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I. Introduction

Sufficient campaign funding for the purchase of vital mass media advertising before an election will mean little if a potential candidate cannot obtain a place on the ballot. Viewing the electoral process as a time continuum, the area of ballot access regulation is particularly important because it represents an essential "starting gate" for those who wish to participate in the political process as candidates. Certain areas of political regulation, for example, campaign finance regulation or regulation of the mass media, have been the focus of significant federal legislative activity. In considering ballot regulation, however, the emphasis is primarily on state and local law. Nevertheless, the federal courts, and especially the Supreme Court, have actively provided constitutional oversight of state laws restricting access to the ballot. Thus, in this area the judiciary, rather than the Congress, has become a forum for the equality-oriented reform that has characterized ballot regulation in the last decade.

While ballot placement may serve as an entry point for a political campaign, there are important and complex cause/effect relationships between regulating ballot access and regulating other areas of the elections process. For example, obtaining a ballot position in a state or local election may affect entitlement as a "legally qualified candidate" to equal opportunity under section 315 of the Federal Communications Act.[1] In addition, certain mechanisms provided by state law as means for achieving ballot access, such as petition or filing fee requirements, can be quite costly. This emphasizes the im-

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1. 47 U.S.C. § 315 (1970).

portant role of campaign financing, even before one technically may be termed a candidate.

In national election campaigns, state ballot access restrictions can pose a critical barrier to a viable candidacy for minor party or independent candidates. In turn, the success or failure of such candidates to obtain a place on the ballot in key states may be very important in determining the strategic allocation of campaign resources by major party candidates. Because ballot access for minor candidates may vitally affect the outcome of elections on a national plane, the significance of state ballot regulation should not be underestimated.

For instance, during the 1948 presidential election campaign, it was the strategy of Strom Thurmond's Dixiecrat Party to persuade Southern Democrats to accept the Dixiecrat candidates as the official nominees of the Democratic Party, forcing President Truman and Vice-Presidential nominee Barkley to seek a different position on the ballot. The Dixiecrats succeeded in Alabama (where Truman and Barkley were not on the ballot at all), Louisiana, Mississippi, and South Carolina. Elsewhere, the Dixiecrats ran under the "State's Rights" designation. Truman lost the four southern states in which the Dixiecrats had been listed officially as Democrats. If Thurmond had obtained access to the ballot under the Democratic Party label in a few other southern states such as Georgia, the election decision might have been thrown into the House of Representatives because of the closeness of the Electoral College vote between Truman and Republican nominee Thomas Dewey. Under those circumstances, Thurmond could have served as kingmaker.[2]

It has also been observed that another crucial factor in the 1948 presidential election was that third party candidate Henry Wallace was not on the ballot in Illinois; if he had been, he could have attracted enough support to wipe out Truman's small 33,612 vote plurality. This, too, might have altered the electoral vote to the point of sending the election to the House of Representatives, particularly if Wallace had made a better showing in California.[3]

Turning to a close election of more recent vintage, it is possible that the campaign of Democratic presidential nominee Jimmy Carter was significantly aided when the United States Supreme Court rejected independent candidate Eugene McCarthy's request to set aside an order of a New York state court, which kept McCarthy's name off the presidential ballot in that state.[4] Otherwise, McCarthy

2. I. Ross, The Loneliest Campaign, The Truman Victory of 1948 230-31, 247 (1968) (hereinafter cited as I. Ross).

3. *Id.* at 258-59.

4. Contessa v. McCarthy, 387 N.Y.S.2d 916, *rev'd.* 389 N.Y.S.2d 312, 429 U.S. 908 (1976) (application for stay of judgment denied).

might have drained off the liberal vote, and thus tilted the state, its massive electoral vote, and conceivably the election, away from Carter.[5]

Given the enormous political impact ballot placement can have, it would be useful to explore the origin of ballot access restrictions.

II. Background of Ballot Restrictions

Modern ballot restrictions trace their existence to agitation by Wilsonian Progressives of the early 1900's in favor of the "short ballot." In 1911, a Short Ballot Organization was formed, with Woodrow Wilson, then president of Princeton, serving as its head.[6] The organization advocated the "Short-Ballot principle," which maintained,

> First: That only those offices should be elective which are important enough to attract (and deserve) public examination; and,
> Second: That very few offices should be filled by election at one time, so as to permit adequate and unconfused public examination of the candidates.[7]

These reformers believed that holding too many election contests at one time resulted in voter confusion that precluded knowledgeable exercise of the franchise. In their words,

> When the ballot is long, *i.e.*, when there are many offices to be filled simultaneously by popular vote, the people . . . will not scrutinize every name, but will give their attention to a few conspicuous ones and vote for the others blindly. . . . [I]t is not the inconvenience of *voting* which practically disenfranchises the bulk of the citizens, but the inconvenience of *voting intelligently*.[8]

It was suggested that this problem could be alleviated and public interest in elections increased by removing insignificant or purely ministerial offices from the ballot. Greater use of nonpartisan ballots was also advocated in order to reduce the influence of the old political "trusts." This was viewed as promoting freer competition and as alleviating the difficulties facing new parties, which were otherwise seen as "stifled at birth."[9]

The reform movement was successful. Certain states shifted from primaries to nonpartisan balloting for small city and town elections,[10] and the short ballot agitation did result "in a considerable decrease in the proportion of public officials chosen at the polls."[11]

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5. J. WITCOVER, MARATHON, THE PURSUIT OF THE PRESIDENCY 1972-1976 630 (1977) (hereinafter cited as J. WITCOVER).
6. R. CHILDS, THE SHORT-BALLOT PRINCIPLES 170 (1911) (hereinafter cited as R. CHILDS).
7. *Id.* at vii.
8. *Id.* at 24-25 (emphasis in original).
9. *Id.* at 21-22, 26, 31-40, 43-50, 152-53.
10. *E.g.*, 9 ALA. CODE tit. 11, § 46-3 (1975).
11. G. POMPER, ELECTIONS IN AMERICA 7 (1968).

Interestingly, however, the original concept of the short ballot—restricting the number of electoral *offices* appearing on the ballot—was quietly translated into legislation to restrict the number of *candidates* appearing on the ballot for each office, although this was not advocated as part of the short ballot principle to any great degree. And, unfortunately, there has been little reasoned development of philosophy behind the restricted state ballot, either regarding limitation on the number of offices or candidates, beyond this early reformist activity. Subsequent case law evaluating ballot restrictions often seems to repeat circa-1910 catchwords of avoiding voter confusion or preserving electoral integrity, without any real analysis of the current validity of these concepts.

The development of regulation of candidate access to the ballot differs from regulatory reform in some other electoral areas where reform has proceeded in a more unified direction. With ballot access regulation, however, actually there have been two distinct eras of reform, which militated for change in opposing directions. As the Supreme Court aptly observed in *Lubin v. Panish*,[12] "[W]hile progressive thought in the first half of the century was concerned with restricting the ballot to achieve voting rationality, recent decades brought an enlarged demand for an expansion of political opportunity."[13] To understand the justifications behind each of the opposing trends in ballot regulation, one must turn first to interests supporting regulation in the first era of reform—that of restricting the ballot.

III. Interests in A Restricted Ballot

A. Promoting the American Two-Party Political System

Alexander Bickel viewed the existence of our essentially two-party political process as responsible for the system's unique stability:

> Now, the dominance of two major parties enables us to achieve a politics of coalition and accommodation rather than of ideological and charismatic fragmentation, governments that are moderate, and a regime that is stable. Without forgetting that of all the mysteries of government the two-party system is perhaps the deepest, one can safely assert that each major party exerts centripetal force; that it ties to itself the ambitions and interests of men who compete for power, discouraging individual forays and hence the sharply defined ideological or emotional stance; that it makes, indeed, for a climate inhospitable to demagogues; and that it provides by its very continuous existence a measure of guidance to the marginally interested voter, who is eminently capable of cast-

12. 415 U.S. 709, 713 (1974).

13. This two-phase configuration of electoral reform is not unique to the ballot access area, but appears as well in the regulation of voter registration and that of political parties and the nominations process.

> ing his ballot by more irrelevant criteria. The system, in sum, does not altogether take mind out of politics, but it does tend to ensure that there are few irreconcilable losers, and that the winners can govern, even though—or perhaps because—there are equally few total victories.[14]

Although recognizing the valuable role minor parties can play in the political process, and that states cannot choke off all political action that is not encompassed by the two major parties, Bickel asserted that "the states are entitled to put some store by the two-party system, and they ought to have the power to give it a certain edge."[15] Ballot access restrictions may serve this purpose by eliminating potentially fragmentary third party candidates from the ballot. The concept of restricting the ballot to protect the stability of the two-party system therefore fosters the preservation of a functional political system.

It may be true that the two-party system is uniquely stabilizing. While the system has never received constitutional status, nevertheless it has been able to achieve a strongly entrenched position. It thus seems logical that if the system continues to promote stability, it will maintain its predominance, without extreme state or federal government support, simply because it works. Nor should one uncritically accept legislation with the express purpose of promoting the two-party system, when it was written and passed by possibly self-interested legislators, primarily members of the two major existing parties. On the other hand, it is possible that reform that serves to weaken the two party process may also weaken systemic stability.

Justice Black, writing for the majority of the Supreme Court in *Williams v. Rhodes*,[16] which invalidated Ohio ballot restrictions against independent and minor parties, seemed especially mindful of the problem of self-interested legislators in stating,

> The State asserts that the following interests are served by the restrictions it imposes. It claims that the State may validly promote a two-party system in order to encourage compromise and political stability. The fact is, however, that the Ohio system does not merely favor a "two-party system"; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them.[17]

The Court seems to recognize that the abstract two-party system protection argument can be translated into an illegitimate argument for

14. A. BICKEL, REFORM AND CONTINUITY 22 (1971) (footnotes omitted) (hereinafter cited as A. BICKEL).
15. *Id.* at 85.
16. 393 U.S. 23 (1968).
17. *Id.* at 31-32.

protection by a state of the two existing major parties.[18] Perhaps this translation reveals the difficulty of separating the two-party system in the abstract from the political reality of the Democratic and Republican Parties.

Elsewhere, the Supreme Court appears hostile to the notion of protecting the political status quo; in *Jenness v. Fortson*,[19] the Court approved Georgia ballot access regulation because it "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." Likewise, in his dissent in *Lippett v. Cipollone*,[20] Justice Douglas questioned the compelling nature of a state interest in preserving the status quo and in preserving political stability by creating impediments to changes in party allegiance by a candidate.

It has even been suggested that legislation protecting the two-party system, thereby promoting moderate or centrist political thought, may actually constitute discrimination against groups and individuals according to the content of their ideas. Candidates representing extremist and unpopular ideas may be denied access to the ballot, yet it is protection of such unpopular viewpoints that lies at the heart of the first amendment concept of free expression.[21] An emphasis on the importance of the role that third parties may play in the political process thus may conflict with regulation protecting the two-party system.

Minor parties, through their representation of new and unpopular ideas, actually may foster systemic stability by providing a release valve for the expression of views and pressures that would otherwise go unheard.[22] If serious minor candidates representing such views were denied an electoral forum because they were precluded from placement on a ballot, then dissident pressure might explode in more destructive, far less legitimate ways. This would certainly not promote systemic stability by any definition.

Ballot access regulation clearly poses the potential difficulties inherent in seeking to preserve systemic stability through legislation. Accommodation is required between the importance of preserving the two-party system and the need to protect the valuable role played by third parties,[23] and the issue may be posed best as one of drawing a line so that only serious candidates are permitted on the ballot, whether their affiliation is with a major or minor party. To foster the

18. *The Supreme Court, 1968 Term, State Regulation of Placement on Ballot*, 83 HARV. L. REV. 86, 88 (1969) (hereinafter cited as *Court Review*).
19. 403 U.S. 431, 439 (1971).
20. 404 U.S. 1032, 1034 (1972) (Douglas, J., dissenting).
21. *Court Review, supra* note 18, at 88-89.
22. *See also* A. BICKEL, *supra* note 14, at 79-80; *Court Review, supra* note 18, at 89.
23. *See* A. BICKEL *supra*, note 14.

two-party system by discriminating against the first amendment rights of serious minor or independent candidates would not be legitimate, regardless of the stabilizing effect on the two-party system.

B. Assuring a Majority Winner

Another interest concerned with preserving the stability of our political system that has been mustered in support of ballot access restrictions is closely related to protecting the two-party system. This is an interest in precluding access to minor and independent candidates in order to ensure that the election results in a majority winner. Assuring that the electoral victor is a majority choice, without the burden of a runoff, was termed a legitimate state interest by the Supreme Court in *Bullock v. Carter*,[24] and Justice Stewart, dissenting in *Williams v. Rhodes*,[25] also supported this concept:

> Surely a State may justifiably assert an interest in seeing that its presidential electors vote for the candidate best able to draw the support of a majority of voters within the State. By preventing parties that have not demonstrated timely and widespread support from gaining places on its ballot, Ohio's provisions tend to guard against the possibility that small-party candidates will draw enough support to prevent either of the major contenders from obtaining an absolute majority of votes—and against the consequent possibility that election may be secured by candidates who gain a plurality but who are *vis-a-vis* their principal opponents, preferred by less than half of those voting. Surely the attainment of these objectives is well within the scope of a State's authority under our Constitution.[26]

If one accepts as desirable the characterization of American politics as pluralistic,[27] a picture of coalition-building by various interests as the key to elections, then nothing is inherently wrong with a minority, through the coalitional process, serving as kingmaker once in a while. Nor is an occasional plurality victory such a great danger to systemic stability. On the national level, several American Presidents have been elected by plurality, for example, Harry Truman and Jimmy Carter. Their terms of office have not evidenced significantly greater dissension than may normally occur within the pull and haul of day-to-day politics or that has been evidenced during the terms of some Presidents who won the office by a sizeable majority.

It can be said that if a recently elected official lacks majority support, the political system will be unstable and the official will not be able to govern effectively based on popular consent. This implies, however, that political affiliation and support remain static, some-

24. 405 U.S. 134, 145 (1972).
25. 393 U.S. 23 (1968).
26. *Id.* at 53-54 (Stewart, J., dissenting).
27. *See* R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

thing that simple observation of the American political scene indicates is not true. For instance, Lyndon Johnson was elected President by a landslide in 1964, yet, by 1968, the country and the Democratic party evidenced sharp political division.

If an absence of an electoral majority occurred very frequently, negative consequences for the stability of the political process might be a very real danger. But, if political expression by minority or independent candidates with recognized support, and the expressive and associational rights of their supporters, were stifled because such candidates were not permitted a place on the election ballot, equally negative consequences could result. The danger of suppressing the means effectively to air strongly dissident views of a significant minority is a danger that the first amendment was particularly designed to address. Again, if legitimate access to the ballot is barred for candidates representing these minority interests, supporters may be more likely to lose trust in the openness of the political system and to turn to illegitimate means of expression that could undermine the stability of the political process.

Thus, an inflexibly restrictive ballot for the purpose of ensuring a majority winner may be capable of damaging, rather than promoting, systemic preservation. In the area of regulating candidate access to the mass media, it may be more important that the views of minor candidates reach the public than that individual candidates themselves receive specific air wave access.[28] While this concept would seem superficially to apply by analogy to ballot access regulation as well, perhaps there are real differences. An election campaign serves as a focal point around which those with a dissident minority viewpoint can organize, and unless a candidate representing a serious minority can obtain a place on the ballot, the organization for purposes of political expression is not likely to be effective. It has been suggested that the importance of minor parties is primarily to prod major parties to take cognizance of the issues raised by minorities, and eventually to absorb these interests into the major party coalition.[29] But unless serious minority candidates are able to attain the forum of the ballot, they may not gain the attention of major parties. Thus, in order for significant minority viewpoints to reach the public, serious minor candidates should reach the ballot.

Even if the absence of a majority winner of an election is a threat to systemic stability, there are other ways to address the problem beside completely excluding minor candidates from the ballot; one suggestion is the run-off election. Justice Harlan, concurring in

28. *Cf.*, A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25-26 (1948).

29. *See* A. BICKEL, *supra* note 14, at 79-80; Illinois State Bd. of Elections v. Socialist Workers Party, 47 99 S. Ct. 983,991 (1979).

Williams v. Rhodes,[30] points out the possible use of this alternative and others to those barring third parties from the ballot:

> My Brother Stewart is, of course, quite right in pointing out that the presence of third parties may on occasion result in the election of the major candidate who is in reality less preferred by the majority of the voters. It seems clear to me, however, that many constitutional electoral structures could be designed which would accommodate this valid state interest, without depriving other political organizations of the right to participate effectively in the political process. A runoff election may be mandated if no party gains a majority, or the decision could be left to the State Legislature . . . Alternatively, the voter could be given the right, at the general election, to indicate both his first and his second choice for the Presidency—if no candidate received a majority of the first-choice votes, the second-choice votes could then be considered. Finally, Electors could be chosen on a district-by-district rather than an at-large basis, thereby apportioning the electoral vote in a way more nearly approximating the popular vote.[31]

It is true that all these suggestions have their own disadvantages; for example, a run-off election might entail additional expense, and selection by the legislature is counter-majoritarian.[32] But the added cost of a run-off does seem a better alternative when weighed against possible systemic instability that could result from a complete prohibition of ballot position to third parties, hence stifling the expression of minority interests with a significant modicum of support.

The electoral choice resulting in plurality victory was made by the voting public itself. If voters particularly feared a plurality outcome as undesirable, they could have responded differently with their vote, i.e., by not "wasting" their vote on a candidate unlikely to win. To say that something is "wrong" with the outcome of popular voting sounds paternalistic, and a like charge could be lodged against a legislative structuring of ballot access rules to prevent voters from choosing among a broader range of candidate (and ideological) choices solely because of a not-always-accurate assertion that a majority winner makes the political system a more stable one.

There are real fears today that the two-party system is in danger of degenerating, while one issue groupings gain in importance,[33] and conceivably, opening the ballot to serious minor candidates might exacerabate such a situation. There is also validity to systemic stability interests in restricting access to the ballot by third party candidates. But these concerns do not alone justify absolute restriction of the ballot to the two major parties.

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30. 393 U.S. 23 (1968).

31. *Id.* at 46 n.8 (Harlan, J., concurring).

32. *See Court Review, supra* note 18, at 90 n.17.

33. *See generally* discussion in *A. Ranney, The Political Parties: Reform and Decline*, in THE NEW AMERICAN POLITICAL SYSTEM 213 (A. King ed. 1978); *cf.*, Elrod v. Burns, 427 U.S. 347, 379, 385 (1976) (Powell, J., dissenting) (concern of J. Powell with invalidation of patronage practices, which were perceived as contributing to the strength of party).

C. *Restricting the Ballot to Serious Candidates*

A legitimate and important justification for some restricting of access to the ballot is that of reserving ballot position for serious candidates only. This interest is also related to the goal of ensuring a functional political system. It works to ensure robust political debate by concerned participants, rather than a campaign characterized by informational static from fringe and frivolous candidates using candidacy as a publicity stunt, not as a forum for expression on issues they sincerely believe important.

It is far easier to say, however, that the ballot should be reserved for serious candidates than it is to define what seriousness means. The term would seem to embody two concepts. First, there should be some focus on the candidate's subjective intent. For example, although Eugene McCarthy may not have believed that his 1976 presidential candidacy had a major chance of victory, he seemed to intend his candidacy to make a serious political point about deficiencies in the role of the two major parties in the electoral system.[34] Second, a determination of seriousness should in some measure be directed to the amount of public support for having a candidate on the ballot as a focal point for the expression of particular viewpoints on issues of concern to political minorities. For a place on the ballot, a candidate should be serious from both these perspectives.

Obviously, a determination of seriousness becomes a problem of line drawing at heart, and a particularly difficult one to quantify or encapsulate in neat formulae. The important problem of line drawing in the ballot access area will be discussed more fully subsequently. Nevertheless, it should be clear that this interest in ballot restriction does not dictate particular numerical limits on those candidates appearing on the ballot; if a large number were able to satisfy criteria of seriousness, then all of this group should be entitled to ballot position.

D. *Preventing Voter Confusion and Apathy*

An interest that does compel a limitation on the number of candidates allowed to appear on the ballot is that in restricting access to the ballot in order to avoid voter confusion and apathy. This notion combines both the goal of systemic integrity, through the fostering of intelligent and interested voting, and that of broadening participation. If a ballot with a shorter list of candidates running for office is more likely to interest the electorate, then they are more likely to

34. *See* Comments of Eugene McCarthy in *Regulation of Political Campaigns—How Successful?* 34-35, 37, AM. BNT. INST. F. (1977).

participate in the political process through the exercise of the franchise.

This notion was originally voiced by the members of the early twentieth century short-ballot movement. But, although there was some advocacy of limitation on the number of candidates running for each office through tests of legitimacy such as petition or monetary requirements,[35] this was not the major thrust of the short-ballot proponents. Rather, the primary concern was that the presence of a large number of unimportant offices on the ballot, such as coroner, for example, for which voter interest and information was low, would simply confuse voters and lead to unintelligent voting, evidenced either by straight voting of the party ticket or a complete lack of participation.[36]

But, as previously noted, there has been a shift in more recent case law and commentary[37] from an emphasis on a government interest in reducing the number of elective offices to an interest in restricting the number of candidates running for each office, because of the fear that voters might be confused by a choice from among multiple names under one office. Thus, the Court stated in *Lubin v. Panish*[38] that,

> A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process . . . . That "laundry list" ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion.[39]

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35. *See* R. CHILDS *supra* note 6, 157.

36. *Id.* at 31-42, 135-36.

Actually, interest in this issue is not merely historical. Herbert Alexander, a current commentator on campaign finance regulation, views public financing plans as raising a problem with the excessive number of elected offices in the United States:

> As the states enact forms of public financing, the large number of elected officials—a hallmark of this country's political system—will become all too obvious. In the United States, over a four-year cycle, more than 500,000 public officials are elected, and far more than that number campaign for nomination. Long ballots require candidates to spend money in the mere quest for visibility, and the long ballot and frequent elections combined bring both voter fatigue and low turnout. As financial pressures mount, states might give increasing consideration to reducing the number of elective offices, thus diminishing the amounts of money (public or private) needed to sustain the electoral system.

H. ALEXANDER, CAMPAIGN MONEY, REFORM AND REALITY IN THE STATES 9 (1976). This also points up the close interrelationships between different areas of electoral regulation. Obviously, the number of offices, or the number of candidates, that appear on a ballot will have a direct bearing on the total amount of public campaign funding that a state or the federal government must provide, and to whom this money will be given.

37. Note, *Adams v. Askew: The Right to Vote and the Right To Be A Candidate—Analogous or Incongruous Rights?*, 33 WASH. & LEE L. REV. 243, 244 (1976) (hereinafter cited as Note, *Candidate Right*).

38. 415 U.S. 709 (1974).

39. *Id.* at 715.

Elections occurring too frequently and requiring voter decisions on too many offices at one time may indeed breed confusion or apathy, especially if low level, non-policy making offices are on the ballot, but this is not the same question as whether four or six candidates in place of two would be too "confusing." There has been insufficient reasoned analysis of the latter question. The Court's observation, that the fact that the long ballot discourages participation is too obvious for discussion, may be open to dispute. With today's higher literacy rates and rapid, modern mass communication, it seems doubtful that several names under an office instead of two will be so confusing as to paralyze the average voter. The fear of confusion appears somewhat overstated, and those who voice the concept sound paternalistic in their estimation of the intelligence of the voting public. Of course, the question is essentially a matter of degree, and there is an outer limit at which voter confusion and apathy become a reality. But, in light of weighty countervailing interests of minority political expression through attainment of the ballot, care must be taken that the limits are not drawn too restrictively.[40]

Voter apathy is manifested primarily by low voter turnout, although there may be some vote drop-off as one proceeds down the ballot from major offices to less publicized ones (a too-many-offices problem). But one commentator, studying the effect of the position a candidate occupies on the ballot, concluded that after taking time to participate in an election, voters are loathe to leave any contests unmarked for fear of "wasting" a vote.[41] Common sense would seem to dictate that once a voter expends the energy to go to the polls to vote at all for a particular office, he or she is not likely to be deterred from voting simply because several candidates are running for that office instead of two. And, although extreme cases are always possible, the "horrible" hypothesized in *Lubin v. Panish*[42] of a dozen or more aspirants running for a single office seems unlikely to occur with great frequency.

In fact, voter apathy appears to be a widespread phenomenon today even where there are only two or three candidates in the running for very prominent offices. In the 1976 presidential election, for example, the turnout of 54.4 percent was the poorest in 28 years.[43] This suggests that electorate apathy is a result of many complex factors not particularly related to the number of candidates appearing

40. *Cf.* Williams v. Rhodes, 393 U.S. 23, 47 (1968) (Harlan, J., concurring). Voter confusion, however, might be a real problem in multimember districts, where ballots have contained over 20 candidates. See Chapman v. Meier, 420 U.S. 1 (1975); Whitcomb v. Chavis, 403 U.S. 124 (1971); Lucas v. General Assembly of Colo., 377 U.S. 713, 731 (1964).

41. Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 S. CAL. L. REV. 365, 374 n.18 (1972) (hereinafter cited as Note, *Ballot Position*).

42. 415 U.S. 709, 716 (1974).

43. J. WITCOVER, *supra* note 5, at 643-44.

on the ballot for each office. Nevertheless, if voter confusion is in fact a problem, voter education, in the form of informational pamphlets on candidates, for example,[44] would be a better answer than eliminating serious candidates on a purely numerical basis. In addition, such educational attempts might enhance political debate.

It has been argued that if a voter cannot comprehend the ballot and votes improperly, resulting in the invalidation of his vote, he has been disenfranchised. By analogy, if the presence of too many candidates for an office on a ballot deterred voting, the same argument could be made. But disenfranchisement can also occur if a candidate with significant support is barred from the ballot simply because too many candidates would be "confusing", and his supporters cannot vote for him. Even assuming an arbitrarily short ballot fosters voter interest and participation, the first amendment rights of the serious candidate, and the additional associational and expressive rights of his supporters, would be impaired. These parties would be denied effective participation through the exercise of their vote and in campaign activity, and some might be alienated from the political system. Thus, the participatory interest appears to cut both ways.

The Court observed in *Lubin v. Panish*[45] that "[r]ational results within the framework of our system are not likely to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospect of success."[46] Yet Justice Harlan, concurring in *Williams v. Rhodes*,[47] stated that "the presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion."[48] If one is primarily concerned with limiting ballot access to a magic number that will not confuse voters (a difficult determination more appropriate to social scientists), then the judicial statements above offer the dubious guideline that the correct outer limit is somewhere between eight and twelve candidates for office. The mere posing of a guideline in this fashion indicates that the answer to ballot regulation does not lie in numerical absolutes. Rather, the key lies in a test of candidate seriousness, which would serve to maintain elections as legitimate forums for political debate, and as a by-product, might keep the number of candidates in a reasonable range in most cases without arbitrary numerical limits.

E. Interests in Administrative Feasibility

The discussion of the number of candidates to appear on a bal-

44. *See* C. MERRIAM, H. GOSNELL, NON-VOTING 237-38 (1924).
45. 415 U.S. 709 (1974).
46. *Id.* at 716.
47. 393 U.S. 23 (1968) (Harlan, J., concurring).
48. *Id.* at 47.

lot implicates questions of administrative feasibility, an issue often raised in other contexts of election regulation.[49] For example, the number of candidates that are permitted a position on the ballot will affect the costs of ballot preparation, dissemination, and counting. One particular problem of administration has been suggested in recent years as justifying ballot restrictiveness; namely, the difficulty that a state faces when there are more candidates for an office than a voting machine has handles.[50] That voting machines are not universally used in elections in many states may diminish the importance of this concern for the present, but the problem situation has arisen.

Several federal courts have addressed the issue, to reach conflicting resolutions. In *Hudler v. Austin*[51] a three-judge federal court in Michigan upheld special state legislation that strengthened requirements necessary for ballot entitlement in order to reduce the overall number of candidates, in part because the preexisting petitioning regulation would have resulted in too many candidates for voting machines.[52] A federal district court in Delaware, however, ordered the use of paper ballots when the number of potential candidates exceeded the capacity of voting machines.[53]

If the number of candidates for an office exceeds machine capacity, but all the candidates meet a reasonable test of seriousness, then all belong on the ballot, regardless of the administrative difficulty. In the great majority of cases, a requirement of seriousness will be sufficient in itself to avoid this mechanical problem. When it does not, barring serious candidates from the ballot simply because of a technological limitation of voting machinery seems more irrational than arbitrarily limiting candidates on the ballot to a particular number to avoid voter "confusion."

Forcing state election systems to turn to paper ballots in place of voting machines may be extremely burdensome and costly. But paper ballots are an existing alternative that should be utilized rather than eliminating a serious candidate. If the United States can put a man on the moon, it should be possible to circumvent technological problems arising on the rare occasions when there are more serious candidacies than voting machines can handle.

Nevertheless, these administrative problems are very real.

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49. For example, campaign finance reporting and disclosure requirements may raise issues of feasibility of compliance and enforcement.

50. *See* Bullock v. Carter, 405 U.S. 134, 145 (1972); Note, *Candidate Right, supra* note 37, at 244 n.9.

51. 419 F. Supp. 1002 (E.D. Mich. 1976) (3 Judge Ct.).

52. The effective date of the legislation came so close to the upcoming primary, however, that the court held the act inapplicable to the general election of that year, forcing defendants to take necessary steps to place all parties on the ballot who would have been eligible under the prior regulation. *Id.* at 1013-14.

53. McInerney v. Wrightson, 421 F. Supp. 726 (D. Del. 1976); *cf.* McCarthy v. Tribbett, 421 F. Supp. 1193 (D. Del. 1976).

When all potential candidates are not serious, administrative costs become a sounder reason for eliminating the more frivolous candidates from the ballot, so that the entire electoral process is not hampered in the interest of a few fringe candidates. For serious candidates, some sacrifice of administrative efficiency and money seems more justifiable, although the problem is a difficult one. Since the experience of many states shows that no more than handful of parties tries to qualify even where petition signature requirements are as low as one percent,[54] it would seem the occasions for sacrifice will be few.

It has already been suggested that the relative expansiveness or restrictiveness of ballot access regulation may affect the amount of public subsidy that may be expended by federal or state governments on election campaigns. An administrative interest in protecting the public treasury could be asserted in support of restrictive ballot regulation, and the same could be said about plans to provide candidates with a public subsidy in the nature of electronic media time. Although the Federal Communications Commission defines "candidate" for purposes of eligibility for equal broadcast opportunity more inclusively than ballot position alone, so that an announced candidate qualified to hold office and permitted write-in status could receive equal opportunity,[55] the liberality of ballot access regulation still has great bearing on the number of individuals entitled to media time under section 315(a) of the Communications Act.[56] These interrelationships between ballot access and other areas of electoral regulation again illustrate that ballot access cannot be regulated in a vacuum. That expansive ballot access may increase administrative difficulty in the area of campaign funding or media coverage does not justify excluding serious candidates from the ballot. But these cross-effects do serve to reinforce the importance of developing a mechanism for reasonable line drawing between the serious and frivolous candidate.

IV. Interests in Allowing Ballot Access

Line drawing focuses on the need for some restriction on ballot placement. But it has been noted that regulation in the area of ballot access evidenced a change in direction in the last decade in the form of judicially mandated broadening of access. Liberalization of ballot access regulation can be justified as supporting several of the general goals of electoral reform, just as the same can be said of ballot restrictive legislation.

54. Williams v. Rhodes, 393 U.S. 23, 44 (1968) (Harlan, J., concurring).
55. *See* 47 C.F.R. §§ 73.120, 73.290, 73.657 (1976).
56. 47 U.S.C. § 315 (197).

A. *First Amendment Rights of Candidates and the Electorate*

Recent Supreme Court case law in the ballot access area has utilized a fourteenth amendment equal protection analysis[57] to invalidate ballot restrictions that impaired fundamental rights of voting or association. But, although the cases do not always emphasize it, a first amendment right of candidates to free expression is a major interest in support of unrestricted ballots. If a serious candidate is denied a ballot position, he is denied an effective mechanism for the expression of his political views. The Court has not recognized a fundamental interest in being a candidate for election, although this has been maintained on a lower federal court level.[58] But if a political candidate's expenditure of personal funds for campaigning is protected under the first amendment as instrumental to his political expression,[59] then surely the right of a serious, qualified candidate to appear on the electoral ballot likewise should be encompassed by the first amendment. Thus, a focus on the individual expressive interest of the political candidate supports broad ballot access.

As noted in *Buckley v. Valeo*,[60] ballot restrictions are not only a direct burden on a candidate's ability to run, but also on the voter's ability to voice preferences. An individualized emphasis on the first amendment rights of voters and supporters of candidates serves to justify liberal ballot access as well. Although the majority in *Williams v. Rhodes*[61] relied on an equal protection analysis, concurring Justices Douglas and Harlan recognized the basic first amendment underpinning in this area in their invalidation of Ohio's ballot restrictions. Thus, Justice Douglas observed that "the First Amendment, made applicable to the States by reason of the Fourteenth Amendment, lies at the root of these cases,"[62] and Justice Harlan "would rest this decision entirely on the proposition that Ohio's statutory scheme violates the basic right of political association assured by the First Amendment . . . ."[63]

Being able to vote for the candidate of one's choice is the most common means of political expression in our mass society, where many are unable to contribute monetarily, or lack the time for volunteer effort. Such a basic right deserves strong constitutional protection. Likewise, while freedom of association is not expressly designated in the Constitution, it seems so fundamentally tied to ef-

57. *E.g.*, Williams v. Rhodes, 393 U.S. 23 (1968).
58. Duncantell v. Houston, 333 F. Supp. 973 (S.D. Tex. 1971). *See* discussion in *Court Review, supra* note 18, at 77-78 n.80.
59. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976).
60. *Id.* at 94.
61. 393 U.S. 23 (1968).
62. *Id.* at 38 (Douglas, J., concurring).
63. *Id.* at 41 (Harlan, J., concurring).

fective political expression in society that it too must come within first amendment protection. The associational interest poses an issue of effectiveness—if a candidate is barred from the ballot or can only be given write-in status, his supporters are prevented from associating effectively for the purpose of meaningful political expression.

As mentioned, some cases have tended to emphasize the individualized first amendment interest of the citizen in associating, but to phrase it within the rubric of a fourteenth amendment equal protection "fundamental interest" standard.[64] This necessitated a finding of a fundamental interest at stake, here an interest in free association or the right to vote freely. But this analysis presents problems. It seems peculiar to speak of equal protection of a fundamental interest (freedom of association by candidate supporters) that is already constitutionally protected under the first amendment itself. It would be far less convoluted to rely on the first amendment directly. Also, if the Supreme Court may retreat from a recognition of fundamental interests,[65] this eventually could weaken the value of ballot access cases relying on this approach and force ballot access proponents to take a different tack. Thus, the interest of the citizen in effective association with a candidate able to achieve ballot access may be better and more straightforwardly approached as a first amendment interest.[66]

Finally, collective, societal first amendment interests are implicated as well in the restriction of a candidate's access to the ballot. From the Meiklejohnian standpoint[67] of promoting political debate so that the public can be informed in its self-governing, when a serious candidate cannot appear on the ballot and thereby gain public attention to his views, robust debate may be inhibited.

B. Promoting Equality of Treatment Among Candidates

Equality notions have been the motivating force behind several recent electoral reforms. An interest in equalizing, constitutionalized under the fourteenth amendment, has figured prominently as well in

64. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968).

65. *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). *But see* Illinois State Bd. of Elections v. Socialist Workers Party, 99 S. Ct. 983, 991 (1979).

66. *See Court Review, supra* note 18, at 91-95. The focus of the Court's analysis in Williams v. Rhodes, 393 U.S. 23 (1968), may be due in part to the fact that plaintiffs' pleadings characterized the case as involving equal protection. *Id.* at 42 n.1 (1968) (Harlan, J., concurring).

It is interesting that in *Williams* the Supreme Court was willing to accept the argument that political association cannot be unduly burdened by too restrictive a regulation of candidate access to the ballot, yet the Court later refused to find that limiting the amount of an individual's campaign contributions unconstitutionally restricted political association. Buckley v. Valeo, 424 U.S. 1 (1976). While in the latter situation the individual can still associate by contributing, although restricted in amount, both situations involve direct political expression by a candidate,with whom supporters associate by contributing or voting.

67. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT(1948).

recent judicial invalidation of ballot regulation on grounds of unfair treatment of certain candidates and their supporters. Legislated inequities addressed by courts include those between wealthy and poorer candidates,[68] and between major party candidates and minor party or independent candidates.[69]

Courts generally have not taken a possible approach under the fourteenth amendment of finding invidious discrimination against a suspect class of unpopular political minorities[70] or the poor. Rather, as mentioned, equal protection analysis has proceeded under the rubric of the fundamental interest; there must be equal treatment by the state when fundamental interests such as the right to vote or to associate freely are involved. It was suggested that the interests are essentially of a first amendment nature, but perhaps in this area equality and expressive interests actually are closely intertwined. Kenneth Karst seems to acknowledge this interrelationship in positing his first amendment principle of equal liberty of expression.[71]

Judicial equalizing on the basis of wealth has been particularly apparent in cases concerning the validity of state filing fee requirements as a prerequisite for a candidate's placement on the ballot. The Supreme Court struck down two such state schemes, in part because they unfairly favored the wealthy, in *Bullock v. Carter*[72] and *Lubin v. Panish*.[73] It is curious that wealth equalization was judicially mandated in the ballot access area when legislation encouraged the contrary, yet the Court refused to countenance wealth equalizing in the area of campaign finance regulation, where legislation attempted to reduce the importance of wealth differentials between candidates. The difference in treatment seems justifiable in light of the fact that in the ballot access area, first amendment and equality interests are allied behind the movement to broaden ballot access, while in the area of campaign finance regulation, equalizing on the basis of wealth may in fact impair first amendment interests in free expression by candidates.[74]

Cases involving state petitioning requirements as a means for minor or independent candidates to achieve ballot access have raised another issue of inequity—that in the treatment between major party and other candidates. The Court has been willing to some extent to enforce greater equality of treatment in this area, but it has found some difference in treatment to be sustainable. This parallels the

68. *E.g.*, Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972).
69. *E.g.*, Williams v. Rhodes, 393 U.S. 23 (1968).
70. *See Court Review, supra* note 18, at 86.
71. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 59 (1975).
72. 405 U.S. 134 (1972).
73. 415 U.S. 709 (1974).
74. *See* Buckley v. Valeo, 424 U.S. 1, 43 (1976).

Court's response in *Buckley v. Valeo*[75] that some difference in the public funding of major party and minor candidates was justified as well.[76]

The cumulative effect of ballot restrictive legislation in fifty states that vary widely as to requirements on evidence of public support for a candidate by signature,[77] filing fees, filing deadlines, etc., may make a national candidacy for a minor or independent candidate virtually impossible—a clear inequity imposed on these candidates. Thus, in 1976, independent presidential candidate Eugene McCarthy was forced to resort to lengthy and expensive judicial proceedings in many federal and state courts, in order to obtain a ballot position as an independent candidate. Several of the states denied ballot access to independents entirely.[78]

It has been observed that the presidential primary process of major political parties is also arduous and costly,[79] but candidates of the two major parties are undeniably in a better position to obtain ballot access than are independents, although primaries may be significant barriers for individual major party candidates. The promulgation of uniform state law requirements on ballot access, if widely enacted by states, might help to resolve this inequity; federal intervention in this area, however, might involve an unconstitutional incursion into the power of the states to regulate elections.

Broadening participation is an aim of electoral reform closely related to that of equality. If serious candidates are allowed on the ballot, presumably supporters of these candidates will be more inclined to participate in campaign activity, or at least in voting. On the other hand, it has been suggested that the appearance of too many candidates on the ballot may result in voter confusion, apathy, and lack of participation.[80] This presents an interesting impasse, whereby the interest in broadened public participation in politics can be asserted both in favor of expansive ballot access and against it. It seems likely that participation might be deterred at either regulatory

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75. *See generally id.*

76. Ballot access decisions seem to shift from a test of strict scrutiny-compelling state interest standard of equal protection review, wherein a state must use the least drastic alternative to achieve its ends, to more lenient review under a rational means test. Buckley v. Valeo, 424 U.S. 1, 92-94 (1976), is a recent suggestion of the propriety of strict scrutiny. Placement of the burden of proof is inconsistent from case to case, and reliance often shifts between first amendment analysis and the more often used equal protection-fundamental interest approach. This makes predicting future judicial trends difficult, because the standards chosen can affect the conclusion reached.

77. *See* Note, *Candidate Right, supra* note 37, at 243 n.3.

78. *See, e.g.*, McCarthy v. Briscoe, 429 U.S. 1316 (1976); McCarthy v. Kirkpatrick, 420 F. Supp. 366 (W.D. Mo. 1976); McCarthy v. Noel, 420 F. Supp. 799 (D.R.I. 1976); McCarthy v. Askew, 420 F. Supp. 775 (S.D. Fla. 1976); McCarthy v. Tribbett, 421 F. Supp. 1193 (D. Del. 1976). *See also* Armor & Marcus, *The Bloodless Revolution of 1976* 63 A.B.A.J. 1108 (1977).

79. J. WITCOVER, *supra* note 5.

80. *See* Lubin v. Panish, 415 U.S. 709, 715 (1974); Note, *Candidate Right*, supra, note 37, at 244.

extreme. Thus, the situation suggests that the answer to ballot regulation lies in reasonable line drawing, not in any absolutes.[81]

C. Preventing the Operation of Incumbent Self-Interest

It has already been observed that because ballot regulations will be enacted primarily by incumbent office holders of the two major parties, the danger that the preeminence of the two-party system will be threatened by such legislation is small. This is really another way of stating that there is a danger of self-interested action by incumbent legislators in the ballot regulation area, as in other areas of political regulation. Major party incumbents may structure the rules governing access to the ballot to protect their own position, to the disadvantage of minor party and independent candidates.[82] Evidence of the operation of this problem is available.

In the 1948 presidential election, third party candidates played a particularly significant role, and this seems to have been an impetus behind the passage of ballot restrictive legislation by major party incumbents. For example, the very restrictive Ohio legislative scheme at issue in *Williams v. Rhodes*,[83] which made ballot access extremely difficult for independent and minor candidates, was passed between 1948 and 1952, after Electors pledged to third party candidate Henry Wallace had received 30,000 votes out of the 3,000,000 cast in 1948. Since President Truman carried Ohio by only 7,000 votes, the Wallace vote might well have been decisive if it had increased marginally.[84] It seems possible that some major party legislators pulled together to pass legislation that would prevent a recurrence of significant third party influence made possible by a place on the ballot.

In the recent case of *Hudler v. Austin*[85] a Michigan law, which stiffened requirements for ballot position, was passed with an upcoming election in mind; it appeared that there might be too many candidates to allow the use of voting machines under the old ballot access standards. If such special legislation is permitted, it might be possible as well for incumbents to enact stricter requirements aimed

81. As an aside, it is obvious that the area of ballot access regulation has been one of considerable judicial activity from the late 1960's onward. Alexander Bickel has stated, "A decade ago, any suit to gain a place on the ballot for a minor party or an independent candidate might have failed at the outset for jurisdictional reasons. Federal courts were loath to exercise supervision over the electoral process. . . ." A. BICKEL, *supra* note 14, at 81. He believed that this jurisdictional barrier was effectively overcome when the Court addressed legislative apportionment in Baker v. Carr, 369 U.S. 186 (1962). If so, this serves again to reveal that no area of electoral regulation can be considered without accounting for developments in other regulatory areas as well.

82. *See* American Party of Texas v. White, 415 U.S. 767, 773 n.4 (1974); *Court Review*, *supra* note 18, at 92.

83. 393 U.S. 23 (1968).

84. *Id.* at 47 n.9 (Harlan, J., concurring).

85. 419 F. Supp. 1002, 1017-18 (E.D. Mich. 1976) (3 judge court).

at barring certain minor candidates from the ballot in a particular election, an extremely worrisome proposition. In *American Party of Texas v. White*[86] the Supreme Court struck down a state practice of printing on absentee ballots only the names of the two major political parties, even when a minor candidate qualified for ballot access.

Surely the most blatant example of the use of ballot regulation by incumbents to entrench themselves further in a position of political power is that provided by laws governing the order in which candidates for the same office appear on the ballot in certain states. The most common state provision for determining order of candidate names on the ballot is rotation of names, whereby a candidate's name occupies different positions on different ballots, and each candidate appears in a particular position approximately the same number of times as any other candidate.[87] Other methods used are alphabetical order (although it has been asserted that some political parties choose candidates with surnames entitling them to an earlier listing on the ballot);[88] party columns; how a political party fared in the preceding election; and lottery. Yet, in Massachusetts and California, for example, first ballot position was reserved for the incumbent candidate running for re-election, and the incumbents were designated as such on the ballot itself.[89]

There is data based on statistical analysis demonstrating that the candidate whose name appears first in the list of candidates for a particular office on a ballot is the beneficiary of a substantial positional bias in his or her favor, which can affect election results.[90] This is termed a windfall or "donkey" vote.[91] Thus, state laws allowing incumbents first ballot position are strong evidence of self-interest on the part of incumbent legislators passing measures designed to safeguard their positions. Along these lines, one commentator noted, "It is likely that California's apparently arbitrary decision to eliminate the positional bias except where an incumbent seeks re-election is attributable to the desire of lawmakers to enhance their chances of re-election."[92]

As a sidelight of the study of positional bias, it was found that the impact of positional preference increases as the election becomes further removed from center stage.[93] This finding lends some sup-

86. 415 U.S. 767, 794 (1974).

87. Note, *Ballot Position, supra* note 41, at 379 n.37. *See* 1975, Cal. Stats. ch 1211 for an example of rotation provision.

88. Note, *Ballot Position, supra* note 41, at 366 n.2.

89. *Id.* at 379 n.37. *See also* CAL. ELECS. CODE § 10301 (Deering, 1961) (current version at CAL. ELEC. CODE § 10211 (Deering 1977)).

90. Note, *Ballot Position, supra* note 41, at 365.

91. *Id.* at 375 n.19. *See* discussion in Clough v. Guzzi, 416 F. Supp. 1057 (D. Mass. 1976) (3 judge court).

92. Note, *Ballot Position, supra* note 41, at 380, 389-90.

93. *Id.* at 374.

port to the notion that too many offices to be voted upon at one election may impair intelligent voting. On the other hand, no correlation was found between the number of candidates and the intensity of the positional bias favoring the first listed candidate,[94] undercutting the argument that too many candidates listed per office would confuse the voter and decrease reasoned voting.

Courts have split when faced with equal protection challenges to ballot position laws. An Arizona case, *Kautenburger v. Jackson*,[95] mandated the use of rotation of names on voting machines in place of an alphabetical order system, and in *Gould v. Grubb*,[96] the California provision for listing incumbents first and the remaining candidates in alphabetical order was held unconstitutional by the California Supreme Court. California's Political Reform Act of 1974 (Proposition 9) prohibited listing incumbents first, and required the use of a randomized alphabet method to ensure every candidate equal access to the best ballot position.[97]

Illustrating an interesting variation on the theme of self-interested legislative control over ballot position, a candidate endorsed by the Democratic Party of Rhode Island in its primary was listed in the first column of the ballot and marked with an asterisk,[98] and county clerks in Illinois at one time placed candidates of the political party to which they belonged at the top of the ballot.[99] In *Clough v. Guzzi*,[100] however, a three judge federal court upheld the Massachusetts statute allowing the incumbent candidate to be listed first on the ballot as well as being designated as the incumbent. The court accepted the highly questionable argument of the state that if there existed an uninformed segment of voters, their votes should go to the incumbent because at least he would have some experience.

The ballot designation of incumbency does provide information to the voter, a first amendment interest of sorts, but it clearly offends all notions of fairness, and is unjustified when evaluated in the context of the considerable advantages in perquisites of office, name recognition, and greater media coverage already possessed by

94. *Id.* at 375 n.21.

95. 85 Ariz. 128, 333 P.2d 293 (1958), also described in Note, *Ballot Position, supra* note 41, at 379.

96. 14 Cal. 3d 661, 122 Cal. Rptr. 377, 536 P.2d 1337 (1973).

97. 1975 Cal. Stats., ch. 1211, referred to in Bolinger, *California Election Law During the Sixties and Seventies: Liberalization and Centralization* (1977), in 28C CAL. ELEC. CODE 55 (West 1977).

98. *See* McKenna v. Reilly, 419 F. Supp. 1179, 1181 (D.R.I. 1976).

99. This practice was invalidated in Sangmeister v. Woodard, 565 F.2d 460 (7th Cir. 1977), *cert. denied*, 435 U.S. 939 (1978). The Court, however, vacated a district court order that a rotational selection procedure be implemented, and remanded the case to the district court to order defendants to devise a constitutionally permissible ballot placement procedure. The opinion cites ballot position case law, and summarizes studies on the possibility of positional bias.

100. 416 F. Supp. 1057 (D. Mass. 1976) (3 judge court).

incumbents.[101] Simply listing the incumbent first provides no information, sacrifices equality, and is even more unjustified.

Thus, in light of potential positional bias, it is facially unfair further to enhance the advantages of incumbency by designating the incumbent as such on the ballot, or by listing the incumbent first, when the obviously less drastic alternative of name rotation is available.[102] Printing different ballot forms may be more costly, but this is little to ask in the interest of avoiding the clear inequity that might otherwise result from this blatant example of official self-interest.

The problem of legislative self-interest certainly cautions careful scrutiny of ballot restrictive regulation. It may militate in favor of erring on the side of greater openness of access, when considered in the context of the advantages to the major parties and to incumbents and the disadvantages to minor candidacies in other areas of electoral regulation such as campaign finance or the mass media.

V. Resolution By Line Drawing

The above analysis indicates that the issue of ballot regulation is not simply balck or white. There are legitimate interests in favor of some ballot restrictiveness as well as in favor of a certain degree of openness. The question, and, hence, the controversy, is where to draw the line that inevitably must be drawn, in order to allow ballot access to serious candidates, while excluding a flock of fringe or frivolous candidates that might otherwise make a mockery of the electoral process.

Although "seriousness" embodies both a notion of objective public support and subjective candidate intent, it is difficult to refine the term further. Subjective determinations are always troublesome, and what should be a proper standard of objective support? The Court's response has as yet been inconsistent and vague. *Jenness v. Fortson*[103] refers to the necessity of a candidate showing a significant modicum of support in order to achieve ballot access. Yet in *American Party of Texas v. White*[104] the Court speaks of significant community support, and in *Storer v. Brown*,[105] of substantial support in the community. Surely "modicum" and "substantial" imply widely divergent standards.

The prime interest of third party and independent candidates is in the expression of their views, in most cases, not in winning the

101. *But see* Note, *Ballot Position, supra* note 41, at 391 n.77. On the utility for informed voting of party labels on ballots, *compare* Elrod v. Burns, 427 U.S. 347, 385 (1976) (Powell, J., dissenting) *with* R. CHILD *supra* note 6 at 21-30, 36-42, 135-36, 152-53.

102. *Id.* at 377-78 n.31. Using a political party's success in a prior election as a ballot placement determinant could conceivably have an effect of promoting continuity in how that party fares from election to election.

103. 403 U.S. 431, 442 (1971).

104. 415 U.S. 767, 782 (1974).

105. 415 U.S. 724, 743 (1974).

election. The requirement of a measure of public support must be cognizant of this distinction, yet case law at times seems to imply that too high a standard is needed. For example, in *Storer* the Court asserts as a consideration "the relationship between the showing of support through a petition requirement and the percentage of the vote the State can reasonably expect of a candidate who achieves ballot status in the general election."[106]

If a candidate's intent is to wage a legitimate political campaign, and if he or she represents views held by a reasonable number of supporters, then whether or not the candidate is a realistic contender for electoral victory, a position on the ballot is merited. As Justice Douglas pointed out in *Williams v. Rhodes*,[107] "to grant the State power to keep all political parties off the ballot until they have enough members to win would stifle the growth of all new parties working to increase their strength from year to year." Likewise, a lower federal court was on the right track when it defined "serious contender"[108] as referring "to the subjective intent of the candidate, as reflected by objective manifestations and not to the likelihood of the candidate prevailing in the election."[109] Thus, the measure of support that should be required is lower than serious contention for electoral victory.

The idea behind drawing the line at inclusion of serious candidates on the ballot is to preserve the respect for and legitimacy of elections, hence, the stability of the political system; it is not to hold the number of candidates down to an arbitrary number in order to avoid voter "confusion." Various ballot access requirements, such as petitions or filing fees, can be viewed as different mechanisms designed to draw the necessary line of seriousness. The ballot access cases of the sixties and seventies evaluated the constitutionality of these mechanisms, finding some more appropriate than others. A general trend may be discerned from these cases to broaden ballot access, although this may be slowing down at present. To determine which mechanisms for line drawing are acceptable, it is useful to examine the various state yardsticks for ballot access.

A. Petition Requirements

One mechanism to determine public support for a candidate is the use of petitions signed by a specified number of registered voters. Nominating petition requirements for ballot access are used exclu-

106. *Id.*
107. 393 U.S. 23, 32 (Douglas, J., concurring).
108. Storer v. Brown, 415 U.S. 724, 746 (1974).
109. McInerney v. Wrightson, 421 F. Supp. 726, 731 n.15 (D. Del. 1976).

sively by at least 15 states, and to some extent by 47 states.[110] Generally, petitions provide an alternative way for minor party or independent candidates to obtain a place on the ballot when major party candidates are permitted more automatic access on the basis of past party performance[111] or as a winner of party primaries.[112]

One initial advantage to using petitioning as a line drawing technique is that the activity necessitated by going out among the public to gather signatures may actually foster more robust political debate.[113] In addition, because petitioning is costly in terms of effort and money, there is a strong inference that a candidate willing to attempt the arduous task is indeed serious about his candidacy. Willingness to sign a nominating petition would seem to be a fair indication of public support, although there is no perfect measure. Thus, in the abstract, petitioning seems a reasonable measure of candidate seriousness.

Petition requirements, however, do present problems as applied in practice. This is due basically to the difficulty in setting a required percentage of voters who must sign a petition in order to entitle the candidate to ballot access. This is the practical heart of the line drawing problem. Clearly, a percentage requirement makes more sense in terms of flexibility under changing circumstances than a flat numerical requirement. But how can a percentage be determined that is significant enough so that only serious candidates will attempt ballot access, but sufficiently practicable so as not to preclude serious candidacies from a place on the ballot?

There is no easy answer to the question of how a requirement of a serious candidacy can be translated into a precise percentage of voter signatures. The Supreme Court held that requiring signatures of 15 percent of the voters was too high, in the case of *Williams v. Rhodes*,[114] but held a five percent requirement permissible under the circumstances presented in *Jenness v. Fortson*.[115] Presumably, an acceptable maximum falls somewhere in between, but the Court has provided no ready formula, and the entire configuration of each state's ballot regulation must be considered in each case. For example, a higher percentage requirement might be less offensive if re-

110. Comment, *The Constitutionality of Qualifying Fees For Political Candidates*, 120 U. PA. L. REV. 109, 113 n.33 (1971) (hereinafter cited as Comment, *Fees*).

111. *See, e.g.*, statutory mechanism described in Hudler v. Austin, 419 F. Supp. 1002 (E.D. Mich. 1976).

112. *See, e.g.*, Georgia legislation described in Jenness v. Fortson, 403 U.S. 431 (1971). Considerations such as fairness, efficiency, cost, and whether other access mechanisms such as primaries or past performances adequately account for public support and seriousness of candidate intent, seem relevant to exclusivity of petition use. These mechanisms also can serve as acceptable line drawers, primarily affecting major party contenders.

113. *See* Comment, *Fees, supra* note 110, at 128-29.

114. 393 U.S. 23 (1968).

115. 403 U.S. 431 (1971). *Compare*, Illinois Stat. Bd. of Elections v. Socialist Workers Party, 99 S. Ct. 983 (1979), wherein the state election code was held unconstitutional insofar as it required new political parties and independent candidates to obtain more than 25,000 petition signatures in Chicago, with the result that more signatures were needed for ballot access in a city election than in a statewide election under a state five percent requirement.

quirements as to who may sign a petition were lenient or write-in candidate status was readily available.[116] The majority opinion in *Williams v. Rhodes*[117] noted that many states have petition requirements as low as one percent, and no significant problems have arisen in these states. Such a requirement seems reasonable; it precludes a flood of fringe and frivolous candidates by requiring some effort for ballot access, yet is sufficiently lenient so that ballot access is not an impossibility for serious candidates. Given that state legislatures are made up primarily of major party incumbents, who generally achieve ballot access through mechanisms other than petitioning, it seems unlikely that these potentially self-interested lawmakers would set petition requirements for minor candidates at too low a level.

It has been observed that meeting petition requirements can be very expensive for a candidate. On the other hand, a primary election campaign can be expensive as well for an individual contender. This cost, however, will not preclude the availability of some major party candidate in the general election, while a minor party effort may be entirely undermined by the cost of petitioning. There may be very real inequity in states in which the administrative costs of primaries are paid by the state, with no comparable aid to those engaged in the petitioning process.[118]

Another difficulty in implementing petitioning requirements for ballot access is the question of the identity of signers of a nominating petition. Cases such as *American Party of Texas v. White*[119] and *Socialists Workers Party v. Rockefeller*[120] have upheld state provisions disallowing signatures on a petition for independent or minor candidates by citizens who voted previously in a major party primary election. Alexander Bickel suggested that such regulation discourages useful coalition formation within the two major parties, which is essential for the stable operation of the political system:[121]

> Voters should be allowed to participate in the nominating process of only one major party at a time, to be sure, but it is a different and not easily excusable thing to let potential dissidents participate in major party nominating proceedings only at the cost of incurring disqualification as later supporters of a minor candidate.[122]

This is a valid criticism, since an individual must either make a

116. *See* Jenness v. Fortson, 403 U.S. 431 (1971).
117. 393 U.S. 23, 33 n.9 (1968).
118. *See* state legislation discussed in American Party of Texas v. White, 415 U.S. 767 (1974).
119. *Id.*
120. 314 F. Supp. 984 (S.D.N.Y. 1970), *aff'd*, 400 U.S. 806 (1970), discussed in A. BICKEL, *supra* note 14, at 88-89.
121. A. BICKEL, *supra* note 14, at 89.
122. *Id.*

break with a major party before the process of compromise can be attempted, or else give up the right fully to back a minority candidate if one is ideologically opposed to the ultimate result of major party coalition building. Such a choice implicates the impairment of first amendment rights of free association.

It is possible that a voter could sign a minority candidate's petition solely in hopes that the minor candidate would draw off votes from a disfavored major party candidate in the general election, to the benefit of the favored major party contender—the so-called stalking horse argument, but signers could also be those ideologically discontented with the major party candidates. The latter individuals have a strong first amendment claim. If corrupt motive on the part of some signers existed, it would be one step removed from cross over voting in an opposing party primary to help elect a candidate easier to defeat in the subsequent general election by one's real favorite. The petition signer is not voting for the stalking horse, only helping to get that candidate on the ballot.[123]

The response of the Supreme Court to the question of who may sign a petition has been somewhat ambiguous. In *Jenness v. Fortson*[124] the Court seemed in part to uphold Georgia's five percent signature requirement precisely because primary voters could still sign nominating petitions. But in *American Party of Texas v. White*[125] the Court took a different position, stating,

> Electors may vote in only one party primary; and it is not apparent to us why the new or smaller party seeking voter support should be entitled to get signatures of those who have already voted in another nominating primary and have already demonstrated their preference for other candidates for the same office the petitioning party seeks to fill.[126]

Surely the issue is not as clear cut as this latter opinion would have it. Justice Douglas, dissenting in this case, made the valid point that if primary voters are excluded from the class of potential petition signers, then independents will be forced to obtain signatures from the most disinterested voters—those who did not care to vote in a primary.[127] Paradoxically, in *Storer v. Brown*,[128] decided at the same time as *American Party*, the Court was amenable to considering the possibility that disqualification of primary voters from signing petitions might mean that from the remaining pool of possible signers, a candidate would have to obtain considerably more than the five percent signature requirement approved in *Jenness* in order to satisfy

123. An analogous issue—candidate affiliation requirements—will be discussed subsequently.
124. 403 U.S. 431 (1971).
125. 415 U.S. 767 (1974).
126. *Id.* at 785.
127. *Id.* at 798-99 (Douglas, J., dissenting).
128. 415 U.S. 724 (1974).

California's requirement of 325,000 signatures—which would be a dubious result.[129] In summary, the arguments for allowing primary voters to sign minor or independent candidate petitions appear to outweigh opposing contentions.

Another difficulty with using petition requirements for ballot access is that presented by petition filing dates. A state interest in early filing dates has been asserted,[130] which presumably stems from a notion that an earlier date will allow more time for the administrative tasks of verifying signatures. When, however, a petition must be filed before or at the same time as the major party conventions or primaries, Alexander Bickel again perceived a similar, and equally undesirable, prevention of coalition building within the two major parties as that which occurs when primary voters are disqualified from later signing nominating petitions. Bickel explained this proposition:

> (T)he important third-party movements in our history . . . came into being after the two major-party conventions, and were enabled to come into being at that time because major-party conventions used to be held much earlier than at present . . . .
>
> The characteristic American third party . . . consists of a group of people who have tried to exert influence within one of the major parties, have failed, and later decide to work on the outside. States in which there is an early qualifying date tend to force such groups to create minor parties without first attempting to influence the course taken by a major one. For a dissident group is put to the choice of foregoing major-party primary and other prenomination activity or organizing separately early on in an election year, or losing all opportunity for action as a third party later.
>
> From the point of view of fostering the two-party system this is counterproductive. It is calculated to induce early third-party movements . . . calculated to drive people away from the coalition-building process that is the genius of the two-party system, and into a premature and more likely permanent ideological separatism, which is precisely what the two-party system is intended to prevent.[131]

It is thus suggested that filing deadlines for nominating petitions for presidential candidates be after major party conventions,[132] or, presumably, on the state level, after major party primaries or caucuses.

Moving back filing dates may not create as great the administrative problems as supposed. For example, in *McCarthy v. Noel*[133] a federal district court allowed Eugene McCarthy ballot access in

129. *Contra*, Hudler v. Austin, 419 F. Supp. 1002, 1010-11 (E.D. Mich. 1976).

130. *See* McCarthy v. Kirkpatrick, 420 F. Supp. 366 (W.D. Mo. 1976). Intra-party rule making also may have an effect on state presidential primary filing deadlines. *See* Congressional Quarterly Weekly Report 1217 (May 13, 1978).

131. A. BICKEL, *supra* note 14, at 87-88.

132. *Id.* at 88.

133. 420 F. Supp. 799, 805 n.10 (D.R.I. 1976).

Rhode Island in 1976, noting that the process of verifying signatures presented no problem and might not take more than a day or so,[134] and that McCarthy could easily be entered on the ballot through the vacant independent column on the voting machines.

To retain early filing dates, in the interest of orderliness seemingly protective of the two-party system, may in fact impair the stability of the two-party process, and is therefore inadvisable. It is ironic that states with early filing dates for independent candidates frequently allow major political parties to nominate substitute candidates as late as a few weeks before the general election when a first nominee dies, withdraws, or is disqualified after the primary.[135]

It would also seem that providing an unreasonably short time for an independent candidate to gather signatures for the nominating petition, such that obtaining a sufficient number of signatures becomes a practical impossibility or extremely difficult in the time available, should be held constitutionally infirm.

Despite the practical problems presented by a petition requirement, many difficulties can be ironed out, for example, through later filing dates and permitting primary voters to sign petitions. Because the relationship between petitioning and candidate seriousness is strong, nominating petitions may be the most reasonable mechanism for line drawing to determine whether minor and independent candidates are entitled to ballot access. Other mechanisms operate less effectively.

B. Filing Fees

Filing fees have been utilized in states as a different prerequisite to ballot access for candidates. Fifteen states employ filing fees for primary elections.[136] Under their statutes, a potential candidate must pay the state a specified amount of money to receive a position on the ballot.

Filing fee schemes have not fared well in court against challenges on equal protection grounds. In *Bullock v. Carter*[137] the Supreme Court held that Texas legislation, providing a filing fee system as an absolute prerequisite to candidate participation in a primary, created an unconstitutional barrier to serious candidates unable to pay the fee and thus improperly limited the field of candidates from which voters could choose. The Texas scheme provided no alternatives to the fees for ballot access nor was write-in status

134. *But compare* R. SMOLKA, ELECTION DAY REGISTRATION, THE MINNESOTA AND WISCONSIN EXPERIENCE IN 1976 (1977) on the problems of verifying voter registrations.

135. *See* Washington Post, May 13, 1975, § A, at 9, col. 6.

136. Note, *The Constitutionality of Filing Fees for Political Candidates in Primary Elections: An Arkansas Analysis*, 30 ARK. L. REV. 49 (1976).

137. 405 U.S. 134 (1972).

available, and fees ranged as high as $8,900. The law was held to discriminate in favor of wealthy candidates, and the Court also found the fees ill-suited to determining candidate seriousness, since legitimate and frivolous candidates alike were excluded if they could not afford the fees. Based on the facts of the Texas provision, the decision seems warranted.

In *Lubin v. Panish*[138] plaintiff was not permitted to file as a candidate under a California law because he was unable to pay the filing fee, and again, no other alternative mechanism for ballot access was available. The Supreme Court held that, absent reasonable alternative means of ballot access, the state had unconstitutionally required filing fees of an indigent, and the Court reiterated that fees did not test the genuiness of a candidacy.

Both cases above addressed filing fees as applied to indigent plaintiff candidates. Although the Supreme Court has not as yet directly addressed the legitimacy of filing fees imposed upon non-indigent candidates, the Court of Appeals for the Fifth Circuit upheld fees in this context.[139] The court believed that non-indigent candidates were not barred from political expression, because they could pay the fee and achieve a ballot position, although the fees might impose a greater hardship on some candidates than on others. Thus, the constitutionality of filing fees may indeed turn on indigency status.

It seemed significant that neither legislative fee scheme addressed by the Supreme Court provided an alternative route to ballot access. If an alternative mechanism exists, a decision on the constitutionality of filing fees might change. In 1976 a Texas court decision found a Texas statute, now requiring candidates in primary elections to pay filing fees or to submit a petition in lieu thereof, to be enforceable.[140] Therefore, by providing for an alternative to the fees, a state may save filing fee legislation from invalidation.

Willingness to pay a filing fee could be used as an indication of candidate seriousness, and the idea is not a new one. Indeed, at one time in parts of Canada and New Zealand, a candidate had to make a deposit of money as an indication of his serious intentions, and if he failed to gain a decent proportion of the vote, the city kept the money as payment for having been bothered by him.[141] While the forfeiture aspect surely raises first amendment problems, a willing-

138. 415 U.S. 709 (1974).

139. Adams v. Askew, 511 F.2d 700 (5th Cir. 1975), discussed at length in Note, *Candidate Right, supra* note 37.

140. *See* Geiger v. DeBusk, 534 S.W.2d 437 (Civ. App. Tex. 1976); Howell v. DeBusk, No. 21, 207 (Civ. App. Tex., filed Mar. 15, 1976). *Cf.* American Party of Texas v. White, 415 U.S. 767, 791 n.23 (1974).

141. *See* R. CHILDS *supra* note 6, at 159-60.

ness to pay a sum of money may be as much evidence of serious intent as expending effort in gathering signatures. But the use of filing fees as a test of seriousness fails under several circumstances. It is possible that a serious candidate will not be able to afford the fee, especially if it assumes a magnitude of the fees in Texas, and thus, this candidate will be excluded from the ballot. On the other hand, frivolous candidates may be able to afford the fee and achieve undeserved ballot placement. In addition, the filing fee requirement does not address the second aspect of seriousness—that of a reasonable amount of public support—at all. Thus, the "fit" of filing fees as a test of candidate seriousness is not nearly as close as that of petitioning,[142] and furthermore, petitioning provides an added benefit in terms of fostering greater political contact between candidate and voter that a filing fee does not.

Nevertheless, it can be argued with some validity that if a candidate cannot afford a reasonably low filing fee, unlike the outrageously high Texas fees, then the candidate may not be able to generate funds to wage a viable campaign anyway. Yet filing fees do clearly discriminate against the poor, and it is viability of a candidate to place certain minority views before the public, not viability in terms of winning an election, that is of significance regarding ballot access.

Filing fees and petitioning requirements, however, may not be as different as is generally supposed.[143] Petitioning may be just as costly as filing fees, if not more so, in terms of expenditure of time, effort, and, probably, money. The real advantage of a petitioning requirement over that of filing fees is that the "fit" of the former as a test of candidacy seriousness is much closer. Petioning may not be any less discriminatory on the basis of wealth or other political resources, such as manpower or time.

Under certain filing fee schemes, the fees collected are used to support the political parties in the state.[144] Such a provision might help to preserve the financial soundness of the electoral system, but it seems an unwarranted discrimination against independent candidates. Although the Supreme Court has sanctioned public funding of major party presidential candidates to a greater extent than minor candidates[145] (the FEC may not have resolved the question whether

142. *See* Comment, *Fees, supra* note 110, at 114 n.44.

143. *But see* Duncantell v. Houston, 333 F. Supp. 973 (S.D. Tex. 1971) for a suggestion that petitioning, unlike filing fees, is not wealth-related.

144. *See* W. Mansfield, *Florida: The Power of Incumbency*, in H. ALEXANDER, CAMPAIGN MONEY, REFORM AND REALITY IN THE STATES 70 (1976); Comment, *Fees, supra* note 110, at 110. *See also* Texas legislation at issue in American Party of Texas v. White, 415 U.S. 767, 791-94 (1974).

145. Buckley v. Valeo, 424 U.S. 1 (1976).

independents are entitled to public funds),[146] state provisions that require an independent candidate to pay a fee that is used to help other political parties he is opposing in the election, seem manifestly unjustified, especially in light of all the other disadvantages independents suffer in the elections process.

Yet, in *American Party of Texas v. White*[147] the Supreme Court upheld the exclusion of minority parties from the benefits of the Texas Primary Financing Law of 1972,[148] which provided public funding from state revenues for primary elections of political parties that received 200,000 or more votes in the preceding gubernatorial election. Filing fees were used to defray party primary expenses, the state providing funds to cover any remaining costs. An alternative of filing a nominating petition was available. The Court noted that public funding compensated for primary expenses to which the major parties alone were subject, and that convention or petitioning options available for small and new parties did not present the expense burdening parties that must hold a primary. The Court added that the state need not fund the efforts of every nascent political group. This opinion seems to foreshadow the Court's later acceptance of funding differentials for major and minor parties under the Federal Election Campaign Act, on the basis that some line drawing is necessary. The Court may not have considered sufficiently, however, that petitioning, and perhaps conventions, can be proportionately expensive for minor parties, although it is true that the state cannot fund every fringe group. The problem of line drawing seems pervasive in the area of public funding of various aspects of the electoral process. In this case, at least, minor or independent candidates did not have to pay filing fees used to fund major party primaries, if they used the petition option instead.

C. Disaffiliation Requirements

Another ballot restriction, which particularly focusses on subjective intent behind a potential candidacy, is the disaffiliation requirement. Such state legislation provides that a candidate must have been dissaffiliated from the political party of which he was previously a member for a specified period before he can become the candidate of another party or run as an independent. The trend of the Supreme Court has been to uphold disaffiliation requirements. The Court affirmed, without opinion, a requirement as long as four

146. *See* letter by Ass't Gen'l Counsel, FEC, Nov. 26, 1976, in response to Advisory Opinion Request 1976-81.

147. 415 U.S. 767, 791-94 (1974).

148. McKool-Stroud Primary Financing Law of 1972, TEX. ELEC. CODE art. 13.08c-1, replaced by the Primary Conduct and Financing Law of 1974, TEX. ELEC. CODE art. 13.08c-2 (Supp. 1974), as described 415 U.S. at 791, n.23.

years in *Lippitt v. Cipollone*,[149] and upheld a one year California disaffiliation regulation in *Storer v. Brown*.[150] The opinion in *Storer* stated that the function of the primary election was to winnow out candidates and settle intra-party differences, and that general elections were not for continuing intra-party feuds. The law was seen as preventing a primary loser from continuing the struggle.

Preventing a candidate from changing parties too rapidly preserves systemic and party stability by precluding a stalking horse candidacy.[151] Yet, a stalking horse seems a more unlikely possibility as the visibility and importance of the office to be filled escalates, since a newly-adopted party would be loathe to nominate this candidate and the stalking horse quality of an independent candidacy might become very obvious to the public. Reasonably short disaffiliation requirements, however, serve a useful purpose. One factor in setting the length of time could be the frequency of elections for the office, for example, but surely a candidate should not be allowed to lose one party primary and then enter another or embark on an independent candidacy.[152]

But too long a disaffiliation regulation may be detrimental to coalition building within the two major parties.[153] A disaffiliation requirement such as California's means that a candidate must leave one party as much as 17 months before a general election, as Justice Brennan recognized in his *Storer* dissent.[154] The four year requirement in *Lippitt* is even worse from this standpoint. Instead of encouraging the settlement of differences within the party, an overly long limitation may force the potential candidate to split from one party prematurely, or otherwise forfeit the right to depart the party later and run under a more agreeable banner if ideological differences prove irreconcilable.

From a constitutional perspective, the rights of political expression and association may be impaired by overly-long disaffiliation requirements. Justice Douglas, in *Lippitt*, aptly pointed out that history is replete with politicians who changed parties, including Theodore Roosevelt, Strom Thurmond, Wayne Morse, John Lindsay, and George Wallace, whether disenchanted with previous party activity or for opportunistic reasons, and that these breaks add vitality to the

149. 404 U.S. 1032 (1972).

150. 415 U.S. 724 (1974).

151. Voter affiliation requirements may present issues of party raiding somewhat analogous to the problem of the stalking horse candidacy raised in the candidate affiliation context. *Compare* Rosario v. Rockefeller, 410 U.S. 752 (1973) and Kusper v. Pontikes, 414 U.S. 51 (1973).

152. This was precluded by CAL. STATS. ANN. §§ 6611, 6801 (1961), as noted approvingly in Storer v. Brown, 415 U.S. 724, 733, 735 (1974).

153. *Compare* R. BICKEL, *supra* note 14, at 87-89.

154. 415 U.S. 724, 758 (1974) (Brennan, J., dissenting).

political process.[155]

A candidate's interest in getting elected may always be somewhat implicated in a political shift, although generally there is an element of idology involved as well, and the latter is especially entitled to first amendment protection. Thus, one federal district court, where no state disaffiliation requirement existed, specifically inquired into the intent of a former Democrat who was seeking ballot status as an independent, and found that he legitimately diverged from his prior party on ideological grounds.[156]

D. Residency Requirements

Another type of state statute regulating access to the ballot is that which sets candidate residency requirements. Reasonable local and state level residency requirements have generally been upheld in court.[157] A useful presentation of the issues involved in candidate residency restrictions is provided in *Draper v. Phelps*,[158] a three judge federal court case. At issue was an Oklahoma provision that a candidate for the state house of representatives must have been a qualified elector in his district for at least six months before the election. The candidate plaintiffs urged the invalidation of comparable voter residency requirements in *Dunn v. Blumstein*[159] as analogous. But the court rejected the closness of the analogy, appropriately holding that the state's interest in residency requirements for candidates was greater than for voters. It was said that the voter acted for

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155. 405 U.S. 1032, 1034 (1972) (Douglas, J., dissenting).

156. *See* McInerney v. Wrightson, 421 F. Supp. 726, 731 (D. Del. 1976).

157. *See, e.g.*, Daves v. City of Longwood, 423 F. Supp. 503 (M.D. Fla. 1976); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.), *aff'd mem*, 414 U.S. 802 (1973); Gilbert v. State, 526 P.2d 1131 (Alaska 1974). *C.f.*, Russell v. Hathaway, 423 F. Supp. 833 (N.D. Tex. 1976); Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd. mem.*, 401 U.S. 968 (1971). But some residency requirements have been held unconstitutional, see, e.g., McKinney v. Kaminsky, 340 F. Supp. 289 (M.D. Ala. 1972) (5 year requirement for county commissioner); Green v. McKeon, 335 F. Supp. 630 (E.D. Mich. 1971) (2 year requirement for city office); Zeilenga v. Nelson, 4 Cal. 3d 716, 94 Cal. Rptr. 602, 484 P.2d 578 (1971) (5 year requirement for county supervisor).

158. 351 F. Supp. 677 (W.D. Okla. 1972) (3 Judge Court). *Compare Mathews v. State Election Bd.*, 582 P.2d 1318 (Okla. 1978). The decision illustrates a potential relationship between candidate and voter residency requirements. *See also Hendrix v. State, ex rel. Oklahoma State Election Bd.*, 554 P.2d 770 (Okla. 1976), validating an Oklahoma statute at issue in *Draper* in response to a challenge to the requirement that a candidate must have been a qualified *registered* elector of the relevant district for at least six months. (Emphasis added). Thus, voter registration can serve as a prerequisite to candidacy in combination with candidate residency. *Compare* statements in *Fleak v. Allman*, 420 F. Supp. 822, 825 (W.D. Okla. 1976) (3 Judge Court), that "Registration is an objective manifestation of the otherwise undocumented fact of residency," and that

> [t]he State has a compelling interest, too, "in requiring that those who expect to stand for the office of state representative take the matter seriously and make plans for their candidacy in advance of the election date." The fact of having registered in the district is an indicium of such foresight. (footnotes omitted)

with *Hendrix, supra*, (Doolin, J., dissenting), and *Henderson v. Fort Worth Independent School Dist.*, 526 F.2d 286 (5th Cir. 1976), *aff'd on rehearing on other grounds*, 574 F.2d 1210 (5th Cir. 1978)."

159. 405 U.S. 330 (1972).

himself alone, while the state congressman must represent his constituents. If a candidate was not informed about his district through his residency there, his constituents would suffer. The court added that the requirement ensured serious candidates who had planned ahead to run from a particular district, which precluded carpet-bagger candidates, and that the provision gave constituents an opportunity to learn about the candidate as well.

Reasonable candidate residency requirements thus serve a valuable, two-way first amendment function of furthering electoral information, which is the same function of a political campaign itself. By residing for a reasonable period in the district to be represented if a candidate wins the election, the candidate can learn about his constituents, and they may learn more about the candidate.

It has been observed that changes in residency laws and a lessening of the political prejudice against "outsiders" have led to a situation in which candidates look for the best state from which to run, one factor being the amount of money it might cost to run in each state.[160] Reasonable residency requirements may ensure that candidates better identify with the constituents they seek to represent, fostering systemic integrity that might otherwise be undermined by a phenomenon of candidates shopping for the district in which their electoral chances will be the greatest, although lacking a real relationship to that district.

On the other hand, ours is a highly mobile society, and it is possible that an individual may move into an area, and soon after, seek office for reasons entirely divorced from a search for an electible forum. Seriousness and interest in a constituency is not per se commensurate with length of residency in a district.[161]

Thus, while candidate residency requirements have a valid place in electoral regulation because they foster a valuable voter-candidate informational exchange, the time required should be the shortest necessary to serve the legitimate state interests involved. Otherwise, the first amendment rights of candidates, supporters, and voters may be violated if a serious candidate, interested and informed about the community, is precluded from running by an overly-long residency requirement. Determining a reasonable time of residency presents a difficult problem, and factors that might be

160. 2 R. COLE, CAMPAIGN SPENDING IN U.S. SENATE ELECTIONS 92 (Jan., 1975) (unpublished Ph.d. Thesis, Harvard School of Public Policy, on file at Harvard University Library).

161. It has been suggested that the campaign process itself serves an informational function, that an opponent is likely to point out the fact that a candidate is a relative newcomer to the district, and that voters can decide if this is important in casting their ballots. Green v. McKeon, 335 F. Supp. 630, 634 (E.D. Mich. 1971), quoting Mogk v. City of Detroit, 335 F. Supp. 698 (E.D. Mich. 1971).

considered are the office sought and the characteristics of the electoral district or constituency represented.

E. Independent Candidacy

Ballot access for independent candidates presents an interesting separate issue regarding ballot placement requirements. When *some* channel is available for an independent candidate to achieve ballot access, and the question is whether a less restrictive alternative exists, courts are more prone to uphold ballot access requirements for independents, such as nominating petitions.[162] But state legislation that completely bars ballot access by independent candidates will be held unconstitutional, as exemplified by the 1976 series of cases successfully pursued by independent candidate Eugene McCarthy to gain ballot access in a number of states.[163]

A three-part test is emerging for court-ordered ballot access for an independent candidate:[164] first, is the independent candidate a serious contender? This addresses the subjective intent aspect of candidate seriousness discussed previously, but if this requirement means serious contender for electoral victory, it would seem too stringent. Second, is the candidate truly independent?[165] In other words, the candidate should not merely be the loser of an intra-party contest who is seeking a second chance. Third, is there a satisfactory level of community support for the candidate?[166] Some courts have been willing to look to national evidence of support when an independent presidential candidate is concerned, including polls or petition performance in other states, and have held that petition signatures are not required in a state that provided no mechanism for petitioning by an independent candidate.[167] The third requirement is equivalent to the objective component of candidate seriousness already mentioned.

It is dubious that a write-in provision standing alone would be upheld as allowing sufficient ballot access for independent candidates, where no other mechanism for access was provided.[168] The existence of a write-in provision, however, seemed to lend support to the Supreme Court in upholding Georgia's five percent petition re-

162. *See* American Party of Texas v. White, 415 U.S. 767 (1974); *cf.* Storer v. Brown, 415 U.S. 724 (1974) (remanded to lower court to determine if petition requirement was unduly burdensome).

163. *See* Armor & Marcus, *The Bloodless Revolution of 1976*, 63 A.B.A.J. 1108 (1977).

164. *See* McCarthy v. Tribett, 421 F. Supp. 1193 (D. Del. 1976).

165. *See* McBride v. Askew, 541 F.2d 465 (5th Cir. 1976); McInerney v. Wrightson, 421 F. Supp. 726, 731 (D. Del. 1976).

166. *Id.* at 732.

167. McCarthy v. Briscoe, 426 U.S. 1317 (1976); McCarthy v. Askew, 420 F. Supp. 775 (S.D. Fla. 1976). *Contra*, McCarthy v. Tribbett, 421 F. Supp. 1193 (D. Del. 1976).

168. McCarthy v. Briscoe, 426 U.S. 1317, 1321 (1976) (Powell, J., in chambers).

quirement in *Jenness v. Fortson*.[169] Yet, in *Lubin v. Panish*,[170] the Court suggested that a write-in procedure would not be an adequate alternative for an indigent candidate to a filing fee requirement, noting that "the realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot."[171] It is accurate to say that the opportunity for write-in status means little in the process of practical politics,[172] and the write-in option is not a realistic means of access for a serious independent candidate.

VI. Conclusion

In the ballot access area, recent regulation has been less a question of legislative equalization than of judicial liberalization of state restrictions. Such restrictions may not always reach an acceptable accommodation between the values of free expression, equality, and systemic stability, and merit some suspicion as enacted by conceivably self-interested major party incumbents. Yet, the same constitutional themes have been present in this area as are found in campaign finance regulation, although in a different balance and arrangement. In the area of campaign finance, free expression and equality values are in conflict; here they appear on the same side of the balance.

The real issue in ballot regulation is that of restricting the ballot to serious candidates only, to protect the integrity of the electoral process. This is the question, not achieving an arbitrary "shortness" of the ballot. And, legitimate requirements of seriousness are likely to result in a ballot of reasonable length anyway.

In its essence, ballot access regulation presents a difficult problem of line drawing to determine which candidates are sufficiently serious to merit a place on the ballot. Nominating petitions and candidate residency requirements, in particular, may serve as useful mechanisms to draw the necessary lines.

169. 403 U.S. 431, 434 (1971).
170. 415 U.S. 709 (1974).
171. *Id.* at 719 n.5. *Contra, id.* at 722-23 (Blackmun, J., concurring).
172. Comment, *Fees, supra*, note 110, at 130.