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Freeholder Requirements in the Montana Code Annotated: Unconstitutional Restrictions on the Right of Political Participation

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FREEHOLDER REQUIREMENTS IN THE MONTANA CODE ANNOTATED: UNCONSTITUTIONAL RESTRICTIONS ON THE RIGHT OF POLITICAL PARTICIPATION

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> The true reason of requiring any qualification with regard to property in voters is to exclude such persons as are in so mean a situation as to be esteemed to have no will of their own.[1]

As the comment above indicates, eminent legal scholar Sir William Blackstone did not consider strength of character to be among the virtues of the non-landowner. Blackstone was not alone. Eighteenth century political theorists, citing Aristotle, Cato, Cicero, and Pliny, extolled the virtues of the freeholder,[2] who would have "a common interest in and a permanent attachment to society and the state."[3] During the formation of the American republic the influence of these theorists led to the adoption of restrictive limits on the right of political participation,[4] including confining voting, candidacy, and petitioning to the landowner.

The same theories inspired Montana lawmakers. Witness Judge Pigott's comments in an 1899 case contesting David Sweeney's election as the Mayor of Niehart, Montana:

> The Legislature doubtless intended to proscribe such requisites for eligibility to mayoralty as would tend to prevent those having no substantial interest in the well-being and prosperity of a municipality from holding its chief executive office.[5]

Despite recent United States Supreme Court decisions discouraging the use of property ownership as a measure of character, Montana's codes still contain many statutes which condition political participation upon freeholder status.[6]

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1. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 171 (1771-1773).

2. Freeholder is defined in BLACK'S LAW DICTIONARY 598 (Rev. 5th ed. 1979) as "[o]ne having title to realty." Montana's definition is similar. *See* MONTANA CODE ANNOTATED [hereinafter cited as MCA] §§ 7-2-4704(3), 70-15-206 (1979); Brodie v. City of Missoula, 155 Mont. 185, 193, 468 P.2d 778, 782-83 (1970). A freeholder is a landowner, and the two terms will be used interchangeably in this comment.

3. C. WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY, 1760-1860, at 5 (1960).

4. Although there is no specific right of political participation, the term is used to describe the privilege to engage in political activity without invidious state restrictions. *See generally* Leclerq, *The Emerging Federally Secured Right of Political Participation*, 8 IND. L. REV. 607 (1975).

5. Mayer v. Sweeney, 22 Mont. 103, 105, 55 P. 913, 914 (1899).

6. There are now approximately 50 such statutes in the MCA. The 1979 Legislature

This comment discusses Montana freeholder statutes which restrict political participation in three areas: voting, candidacy, and petitioning.[7] Constitutional authority for freeholder restrictions is examined. Constitutional objections are discussed, first in theoretical terms and then as applied. Succeeding sections focus on voting, candidacy, and petitioning restrictions, distinguishing each by its special legal treatment. This comment contends that nearly all of these statutes are unconstitutional.[8] Montana's legislature should remove the freeholder restrictions from them, thereby continuing the statutory reform begun by the recent recodification.[9]

I. RESTRICTIONS ON AMERICAN POLITICAL PARTICIPATION

A freeholder requirement is one of many restrictions placed on the ability of Americans to participate in what is called popular democracy. These restrictions include bona fide and durational residency,[10] age,[11] religious,[12] sex,[13] race,[14] and wealth[15] qualifica-

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repealed or removed freeholder restrictions from nine statutes, including MCA §§ 7-2-4601(2), -3-4346(1), -4-4301(1)(a), -4401(1), -5-4321(2), -6-2344(1), -4431(1), -14-4404, -35-2108(2) (1979). In most statutes, the freeholder restriction was replaced with a requirement that a voter or candidate need only be a "qualified elector." MCA § 13-1-101(6) (1979) equates "elector" with "voter," and MCA § 13-1-111 (1979) sets forth voter qualifications.

7. Montana freeholder statutes were discovered with the help of a computer search of the MCA which listed all the statutes containing the word "freeholder." This service is available through the Montana Department of Community Affairs, Capitol Station, Helena, Montana 59601. This technique does not identify all statutes which impose property restrictions. For example, MCA § 7-35-2101(1)(a) (1979) imposes a freeholder restriction without using the word "freeholder."

8. This comment deals only with political participation statutes. There are many other freeholder restrictions. *See, e.g.*, MCA §§ 2-9-507(1), 27-16-205, -403(1), -17-309, -18-722, 33-26-102, -104(1), 46-9-403(3) (1979) which require sureties to be freeholders or householders; MCA § 7-14-4203(1) (1979) which allows only freeholders to appraise damages caused by street grade change if city and adjoining landowner cannot agree; MCA §§ 7-21-2306(2)(a), -2407(3)(a) (1979) requiring itinerant vendors and transient retail merchants to be bonded by surety companies or two responsible freeholders; MCA § 69-14-1002(1) (1979) which allows freeholder railroad employees reimbursement for decrease in residence values caused by railroad terminal location changes; MCA § 70-32-206(1) (1979) which allows only freeholders to appraise the value of the household exempt from execution; MCA § 81-4-601 (1979) which allows only freeholders or resident stock owners to identify estrays.

9. *See* Dowling, *The Creation of the Montana Code Annotated*, 40 MONT. L. REV. 1, 16 (1979).

10. *See, e.g.*, MCA § 13-1-111(1)(c) (1979) which requires voters to be Montana residents, and residents of the county in which they vote for 30 days.

11. *See, e.g.*, MCA § 13-1-111(1)(b) (1979) which requires voters to be at least 18 years old.

12. *See, e.g.*, GA. CONST. art. VI (1777), *reprinted in* 2 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 799 (1906) [hereinafter cited as THORPE], which required Georgia representatives to be Protestants.

13. *See, e.g.*, PA. CONST. § 6 (1776), *reprinted in* 7 THORPE 3813, which gave men the right of suffrage.

14. *See, e.g.*, CAL. CONST. art. II, § 1 (1879), *reprinted in* 1 THORPE 415, which denied

tions. This section of the comment traces the history of American political participation restrictions, their constitutional bases, and their limits.

A. Constitutional Authority

As the introduction indicates, the idea that all men are not equal did not originate with the founders of our country. Despite the popular view that the American revolution created a democracy where all could participate in government, these restrictive political theories led to the belief that some mechanism for regulation of elections was necessary.[16] Thus the federal constitution contains bona fide and durational residency, citizenship, and age restrictions for federal political candidates.[17] Most of the power to regulate elections was left to the states,[18] however, and early American statesmen used this power and the restrictive political theories described above to fashion many limits on popular political participation. Every state has extensively regulated the right to vote or to be a candidate.[19] Most of these restrictions remained intact until the 1960's, when the Warren Court struck many of them down.[20]

Montana law reflects the impact of these restrictive political theories. Montana's first constitution imposed age, durational residency, and citizenship requirements on voters[21] and candidates,[22] and a taxpayer requirement on voters in any election concerning the creation of any levy, debt, or liability.[23] More important, the 1889 Constitution specifically gave the Montana Legislature the

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voting to Chinese, idiots, criminals, and embezzlers.

15. *See, e.g.*, N.J. CONST. arts. III, IV (1776), *reprinted in* 5 THORPE 2595, which required voters to be worth at least 50 pounds, assembly members at least 500 pounds, and legislative council members at least 1000 pounds.

16. The practical problems of conducting elections are another consideration. *E.g.*, states may require persons to meet certain reasonable voting requirements, Kramer v. Union Free School Dist., 395 U.S. 621, 625 (1969); candidacy restrictions limiting the size of the ballot reduce voter confusion, Storer v. Brown, 415 U.S. 724, 732 (1974); candidacy restrictions preserve the integrity of the electoral process by reducing the potential for frivolous candidacies, American Party of Texas v. White, 415 U.S. 767, 781-85 (1974); states have the duty to protect the integrity of the political process from frivolous candidacies, Bullock v. Carter, 405 U.S. 134, 145 (1972).

17. *See* U.S. CONST. art. I, § 2, cl. 2 (representatives); § 3, cl. 3 (senators); art. II, § 1, cl. 5 (president).

18. *See generally* U.S. CONST. art. I, § 2, cl. 1; § 4, cl. 1 which allows state legislatures to impose qualifications on federal elections but provides that Congress may override them.

19. *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1115 (1975). This article also contains an exhaustive summary of various state restrictions.

20. Leclerq, *supra* note 4, at 617.

21. MONT. CONST. art. IX, § 2 (1889).

22. *Id.* §§ 7, 11.

23. *Id.* § 2.

power to impose any other restrictions "necessary to secure the purity of elections and guard against abuses of the elective franchise."[24] Under the 1889 Constitution, Montana legislatures enacted numerous statutes restricting political participation, including the freeholder statutes which are the subject of this comment.[25]

Freeholder restrictions vary widely in operation and application. Most of Montana's freeholder statutes set no minimum landowning requirement[26] and could be satisfied by owning even the smallest amount of land.[27] By contrast, the Maryland statute invalidated in *Davis v. Miller*[28] required the ownership of real property worth at least $2,000. Montana's freeholder statutes apply in many situations. For example, only freeholders may become trustees of cemetery care and improvement associations[29] or citizen members of city-county planning boards.[30] Only freeholders may vote in agricultural association elections.[31] Montana citizens may not petition to extend county roads[32] or to create rural fire districts[33] unless they own land. In short, Montana law forecloses significant opportunities for those who do not own land. Most of these restrictions appear to be unconstitutional; the next part of this comment examines the constitutional checks on political participation restrictions.

B. Constitutional Checks

1. *Theoretical Model*

The equal protection clause[34] is the most effective check on the states' power to regulate political participation.[35] There were early,

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24. *Id.* § 9.

25. The 1972 Constitution contains few election restrictions, leaving the matter almost entirely to the legislature. MONT. CONST. art. IV, § 3 requires the legislature to enact requirements for adminstration of elections which shall secure their purity and guard against abuses.

26. *But see* MCA § 7-3-4346(1) (1978) which required city-county commissioners to own real property worth at least $1000. This statute was repealed by the 1979 Legislature. *See* note 6 *supra.*

27. *Accord,* Turner v. Fouche, 396 U.S. 346, 363 (1970).

28. 339 F. Supp. 498, 499 (D.Md. 1972).

29. MCA § 35-20-302(2) (1979).

30. MCA § 76-1-221(1)(d) (1979).

31. MCA § 35-16-302(1) (1979) provides that members of agricultural associations must hold title to land, MCA § 35-16-201 (1979) provides that only holders of title to land may incorporate into agricultural associations, and MCA § 35-16-313 (1979) allows only members or stockholders to vote.

32. MCA § 7-14-2601(1) (1979).

33. MCA § 7-33-2101 (1979).

34. U.S. CONST. amend. XIV, § 1 provides that "[n]o State shall . . . deny to any person . . . the equal protection of the laws."

35. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 763 (1978).

unsuccessful attempts to identify voting[36] and candidacy[37] as privileges of United States citizenship which states may not abridge.[38] The equal protection clause, however, provided the Warren Court's authority to strip away most of the invidious state restrictions during the 1960's. Once characterized as "the last resort of constitutional arguments,"[39] equal protection has become one of the most important vehicles for the protection of individual rights against the tyranny of majority rule. Equal protection is a particularly appealing constitutional argument because it embodies the idea of fairness which is at the heart of American democracy. Equal protection deals with legislative line-drawing and tests the method the government chooses to achieve an end.

The Court has developed at least two standards of review in equal protection analysis. General economic and social welfare legislation is subject to lower level review.[40] Here the Court looks for a rational relationship between the end desired and the legislative means employed to achieve it. If the Court can hypothesize that the legislature could reasonably conclude that the legislation would achieve the end desired, the legislation is upheld.[41] Under "strict scrutiny" analysis the Court demands that the government demonstrate that it is pursuing a compelling interest.[42] Strict scrutiny is triggered by legislative infringement on fundamental rights,[43] or by legislation which discriminates on some suspect basis.[44] The Court demands that a greater interest be served by such legislation because of the greater potential for infringement on individual rights.[45]

2. *Applied Equal Protection*

The foregoing analysis presents the theoretical model for a two-tier treatment of equal protection problems. Political partici-

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36. *E.g.*, Pope v. Williams, 193 U.S. 621, 632 (1904); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171 (1875).

37. *E.g.*, Snowden v. Hughes, 321 U.S. 1, 7 (1944).

38. U.S. CONST. amend. XIV, § 1 provides that "[n]o State shall make . . . any law which shall abridge the privileges and immunities of citizens of the United States."

39. Buck v. Bell, 274 U.S. 200, 208 (1927).

40. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087 (1969); TRIBE, *supra* note 35, at 1000.

41. *See, e.g.*, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); TRIBE, *supra* note 35, at 995; *Developments—Equal Protection, supra* note 40, at 1083.

42. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) where the Court noted that "[p]ressing public necessity may sometimes justify the existence of such [race] restrictions."

43. *Developments—Equal Protection, supra* note 40, at 1121.

44. *Id.* at 1088; TRIBE, *supra* note 35, at 1002.

45. TRIBE, *supra* note 35, at 1000.

pation restrictions have been subject to both levels of equal protection analysis. Voting restrictions have been invalidated, on the one hand, because voting was said to be a fundamental right.[46] On the other hand, voting restrictions were upheld in another case which did not accord fundamental status to voting.[47] Some litigants attempted to characterize freeholder restrictions as suspect wealth classifications.[48] Others tried to use the right to vote[49] or the right to associate[50] to secure fundamental status for the right to be a candidate.[51] Once the level of review was set, freeholder restrictions have been found to be both rationally related[52] and not related at all to a state interest.[53] So, even though the Court has never found a freeholder restriction which could withstand strict scrutiny,[54] there is no single accepted method of equal protection analysis.

Before we apply this analysis to Montana's freeholder statutes, it is important to note that equal protection analysis as applied by the Court does not perfectly conform with the model. Equal protection decisions, especially on voting rights, have been called result-oriented, unpredictable, and inconsistent.[55] Some commentators suggest that the Court should abandon its complex equal protection mechanism for a recognition that value judgments are required.[56] Others have suggested that recent cases demonstrate that the Court is indeed reverting to a sliding-scale approach in which the Court balances competing interests.[57] Future decisions in this area, therefore, may not be easily classified, although the Court's recognition of the need for value judgments could improve predictability.

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46. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

47. Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719, 732 (1973).

48. *Developments—Elections, supra* note 19, at 1221 n.19.

49. Even though there is no specific constitutional right to vote, the Court has fashioned a fundamental right to vote from the Fourteenth Amendment. *See* Lubin v. Panish, 415 U.S. 709, 721 (1974); Reynolds v. Sims, 377 U.S. 533, 562 (1964).

50. The right of association is a corollary of the First Amendment's protection of freedom of speech. *See generally* NAACP v. Alabama, 357 U.S. 449, 460 (1958).

51. *See generally* Leclerq, *supra* note 4, at 625; Gordon, *The Constitutional Right to Candidacy*, 25 U. KAN. L. REV. 545, 546 n.9 (1977).

52. Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719, 731 (1973).

53. Turner v. Fouche, 396 U.S. 346, 363 (1970).

54. Indeed, very few statutes survive strict scrutiny. 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, 8 (1972).

55. *See, e.g.*, Comment, *A Case Study in Equal Protection: Voting Rights Decisions and a Plea for Consistency*, 70 NW. U.L. REV. 934, 934 (1976).

56. *Id.* at 964; *see generally* text following note 72 *infra*.

57. *See, e.g.*, Storer v. Brown, 415 U.S. 724, 730 (1974).

II. FREEHOLDER VOTING RESTRICTIONS

A. *United States Supreme Court Treatment*

Half of the sixteen Constitutional amendments adopted since 1791 deal with voting or the electoral process.[58] The right to vote has been called the most precious of all our rights[59] and "preservative of other basic civil and political rights."[60] Voting seems fundamental to our system of participatory democracy. If voting is a fundamental right, voting restrictions should trigger strict scrutiny under equal protection analysis. This in turn should lead to the invalidation of voting restrictions which do not serve a compelling state interest. A number of decisions beginning with *Avery v. Midland County,*[61] however, suggest that the right to vote is fundamental only in general interest elections.

Avery extended the "one man, one vote" reapportionment decision in *Reynolds v. Sims*[62] to local government units with general governmental powers. Neither decision was unanimous; Justice Harlan dissented in both. In another dissent, in *Hadley v. Junior College District,*[63] Harlan emphasized his concern that the Court's interference in local government affairs was impeding the role of state and local governments as laboratories for social experimentation, and that "the greater diversity of functions performed by local governmental units creates a greater need for flexibility. . . ."[64] Harlan's persuasive dissent led to the majority's recognition that there might be elections in which *Reynolds* would not apply.[65] The Court found such an election in 1973 in *Salyer Land Co. v. Tulare Water District.*[66] Justice Rehnquist, writing for the majority, applied lower level scrutiny to a California statute limiting to landowners the right to vote on a water storage district's activities. The right to vote was not fundamental in this election because the water district did not exercise general governmental functions and only indirectly affected the plaintiff challenger.[67]

The Court had used strict scrutiny to invalidate property ownership restrictions on voting several times before *Salyer* was de-

58. U.S. CONST. amends. XII, XV, XVII, XIX, XXII, XXIII, XXIV, XXVI.
59. Wesberry v. Saunders, 376 U.S. 1, 17 (1964).
60. Reynolds v. Sims, 377 U.S. 533, 562 (1964).
61. 390 U.S. 474 (1968).
62. 377 U.S. 533 (1964).
63. 397 U.S. 50, 59 (1970)(Harlan, J. dissenting).
64. *Id.* at 66-67.
65. *Id.* at 56.
66. 410 U.S. 719 (1973).
67. *Id.* at 729.

cided. *Hill v. Stone*[68] illustrates this line of authority. In *Hill* the Court summarized its stance:

> [A]s long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or state can demonstrate that the classification serves a compelling state interest.[69]

Hayward v. Clay,[70] in which the Fourth Circuit Court of Appeals invalidated a South Carolina statute conditioning an annexation election upon a majority vote of affected landowners, typifies the current application of this basic principle.

The key, therefore, to assessing the constitutionality of freeholder voting restrictions is whether the election is of general or special interest. Although the Court has not provided a clear test for distinguishing the two, the distinction is crucial because no landowner restriction on the franchise has ever passed strict scrutiny.[71] The *Salyer* Court found that the water district election was of special interest because the district lacked certain governmental powers and because the district's activities would only indirectly affect the non-landowning challenger.[72] In *Hadley,* however, a junior college district election was found to be a general election even though the powers exercised were arguably less than those of the *Salyer* water district.[73] As to direct effect, surely the power to construct a dam and flood a valley has at least a potentially greater effect on a resident than the power to run a junior college in his city. The Court is making value judgments. Despite the complex analytical framework constructed for equal protection analysis, the Court is engaged in interest balancing. Value judgments and interest balancing are not all bad; indeed, seasoned judgment is the basis of justice. The foregoing analysis does suggest that there are in-

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68. 421 U.S. 289 (1975).

69. *Id.* at 297.

70. 573 F.2d 187 (4th Cir. 1978), *cert. denied*, 493 U.S. 959 (1978).

71. *See* text accompanying note 54 *supra.* The Court has never accepted any state assertion of a compelling interest. States have asserted that landowners will better inform themselves, Kramer v. Union Free School Dist., 395 U.S. 621, 631 (1969), are more responsible fiscally, Cipriano v. City of Houma, 395 U.S. 701, 704-05(1969), and that a freeholder requirement helps tax enforcement, Hill v. Stone, 421 U.S. 289, 299 (1975).

72. *See* text accompanying note 67 *supra.*

73. *Compare* Hadley, 397 U.S. 50, 53 (junior college district could levy taxes, issue bonds, hire and fire teachers, make contracts, supervise and discipline students, annex school districts, and condemn property) *with* Salyer, 410 U.S. 719, 723-24, 728 n.7 (water district could levy taxes, issue bonds, hire and fire staff, make contracts, condemn property, plus build dams, levees and irrigation works, generate and distribute hydroelectric power, and fix water rates).

fluences besides theoretical equal protection analysis in any political participation decision.

B. *Application to Montana Law*

Only one Montana statute directly burdens the right to vote with a freeholder requirement.[74] More common is a freeholder restriction on the right of petition, which indirectly restricts the right to vote.[75] Montana's 1979 Legislature removed freeholder voting restrictions from four statutes,[76] leaving a direct freeholder voting restriction only in agricultural association elections.[77] However, this remaining restriction is constitutionally permissible since the benefits and burdens of agricultural associations fall mainly on a distinctly indentifiable group of voters.[78]

Another indirect voting restriction is imposed by a group of statutes which limits to freeholders the ability to protest and thus to prevent annexation of land by an adjacent city.[79] Annexation is a perennial Montana problem; one of these statutes has survived numerous constitutional challenges before the Montana Supreme Court.[80] Allowing landowners to protest annexation effectively permits them to vote on overturning a city's decision to annex. In essence, this is an annexation election in which only landowners can vote.[81] Since annexation would result in a complete change in local government for residents of the area to be annexed, this is a general election.[82] The freeholder voting restriction is invalid unless it serves some compelling state interest. No state has ever met this burden.[83]

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74. MCA § 35-16-311 (1979).

75. *See* text accompanying notes 81 and 109 *infra.*

76. MCA §§ 7-5-4321(2), -6-2344(1), -4431(1), -14-4404. *See* note 6 *supra.*

77. MCA § 35-16-311 (1979).

78. *Accord,* Salyer, 410 U.S. at 729.

79. MCA §§ 7-2-4313(2), -4314(2), -4323(2), -4324(2), -4710(1), (2) (1979). MCA §§ 7-2-4741(1), -4751(1) (1979) (allow only landowners to petition for court review of annexation decisions.

80. REVISED CODES OF MONTANA (1947) § 11-403(1) (now codified at MCA § 7-2-4314(2) (1979)) allows a majority of resident freeholders to veto the annexation of contiguous lands by first class cities. The statute survived constitutional attacks in Burritt v. City of Butte, 161 Mont. 530, 541, 508 P.2d 563, 569 (1973); Brodie v. City of Missoula, 155 Mont. 185, 194-95, 468 P.2d 778, 783 (1970); Calvert v. City of Great Falls, 154 Mont. 213, 220-21, 462 P.2d 182, 186 (1969); Harrison v. City of Missoula, 146 Mont. 420, 426, 407 P.2d 703, 706 (1965).

81. Note, however, that this may be a single issue election. Different standards are applicable to single issue elections, where voter will is expressed directly rather than through elected representatives. Town of Lockport v. Citizens for Community Action, 430 U.S. 259, 266 (1977). *See also* TRIBE, *supra* note 35, at 772-73.

82. *Accord,* Hayward v. Clay, 573 F.2d 187, 190 (4th Cir. 1978), *cert. denied,* 439 U.S. 959 (1978).

83. *See* note 54 *supra.*

The freeholder restriction in these statutes actually deters, rather than serves, a compelling state interest. The Montana Supreme Court has recognized that easing annexation promotes a compelling state interest.[84] Opening the annexation election to non-landowners should make annexation easier since non-landowner residents of an area to be annexed will arguably favor annexation. They stand to gain city services but will only indirectly bear the cost of providing such services.[85] The compelling state interest in easing annexation is thus served by removing, rather than retaining, the freeholder restrictions.

III. Freeholder Candidacy Restrictions

The right to be a candidate is not generally accorded the fundamental status that the right to vote enjoys.[86] This, plus the fact that freeholder restrictions on candidacy fail to meet even the lower tier rational relation standard,[87] simplifies the constitutional considerations. Indeed, commentators suggest that all such candidacy restrictions are unconstitutional.[88] Two Montana freeholder candidacy restrictions have already been declared unconstitutional;[89] Montana's 1979 Legislature removed freeholder restrictions from four candidacy statutes.[90] It would seem logical that the five remaining statutes, limiting to freeholders the right to be trustees of cemetery care and improvement associations,[91] directors of agricultural associations,[92] and citizen members of city,[93] county,[94] or city-county[95] planning boards are unconstitutional. But their fate is

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84. Burritt v. City of Butte, 161 Mont. 530, 541, 508 P.2d 563, 569 (1973). The Montana Legislature expressed a similar philosophy in MCA § 7-2-4502 (1979), which allows cities of the first class to annex wholly surrounded lands without regard to freeholder protest.

85. The Court has recognized that renters do, albeit indirectly, bear the burden of real property taxes. City of Phoenix v. Kolodziejski, 399 U.S. 204, 210-11 (1970). Note that freeholders may elect *not* to receive city services when their land is annexed. MCA §§ 7-2-4205, -4305, -4409, -4506, -4610 (1979).

86. Bullock v. Carter, 405 U.S. 134, 142-43 (1972).

87. Turner v. Fouche, 396 U.S. 346, 363 (1970).

88. *Developments—Elections, supra* note 19, at 1223; *Accord,* Leclerq, *supra* note 4, at 652.

89. MCA § 7-3-4346(1) (1978) allowed only freeholders to become city-county commissioners and was declared unconstitutional in Warden v. City of Bozeman, Memorandum No. 2341 (D.Mont., Butte Division, 1973). MCA § 7-4-4401(1) (1978) allowed only freeholders to become aldermen and was declared unconstitutional in Sadler v. Connolly, ___ Mont. ___, 575 P.2d 51, 54 (1978). Both statutes were amended by the 1979 Legislature. *See* note 6 *supra.*

90. MCA §§ 7-3-4346(1), -4-4301(1)(a), -4401(1), -35-2108(2) (1978). *See* note 6 *supra.*

91. MCA § 35-20-302(2) (1979).

92. MCA §§ 35-16-202(1)(d), -314(1) (1979).

93. MCA § 76-1-221(1)(d) (1979).

94. MCA § 76-1-212(1) (1979).

95. MCA § 76-1-202(1) (1979).

not so easily resolved.

First, allowing non-landowners to be directors of agricultural associations is at least incongruous with the previous suggestion that it is constitutionally permissible to allow only freeholders to vote for them.[96] Even though the Court found in *Turner v. Fouche* that a freeholder statute bore no reasonable relation to a state interest in limiting the ballot to interested candidates,[97] it specifically reserved the question of whether in other circumstances such statutes might be constitutional.[98] This could be such a circumstance.

The state might well argue that only landowners are qualified to deal with the unique problems inherent in agricultural associations, and that it would be foolish to let mere lessees run in elections where only landowners can vote. On the other hand, lessees too could be familiar with the problems of agricultural associations. Further, since only landowners can vote for directors, landowners are in a good position to ensure that their interests will be protected by the candidates they elect. Maintaining a freeholder restriction on voters, but not on candidates, is consistent with traditional American distrust for elected officials. This suggests that in our system it is much more critical for the voter to be well-qualified than the candidate.

A second consideration is a possible change in the standard of review. Commentators have suggested[99] and lower courts have held[100] that the right to be a candidate is a fundamental right, triggering strict scrutiny of statutes which restrict it. The right to candidacy has been variously denoted as fundamental in itself,[101] as a fundamental first amendment right,[102] and as inseparably intertwined with the fundamental right to vote.[103] Only in *Turner* has the Court met the issue squarely;[104] its reluctance to decide which

96. *See* text accompanying note 78 *supra.*

97. 396 U.S. at 363.

98. *Id.* at 364.

99. *See, e.g.,* Leclerq, *supra* note 4, at 625; Gordon, *supra* note 51, at 552; Note, *Durational Residency Requirements for State and Local Office: A Violation of Equal Protection?,* 45 S. CAL. L. REV. 996, 1009 (1972); Note, *Durational Residency Requirements for Candidates,* 40 U. CHI. L. REV. 357, 369 (1973).

100. *See, e.g.,* Mancuso v. Taft, 476 F.2d 187, 196 (1st Cir. 1973); Zeilenga v. Nelson, 4 Cal.3d 716, 723, 484 P.2d 578, 581 (1971); McKinney v. Kaminsky, 340 F.Supp. 289, 294 (M.D.Ala. 1972).

101. Sorenson v. City of Bellingham, 80 Wash.2d 547, 552, 496 P.2d 512, 515 (1972); Cowan v. City of Aspen, 181 Colo. 343, 348, 509 P.2d 1269, 1272 (1973).

102. Minielly v. State, 242 Ore. 490, 499, 411 P.2d 69, 73 (1966); Fort v. Civil Service Comm'n, 61 Cal.2d 331, 335, 392 P.2d 385, 387 (1964).

103. Lubin v. Panish, 415 U.S. 709, 716 (1974); Bullock v. Carter, 405 U.S. 134, 142-43 (1972).

104. 396 U.S. at 362.

level of scrutiny to apply has confused the lower courts.[105] Elevating candidacy to a fundamental right would make a freeholder restriction on agricultural association directors even more difficult to uphold, and would seal the fate of the other statutes discussed above. A more plausible approach would be to denote the right to candidacy as fundamental except in special elections. This was done with voting[106] and is consistent with the Court's observation that voting and candidacy are closely related.[107]

IV. Freeholder Petitioning Restrictions

A. *Application of Voting Analysis*

By far the largest number of Montana freeholder statutes restrict to landowners the ability to petition local government for expansion or reduction of government services. In many instances, if enough landowners sign petitions the government is obliged to act.[108] Like the annexation statutes previously examined,[109] these statutes call for what are essentially elections in which only landowners can vote. Thus the standards discussed above on voting restrictions should be applicable. Most of the statutes involve the addition of land to or the creation of special improvement districts, such as hospital,[110] cemetery,[111] or rural fire districts.[112] Arguably, these are special elections like that in *Salyer* and the freeholder restrictions are valid. However, establishing a cemetery district or the boundaries of a rural fire district is certainly of general interest to non-landowner residents who use those services. A voting rights attack is therefore subject to the same general/special election distinction problem discussed above.[113] A more fruitful method of attack might be based on the right to petition for redress of grievances, which enjoys specific constitutional protection.[114]

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105. Gordon, *supra* note 51, at 571.

106. *See* text accompanying note 69 *supra.*

107. *See* text accompanying note 103 *supra.*

108. *See, e.g.,* MCA § 7-14-2601(1) (1979) which provides that freeholders may petition county to open roads; MCA § 7-14-2103(2) which provides that the duties of county commissioners include opening roads for which freeholders petition. *But cf.* MCA § 7-21-3101 (1979) which provides that county commissioners *may* establish public scales upon freeholder petition. When the government is not forced to act, these petitions seem less objectionable. Still, the statutes give legal authority to landowner petitions which is denied to non-landowner petitions.

109. *See* text accompanying notes 79-85 *supra.*

110. MCA § 7-34-2152 (1979).

111. MCA § 7-35-2101(1)(a) (1979).

112. MCA § 7-33-2101 (1979).

113. *See* text accompanying notes 71-73 *supra.*

114. U.S. Const. amend. I states that "Congress shall make no law . . . abridging . . . the right of the people peaceably to . . . petition the government for a redress of

B. *Constitutional Right of Petition*

The right of petition can be traced to the Magna Carta.[115] The right of petition is protected as one element of a broad right to freedom of expression.[116] Since the prohibition against federal abridgment of this first amendment right extends to the states through the Fourteenth Amendment,[117] a state must demonstrate a compelling interest in regulating the freedom of petition.[118] Freeholder restrictions have never met a compelling interest test in voting or candidacy cases.[119] It also seems unlikely that the state could meet such a burden here, especially since neither voting nor candidacy enjoys the same constitutional recognition as the right of petition.

This comment has suggested that a group of statutes allowing only landowners to protest annexation is invalid.[120] Those statutes also seem vulnerable to First Amendment attack as unconstitutional restrictions on the right of petition. Similarly, either method of attack would invalidate freeholder restrictions on the right to petition to *seek* annexation,[121] to create rural fire districts,[122] rural special improvement districts,[123] or county planning districts,[124] to open public scales,[125] and to extend or change public roads.[126] Another statute[127] provides three different methods for establishing free public libraries, two of which restrict the right to petition to freeholders or resident taxpayers. This freeholder restriction also appears to be unconstitutional.[128] On the other hand, the state might be able

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grievances."

115. 1 C. STEPHANSON AND F. MARCHAM, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 126 (2d ed. 1975).

116. *See, e.g.*, Schneider v. Smith, 390 U.S. 17, 25 (1968); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967); Thomas v. Collins, 323 U.S. 516, 530 (1954); DeJonge v. Oregon, 299 U.S. 353, 364 (1937).

117. Hague v. C.I.O., 307 U.S. 496, 512 (1939).

118. American Party of Texas v. White, 415 U.S. 767, 780 (1974); Williams v. Rhodes, 393 U.S. 23, 31 (1968).

119. *See* note 54 *supra.*

120. *See* text accompanying notes 79-83 *supra.*

121. MCA §§ 7-2-4601(3), -4705(2) (1979).

122. MCA § 7-33-2101 (1979). Other freeholder restrictions appear throughout Title 7, Chapter 33, Part 21, of the MCA.

123. MCA § 7-12-2102 (1979).

124. MCA § 76-2-101(1) (1979). *See also* MCA §§ 76-1-505(1), -505(2) (1979) conditioning extension of city-county planning board jurisdictional area upon freeholder petition or protest.

125. MCA § 7-21-3101 (1979).

126. MCA §§ 7-14-2103(2), -2103(3), -2601(1), -2611(1) (1979). Note that even though only freeholders may petition to open roads, lessees may be required to pay for them. MCA § 7-14-2501(1) (1979).

127. MCA § 22-1-303 (1979).

128. The resident taxpayer qualification does, however, considerably widen the classifi-

to assert a compelling interest in efficient land use to justify limiting to abutting landowners the right to petition to abandon or vacate adjoining public land.[129] Still another statute allows cities of the first class to annex wholly surrounded land regardless of freeholder objections.[130] In a comment which argues that freeholder restrictions are unconstitutional, there can be no objection to a statute which mandates *disregard* of freeholder protest.

CONCLUSION

State and local governments occupy a special place in the American system of democracy. Described as laboratories for social experimentation, these governments have generated ingenious and fundamental ideas about how to better govern America. With this freedom to be creative, however, comes the responsibility to adhere to the basic constitutional principles which guide our country. Our Constitution is no static document. Old ideas of who may responsibly participate in the experiment of democracy must give way to new interpretations of the right of political participation. Although property rights are the foundation of American capitalism, the United States Supreme Court has held that most landowner restrictions on the right of political participation are unconstitutional. This method of defining interested citizens, then, has failed, and states have the responsibility to eliminate these statutes from their codes.

Legislatures have other responsibilities, however, apart from purely constitutional considerations. A legislature has a unique position as the only branch of our government able to make laws. It can encourage respect for and compliance with the institutions with which we choose to govern by ensuring that legislation is cohesive and up-to-date. The 1977 Montana Legislature can be proud of the recodification it mandated. The 1979 Legislature removed freeholder restrictions from nine statutes. The elimination of the additional freeholder restrictions discussed here would encourage greater citizen participation in our democracy, foster greater respect for our government, and promote peaceful resolution of social conflicts. The 1981 Legislature has a unique opportunity to con-

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cation. A resident taxpayer need not own land but must satisfy the residency requirements in MCA § 1-1-215 (1979) and must be listed on the city or county assessment roll. *See generally* Mayer v. Sweeney, 22 Mont. 103, 106, 55 P. 913, 914 (1899) ("taxpaying freeholder" need not pay real estate taxes; taxes on personalty are sufficient).

129. MCA §§ 7-5-2504, -14-2616(1), -2616(2) (1979) allow abutting freeholders to petition county commissioners for abandonment of public sites in unincorporated townsites. MCA § 7-14-2601(1) (1979) allows freeholders to petition for abandonment of county roads.

130. MCA § 7-2-4602 (1979).

tinue Montana's statutory reform by removing the freeholder restrictions from these statutes.