Missouri Law Review

Volume 83
Issue 1 *Winter 2018*

Article 10

Winter 2018

Is This Necessary: An Analysis of the Court's Relaxed Application of Anderson in Peters v. Johns

Aaron Hadlow

NOTE

Is This Necessary: An Analysis of the Court's Relaxed Application of *Anderson* in *Peters v. Johns*

Peters v. Johns, 489 S.W.3d 262 (Mo. 2016) (en banc)

Aaron Hadlow[*]

I. INTRODUCTION

In recent years, policing tactics have undergone increased public scrutiny as Black Lives Matter[1] and other social activists have called attention to incidents where police officers have used lethal force. Reports, such as the United States Department of Justice's Investigation of the Ferguson Police Department,[2] have revealed deeply systemic policing practices that enforce poverty among minority groups by means of racially-targeted policing practices and subsequent penalties. Perhaps nowhere in the country are these issues more pressing upon the minds of voters than in the St. Louis, Missouri, community. These issues are what motivated St. Louisan Rachel Johns to seek the Missouri House of Representatives' seat for her North County community. These issues are what motivated her to engage a political system that she had long felt "failed her." Johns, as any who seeks to do the hard work of effecting positive community change, was met with adversity: Her candidacy was challenged because she failed to meet the formal election requirements of Missouri's Constitution. The courts agreed with her challenger, and Johns was told

---

[*]B.A., Philosophy, Missouri State University, 2011; J.D. Candidate, University of Missouri School of Law, 2018. I extend my thanks to my wife and family for their continual support of my academic endeavors. I am also grateful to my faculty advisor Professor Reuben and the members of the *Missouri Law Review* for their thoughtful feedback throughout the editing process.

1. Beginning as "[a] call to action," the Black Lives Matter movement was formed as an activist organization that works to "creat[e] a world where black lives actually do matter" by encouraging social action to combat the violence inflicted on communities of color by "the state and vigilantes." Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015, 5:00 PM), https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement; *About: Build Power*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ (last visited Mar. 29, 2018).

2. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

she must wait – wait to run until 2018, wait to pursue her and her supporters' political objectives, and wait for the uncertain tides of political momentum to change, perhaps unfavorably.

This Note analyzes the Supreme Court of Missouri's application of *Anderson v. Celebrezze* in one of Missouri's most recent candidacy requirement cases, *Peters v. Johns*.[3] It argues that the court underappreciated the burden imposed on Johns by its two-year voter registration requirement.[4] Part II discusses the facts and holding of *Peters v. Johns*. Part III provides the legal background to help understand the court's decision. Part IV discusses the court's reasoning in *Peters v. Johns*, while Part V argues for a more rigorous application of the *Anderson* test.

II. FACTS AND HOLDING

On February 4, 2015, Rachel Johns, a resident of the 76th District of the Missouri House of Representatives, registered to vote.[5] In 2016, Johns declared her candidacy for the Democratic Party's nominee for the 76th District, which was to be decided during the August 2, 2016, primary.[6] Johns filed the required paperwork with the Missouri Secretary of State's Office.[7] Johns stated under oath that she "will qualify" to hold the office of state representative as required by Missouri's Constitution.[8]

Joshua Peters, the incumbent, was also running in the Democratic primary for the 76th District.[9] Peters filed suit in the Circuit Court of the City of St. Louis challenging Johns's candidacy.[10] Peters challenged Johns's candidacy pursuant to Missouri Revised Statute section 115.526 because she would not have been a registered voter for two years prior to the November 8, 2016, general election.[11] Peters argued that Johns, therefore, could not meet the two-year durational voter registration requirement found in article III, section 4 of the Missouri Constitution.[12] Article III, section 4 requires a candidate to be "a qualified voter for two years" prior to the date of the general election.[13] Peters sought to have Johns removed from the Democratic primary ballot.[14]

Johns argued that the durational voter registration requirement was constitutionally invalid because its temporary disqualification of her candidacy

3. Anderson v. Celebrezze, 460 U.S. 780 (1983); Peters v. Johns, 489 S.W.3d 262 (Mo. 2016) (en banc).

4. *See infra* Part V.

5. *Peters*, 489 S.W.3d at 265–66.

6. *Id.* at 266 & n.1.

7. *Id.* at 266.

8. *Id.*

9. *Id.* at 266 & n.2.

10. *Id.* at 266.

11. *Id.*; *see also* MO. REV. STAT. § 115.526 (2016).

12. *Peters*, 489 S.W.3d at 266; *see also* MO. CONST. art. III, § 4.

13. MO. CONST. art. III, § 4.

14. *Peters*, 489 S.W.3d at 266.

was a penalty for engaging in First Amendment protected "expressive speech."[15] Johns stated that she had not registered to vote because to do so "would mean endorsing a system that had continued to fail her community."[16] Further, Johns argued that the durational voter registration requirement unconstitutionally burdened her voting rights and the voting rights of the residents of her legislative district.[17]

The Circuit Court for the City of St. Louis held that the durational voter registration requirement did not constitutionally violate the First or Fourteenth Amendment.[18] The circuit court ruled that Johns be removed from the primary ballot.[19] Johns appealed directly to the Supreme Court of Missouri pursuant to the court's exclusive jurisdiction over constitutional questions.[20] The Supreme Court of Missouri held that (1) a "qualified voter" under article III, section 4 is a registered voter; (2) Johns failed to preserve at trial a Fourteenth Amendment Equal Protection claim;[21] (3) Johns's failure to register as a voter did not qualify as "expressive speech" under the First Amendment; and (4) article III, section 4 requirements did not violate the voting rights of Johns or the voters in her legislative district.[22]

III. LEGAL BACKGROUND

The holding in *Peters v. Johns* requires an understanding of the court's application of the First Amendment to the issues of symbolic speech, voting requirements, candidacy requirements, and associational rights. Part A of this section overviews the history of Missouri's voter registration requirements for candidacy. Part B of this section briefly reviews judicial levels of scrutiny. Part C of this section outlines a few relevant cases on expressive conduct. Part

15. *Id.* at 266, 270.

16. *Id.* at 270.

17. *Id.* at 266.

18. *Id.* The court noted that the basis of its decision relies on the First and Fourteenth Amendments and eschewed a "separate Equal Protection Clause analysis." *Id.* at 272 n.10. But the court recognized its decision "necessarily relies . . . on the analysis of a number of cases applying the 'fundamental rights' strand of equal protection law." *Id.*

19. *See id.* at 266.

20. *Id.* at 266 & n.3; *see also* MO. CONST. art. V, § 3.

21. The court quickly disposed of this claim. In doing so, it discussed the requirements of preservation. *Peters*, 489 S.W.3d at 269. To preserve a constitutional challenge, Missouri courts have held that a party must: (1) raise the challenge at the earliest opportunity; (2) state with specificity the constitutional provision at issue; (3) support the challenge with facts showing a constitutional violation; and (4) preserve the question throughout appellate review. *Id.*; Mayes v. Saint Luke's Hosp. of Kan. City, 430 S.W.3d 260, 266 (Mo. 2014) (en banc). The purpose for this rule is to allow the circuit court an opportunity to "fairly identify and rule on the issue." *Peters*, 489 S.W.3d at 269. Given the court's quick treatment of the claim, and the limited scope of arguments addressed here, this point is not addressed elsewhere in this Note.

22. *Id.* at 268–69, 271, 277–78.

D of this section discusses durational voter registration requirements and the impact of those requirements on (1) candidacy rights and (2) voter rights.

A. The Meaning of a "Qualified Voter"

Missouri Constitution article III, section 4 lays out the "qualifications of representatives."[23] Article III, section 4's durational voter registration provision requires representatives to "be twenty-four years of age, *and next before the day of his election shall have been a qualified voter for two years*."[24] The legislature's use of the words "qualified voter" dates back to Missouri's 1875 Constitution.[25] Under the 1875 Constitution,[26] other candidacy provisions similarly had a durational "qualified voter" requirement.[27] "Qualified voter" was also used to describe those entitled to vote.[28]

The court first read "qualified voter" to mean "registered voter" in *State ex. rel. Woodson v. Brassfield*.[29] In that case the court noted that if a law required registration, then a qualified voter was only one that had fulfilled the registration requirements.[30] Notably, under Missouri's 1875 Constitution, only white males twenty-one years of age or older were eligible for registration and thus, qualification.[31] As voting rights expanded beyond the narrow class eligible[32] under the court's early interpretation of "qualified voter," the court continued to reaffirm that "qualified voter" meant "registered voter."[33]

---

23. *See* MO. CONST. art. III, § 4.

24. *Id.* (emphasis added).

25. MO. CONST. of 1875, art. IV, § 4 (1909).

26. Missouri's 1875 Constitution became ineffective upon the ratification of the state's 1945 Constitution. Missouri's case law describing the development of the definition of "qualified voter" still relies, in part, on the 1875 provision. *See, e.g.*, State *ex rel*. Burke v. Campbell, 542 S.W.2d 355, 357 (Mo. Ct. App. 1976).

27. *See*, *e.g.*, MO. CONST. of 1875, art. IV, § 6 (1909) (state senators); *see also id.* art. VI, § 26 (circuit judges).

28. *See* MO. CONST. of 1875, art. VIII, § 2 (1909); *id.* art. IV, § 2; *id.* art. IV, § 5; *id.* art. VI, § 5; *id.* art. VI, § 25.

29. State *ex rel*. Woodson v. Brassfield, 67 Mo. 331 (1878).

30. *Id.* at 336.

31. *See* MO. CONST. of 1875, art. VIII, § 2 (1909).

32. *Id.* ("Every male citizen of the United States . . . who is over the age of twenty-one years . . . .").

33. *See, e.g.*, State *ex rel*. Burke v. Campbell, 542 S.W.2d 355, 357–58 (Mo. Ct. App. 1976); State *ex rel*. Mason v. Cty. Legislature, 75 S.W.3d 884, 887–88 (Mo. Ct. App. 2002).

B. Levels of Scrutiny

There are generally three levels of scrutiny applied by a court when it reviews a state law or regulation that restricts constitutionally protected activity.[34] Those three levels of scrutiny are (1) rational basis, (2) intermediate, interchangeably called "heightened," and (3) strict scrutiny. The level of scrutiny applied is determined by the constitutional right at issue. If a court regards a right as more important or fundamental, then the court examines the purpose of the state restriction more closely. Review under the rational basis test is the most deferential to state interests underlying a statute or regulation of constitutionally protected activity. A state restriction will be upheld under rational basis review if it is "rationally related to a legitimate state interest."[35] Formulations of the test applied for intermediate scrutiny vary, though generally courts balance the imposition of the restriction on the right at issue against the State's "important or substantial" interest underlying the restriction.[36] Finally, strict scrutiny requires the state restriction on constitutional rights be "narrowly tailored" to achieve a "compelling state interest."[37]

Under these tiers of review, the court often upholds state restrictions of individual rights when reviewed under rational basis. Similarly, outcomes under intermediate scrutiny review often favor state restrictions.[38] Unlike rational basis and intermediate scrutiny, strict scrutiny often results in courts striking down state restrictions on individual rights.[39]

C. Symbolic Speech and Expressive Conduct

The First Amendment protects "expressive conduct" as a species of "symbolic speech."[40] But, a party asserting a free-speech claim must first "demonstrate that the First Amendment even applies."[41] This burden of first demonstration may be met by showing that the conduct in question was expressive.[42]

---

34. Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 784 (2007).

35. *Id.* at 786.

36. *Id.* at 791 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

37. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800–01 & n.30 (2006).

38. Bhagwat, *supra* note 34, at 818. For example, in First Amendment cases "the lower courts' analysis of cases in different areas of intermediate scrutiny is very consistent – regardless of context, the government usually wins." *Id.*

39. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (coining the phrase that strict scrutiny is "'strict' in theory and fatal in fact").

40. *See* Clark v. Cmty. for Creative Non-violence, 468 U.S. 288, 293 (1984); *O'Brien*, 391 U.S. at 375; Texas v. Johnson, 491 U.S. 397, 403 (1989).

41. *Clark*, 468 U.S. at 293 n.5.

42. *See O'Brien*, 391 U.S. at 376.

Expressive conduct may trigger First Amendment protections when it is "sufficiently imbued with elements of communication."[43]

In *Clark v. Community for Creative Non-violence*, the U.S. Supreme Court did not disturb a lower court's finding of expressive conduct when demonstrators sought to sleep on the National Mall in Washington, D.C., in structures constructed to symbolize the plight of the homeless.[44] The Court upheld a National Park Service regulation, which prohibited overnight camping at the National Mall, on the basis of reasonable time, place, and manner restrictions.[45] In addressing the preliminarily issue whether conduct was expressive, and thereby warranting application of the First Amendment, the Court noted that "it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies."[46] This ruling did not "deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to it."[47] Subsequent First Amendment analysis for expressive conduct is predicated on this initial showing.[48]

The Supreme Court has given instructions on meeting this burden.[49] One way to meet this burden is to show that conduct is "necessarily expressive."[50] In *United States v. O'Brien*, the Court reviewed the constitutionality of 50 U.S.C. § 462(b), which prohibited the willful or knowing destruction or mutilation of one's Selective Service Registration Certificate.[51] A Selective Service Registration Certificate is commonly known as a draft card.[52] On March 31, 1966, David O'Brien and three fellow protesters burned their draft cards on the steps of the South Boston Courthouse.[53] The crowd that witnessed the event turned violent and O'Brien was escorted by an FBI agent inside the courthouse, where O'Brien was placed under arrest.[54] O'Brien told the FBI agent that he burned his draft card in political protest.[55] O'Brien also indicated his awareness of 50 U.S.C. § 462(b)'s prohibition on such acts.[56]

In analyzing O'Brien's conduct under the First Amendment, the Court remarked that it could not "accept the view that an apparently limitless variety

43. *Johnson*, 491 U.S. at 404 (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).

44. *Clark*, 468 U.S. at 291–93.

45. *Id.* at 294–95.

46. *Id.* at 293 n.5.

47. *Id.*

48. *Id.* at 293 (holding that a showing of expressive conduct sufficient to trigger First Amendment protections "only begins the inquiry").

49. United States v. O'Brien, 391 U.S. 367, 375 (1968).

50. *Id.*

51. *Id.* at 370.

52. *Id.* at 386.

53. *Id.* at 369.

54. *Id.*

55. *Id.*

56. *Id.*

of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[57] The Court noted that conduct with a "communicative element" may warrant First Amendment protection, but when "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest" may permit the State to regulate the activity.[58]

This application of heightened scrutiny[59] justifies a regulation if "[the regulation] furthers an important or substantial governmental interest"; if that interest "is unrelated to the suppression of free expression"; and if "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[60]

The Court found Congress to have "sweeping" power to raise and support armies.[61] Further, Congress could establish a "system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system."[62] The Court held that any legislation enacted to ensure "the continuing availability" of issued draft cards served a "legitimate and substantial purpose" because the draft cards served (1) as initial notice of registration and eligibility classifications, (2) as proof that the individual described on the card had in fact registered for the draft, (3) to facilitate communication between registrants and local draft boards, (4) as continual reminders of requirements imposed on the registrant to update information with local boards, and (5) as notice of prohibitions against deceptive misuse of certificates including alteration or forgery.[63] The Court also held that the regulation was narrowly drafted only to prevent "harm to the smooth and efficient functioning of the Selective Service System."[64] The Court distinguished the *O'Brien* restriction from others that specifically restricted "communicative element[s]" of expressive conduct, like a restriction punishing people who expressed their opposition to organized government by displaying a flag or other symbol.[65] The Court held that the *O'Brien* restriction was narrowly tailored to regulate the "noncommunicative" elements of O'Brien's conduct and any restriction on the "communicative" elements of O'Brien's conduct was incidental.[66]

While deciding *O'Brien*, the Court limited the scope of First Amendment protections for symbolic speech if the "incidental restriction" on free speech is

57. *Id.* at 376.
58. *Id.*
59. *See supra* Part III.B.
60. *O'Brien,* 391 U.S. at 377.
61. *Id.*
62. *Id.*
63. *Id.* at 377–79.
64. *Id.* at 382.
65. *Id.*; *see also* Stromberg v. California, 283 U.S. 359, 369 (1931) (striking down a prohibition on displaying a Communist Party flag).
66. *O'Brien*, 391 U.S. at 382.

"no greater than . . . essential" to further an "important or substantial" governmental interest.[67] The Court returned to the issue of symbolic speech in *Texas v. Johnson*, where it found a Texas flag-burning statute unconstitutional.[68]

In *Texas v. Johnson*, the Court laid out the elements required for expressive conduct to merit symbolic speech status.[69] Texas passed a statute[70] that prohibited the "desecration of a venerated object."[71] Gregory Lee Johnson participated in a demonstration that culminated when Johnson "unfurled the American flag, doused it with kerosene, and set it on fire."[72] Johnson was charged, convicted, and sentenced to one year in prison and a $2000 fine.[73]

In determining whether Johnson's flag burning warranted First Amendment protection as expressive speech, the Court asked whether Johnson acted (1) with "[a]n intent to convey a particularized message" and (2) whether "the likelihood was great that the message would be understood by those who viewed it."[74] The Court noted that the flag was central to Johnson's conduct and that flags are "[p]regnant with expressive content."[75] Moreover, the context of Johnson's conduct was at a political demonstration.[76] The Court concluded that Johnson's conduct was "intentional and overwhelmingly apparent," therefore, "sufficiently imbued with elements of communication."[77]

The Court applied heightened – but not strict – scrutiny, and found that the interests of Texas in "preventing breaches of the peace" and "preserving the flag as a symbol of nationhood and national unity" were insufficient to justify a restriction on Johnson's expressive conduct.[78] The Court emphatically held that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," citing thirteen cases that supported its proposition.[79]

In review, the Court's rulings for expressive conduct as symbolic speech afford First Amendment protections under free-speech claims only when a

67. *Id.* at 377.

68. Texas v. Johnson, 491 U.S. 397, 399 (1989).

69. *Id.* at 404.

70. TEX. PENAL CODE § 42.09(a)(3) (1989), *invalidated by Johnson*, 491 U.S. 397 (1989).

71. *Johnson*, 491 U.S. at 400.

72. *Id.* at 399.

73. *Id.* at 400.

74. *Id.* at 404 (alteration in original) (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974)). This is the test for expressive speech laid out by the Court in *Spence v. Washington*.

75. *Johnson*, 491 U.S. at 405.

76. *Id.* at 406.

77. *Id.* (second quote quoting *Spence*, 418 U.S. at 409).

78. *Id.* at 407.

79. *Id.* at 414.

claimant meets its burden of first demonstration.[80] This burden of first demonstration is met when a plausible contention is shown that the symbolic conduct in question is expressive.[81] Symbolic speech satisfies expressiveness when it is sufficiently communicative, in that (1) it intends to convey a particularized message and (2) there is a great likelihood that the message will be understood by those who viewed it.[82]

D. Candidacy Requirements

State regulation of elections has been the subject of U.S. Supreme Court review since as early as 1886.[83] Importantly, the Court has discussed the impact of state requirements for candidate filings and voting procedures.[84]

In *Anderson v. Celebrezze*, an independent presidential candidate was barred from the general election ballot in Ohio after not meeting an early filing requirement for candidacy.[85] Ohio required a filed statement of candidacy by a certain date.[86] The candidate failed to file the statement of candidacy by the deadline but met all other requirements.[87]

The Court noted the inseparability of candidates' access to the ballot with the rights of voters.[88] The Court recognized the necessity of regulating elections by reasoning that regulations ensure that the "democratic processes" are "fair and honest" and involve "some sort of order, rather than chaos."[89] This paramount state interest warranted a delicate balancing of "the character and magnitude of the asserted injury to the rights protected by the First . . . Amendment[] that the [candidate] seeks to vindicate" against the identified and evaluated "precise interests put forward by the State as justifications for the burden imposed by its rule."[90] The balancing test further required the Court to "not only determine the legitimacy and strength of each of those interests" but also

80. *See* Clark v. Cmty. for Creative Non-violence, 468 U.S. 288, 293 n.5 (1984).

81. United States v. O'Brien, 391 U.S. 367, 375 (1968).

82. *Johnson*, 491 U.S. at 404.

83. *See* Yick Wo v. Hopkins, 118 U.S. 356, 371 (1886) (noting "[i]t has accordingly been held generally in the states that whether the particular provisions of an act of legislation establishing means for ascertaining the qualifications of those entitled to vote, and making previous registration in lists of such, a condition precedent to the exercise of the right, were or were not reasonable regulations, and accordingly valid or void, was always open to inquiry, as a judicial question"); *see also* Anderson v. Celebrezze, 460 U.S. 780 (1983) (candidates' rights); Burdick v. Takushi, 504 U.S. 428 (1992) (voters' rights).

84. *Anderson*, 460 U.S. at 782 (state requirements for candidate filings); *Burdick*, 504 U.S. at 430 (voting procedures).

85. *Anderson*, 460 U.S. at 782.

86. *Id.*

87. *Id.*

88. *Id.* at 786.

89. *Id.* at 788 (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

90. *Id.* at 789.

to "consider the extent to which those interests make it necessary to burden the [candidate's] rights."[91]

In applying the "character and magnitude of the asserted injury" prong of its balancing test, the Court determined that ballot access to independent candidates for the presidency was "uniquely important" because the President and Vice President are the only elected officeholders who represent the nationwide electorate.[92] Because of this unique importance, Ohio's filing deadline "more than burden[ed] the associational rights of independent voters and candidates. It place[d] a significant state-imposed restriction on a nationwide electoral process."[93]

The Court then proceeded to the second prong of its balancing test, which required it to identify and evaluate the "precise interests put forward by the State as justifications for the burden imposed by its rule."[94] The second prong required the Court to not only determine the "legitimacy and strength" of the State's interest but also the "extent . . . those interests make it necessary to burden the [candidate's] rights."[95] The Court identified three state interests: voter education, equal treatment, and political stability.[96] It ruled that the State's voter education interest was "important and legitimate"; however, it did not justify the restriction to the presidential ballot imposed by the early deadline because "modern communications" allowed for more effective voter education, while campaign spending indicated that most voter education occurred "largely during the month before an election."[97] The Court similarly found the State's interest in equal treatment to be insufficient to justify burdening the candidate's rights because independent candidates, unlike partisan candidates, do not participate in primaries and thereby do not have the same administrative concerns tied to "intraparty contest[s]."[98] It also found the State's interest in political stability an insufficient justification for the early deadline for independent candidates.[99] The Court held that Ohio's deadline "for independent candidates for the office of President of the United States [was not] justified by the State's asserted interest."[100]

Anderson's focus was on candidates' rights.[101] In *Burdick v. Takushi*, the Court engaged in a similar analysis to that in *Anderson* but for voters' rights.[102]

---

91. *Id.*

92. *Id.* at 794–95.

93. *Id.* at 795.

94. *Id.* at 789.

95. *Id.*

96. *Id.* at 796–806.

97. *Id.* at 796–97 (second and third quotes quoting Dunn v. Blumstein, 405 U.S. 330, 358 (1972))

98. *Id.* at 799–801.

99. *Id.* at 801–06.

100. *Id.* at 805–06.

101. It is important to again note, and the Court recognized, that candidates' rights are inextricably bound with voters' rights. *See id.* at 786.

102. Burdick v. Takushi, 504 U.S. 428, 438–39 (1992).

Burdick also illuminated the analysis required by "the extent to which those interests make it necessary to burden . . . rights" prong of the *Anderson* balancing test.[103] The issue before the Court in *Burdick* was "whether Hawaii's prohibition on write-in voting unreasonably infringe[d] upon its citizens' rights under the First . . . Amendment[]."[104]

The Court rejected the contention that voting regulations are always subject to strict scrutiny, which requires that the regulation be narrowly tailored to advance a compelling state interest, because it "would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[105] Rather, election efficiency and fairness are better achieved under a more "flexible standard."[106] That flexible standard, as applied in *Burdick*, was the *Anderson* balancing test.[107] The Court fleshed out the *Anderson* test by distinguishing the classification of burdens to voter rights under the First and Fourteenth Amendments.[108] If a challenged election regulation imposes a "severe" burden on voters' rights, then the regulation must be "narrowly drawn to advance a state interest of compelling importance."[109] But if an election regulation imposes only "reasonable, nondiscriminatory restrictions" upon voters' rights, then "the State's important regulatory interests are generally sufficient to justify" the regulation.[110] Essentially, the Court ruled that if the burden is "severe," then strict scrutiny applies.[111] But, if the burden imposed is reasonable and nondiscriminatory, and thereby de minimis, then an important state interest is sufficient to support the regulation.[112] Before the Court proceeded to an analysis of the merits of Hawaii's interest, it first engaged in this burden determination.[113]

In doing so, the Court reiterated that the voters' rights at issue[114] were inseparable from candidacy rights.[115] It then found that Hawaii's write-in ballot prohibition only limitedly burdened the rights at issue because the prohibition was found to be "reasonable" and it did not require voters to "espouse positions that they do not support," but rather it "require[d] them to act in a timely fashion" in accordance with ballot access regulations to ensure the candidate of their preference is on the ballot "if they wish to express their views

103. *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789).
104. *Id.* at 430.
105. *Id.* at 433–34.
106. *Id.* at 434.
107. *Id.*
108. *See id.*
109. *Id.* (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).
110. *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).
111. *Id.* (quoting *Norman*, 502 U.S. at 289).
112. *Id.*
113. *See id.* at 434–39.
114. The voting rights identified were the right of expression and association with the candidate of the voter's choice. *Id.* at 430.
115. *See id.* at 434–35.

in the voting booth."[116] This finding of a limited burden triggered lesser scrutiny.[117]

The Court then identified Hawaii's precise interests, which justified the burden imposed by the State's prohibition on write-in candidates. Those interests were (1) "avoid[ing] the possibility of unrestrained factionalism at the general election," and (2) "guard[ing] against 'party raiding.'"[118]

Under (1), the Court reasoned that Hawaii was "within its rights to reserve '[t]he general election ballot . . . for major struggles . . . [and] not a forum for continuing intraparty feuds.'"[119] A prohibition on write-in candidates "is a legitimate means of averting divisive sore-loser candidacies."[120]

Under (2), the Court defined "party raiding" as the "organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election."[121] The Court reasoned that Hawaii's electoral process could be "circumvented in a party primary election by mounting a write-in campaign for a person who had not filed in time or who had never intended to run for election."[122] Further, Hawaii's electoral process could be "frustrated at the general election by permitting write-in votes for a loser in a party primary or for an independent who had failed to get sufficient votes to make the general election ballot."[123] The Court held that the write-in ban was a "reasonable way of accomplishing" these goals.[124]

IV. INSTANT DECISION

Part A of this section discusses the majority's instant decision in *Peters v. Johns* authored by Judge Mary R. Russell. Part B of this section discusses Judge Laura Denvir Stith's dissenting opinion.

A. Majority Instant Decision

The Supreme Court of Missouri approached the issues in *Peters v. Johns* by first deciding the meaning of "qualified voter" as included in article III, section 4.[125] The court held that the meaning of "qualified voter" is to be understood as a registered voter because all jurisdictions require registration to

116. *Id.* at 438.

117. *See id*..

118. *Id.* at 439 (first alteration in original) (first quoting Munro v. Socialist Workers Party, 479 U.S. 189, 196 (1986), then quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 219 (1986)).

119. *Id.* (alterations in original) (quoting Storer v. Brown, 415 U.S. 724, 735 (1974)).

120. *Id.*

121. *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 n.9 (1983)).

122. *Id.* at 440.

123. *Id.*

124. *Id.*

125. Peters v. Johns, 489 S.W.3d 262, 266–67 (Mo. 2016) (en banc).

vote.[126] This was not always the case in Missouri.[127] Under Missouri's 1875 Constitution, a qualified voter included "all those who could appear at the polls and vote on election day."[128] Registration was required only for the most populous areas.[129] But with the adoption of the 1945 Constitution, Missouri incorporated an understanding that a "qualified voter" was any registered voter "when and where registration is required."[130] Because Missouri now requires registration to vote in all of its legislative districts, a "qualified voter" can only be a registered voter.[131] Under this reading, Johns could not be a "qualified voter" for the required duration in any sense that meets article III, section 4 requirements because she was not registered two years prior to the date of the general election.[132]

The court then held that Johns's failure to register to vote did not invoke First Amendment protection when she intentionally did not register to avoid "endorsing a system that had continued to fail her community."[133] The court held that Johns's asserted free speech claim did not trigger First Amendment protections when she could not show that her intentional failure to register was sufficiently communicative.[134] Johns's failure to register was not sufficiently communicative because she could not show that it was intended to convey that she did not endorse a political system that failed her community and that there was any likelihood her failure to register would have been understood as a political statement.[135] The court found Johns "[did] not assert that anyone viewed [her] voter registration records and observed her absence therefrom," nor did she "allege that she told anyone that she intentionally did not register," as an act of political protest.[136] The court concluded that under these conditions "there [was] simply no basis" to hold that Johns's failure to register was "any different from anyone else's failure to register simply out of neglect or indifference."[137]

The court then held that article III, section 4 did not violate Johns's candidacy or voting rights by requiring that Johns register a full two years prior to the date of the general election in which she sought ballot access.[138] The court applied the *Anderson* balancing test.[139] In assessing the character and magnitude of the asserted injury to Johns, the court found that article III, section 4's

126. *Id.* at 268.
127. *Id.* at 267.
128. *Id.*
129. *Id.*
130. *Id.* at 268.
131. *Id.*
132. *Id.*
133. *Id.* at 270–71.
134. *Id.* at 271.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 277.
139. *Id.* at 271–72.

regulation on voter registration invoked (1) Johns's right to ballot access and (2) First Amendment associational rights of voters in her district.[140]

Following *Burdick*, the court reasoned that it was "the severity of the burden on the asserted constitutional rights that produces the level of scrutiny."[141] The court found that for Johns's right to ballot access there was only a de minimis burden imposed by article III, section 4 where it (1) affected a non-fundamental right; (2) only delayed her candidacy, not prevented it; and (3) applied to any "putative candidate for state representative, regardless of economic status or political affiliation."[142] The court then held that given the de minimis burden, rational basis scrutiny applied.[143]

Under rational basis scrutiny, the court weighed the identified magnitude and character of injury to Johns's right to ballot access against the proffered interests of Missouri in article III, section 4 requirements.[144] The court recognized Missouri's interest in "protecting the integrity of [its] electoral systems from frivolous candidacies" to ensure that "election processes are efficient, and [to] avoid[] voter confusion caused by an overcrowded ballot."[145] Further, the court recognized that Missouri has an interest in "encouraging candidates to show a level of commitment to the electoral process and exhibit meaningful social engagement and interest in Missouri civic affairs."[146] The court reasoned that article III, section 4 requirements were a reasonable means of addressing these interests because they "ensure[] that a prospective legislator has taken the minimal steps necessary to be entitled to participate in the electoral process."[147]

Turning to the First Amendment associational rights of voters in Johns's district, the court held that the burden on voters in Johns's district was similarly de minimis when article III, section 4's nondiscriminatory application did not impact the right of voters to vote but rather "only temporarily delays their ability to vote for Johns."[148] Under this determination, the court reasoned, rational basis applied.[149] In balancing the injury to voters against Missouri's interest in election fairness, and recognizing that "candidates for state representative demonstrate sufficient seriousness about the electoral systems and social and civic engagement," the court held article III, section 4 to be a reasonable method for achieving Missouri's interests.[150]

140. *Id.* at 272–73.
141. *Id.* at 273 (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)).
142. *Id.* at 274–75.
143. *Id.*
144. *Id.* at 274–77.
145. *Id.* at 275.
146. *Id.*
147. *Id.* at 276.
148. *Id.* at 277.
149. *Id.*
150. *Id.* at 277–78.

B. Judge Stith's Dissent

Judge Stith concurred with the majority opinion regarding Johns's First Amendment claim that article III, section 4 violated her free speech rights.[151] However, Judge Stith dissented from the majority view that article III, section 4 did not violate Johns's First Amendment rights and the rights of the voters in the 76th District.[152]

Judge Stith argued that the court must engage in a full application of the *Anderson* test to determine the burden imposed on Johns's right.[153] This determination requires a full consideration of the injury to Johns's right against the State's interests supporting the voter registration requirement.[154] Accordingly, Judge Stith reasoned that "[i]f the [State's] interest is minimal or the necessity of imposing the burden questionable, then the burden is more likely to be substantial than where the interest protected is high and its connection to and the necessity for the burden to protect that interest is great."[155] Only after engaging in this first burden determination can the court determine the scrutiny level to be applied.[156]

Judge Stith argued that the majority failed to engage in this analysis "in context."[157] Stith's *Anderson* analysis "in context" would have the court, instead, consider both the State's interests alongside Johns's injury and the necessity of the requirement, *then* proceed to a scrutiny determination.[158] This stands in contrast to the majority's approach, which determined the burden in the "abstract" by only considering the rights at issue, foregoing an evaluation of the State's underlying interest and the necessity of the registration requirement.[159]

Judge Stith further argued that an *Anderson* analysis "in context" would have resulted in a substantial burden determination, rather than the majority's de minimis determination.[160] This difference would have resulted in an application of strict scrutiny, rather than the majority's application of rational basis

---

151. *Id.* at 278 (Stith, J., dissenting).

152. *Id.* Judge Breckenridge and Judge Teitelman joined Judge Stith in dissent. *Id.*

153. *Id.* at 279.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* Assumedly, under this approach the emphasis of the *Anderson* factors would lie in the interrelation of the injury, the interests, and the necessity of the requirement. On its face, this seems to suggest that the court should consider each factor twice. Once to make a burden determination and thereby decide which level of scrutiny is applicable, and then again when considering whether the rights and regulations sufficiently met the *Anderson* factors in their contextual application to the proper level of scrutiny. *See id.*

159. *Id.*

160. *Id.* at 279–80.

review.[161] Under strict scrutiny, a "restriction [must] be narrowly drawn to advance a state interest of compelling importance."[162] In Judge Stith's view, Missouri's voter registration requirement was not supported by a sufficiently compelling state interest; therefore, the restriction should not disqualify Johns's candidacy.[163]

V. COMMENT

This Part argues that (A) the majority opinion underappreciated the "character and magnitude" of the injury to Johns's First Amendment right, (B) the court over-appreciated the "legitimacy and strength" of the State's interests that support the voter registration requirement, and (C) the court over-appreciated the necessity of the voter registration requirement.[164]

A. The Majority Opinion Underappreciates Johns's Injury

The *Anderson* balancing test requires the court to first identify "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the [candidate] seeks to vindicate."[165] In *Peters v. Johns*, the court identified two constitutional rights at issue: (1) Johns's candidacy rights and (2) voter associational rights under the First Amendment.[166] In evaluating Johns's candidacy rights, the court framed the burden imposed as de minimis because (1) article III, section 4 placed a "minimal delay" on Johns's candidacy; (2) the provision was nondiscriminatory; and (3) the right to run for office was not a fundamental liberty interest.[167]

The following subparts address Johns's candidacy rights because any injury that burdens Johns's candidacy rights necessarily imputes upon the rights

161. *Id.* at 280.

162. *Id.* at 279 (alteration in original) (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

163. *See id.* at 282.

164. While equally worthy of consideration, this note does not fully examine the injury to the voters' First Amendment associational rights because of Johns's removal from the ballot. Nor does it consider the court's refusal to reach the First Amendment issue of Johns's failure to register to vote as symbolic speech. While not at issue in this case, there is a problematic failure of liberal free speech principles to protect the rights of women and minorities. *See generally* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); SPEECH AND HARM: CONTROVERSIES OVER FREE SPEECH (Ishani Maitra & Mary Kate McGowan eds., 2012); Ishani Maitra & Mary Kate McGowan, *On Racist Hate Speech and the Scope of a Free Speech Principle*, 23 CANADIAN J.L. & JURIS. 343 (2010).

165. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

166. *Peters*, 489 S.W.3d at 272.

167. *Id.* at 274–75.

of voters, as recognized by the interrelated nature of the rights in *Burdick*.[168] Since voters' rights have greater protection, as a recognized fundamental liberty interest, if a lesser protected candidacy right is violated, then the right of the voters to cast a ballot for that candidate would also be burdened. With that in mind, this section is broken into two parts: Part 1 addresses the court's underappreciation of the injury imposed on Johns by the delay, and Part 2 addresses the court's underappreciation that the voter registration requirement applies in a nondiscriminatory way.

1. The Court Underappreciates the Injury Imposed on Johns by a Delay in Candidacy

The court reasoned that because Johns is now registered to vote, she is only temporarily delayed from being a candidate and that this temporary delay is only a nominal injury.[169] The court relied on two cases to support this rationale, both of which are distinguishable from the instant case.[170] One involved a challenge to a minimum age requirement.[171] The other case challenged a requirement for completing a term of office before assuming a second elected role.[172]

A challenge to a minimum age requirement is different from a voter registration requirement because a minimum age requirement applies to nearly every facet of public life as a safeguard against immaturity and, in some cases, ensures that sufficient biological developments have occurred so that the reg-

168. Burdick v. Takushi, 504 U.S. 428, 433 (1992) (noting that "[e]lection laws will invariably impose some burden upon individual voters").

169. *Peters*, 489 S.W.3d at 274–75.

170. Clements v. Fashing, 457 U.S. 957 (1982); Stiles v. Blunt, 912 F.2d 260 (8th Cir. 1990). Judge Stith's dissent explains why these two cases are distinguishable. *Peters*, 489 S.W.3d at 281–82 (Stith, J., dissenting). The candidate requirement at issue in *Clements* barred sitting officeholders from running for other elected positions until the officeholder concluded his or her term in office. *Clements*, 457 U.S. at 960. Judge Stith distinguished the State's legitimate concern as not relevant to Missouri's concern because the State's concern in *Clements* was that candidates would neglect their present-office responsibilities while engaging in campaign activities. *Peters*, 489 S.W.3d at 281–82 (Stith, J., dissenting). Johns was not a current officeholder; thus, the concern in *Clements* did not apply. *Stiles* is distinguishable because the candidate requirement at issue was a minimum age requirement. *Stiles*, 912 F.2d at 261–62, 265–66; *Peters*, 489 S.W.3d at 282 (Stith, J., dissenting). The *Stiles* court reasoned that age correlates with maturity, and thus the State's concern that candidates have a minimum level of maturity, by way of reaching a certain age, was sufficiently related. *Stiles*, 912 F.2d at 267–68.

171. *Stiles*, 912 F.2d at 261–62.

172. *Clements*, 457 U.S. at 966–67.

ulated activity is safer for the participant – for example, driving license requirements,[173] alcohol and tobacco sales,[174] and contractual capacities.[175] Even candidacy minimum age requirements are undergirded by these considerations, and barring premature death, everyone will inevitably eclipse the minimum age. Minimum age requirements are warranted because their underlying rationales are more substantial and more closely related to the State's concern due to the close scientific correlation between age and maturity.[176] Discussed more fully *infra*,[177] Missouri's proffered interests that purportedly justify a voter registration requirement include (1) ensuring that candidates demonstrate a minimal level of civic engagement and (2) winnowing the field of frivolous candidacies. Each tenuously support the State's interest in maintaining orderly elections. Denying an eighteen-year-old, whose biological development is not yet fully complete, access to buy alcohol, or even access to a state legislative ballot, is distinguishable from denying a long-term resident of Missouri and community activist access to the ballot.

In light of the State's questionable interests, a more obvious reason that a voter registration requirement imposes a more significant harm than the court credits is that Johns sought to run in the 2016 election, rather than some other election.[178] Denied access to the ballot is significantly injurious because the social and political factors at play during any election are unique and factor into a candidate's decision to enter a race.[179] The issues that press upon the minds of the voters when considering candidates in the ballot box vary from election to election. The political machinery, which increasingly determines election outcomes, coalesces behind candidates based on these issues. In short, timing in elections is everything. Johns registered to vote in the wake of social

173. MO. REV. STAT. § 302.178 (2016).

174. MO. REV. STAT. § 311.325 (Cum. Supp. 2017) (alcohol sales); MO. REV. STAT. § 407.933 (2016) (tobacco sales).

175. MO. REV. STAT. § 431.055 (2016).

176. *See* Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 219 (2009) (discussing the important relationship between the development of the prefrontal cortex and judgment and decision making).

177. *See* discussion *infra* Part V.B.

178. Political scientists have long recognized the importance of timing in elections. *See* Christopher R. Berry & Jacob E. Gersen, *The Timing of Elections*, 77 U. CHI. L. REV. 37, 43 (2010) ("The ability to exclude parties or candidates from ballots, to regulate who may vote, and to determine the way in which those votes are tallied are standard tools for influencing the outcomes of democratic elections."); *see also* Walter J. Stone & L. Sandy Maisel, *The Not-So-Simple Calculus of Winning: Potential U.S. House Candidates' Nomination and General Election Prospects*, 65 J. POL. 951 (2003) (discussing generally the careful consideration of candidate entry into election races).

179. *See* Gordon S. Black, *A Theory of Political Ambition: Career Choices and the Role of Structural Incentives*, 66 AM. POL. SCI. REV. 144, 144–45 (1972); *see also* JOSEPH A. SCHLESINGER, AMBITION AND POLITICS: POLITICAL CAREERS IN THE UNITED STATES 6, 9 (1966) (discussing ambition theory in the context of politicians seeking office).

protests in her community.[180] The issues for which she advocated were unique to a political movement, of which the supporting tide may shift with future elections. Ironically, Johns answered the call to civic engagement only to be told that she was not qualified because she was not sufficiently civically engaged.[181]

2. The Court Underappreciates the Discriminatory Nature of the Voter Registration Requirement

The court underappreciates the disparate impact of a voter registration requirement on the class of those denied the right of suffrage because they were "adjudged incapacitated, incarcerated, on probation or parole after commission of a felony, or convicted of a crime."[182]

The devastating effect of mass incarceration on communities of color is undeniable.[183] Black neighborhoods in St. Louis have been especially affected by a regime of discriminatory policing practices and an application of a statutory scheme that disproportionately penalized black residents over white residents.[184] Johns sought to address these very issues by running for office.[185] While Johns herself was not subject to disenfranchisement because of laws that strip those convicted of felonies of their right to vote, some who might have supported her are barred from voting because of their felony convictions. These statutes are vestiges of a legal regime intended to prevent individuals of color from voting as well as to dilute support for candidates running to address issues affecting communities of color.[186] This disenfranchised class is also barred from running for office. While the court was certainly aware of the effect of voter registration requirements on potential candidates, and perhaps

180. Appellant's Brief at 1–2, Peters v. Johns, 489 S.W.3d 262 (Mo. 2016) (en banc) (No. SC 95678).

181. Similarly, the court arrived at a de minimis burden analysis for the voters' rights at issue. The court reasoned along the same lines that the burden on the voters is only temporary in that voters are not denied the right to vote for Johns in future election. Instead, voters are merely denied the right to vote for Johns in 2016; therefore, only a de minimis burden existed. *Peters*, 489 S.W.3d at 277.

182. *Id.* at 274 n.15.

183. *See generally* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004) (discussing the impact of mass imprisonment on community networks, social norms, citizenship and franchise, labor market exclusion, and enforced civic isolation).

184. *See* CIVIL RIGHTS DIV., *supra* note 2, at 42.

185. Appellant's Brief, *supra* note 180, at 1–2.

186. Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 563 (2003) ("Felon voting restrictions were the first widespread set of legal disenfranchisement measures that would be imposed on African-Americans, although violence and intimidation against prospective African-American voters were also common . . . .").

there is wisdom in not permitting those convicted of felonies to enter the policy-making arena, the court cannot fairly say that voter registration requirements are nondiscriminatory in application considering commonly known sociological facts.[187]

B. The Court Over-Appreciates the State's Interests and the Restriction Is Not Necessary

The voter registration requirement under article III, section 4 reveals itself as a substantial burden when considering Missouri's interest supporting the provision and the (lack of) necessity of the requirement. The court discussed two interests that Missouri had in a voter registration requirement: (1) to protect the electoral integrity from "frivolous candidacies" and (2) to require that candidates demonstrate a minimal level of civic engagement and commitment to Missouri's electoral process.[188]

As the court recognized, the State's interest in preventing frivolous candidacies and voter confusion need not be supported by a "particularized showing" of actual "voter confusion, ballot overcrowding, or the presence of frivolous candidacies" prior to the imposition of a "reasonable restriction[] on ballot access."[189] Important to the court's argument is its qualification of restrictions on ballot access as "reasonable."

A restriction on ballot access must be "justified by a legitimate interest" and the restriction must be a "reasonable way of accomplishing this goal."[190] For Missouri's voter registration requirement to be reasonable, it must accomplish the State's goal of protecting electoral integrity from "frivolous candidacies." As a policy, Missouri should cautiously review restrictions that aim to decide what makes a candidate "frivolous" because the "impact of candidate eligibility requirements on voters implicates basic constitutional rights."[191] A determination of "frivolity" seems difficult, if not impossible, for the State to achieve because it is entirely subjective, beholden to the individual or group of individuals making the determination. Many may have considered our sitting

187. One out of every thirteen African Americans of voting age cannot vote because of felony conviction disenfranchisement statutes. CHRISTOPHER UGGEN ET AL., STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 at 1–2 (July 2012), http://www.sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf. This rate is four times greater than non-African Americans, where nearly 7.7% of the adult African American population is disenfranchised compared to 1.8% of the non-African American populations. *Id.*; *see also* JEAN CHUNG, FELONY DISENFRANCHISEMENT: A PRIMER (Jan. 2017), http://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf (presenting same).

188. Peters v. Johns, 489 S.W.3d 262, 275 (Mo. 2016) (en banc).

189. *Id.* at 275 (citing Munro v. Socialist Workers Party, 479 U.S. 189, 194–95 (1986)).

190. *Id.* at 273 (citing Schulz v. Williams, 44 F.3d 48, 57 (2d Cir. 1994)).

191. Anderson v. Celebrezze, 460 U.S. 780, 786, 788 n.9 (1983).

President a frivolous candidate at the outset of his campaign. It seems unreasonable that whether a person be registered (or not) to vote for any period would be an indicator of "seriousness" or "frivolousness" but rather an indicator of whether one intends to vote – and given abysmal voter turnout rates, even this is questionable. Additionally, as Judge Stith noted in her dissent,[192] Missouri does not require a minimal period of voter registration for positions of higher office.[193] For example, Johns would have qualified to run for Governor, Lieutenant Governor, Attorney General, Secretary of State, and State Auditor without registering to vote.[194] Should it be assumed that the State does not care to ensure that officeholders of these positions are civically engaged and committed to Missouri's electoral process? Perhaps it could be argued that, practically speaking, to successfully wage a state-wide campaign for one of these positions, a candidate surely would have already held an elected office. But recent trends suggest that demonstrated prior civic engagement and commitment to the electoral process is neither an important consideration for voters nor a necessary requirement for ensuring that serious candidates receive the due attention and focus of voters.[195] That durational voter registration requirements are not required indicium of "seriousness" or "frivolity" for these higher offices strongly suggests that the restriction is unreasonable.

Nor does a voter registration requirement reasonably accomplish the State's interest that candidates demonstrate a minimal level of civic engagement and commitment to Missouri's electoral process. As the dissent notes, only one-third of registered voters even vote at all, much less demonstrate civic engagement beyond voting in major elections.[196] With such abysmal turnout rates in elections, it can hardly be said that being a registered voter indicates even the barest level of civic engagement. Thus, a durational voter registration requirement seems a poor indicator of civic engagement. As Judge Stith reasoned in her dissent:

---

192. *Peters*, 489 S.W.3d at 284 (Stith, J., dissenting).

193. For example, the only qualifications to run for governor are that the candidate be at least thirty-five years old, a citizen of the United States, and a resident of Missouri for ten years prior to the election. MO. CONST. art. IV, § 3.

194. *See id.* (governor); MO. CONST. art. IV, § 10 (lieutenant governor); MO. CONST. art. VII, § 8 (attorney general, secretary of state, and state auditor).

195. *See, e.g.*, Zachary Crockett, *Donald Trump Is the Only US President Ever with No Political or Military Experience*, VOX (Jan. 23, 2017, 10:07 AM), https://www.vox.com/policy-and-politics/2016/11/11/13587532/donald-trump-no-experience ("Trump's lack of public service is part of the 'outsider' appeal that may have contributed to his success: Polls have shown that most Americans, especially Trump supporters, distrust the government."); s*ee also* Jason Hancock, *Political Newcomer Eric Greitens Defeats Democrat Chris Koster in Missouri Governor Race*, KAN. CITY STAR (Nov. 9, 2016, 9:26 AM), http://www.kansascity.com/news/politics-government/election/article113266403.html (discussing Governor Eric Greitens's platform to clean up Jefferson City politics).

196. *Peters*, 489 S.W.3d at 283 (Stith, J., dissenting).

> Why is registration any more relevant to guaranteeing a committed and civic-minded representative than would be other far stronger indicators of public mindedness, such as testifying about public issues, demonstrating for or against public issues of the day, being active in the League of Women Voters, working for a candidate for election, or any of a dozen other indicators of civic pride and interest?[197]

In comparison, such a poor indicator cannot be called reasonable, especially when there are other, better indicators of civic engagement; perhaps none of which are better than actually running for office and fulfilling all the substantial requirements to do so.

Under these considerations, the court appears to have over-appreciated the State's interest supporting article III, section 4. It also neglected to adequately consider *Anderson*'s tailoring requirement, which requires the court to "consider the extent to which those interests make it necessary to burden the [candidate's] rights." But under *Anderson's* tailoring requirement, it is hardly clear that the voter registration requirement of article III, section 4 is "necessary" to achieve Missouri's interests in maintaining electoral integrity.

A narrow definition of *Anderson* necessity would require that the state interest be achieved by no other means. If the State wishes to winnow the field to only serious candidates, is winnowing not already achieved by the other requirements of article III, section 4?[198] Article III, section 4's residential requirements ensure that the candidate is part of the community that she seeks to represent, while the provision's minimum age requirement further winnows the field to those who have matured to twenty-four years old, giving individuals ample opportunity to learn a trade or complete a program of post-secondary education.

A broader interpretation of *Anderson*'s tailoring requirement might be satisfied if Missouri's interests were achieved by the restriction, even if there were better means of achieving the interest or if some other restriction already accomplished the stated interest. But under this broad interpretation, the meaning of "necessary" seems to be impoverished. Necessary is defined as "absolutely needed" or "required."[199] How could a restriction that is not absolutely needed be in any sense "necessary" when it is already achieved by other restrictions?

The State's interest in requiring candidates to demonstrate a minimal level of civic engagement and commitment to Missouri's electoral process is even less necessary than its winnowing rationale. There is no logical necessity in the relationship between the registered voter and that voter's civic engagement. As mentioned, scores of registered voters never make it to the polls,

197. *Id.*

198. *See* MO. CONST. art. III, § 4. Article III, section 4 also requires candidates be at least twenty-four years old and a one-year resident of the legislative district in which they seek election. *Id.*

199. *Necessary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/necessary (last updated Mar. 23, 2018).

while many volunteer in the community and advocate politically without ever casting a ballot. With such little civic engagement in the electoral process to begin with, it seems counterintuitive to discourage candidates who are recently moved to civic engagement. Candidates animated by recent events will represent the very issues that press upon the minds of voters at the ballot box.

VI. CONCLUSION

The *Anderson* test requires the court to balance "the character and magnitude of the asserted injury to the rights protected by the First . . . Amendment[] that the [candidate] seeks to vindicate" against the identified and evaluated "precise interests put forward by the State as justifications for the burden imposed by its rule."[200] The balancing test further requires the court to "not only determine the legitimacy and strength of each of those interests," but also it must "consider the extent to which those interests make it necessary to burden the [candidate's] rights."[201] In this analysis of Johns's rights, the court underappreciated the character and magnitude of the injury imposed by article III, section 4. It also over-appreciated the validity of the State's interests and the necessary extent by which the regulation accomplished those interests. These misappraisals resulted in a de minimis burden determination, resulting in an application of rational basis review. If the court applied *Anderson* more rigorously, then it may have deemed the burden imposed by the requirement substantial, thereby warranting an application of strict scrutiny. Application of strict scrutiny would have likely invalidated the voter registration requirement under article III, section 4. Johns would have then likely remained on the November ballot, where she may or may not have won the election. Her opponent was the incumbent, and she faced an uphill political battle. Regardless, voters did not have the chance to cast their ballots for her because of the court's misguided ruling.

200. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
201. *Id.*