The Constitutionality of Resign-to-Run Statutes: Morial v. Judicial Commission of Louisiana

Neil M. Horwitz

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.
THE CONSTITUTIONALITY OF RESIGN-TO-RUN STATUTES: MORIAL V. JUDICIARY COMMISSION OF LOUISIANA

INTRODUCTION

Founded on the notion that it is desirable to remove the judiciary from partisan politics, statutes requiring that a judge resign his post before running for nonjudicial political office have been adopted by a majority of the states. Although the need to maintain judicial integrity is significant, the constitutionality of the resultant intrusion on protected freedoms of voters and potential candi-

1 In discussing the need for resign-to-run statutes, the American Bar Association Reporter for the Code of Judicial Conduct notes that "by being a judge or a candidate for judicial office, a person does not surrender his rights as a citizen; nevertheless, the fundamental need for impartiality and the appearance of impartiality of judges dictates that limits be placed on the political conduct of judges and candidates for judicial office." E. Thode, Reporter's Notes to Code of Judicial Conduct 95 (1973).


dates has been questioned. The United States Court of Appeals for the Fifth Circuit recently considered this issue in Morial v. Judiciary Commission of Louisiana and held that Louisiana's resign-to-run rule is consistent with the first amendment rights of free speech and association and the guarantee of equal protection under the laws. Emphasizing the unique status accorded judges in our system of government and the possibilities for abuse of the judicial office, the court viewed the statute to be a reasonable exercise of legislative power. In light of the competing interests that come into play when judges seek to run for nonjudicial office in the face of a legislative prohibition that seeks to preserve a nonpartisan judiciary, an analysis of this decision and the constitutionality of resign-to-run statutes in general seems warranted.

**MORIAL v. JUDICIARY COMMISSION OF LOUISIANA**

Ernest Morial, a Louisiana state court judge, wished to pursue a campaign for the mayorality of New Orleans. A Louisiana statute

---


6 565 F.2d 295 at 307.

7 Id. at 302-03.

8 Id. at 297.

9 LA. REV. STAT. ANN. § 42:39 (West Supp. 1979). Section 42:39 provides that no judge except a justice of the peace may qualify as a candidate for nonjudicial office unless he resigns at least 24 hours before the qualifying date.
and a provision of its code of judicial conduct,\textsuperscript{10} however, required judges to resign their positions on the bench prior to running for any nonjudicial political office. After the Louisiana Supreme Court denied his request for a leave of absence,\textsuperscript{11} Judge Morial and thirteen citizen-voters brought suit in federal district court to enjoin enforcement of the resign-to-run rule.\textsuperscript{12} Granting relief, the district court found that the rule created "a 'chilling' and inhibitory effect" upon the plaintiffs' free exercise of speech and association in violation of the first and fourteenth amendments.\textsuperscript{13}

On appeal, the fifth circuit sitting en banc reversed.\textsuperscript{14} Taking guidance from the Hatch Act cases, wherein the Supreme Court upheld restrictions placed upon the political activities of civil service employees,\textsuperscript{15} the Morial court characterized the proper analysis

\textsuperscript{10} LA. REV. STAT. ANN., CODE OF JUDICIAL CONDUCT, Canon 7A(3) (West Supp. 1979). Canon 7A was modeled after 7A of the ABA Code of Judicial Conduct. The American Bar Association's canon provides in pertinent part that "[a] judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office . . . ." ABA CANONS OF JUDICIAL CONDUCT No. 7A(3). Canon 7A(3) initially was proposed by the ABA's Committee on Professional Ethics and Grievances and provided that "[w]hile holding judicial office [a judge] should decline nomination to any other place which might reasonably tend to create a suspicion or criticism that the proper performance of his judicial duties is prejudiced or prevented thereby." ABA CANONS OF JUDICIAL ETHICS No. 30 (1924). This version was criticized on the ground that it "left it to somebody to determine whether suspicion would point to [the judge]." REPORT OF THE 56TH ANNUAL MEETING OF THE ABA 179 (1933). The present wording of the canon assumes that "suspicion is likely to point to [the judge]," and it therefore requires that the judge resign prior to becoming a nonjudicial candidate. \textit{Id.}

\textsuperscript{11} 565 F.2d at 297. In a subsequent exchange of letters, the Supreme Court's Committee on Judicial Ethics informed Judge Morial that preliminary surveys were permissible to determine the extent of voter and financial support. \textit{Id.} at 301.

\textsuperscript{12} \textit{Id.} at 297.

\textsuperscript{13} Morial v. Judiciary Comm'n, 438 F. Supp. 599, 608 (E.D. La.), rev'd \textit{en banc}, 565 F.2d 295 (5th Cir. 1977), \textit{cert. denied}, 435 U.S. 1013 (1978). Terming Louisiana's interest in avoiding the appearance of impropriety as well as averting actual impropriety on the part of its judiciary "compelling," the district court nevertheless found the state's means to be "imprecise," "ineffective" and "far too broad." 438 F. Supp. at 611. The Louisiana statute and the canon were found to burden significantly and substantially the fundamental rights of all the plaintiffs. \textit{Id.} at 610. Since becoming a candidate is one way in which to implement first amendment freedoms, the statute and canon inhibited Judge Morial's constitutional rights. \textit{Id.} at 608, 610. The citizen-voters' right to vote and their first amendment right to freedom of association were infringed because they were restricted in supporting the candidate of their choice. \textit{Id.} at 610. Thus, the district court granted a preliminary injunction barring Louisiana's enforcement of the statute. \textit{Id.} at 612-13. The court reasoned that, without immediate injunctive relief, the citizen-voters would suffer irreparable harm and candidate Morial would be placed at a severe disadvantage in the campaign. \textit{Id.}

\textsuperscript{14} 565 F.2d at 296.

to be employed in reviewing the rule as a "means-end" test.\textsuperscript{16} Under this approach, as the burden on first amendment freedoms increases, the level of scrutiny appreciates accordingly.\textsuperscript{17} With this framework in mind, the \textit{Morial} court undertook a careful examination of the interests of Morial, the voters and the state that were implicated in the enforcement of the resign-to-run statute and canon.\textsuperscript{18}

Although the court noted that Morial had a substantial interest in being permitted to run for political office, it observed that the Louisiana rule did not impinge on other "core first amendment values."\textsuperscript{19} In support of this conclusion, the court pointed out that judges in Louisiana may freely vote for any candidate and express private opinions concerning political issues outside of the context of

\textsuperscript{16} 565 F.2d at 299-300. The fifth circuit considered several threshold questions prior to reaching the merits of the case. It initially determined that, although Judge Morial eventually resigned his judgeship and was elected Mayor of New Orleans, the case was not moot since "[s]uits challenging the validity of state election laws are classic examples of cases in which the issues are 'capable of repetition, yet evading review.'" \textit{Id.} at 297-98 n.3 (citing \textit{American Party v. White}, 415 U.S. 767, 770 n.1 (1974); \textit{Storer v. Brown}, 415 U.S. 724, 737 n.8 (1974); \textit{Moore v. Ogilvie}, 394 U.S. 814, 816 (1969)). The \textit{Morial} court noted that in none of the leading Supreme Court decisions had the suit been brought as a class action. 565 F.2d at 297-98 n.3; see \textit{Mandel v. Bradley}, 432 U.S. 173 (1977) (per curiam). \textit{See also} \textit{Magill v. Lynch}, 560 F.2d 22, 25 n.1 (1st Cir. 1977), \textit{cert. denied}, 434 U.S. 1063 (1978). The fifth circuit also rejected the argument that the case should have been dismissed for lack of subject matter jurisdiction in that it did not present a real case or controversy. 565 F.2d at 298-99. The court reasoned that, although Morial had yet to violate the law, his future conduct was sufficiently ar that Louisiana authorities could "determine that [this] conduct would . . . expose him to sanctions." \textit{Id.} Thus, "the threat of punishment . . . [could not] be characterized as 'imaginary or speculative.'" \textit{Id.} at 299. Finally, the court found that it was not precluded by principles of federalism and comity from entertaining questions of state judicial administration. \textit{Id.}

\textsuperscript{17} 565 F.2d at 299-300. The court rejected characterizing the type of analysis to be employed as a "balancing approach." \textit{Id.} at 299; see \textit{Magill v. Lynch}, 560 F.2d 22, 27 (1st Cir. 1977), \textit{cert. denied}, 434 U.S. 1063 (1978); \textit{Alderman v. Philadelphia Hous. Auth.}, 496 F.2d 164, 171 n.45 (3d Cir. 1974). Although the court noted that "the means-end fit" need not be perfect, the inquiry would require a "closeness of fit between [the] governmental interests" involved and the means used to effectuate them. 565 F.2d at 300. More specifically, since the resign-to-run statute imposed a prohibition on a non-speech activity, the court adopted a test whereby the restraint would be upheld if it was "justified by a reasonable necessity to burden those activities to achieve a compelling public objective." \textit{Id.} at 300 (citation omitted). The \textit{Morial} court admitted that its view of the proper constitutional analysis to be used had "not been articulated . . . in precisely this way" by the Supreme Court. \textit{Id.} at n.5.

\textsuperscript{18} See 565 F.2d at 301-03.

\textsuperscript{19} \textit{Id.} at 301. The \textit{Morial} court noted that "relegating one's robes to the closet is a heavy price to pay for tossing one's hat in the ring" and found that a burden upon the ability to run for office substantially affects freedom of political expression. \textit{Id.} \textit{See also} \textit{Mancuso v. Taft}, 476 F.2d 187, 195 (1st Cir. 1973); \textit{People's Party v. Tucker}, 347 F. Supp. 1, 3 (M.D. Pa. 1972); \textit{Zeilenga v. Nelson}, 4 Cal. 3d 716, 720, 484 P.2d 578, 580, 94 Cal. Rptr. 602, 604 (1971) (en banc). On the other hand, the court observed that candidacy is not a fundamental right. 565 F.2d at 301 (citing \textit{Bullock v. Carter}, 405 U.S. 134, 143 (1972)); see notes 54-61 and accompanying text infra.
a political campaign. These unabridged rights were found to mitigate the impairment of first amendment freedoms caused by restrictions on the right to candidacy. With respect to the rule's impact upon the plaintiff-voters, the court termed the burden inflicted by the statute "less substantial." While the attractive qualities of Louisiana judges as candidates for nonjudicial office was acknowledged, the court found that their exclusion from the pool of prospective office-seekers did not significantly reduce the availability of candidates to represent particular viewpoints.

Concluding its analysis of the interests of Morial and the voters, the court determined that strict constitutional scrutiny would be inappropriate. Instead, the proper inquiry was found to be whether the state had demonstrated a "reasonable necessity" for imposing the resignation requirement.

In determining the reasonable necessity for burdening the plaintiffs' rights with a resign-to-run rule, the court identified the interest of Louisiana in "assuring the impartiality of judicial administration" as "grave and honorable." Viewed in this way, the requirement of resignation made a "substantial contribution" to the goal of avoiding the appearance of impropriety during and after nonjudicial political campaigns. Thus, the first amendment chal-

---

20 565 F.2d at 301.
21 Id.
22 Id.
23 Id. at 302. The court stated that, where restrictions on candidacy had been struck down by the Supreme Court, it was because an "identifiable group or viewpoint" was being excluded. Id.; see Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Turner v. Fouche, 396 U.S. 346 (1970); Williams v. Rhodes, 393 U.S. 23 (1968). The Morial court contrasted those situations with the facts before it:

While we would be the last to deny that Louisiana state judges have qualities of talent and experience which make them attractive candidates for non-judicial office, excluding the class of judges cannot be said to have a major impact upon the availability of candidates to represent any particular group or viewpoint. Exclusion of judges from the pool of prospective candidates cannot be supposed to have a qualitatively different effect on the interests of voters than the analogous exclusion of equally talented and experienced federal and state civil servants, an exclusion which the Supreme Court found constitutional in [the Hatch Act cases].

565 F.2d at 302; see notes 75-90 and accompanying text infra.
24 565 F.2d at 302.
25 Id.; see note 17 supra.
26 565 F.2d at 302; see United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). Specifically, the resign-to-run rule was understood to advance the interests of Louisiana in preventing abuse of the judicial office by a judge during a political campaign, preventing abuse by a judge returning to his former position after a defeat, and avoiding the appearance of impropriety during and after the political campaign.
565 F.2d at 302.
27 565 F.2d at 303. The Morial court reasoned that "[h]e who does not hold the powers
With respect to the plaintiffs’ equal protection argument, the court noted that the rule created two classifications. First, while judges planning to run for nonjudicial office were required to resign, there was no proscription on judges seeking other judicial positions. In addition, only judges had to resign from office when running for a nonjudicial position. Although the district court found no rational basis for distinguishing between elections for judicial and nonjudicial office, the fifth circuit found sufficient differences of the office cannot abuse them or even be thought to abuse them.”

It was acknowledged by the court that Judge Morial intended to run as an independent candidate. Recognizing the “restrictive language of Letter Carriers,” which apparently limited the holding to partisan political activity, the Morial court nevertheless stated that this did not require “courts to ignore the reality of partisanship if the formality of party affiliation [was] absent.” The court noted that “[a] faction may form around a man as much as around a party label; the judicial office may be abused by using it to promote the interest of a faction as well as a formal party.”

In United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548 (1973), the Supreme Court stated that “plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited.”

This specific language was relied upon in Smith v. Ehrlich, 430 F. Supp. 818 (D.D.C. 1976), wherein the court upheld the constitutionality of a statute prohibiting partisan and nonpartisan political involvement by attorneys employed in the state’s legal services agencies. Recognizing that the power to regulate partisan political activities of government employees was clearly upheld by the Supreme Court, the Smith court found no “intimation that Congress was limited to controlling only partisan behaviour [sic]. In fact the Letter Carriers decision rather unequivocally reach[ed] the opposite conclusion.”

In interpreting Letter Carriers, the Magill court believed that when ostensibly nonpartisan elections are involved, the government still may restrict the constitutional rights of its employees if “political parties play[ed] a large role in the campaigns.”

The district court found that judicial and nonjudicial campaigns were similar because in both types of campaigns money is raised, speeches and promises are made and candidates attempt to appeal to diverse groups.
between the judiciary and other governmental bodies to justify the distinctive treatment. While the *Morial* decision addressed only the constitutionality of the Louisiana resign-to-run statute, it is likely that the opinion will be influential in judicial determinations regarding similar statutes in other jurisdictions. It therefore seems worthwhile to assess the soundness of the decision.

**THE "REASONABLE NECESSITY" TEST AND RESIGN-TO-RUN STATUTES**

Challenges to resign-to-run statutes typically focus on the restrictions such laws place on activities protected by the first amendment. Since these laws direct themselves to a specific part of the populace, they are also susceptible to attack on equal protection grounds. When confronted with first and fourteenth amendment

---

33 565 F.2d at 305. The *Morial* court referred to the fact that the judiciary is treated separately in the state constitution. *Id.* Furthermore, contrary to the findings made by the district court, campaign activities on the part of the judicial office-seekers were viewed to be different from those of people seeking election to other public offices. *Id.*

Recognizing that the "case [was] a difficult one" and that his "voice [was] a lonely one," Judge Fay dissented. 565 F.2d at 310 (Fay, J., dissenting). Noting that first amendment jurisprudence is in "flux," and that "reconciling the plethora of cases . . . is near to impossible," Judge Fay accepted the "reasonable necessity" standard adopted by the majority. *Id.* at 308 (Fay, J., dissenting). Since the district court made a finding of fact that judicial and nonjudicial campaigns are similar, see note 32 supra, the dissent thought the classifications created by the statute were constitutionally impermissible. 565 F.2d at 309 (Fay, J., dissenting). Judge Fay, however, did see merit in resign-to-run statutes that are applied to all office holders. *Id.* at 309-10 (Fay, J., dissenting).


When a suspect class or fundamental constitutional right is involved, "strict scrutiny"
claims, it is usual for courts to apply the same standard of constitutional scrutiny. In evaluating restraints placed on political activity by a state, the courts seek to determine how the limitations on individual freedoms advance governmental interests. The means employed to achieve the state’s interests will be upheld if they relate directly to the interests involved and have been so narrowly conceived as to have the least impact possible on protected rights. This “means-end” or “balancing” approach is not used, however,

is the appropriate standard of review. See notes 39-41 and accompanying text infra. A suspect classification is one that is invidious and arbitrary on its face. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (race); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (nationality).

In recent years, traditional equal protection analysis has given way to a standard of review which varies according to such factors as the importance of the governmental interest, the individual interests being burdened and the means used by the government to effectuate its interest in comparison to the possible alternatives. This new test is more means-oriented. By focusing attention on the means and its closeness to the interests sought, the hope is that this test will avoid the categorization of the traditional equal protection tests and thus be less result-oriented. See Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); Yarbrough, The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-so-Fundamental “Rights” or “Interests” Through a Flexible Conception of Equal Protection, 1977 Duke L.J. 143. See also Note, Equal Protection: Modes of Analysis in the Burger Court, 53 Den. L.J. 687 (1978).

Although judicial scrutiny in the first amendment area is usually termed a “balancing” process, the Supreme Court has stated that first amendment freedoms are not actually balanced against governmental interests. United States v. Robel, 389 U.S. 258, 268 n.20 (1967). The Court reasoned that it is “inappropriate for [the] Court to label one [interest] as being more important or more substantial than the other.” Id. Endorsing a “means-end” analysis, the Court quoted Chief Justice Marshall: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.” Id. (quoting M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)). Nonetheless, it is common for courts to refer to the proper method of scrutiny as being a balancing approach. See, e.g., Magill v. Lynch, 560 F.2d 22 (1st Cir. 1977), cert. denied, 434 U.S. 903 (1978); McNea v. Garey, 434 F. Supp. 95 (N.D. Ohio 1976). In Magill, the court stated that it could not “be more precise than . . . [to characterize] the Court’s approach as ‘some sort of “balancing” process.’ ” 560 F.2d at 27 (citations omitted).

when a fundamental right is burdened. In such circumstances, strict scrutiny is the applicable standard of review and the onus is placed upon the government to show that the law furthers a compelling interest, that it is closely related to the achievement of that interest and that less burdensome means are not available.

To date, the Supreme Court has not declared political candidacy a fundamental right. There is, however, both historical and case law precedent arguing in favor of the recognition of this right as fundamental. The debates surrounding the adoption of the Constitution in 1787 are replete with references to the need for the electoral process to be free from legislative intrusion. Discussion involved not only the issue of franchise, but also the extent to which there should be limitations placed on those seeking election. Addi-

---

39 Fundamental rights may derive from express provisions of the Constitution or may be implicit therein. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (right to privacy); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy). In recent years, the Supreme Court has been more reluctant to recognize fundamental rights. See, e.g., San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (right to education); Lindsey v. Normet, 405 U.S. 56 (1972) (right to governmental employment).

40 Under the Warren Court, the traditional two-tier test was criticized as being too result-oriented. That is, once the decision was made that a suspect class or fundamental right was involved, the challenged law generally would be struck down. On the other hand, when a rational basis test was found to be appropriate, the law was almost always upheld. See Bice, Standards of Judicial Review Under the Equal Protection and Due Process Clauses, 50 S. CAL. L. REV. 689 (1977). In Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), Justice Marshall observed that "[i]f a statute invades a 'fundamental' right or discriminates against a 'suspect' class, it is subject to strict scrutiny . . . [and] nearly always is struck down . . . [T]he only critical decision is whether strict scrutiny should be invoked at all." Id. at 319 (Marshall, J., dissenting) (citations omitted); see Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976). The Burger Court has taken a different approach and has struck down statutes using the minimal level of scrutiny. See, e.g., Stanton v. Stanton, 421 U.S. 7 (1975); Police Dep't v. Mosley, 408 U.S. 92 (1972); James v. Strange, 407 U.S. 128 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Reed v. Reed, 404 U.S. 71 (1971); note 35 supra. Minimal scrutiny under the Burger Court, therefore, "is not a toothless [standard]" nor one that predetermines the outcome of the decision. Mathews v. Lucas, 427 U.S. 495, 510 (1976). The Burger Court continues to utilize the language of two-tier analysis, but its decisions indicate a trend toward the same "balancing" or "means-end" test used in first amendment analysis.


43 See id. The framers of the Constitution feared that limitations placed on the right to vote and qualifications placed on the ability to become a candidate by state legislatures would destroy the republican form of government. James Madison, for example, stated that "[t]he qualifications of electors and elected were fundamental articles in a Republican
tionally, the debates on the passage of the fifteenth amendment, although inconclusive, indicate that the right to hold office was understood to be distinct from the right to vote and thus in need of specific protection.\textsuperscript{44} In recent years, various state and lower federal courts have acknowledged the existence of a fundamental right to candidacy.\textsuperscript{45} Notwithstanding the absence of a clear conceptual footing upon which to base this right, it appears that since political expression and voting are consistently found to be protected activities, candidacy is viewed to deserve constitutional protection as an inherent part of the political process.\textsuperscript{46}

Proponents of the recognition of a fundamental right of candidacy found support for their position in Williams v. Rhodes,\textsuperscript{47} decided by the Supreme Court in 1968. Williams involved a challenge to the validity of Ohio's election law which required political parties to obtain petitions containing a specified number of signatures of qualified voters before the party's candidates could be placed on the ballot in the 1968 presidential election.\textsuperscript{48} The effect of this law was to exclude new and minor parties and independent candidates from

\textsuperscript{44} See Gordon, supra note 42, at 548-50. Ms. Gordon states that the rights to vote and hold office were regarded by the framers of our Constitution as "crucial to the success of their new scheme of government, and... the Reconstruction Congress regarded them as indispensable to the security of political freedom for the emancipated slaves." Id. at 550. Despite these early indications that political candidacy was considered to be a fundamental freedom, however, "the extent to which the right to hold office was specifically meant to be defined and protected in the constitutional plan" remained "inconclusive." Id.


\textsuperscript{46} See Gordon, supra note 42, at 562-69. A footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938), was seen as "a caveat that the Court's standards of review may vary depending on the kind of legislation challenged." Gordon, supra note 42, at 563 (footnote omitted) (emphasis in original). Ms. Gordon reasons that certain language in Carolene Products places "candidacy on an equal basis with voting, although not as a right derived from the right to vote, and, therefore, as a fundamental right for no other reason than its connection with the political processes." Id. at 564 (emphasis in original).

\textsuperscript{47} 393 U.S. 23 (1968).

\textsuperscript{48} Id. at 24-25.
the ballot, while giving the two established political parties a monopoly. Stating that there was no compelling interest justifying the significant burden placed on the right to vote for the candidate of one’s choice, the Court sustained the plaintiffs’ equal protection claims. In reaching this conclusion, the Court referred to the “right . . . to cast [one’s] vote effectively” as one of “our most precious freedoms.” The decision of the Williams Court was interpreted by some as an endorsement of the idea that there is a fundamental right to candidacy. Emphasizing the ultimate implications of the right to vote effectively, it was reasoned that any regulations restraining the right of candidates to gain access to the ballot should be subjected to strict scrutiny. Whatever appeal this logic may have had for political purists, however, the Supreme Court later declined to adopt such a view. In Bullock v. Carter, the Court struck down a Texas law requiring that large filing fees be paid by candidates seeking access to the primary ballot. Giving close scrutiny to the state’s argument that the fee requirement was necessary to regulate the size of the ballot and finance the primary election,

---

48 Id. at 25.
49 Id. at 30. Discussing the importance of the right to vote, the Court stated that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which . . . we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” Id. at 31 (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).
50 393 U.S. at 31 (emphasis added). Ohio had contended that in the interest of fostering political stability, it could validly promote a two-party system. The Court rejected this argument, however, finding Ohio’s system to “[favor] two particular parties . . . and in effect [tend] to give them a complete monopoly.” Id. at 32. The state also believed its system ensured that people who disagreed with the two major parties would have an opportunity to express their preferences on leadership and issues. While this was a “laudable goal,” the Court reasoned that the Ohio system could not achieve this purpose because its “burdensome procedures . . . operat[ed] to prevent such [groups] from ever getting on the ballot . . . thus [denying] the ‘disaffected’ not only a choice of leadership but a choice on the issues as well.” Id. at 33.
51 See, e.g., Note, Durational Residence Requirements for State and Local Office: A Violation of Equal Protection?, 45 S. Cal. L. Rev. 996, 1009 (1972); Comment, Durational Residence Requirements for Candidates, 40 U. Chi. L. Rev. 357, 369 (1973); Comment, Equal Protection and Property Qualifications for Elective Office, 118 U. Pa. L. Rev. 129, 137-39 (1969). One commentator has stated that “free access to public office” is important because “[t]he promise of democracy is that today’s minorities, through rational persuasion and political maneuvering, can become tomorrow’s majority. The promise is dashed if today’s majority biases the structure of governmental institutions in favor of its own self-perpetuation.” Id. at 139 (footnotes omitted).
54 Id. at 149.
the Court described its inquiry as an examination "in a realistic light [of] the extent and nature of [the law's] impact on voters."\(^{56}\) Although the Bullock Court acknowledged that "the rights of voters and the rights of candidates do not lend themselves to neat separation," it observed that candidacy is not accorded the status of a fundamental right.\(^{57}\) In addition to confirming the notion that not all burdens on the exercise of the right to vote should be subject to strict scrutiny,\(^{58}\) the Court analyzed the constitutionality of the statute in terms of whether it was "reasonably necessary to the accomplishment of legitimate state objectives."\(^{59}\)

Bullock, and the Hatch Act cases that were to follow,\(^{60}\) indicate that if strict scrutiny is to be given to restrictions on the right to run for office, it is for some other reason than that candidacy is a fundamental right. Thus, a justification for employing a strict scrutiny approach to invalidate certain election laws sometimes has been based upon an appreciation of the interrelationship between restrictions placed on candidacy and the resulting impact on the fundamental right to vote. Where voters' rights are impaired by strictures placed on political candidacy, this approach considers the extent and nature of the infringement.\(^{61}\) A case-by-case approach finds

---

\(^{56}\) Id. at 143-45.


As recently as 1973, the first circuit held that candidacy is a fundamental right. Mancuso v. Taft, 476 F.2d 187, 196 (1st Cir. 1973). Following the Supreme Court's decision in United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), however, the first circuit changed its view. In Magill v. Lynch, 560 F.2d 22 (1st Cir. 1977), cert. denied, 434 U.S. 1063 (1978), the first circuit stated that, based on its interpretation of Letter Carriers, there was a different governmental interest involved in regulating the conduct of public employees as opposed to citizens in general. 560 F.2d at 27. Magill involved a suit brought by public employees. Thus, the court left unanswered whether candidacy might be a fundamental right for "citizens who are not government employees." Id.

California precedent long held that the right of candidacy was a fundamental right protected by the first amendment. See Zeilenga v. Nelson, 4 Cal. 3d 716, 720, 484 P.2d 578, 580, 94 Cal. Rptr. 602, 604 (1971) (en banc) (citing Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 335, 392 P.2d 355, 357, 38 Cal. Rptr. 625, 627 (1964)). But recently, in Bill v. Williams, 70 Cal. App. 3d 531, 139 Cal. Rptr. 19 (1977), a California court of appeals stated that "candidacy is not viewed as a 'fundamental right' which of itself warrants strict scrutiny. However, where a practice . . . also has a real and appreciable effect on the right to vote effectively, that practice is subject to rigorous judicial review." Id. at 535, 139 Cal. Rptr. at 21 (citations omitted).

\(^{58}\) Id. at 143-45.

\(^{59}\) Id. at 144.

\(^{60}\) See notes 75-90 and accompanying text infra.

support in the Williams and Bullock rationales, which considered the ability of individuals to vote effectively. Although it is difficult precisely to define the appropriate level of scrutiny to be applied, it seems clear that invalidation of state election laws has typically occurred where a given limitation placed upon candidacy effects a direct burden on the ability of a particular portion of the electorate to vote effectively. In such situations, the government’s interests must be compelling to justify interference with a fundamental right.

Where the infringement on voters’ rights is more incidental, however, fundamental right analysis becomes inappropriate. This was the case in Morial. The consequences of Louisiana’s resign-to-run law did not tend to exclude potential representatives of particular groups of people or political philosophies. Since the right to run for office is not fundamental and the statute had only an indirect impact on the rights of voters, the fifth circuit was free to apply something less exacting than strict scrutiny. The court’s adoption of a test whereby restrictions on political activity would be upheld only “if justified by a reasonable necessity . . . to burden those activities to achieve a compelling public objective” seems appropriate. This standard of review gives adequate consideration to the

Bullock v. Carter, 405 U.S. 134 (1972). See also Turner v. Fouche, 396 U.S. 346 (1970); Moore v. Ogilvie, 394 U.S. 814 (1969); Williams v. Rhodes, 393 U.S. 23 (1968). In Bullock, the Court analyzed the rights of candidates as they affect the fundamental right to vote, because statutes affecting candidates “always have at least some theoretical, correlative effect on voters.” 405 U.S. at 143. In Lubin, the Court noted the intertwining of candidacy and voting and stated that “voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance.” 415 U.S. at 716. In Storer, the Court made clear that the relationship between candidacy and voting does not mandate automatic invalidation of every restriction on the right to vote. Instead, the decision is a “matter of degree” and is based upon the interests of the state and the impact of the restrictions upon affected individuals. Id. at 730 (citation omitted). See generally Gordon, supra note 42. Ms. Gordon observes that

[p]rotection of candidates’ rights has been traced through a circuitous route whereby it is shown that voters’ rights are abridged by the impairment of a candidate’s ability to gain access to the ballot. It has been argued that the right to vote loses its importance in the absence of a meaningful choice for the voter and, hence, restrictions on candidates’ opportunities to run for office indirectly restrict voters as well.

Id. at 558 (footnote omitted) (emphasis in original).


See 565 F.2d at 302.

See notes 54-57 and accompanying text supra.

565 F.2d at 300 (citation and footnote omitted). The Supreme Court has characterized the nature of the governmental interest that must be shown to justify a restriction on first
importance of political activity as the "ultimate [form] of political expression in our society." 7

While the protection accorded first amendment activities under the reasonable necessity test seems to be of a suitable magnitude, the application of this standard by the Morial court stands on less firm ground. While acknowledging that the decision which a judge is forced to make if he is contemplating running for nonjudicial office burdens the exercise of an important right, 6 the court deemphasized the impairment of first amendment rights by examining the interests of judges left untouched by the law's scope. 66 Consideration of the interests left unaffected by the rule, however, appears irrelevant. When the Supreme Court engaged in this type of analysis in the Hatch Act cases, it did so in the face of a challenge to the Act on vagueness and overbreadth grounds. 70 Utilization of this approach to determine the significance of the intrusion on the freedoms of expression and association seems questionable when over-
breadth is not alleged and the constitutionality of the statute as applied is contested.

With respect to Louisiana's interest in ensuring "the actual and perceived integrity of state judges," the statute was found to be reasonably necessary. To the extent that forced resignation rids the appearance of abuse by a sitting judge during an election campaign, however, a leave of absence would be a less intrusive means to vindicate the state's interests. In addition, while resignation certainly prevents the possibility of immediate post-campaign abuses, there is nothing to prevent a defeated ex-judge from mounting a subsequent campaign for a judicial office. Although it is true that the state has a certain degree of latitude in choosing the best means to avoid the appearance of impropriety, the temporary nature of the resignation requirement brings into question both the reasonable necessity of the statute and its effectiveness. This is also true of the classifications created under the statute. Permitting judges to run for other judicial positions, while proscribing campaigns for nonjudicial office, was justified on the basis of the distinctive nature of the judicial position. The partisan character of nonjudicial races, where promises of post-campaign conduct are commonplace, was understood to present a situation where defeated judges could be accused of acting improperly in the post-campaign period. It is not unusual for would-be legislators defeated in a bid for elective office, however, to seek judicial positions. The possibility that these once-aspiring legislative office-holders could act in a partial manner, or appear to do so, seems just as likely as it does in the case of defeated judges.

The *Morial* court's analysis was patterned after the approach taken by the Supreme Court in the Hatch Act cases. These decisions upheld the constitutionality of sweeping restrictions on the partisan political activity of federal and state civil servants. A close examination of the governmental interests involved in those cases and the means used to realize them reveals that those decisions involved issues readily distinguishable from those presented in *Morial*.

The Supreme Court's initial consideration of the Hatch Act, *United Public Workers v. Mitchell*, concerned the constitutionality of section 9 which prohibits employees of the executive branch

---

11 565 F.2d at 302-03.
12 See note 35 supra.
13 565 F.2d at 305-06.
14 Id. at 305.
of the federal government from taking an active part in political campaigns. Balancing the individual freedoms that are circumscribed under the Act against the government interest in "orderly management of administrative personnel," the Court upheld the constitutionality of the Act, finding only a "measure of interference" with protected activities. In 1973, United States Civil Service Commission v. National Association of Letter Carriers and Brodrick v. Oklahoma further clarified the basis upon which the constitutionality of the Act rested. In Letter Carriers, the Court utilized a "balancing" approach and viewed the Act as "serv[ing the] great end of Government—the impartial execution of the laws." In order to realize this interest, the Court reasoned that it is necessary to permit some restrictions upon the constitutional freedoms of federal employees. The Court concluded that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of political conduct by federal employees." Brodrick applied similar reasoning in reviewing the validity of a state Hatch Act. While the Court noted that had the state act

---

74 Id. at 94-104. Section 9(a) of the Hatch Act, 5 U.S.C. § 7324(a) (1976), provides in pertinent part: "An employee in an Executive agency . . . may not (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or (2) take an active part in political management or in political campaigns."

75 413 U.S. at 548 (1973).


77 413 U.S. at 565. The Court balanced the interests of federal employees in being free to speak about "matters of public concern" with the government's interest in "promoting the efficiency of the public services it performs through its employees." Id. at 564 (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)). The Supreme Court interpreted the Hatch Act as prohibiting federal employees from taking "formal positions in political parties, . . . play[ing] substantial roles in partisan political campaigns and . . . run[ning] for office on partisan political tickets." 413 U.S. at 565. The Court recognized a congressional intent to prevent the possible creation of "a powerful, invincible, and perhaps corrupt political machine" by federal employees left unrestricted in their political activity. Id.

78 413 U.S. at 564. Important to the Court's evaluation and "balancing" of the competing interests was that the "restrictions . . . [were] not aimed at particular parties, groups, or points of view, but appl[ied] equally to all partisan activities . . . . They discriminat[ed] against no racial, ethnic, or religious minorities. Nor [did] they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls." Id.

79 Id. at 556. Justice Douglas wrote a strong dissent, reasoning that § 9(a) was written far too broadly and would have a "chilling effect" on the first amendment rights of federal employees. Id. at 596-98 (Douglas, J., dissenting).

been directed at private individuals it would have been violative of the first amendment, it interpreted the statute "to regulate political activity in an even-handed and neutral manner." Following the rationale of Letter Carriers, the Court held that the statute could validly prohibit the state employees from "becoming . . . candidates for any paid public office."

In all three of these cases, the Court was determining the constitutionality of statutes that dated back to the 19th century and were passed to limit the injection of partisan politics into the system of civil service. As less drastic means of preserving an impartial civil service system based on meritorious performance proved ineffective, the extent of the limitations placed on political activity

statute prohibited classified service employees from soliciting or receiving contributions for political organizations or candidates. In addition, the statute provided:

No employee in the classified service shall be a member of any . . . committee of a political party, or . . . of a partisan political club, or a candidate . . . to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

Id. 413 U.S. at 616-17. Every state has a Hatch Act similar to the federal statute. Id. at 604 n.2; see, e.g., Ala. Code tit. 36, ch. 26 § 38 (1975); Fla. Stat. Ann. § 110.092(4) (West 1973 & Supp. 1978); Haw. Rev. Stat. tit. 7, § 76-81 (1976); N.J. Stat. Ann. § 11:17-2 (West 1976); N.Y. Civ. Serv. Law § 107 (McKinney 1973); Or. Rev. Stat. § 260.432 (1977); Pa. Stat. Ann. tit. 71, § 741.904 (Purdon 1962 & Supp. 1978-1979); W. Va. Code § 29-6-19 (1976). When courts have found such statutes to be unconstitutional, they have done so on the basis of the overbreadth doctrine. See, e.g., Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971); Gray v. City of Toledo, 323 F. Supp. 1281 (N.D. Ohio 1971); Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966); Fort v. Civil Serv. Comm’n, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964). In such cases, courts usually emphasize that the governmental interests are valid and that carefully drawn statutes would be upheld. For example, in Gray v. City of Toledo, 323 F. Supp. 1281 (N.D. Ohio 1971), police department regulations prohibited promoting the candidacy of others, circulating petitions for candidates, serving on political committees, soliciting votes, speaking at political meetings and engaging in political discussions either while on duty or in the station house. Id. at 1287. The court held that the government interest in maintaining the integrity and efficiency of its public service "is of such a calibre that it may properly be classified as a compelling governmental interest," and this is "sufficient to justify an encroachment upon an individual’s first amendment rights." Id. at 1285. The court stressed, however, that the restrictions must be "directly related to the goal of prohibiting partisan political activity." Id. The court specifically stated that the "relinquishment" of the right of candidacy may constitutionally be made a condition of employment in the state civil service, but that this governmental restriction of constitutional rights must not "unduly infringe upon protected rights." Id.; accord, Bagley v. Washington Township Host. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966). The Gray court held that a city could not restrict the freedom of expression of its public employees on political subjects or candidates where "such activity [was] not directed towards party success." 323 F. Supp. at 1289 (citation omitted).

Yet, as the Letter Carriers Court observed, the modern-day Hatch Act only forbids political activity that is considered to be inimical to the efficient operation of the federal service. As a result, the restrictions placed on political activity are viewed to promote "impartial execution of the laws" and protect against the development of a corrupt political machine composed of government personnel. Significantly, the Act is also intended to preserve the rights of civil servants and protect them from coercion by their superiors.

Except for the need to maintain impartiality in the judicial system, the concerns to which the Hatch Act is directed are absent in the Louisiana resign-to-run rule. The statute and canon were not enacted in response to a history of abuses committed by Louisiana judges seeking election to nonjudicial positions or returning to office after defeat. If there was a generalized fear that such improprieties did occur, less intrusive means of preventing these wrongs were not attempted. Moreover, it seems obvious that Louisiana neither feared the creation of a corrupt political machine consisting of judges nor sought to protect judges from outside coercion. Since the only significant governmental interest to be fulfilled by the resignation requirement was impartiality, the Hatch Act cases do not seem too helpful in the assessment of the constitutionality of resign-to-run statutes.

While resign-to-run statutes may be valid restrictions on the rights of judges in some instances, their constitutionality should not be assessed without reference to the vagaries of judicial selection and political life in each state. If it can be shown that there has been a history of abuse of judicial office during or after nonjudicial campaigns, then there would be sufficient justification for a resign-to-run rule. Absent a background of political abuse, however, the significant intrusion of a broad resign-to-run rule upon the right to run for political office would appear unconstitutional.

---

87 See id. at 559-60.
88 See id. at 565.
89 See id.
90 As noted by the Letter Carriers Court, a major reason for enacting the Hatch Act was "to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." Id. at 566 (citations omitted). The Court reflected that Congress might at some later date discard this belief but this was "its current view . . . and [the Court was not] now in any position to dispute it. Nor, in [its] view, does the Constitution forbid it." Id. at 567.
CONCLUSION

Resign-to-run statutes seek to remove the judiciary from partisan politics and thereby prevent actual impropriety as well as the appearance of impropriety. This is a desirable goal and the *Morial* court has provided a sound constitutional framework with which to analyze such statutes. The facts and circumstances behind each state's resign-to-run statute, however, should be examined more closely than was done in *Morial* before the statute is found constitutional under the reasonable necessity standard.

*Neil M. Horwitz*