion may be drawn from *The Federalist*, No. 57:

> The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom . . . to pursue, the common good of the society; and in the next place, to take *the most effectual precautions* for keeping them virtuous whilst they continue to hold their public trust.[123]

As has been indicated, the rights of voters to vote, political parties to associate, and candidates to run for office are functionally inseparable.[124] The mutual reinforcement of these rights has been consistently recognized by the Supreme Court, whose most recent commentary on the issue, handed down in a ballot-access case only two years ago, is illuminating:

> Restrictions on access to the ballot burden two distinct and fundamental rights, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their vote effectively." The *freedom to associate as a political party*, a right we have recognized as *fundamental*, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referendums, "voters can assert their preferences only through candidates or parties or

---

122. 395 U.S. at 627-28. In a somewhat more general context, Chief Justice Burger recently reaffirmed that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978).

123. THE FEDERALIST No. 57 (A. Hamilton or J. Madison) 434 (J. Hamilton ed., Lippincott 1888) (emphasis added).

124. *See* note 109, *supra*, and text accompanying notes 71 and 103-09, *supra*. *See also* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. at 184; Lubin v. Panish, 415 U.S. at 416; Bullock v. Carter, 405 U.S. at 143; Williams v. Rhodes, 393 U.S. at 30.

> both." By limiting the choices available to voters, the state impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure.
>
> When such vital interests are at stake, *a State must establish that its classification is necessary to serve a compelling state interest.*[125]

Two conclusions may be drawn from the preceding paragraph. First, the Court has formally recognized as fundamental the right to associate as a political party, ancillary to the fundamental right to vote.[126] Second, the qualified constitutional right to candidacy, long hailed as emerging by constitutional scholars,[127] may finally be said to have emerged, although the Court has yet to recognize its existence in so many words.[128] By recognizing the applicability of strict scrutiny to substantial legislative ballot-access limitations,[129] the Court has functionally mooted the semantic issue. The purpose of the "quasi-fundamental" designation[130] is to underscore this point.

Bearing in mind that the Constitution forbids "sophisticated as well as simple-minded modes of discrimination,"[131] judicial scrutiny of ballot-access regulations thereupon proceeds on the basis of a "totality of circumstances" approach.

---

125. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. at 184 (emphasis added) (citations omitted).

126. *Id. See also* Williams v. Rhodes, 393 U.S. at 30-31.

127. *See, e.g.*, Elder, *supra* note 3; Jardine, *supra* note 28; LeClercq, *supra* note 1.

128. Although Justice Douglas, writing in 1972, was apparently willing to take the final step of formal recognition of a fundamental right to run for public office, this position has yet to be endorsed by the Court. Lippitt v. Cipollone, 404 U.S. 1032, 1033 (1972) (Douglas, J., dissenting). Several district courts have not been as reluctant as the Supreme Court to formally acknowledge candidate ballot-access rights as fundamental. *E.g.*, Duncantell v. City of Houston, 333 F. Supp. 973 (S.D. Tex. 1971); Thomas v. Mims, 317 F. Supp. 179 (S.D. Ala. 1970); Socialist Labor Party v. Rhodes, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom.* Sweetenham v. Gilligan, 409 U.S. 942 (1972); Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y. 1969). *Contra*, Westherington v. Adams, 309 F. Supp. 318 (N.D. Fla. 1970); Rees v. Layton, 6 Cal. App. 3d 815, 86 Cal. Rptr. 268 (1970).

129. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. at 184-85.

130. See note * *supra*.

131. Reynolds v. Sims, 377 U.S. at 563; Gomillion v. Lightfoot, 364 U.S. at 342; Lane v. Wilson, 307 U.S. 268, 275 (1939).

Although decisions in this context are unquestionably a "matter of degree,"[132] the courts are directed to consider "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."[133] Pursuant to this three-factor approach, several facially valid individual ballot-access provisions may be scrutinized in a collective context to determine if constitutionally impermissible barriers to the exercise of voter and candidate rights have been created.[134] In

---

132. Dunn v. Blumstein, 405 U.S. at 348.

133. Storer v. Brown, 415 U.S. at 730; Dunn v. Blumstein, 405 U.S. at 335; Kramer v. Union Free School Dist., 395 U.S. at 626; Williams v. Rhodes, 393 U.S. at 30. *See also* American Party of Texas v. White, 415 U.S. at 783 n.15; Jenness v. Fortson, 403 U.S. at 437, 442.

134. *See* Storer v. Brown, 415 U.S. at 737. Thus, in *Jenness v. Fortson*, the Court upheld a Georgia statute requiring new political parties and independent candidates to submit nominating petitions signed by 5% of those eligible to vote at the last general election for the office in question. In calculating the burden imposed by the statute, the Court considered the fact that Georgia allowed all registered voters to sign such nominating petitions irrespective of whether they voted in a major party primary, that it allowed a district-wide candidate to obtain signatures on the basis of a district-wide measuring election, and that, in any case, it allowed voters to write in candidates who had not qualified for printed ballot status. 403 U.S. 431. Compare *Storer v. Brown*, 415 U.S. 724, which was remanded for further consideration of the extent of the burden imposed by a California statute requiring independent presidential candidates to submit nominating petitions signed by 5% of the voters in the last general election. Noteworthy distinctions between this statute and the Georgia statute upheld in *Jenness* include California's disqualification of persons who voted in major party primaries from signing nominating petitions, and its allocation of a time period for signature gathering which was confined to a twenty-four day period between the primary and the general election. The Court was consequently concerned that the primary election would substantially deplete the pool of voters eligible to sign nominating petitions, thereby rendering the *effective* percentage required greater than the 5% sustained in *Jenness*. *Id.* at 743-44. The case was remanded for further factual findings on this point despite the availability of write-in ballot space for candidates who had not otherwise qualified. *Cf.* American Party of Texas v. White, 415 U.S. 767 (Texas statute requiring independent parties to submit petitions signed by 1% of the total vote cast for governor in the last preceding election sustained). Although the Court in *White* held that Texas could constitutionally limit voters to *either* voting in a primary or signing a nominating petition, *Id.* at 785, it considered this factor along with the fact that the "measuring election" was statewide, in evaluating the restrictiveness of the Texas legislative scheme. It therefore concluded that, even though the nominal signature requirement was 1%, the totality of circumstances was such that the requirement fell "within the *outer boundaries* of support the State may require before according political parties ballot position." *Id.* at 783 (emphasis added). Thus, at least five factors must be considered in evaluating the constitutionality of "demonstrated support" requirements in a "totality of circumstances" context, including the percentage of signatures nominally required, whether the measur-

applying these standards, the courts are directed to bear in mind that the Constitution "requires that access to the ballot be real, not merely theoretical,"[135] and that, absent a presumption of constitutionality,[136] the state must bear the twin burdens of establishing the presence of a compelling state interest,[137] and the absence of a less restrictive alternative.[138] Such are the dimensions of judicial review of legislation burdening the right to candidacy at this time.[139]

IV. Conclusion

Ultimately, of course, deciding whether to closely scrutinize ballot-access restrictions necessitates the simultaneous resolution of a number of related jurisprudential issues as well. Are the individual interests in voting, political association, and candidacy fundamental?[140] Are they functionally severable?[141] Is the fundamentality of a right sufficient justification for closely scrutinizing limitations on its exercise?[142] Do

---

ing election is statewide or districtwide, whether primary voters are disqualified from signing nominating petitions, the time allowed for gathering such signatures, the availability of write-in ballot space to candidates who have not qualified for printed ballot status, as well as the presence of any cumbersome requirements concerning internal party organization. *See* Williams v. Rhodes, 393 U.S. at 25.

135. American Party of Texas v. White, 415 U.S. at 783. *See also* Janness v. Fortson, 403 U.S. at 439.

136. *See* note 119 *supra*.

137. *See* text accompanying notes 118-35 *supra*.

138. *See* note 119 *supra*.

139. In short, the "right," like virtually all others, is a qualified one, in that the choice of a would-be candidate to run for public office may validly be limited to the extent that the state interests discussed in Section II *supra* are "compelling", and to the extent that these interests are promoted by the least restrictive alternatives available to the state at the time.

140. The modern legal significance of the "fundamentality" of a personal right or liberty is traceable more or less directly to Justice Cardozo's majority opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937), in which the question of incorporating the Bill of Rights into the due process clause of the fourteenth amendment was resolved by selectively incorporating those portions found "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 325. Earlier incarnations of the principle may be found in *Brown v. Mississippi*, 297 U.S. 278, 285 (1936); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926); *Pierce v. Society of Sisters*, 268 U.S. at 535; *Yick Wo v. Hopkins*, 118 U.S. at 369-70.

141. *See generally* text accompanying notes 71, 103-09 & 124-25 *supra*.

142. For some thoughtful recent considerations in its defense, see Gerety, *supra* note 12, at 40-44; LeFrancois, *The Constitution and the "Right" to Marry: A Juris-*

any extrinsic considerations of public policy counsel judicial deference to the legislatures?[143]

If, based on the preceding analysis, close scrutiny is to be applied to ballot-access limitations, constitutional principle demands that the state interests involved be carefully evaluated, and that the causational nexus between the proffered legislative solution and the achievement of those objectives be examined to determine if the chosen legislative means constitutes the least restrictive alternative. Pursuant to this process, the Supreme Court has recognized the "qualified candidate,"[144] "unconfused voter,"[145] and "political stability"[146] interests as compelling,[147] but has insisted that ballot-access limitations be narrowly drawn so as to achieve the essential aspects of the asserted state interests without unnecessarily infringing the countervailing and equally compelling interests in free political expression.[148]

---

prudence Analysis, 5 OKLA. CITY UNIV. L. REV. 507, 508-17 (1980). While the existence of judicially discerned classifications within or without the language of any constitutional provision may be offensive to positivists, textualists, and some others, see J. CHOPER, *supra* note 11, at 4-12, 47-49, 61-63, 73-77; J. ELY, *supra* note 1, at 9 n.32; H. KELSEN, PURE THEORY OF LAW 352-55 (M. Knight trans. 1967); Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594-600, 624-29 (1958), that the interpretivists have at least temporarily carried the day is evidenced, *inter alia*, by the following excerpt from Chief Justice Burger's majority opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980):

> The State argues that the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that accordingly no such right is protected . . . . But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees.

Id. at 579.

143. For example, both the unquestionably special expertise of an elected legislature in dealing with election laws, and the conflict-of-interest possibilities which may flow therefrom, would need to be addressed pursuant to this issue. *See generally* text accompanying notes 1-3 *supra*.

144. *See generally Developments*, *supra* note 20, at 1217-33.

145. *See* text accompanying notes 23-24 *supra*.

146. *See* Storer v. Brown, 415 U.S. at 736.

147. That the asserted "administrative convenience" rationale should not be categorically so regarded is maintained in the text accompanying notes 55-70 *supra*.

148. Concerning the proposition that the "unconfused voter" and "political stability" interests, even assuming them to be compelling, tend to support both regula-

Thus, although the ramifications of this analysis have yet to be worked out in detail,[149] the basic framework for judicial review now appears to be firmly in place. The right to ballot access, of course, is "fundamental" to American democracy in a literal sense.[150] It is functionally inseparable from the right to vote. The fundamental rights analysis employed by the Court serves the essential function of invoking strict scrutiny in an area in which meaningful judicial review is most appropriate.[151] Moreover, since ours is a system in which the constituencies of minority party and independent candidates do not enjoy the benefit of proportional representation,[152] thereby being effectively excluded from direct participation in the legislative process, the only method by which they may simultaneously promote their ideas and verify their support of that system — short of governmentally coerced assimilation into a "wing" of one of the two major parties — is through meaningful access to the *political* process of voting, association, and candidacy. Whether the source of the constitutional protection is found in the first, ninth, or fourteenth amendments, those rights *should* not be fractionalized encumbered, or abridged absent a *bona fide* necessity to secure a compelling governmental interest.

---

tion *and* deregulation when carefully considered, see text accompanying notes 31-33, 42-43 *supra*.

149. *See* the cases at notes 92-93 *supra*.

150. Webster defines "fundamental" to mean "one of the minimum constituents without which a thing would not be what it is or on which all further development is founded . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 921 (P. Gove ed. 1971). Concerning the application of this definition to the right to ballot access, see text accompanying notes 13, 114-17, 124-28 *supra*.

151. *See* text accompanying notes 2-6, 11-12 *supra*.

152. *See also* note 4 *supra*.