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Adams V. Askew: The Right To Vote And The Right To Be A Candidate-Analogous Or Incongruous Rights?

ADAMS V. ASKEW: THE RIGHT TO VOTE AND THE RIGHT TO BE A CANDIDATE—ANALOGOUS OR INCONGRUOUS RIGHTS?

Expansion of political participation and the candidate's freedom of access to the ballot have gained increasing attention in recent years.[1] Controversy over the right to such access has arisen amidst the efforts of many states to limit the size of the ballot.[2] A conflict which has developed between those who would allow unfettered access to the ballot and those who would limit entry to the political arena[3] has coalesced into two divergent approaches to the fulfillment of a single goal. The goal is the democratic system of government, and each approach claims to represent the only mode for a viable democratic process.

Until the Supreme Court intervened in the Tennessee apportionment scheme in *Baker v. Carr,*[4] the federal courts had characterized challenges to state electoral regulations as "political questions" unsuited to judicial scrutiny.[5] Since the *Baker* ruling, federal courts

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[1] Political participation involves the right to vote and the right to form political parties as well as the right to be a candidate for public office. The right to vote was declared a fundamental right in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). The right to form and be a part of political parties is protected under the right of association. NAACP v. Alabama, 357 U.S. 449 (1958). However, the right of candidacy has received little discussion until recently. *See, e.g.,* Williams v. Rhodes, 393 U.S. 23 (1968). For a discussion of the status of all three forms of political participation, *see* LeClercq, *The Emerging Federally Secured Right of Political Participation,* 8 IND. L. REV. 607 (1975) [hereinafter cited as LeClercq].

[2] The states have a legitimate interest in regulating the ballot. In a recent decision, the Supreme Court stated that almost all of the various state regulations are constitutionally valid. Storer v. Brown, 415 U.S. 724, 730 (1974); *accord,* Lubin v. Panish, 415 U.S. 709 (1974); Adams v. Askew, 511 F.2d 700 (5th Cir. 1975); Beller v. Kirk, 328 F. Supp. 485 (S.D. Fla, 1970), *aff'd,* 403 U.S. 925 (1971); Hadnot v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd,* 405 U.S. 1035 (1972).

[3] There is a wide variance among the states in methods of which a candidate's access to the ballot is controlled. Typical of one extreme is Ohio, which requires payment of a qualifying fee equal to ½% of the annual salary of the office as prerequisite to being placed in either the primary or general election ballot. OHIO REV. CODE ANN. § 3513.10 (1972). Virginia requires the payment of a fee in order to be placed on the primary ballot and the filing of a petition by non-affiliated candidates to obtain a place on either the primary or general election ballot, VA. CODE ANN. §§ 24.1-168, -185, -198 (1973 Repl. Vol). In contrast to such burdensome restrictions, Tennessee does not require a filing fee, but demands a petition for both the primary and general elections. TENN. CODE ANN. § 2-505 (Supp. 1974).

[4] 369 U.S. 186 (1962).

[5] *See* LeClercq, *supra* note 1, at 618-19, for a discussion of the role of *Baker* in

have become involved in the political system in order to reconcile state attempts to regulate access to the ballot with the individual's desire to participate in the political process.[6] In one such instance, the Supreme Court noted the tension between the two approaches:

> The present case draws these two means of achieving an effective, representative political system into apparent conflict and presents the question of how to accommodate the desire for increased ballot access with the imperative of protecting the integrity of the electoral system from the recognized dangers of ballots listing so many candidates as to undermine the process of giving expression to the will of the majority.[7]

States attempt to control the size of the ballot in order to avoid irrational voting or electoral fragmentation which may result in run-off elections. Long lists of candidates tend to confuse and frustrate the voter.[8] Moreover, mechanical problems increase as the number of candidates overwhelms voting machines.[9] These factors combine to threaten a severe dysfunction of the electoral system. In response, the states have developed methods for regulating the candidate's access to the ballot.[10]

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the protection of individual political rights from violations imposed by state electoral systems. *Baker* was significant because it represented the first real intervention by the Supreme Court in a state's system of regulating its ballot. Prior to *Baker*, the states were thought to have plenary power to set qualifications for political participation, subject only to a federally protected right against racial discrimination. *See, e.g.*, Snowden v. Hughes, 321 U.S. 1 (1944), for the pre-*Baker* approach.

[6] *See* R. CLAUDE, THE SUPREME COURT AND THE ELECTORAL PROCESS (1970), for a discussion of the role of the Supreme Court in protecting the rights of political participation from state regulation.

[7] Lubin v. Panish, 415 U.S. 709, 714 (1974).

[8] In *Lubin*, the Court reasoned that the addition of insincere candidates to the ballot merely increases the number of candidates and the consequent confusion of the electorate. *Id.* at 715.

[9] The state could be faced with a perplexing problem—what to do when there are more candidates than there are handles on a voting machine. Even if the number of candidates does not eclipse the capacity of the voting machine, a magnitude of aspirants can create difficulties such as the bewilderment of a voter confronted with a choice from a covey of candidates, few of whom are known. Many voters avoid voting in overcrowded elections, and those who do participate are often confused and frustrated. Lubin v. Panish, 415 U.S. 709, 715 (1974).

[10] In Williams v. Rhodes, 393 U.S. 23 (1968), the court overturned the Ohio system for limiting the size of the ballot because the system made it practically impossible for a "third party" to gain access to the ballot; the Court, however, recognized that the state has an interest in political stability. Even though the Ohio restrictions were invalidated, recent decisions have demonstrated that the states can still require a

Various states have attempted to regulate the ballot through a fee system which requires a candidate to pay a predetermined sum as a condition precedent to being placed on the official ballot.[11] The filing fee is designed to limit the ballot to serious candidates who are thought to demonstrate their earnest intentions through payment of the fee.[12] The constitutionality of one such fee system was challenged in the recent case of *Adams v. Askew*.[13] *Adams* crystallized the struggle between individuals who propound the necessity of unrestricted candidacy and the governmental bodies which argue for the indispensability of a limited ballot.

The plaintiffs in *Adams* expounded the view that ballot access should be essentially unrestricted. Although they had been able to pay the fee and had been placed on the ballot, they alleged that the required filing fees inhibited their constitutionally guaranteed access to the ballot.[14] In earlier decisions, the Supreme Court had declared unconstitutional the requirement of filing fees, but expressly had limited its holding to the indigent candidate.[15] However, those cases constituted the initial review of filing fees by the Supreme Court, and the Court's willingness to invalidate application of the filing fees to indigents seemed to foreshadow the potential vulnerability of the entire system.[16] The plaintiffs in *Adams v. Askew* predicated their

showing of threshold support from the potential candidate or party before giving them a place on the ballot. Storer v. Brown, 415 U.S. 724 (1974); American Party v. White, 415 U.S. 767 (1974); Jenness v. Fortson, 403 U.S. 431 (1971). *See* LeClercq, *supra* note 1, at 627. *Compare* Kusper v. Pontikes, 414 U.S. 51 (1973) *with* Rosario v. Rockefeller, 410 U.S. 752 (1973) (restrictions on change in party affiliation). *See generally* Kester, *Constitutional Restrictions on Political Parties*, 60 VA. L. REV. 735 (1975).

[11] *See* Comment, *The Constitutionality of Qualifying Fees for Political Candidates*, 120 U. PA. L. REV. 109 (1971), for a chart of the use through 1971 of qualifying fees by the states.

[12] Adams v. Askew, 511 F.2d 700, 704 (1975). The rationale of the qualifying fee system is that only a serious candidate will be willing to pay the requisite fee. The presumption that payment of the fee indicates that a candidate is serious raises questions concerning irrebutalbe presumptions. If payment raises a presumption of seriousness, non-payment raises a presumption of frivolity. Therefore, if an indigent candidate has no other available means of indicating his sincerity, he has no way to rebut the presumption that he does not want to run and thus will be excluded from the ballot. LeClercq, *supra* note 1, at 635. *Cf.* Weinberger v. Salfi, 95 S. Ct. 2457 (1975).

[13] 511 F.2d 700 (1975).

[14] *Id.* at 703. Florida could not require the payment of a fee from indigents. Fair v. Taylor, 359 F. Supp. 304 (M.D. Fla., 1973), *vacated and remanded*, 416 U.S. 918 (1974).

[15] Bullock v. Carter, 405 U.S. 134 (1972), and Lubin v. Panish, 415 U.S. 709 (1974), involved indigent candidates who could not pay the filing fee.

[16] Because the filing fee system had been struck down in part, the question arose

challenge to the constitutionality of the qualifying fee requirements on those decisions.[17]

The Supreme Court first reviewed filing fees in *Bullock v. Carter*.[18] The plaintiffs in *Bullock* were indigents who challenged the Texas filing fee system which imposed high fees on candidates for state office.[19] The size of the required fees led the Court to conclude that the system effectively excluded indigents from candidacy.[20] The Court noted that such an exclusion greatly affected voters by depriving them of the opportunity to vote for indigent candidates.[21] Since the right to vote, which previously had been declared a fundamental right,[22] was involved, the Supreme Court subjected the Texas fee system to a strict standard of review.[23] To withstand such review, the

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as to whether the Supreme Court was contemplating the invalidation of all qualifying fees. The Court seemingly was expanding the protection which could be afforded to political candidates. LeClercq, *supra* note 1, at 625-36. *But see* Jardine, *Ballot Access Rights: The Constitutional Status of the Right to Run for Office*, 1974 UTAH L. REV. 290 (1974) [hereinafter cited as Jardine], for a view that the Burger Court may be retreating from the broad protection given by the Warren Court to electoral-connected rights, especially the right to vote.

[17] 511 F.2d at 702.

[18] 405 U.S. 134 (1975). Lendall v. Bryant, 387 F. Supp. 397 (E.D. Ark. 1975) recently interpreted *Bullock* and *Lubin*. In that case, a third party had to file a petition in order to be placed on the ballot. The court emphasized the excessive length of time between the deadline for filing the petition and the election and declared the statute unconstitutional. The court observed that a common rule runs through *Bullock* and *Lubin* as well as two companion cases to *Lubin:* Storer v. Brown, 415 U.S. 724 (1974), and American Party v. White, 415 U.S. 767 (1974). In respect to that rule, the district court stated:

> [T]he measures adopted by the State must not go beyond what the State's compelling interests actually require, and broad and stringent requirements or restrictions with respect to would-be independent candidates cannot stand where more moderate ones would do as well.

387 F. Supp. at 402. For comments on the impact of *Bullock* and *Lubin, see* Note, *The Constitutionality of Candidate Filing Fees,* 70 MICH. L. REV. 558 (1972); Comment, *Constitutional Law—The Validity of Primary Filing Fees,* 18 N.Y.L.F. 451 (1972); Comment, *Constitutional Law—A State May Not Require Filing Fee From Indigent as Prerequisite to Ballot Placement,* 50 WASH. L. REV. 209 (1974); Comment, *The Emerging Right to Candidacy in State and Local Elections: Constitutional Protection of the Voter, the Candidate, and the Political Group,* 17 WAYNE L. REV. 1543 (1971).

[19] Bullock v. Carter, 405 U.S. 134 (1972).

[20] *Id.* at 143.

[21] *Id.* at 144.

[22] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[23] *Id.* at 144. Mr. Chief Justice Burger has indicated his dissatisfaction with the inflexibility of the strict scrutiny test. Dunn v. Blumstein, 405 W.S. 330 (1972) (Burger, C. J., dissenting). In Bullock v. Carter, 405 U.S. 134 (1972), his majority opinion deviated slightly from the traditional strict scrutiny standard of review. The *Bullock*

fees had to be reasonably necessary to the accomplishment of a compelling state interest.[24] The Court determined that less restrictive means for limiting the size of the ballot existed and accordingly held that states which require the payment of a filing fee must afford indigents an alternative means of access to the ballot, such as the collection of names on a petition.[25]

The Court next reviewed qualifying fees in *Lubin v. Panish*,[26] in which the plaintiffs again were indigents.[27] While the Court did not identify its standard of review, the *Lubin* decision, employing the same language used in *Bullock*, stated that the fees had to be reasonably necessary to the accomplishment of a compelling state interest. Hence, the Supreme Court ruled that California could not compel indigents to pay a qualifying fee in order to be placed on the ballot.[28]

In *Adams v. Askew*,[29] three persons initiated the action as representatives of the class of candidates who had paid the Florida qualifying fee in 1972. Although those individuals were not indigents,[30] they argued that filing fees were an unconstitutional barrier to the ballot regardless of whether the candidate could not pay or was merely

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test required that the challenged regulations be reasonably necessary to the accomplishment of a compelling state interest. That formula was also applied in Lubin v. Panish, 415 U.S. 709 (1974), Storer v. Brown, 415 U.S. 724 (1974), and American Party v. White, 415 U.S. 767 (1974). *See generally* LeClercq, *supra* note 1, at 635.

The application of the *Bullock* standard involves the question whether there are less restrictive alternatives to the regulation. If such alternatives exist, the requirement is not necessary and will be struck down. 405 U.S. at 145. *See generally* 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 (1973) [hereinafter cited as Gunther] for a discussion of the Burger Court's approach to review of equal protection claims.

[24] Bullock v. Carter, 405 U.S. 134, 145 (1972).

[25] *Id. See, e.g.*, Matthews v. Little, 498 F.2d 1068 (5th Cir. 1974). In *Matthews*, there were alternative methods to qualify for the ballot. With such alternatives available, the system was found to be constitutional. *See* Lubin v. Panish, 415 U.S. 709, 722 (Blackmun, J., concurring). Mr. Justice Blackmun noted that the majority had disregarded the write-in process as a viable alternative. He argued that write-in voting was a constitutionally acceptable alternative.

[26] 415 U.S. 709 (1974).

[27] *Id.* The effect of the filing fees on the indigent candidates and voters impressed Mr. Justice Douglas. In his concurring opinion, Mr. Justice Douglas stated that *Lubin* dealt less with candidate and voter rights than with wealth discrimination. Focusing on the interests of the indigents, he concluded that the filing fee was unconstitutional in that it discriminated against poor people because wealth became a qualification for political participation. 415 U.S. at 719. (Douglas, J., concurring).

[28] *Id.* at 718-719.

[29] 511 F.2d 700 (5th Cir. 1975).

[30] *Id.* at 702.

unwilling to do so.[31] Plaintiffs contended that the right of candidacy is inseparable from the right to vote and, therefore, warrants constitutional protection regardless of the candidate's economic status.[32] Thus, plaintiffs sought to have the fee system declared unconstitutional with respect to non-indigents as well as indigents.[33]

The Fifth Circuit, however, stressed the necessity of limiting the ballot and noted the role that such regulation played in ensuring that the choice by voters would be more easily and reasonably made.[34] The court focused on the risks to the political system brought on by frivolous candidacies.[35] In the court's analysis, at the core of the state's interest in regulating the ballot was the desire for an efficiently operating political system.[36] Thus, the Fifth Circuit held that qualifying fees were a rational means by which the state could regulate the ballot.[37]

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[31] *Id.* The Fifth Circuit heavily emphasized the fact that the Supreme Court in *Bullock* had noted that plaintiffs were unable and not merely unwilling to pay the fees. A different interpretation of that language is found in Stoner v. Fortson, 359 F. Supp. 579 (N.D. Ga. 1972). In *Stoner,* the plaintiff stated that he was unwilling to pay the fee because he had little money available for use in his campaign. He could have raised the money among his friends but did not wish to do so. The district court held that the language in *Bullock* was not determinative. *Id.* at 581 n.4.

[32] *Id. See also* Toporek v. State Election Commission, 362 F. Supp. 613 (D.S.C. 1973).

[33] 511 F.2d at 702.

[34] The Florida state courts historically have placed great emphasis on the state interest. Qualifying fees withstood a challenge based on the state constitution in Bodner v. Gray, 129 So. 2d 419 (Fla. 1961). Prior to the *Fair* decision, *supra* note 14, federal courts had also refused to overturn the system. Spillers v. Slaughter, 325 F. Supp. 550 (M.D. Fla. 1971), *vacated and remanded with instructions,* 404 U.S. 806 (1971); Fowler v. Adams, 315 F. Supp. 592 (M.D. Fla. 1970), *appeal dismissed,* 400 U.S. 986, *order granting injunction,* 400 U.S. 1205 (1970) (even though candidate lost suit, he was placed on ballot). Wetherington v. Adams, 309 F. Supp. 318 (N.D. Fla. 1970), *rev'd and remanded,* 406 F.2d 724 (5th Cir. 1968). *Compare* Draper v. Phelps, 351 F. Supp. 677 (W.D. Okla. 1972), which upheld a candidate residency requirement because of the compelling state interest in regulating the ballot, *with* Bolanowski v. Raich, 330 F. Supp. 724 (E.D. Mich. 1971), which overturned such a requirement.

[35] 511 F.2d at 702.

[36] *Id.* at 704. One commentator has noted that the state interest in regulating the ballot covers four broad categories: (1) maintaining the integrity of the ballot; (2) preventing confusion; (3) ensuring competent candidates; (4) expediting administrative concerns. Jardine, *supra* note 16, at 303-06.

[37] 511 F.2d at 704. *But see* Harper v. Vance, 342 F. Supp. 136, 143 (N.D. Ala. 1972) where the court decided that qualifying fees did not have a rational basis; hence that court did not have to decide whether to apply strict scrutiny.

In determining that the Florida filing fees were a rational means for regulating the ballot, the Fifth Circuit relied on *Bullock* as support for its conclusion that there might

The plaintiffs in *Adams* argued that *Bullock* and *Lubin* required more than a rational relationship between the fees and the state objective.[38] They contended that the strict scrutiny test, which would require that the fees be necessary to the accomplishment of a compelling state interest,[39] should be utilized in cases involving restrictions on the right to be a candidate. In rejecting that contention, the Fifth Circuit distinguished between the rights involved in *Bullock* and *Lubin* and the rights brought before the court in *Adams*.[40]

Strict scrutiny had been utilized in *Bullock* because the right to vote, a right considered fundamental by the courts,[41] was involved in

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be a rational basis for the requirement of the fee. 511 F.2d at 702 *citing* Bullock v. Carter, 405 U.S. 134, 146 (1974). However, in *Bullock,* the Court was recognizing the inchoate nature of the issue and was deferring a decision as to the rationality of filing fees. Moreover, the Court in *Lubin* was highly critical of the rational basis of requiring fees. 415 U.S. at 171. *Lubin* emphasized the inadequacy of filing fees to demonstrate a potential candidate's sincerity. *Id.* Qualifying fees are not a conclusive test of sincerity. Additionally, they measure a candidate's qualifications in economic terms, a constitutionally fatal shortcoming. *Id.* at 716. Consequently, there is sufficient indication in *Lubin* to warrant consideration of the rationality of filing fees.

Of all the reasons given by the states to justify regulation of the ballot, the Supreme Court seems to have been most impressed by the need to exclude frivolous candidates from the ballot. Lubin v. Panish, 415 U.S. 709' 717 (1974); Bullock v. Carter, 405 U.S. 134, 145 (1972); Jenness v. Fortson, 403 U.S. 431, 442 (1971). However, the payment of a qualifying fee is not a certain test of a candidate's fr volity. Qualifying fees can exclude sincere candidates as well as allow insincere candidates who can afford the price of access to the ballot. For example, a businessman may be willing to pay the cost of candidacy in order to improve his business by making his name known, or an attorney may wish to circumvent the ethical prohibitions on advertising. *See* Lubin v. Panish, *supra* at 717.

[38] 511 F.2d at 702. The plaintiffs advanced another argument which the Fifth Circuit succinctly rejected. Plaintiffs contended that the decision of Fair v. Taylor, 359 F. Supp. 304 (M.D. Fla. 1973), *vacated and remanded,* 416 U.S. 918 (1974), which struck down the requirement of the fees from indigents, made the fees void as applied to non-indigents as well. The Fifth Circuit interpreted plaintiff's argument to be that the court in *Fair* should have declared the fees void *in toto.* Even though the plaintiffs in *Fair* had standing to challenge the fees on their face, that court refused to extent its ruling beyond the rights of indigents. 359 F. Supp. at 307. The Fifth Circuit denied that the *Fair* ruling was too narrow and further noted that judicial policy supported a narrow ruling which applied only to the facts brought before the court. 511 F.2d at 705. *See* United States v. Raines, 362 U.S. 17, 21 (1960); Barrows v. Jackson, 346 U.S. 249, 256 (1953). *See also* Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) for the traditional discussion of the limitation of judicial statesmanship.

[39] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[40] 511 F.2d at 701.

[41] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). *But see* Salyer Land Co. v. Tulane Lake Basin Water Storage Dist., 410 U.S. 719 (1973), where the Court did not utilize strict scrutiny in a case involving voting rights. The Court upheld a

the case. The decision in *Bullock* was based on the effect of the exclusion of indigent candidates upon voters.[42] Not only were the voters limited to their choice of candidates, but the effect was proportionally greater on the less affluent members of the community.[43] The Fifth Circuit noted that the use of strict scrutiny in *Bullock* was compelled by the severe impairment of the rights of voters to participate effectively in the political system through the disqualification of serious but indigent candidates.[44] The issue in *Adams,* however, was the right to run for office, which in the Fifth Circuit's view, was not a fundamental right.[45] Thus, while Florida's qualifying fee may have placed some incidental limitations on the exercise of the right to vote, its effect was insufficient to compel strict review.[46]

In contrast, the Supreme Court in *Bullock* had concentrated upon the impact of the qualifying fee system upon voters. Affluent voters had the choice of affluent candidates because the candidate's economic status allowed him to pay the fee. However, the indigent can-

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system where the directors of the District were elected on the basis of a person having a vote for each $100 in assessed property he owned. *See also* Richardson v. Ramirez, 418 U.S. 24 (1974) where the court upheld the disenfranchisement of felons. *See* Jardine, *supra* note 16, at 293-95.

[42] 405 U.S. at 143-44. Because of the close relationship between the rights of candidates and voters, voters will sometimes be made part of the candidate's suit. Some cases have allowed voters to intervene. *See, e.g.,* Carter v. Dies, 321 F. Supp. 1358 (N.D. Tex. 1970); Jenness v. Little, 306 F. Supp. 925 (N.D. Ga. 1970), *appeal dismissed,* 397 U.S. 94 (1970). Some voters have been joined as plaintiffs in the suit. Duncantell v. City of Houston, 333 F. Supp. 973 (S.D. Tex. 1971).

[43] 405 U.S. at 144.

[44] 511 F.2d at 703.

[45] *Id.* at 702. The Supreme Court noted in *Bullock* that the right of candidacy had not yet been afforded fundamental status and did not warrant strict scrutiny. 405 U.S. at 142. However, one district court has treated the right of candidacy as fundamental:

> [T]he right to run or be a candidate is inextricably woven into the fabric of the First Amendment. Consequently, any abridgement of that right must receive careful judicial scrutiny . . . .

Duncantell v. City of Houston, 333 F. Supp. 973, 975 (S.D. Tex. 1971). The reasoning of *Duncantell* is evident in other cases which treat the right to candidacy as fundamental. Gonzales v. City of Sinton, 319 F. Supp. 189 (S.D. Tex. 1970); Thomas v. Mims, 317 F. Supp. 179 (S.D. Ala. 1970).

[46] *Id.* at 703. *But see* Bolanowski v. Raich, 330 F. Supp. 724 (E.D. Mich. 1974). One lower court has described the rationale of *Bullock* as looking to the effects on the exercise of the vote caused by the restrictions on candidacy. The court concluded that the compelling interest standard is applicable to a statutory restriction on candidacy if that restriction has had a discriminatory impact which, if it had resulted directly from a statute limiting the right to vote, would have required application of the stricter standard of review to that statute. Human Rights Party v. Secretary of State, 370 F. Supp. 921, 923 (E.D. Mich. 1973).

didate was excluded by the high fees, restricting the poor voter's opportunity to choose a representative from his own economic class.[47] Assuming that a voter would tend to cast his vote for someone from his own social and economic background, the indigent voter would be frustrated by the limitation of his choice to a selection of affluent candidates. On this basis, the Fifth Circuit in *Adams* held that the connection between voters' rights and candidates' rights depended upon the involvement of indigents in the controversy.[48] The decision in *Adams* turned on the distinction between the rights of candidates and the rights of voters.[49] Whether such a distinction is tenable, however, is a difficult question.

The Supreme Court recognized the difficulty in distinguishing between the two rights by indicating that restrictions upon candidates were to be examined in a manner which considers the extent and nature of their impact on voters.[50] Moreover, while the *Bullock* opinion stated that the right to vote and the right to be a candidate are incapable of "neat separation,"[51] the Court stated in *Lubin* that the two rights are inseparably intertwined.[52] The *Lubin* opinion did not specify whether the qualifying fees were closely scrutinized because of their effect on voters or whether the Court was tacitly assigning fundamental status to the right of candidacy. The Court's silence indicates a third possibility, that the two rights are linked together by a common source—free political expression.

Lubin indicated that a freely accessible ballot serves an important function in effectuating optimum political participation. The Court observed that the right of candidacy warrants protection and is intertwined with the rights of the electorate.[53] The Supreme Court did not differentiate between the right of affluent candidates and the right of indigent candidates, nor did it qualify its reasoning to apply only

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[47] 405 U.S. at 144.

[48] 511 F.2d at 703.

[49] The most powerful argument in favor of making the distinction is that historically the right to be a candidate has not been afforded the same degree of protection as the right to vote. However, this line of reasoning does not consider the fact that the right to vote has been afforded protection as a fundamental right only within the last ten years. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). The true test of whether the two rights can be distinguished in analysis of the origin and function of each right. *See* Comment, *The Constitutionality of Qualifying Fees for Political Candidates,* 120 U. PA. L. REV. 109, 127 (1971).

[50] 405 U.S. at 143.

[51] *Id.*

[52] 415 U.S. at 716.

[53] *Id.*

to indigent candidates whose rights affect the rights of poor voters. Rather, the thrust of the decision was that the ballot must be reasonably accessible to everyone. Consequently, the Supreme Court's reasoning may indicate that such distinctions made by the *Adams* court are not tenable.[54]

The Fifth Circuit's distinction in *Adams* between the right to vote and the right to run for office seems highly contrived. An analysis of the origin and functions of the right to vote blurs the distinction between that right and the right of candidacy. The right to vote is deemed essential to the concept of free political expression under the First Amendment.[55] The right of candidacy is also rooted in the idea of political expression. Each is but a facet of free expression, and each is so closely related to the other that consideration of the effects of ballot restrictions on one without consideration of the effects on the other is virtually impossible.[56]

The artificiality of the Fifth Circuit's distinction between the right to vote and the right to run for office is illuminated by the similarity between the two rights. The right to be a candidate is an integral a part of the First Amendment as the right to vote.[57] The two rights are analogous[58] and interdependent.[59] Candidacy without voters would be worthless, and the right to vote would be meaningless were there no parties nor candidates from which to choose.[60] Conse-

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[54] *Id.* at 719.

[55] The franchise is probably the most effective mode of political expression available to an individual. An elected official may ignore public criticism until he feels that his ability to garner votes is being impaired. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Ajello v. Schaffer, 349 F. Supp. 1168 (D. Conn. 1972); Socialist Workers Party v. Martin, 345 F. Supp. 1132 (S.D. Tex. 1972), *aff'd,* 483 F.2d 554 (5th Cir. 1973).

[56] Williams v. Rhodes, 393 U.S. 23, 30 (1968).

[57] Duncantell v. City of Houston, 333 F. Supp. 973, 975 (S.D. Tex. 1971); *accord,* Socialist Worker's Party v. Martin, 345 F. Supp. 1132, 1135 (S.D. Fla. 1972), *aff'd,* 483 F.2d 554 (5th Cir. 1973).

[58] Jenness v. Little, 306 F. Supp. 925, 927 (N.D. Ga. 1970), *appeal dismissed,* 397 U.S. 94 (1970). *See also* Ajello v. Schaffer, 349 F. Supp. 1168, 1175 (D. Conn. 1972); Socialist Workers Party v. Martin, 345 F. Supp. 1132, 1137 (S.D. Fla. 1972), *aff'd, sub nom.* Socialist Workers Party v. Hill, 483 F.2d 554 (5th Cir. 1973). *But cf.* Beller v. Kirk, 328 F. Supp. 483 (S.D. Fla. 1970), *aff'd mem.,* 403 U.S. 925 (1971).

[59] Williams v. Rhodes, 393 U.S. 23, 30 (1968).

[60] Duncantell v. City of Houston, 333 F. Supp. 973, 976 (S.D. Tex. 1971). A district court similarly noted the relationship between the right of political association and the right to vote. The right to form a party means little if the party cannot present a candidate to the voters. Likewise, the right to vote is burdened when active parties are excluded from the ballot. Barnhardt v. Mandel, 311 F. Supp. 814, 824 (D. Md. 1970). *See also* Williams v. Rhodes, 393 U.S. 23, 32 (1968).

quently, 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 a candidate who represents the voter's views.[61]

Political expression is the means through which the people ensure that the government is fairly representative of their needs and desires.[62] Different segments of society can vote against those elected officials who raise their distrust. Factions displeased with the status quo may form political parties and present candidates.[63] Thus, the rights 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.[64] Such a conclusion is compelled, in the Court's reasoning, because the right to associate and the right to be a candidate are intertwined with the right to vote.[65] However, the question arises whether that conclusion signifies that the right to be a candidate is on equal footing with the right to vote.

Analysis of the origin and function of the right to run for public office suggests that the right of candidacy may be analogous to the right to vote.[66] Both the origin and function of the right of candidacy point to the rational congruity of that right and the franchise. The right to be a candidate derives from two sources—the right to vote and the right of political association.[67] Furthermore, these rights form

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[61] Lubin v. Panish, 415 U.S. 709, 716 (1972); Bullock v. Carter, 405 U.S. 134, 144 (1972); Williams v. Rhodes, 383 U.S. 23, 32 (1968). However, *Lubin* indicates that minor restrictions upon the ability of a voter to have a suitable candidate available may not present constitutional questions. 415 U.S. at 716-717. The harm must be significant before a federal court will intervent. Storer v. Brown, 415 U.S. 724, 730 (1974).

[62] Ensuring fair representation has been noted as the basis for free expression:

> It appears to this court that the reasons given for requiring the compelling interest standard in voting cases are equally applicable to cases challenging qualifications for public office; in both situations the challenge is directed to the assumption that the institutions of state government are structured so as to fairly represent all the people.

Stapleton v. City Clerk, 311 F. Supp. 1187, 1190 (E.D. Mich. 1970).

[63] Williams v. Rhodes, 393 U.S. 23, 31 (1968).

[64] Communist Party v. Whitcomb, 414 U.S. 441 (1974) *and cases cited therein. See also* Moore v. Ogilvie, 394 U.S. 814 (1969). .

[65] Kusper v. Pontikes, 414 U.S. 51 (1974). *But cf.* Rosario g. Rockefeller, 410 U.S. 752 (1973).

[66] *See, e.g.,* Duncantell v. City of Houston, 333 F. Supp. 973 (S.D. Tex. 1973); Socialist Workers Party v. Welch, 334 F. Supp. 179 (S.D. Tex. 1971).

[67] One commentator has described the relationship as follows;

part of the concept that through free political expression, the political system will remain representative of the will of the people. In these ways, candidacy is a corollary[68] or a concomitant[69] of the right to vote.

While other courts have noted the congruity of the two rights,[70] the Fifth Circuit in *Adams* refused to equate the right of candidacy with the right to vote. However, the connection between the rights does not depend on the economic status of the individuals who are involved. Rather, the two rights are related through a factor which is common to everyone—the right to free political expression. The right to vote, to form parties, and to run for office share corresponding places in the system of free expression and self-government and merge into a right of political participation.[71]

The Fifth Circuit in *Adams* rejected the merger of the rights and instead distinguished between the rights of candidates and the rights of voters. Moreover, such a distinction was dependent upon the economic status of the candidate—the court reasoned that the rights of candidates were analogous to the rights of voters only when the candidate was indigent.[72] Because the right to vote—a fundamental right—was not involved, the court ruled that a state can require a non-indigent to pay a qualifying fee as a prerequisite to being placed on the ballot. Such a requirement is, however, virtually an economic qualification for candidacy—a qualification forbidden by the Constitution.[73] An individual's right to be a candidate is not absolute, but neither is the state's power to restrict access to the ballot. In its analysis of the difference between the right to vote and the right to be a candidate, the *Adams* court failed to consider the benefits of a limited ballot in light of the need to ensure full political expression.

> The right to be a candidate issues from two distinct but related sources. It wells derivatively from the right to vote, since restrictions on candidacy have an obvious impact upon the right to case a meaningful vote for the candidates of one's choice. The right springs directly from the right of political association protected by the first and fourteenth amendments.

LeClercq, *supra* note 1, at 625.

[68] Ajello v. Schaffer, 349 F. Supp. 1168, 1175 (N.D. Ga. 1972); Thomas v. Mims, 317 F. Supp. 179, 181 (S.D. Ala. 1970); Jenness v. Little, 306 F. Supp. 925, 926-27 (N.D. Ga. 1969), *appeal dismissed,* 397 U.S. 94 (1970).

[69] Duncantell v. City of Houston, 333 F. Supp. 973, 975 (S.D. Tex. 1973).

[70] *See* text accompanying notes 66-69 *supra.*

[71] LeClercq, *supra* note 1, at 627.

[72] Adams v. Askew, 511 F.2d 700, 702 (5th Cir. 1975).

[73] Lubin v. Panish, 415 U.S. 709, 716 (1974).

Hopefully, emerging analysis will recognize the congruity between the rights.

MICHAEL A. BRAGG

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