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## FUNDAMENTAL ELECTION RIGHTS: ASSOCIATION, VOTING AND CANDIDACY

GARY AHRENS\* AND NANCY HAUSERMAN\*\*

### INTRODUCTION

The idea of a republican form of government involves several distinct, but mutually dependent election rights. The right to vote, the right of free speech, the right to petition government, and the right to associate for political purposes have all been discussed and identified as such by the courts. However, the courts have not been able to decide on a logical relationship between these rights; nor have they identified which of them may be described as the prime principle and which are its corollaries. In 1968, the Supreme Court said the prime principle was the right to vote.<sup>1</sup> However, its decisions since then have qualified that statement to the point that it is no longer useful as the sole criterion for the determination of election rights, if indeed the Court ever intended it to be used as one.

In election cases involving third party and independent candidates, litigants have frequently asserted that the right to be a candidate belongs in the class of fundamental election rights with voting, association, and others, but it has yet to be clearly given that status by the Court. This article argues that it should be included as a fundamental right. It will demonstrate that the Court should recognize as the basic Constitutional principle the proposition that a government cannot exist as a democratic republic unless it protects the individual's right to freely associate and disassociate in electoral politics; and that the right to be a candidate is intertwined with the other corollaries to political association.

The pronouncements of the courts implicitly recognize that the political system envisioned in the Constitution holds as a fundamental value the right of free association between individuals as political equals. Association is not explicitly mentioned in the text of the Constitution, but is the whole of which the first amendment protects: free speech, free press, assembly, petition, and voting are the

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1. *Williams v. Rhodes*, 393 U.S. 23, 31 (1968), citing *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

parts. Free political association distinguishes the American political system. Ours is not a system which is predicated on the subordination of all the members of society to one or another political organization or hierarchy; nor does it forbid any association of individuals without specific permission from the government. In election cases, the courts have tried to steer between the anarchy of splintered and fractionalized parties—which would result from unstabilized political association—and the oligarchy of one established party, even if it is nominally split in two wings called democrat and republican, which rigid associational control would create. The rights which have been principally discussed in these cases, the right to vote and the right to be a candidate, implement the right to associate for political purposes. Necessary as they may be, issues of voting and candidacy are secondary to the central problem facing the courts in these cases, which is the reasonable control of the process of political association and its corollary, disassociation.

#### BACKGROUND: PATTERNS OF ELECTION RIGHTS LITIGATION

The fact situations from which litigation has arisen generally conform to a somewhat uniform pattern. A person who is not a member of one of the major political parties,<sup>2</sup> or who is not a member of any political party,<sup>3</sup> tenders an application to be placed

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2. Illinois State Bd. of Elections v. Socialist Workers Party, \_\_\_ U.S. \_\_\_, 99 S. Ct. 983 (1979). See American Party of Texas v. White, 415 U.S. 767, *reh. denied*, 416 U.S. 1000 (1974); Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23 (1968); Communist Party v. State Bd. of Elections, 518 F.2d 517 (7th Cir. 1975); Rose v. Hanly, No. 77-C-326 (N.D. Ill., filed March 15, 1977); Ashworth v. Fortson, 424 F. Supp. 1178 (N.D. Ga. 1976); American Party v. Jernigan, 424 F. Supp. 943 (E.D. Ark. 1977); Salera v. Tucker, 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976); King v. Willis, 333 F. Supp. 670 (D. Del. 1971); Georgia Socialist Workers Party v. Fortson, 135 F. Supp. 1035 (N.D. Ga. 1970).

3. See McCarthy v. Briscoe, 429 U.S. 1316 (1976); Storer v. Brown, 415 U.S. 724 (1974); Lubin v. Panish, 415 U.S. 709 (1974); Moore v. Ogilvie, 394 U.S. 814 (1969); MacBride v. Exon, 558 F.2d 443 (8th Cir. 1977); MacBride v. Askew, 541 F.2d 465 (5th Cir. 1977); Jones v. Hare, 440 F.2d 685 (6th Cir. 1971); McCarthy v. Andrus, No. 1-76-191 (D. Idaho filed Oct. 5, 1977); Cross v. Fong Eu, 430 F. Supp. 1036 (N.D. Cal. 1977); Ihlenfeldt v. State Elections Bd., 425 F. Supp. 1361 (E.D. Wis. 1977); Lendall v. Jernigan, 424 F. Supp. 951 (E.D. Ark. 1977); McCarthy v. Salmon, No. 76-C-213 (D. Vt., filed Oct. 7, 1976); McCarthy v. Rampton, No. 76-C-303 (D. Utah, filed Oct. 6, 1976); Harless v. McCartney, No. 76-0293-CH (S.D.W. Va., filed Sept. 30, 1976); McCarthy v. Hardy, 420 F. Supp. 410 (E.D. La. 1976); McCarthy v. Kirkpatrick, 420 F. Supp. 366 (W.D. Mo. 1976); McCarthy v. Noel, 420 F. Supp. 799 (D.R.I. 1976); McCarthy v. Tribbitt, 421 F. Supp. 1193 (D. Del. 1976); McCarthy v. Askew, 420 F. Supp. 775 (S.D. Fla. 1976); McCarthy v. Exon, 427 F. Supp. 1143 (D. Neb. 1976); McCarthy v. Austin, 423 F. Supp. 990 (W.D. Mich. 1976); McCarthy v. Lunding, No. 76-C-2733 (N.D. Ill., filed Aug. 6, 1976); McCarthy v. Shanahan, No. 76-237-C6 (D. Kan., filed June 17, 1976); Zapata v. Davidson, 24 Cal. App. 3d 823, 101 Cal. Rptr. 438 (1972); McCarthy v. Secretary of

on a ballot;<sup>4</sup> or in election financing cases, tenders an application for aid<sup>5</sup> to the bureaucratic official who is in charge of processing such matters.<sup>6</sup> The official refuses to comply with the request and is in

Commonwealth, 371 Mass. 667, 359 N.E.2d 291 (1977); *McCarthy v. Slater*, 553 P.2d 489 (Okla. 1976); *McCarthy v. Hassler*, No. A-7991-II (Chancery Court, Davidson County, Tenn., filed Sept. 22, 1976).

4. See *Illinois State Bd. of Elections v. Socialist Workers Party*, \_\_\_ U.S. \_\_\_, 99 S. Ct. 983 (1979); *McCarthy v. Briscoe*, 429 U.S. 1316 (1976); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *MacBride v. Exon*, 558 F.2d 443 (8th Cir. 1977); *MacBride v. Askew*, 541 F.2d 465 (5th Cir. 1976); *Communist Party v. State Bd. of Elections*, 518 F.2d 517 (7th Cir. 1975); *Jones v. Hare*, 440 F.2d 685 (6th Cir. 1971); *McCarthy v. Andrus*, No. 1-76-191 (D. Idaho filed Oct. 5, 1977); *Cross v. Fong Eu*, 430 F. Supp. 1036 (N.D. Cal. 1977); *Rose v. Hanly*, No. 77-C-326 (N.D. Ill. filed Mar. 15, 1977); *Ihlenfeldt v. State Election Bd.*, 425 F. Supp. 1361 (E.D. Wis. 1977); *American Party v. Jernigan*, 424 F. Supp. 943 (E.D. Ark. 1977); *Lendall v. Jernigan*, 424 F. Supp. 951 (E.D. Ark. 1977); *Ashworth v. Fortson*, 424 F. Supp. 1178 (N.D. Ga. 1976); *McCarthy v. Salmon*, No. 76-C-213 (D.Vt., filed Oct. 7, 1976); *McCarthy v. Rampton*, No. 76-C-303 (D. Utah, filed Oct. 6, 1976); *Harless v. McCartney*, No. 76-0293-C4 (S.D.W. Va., filed Sept. 30, 1976); *McCarthy v. Hardy*, 420 F. Supp. 410 (E.D. La. 1976); *McCarthy v. Kirkpatrick*, 420 F. Supp. 366 (W.D. Mo. 1976); *McCarthy v. Noel*, 420 F. Supp. 799 (D.R.I. 1976); *McCarthy v. Tribbitt*, 421 F. Supp. 1193 (D. Del. 1976); *McCarthy v. Askew*, 420 F. Supp. 775 (S.D. Fla. 1976); *McCarthy v. Exon*, 424 F. Supp. 1143 (D. Neb. 1976); *McCarthy v. Austin*, 423 F. Supp. 990 (W.D. Mich. 1976); *McCarthy v. Lunding*, No. 76-C-2733 (N.D. Ill., filed Aug. 6, 1976); *McCarthy v. Shanahan*, No. 76-237-C6 (D. Kan., filed June 17, 1976); *Udall v. Bowen*, 419 F. Supp. 746 (S.D. Ind. 1976); *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976); *Lendall v. Bryant*, 387 F. Supp. 397 (E.D. Ark. 1975); *Harper v. Vance*, 342 F. Supp. 136 (N.D. Ala. 1972); *King v. Willis*, 333 F. Supp. 670 (D. Del. 1971); *Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035 (N.D. Ga. 1970); *Zapata v. Davidson*, 24 Cal. App. 3d 823, 101 Cal. Rptr. 438 (1972); *McCarthy v. Secretary of Commonwealth*, 371 Mass. 667, 359 N.E.2d 291 (1977); *McCarthy v. Slater*, 553 P.2d 489 (Okla. 1976); *McCarthy v. Hassler*, No. A-7991-II (Chancery Court, Davidson County, Tenn., filed Sept. 22, 1976).

5. See *Buckley v. Valeo*, 424 U.S. 1 (1976); *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975); *McCarthy v. Kopel*, No. C-76-45 (N.D. Iowa, filed Feb. 6, 1978, decided April 4, 1978) (free lists of registered voters given exclusively to two largest parties); *Murray v. Norberg*, 423 F. Supp. 795 (D.R.I. 1976); *McKenna v. Reilly*, 419 F. Supp. 1179 (D.R.I. 1976).

6. See, e.g., *Illinois State Bd. of Elections v. Socialist Workers Party*, \_\_\_ U.S. \_\_\_, 99 S. Ct. 983 (1979) (Illinois Electoral Board); *McCarthy v. Briscoe*, 429 U.S. 1316 (1976) (Governor and Texas Secretary of State); *Buckley v. Valeo*, 424 U.S. 1 (1976) (Secretary of the U.S. Senate, Clerk of the House, Comptroller General, Attorney General, and the Federal Election Commission); *Lubin v. Panish*, 415 U.S. 709 (1974) (Los Angeles County Registrar-Recorder and Secretary of State of California); *Moore v. Ogilvie*, 394 U.S. 814 (1969) (Illinois Electoral Board); *Communist Party v. State Bd. of Elections*, 518 F.2d 517 (7th Cir. 1975) (Illinois Electoral Board); *Jones v. Hare*, 440 F.2d 685 (6th Cir. 1971) (Michigan Secretary of State); *McCarthy v. Kopel*, No. C-76-45 (N.D. Iowa, filed Feb. 6, 1978) (County Auditor and Commissioner of Elections, Iowa Attorney General, and Iowa Secretary of State); *McCarthy v. Rampton*, No. 76-C-303 (D. Utah, filed Oct. 6, 1976) (Governor, Lieutenant Governor, and

turn sued by the candidate who may be joined by electors who say they would vote for the candidate.<sup>7</sup> The candidate seeks declaratory and injunctive relief<sup>8</sup> and, since 1976, attorney's fees.<sup>9</sup> The plaintiffs in these cases are invariably individual persons or third parties, candidates for President or other federal or state offices, candidates for presidential elector, and/or the registered electors of states; the defendants are always public office holders or civil servants. Generally, the plaintiffs have appeared *pro se*,<sup>10</sup> or have been represented by voluntary counsel.<sup>11</sup> In one instance counsel for the plaintiff was appointed by the court.<sup>12</sup> Defendants have been represented by the appropriate attorney general's office.<sup>13</sup>

The plaintiffs typically base their claims on behalf of their individual fundamental rights, and challenge the reasonableness of the administrative ordering system presented by the statute which the

Secretary of State of Utah); *Harper v. Vance*, 342 F. Supp. 136 (N.D. Ala. 1972) (Chairman of State Democratic Executive Committee and Alabama Secretary of State); *King v. Willis*, 333 F. Supp. 670 (D. Del. 1971) (Delaware State Election Commissioner and Department of Elections); *Zapata v. Davidson*, 24 Cal. App. 3d 823, 101 Cal. Rptr. 438 (1972) (County Registrar of Voters).

7. See *McCarthy v. Briscoe*, 429 U.S. 1316 (1976); *American Party of Texas v. White*, 415 U.S. 767, *reh. denied*, 416 U.S. 1000 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *Jeness v. Fortson*, 403 U.S. 431 (1971); *Communist Party v. State Bd. of Elections*, 518 F.2d 517 (7th Cir. 1975); *McCarthy v. Tribbitt*, 421 F. Supp. 1193 (D. Del. 1976); *McCarthy v. Exon*, 424 F. Supp. 1143 (D. Neb. 1976); *McCarthy v. Austin*, 423 F. Supp. 990 (W.D. Mich. 1976); *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976); *Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035 (N.D. Ga. 1970).

8. See generally cases cited in notes 2 and 3 *supra*.

9. See *McCarthy v. Kopel*, No. C-76-45 (N.D. Iowa, filed April 4, 1978) (state ordered to pay plaintiff attorney's fees for successful challenge of Iowa election law which limited indirect campaign aid to two largest parties); 42 U.S.C. § 1988 (Supp. 1976) (as amended by Attorney's Fees Award Act of 1976). *But see McCarthy v. Briscoe*, 553 F.2d 1005, 1007 (5th Cir. 1977) (fees not awarded for unsuccessful challenges).

10. See, e.g., *Jones v. Hare*, 440 F.2d 685 (6th Cir. 1971); *Cross v. Fong Eu*, 430 F. Supp. 1036 (N.D. Cal. 1977); *Ashworth v. Fortson*, 424 F. Supp. 1178 (N.D. Ga. 1976); *Harless v. McCartney*, No. 76-0293-CH (S.D.W. Va., filed Sept. 30, 1976); *Lendall v. Bryant*, 387 F. Supp. 397 (E.D. Ark. 1975).

11. See, e.g., *McCarthy v. Kopel*, No. C-76-45 (N.D. Iowa, filed Feb. 6, 1978) (voluntary counsel later awarded fees); *McCarthy v. Rampton*, No. 76-C-303 (D. Utah, filed Oct. 6, 1976) (ACLU); *McCarthy v. Noel*, 420 F. Supp. 799 (D.R.I. 1976) (ACLU); *McCarthy v. Askew*, 420 F. Supp. 775 (S.D. Fla. 1976) (ACLU); *Zapata v. Davidson*, 24 Cal. App. 3d 823, 101 Cal. Rptr. 438 (1972) (legal aid); *McCarthy v. Hassler*, No. A-7991-II (Chancery Court, Davidson County, Tenn., filed Sept. 22, 1976).

12. See *King v. Willis*, 333 F. Supp. 670 (D. Del. 1971).

13. *But see Ashworth v. Fortson*, 424 F. Supp. 1178 (N.D. Ga. 1976) (Georgia State Legal Dept.); *Zapata v. Davidson*, 24 Cal. App. 3d 823, 101 Cal. Rptr. 438 (1972) (County Counsel).

official has offered as authority for refusing the candidate's request. The defendants argue for the fundamental interests of the whole polity, and defend the particular degree to which the government has chosen to impinge upon recognized substantive rights of the individual as necessary to the maintainance of orderly bureaucratic processes.

The interests of political parties and organizations, whether new or established, have been considered by the courts, but are consistently subordinated to the rights of candidates and voters. No decision involving a recognized party interest has identified a Constitutionally protected right capable of being held by a political party organization as a legal person separate from the legal persons of its members. Where party or organizational interests have been protected, the courts have based their decisions on the states' rights to maintain order in the electoral process, or upon voter's or candidate's rights to effectively participate in elections.

To preserve these substantive rights, plaintiffs assert that the enforcement of particular state laws denies them the "equal protection of laws" as guaranteed by the fifth and fourteenth amendments to the United States Constitution;<sup>14</sup> and the courts at all levels, state and federal, generally resolve these challenges with an application of that clause.<sup>15</sup> Due process standards are mentioned in the opinions of several courts, but no election case opinion contains more than a general affirmation of the principle that measures taken by states to secure important or substantial interests must be specifically directed to the realization of the states' goals and may not be vague or ambiguous.<sup>16</sup>

#### THE SUPREME COURT AND ELECTION RIGHTS: THE TWO TIER ANALYSIS

In its ballot access and election funding decisions, the Supreme Court has principally discussed these personal rights:<sup>17</sup> the right to

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14. *But see* Murray v. Norberg, 423 F. Supp. 795, 800-01 (D.R.I. 1976) (alleged that tax checkoff fund distribution statute was misleading and denied due process by being vague).

15. *But see* McCarthy v. Hardy, 420 F. Supp. 410, 412 (E.D. La. 1976). (In response to plaintiffs' requests for information concerning nomination requirements, the offices of both the Secretary of State and Attorney General of Louisiana supplied incorrect information. The district court held the State of Alabama was estopped from asserting correct requirements to refuse McCarthy access to the ballot.)

16. *See* note 14 *supra*.

17. In the third party and independent cases the only other right discussed is a first amendment right to "free discussion of governmental affairs" which logically in-

vote,<sup>18</sup> the right to associate for political purposes,<sup>19</sup> and the right to be a candidate for office.<sup>20</sup> Even though the Court has separately identified and discussed these rights, it has also declared them to be inextricably intertwined.<sup>21</sup> The Court has further complicated matters by saying voting and association are firmly established as fundamental personal rights guaranteed by the Constitution<sup>22</sup> while the right to be a candidate is not.<sup>23</sup> (The Court serves us a Waldorf salad, but insists that we separate on our plates the apples and walnuts from the celery). Any alleged interference with fundamental rights is subjected to "close scrutiny," a standard which in effect shifts both the burden of going forward with the evidence and the burden of proof to a state-defendant. When it is claimed that a statute interferes with non-fundamental rights, it may be declared to be constitutionally sound if it can be said to have a rational basis.<sup>24</sup> Applying a rational basis test to an asserted right of candidacy places the characterization of that right within the states' administrative discretion; the plaintiff having to show that the particular state action in question would lead to absurd results in every possible sequence of circumstances in order to win the case,<sup>25</sup> an extremely difficult burden of proof.

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volves free press as well as free speech rights. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The Court has connected assembly rights to free speech rights. *NAACP v. Alabama*, 357 U.S. 449, 460 (1967).

18. See *Illinois State Bd. of Elections v. Socialist Workers Party*, \_\_\_ U.S. \_\_\_, 99 S. Ct. 983, 990 (1979); *Buckley v. Valeo*, 424 U.S. 1, (1976); *American Party of Texas v. White*, 415 U.S. 767, 795, *reh. denied*, 416 U.S. 1000 (1974); *Storer v. Brown*, 415 U.S. 724, 729-30 (1973); *Lubin v. Panish*, 415 U.S. 709, 713 (1973); *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972); *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

19. *Illinois State Bd. of Elections v. Socialist Workers Party*, \_\_\_ U.S. \_\_\_, 99 S. Ct. 983, 990 (1979); *American Party of Texas v. White*, 415 U.S. 767, 771, *reh. denied*, 416 U.S. 1000 (1974); *Storer v. Brown*, 415 U.S. 724, 729 (1973); *Lubin v. Panish*, 415 U.S. 709, 713-16 (1974); *Williams v. Rhodes*, 393 U.S. 29, 30 (1968).

20. See *Lubin v. Panish*, 415 U.S. 709, 718 (1973); *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *Williams v. Rhodes*, 393 U.S. 29, 32, 36 (1968).

21. See *Lubin v. Panish*, 415 U.S. 709, 716 (1973) (right to vote and right of party or candidate to place on ballot); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (rights of voters and rights of candidates); *Williams v. Rhodes*, 393 U.S. 29, 30-31 (1968) (right to associate for the advancement of political beliefs and right to vote are "different but overlapping").

22. *Williams v. Rhodes*, 393 U.S. 29, 30 (1968).

23. *Lubin v. Panish*, 415 U.S. 709, 716 (1973); *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972). See generally Gordon, *The Constitutional Right to Candidacy*, 25 KAN. L. REV. 545 (1977). But see Sims, *Discrimination in State Election Laws Against Third Party and Independent Candidates*, 6 COLUM. HUMAN RIGHTS L. REV. 155, 163-66 (1974).

24. *Bullock v. Carter*, 405 U.S. 134, 143-44 (1972).

25. *Craig v. Boren*, 429 U.S. 190, 221-22 (1976). See note 27 *infra*.

Using the "two-tier test" the nature of the constitutional right at issue is supposed to determine the court's standard of review,<sup>26</sup> but clearly the outcome is determined by the choice of standard.<sup>27</sup> If the Court really believed in the two-tier test, then candidacy, a non-fundamental right,<sup>28</sup> would be "inextricably intertwined" with fundamental rights of voting and association. The uncertain career of the two-tier test is a topic too big for our essay. We simply make the observation that since *Bullock v. Carter*<sup>29</sup> the Court has, as a matter of fact, closely scrutinized every election case where candidacy has been an issue.<sup>30</sup>

Beyond the problem posed by unseparate and unequal treatment of these rights, the use of the term "fundamental rights" has been confused in two other ways. First, when "fundamental rights" are opposed to state "interests",<sup>31</sup> there is an implication that peo-

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26. *Bullock v. Carter*, 405 U.S. 134, 142-44 (1972).

27. Justice Thurgood Marshall has claimed that the jurisprudential separation of rights into two classes of interests, fundamental and non-fundamental, with corresponding modes of review, strict scrutiny and rational basis, is, in two of Marshall's adjectives, "outdated and intellectually disingenuous." *Beal v. Doe*, 432 U.S. 438, 457 (1977) (Marshall, J., dissenting). Marshall says that the court pretends to have two different types of review, and pretends that its determination of the type of review to be applied in a given case does not also determine the final result of the case. Marshall says that in every case of equal protection the choice of standards has determined the outcome of the case. Where "strict scrutiny" has been held to be the mode of review the statute complained of has been overturned. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976). Where "rational basis" has been held to apply the statute is nearly always upheld. *Beal v. Doe*, 432 U.S. 438, 457 (1977). Since the choice of standards depends on the courts' decision as to whether an asserted right is fundamental, entailing strict scrutiny, or non-fundamental, requiring only a rational basis, the outcome of equal protection cases turns on the courts' pigeon-holing of claims in one of the two categories of rights. Marshall says the court clings to this fictional decision model in its opinions, but in fact ignores it. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318-21 (1976); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); *Richardson v. Belcher*, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting); *Dandridge v. Williams*, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting). See also Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Never Equal Protection*, 86 HARV. L. REV., 1, 17-20 (1972).

28. See generally Gordon, 25 KAN. L. REV., *supra* note 23.

29. 405 U.S. 134 (1972).

30. See *Buckley v. Valeo*, 424 U.S. 1 (1976); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *Lubin v. Panish*, 415 U.S. 709 (1974); *accord*, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 320 (1976) (Marshall, J., dissenting).

31. See also *Illinois State Bd. of Elections v. Socialist Workers Party*, \_\_\_ U.S. \_\_\_, 99 S. Ct. 983, 992-93 (1979) (Blackmun, J., dissenting). Justice Marshall's criticisms of the impossible jargon of the two-tier test seem to have persuaded at least one other member of the Court. Justice Blackmun says the term "compelling interest" can be used to cover a variety of *ad hoc* or *a posteriori* decisions.



ple's rights as individuals are somehow inherently more fundamental than their interest as members of the whole polity (though the cases have never admitted that one interest could always be preferred over the other). The Founding Fathers feared chaos could result from *both* the excesses of individual liberty and the encroachments of centralized state power. When they reviewed the histories of political systems in a search of examples of the forms of government with the greatest stability and endurance,<sup>32</sup> they concluded that both state and federal governments should be republics, whose form should be neither radically anarchic nor radically authoritarian.<sup>33</sup> (The 20th century has seen the social chaos that results from attempts to decide an individual's rights in a particular instance solely on the basis of what is supposed to be the interests of the whole society).<sup>34</sup> Thus, according to the Founders, theories of fundamental interests should be upheld regardless of which side wins one of these election cases. When the plaintiff wins, it can be said that the courts have declared that within the circumstances, the Constitutional tradition supports a particular fundamental interest of the people as individuals. When the defendants win, the circumstances of the case can be said to have reaffirmed the reasonableness of a legal norm offered by legislators or administrators as a positive expression of the fundamental interest of the people as a whole. Both interests are fundamental; the courts' task is to decide against the asserted interest which—within terms of the facts and circumstances pleaded at the bar—seriously threatens the greater quantity of general values as expressed in the Constitution and elaborated by constitutional litigation. As is often the case, the theory is simple, but its application is not.

Second, the courts have used the term fundamental rights for both the most general values stated in the Constitution and other more specific constitutional statements. The most general values may be called organic values. They are the undeniable rights of ordinary citizens and cannot be disputed unless one is willing to contemplate an abrupt change in the direction of the progress of American constitutional thought, as well as significant changes in the text of the Constitution itself. The principle organic value involved in the election cases is the right to a "Republican Form of

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32. See H. ARENDT, ON REVOLUTION 226-29 (1963).

33. See THE FEDERALIST PAPERS 79, 226-27, 280-82, 431-33. (C. Rossiter ed. 1961) (Madison, Nos. 10, 37, 62; Hamilton, No. 72) [hereinafter THE FEDERALIST PAPERS]; R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION 3-21 (1954).

34. See H. BERMAN, JUSTICE IN THE U.S.S.R. 13-65 (1963); H. ARENDT, THE ORIGINS OF TOTALITARIANISM 175-221 (1951).

Government.”<sup>35</sup> Few would deny that the people have a right to have “a voice in the election of those who make the laws.”<sup>36</sup> However, such statements are so general that there is rarely agreement about how accurately or appropriately the right has been expressed by election statutes or by the principles that the Supreme Court has offered to justify its election decisions. In our own country’s relatively short experience with elective politics (relative to the two millenia of western political experience which began with the Greek city-republics) there have been majorities who, for a time, successfully opposed extending this general proposition to include small property holders, the propertyless, freedmen, the foreign born, and women. Children, aliens, lunatics and convicted felons still do not qualify as people within this general proposition. “Fundamental rights” is also used to describe Constitutional principles whose articulation as “personal rights” and “legitimate state interests” have, by the process of political and judicial testing, been settled to such a firm degree that without more than ordinary knowledge of their legislative and judicial histories, it is nearly impossible to distinguish these principles from the general values from which they were originally derived. Thus, the presumption that a competent adult citizen is entitled to vote is now held with the same respect traditionally accorded the more abstract value of preserving a popular republic, although the right to vote was not explicitly mentioned in the Constitution until the fourteenth and fifteenth amendments were added in 1868 and 1870.

To solve the problem of finding principles which can be applied to regulate the association and disassociation of persons into political parties and organizations, it is necessary to put aside the obviously confused fundamental/non-fundamental right terminology. Without too much difficulty a simple hierarchy can be hypothesized by placing the most general organic value at the top and ranging the principles below it depending on their degree of specificity. As principles, the right to vote and the right to be a candidate are subordinate to the right to associate, because they are politically impotent—even if scrupulously preserved—if the right to associate is denied.<sup>37</sup>

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35. U.S. CONST. arts. I & II.

36. *Lubin v. Panish*, 415 U.S. 709, 721 (1974); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) citing *Wesberry v. Sanders*, 376 U.S. 1, 17 (1974). See *Powell v. McCormack*, 395 U.S. 486, 547 (1969).

37. The Founding Fathers were too busy practicing the realities of Enlightenment Theory to engage in niceties about logic. See generally H. COMMAGER, *THE EMPIRE OF REASON* (1977).

THIRD-PARTY CANDIDATES AND THE CONSTITUTIONAL  
RIGHT TO ASSOCIATE

The Founders gave the people's pre-constitutional understanding that they possessed a right to alter or abolish any form of government destructive to the ends of life, liberty, and the pursuit of happiness<sup>38</sup> a more particular political form and procedural structure in those sections of the Constitution which set out how governments shall be determined. The Congress, and ultimately the President, are chosen "by the People of the Several States."<sup>39</sup> In turn, this government guarantees that the states shall have a "Republican Form of Government."<sup>40</sup>

James Madison explained what a republic is:

[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable portion or a favored class of it; otherwise, a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic. It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly by the people; and that they hold their appointments by either of the tenures just specified; otherwise, every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republic character . . . .<sup>41</sup>

How the government shall be chosen is a subject of four of the Constitution's seven articles and nine of its twenty-six amendments.<sup>42</sup>

Court opinions in the third-party and independent election cases are full of general remarks reflecting a recognition that the assertion of a Constitutional right places some responsibility on

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38. See The Declaration of Independence.

39. U.S. CONST. arts. I & II.

40. U.S. CONST. art. IV.

41. THE FEDERALIST PAPERS, *supra* note 33, (No. 39) at 241.

42. U.S. CONST. arts. I, II, IV, V; amends. XII, XIV, XV, XVII, XIX, XXII, XXIII, XXIV, XVI.

them for preventing the "degradation of the republic."<sup>43</sup> These statements, though they are one step removed from the declared principles of the right to vote and associate which are used to decide the controversies of the case, inform and condition the judges' reasoning.

When persuaded that it is faced with the alternatives of either condoning a "degradation of the republic", or rearranging and re-arguing the principles in its opinion so that they spontaneously generate a new principle, a court will find that new principle in the precedents; even if its opinion must argue for what is reasonable to conclude rather than for what is implied by the precedents. In the independent third party election cases, the Court's references to the interrelationship of voting, association, and candidacy are examples of how apparently rigid limits are intentionally blurred when it seems necessary to prevent the "degradation of the republic."<sup>44</sup>

Although "a republican form of government" is guaranteed to the states by the Constitution,<sup>45</sup> the Supreme Court has repeatedly declared that the courts have no jurisdiction over a claim based on this section. According to the Court, defining an appropriate republican form is a nonjusticiable political question.<sup>46</sup> To avoid a

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43. *E.g.*, "A fundamental principle of our representative democracy is, in Hamilton's words 'that the people should choose whom they please to govern them', 2 Elliot's Debates 257." *McCarthy v. Austin*, 423 F. Supp. 990, 995 (W.D. Mich. 1976) citing *Powell v. McCormack* 395 U.S. 486, 547 (1969); "No right is more precious in a free country than that of having voice in the election of those who make the laws under which, as good citizens, we live." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968), citing *Wesberry v. Sanders*, 370 U.S. 1, 17 (1964); "Free and honest elections are the very foundation of our republican form of government." *McDougall v. Green*, 335 U.S. 281, 288 (1948) (Douglas, J., dissenting); "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." *Lubin v. Panish*, 415 U.S. 709, 714 (1974), citing *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); "Statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Kramer v. Free Union School Dist.*, 395 U.S. 621, 626 (1969); "[A state may not] freeze the status quo but [must] recognize the Potential Fluidity of American Political Life." *American Party of Texas v. White*, 415 U.S. 767, 787 (1974), citing *Jenness v. Fortson*, 403 U.S. 431, 439 (1971).

44. *Accord*, Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 5-6 (1978); Ely, *Towards a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 452-54 (1978).

45. U.S. CONST. art. IV.

46. *Baker v. Carr*, 369 U.S. 186 (1962). See *Stokes v. Fortson*, 234 F. Supp. 575, 578 (W.D. Pa. 1963); Sims, 6 COLUM. HUMAN RIGHTS L. REV., *supra* note 23, at 158-60.

complex discussion of "political questions" it is perhaps sufficient to say that some of the Constitution's statements of organic values are by their nature too controversial to be acceptably defined by a judicial system limited to the adjudication of cases and controversies. That, and the Court pragmatically forbids itself from crossing a line it has defined for itself. However, not all the values stated in the Constitution are so general as to be incapable of being given reasonably clear meanings by other less open ended language in the Constitution. The rights of voting, assembly, free speech and petition explain and give structure to the general ideal of a republic inherent in the American Constitution without rigidly imposing a particular set of mechanical administrative rules (which are always the actual objects of legal controversy). These rights can be given new common sense applications without changes in their wording. But while malleable, these rights are firm enough to be used as standards to measure disputed administrative rules, which are brittle and relatively unadaptable.

The rules which have been challenged prohibited independent candidates from getting on the ballot (by failing to provide a statutory process for doing so),<sup>47</sup> demanded they present petitions signed by a percentage<sup>48</sup> (worked out and qualified in various ways) of the eligible electors in a voting district,<sup>49</sup> demanded that independents from a political party or organization nominate them<sup>50</sup> and precluded losing candidates in party primaries from running as independents.<sup>51</sup>

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47. See *McCarthy v. Briscoe*, 429 U.S. 1317, 1320 (1976) (Texas); *MacBride v. Askew*, 541 F.2d 465, 467 (5th Cir. 1976) (Florida); *McCarthy v. Tribbitt*, 421 F. Supp. 1193, 1198 (D. Del. 1967); *McCarthy v. Exon*, 424 F. Supp. 1143, 1145 (D. Neb. 1976); *McCarthy v. Askew*, 420 F. Supp. 775, 779 (S.D. Fla. 1976).

48. *Illinois State Bd. of Elections v. Socialist Workers Party*, \_\_\_ U.S. \_\_\_, 99 S. Ct. 983, 989 (1979); *Jones v. Hare*, 440 F.2d 685, 686 (6th Cir. 1971); *McCarthy v. Salmon*, No. 76-213 (D. Vt., filed Oct. 7, 1976); *Cross v. Fong Eu*, 430 F. Supp. 1036, 1039-41 (N.D. Cal. 1977); *Udall v. Bowen*, 419 F. Supp. 746, 748 (S.D. Ind. 1976); *Salera v. Tucker*, 399 F. Supp. 1258, 1266 (E.D. Pa. 1975); *Lendall v. Bryant*, 387 F. Supp. 397, 403 (E.D. Ark. 1975); *Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035, 1040 (1970).

49. *E.g.*, *American Party of Texas v. White*, 415 U.S. 767, 788 (1973) (petitioners' signers must swear not to vote in primaries); *Harless v. McCartney*, No. 76-0293-CH (S.D.W. Va., filed Sept. 20, 1976) (independent candidate's supporters could not solicit signatures outside their own magisterial district, petition signers forego right to vote in a party primary).

50. See *American Party v. Jernigan*, 424 F. Supp. 943, 945 (E.D. Ark. 1977); *McCarthy v. Austin*, 423 F. Supp. 990, 998 (W.D. Mich. 1976); *McCarthy v. Slater*, 553 P.2d 489, 491 (Okla. 1976); *McCarthy v. Hassler*, No. A-7991-11 (Chancery Court, Davidson County, Tenn., filed Sept. 22, 1976).

51. *Storer v. Brown*, 415 U.S. 724, 734-35 (1974); *Salera v. Tucker*, 399 F. Supp. 1258, 1268 (E.D. Pa. 1975).

Third-party candidates have challenged regulations requiring percentages and geographical spreading of petition signatures<sup>52</sup> or a particular organizational structure<sup>53</sup> and regulations limiting the ability of voters to change party affiliations.<sup>54</sup> Both independents and third parties have challenged regulations excluding them from election funding schemes,<sup>55</sup> regulations requiring particular time periods and sequences for the performance of acts necessary for ballot access,<sup>56</sup> and regulations setting the physical placement of candidate names on the ballots and the styles of descriptions attached to candidate names.<sup>57</sup> Beyond particular statutory provisions, courts have examined the totality of a state's election laws<sup>58</sup> and scrutinized the exercise of administrative discretion by various agencies with power to affect election procedures.<sup>59</sup>

Whether the disputed measures have withstood challenge or have been swept away by the courts, and seemingly regardless of the actual merits of the plaintiff's complaint, the reasons and arguments offered in defense of ballot regulations have been mere repetitions of prior court pronouncements about the interests which states have in regulating the electoral process.

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52. See *American Party v. Texas*, 415 U.S. 767, 773-75 (1974); *Communist Party v. State Bd. of Elections*, 518 F.2d 517, 518 (1975); *American Party v. Jernigan*, 424 F. Supp. 943, 946 (E.D. Ark. 1977); *Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035, 1037 (N.D. Ga. 1970).

53. *American Party of Texas v. White*, 415 U.S. 767, 781 (1973); *King v. Willis*, 333 F. Supp. 670, 672 (D. Del. 1971) (law required parties to hold a national convention, nominate candidates for all state wide offices, and elect a state committee).

54. *American Party of Texas v. White*, 415 U.S. 767, 786 (1973); *Nader v. Schaffer*, 417 F. Supp. 837, 848 (D. Conn. 1976); *Salera v. Tucker*, 399 F. Supp. 1258, 1264 (E.D. Pa. 1975).

55. See cases cited in note 2 *supra*.

56. See *Williams v. Rhodes*, 393 U.S. 23, 32 (1968); *MacBride v. Exon*, 558 F.2d 443, 448 (8th Cir. 1977); *McCarthy v. Kirkpatrick*, 420 F. Supp. 366, 373 (W.D. Mo. 1976); *McCarthy v. Noel*, 420 F. Supp. 799, 803 (D.R.I. 1976); *Salera v. Tucker*, 399 F. Supp. 1258, 1266 (E.D. Pa. 1975).

57. See *American Party of Texas v. White*, 415 U.S. 767, 794-95 (1973) (only major party candidate names placed on absentee ballots); *Ihlenfeldt v. State Election Bd.*, 425 F. Supp. 1361, 1364 (E.D. Wis. 1977) (independents and minor parties placed in column marked independent); *McCarthy v. Kirkpatrick*, 420 F. Supp. 366, 375 (W.D. Mo. 1976) (presidential electors names, but not those of independent candidates appeared on ballot).

58. See *Williams v. Rhodes*, 393 U.S. 23 (1968).

59. See *McCarthy v. Salmon*, No. 76-213 (D. Vt., filed Oct. 7, 1976) (candidate complied with all Vermont laws but town clerks failed to certify petition signatures by deadline); *McCarthy v. Secretary of the Commonwealth*, 371 Mass. 667, 359 NE 2d 291, 294 (1977) (candidate complied with all Massachusetts laws but Secretary of Commonwealth required candidate to prove validity of petition signatures).

Similarly, with rare exceptions, the courts' opinions repeat, in part or whole, a standard litany of truisms.<sup>60</sup> A state has an interest in the "stability of the political system"<sup>61</sup> and in avoiding "chaos."<sup>62</sup> A state may regulate the electoral process to "preserve the integrity of the electoral process,"<sup>63</sup> or to "promote fairness, efficiency and the orderly operation of election machinery."<sup>64</sup> More particularly, states have an interest in "providing the electorate with an understandable ballot"<sup>65</sup> so they may "avoid confusion, deception and even the frustration of the democratic process at the general election."<sup>66</sup> States can regulate the ballot to "prevent clogging," "avoid frivolous or fraudulent candidacies,"<sup>67</sup> and assure that the winner is elected by a majority, not a plurality.<sup>68</sup> A state has a legitimate interest in preventing "splintered parties and unrestrained factionalism,"<sup>69</sup> and may require primary elections to "winnow out the candidates"<sup>70</sup> as well as "restrain independent candidates prompted by short-range political goals, or personal quarrel."<sup>71</sup> A state may "curb ballot flooding,"<sup>72</sup> "prevent 'laundry list' ballots which

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60. The Court reiterated nearly all of these in *Illinois State Bd. of Elections v. Socialist Workers Party*, \_\_\_ U.S. \_\_\_, 99 S. Ct. 983, 991 (1979).

61. *McCarthy v. Noel*, 420 F. Supp. 799, 802 (D.R.I. 1976); *McCarthy v. Austin*, 423 F. Supp. 990, 996 (W.D. Mich. 1976); *Salera v. Tucker*, 399 F. Supp. 1258, 1263 (E.D. Pa. 1975).

62. *Storer v. Brown*, 415 U.S. 724, 730 (1973); *Lendall v. Jernigan*, 424 F. Supp. 951, 955 (E.D. Ark. 1977).

63. *American Party of Texas v. White*, 415 U.S. 767, 783 n.1 (1973); *Ashworth v. Fortson*, 424 F. Supp. 1178, 1181 (N.D. Ga. 1976); *Harless v. McCartney*, No. 76-0293-CH (S.D. W. Va., filed Sept. 30, 1976); *McCarthy v. Noel*, 420 F. Supp. 799, 802 (D.R.I. 1976); *McCarthy v. Tribbitt*, 421 F. Supp. 1193, 1198 (D. Del. 1976).

64. *Storer v. Brown*, 415 U.S. 724, 730 (1973); *Lendall v. Jernigan*, 424 F. Supp. 951, 953, (E.D. Ark. 1977).

65. *Salera v. Tucker*, 399 F. Supp. 1258, 1263 (E.D. Pa. 1975), *citing* *Williams v. Rhodes*, 393 U.S. 23, 32-33 (1968).

66. *American Party of Texas v. White*, 415 U.S. 767, 782 n.14 (1973); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

67. *Bullock v. Carter*, 405 U.S. 134, 135 (1972); *MacBride v. Askew*, 558 F.2d 442, 448 (8th Cir. 1977); *Lendall v. Jernigan*, 424 F. Supp. 951, 954 (E.D. Ark. 1977); *McCarthy v. Tribbitt*, 421 F. Supp. 1193, 1198 (D. Del. 1976); *McCarthy v. Austin*, 423 F. Supp. 990, 997 (W.D. Mich. 1976); *Lendall v. Bryant*, 387 F. Supp. 397, 402 (E.D. Ark. 1975).

68. *Lubin v. Panish*, 415 U.S. 709, 712-13 (1974); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968); *Salera v. Tucker*, 399 F. Supp. 1258, 1263 (E.D. Pa. 1975).

69. *Storer v. Brown*, 415 U.S. 724, 736 (1973).

70. *Id.* at 735.

71. *Id.*

72. *Lubin v. Panish*, 415 U.S. 709, 713 (1974).

discourage voter participation and frustrate participants,"<sup>73</sup> keep "publicity seekers off ballots,"<sup>74</sup> and reserve the ballot for "serious candidates" who have demonstrated a "modicum of community support."<sup>75</sup> A state has an interest in easing its administrative burdens.<sup>76</sup> Finally, it is an appropriate use of "public money to facilitate and enlarge public discussion and participation in the electoral process."<sup>77</sup>

Although the courts may be criticized for their unimaginative prose, their opinions are nonetheless based on common-sensical observations about the realities of electioneering. We considered those observations, together with the list of identified personal rights and the confusion created by the two-tier system (the retreat from which a majority of the Court has yet to acknowledge), and Madison's definition of a republic as clues to the identity of the basic theorem. An additional clue from jurisprudence persuaded us that association is the correct choice.

#### GIERKE'S THEORY OF ASSOCIATION AND ELECTION RIGHTS

The personal right of association, as the value upon which the other democratic values depend, was discussed by a writer dedicated to the ideal of democracy and freedom within a stabilized political order, Otto Friedrich Von Gierke.<sup>78</sup> Gierke's notions about association are in perfect harmony with almost every statement which judges have made concerning the Constitution and elections

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73. *McCarthy v. Briscoe*, 429 U.S. 1317, 1323 (1976); *Cross v. Fong Eu*, 430 F. Supp. 1036, 1040 (N.D. Cal. 1977); *Ashworth v. Fortson*, 424 F. Supp. 1178, 1181 (N.D. Ga. 1976).

74. *Udall v. Brown*, 419 F. Supp. 746, 749 (S.D. Ind. 1976).

75. *American Party of Texas v. White*, 415 U.S. 767, 782 n.14 (1973); *Storer v. Brown*, 415 U.S. 724, 735 (1973); *Jeness v. Fortson*, 403 U.S. 431, 442 (1971); *Cross v. Fong Eu*, 430 F. Supp. 1036, 1039 (N.D. Cal. 1977); *Ihlenfeldt v. State Election Bd.*, 425 F. Supp. 1361, 1364 (E.D. Wis. 1977); *Ashworth v. Fortson*, 424 F. Supp. 1178, 1181 (N.D. Ga. 1976); *Harless v. McCartney*, No. 76-0293-CH (S.D.W. Va., Sept. 30, 1976); *McCarthy v. Kirkpatrick*, 420 F. Supp. 336, 373 (W.D. Mo. 1976); *McCarthy v. Tribbitt*, 421 F. Supp. 1193, 1197 (D. Del. 1976); *McCarthy v. Austin*, 423 F. Supp. 990, 995 (W.D. Mich. 1976).

76. See *Cross v. Fong Eu*, 430 F. Supp. 1036, 1042 (N.D. Cal. 1977) (vote counting resources); *Ashworth v. Fortson*, 424 F. Supp. 1178, 1181 (N.D. Ga. 1976); *McCarthy v. Salmon*, No. 76-213 (D. Vt., filed Oct. 6, 1976); *Harless v. McCartney*, No. 76-0293-CH (S.D.W. Va., filed Sept. 20, 1976) (verify signatures, print ballots, litigate challenges); *McCarthy v. Kirkpatrick*, 420 F. Supp. 366, 373 (W.D. Mo. 1976) (verify signatures); *Salera v. Tucker*, 399 F. Supp. 1258, 1267 (E.D. Pa. 1975) (print ballots, resolve challenges to signatures).

77. *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976).

78. See generally O. GIERKE, *ASSOCIATIONS AND LAW* (G. Heiman trans. 1977).



and every argument made by the litigants. We are mindful of the warnings of Holmes and others and make no attempt to establish causal links between what the courts have done and Gierke's theories. But Gierke's theory of association and the courts' opinions do tend to support our claim that the constitutional rights involved in elections equally depend on the right to associate for their existence as meaningful rights. If we must talk of "fundamental" rights, the right to be a candidate is not less fundamental than either of the other two.

Gierke did not bother with other writers' preoccupation with the fiction of the state of nature and the task of deciding what is rationally necessary for man's progress from that state (where individuals are solitary and without social, political or legal ties)<sup>79</sup> to an organized community. Gierke begins by noting that historically, as a matter of fact, individual humans have always lived in groups and that human groups, whether large or small, are likely to be either subdivided into smaller groups, be part of a larger group, and overlap still others. A community, state, or nation is never a mere sum of isolated individual persons; each society also contains intermediary associations. Individuals can only act effectively by joining others or persuading others to join them. In Gierke's scheme, which is an early step in the general direction of legal realism, laws which regulate community life regulate not only the relation of the individual to the whole of the community, but also regulate the relationships between the intermediate group, as well as with the community as a whole. The rights and obligations of individuals and groups in the community are never merely those which are *conceded* by the laws of the community, because neither the individual nor groups of associations of individuals depend solely on the law for their factual existence. Society is *not* created from the top down. Gierke sees law as a device for *stabilizing* some of the relations between individuals, groups, and the community; not as the sole means for *creating* social relationships.<sup>80</sup> In Gierke's opinion, these natural social bonds, which existed before the promulgation of laws and which are made and unmade spontaneously without centralized direction or control, are the result of natural processes. As such

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79. *E.g.*, T. HOBBS, *LEVIATHAN*, 183-8 (C.B. Macpherson ed. 1968).

80. *Accord*, Ely, 37 MD. L. REV. *supra* note 44, at 453: "Warren Court . . . interventionism was fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process (which is where such values are properly identified, weighed, and accommodated) was open to those of all viewpoints on an equal basis."

they have a natural law claim to legitimacy which ordinarily takes precedence over positive laws. He argues that the function of the law-state's administration of power can extend no further than the promulgation of positive measures which, in a contemporary metaphor, control the chain reaction. The law-state may stop the reaction but is incapable of ordering its sequence or direction; the law-state's sole reason for existence is to prevent an explosion by controlling the pace of interreaction. Taken to extremes, laws which limit the right of association by defining an excessive number of prohibited associations, or worse still, by prohibiting all save specifically allowed or required associations, because they tend to stifle individual natural tendencies, can only be imposed by force. A law-state whose positive laws depend solely on force for their effectiveness has lost the right to be called a state of laws.<sup>81</sup> Similarly, where there is no law-state protection of certain traditional kinds of associations, the more powerful associations are soon tempted to forcibly eliminate weaker ones and are in turn subject to subversion and forcible overthrow. Individual rights are destroyed in both circumstances. Thus, the right to vote or the right to be a candidate cannot be considered without also considering their material effect on the right to associate. Nor can the right to associate be discussed outside the context of the historical realities of electioneering.<sup>82</sup>

In the context of the ballot access and election financing cases, the suppression of minor parties or independents suppresses the spontaneous formation of new political associations either directly or indirectly. Yet it is also true that wearing the guise of new associations for new political purposes, independents and third parties have set out, not with the intention of offering new perspectives or programs, but with the intention of sabotaging the processes of association whereby the majority parties have traditionally worked out compromises among their adherents.<sup>83</sup> For example, "dirty tricks" are thus criminal in nature because they are intended to be frauds on the individual participating in politics, whether actively or merely as a voter, and are intended to deprive the individual of the chance to make careful and considered decisions of how he or she will associate on political issues. The ideal of free choice depends, of course, on the presumption that all individuals are careful and reasonable participants in the political processes. Even if, as a mat-

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81. See note 91 *infra*.

82. See also D. Fellman, *Constitutional Rights of Association*, in *FREE SPEECH AND ASSOCIATION* 23 (P. Kurland ed. 1975).

83. See, e.g., H. Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, in *FREE SPEECH AND ASSOCIATION* 930 (P. Kurland ed. 1975).

ter of fact, many examples can be shown where a majority of the individuals in polity have been totally indifferent to, ignorant of, or irrational about political issues, the laws cannot patronize these individuals without also patronizing those who are concerned, knowledgeable and reasonable and who would like to participate in the electoral processes.

For whatever reasons, historically two parties have always dominated U.S. political life (perhaps only for the reason that every proposed legislative action must, at its simplest terms, be either endorsed or opposed) and there is no third party which has continually presented a clearly distinct identity, philosophy, or program appealing to more than a very small minority of the electorate.<sup>84</sup> The history of third parties also shows that some third parties have been no more than disaffected minorities of major parties. Their independent posture is taken for the sole purpose of extorting concessions from the majority not otherwise obtainable.<sup>85</sup> History makes it reasonable to suspect the motives of third parties and independents.<sup>86</sup> However, it is not because a party is a third, fourth, or even fifth party, or because a candidate runs as an independent that these candidacies draw suspicion, but because the party or candidate is *new*. It is difficult, if not impossible, to know whether such candidacies are offered as serious alternatives and serious attempts to gain the association and support of individual voters or are merely attempts to manipulate the electorate.

The courts have recognized that the election ballot is not supposed to be the stage where political activity begins and is not supposed to be the first or only time a voter may associate himself or herself with a candidate or party.<sup>87</sup> In contrast, in political systems where open political controversy is not permitted<sup>88</sup> and political activity is limited to the casting of votes, voting is more properly described as participating in a ceremonial exercise than as the exercising of a free choice.<sup>89</sup> In such circumstances those in power use the ap-

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84. See Sims, 6 COLUM. HUMAN RIGHTS L. REV., *supra* note 23, at 155-57.

85. *E.g.* Teddy Roosevelt's Bull Moose Party and Strom Thurmond's Dixiecrats.

86. *Cf.* Sims, 6 COLUM. HUMAN RIGHTS L. REV., *supra* note 23 (third parties include the Anti-Masonic, Vegetarian, Loco Foco, Prohibition, Vote for Jesus, and Raza Unida parties).

87. See Illinois State Bd. of Elections v. Socialist Workers Party, \_\_\_ U.S. \_\_\_, 99 S. Ct. 983, 991 (1979), *citing* American Party of Texas v. White 415 U.S. 767, 786-87 (1974), and Lubin v. Panish, 415 U.S. 709, 715 (1974).

88. See H. BERMAN, *supra* note 34, at 52-53, 374-75.

89. *Id.* at 374.

pearance of law to mask the forcible subordination of all to the will of one particular association.<sup>90</sup> The first amendment guarantees of the right of free speech and the right to petition government are like the right to vote. They ensure that the more basic principle of free association for political purposes can be realized and are no less intertwined with the right of association. Neither right has any meaning if association is not protected. Free association ensures that an individual does not have to face the government alone.<sup>91</sup>

The courts say the ballot is reserved for deciding major controversies and represents an attempt to peaceably compromise the wills of major segments of the polity who have been otherwise unable to work out a consensus.<sup>92</sup> Thus, while the ballot may be a substitute for a violent struggle, it is never a substitute for political association. To admit third parties and independents to this final resolution without a showing of some community support would impute to them associational persuasiveness they did not possess. It would also threaten the authority of the election as a means of peacefully resolving major questions. For example, a third party or independent might, simply by being placed on the ballot, draw enough votes to prevent the determination of a clear majority and thereby cripple the authority of the plurality winner.<sup>93</sup>

Preserving the integrity of the election process means an individual candidate may not be allowed to completely avoid political association and yet be treated equally with an individual who has persuaded many others to associate with him or her and support his or her candidacy. An independent candidate does not avoid political association, but seeks to gain the association of electors on the basis of personal qualities and characteristics rather than a defined

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90. *Id.*

91. [We] are today again confronted with political systems which must be qualified partly or wholly as terror-states—although they display a constitutional facade and even catalogues of constitutional freedoms—in view of all of this, it seems to me that the need for a material idea of the law state is urgent. It will have to be an idea that breaks through the formal-judicial frames of the state constitution and gets down to the fundamental, material principles of public and private law, which determines the inner limits of the power of the state in relation to non-state social speeches. [S]tates which boast of being “people’s democracies”, but which in fact suppress free expression of political opinion and free association, completely deny . . . the principle of representation, which is a fundamental to the law state. H.J. van Eikema Hommes, *The Idea of the Law State and the Future of Society*, ARCHIV FUR RECHTSUND SOZIAL PHILOSOPHIE, Beiheft II, 133, 136 (1979).

92. *E.g.*, *Storer v. Brown*, 415 U.S. 724, 735 (1973).

93. The three way electoral split which resulted in Lincoln’s election is an example.

political philosophy, program or issue.<sup>94</sup> A candidate who runs independently is not bound to respect any particular body of opinion, however wisely held or carefully worked out. He or she has no real *political* constituency because there is no stable consensus between the independent candidate and those who support such a candidacy. A candidate who achieves office on such a basis, and who lacks the qualities necessary to be the object of a cult of personality, must understand the isolation and insecurity of his or her position. On the other hand, persons with a cult following may be tempted to exceed their authorized powers and substitute personal authority for the authority of law.<sup>95</sup>

One may expect that independents are rarely elected when traditional political associations are healthy and functioning to distill opinions and formulate interests. One should also expect that a candidate elected without the endorsement of a strong party may attempt to weaken parties still further by destroying or hindering their abilities to associate.<sup>96</sup> The operatives who perform such tasks should not be confused with citizens freely associating and supporting one of themselves as a first among equals.<sup>97</sup> Awareness of the potential for deception justifies protections, though such awareness need not and should not preclude admission to the ballot.

Individuals, groups, and the state have an interest in preventing political associations from being manipulated as the tools of individuals, and individuals from being the slaves of the associations. In ballot access and election financing cases this means protecting the independent and third party candidates' access to the process while protecting traditional political associations from murder, if not from senescence and their eventual natural demise.<sup>98</sup>

#### CONCLUSION

This history of the Court's application of Constitutional values is evidence that its and the litigants' efforts to ensure against the

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94. See *Ashworth v. Fortson*, 424 F. Supp. 1178, 1183 (N.D. Ga. 1976); *McCarthy v. Tribbitt*, 421 F. Supp. 1193, 1198 (D. Del. 1976); *McCarthy v. Austin*, 423 F. Supp. 990, 998 (W.D. Mich. 1976); *McCarthy v. Slater*, 553 P.2d 489, 492 (Okla. 1976).

95. George Washington was an independent and the subject of a cult of personality, yet exercised extraordinary restraint as president. See generally P. KURLAND, *WATERGATE AND THE CONSTITUTION* 165-66 (1978).

96. See *id.* at 188-89.

97. *Id.*

98. One "hopeless" campaign by an independent had other goals besides winning. See *Armor & Marcus, The Bloodless Revolution of 1976*, 63 A.B.A.J. 1109-12 (1977); see also *McCarthy, Unconstitutional Support of the Two-Party System*, 21 LOY. L. REV. 663 (1975).

degradation of the republic have steadily expanded the framework of recognized rights. Constitutional precedents never permanently stall this development. They can be used to prove that a right has been historically recognized or that a new argument's claim has not yet been accepted. They cannot be used to prove conclusively that a claim ought not be recognized. Every new recognition should be the culmination of a process of argument about the basic values underlying the foundation of the state, the experience of law which has become traditional, and the facts in the particular case before the court. New arguments must be skeptically approached and reargued until their propositions are either demolished or become commonplace. It is too early to say that the right to be a candidate has become so commonplace, but we can find no good reasons in the facts of these cases to say it should not be considered an integral part of the electoral process. It cannot be disputed that it is directly implied by the right of political association, the prime principle. Until the Court formally abandons the two-tier system, it should treat the right to be a candidate no differently than rights to association and its other corollaries, voting, free speech, or petition.

