Equal Protection: Analyzing the Dimensions of a Fundamental Right - The Right to Vote

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EQUAL PROTECTION: ANALYZING THE DIMENSIONS OF A FUNDAMENTAL RIGHT—THE RIGHT TO VOTE

The purpose of this comment is to examine the fundamental right to vote, perhaps more appropriately termed political participation rights, and the Supreme Court’s analysis of how that right may be limited. First, the general conceptual framework of equal protection will be examined; second, the comment will explore the Supreme Court’s method of assessing the dimensions of the voting right in the context of its two tier equal protection test; and third, an attempt will be made to suggest a theoretical framework which would provide a more flexible and logical approach to political participation rights.

EQUAL PROTECTION

The Two Tier Test

The Court has two different standards of review that it can apply to a legislative classification: strict scrutiny and minimum scrutiny. Simply stated, if you are able to persuade the Court that the classification is “suspect” or that it impairs a “fundamental right,” the law will be reviewed, and in practice struck down, under the strict scrutiny/compelling state interest test. Otherwise, the Court will employ the rational relationship test which requires the state’s classification to be related to some legitimate state purpose, and in practice ratifies the legislative scheme.

Under the two tier equal protection formula the initial

1. The Court has indicated in dictum that the right to vote is not, per se, a constitutionally protected right. Rather, what the right to vote encompasses is the right to participate in elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the state’s population. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973).

The Court’s definition of the right to vote may be an attempt to explain why it does not review restrictions with respect to age or citizenship. In any event this comment will use the “right to vote” and “political participation rights” interchangeably to express the Court’s definition.

2. Mr. Justice Harlan held the view that the equal protection clause of the fourteenth amendment was not the proper constitutional basis for a determination of fundamental rights. Rather, he believed that the legislative enactment should be voided only if it violated the basic values implicit in the concept of ordered liberty under the due process clause of the fourteenth amendment. Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (concurring opinion).
question in determining the use of the compelling state interest test is whether the classification is "suspect" or impairs a "fundamental right." The standard for "suspectness" is whether the law discriminates against a distinct and insular minority. The Court has found "suspect" classifications which label groups according to race and alienage. Further, the Court has indicated that laws which classify by sex or illegitimacy are subject to close inspection, although the net effect of decisions in these areas is to leave such classifications out of the province of the strict scrutiny-compelling state interest standard. The method of identifying fundamental rights not specifically enumerated in the Constitution is not clear, but apparently turns on whether the Court believes that such a right is implicit in the Constitution. Thus, the Court has viewed the Constitution

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3. Mr. Justice Stone first introduced the standard in 1938: "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for correspondingly more searching judicial inquiry." United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

One commentator has suggested a model for determining a "suspect" classification: (1) Is the group discrete and insular, thus subject to political injury actually caused by the statute? (2) Has the group been stigmatized in the past so that it is subject to psychological injury, and is such injury caused by the statute? (3) Are the distinguishing characteristics of the group congenital and immutable so that the group is vulnerable to "unfair penalty," and is such penalty imposed by the statute? Note, A Question of Balance: Statutory Classifications Under the Equal Protection Clause, 26 STAN. L. REV. 155, 163-64 (1973).

In San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Supreme Court reiterated the discrete and insular minority standard by noting that classifications based on group characteristics would trigger the strict scrutiny-compelling state interest standard when that group was saddled "with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Id. at 28.


6. Reed v. Reed, 404 U.S. 71 (1971). In Craig v. Boren, 97 S. Ct. 451 (1976), the United States Supreme Court per Mr. Justice Brennan invalidated an Oklahoma law which prohibited sale of 3.2% beer to males under 21 and to females under 18 on the ground that Oklahoma's gender-based differential constituted an invidious discrimination against males 18-20 years of age in violation of the equal protection clause. The Court in reaching its decision used a middle level of scrutiny: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Id. at 457. See also Califano v. Goldfarb, 45 U.S.L.W. 4237 (Mar. 2, 1977).


8. Mr. Justice Powell in examining the question of whether education was a fundamental right noted:

The key to discovering whether education is "fundamental" is not to be
as guaranteeing these "fundamental rights:" the right to privacy,\(^9\) the right to vote,\(^10\) the right to interstate travel,\(^11\) and the right of access to the criminal justice system.\(^12\) The Court has refused to label as fundamental, claims involving housing,\(^13\) welfare,\(^14\) education,\(^15\) or economic regulation,\(^16\) with the result that these areas are left to the discretion of state legislatures.

A Middle Level Scrutiny

The rigidity of the Court's two tier system has led commentators to suggest a more flexible approach.\(^17\) Most notably, Professor Gerald Gunther has proposed that the Court address itself to whether the legislative classification is in fact substantially related to the purpose of the statute—a means focus test.\(^18\) Such an approach would not result in the Court exercising complete deference to the legislature, but rather it would have the Court assess the legislation (the means) in terms of the legislative purpose to determine whether it substantially furthers the legislative purpose. Such a furtherance would have to have a basis in reality, not merely conjecture.\(^19\) One promi-
nent example of where the Court attempted to use such a middle level approach was in *Eisenstadt v. Baird.* In *Eisenstadt* the Court voided a Massachusetts law which made it a felony for anyone to give away or sell contraceptives to unmarried individuals. Mr. Justice Brennan refused to directly extend the *Griswold* right to privacy rationale, which would have triggered the compelling state interest test. Instead, he noted that if one viewed the legislation as a health measure, the inclusion of all contraceptives in the statute was overbroad since not all contraceptives are potentially dangerous. Although he purported to use the rational relationship test, it was obvious that a stricter level of scrutiny was being employed since the Court did not give as much deference to the legislature as usual.

Hopes that the Court would articulate Gunther's means-focus test, or at least some balancing approach to equal protection problems, were dashed in *San Antonio Independent School District v. Rodriguez.* There the Court affirmed its ad-

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23. *Id.* at 451-52. Mr. Justice Brennan, in addition to rejecting health considerations as a purpose of the statute, also found that deterrence of premarital sex could not "reasonably be regarded as the purpose of the Massachusetts law." *Id.* at 448-50. He then indicated that the purpose of the statute was a prohibition on contraception and, as such, was unconstitutional. Mr. Justice Brennan stopped short of using the *Griswold* compelling state interest test for voiding the statute, yet the actual standard of scrutiny which he used was unclear.

While praising Mr. Justice Brennan's avoidance of the deferential approach to state legislation, Professor Gunther felt that the Justice overshot the mark of his means-focus test by rejecting purposes offered by the state:

Justice Brennan's rejection of the antifornication and health purposes carried concentration on actual state objectives much further than the model would suggest. Indeed, it undercuts the model in a fundamental way. A peremptory rejection of proffered state purposes strongly suggests a value-laden appraisal of the legitimacy of ends. The two disbelieved purposes had been offered by the State and explained by the state courts. Intensified rationality scrutiny justifies focus on actual purpose rather than court-conceived ones; it does not justify rejecting several properly offered state objectives in the interest of molding the controversy into an equal protection violation.

Gunther, *supra* note 18, at 35-36.
24. 405 U.S. at 447.
25. Mr. Justice Marshall had proposed a balancing test, but such a formulation was rejected. *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 102-03 (1973) (Marshall, J., dissenting).
herence to the two tier model by rejecting any claims that the right to an education was implicitly guaranteed by the Constitution. The Court distinguished Eisenstadt apparently by concluding that the correct form of equal protection analysis in that case was the compelling state interest standard.

Analyzing a Fundamental Right

While the question of determining which classifications should be labelled as "suspect" or as impairing a "fundamental right" is certainly important and has generated much debate, such a discussion is beyond the scope of this comment. Rather, the focus will be on the question of how the Court should treat a right that already has been declared fundamental. In practice, the use of the compelling state interest test invalidates all restrictions on a fundamental right since the state's burden in justifying such a restriction is very heavy. Such an approach to the compelling state interest test is tantamount to declaring that a "fundamental right" enjoys absolute protection under the fourteenth amendment. Obviously, such a result is unworkable. Absent the absoluteness of a fundamental right, theoretical adherence to a compelling state interest test is ill-suited for determining the dimensions of the right to vote. Since the use of the rational relationship test has, in practice, traditionally meant complete deference to the legislature, this test also is not a satisfactory model in which to analyze a fundamental right.

It is with this conceptual problem in mind that the Supreme Court's analysis of the fundamental right to vote would be appropriate.

The Supreme Court's Treatment of the Fundamental Right to Vote

Although subject to exceptions, the Supreme Court's deci-

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27. Id. at 34 n.7.
28. See note 17 supra.
29. In Dunn v. Blumstein, 405 U.S. 330 (1972), Chief Justice Warren Burger objected to the majority's use of the compelling state interest test in voiding a one year voting residency requirement. The Chief Justice stated: "To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable [standard] and I doubt one ever will, for it demands nothing less than perfection." Id. at 363-64 (dissenting opinion).
sions in the area of political participation rights have generally fallen into three categories: first, one individual's vote must have the same weight as another's—one man, one vote; second, as many people as possible should have access to the ballot box; third, minority and third party candidates cannot per se be kept off the ballot.

One Man, One Vote

The first area where the Court has sought to protect the franchise is with the concept of one man, one vote. Beginning with its decision in *Baker v. Carr*, the Court declared that even though the question of reapportionment was political, judicial review was appropriate to determine if the legislative action exceeded constitutional authority. The Court was influenced by the fact that in *Baker* the vote of an individual in one county was worth 19 times that of a voter in a different county. Two years later, Chief Justice Earl Warren, in *Reynolds v. Sims*, noted that the right to vote freely for the candidate of one's choice was the essence of a democratic society, and that that right could be denied by a dilution of the weight of a citizen's vote just as effectively as by an outright prohibition. However, the application of the one man, one vote principle cannot be neatly summarized since the Court has announced different guidelines for different types of elections.

Perhaps the clearest rule is that for congressional district elections, state legislatures are required to draw voting lines, as nearly as is practicable, so that one man's vote equals another man's vote. While recognizing that exact mathematical precision is impossible, the Court has struck down as unconstitutional congressional districting plans where there was a variance of 4.13% between a state's two congressional districts (i.e., one district being overrepresented by 2.43%, another district being underrepresented by 1.7%). Furthermore, the state must justify each variance no matter how small, unless the

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34. 369 U.S. at 245 (Douglas, J., concurring).
population variances resulted despite good faith efforts to draw the lines with precision. The Court, however, will allow state legislatures to deviate slightly from the general rule in situations where substantial population shifts over a ten year period can be predicted with a high degree of accuracy (for example, in a fast growing suburban development).

The Court is more flexible with respect to population variances when state legislative districts are involved. Chief Justice Earl Warren stated one of the reasons for this policy:

A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions as political subdivisions. . . . In many states much of the legislature's activity involves the enactment of so-called local legislation directed only to the concerns of the particular political subdivisions.

The Court has struck down variations for state legislative districts that have ranged from 30% to 40%, but it has upheld a variation of 16.4% by noting that the policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature is a rational one. Furthermore, the Court has said that variations of 9.9% are not sufficient to make out a prima facie case of invidious discrimination under the fourteenth amendment so as to require justification by the state. The numbers which the Court have picked out seem quite arbitrary, reflecting the Court's wishes that the litigation stop somewhere.

The test which the Court uses for state legislative districts is not as stringent a test as the one used for congressional districts, but state legislatures are not given a completely free hand. While the Court may indicate that it is using the rational

38. Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969). In Kirkpatrick the most populous district was 3.13% above the mathematical ideal, and the least populous was 2.84% below the ideal. Id. at 528-29.
39. Id. at 535. The Kirkpatrick court did not indicate how much of a deviation would be permissible.
43. Id. at 329.
44. White v. Regester, 412 U.S. 755 (1973). In Gaffney v. Cummings, 412 U.S. 735, 749-50 (1973), Mr. Justice White concluded that a 7.83% variation was not sufficient to make out a prima facie case: "That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little if anything to be accomplished by doing so."
relationship test, the standard of review is clearly higher than minimum scrutiny since the Court does not completely defer to the state legislature as is usual when that test is used. The best summary of the test the Court uses for state legislative districts is that once a prima facie case of violation of the one man, one vote principle is established, the state's justifications must be based on political reality, not mere speculation (i.e., the State must show that the lines are so drawn to maintain the integrity of political subdivisions).

With respect to the district lines for local elections, the Court has also insisted on the one man, one vote principle. However, the Court has allowed a variance of 11.9%, indicating that historical patterns in certain cases might be sufficient to justify some differences. Although the Court appears to confine its holdings in this area to the facts of each particular case, it uses the same flexible test for local elections as it uses for state reapportionments.

There is an obvious contradiction in using the strict compelling state interest test for congressional reapportionment and a less stringent test for state and local apportionments. Since the Court has already declared equality of voting a fundamental right, a State should have to justify any significant deviations from the one man, one vote principle by a showing of necessity or compelling state interest. Whether or not one agrees with the policy considerations behind the distinctions, it is apparent that the Court is only paying lip service to the two tier equal protection test and in practice is really using an equal protection approach that turns on the Court's vision of the needs of a democratic society in a particular situation.

45. Whatever the parameters of the word "rational," it is clear that by injecting itself into this political controversy, the Court is willing on occasions to substitute its judgment for that of the state legislature's.

46. One commentator has termed this type of formulation "new bite for the old equal protection." See Gunther, supra note 18, at 20.


48. Abate v. Mundt, 403 U.S. 182 (1971). In Abate, Mr. Justice Marshall indicated that the Court's decisions in the area of local district apportionment reflected the view that the particular circumstances and needs of a local community as a whole sometimes justified departures from strict equality. Id. at 185.

49. The fact that congressional reapportionment is based on Article 1, section 2, which requires that Representatives be chosen "by the People of the several States" should not account for the distinction: See generally White v. Regester, 412 U.S. at 777-82 (Brennan, J., dissenting); Mahan v. Howell, 410 U.S. 315, 339-43 (1973) (Brennan, J., dissenting).

50. Another example of where the Court has strayed from the one man, one vote principle is in Gordon v. Lance, 403 U.S. 1 (1971), where a state statute which required voters to approve bond issues by a 60% super-majority was upheld. It was quite plain
While one may agree ultimately with the outcome of the cases, the Court's adherence to the rigid all or nothing equal protection test presents conceptual difficulties in determining the degree of a permissible variance. Since the right to vote has been declared a fundamental right, state legislatures in theory should have to comply with the compelling state interest standard in justifying any significant deviations from the one man, one vote principle, not merely be allowed to show that the scheme is rational.

Access to the Ballot Box

The Court has also intervened in protecting voter rights to insure that as many people as possible have access to the ballot box. The Court first moved in this direction in 1965 when it struck down a Texas statute denying military personnel the right to vote. Likewise, the Court declared unconstitutional Virginia's poll tax by noting that the introduction of wealth by requiring payment of a fee, as a measure of a voter's qualification was capricious and irrelevant. Neither case clearly articulated a standard of review for cases restricting voter access to the ballot. Not until Kramer v. Union Free School District did the Court hold that a state must demonstrate a compelling state interest to be able to deny a citizen the right to vote.

In Kramer, the Court struck down a New York statute which stated that residents who were otherwise qualified to vote in state and federal elections could do so in school district elections only if they owned or leased taxable realty or were parents of children enrolled in the public schools. The Court explained its use of the compelling state interest test this way:

This careful examination is necessary because statutes distributing the franchise constitute the foundation of our

that by requiring such a super-majority voters who favored passage of such a bond issue had their ballots effectively diluted. However, the Court noted that there was nothing in the language of the Constitution or the country's history to indicate that the majority had to prevail on every issue. Id. at 6.

54. As a result of this classification the following qualified voters were excluded from participating in the election: senior citizens living with children or relatives; clergy, military personnel, and others who lived on tax-exempt property; boarders and lodgers; parents who neither owned nor leased qualifying property and whose children were too young to attend school; parents who neither owned nor leased qualifying property and whose children attended private schools. Id. at 630.
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.\(^5\)

In the same decision the Court upheld limitations on the
franchise based on age, residency, and citizenship\(^6\) without
requiring that they further some compelling state interest.\(^7\)
The obvious contradictions of *Kramer* demonstrate the conces-
tual difficulty of using the compelling state interest test to
decide the appropriate voter restrictions in a democratic so-
ciety.\(^8\)

In spite of this inconsistency, the Court extended the
*Kramer* rationale by voiding state laws that restricted voting
in bond referenda solely to property owners,\(^9\) and denied the
right to vote to residents of a federal enclave.\(^10\) In *Hill v. Stone*,
the Court invalidated a Texas dual box election procedure
where all the persons—who owned taxable property rendered
for taxation voted in one box and all other voters cast their
ballots in a separate box.\(^11\) The statute provided that a bond
issue could pass only if it was approved by a majority vote in
both the renderers' box and in the aggregate of both boxes. The
effect of this mechanism was that nonrenderers could defeat a
bond issue but they could not pass it.\(^12\) The state argued that
the rendering of property to vote in a bond election facilitated

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55. *Id.* at 626.
56. *Id.* at 625.
57. One commentator in discussing the *Kramer* decision has noted:
A voter qualification, regardless of the sub-category to which it is as-
signed, is still a voter qualification. Mr. Kramer was prevented from
voting because he was neither a parent nor an owner or lessee of property.
Other persons are prevented from voting for other reasons, even though
it must be conceded that, at least to some of them, their interests in the
election are greater than Mr. Kramer's . . . . The individual compari-
sions that inevitably result when the reasonableness standard of equal
protection are discarded in favor of compelling state interest are impossi-
ble to implement on a case-by-case basis.

Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School
District No. 15, 15 Ariz. L. Rev. 457, 467-68 (1973).*
58. The Court in 1973, apparently recognizing this dilemma, redefined the right
to vote by noting that it is the right to participate in state elections on an equal basis
with other qualified voters whenever the state has adopted an elective process for
determining who will represent any segment of the state's population. San Antonio
62. *Id.* at 293 n.3.
the enforcement of the state's revenue laws, but Mr. Justice Marshall, writing for the Court, noted that the use of the franchise to compel compliance with other, independent state objectives was questionable in any context.\textsuperscript{63}

However, there have been occasions when the Court has refused to use the compelling state interest test and has upheld restrictions limiting access to the ballot box. The first case to do so was \textit{Rosario v. Rockefeller}.\textsuperscript{64} In \textit{Rosario} the Court upheld a New York statute that required a voter to enroll in the party of his choice at least 30 days before the general election in order to be eligible to vote in the next primary. Thus, the cutoff for enrollment was approximately eight months prior to a Presidential primary (held in June) and eleven months prior to a nonpresidential primary (held in September). The Court distinguished \textit{Kramer}, stating that the New York law did not absolutely disenfranchise any voter, but merely imposed a time deadline to be eligible to vote in a party primary.\textsuperscript{65} While conceding that the period between the enrollment deadline and the next primary was lengthy,\textsuperscript{66} the Court concluded that insuring the integrity of the electoral process by preventing ballot raiding was a legitimate and valid state goal.\textsuperscript{67} The Court did not explain why it failed to apply the compelling state interest test or why New York should not be required to use less drastic means to prevent raiding, such as providing a shorter period between the enrollment deadline and the next primary. Mr. Justice Powell, in dissent, attacked the majority's opinion by saying:

The majority does not identify the standard of scrutiny it applies to the New York statute. We are told only that the cutoff is "not an arbitrary time limit unconnected to any important state goal;" that it is "tied to a particularized

\begin{footnotesize}
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\item Id. at 299. In fact, the rendering requirement may have, in effect, created a property-related classification. Because of the structure of the Texas property tax system, those with realty and business are automatically eligible to vote as renderers, while other voters must take the somewhat unusual step of voluntarily rendering their property for taxation. \textit{Id.} at 298 n.7.
\item 410 U.S. 752 (1973).
\item Id. at 757. The statute provided a long list of exemptions, most prominent of which were for persons too ill to enroll and newly arrived residents. \textit{Id.} at 754 n.3.
\item Id. at 760. Under New York law, a voter who wishes to switch parties is required to enroll in the new political party between the prior primary and the October cutoff date (i.e., one month before the general election).
\item Id. at 761. The raiding which the New York statute was designed to prevent is when members of one party vote in the primary of another party for a candidate whom they consider to be the weaker opponent for the general election.
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legitimate purpose and is in no sense invidious or arbitrary. The Court does not explain why this formulation was chosen, what precedents support it, or how and in what context it is to be applied. Such nebulous promulgations are bound to leave lower courts and state legislatures in doubt and confusion as to how we will approach future significant burdens on the right to vote and to associate freely with the party of one's choice.

*Kusper v. Pontikes,* added to the confusion surrounding the *Rosario* decision. In *Kusper* the Court declared unconstitutional an Illinois law which prohibited a person from voting in the primary election of a political party if he had voted in the primary of any other party within the preceding 23 months. The Court distinguished *Rosario* on the grounds that the Illinois statute locked a voter into a pre-existing party affiliation from one primary to the next, and the only way to break that lock was to forego voting in any primary for a period of almost two years. In both *Rosario* and *Kusper* the statutes affected the voters' rights in a significant way, yet one law was allowed to stand and the other was struck down. In *Rosario* the Court used the rational relationship test to uphold the restriction, but the test used in *Kusper,* although framed in first amendment language, seemed to approach the stricter compelling state interest standard:

As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. If the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

Another decision which applied the rational relationship test was *Salyer Land Company v. Tulare Lake Basin Water Storage District.* *Salyer* involved a California water storage district statute which allowed only land owners to vote. The

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68. *Id.* at 767 (Powell, J., dissenting).
70. *Id.* at 60-61.
71. *Id.* at 58-59. Again, one may ask why Illinois had to choose a less drastic means of regulating access to the ballot box while New York did not. The explanation that *Kusper* is based on the first amendment does not alter the fact that in *Rosario* a significant burden was also placed on political association.
franchise was extended to individual and corporate land owners whether or not they resided in the district, and the vote was weighted according to the voter’s land assessment. The Court upheld these restrictions by indicating that *Kramer* had left open the question of whether the state in some circumstances might limit the exercise of the franchise to those primarily interested or primarily affected. The Court believed that this special election district should be made an exception to the *Kramer* rule because the district’s primary purpose was limited to water storage and distribution and the district performed no other general public services of the type ordinarily financed by a municipal body. It is important to note, however, that the water storage district performed an important governmental function in regulating land control and water distribution. The district’s decisions in these areas significantly affected all residents, not just land owners. *Salyer* is, therefore, inconsistent with the attempt in *Kramer* to encourage greater voter participation.

In summary, the Court has proclaimed voting a fundamental right and has used the compelling state interest test to insure that as many people as possible have access to the ballot box, but the test has not been uniformly applied and the Court has upheld as reasonable under the rational relationship test significant state restrictions on the franchise. The major problem with this approach is that it fosters judicial inconsistency. On the one hand, the Supreme Court tells us that voter access to the ballot box is fundamental and, therefore, only the compelling state interest test should be used. On other occasions we are told that certain restrictions on this fundamental right are valid not because they meet the compelling state interest standard, but because they have a rational basis. Such an arbitrary choice in picking the standard of review to test the validity of such restrictions highlights the inadequacy of the

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73. *Id.* at 726-28.

74. *Id.* at 728-29.

75. The Court has dealt with residency requirements and with absentee ballots for prisoners who were entitled to vote. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court used the compelling state interest test to void a one-year residency requirement and suggested that a 30-day limitation would be sufficient. *Id.* at 347. However, in *Marston v. Lewis*, 410 U.S. 679 (1973), a 50-day residency requirement was upheld. With respect to providing absentee ballots for prisoners, the Court has held that the State has an affirmative obligation to provide for such ballots. *O'Brien v. Skinner*, 414 U.S. 524 (1974). In *Skinner* Chief Justice Warren Burger, writing for the majority, did not indicate what level of scrutiny was used in arriving at the decision.
two tier equal protection approach in evaluating a fundamental right.

Right to a Place on the Ballot

The Court also has sought to protect independent and third-party candidates seeking to have their names placed on the ballot. The Court began to move in this direction in 1968 with the decision of Williams v. Rhodes. At issue in Williams was an Ohio statute which provided that in order for an independent presidential candidate to be listed on the ballot in a general election, the candidate had to file petitions with signatures of 15% of the electorate on February 15th of the election year. Mr. Justice Black, writing for the Court, used the compelling state interest test to void the law and noted that the statute placed a burden on the right to political association and the right of qualified voters to cast an effective ballot.

In Jenness v. Fortson, the Court upheld a statute which imposed a less restrictive filing date (the second week in June) and required independent candidates to present petitions signed by five percent of all eligible voters. The Court did not indicate which test it was using, but the state was not required to present compelling reasons to justify the restrictions.

The Court in Bullock v. Carter struck down state filing fees for party primary elections which ranged as high as $8,900. Recently, in Lubin v. Panish, a California statute was declared unconstitutional as denying indigents access to the ballot through the use of filing fees. Although the statute in Lubin was voided, the Court did not use the compelling state interest standard. Instead, Chief Justice Warren Burger said: “Selection of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably

76. 393 U.S. 23 (1968).
77. Id. at 30-31. Mr. Justice Black stated: “The State here has failed to show any compelling interest which justifies imposing such heavy burdens on the right to vote and associate.” Id. at 31.
78. 403 U.S. 431 (1971).
79. In another decision which involved percentage requirements for nominating petitions, the Court struck down an Illinois statute which required independent candidates to gather 25,000 signatures from each of at least 50 of the state’s 102 counties. Moore v. Ogilvie, 394 U.S. 814 (1969). Again, the Court did not indicate what test it was using, but merely noted that the law applied a rigid, arbitrary formula to sparsely settled counties and populous counties alike. Id. at 818.
80. 405 U.S. 134 (1972).
necessary to the accomplishment of the State’s legitimate election interests.\textsuperscript{82}

The difficulty which the Court is faced with in providing greater access to the ballot is that it must contend with two competing objectives. One objective is that the people should be given an opportunity to vote for a candidate who closely approximates their own view. However, a state has a substantial interest in promoting compromise, in attempting to insure that an election winner will represent a majority of the community, and in providing the electorate with a comprehensible ballot in order to maintain political stability.\textsuperscript{83}

The current rigid equal protection formula is ill-suited to determine at what point state restrictions on candidate access to the ballot becomes unacceptable. Mr. Justice White recognized this dilemma when he stated in \textit{Storer v. Brown}:

\begin{quote}
It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made.\textsuperscript{84}
\end{quote}

\textit{Summary of the Court’s Analysis}

Although the Court maintains that it is adhering to the two tier equal protection test, the decisions dealing with political participation rights reflect a desire to use a less rigid balancing approach in analyzing the parameters of this fundamental right. In some instances we have seen the Court use the compelling state interest test, in some decisions the rational relationship test, and in a few cases the level of scrutiny is not identified. The Court has failed to articulate a consistent standard in evaluating this fundamental right. It is with this conceptual problem in mind that a discussion of fashioning a more

\textsuperscript{82} Id. at 718. In a concurring opinion Mr. Justice Douglas said that the appropriate standard of review was the compelling state interest test. Id. at 722.


\textsuperscript{84} Id. at 730. In \textit{Storer}, the Court upheld a California provision which required a one year disaffiliation from a political party in order for an independent candidate to run for office. See note 88, infra. In a case decided the same day as \textit{Storer}, the Court upheld Texas’ scheme limiting the way individuals can get their names placed before the electorate. American Party of Texas v. White, 415 U.S. 787 (1974).
flexible equal protection test for the evaluation of a fundamental right becomes appropriate.

A MORE FLEXIBLE APPROACH TO VOTING AS A FUNDAMENTAL RIGHT

As previously indicated, the Court does not always identify which test it uses or why it chooses a particular level of scrutiny in reviewing limitations on voting rights. Thus, we are left without a satisfactory framework in which to analyze the validity of state restrictions. The confusion stems from the fact that the compelling state interest test, in practice, always results in the invalidation of state restrictions. Yet, this result conflicts with the view that some restrictions are recognized as necessary to promote stability in the electoral process.

The proposed test does not deal with the whole spectrum of equal protection. Rather, the test deals with the issue of assessing the dimensions of the fundamental right to vote. The starting point is that this test does not attempt to eliminate the need for making difficult value judgments on the appropriateness of the restriction by allowing the Court to plug in the variables and come up with automatic answers. Rather, the purpose of the test is to suggest a method of intelligently and systematically discussing questions regarding restrictions on the franchise. Such an approach would avoid the problem of bogging the Court down in a discussion of which level of scrutiny to apply.

The proposed test is comprised of four parts. First, the Court should continue to recognize that it does not sit as a superlegislature and, therefore, may not always be competent to deal with some areas involving political participation rights. Second, the Court should recognize that the state has a legitimate interest in maintaining order in the electoral process and, consequently, political participation rights cannot be absolute. Third, the Court should recognize that political participation rights enjoy a preferred status under the Constitution and such a status requires the state to demonstrate that the legislative means substantially further the legislative purpose. Fourth, even though the state shows that the law is, in fact, doing what it was designed to do, the Court should use a sliding scale to determine whether the restriction is appropriate in a democratic society. Thus, the greater the burden on political participation rights, the greater the degree of proof which the state bears in justifying that restriction.
The Court's Inability to Deal with Certain Voting Rights

The Court does not have the ability to effectively consider the validity of all restrictions on political participation rights. This element of the test is important because it gives the Court a means of deferring to state legislatures on certain questions of political participation rights. For example, the Court has determined that it is not the proper branch of the government to set the voting age requirement, perhaps on the rationale that such a determination is a sensitive political decision better left to the state legislatures. Further, in the one man, one vote area, the Court has decided that it will no longer consider cases involving apportionment lines for state legislatures where the variance is below a certain percentage, because of the burden it places on the court system. Obviously, the Court is not the proper branch to effectively regulate the administration of election machinery, thus deference to the state legislature seems appropriate in this area.

At the same time, the Court should not retreat from its responsibility to insure that state legislatures adhere to constitutional standards in regulating the right to vote. While the Court's decision to intervene in a given problem is a policy decision, it should be remembered that state legislatures are notorious for infringing on political participation rights if it is in their self-interest to do so.

87. One commentator has criticized this interventionist approach:
   The traditional approach under the equal protection clause is that the task of making such classifications rests with the legislature, with the judicial role being a limited one, correcting excesses where they occur, but upholding the legislation as reasonable. In the voter qualification context, as with equal protection generally, the traditional division of responsibility is eminently reasonable. Unlike the courts, the legislatures have extensive fact-finding machinery at their command. Unlike the courts, the scope of factual inquiry available to legislators is not limited to the record in particular litigation. And unlike the courts, legislatures are more reflective of the public will on basic policy matters, because of their periodic answerability to the people.
88. Even though it can be argued that legislators reflect their constituency, it must be remembered that legislators have the ability to draw their own state district lines so that their constituency will reflect their own views. This power, no doubt, led the Court in Reynolds v. Sims, 377 U.S. 533 (1964), to intervene since rural interests were disproportionately overrepresented and urban populations were grossly underrepresented.
Political Participation Rights Are Not Absolute

Political participation rights must be seen as less than absolute since some restrictions are necessary in order to insure that the electoral processes will be carried out in an orderly manner. For example, it is quite clear that in order to insure a manageable ballot, not every individual who wants to run for President should be allowed to have his name placed on the ballot. In this context a requirement that he demonstrate some measurable support from the body politic is reasonable. If the right to participate in the political selection process were absolute, every voter could have his name placed on the ballot. The result would be an unmanageable ballot that would hamper free elections. Similarly, a state law requiring citizens to register to be eligible to vote may be an inconvenience to some, yet it is recognized as a justifiable restriction on the franchise in order to assure an orderly electoral process.

It is fairly obvious from the Court's decisions in this area that a state's restriction on the right to vote will not automatically be struck down merely because the restriction is on a fundamental right. In fact, the Court's unexplained use of the compelling state interest test in some decisions and its absence in others demonstrates that some restrictions are not only desirable, but constitutional as well. It would be inexact to suggest that because the Court has used the compelling state interest test to invalidate some state restrictions, that political participation rights are absolute. However, with one exception, whenever the Court does employ the compelling state interest test, it appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a later rather than an early decision to seek independent ballot status.

Id. at 736. Mr. Justice Brennan, dissenting, accepted the identification of California's compelling state interests with respect to political stability, but argued that the state had not demonstrated the absence of reasonably less burdensome means of achieving its objectives. Id. at 760-61.
interest test, the state law is always voided.\textsuperscript{93}

The proposed test recognizes at the outset that voting rights are not absolute, thus clearing the way for an application of a more flexible analysis.

\textit{Application of the Means-Focus Test}

The third part of this analysis focuses on the level of scrutiny which the Court should apply. Under the traditional rational relationship test, the state’s burden of justifying a regulation or classification would require only a showing that it bore some rational relationship to a legitimate state purpose. Such an approach has nearly always resulted in the Court upholding the state law. In fact, the state’s burden in demonstrating a rational relationship is usually de minimus once this test is invoked since the Court has shown complete deference to the legislature. On the other hand, application of the compelling state interest test would seem unsatisfactory in analyzing the dimensions of a fundamental right because the use of that standard has always resulted in voiding the state’s classification.

What this phase of the proposed test purports to do is to force the state to demonstrate that the law accomplishes what it was, in fact, set up to do before the Court attempts to assess the appropriateness of the state’s purpose. The reason for this higher level of scrutiny is that political participation rights, having already been declared fundamental by the Court, should enjoy a preferred or favored status in the Constitution.

Professor Gunther has described an inquiry of this nature as a means-focus test: \textit{i.e.}, that the legislative means must substantially further the legislative ends or purpose:

\begin{quote}
\textit{Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: That legislative means must substantially further legislative ends . . . . Moreover, it would have the Justices gauge the reasonableness of the questionable}
\end{quote}

\textsuperscript{93} In 	extit{McGowan v. Maryland}, 366 U.S. 420 (1961), the Court outlined the rational relationship test this way:

\begin{quote}
The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.
\end{quote}

\textit{Id. at 425-26.}
means on the basis of materials that are offered to the Court rather than resorting to rationalizations created by perfunctory judicial hypothesizing.\footnote{Gunther, supra note 18, at 20-21. For a discussion of the theoretical framework of a means-focus test see Comment, A Case Study in Equal Protection: Voting Rights Decisions and a Plea for Consistency, 70 NW. U.L. REV. 934, 957-64 (1976).}

Although this proposed test goes beyond the Gunther model and also concerns itself with the appropriateness of the legislative ends, this initial inquiry, while not free from conceptual difficulties,\footnote{Professor Gunther acknowledged that one of the difficulties in applying the model would be to avoid a disguised examination of the appropriateness of the legislative ends. Gunther, supra note 18, at 48. However, suppose the legislature enacts a law which permits only leaseholders and property owners to vote in a bond election on the ground that they are the ones who would be paying the increased taxes. Obviously, the means substantially further the legislative purposes since those who don’t fall into either of the two categories are prohibited from voting. The real question is whether the purpose (ends) is a permissible one under the Constitution.} would be helpful in defining the issues. Additionally, the state would bear the burden of explaining what the law is trying to accomplish. The problem with ending the analysis here, as the Gunther model has, and limiting our concerns solely to whether the means substantially further the ends, is that those ends (purposes) may be impermissible in a democratic society.\footnote{One commentator has noted some misgivings about the Gunther model: We are therefore left with a test which cannot be meaningfully applied because it presumes to evaluate a logical relationship which in fact is not the basis of the constitutional infringement. . . . Yet, fundamentally it is not the hoped for benefit or harm of a particular legislative act or even the causal connection between the legislative purpose and the act itself, but rather the actual effect of the act that is potentially unconstitutional. Whether the legislature is capricious in its reasoning or totally logical in its action is really not for judicial inquiry, but rather it is for the Court to determine if a class of individuals has in fact been unconstitutionally harmed by the classification drawn. Comment, The Mandate for a New Equal Protection Model, 24 CATH. L. REV. 558, 565-66 (1975) (emphasis in original).} Furthermore, an objective inquiry into the legislature’s intent in enacting a law presents a further problem in that each Justice’s subjective value preferences would undoubtedly influence the direction of such an analysis. However, a means-focus test is used as one of the elements in assessing the validity of a restriction because if the law does not accomplish what the legislature intended, then the state’s burden in justifying the restriction should increase.\footnote{An example of how the means-focus test might work in right to vote cases was illustrated in Hill v. Stone, 421 U.S. 289 (1975). In Hill, the Court struck down a Texas voting procedure whereby all persons owning taxable property voted in one box in local bond elections and all other registered voters cast their ballots in a separate
A Subjective Analysis of the Statute’s Appropriateness

The fourth part of this test would have the Court subjectively analyze the constitutional appropriateness of any restriction on the right to vote. As the burden on the right to vote increases, the justification for that burden must correspondingly increase in order for it to be constitutionally valid. The value of a flexible test is that the Court is not left having to decide whether to use the compelling state interest test, the rational relationship test, or refuse to explain how it reached the result it did. As previously mentioned, political participation rights are not absolute, and consequently, any test which attempts to analyze this right must reflect the fact that certain restrictions will be upheld, while others will not. The Court’s current approach in the area is hardly a model of rationality and tends to confuse the real issue in the case which is the appropriateness of the restriction.

The application of such a sliding scale approach will not

box, with the bond issue deemed to have been passed only if it was approved by a majority vote in the renderers’ box and in the aggregate of both boxes. Id. at 292. The state contended that the use of such a system encouraged prospective property owners to account for their property and thereby helped enforce the State’s tax laws. Id. at 298-99. Mr. Justice Marshall responded to the state’s contention:

It seems particularly dubious here, since under the State’s construction of the rendering requirement, an individual will be given the right to vote, if he renders any property at all no matter how trivial. Those rendering solely to earn the right to vote in bond elections may well render property of minimal value, in order to qualify for voting without imposing upon themselves a substantial tax liability. The rendering requirement thus seems unlikely to have any significant impact on the asserted state policy of encouraging each person to render all of his property.

Id. at 299-300 (emphasis added). In other words, the legislative means did not substantially further the legislative ends.

98. Professor Wilkinson, in a recent thought-provoking article on equal protection, has framed a test for analyzing political participation rights in the following way: “The Court may thus begin an analysis of state election law by asking, simply and straightforwardly, whether a significant measure of political equality has been denied. If it has, the practical inquiry must be whether judicial standards of sufficient coherence and specificity exist to remedy the problem.” Wilkinson, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 U. Va. L. Rev. 945, 976 (1975). It is not clear whether the Wilkinson test would include the means-focus test as a method of evaluation. The test proposed in this comment does not start out with the concept of political equality, but rather, includes the means-focus scrutiny at the outset as a way of allocating the burden of proof and establishing the state’s purpose in enacting the law. Practically speaking, the Wilkinson test and the test proposed herein may not differ in substance. However, the proposed test has been framed in current equal protection language in the hope that the Court may find this conceptually easier to adopt as opposed to merely dealing with the broad notion of political equality.
automatically dictate the result in a case. In fact, the ultimate resolution of the matter may depend upon who is sitting on the Court at the time of the decision. But at least by using a sliding scale, the debate will focus on the necessity for such a burden rather than debating which level of scrutiny to apply.

How the Proposed Test Would Work

An example of the test’s implementation would be useful. In *Rosario v. Rockefeller* the voter was required to enroll in the party of his choice at least thirty days before the November general election in order to be eligible to vote in New York’s next primary (held in June) and eleven months prior to a non-presidential primary (held in September).99 Using the more flexible approach to voting rights, the case might be viewed this way: First, this is not an area where the Court lacks an ability to effectively evaluate restrictions on the franchise since the evaluation of the burden seems very straightforward. Second, since the right to vote is not absolute, the state has the option of enacting laws restricting the franchise, especially here in order to prevent the voters of one party from voting in the primary of another party. Third, the means-focus test asks the question, do the legislative means (the legislation itself) substantially further the legislative ends (the legislative purposes)? Here the purpose of the state restriction is to prevent party raiding by imposing strict time limitations on declaring one’s party affiliation. While the restriction may be burdensome, the means do substantially further the ends since voters are required to make a choice of party affiliation well before the thought of crossing over to the other party and voting for the weaker candidate becomes politically realistic.99.1 Fourth, the last question, and the most crucial element, is the appropriateness of the restriction. While all may agree that the state of New York has a legitimate goal of limiting party raiding, the timing of such a restriction becomes the real issue. At this point the Justices will have to make a subjective value judgment as to whether this constitutionally guaranteed right can be burdened by this restriction. The answer cannot be gleaned from any model, but rather must be argued on the basis of a policy decision as to whether the increased state burden on the franchise can be correspondingly justified by the state’s desire to

99.1. Although this restriction might be invalidated as overinclusive, such a statistical determination may prove difficult. See generally Craig v. Boren, 97 S. Ct. 451, 460 (1976).
prevent party raiding. Obviously, such an approach will not satisfy those who desire simple formulas, but at least by using this framework, the issue of appropriateness will not be obscured by a debate as to which level of scrutiny to apply.

Chances for Implementation of the Proposed Test

Whether or not the Court will articulate a new right to vote test along the lines suggested is not clear. Even if the Court refuses to adopt a more flexible test for determining what is a "suspect classification" or a "fundamental right," the Court must still deal with the appropriateness of a restriction on a right that has already been declared fundamental. Although the Court still formally adheres to the two tier test,\(^{101}\) the reality of the matter is that the Court seems to be analyzing the propriety of the burden on a case by case basis.

The Court has maintained this degree of flexibility in every category of political participation rights by using a level of scrutiny which will bring the Court to its desired result. For example, in the area of state legislative redistricting (one man, one vote), the Court applies a less strict standard of review than it applies to congressional district lines. The Court tells us when examining the constitutionality of state legislative boundary lines, that it is using the rational relationship test.\(^{102}\) However, such a test in the past has nearly always resulted in upholding the state's classification and since the Court has not hesitated in this area to strike down variances it deems significant, it is clear that a stricter standard of review is being used.\(^{103}\) In the area of providing greater voter access to the ballot box, the Court uses the two standards depending upon the result it wishes to reach. This situation is evidenced by the Rosario and Kusper decisions where the Court used different tests to decide the validity of restrictions to prevent raiding in party primaries.\(^{104}\) Likewise, in assessing independent and

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\(^{100}\) Five Justices thought the time deadline was a minimal infringement since the law did not prohibit voters from voting but only imposed a time limitation on their enrollment. \textit{Id.} at 753-62. Four Justices felt that the state's interest in preventing party raiding was not substantial enough to enact such a lengthy time deadline since it assumed a willingness to manipulate the system which was not likely to be widespread. \textit{Id.} at 769 (Powell, J., dissenting).


\(^{103}\) \textit{See text accompanying note 45 supra.}

\(^{104}\) \textit{See text accompanying note 70 supra.}
third party candidate access to the ballot, the Court in *Lubin v. Panish* invalidated by means of the rational relationship test a California statute which effectively denied indigents access to the ballot because they were unable to pay the necessary filing fees. However, using the traditional rational relationship approach in *Lubin* the Court could have found a basis for the law by noting the state’s desire to limit ballot size and to have the candidates pay some of the election’s administrative costs. It is apparent in *Lubin* that the Court was employing some type of sliding scale in deciding the validity of the restriction.

Whether the Court will expressly label its evaluation of political participation rights as one of a sliding scale remains to be seen. Mr. Justice Marshall, dissenting in *San Antonio Independent School District v. Rodriguez*, proposed using a sliding scale for determining the extent to which interests not specifically mentioned in the Constitution are deemed fundamental. The thrust of the Marshall argument was that as the nexus between specific constitutional guarantees and the non-constitutional guarantee became closer, the nonconstitutional interest became more fundamental and the standard of scrutiny adjusted accordingly. Yet, the majority in *Rodriguez* rejected Marshall’s sliding scale approach when it declared that education was not a fundamental right under the Federal Constitution. Perhaps one way which the Court could adopt the sliding scale approach for analyzing political participation rights consistent with *Rodriguez* is to note the difference between analyzing whether a right should be declared fundamental and passing on the constitutional validity of a restriction on a right already declared fundamental. In the former, the analysis is directed to an inquiry of whether that interest is explicitly or implicitly guaranteed by the Constitution. In the latter situation, the Court is dealing with a declared fundamental right and assessing whether state restrictions pass constitu-

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106. One commentator has noted that this manipulative power reflects the fact that the rationality test is an “empty requirement and a misleading analytical device.” Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123, 128 (1972).
108. 411 U.S. at 102-03 (Marshall, J., dissenting).
109. 411 U.S. at 35.
110. Id. at 33-34.
tional muster. Thus, the Court's decision in *Rodriguez* has not foreclosed it from using a sliding scale approach for political participation rights.

A flexible approach to political participation rights could be a beginning to a search for a more viable overall equal protection standard. Even if the Court does not articulate the proposed test as such, it is helpful in analyzing the problems that the Court faces and its response to those issues.

**CONCLUSION**

The Court's current approach in analyzing the constitutionality of restrictions on political participation rights is at best uneven and is unsatisfactory due to a lack of judicial consistency. The problem stems from the fact that the Court uses the compelling state interest test in some situations and the rational relationship test in other circumstances without giving a clear explanation as to when a particular standard of review should be used. A more flexible approach to the question of political participation rights is in order. The new proposed test using a sliding scale would appear to be a more realistic mode of analyzing the difficult question of whether or not the restriction is appropriate in a democratic society. This test does not provide automatic answers to the issues before the Court, but does provide a framework within which the answers to these complex constitutional problems will not appear so mysterious.

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