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NOTES

The Constitutionality of Candidate Filing Fees

I. INTRODUCTION

Early in the twentieth century a "progressive impulse" captured the energies of this country's burgeoning urban middle class. Sickened by the corruption and scandals of the nineteenth century and fearful of the rising influx of European immigration, the so-called Progressives began working for political reform. The emphasis of this reform was primarily structural. Rather than by a remodeling of the citizenry, reform was to be achieved by "a careful and scientific adjustment of the machinery of government for the correction of prevalent evils." Progressives pushed such reforms as initiative, recall, referendum, and frequent elections in the belief that these measures would provide closer voter supervision of elected officials. In addition, great emphasis was placed on reforming the ballot in order "to concentrate the attention of the electorate on the selection of a much smaller number of officials and so afford to the voters the opportunity of exercising more discrimination in their use of the franchise." The principal thrust in this area was the "short ballot" movement, which advocated a reduction in the number of elective offices. But the "short ballot" concept, with its underlying premise that reasoned choice was enhanced by reducing the number of choices to be made, also gave rise to restrictions on the number of candidates running for a given office. How better to restrict the number of candidates and to weed out the frivolous than to require the payment of a fee as a condition to appearance on the ballot? Thus was born the candidates' filing fee.

The Progressive movement died with America's entry into the First World War, but not before several state legislatures had been prompted to enact filing fees. After the War the belief that political

2. Id. at 173-84.
3. S. Russell, Progressive Politics 33 (1914). The idea of structural reforms was perhaps most graphically expressed in a speech by an opponent of these reforms, Chief Justice Taft:
   "We think that all we need in order to create a government of the highest efficiency and morality and usefulness, is to discover some patent device to do this, without any special effort at improving the individuals who are its members.
5. See E. Bullock, Short Ballot (1915).
7. See, e.g., Ch. 4, § 45, [1893] Minn. Laws 27-38; Ch. 241, § 1, [1903] Tenn. Acts 558; Ch. 66, § 5, [1905] Neb. Laws 327; Ch. 109, § 4, [1905] N.D. Laws 206; Ch. 139, § 8,
responsibility could be greatly increased by structural reform of the electoral system continued to hold sway. In 1930, for instance, the National Municipal League published “A Model Election Administration System” that carried forward the notion that restrictions should be placed on candidates to reduce the size of the ballot. One of the restrictions proposed by the model act was “to require a substantial filing fee of each candidate, with provision that any candidate who receives a fair vote will have the fee refunded to him.”

Apparently a majority of the states still share the League’s concern. All but fifteen have some provision dealing with the payment of filing fees. The continuing vitality of this concern is demonstrated by the fact that several legislatures have only recently approved the imposition of such fees. These restrictions are not without their detractors. Indeed, filing fees have increasingly come under fire as prevailing values of the nation have changed. Whereas the Progressives were concerned with restricting the ballot to achieve voting rationality, the dominant theme of recent electoral reforms has been toward increased access to the ballot. The result has been a conflict between the Progressive ideals as embodied in the filing fee systems and the growing restiveness of many in our society with any alleged restrictions on essential rights. Not surprisingly this conflict has been translated into constitutional litigation.

II. FILING FEES AND ASSESSMENTS

Schemes for filing fees are rich in their variation. All basically entail an assessment which, when paid by a candidate, entitles him...


8. One of the principal causes of our long ballot is that many persons, for one motive or another, run for office, though they have no expectation of being elected. Sometimes it is the crank; sometimes it is the young lawyer or business man who wishes to avail himself of free advertising. In many communities the same persons run for office over and over again without the least expectation of being elected. It is a sad commentary upon our elections that occasionally an unheard-of person is elected to a high office. Some means should be taken to prevent the ballot from being cluttered up with the names of persons who are advertisers or cranks.

Harris, A Model Election Administration System, 19 NATL, MuN. REv. 629, 659 (1930).

9. Id. at 659. The National Municipal League also envisioned the possibility of using petitions as a threshold measure but preferred fees since it was felt that petitions were too easily obtained because of the public’s willingness to sign anything.


to have his name printed on the ballot; but in implementing this general requirement distinctive provisions abound. It is precisely these differences that the courts have seized upon to distinguish between valid and invalid schemes.

The first major distinction between various types of filing fees lies in the scope of their applicability. Some filing schemes apply only to those candidates running in primary elections. Other schemes enjoy general applicability; they require that all candidates pay the assessment. Judged on this criterion, the states with filing fees are almost evenly divided. Fourteen states have fees that apply to candidates in general elections, 16 while the remainder of those having fee systems apply them only to primary elections. 17

Filing fees systems can also be differentiated on the basis of who collects the fees and for what purposes the fees are used. In five states where the fees are required for candidates in primary elections, the fees are paid to and utilized by the party in whose primary the candidate chooses to run. In three other states the fees are split between the party and the state. The remainder of the states provide that the payment be made to some state or local official. Most of these

14. There are frequently other requirements that must be met in addition to the payment of a filing fee. They range from the signing of a declaration of candidacy to the somewhat more burdensome requirement of circulating a nominating petition.

15. Under this heading are included the fee systems of states that make entry into the primary election mandatory for all general election candidates.


19. Ark. Stat. Ann. §§ 3-109, -120 (Supp. 1969) (a fixed candidate fee is required of all candidates; in addition party candidates must pay a ballot fee set by the party); Fla. Stat. Ann. § 99.092 (Supp. 1971) (a fee of 3% of the annual salary of the office is to be paid to the state, and an assessment of 2% to the party); La. Rev. Stat. Ann. §§ 18.310-311 (West 1969) ($100 is to be paid to the state for all candidates, and up to $500 to the party, depending on party assessments).

states put the fees into the general operating fund, although in five states the fees are earmarked for payment of governmental election expenses.

Still a third way of distinguishing the various fee systems is by the amount of the fee. Thirteen states set the fee for major offices at a percentage of the salary; such fees vary from one fourth of one per cent to six per cent of the annual salary. In four states the fees are set by the political party within a dollar limit established by statute. The remaining states require a fixed fee, the amount paid varying with the office. The maximum fees in these states range from one to fifteen hundred dollars.

The final characteristic of a fee system relevant to constitutional analysis is its force as an absolute requirement for appearance on the ballot. At the present time the majority of states impose mandatory fees on all candidates in the election. Only seven states provide alternative methods of reaching the ballot that do not require payment of a fee.

The differences in the internal structure of fee systems might suggest that legal generalizations on the validity of fee systems would be misplaced. Indeed, a series of federal cases have held some of the above distinctions to be of constitutional import. Whether these holdings are consistent with constitutional theory is a question open to considerable doubt.

30. See pt. IV. infra.
III. THE LEGAL HISTORY OF FILING FEES

The first cases to challenge filing fees arose in state courts; they were based primarily on alleged violations of state constitutions. Since few courts dealt with the same arguments, no discernible pattern emerged from these cases. Of more importance have been the recent attacks on filing fees based on federal grounds. The first of these was Jenness v. Little, a declaratory judgment action that sought to invalidate an Atlanta city ordinance imposing a mandatory filing fee on all candidates in municipal elections. The court limited its consideration to the claims of a candidate for alderman who alleged that the ordinance violated her rights under the due process, freedom of assembly, and equal protection clauses of the Federal Constitution. Basing its decision on the poll tax cases, the court held that "to prohibit candidates from getting their names on the ballot solely because they cannot post a certain amount of money is illegal and unconstitutional." It refused, however, to hold the fees unconstitutional per se, stating that if "the candidate can get his

31. For discussion of several of these state cases, see Annot., 89 A.L.R.2d 864 (1963).
32. E.g., Kelso v. Cook, 184 Ind. 173, 110 N.E. 987 (1916) (fee unconstitutional because not related to services rendered to the candidate by the state); State ex rel. Thompson v. Scott, 99 Minn. 145, 108 N.W. 828 (1906) (fee constitutional because the amount so low as to impose no hardship on any prospective candidate); State ex rel. Neu v. Waechter, 332 Mo. 574, 58 S.W.2d 971 (1933) (fee unconstitutional because of state constitutional provision for free elections); State ex rel. Riggle v. Brodigan, 37 Nev. 492, 145 P. 258 (1915) (fee not unconstitutionally excessive because it was not as much as campaign expenditures); Johnson v. Grand Forks County, 16 N.D. 363, 113 N.W. 1071 (1907) (fee unconstitutional because it forced voters to pay a fee to enter a candidate of their choice); Ledgerwood v. Pitts, 122 Tenn. 570, 125 S.W. 1036 (1910) (fee unconstitutional as creating an arbitrary and oppressive classification).
34. The fee schedule was as follows: for mayor, $1000; for vice mayor, $500; for alderman, $500; for school board member, $400. See 306 F. Supp. at 927.
35. The suit was originally brought by Linda Jenness, a candidate for mayor, to void a fee schedule enacted pursuant to a state statute (No. 229, § 3, 1969 Ga. Laws 2522) amending the city charter to allow such fees. The candidate for alderman, Ethel Mae Matthews, and a black voter and resident of Atlanta, Julie Shields, intervened as co-plaintiffs alleging that the ordinance was unconstitutional and violated § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970). The court found for the plaintiffs on the statutory ground and voided the ordinance. The city then enacted the ordinance involved in this case. Jenness did not press her claims against the new ordinance, but Matthews and Shields amended their complaints to challenge it. The court did not deal with the claims of the voter, Shields, stating that its holding on the rights of the candidate, Matthews, was substantially determinative of all of the issues in the case. 306 F. Supp. at 927. The court also dealt with the allegations under § 5 of the Voting Rights Act of 1965, finding them baseless. 306 F. Supp. at 928.
37. 306 F. Supp. at 929. The court's holding applied only to future elections since it was felt that enjoining the fee for the current election would leave the city with no way to regulate the ballot. 306 F. Supp. at 929.
name on the ballot in some other fashion, either by nominating petition, primary, or pauper's affidavit," the city would be permitted to continue the fees.

From the Jenness decision, it seemed clear that fees would be struck down unless an alternative method of getting on the ballot was provided. But this seemingly clear conclusion was severely qualified in the next case dealing with filing fees, Wetherington v. Adams. The plaintiff, a candidate for the state legislature, sought to void a Florida statute imposing a mandatory filing fee on all those seeking a party nomination through a primary election. The plaintiff contended that fees were an unconstitutional denial of his rights to due process and equal protection. In disposing of the due process claim the court cited Snowden v. Hughes for the proposition that "an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause." The equal protection argument, the court held, was to be resolved according to the Supreme Court's formulation in Williams v. Rhodes:

"In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and interests of those who are disadvantaged by the classification."

Using this formulation, the Wetherington court found that the filing fees were justified by the state's interests in keeping elections to a manageable size, in limiting the ballot to only serious candidates, and in strengthening the political parties. These interests were clearly predominant since whatever disadvantage the fees caused a candidate were largely offset by a statute allowing the voter to write in the name of any candidate not on the ballot. Jenness was noted and distinguished with the statement that

38. 306 F. Supp. at 929.
40. The fee was 5% of the annual salary, with 2% going to the party and 3% going to the state. FLA. STAT. ANN. § 99.092 (Supp. 1971).
41. Plaintiff also contended that, if not unconstitutional per se, then the particular fees applying to him were unconstitutional as excessive. This contention was not, however, pressed in oral argument and the court treated it only in passing. 309 F. Supp. at 320.
42. 321 U.S. 1 (1945). For further discussion of Snowden, see pt. IV. B. infra.
44. 393 U.S. 23 (1968). For further discussion of Williams, see text accompanying notes 103-05 infra.
46. 309 F. Supp. at 321.
47. See FLA. STAT. ANN. § 101.011 (2) (Supp. 1971).
there are factual differences between this case, and that one, which may be ground for differentiation between them. Be that as it may, this Court holds the prohibition here involved against candidates who do not pay the fees in question having their names on the ballot is legal and constitutional.48

The Wetherington court's handling of Jenness did little to clarify the apparent inconsistencies between the holdings. Thus, when the Jenness court was presented with another filing fee case in Georgia Socialist Workers Party v. Fortson,49 it felt constrained to reconcile the decisions. Fortson involved an attack on another Georgia statute, which imposed on all general election candidates a filing fee equal to five per cent of the annual salary of the office.50 The court did not specifically deal with any of the claims advanced by the plaintiffs,51 but instead simply stated that Jenness was controlling. The main portion of the opinion attempted to reconcile Jenness and Wetherington. The distinction was that the former dealt with independent candidates in general elections while the latter dealt with regular party candidates in primary elections.52 Yet the court did not appear totally satisfied with this distinction. It criticized the argument in Wetherington that serious candidates can raise the fee through campaign funding, stating:

While as the Wetherington court says, it may be true that serious candidates traditionally attract money for their candidacy, we cannot say as a matter of law that one's candidacy is not serious or that he does not have the right to run merely because he does not have or has thus far failed to attract a certain amount of money.53

This caveat suggested that the views of the two courts were not completely reconcilable, a suggestion that was strengthened by another three-judge panel sitting in Fowler v. Adams.54 In this case, a

50. No. 1079, § 34-1013, [1970] Ga. Laws 366-68. The suit also involved the constitutionality of Ga. Court Ann. § 34-1001 (Supp. 1970), which sets petition requirements for candidates other than those nominated by the major political parties. The statute requires minor party and independent candidates to submit petitions signed by 5% of the eligible voters to get on the general election ballot. Major party candidates do not have to submit petitions. The court upheld these requirements, and the Supreme Court affirmed, 403 U.S. 431 (1971). Inasmuch as the filing fee requirements were not considered by the Court on appeal, it will be necessary to deal with only the lower court's holding on that issue.
51. The plaintiffs, voters and candidates for governor and Congress, had alleged violations of equal protection and first amendment rights to vote, run for office, and petition for grievance. 315 F. Supp. at 1037.
52. 315 F. Supp. at 1041.
53. 315 F. Supp. at 1041.
54. 315 F. Supp. 592 (M.D. Fla.), injunction granted, 400 U.S. 1205 (1970), appeal dismissed, 400 U.S. 986 (1971). The appeal was initially handled by Justice Black as
candidate for the Republican nomination for a seat in the United States House of Representatives sought to void the same Florida statute that had been upheld in Wetherington. He argued that the statute, in addition to violating equal protection, added requirements for congressional candidates other than those found in article I, section 2, clause 2, of the Constitution. Dealing first with the article I argument, the court denied plaintiff's claim on the ground that such fees were merely an exercise of the state's power to regulate the manner of holding elections set forth in article I, section 4, clause 1 of the Constitution. As for the equal protection argument, the court cited as controlling the Wetherington holding that the state's interest in imposing the fees outweighed any harm to the candidate. The contrary decisions were distinguished on tangential issues rather than on their merits. Jenness, for example, was distinguished on the ground that the case had later been found

Circuit Justice, who stated that "[t]he case raises questions which make it impossible for me to predict with certainty what the majority of this Court would decide." 400 U.S. at 1206. In view of his uncertainty on the merits, Justice Black ordered Fowler's name placed on the ballot on the equitable ground that, while this order caused the state little injury, a failure to do so would irreparably damage Fowler.

It is unclear what issues in particular troubled Justice Black since the case involved both article I and equal protection claims. In his opinion he spent more time with the former but noted the discrepancy between this case and Fortson.

56. The "added qualifications" argument has often been made in state courts. Although not dealing with filing fees as a qualification, several of the state courts have held other restrictions unconstitutional as adding to the qualifications in the federal constitution. See, e.g., Danielson v. Fitzsimmons, 232 Minn. 149, 44 N.W.2d 484 (1950) (conviction of a felony); Shub v. Simpson, 80 N.J.L. 193, 76 A.2d 332 (1950) (requirement that candidate file affidavit that he is not a subversive person); State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968) (requirement that candidate be a resident and qualified elector of district from which he is running); State ex rel. Sundfor v. Thorson, 72 N.D. 246, 6 N.W.2d 89 (1942) (prohibition of defeated primary candidate from running in general election); Ekwall v. Stadelman, 146 Ore. 499, 30 P.2d 1037 (1934) (prior oath by judge that he would accept no other nonjudicial office during his term); State v. Crane, 65 Wyo. 189, 197 P.2d 894 (1948) (state constitutional provision that governor not eligible for any other elective office during his term). Contra, Holley v. Adams, 238 S.2d 401 (Fla. 1970) (statute providing that current officeholders may not run for other concurrent offices acceptable since the candidate may give up his current office); Secretary of State v. McGucken, 244 Md. 222, 222 A.2d 693 (1966) (requirement that candidate appoint a campaign treasurer). Federal courts have not dealt with this argument, although it seems likely that they will view the provisions as restrictively as state courts. Cf. Powell v. McCormack, 395 U.S. 486 (1969); Bond v. Floyd, 385 U.S. 116 (1966).

57. U.S. CONST. art. I, § 2, cl. 2, states: "No person shall be a Representative who shall not have attained to the Age of twenty-five years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of the State in which he shall be chosen."

58. U.S. CONST. art. I, § 4, cl. 1, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

59. 315 F. Supp. at 593-94. See text accompanying note 46 supra.
moot on appeal to the Supreme Court.\textsuperscript{60} \textit{Fortson} was held inapplicable since that court had specifically distinguished \textit{Wetherington}, a case which the present court found controlling. The shallowness of this reasoning was apparent even to the court, however, since it felt constrained to follow the \textit{Fortson} court's example and disagree with the supposedly distinguished decisions. Thus, the \textit{Fowler} court stated:

Nor may ... [plaintiff] ... rely on \textit{Harper} v. Virginia State Board of Elections ... . Permitting candidates to qualify in unlimited number simply upon meeting age, residence and citizenship requirements is calculated by sheer unwieldy weight of numbers of names to lead to a breakdown of the election process and destroy the free right of suffrage which \textit{Harper} champions. At least, there is some guarantee of serious intentions when a candidate or his supporters pay a qualifying fee. We think \textit{Harper} may not be so applied, despite the contrary views of the \textit{Jenness} court.\textsuperscript{61}

Although \textit{Fowler} and \textit{Fortson} accepted the primary-general election distinction, both courts appeared to recognize that in reality it was merely a method of superficially reconciling fundamentally conflicting cases. Furthermore, neither opinion offered any precedent or policy support for the distinction. This gap in analysis was quite evident in \textit{Thomas} v. \textit{Mims},\textsuperscript{62} the next case to deal with the filing fee issue.

In \textit{Thomas} a candidate for the Mobile Board of Commissioners sought to invalidate an Alabama statute that imposed a mandatory filing fee on all those running in the municipal general election.\textsuperscript{63} The plaintiff contended that the statute denied her rights to vote and to seek office in violation of due process and equal protection. The court disposed of her due process claim by citing the \textit{Snowden}\textsuperscript{64} holding that the right to state office was a state created, not a federally created, right. In dealing with the equal protection argument, the court said: "The state must demonstrate not merely a reasonable justification for the distinction it draws between its citizens, it must show a compulsing state interest."\textsuperscript{65} The court then examined the asserted state interests in defraying the costs of the election, in ensuring that only serious candidates are on the ballot, and in control-

\begin{itemize}
  \item \textsuperscript{60} Matthews v. Little, 397 U.S. 94 (1970). It is not clear how the \textit{Fowler} court concluded that the Supreme Court's decision invalidated the lower court decision in \textit{Jenness}. The \textit{Matthews} decision merely stated that, since the election had taken place between \textit{Jenness} and the appeal, the case was moot. 397 U.S. at 94. The merits of the case were not discussed, so it appears that the decision of the lower court was left intact.
  \item \textsuperscript{61} 315 F. Supp. at 596 (emphasis original).
  \item \textsuperscript{62} 317 F. Supp. 179 (S.D. Ala. 1970).
  \item \textsuperscript{64} 321 U.S. 1 (1945), discussed in pt. IV. B. \textit{infra}.
  \item \textsuperscript{65} 317 F. Supp. at 181 (emphasis original).
\end{itemize}
ling ballot size. Although these interests were essentially the same as those accepted to justify the fees in Wetherington,66 the Thomas court struck down the fees.67 Yet, in the face of what appeared to be a fundamental inconsistency on this common issue and without offering any support for the distinction, the Thomas court concluded that Wetherington "is distinguishable because the fee involved there was for party primary elections."68

Although not logically consistent in many respects the five cases from Jenness through Thomas were at least unanimous in their agreement that filing fees are normally constitutional for primary elections, but are constitutional for general elections only if an alternative method of getting on the ballot is provided. But almost as quickly as this latter generalization emerged, it was qualified by the case of Carter v. Dies.69

Under attack in Carter was a Texas statute that required candidates to pay a flat fee of fifty dollars plus their pro rata share of the costs of the election in order to get on the primary ballot.70 The suit was initiated by various candidates for county office, but at trial the court allowed several voters to intervene as plaintiffs. As amended, the complaint alleged that the fees violated the due process and equal protection clauses by denying the plaintiffs and intervenors, respectively, their rights to run for office and to vote for candidates of their choice. In its decision, however, the court dealt exclusively with the rights of the intervenor voters.71 The court found that the fees, by keeping poor candidates off the ballot, seriously impaired a citizen's ability to vote effectively.72 Because of this impairment, it was held that the fees could be justified under the equal protection clause only if they were necessary to the accomplishment of some compelling state interest. The court noted that the Texas fee system had previously been held to be a revenue generating mechanism.73 Relying on the

66. See text accompanying note 46 supra.
67. Thomas suggested, as had Jenness, that a filing fee might be permissible if it were a part of a system that allowed a candidate to "'get his name on the ballot in some other fashion, either by nominating petition, primary election, or pauper's affidavit.'" 317 F. Supp. at 182, quoting Jenness v. Little, 306 F. Supp. 925, 929 (N.D. Ga. 1969), appeal dismissed sub nom. Matthews v. Little, 397 U.S. 94 (1970).
68. 317 F. Supp. at 182.
70. Ch. 492, § 186, [1951] Tex. Laws 1168-69 (now TEX. ELECTION CODE art. 13.07 (Supp. 1971)). The assessment of costs often involved substantial sums. For example, the costs assessed against plaintiff candidate for county judge amounted to $6300. 321 F. Supp. at 1360.
71. "Since the rights of the intervenors as voters will be determinative of the constitutionality of the laws here attacked, we deem it unnecessary to discuss the rights of the candidates." 321 F. Supp. at 1360.
73. 321 F. Supp. at 1361, citing Campbell v. Davenport, 562 F.2d 624 (6th Cir.
poll tax cases, the court concluded that the state's interest in raising revenue was not sufficient to justify the infringement on the right to vote, and the filing fees were therefore declared unconstitutional. 74

The *Carter* court attempted to reconcile the prior federal cases involving filing fees. The effort instead resulted in yet another demonstration of the basic inconsistencies among the various decisions. First, the court limited its holding by stating:

The Court does not mean to imply that there is no compelling interest, pursuant to which the State may require a primary filing fee. We have limited our decision here to say that a filing fee violates the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment when it is used as a revenue collecting device or when made an absolute qualification in order for a candidate to get his name on the ballot. Indeed, there may be other compelling interests which would justify some type of reasonable fee. 76

The court went on to distinguish *Wetherington* by saying:

The plaintiff in that case was a candidate and the issues were decided on the basis of what were his rights vis-a-vis those of the state. While neither approving nor disapproving of the reasoning used or the results reached, we need only say that in the case at bar we have resolved the issues on the rights of the voters. The cases are, therefore, distinguishable. 77

It is not at all clear that the court was persuaded of its own logic. It may have simply been looking for a way to void fees in a primary election without directly contradicting *Wetherington*. Or it may have been reacting to an isolated situation presented by the Texas statute. 77

This latter interpretation was reinforced on appeal by a unanimous Supreme Court, which seized upon the "salient features" of

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1966). The question in *Campbell* was whether the costs assessed under the statute were regulatory or merely another form of state tax, the latter being deductible for federal income tax purposes. The *Campbell* court found the assessment to be a tax:

The persuasive factor in reaching our conclusion is the size of the primary assessment in Texas. A fee of $100 or even $500 might be explainable primarily in terms of regulation. But it strains our imagination to accept the Commissioner's argument that an assessment of some $2000 is primarily for the purpose of regulation. The most reasonable explanation of the size of the assessment is to raise revenue to cover the cost of the primary. 362 F.2d at 629. *Contra*, McLean v. Durham County Bd. of Elections, 222 N.C. 6, 21 S.E.2d 842 (1942).

74. 321 F. Supp. at 1362-63.
75. 321 F. Supp. at 1362.
76. 321 F. Supp. at 1362-63.
77. This explanation is supported by Judge Thornberry's concurring opinion in *Carter*. 321 F. Supp. at 1363. He pointed out that the fees were several times higher than those dealt with by other courts and thus posed a proportionately greater disadvantage to poor candidates.
the Texas system in affirming the district court. Following the lead of the lower court, the Supreme Court placed its emphasis upon the fees as restrictions on the voters' rights:

Unlike a filing fee requirement which most candidates could be expected to fulfill from their own resources or at least through moderate contributions, the very size of the fees imposed under the Texas system gives it a patently exclusionary character. To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments, a phenomenon which can hardly be rare in light of the size of the fees, it tends to deny some voters the opportunity to vote for a candidate of their choosing.

In light of the harm caused the voters, the Court concluded that a strict scrutiny of the fees and the state interests offered to justify them would be required.

Under this standard the Court could not deem the fees necessary to the regulation of the ballot or to the production of revenue—interests which the Court nonetheless acknowledged as legitimate. Once again it was the excessive character of the fees that concerned the Court: such fees did not effectively promote the goal of limiting the ballot to serious candidates since legitimate candidates might well be unable to meet the assessment. Similarly, the Court was unwilling to accept the proposition that filing fees were necessary to the financing scheme of primary elections. On the basis of this analysis the Supreme Court concluded that the Texas fee system violated the equal protection clause, although its holding was couched in more guarded terms than that of the district court. Whereas the lower court decision maintained that filing fees would be unconstitutional when used as a revenue measure or when made an absolute requirement with no alternative means of access to the ballot, the Supreme Court simply noted that the Texas scheme suffered from both flaws. More importantly, the Court cautioned that its decision was not intended to reflect upon the validity of reasonable filing fees.

Because of its limitations, Carter leaves many questions unresolved. Jenness, Fortson, and Thomas had taken the position that filing fees were unconstitutional unless a reasonable alternative was provided. In light of Carter, will a fee that is excessive in amount be invalid despite the availability of an alternative route to the ballot? Conversely, will a fee that is reasonable in amount be valid?

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79. 40 U.S.L.W. at 4214.
80. 40 U.S.L.W. at 4214, 4216.
81. 40 U.S.L.W. at 4216.
despite the lack of an alternative, as apparently was suggested in \textit{Wetherington} and \textit{Fowler}  \footnote{See also Spillers v. Slaughter, 325 F. Supp. 550 (M.D. Fla. 1971). \textit{Spillers} involved another attack on the Florida statute upheld in \textit{Wetherington}. Unlike other cases, however, the plaintiffs included both prospective candidates and voters. Their complaint offered a new argument in opposition to filing fees. In addition to a violation of equal protection, the plaintiffs alleged that fees denied their rights in "voting and running for office [which] are expressions of free speech and association, and constitute privileges and immunities which are secured by the First and Fourteenth Amendments to the Constitution." 325 F. Supp. at 551. Neither the additional parties nor claims were sufficient to induce the court to change the stance previously adopted. The court summarily concluded that the privileges and immunities argument was covered by the Snowden theory of state-created rights. See pt. IV. B. infra. As for the equal protection argument, the court indicated the state interests recognized in \textit{Wetherington} were sufficient to outweigh any disadvantage to either voters or candidates. See 325 F. Supp. at 552-53. The district court decision in \textit{Carter} and the poll tax cases were distinguished as applying only to fees imposed to raise revenue. 325 F. Supp. at 553-54.} Or will a fee only be struck down when it is unreasonable in amount and when no alternative access is available? But perhaps the most important question left unresolved by \textit{Carter} is whether any fee system regardless of its provisions should be valid. Underlying the latter question is the fundamental conflict between the Progressive legacy of ballot restriction and the present demand for increased access to the ballot. A resolution of this conflict can no longer be avoided.

\section*{IV. The Constitutional Issues}

Three claims recurred frequently in the filing fee cases: excessiveness of the fee, lack of due process, and violation of equal protection. The first two were not extensively discussed by most of the courts; it was the third claim that occupied the attention of the courts and served as the basis for the most significant differences of opinion. Much of this section will therefore be devoted to the equal protection argument in an attempt to resolve the inconsistencies that have arisen in the recent cases.

Because there is considerable variation among the filing fee systems in various states, a survey that sought to analyze these distinctions in every context would be needlessly confusing. In the discussion that follows, the focus of analysis will instead be on a hypothetical or model fee system. The significance of the variations from this model will be postponed until this analysis is complete. In this model the term "filing fee" will be used to describe a mandatory system of fees for all general election candidates. It will be assumed that the amount of the fee is three per cent of the annual salary for the office. The fees, under this model, will be paid to a state official and deposited in the general operating fund. This hypothetical system, it should be noted, is simply a combination of the most widely adopted characteristics of present fee systems. It should therefore provide the most convenient method for the general analysis of the constitutionality of the fees.
A. Excessiveness

The argument that a filing fee is excessive is simply an argument that the fee does not meet the court’s standard for reasonableness. Most of the plaintiffs pressed the argument as a backstop in the event that they lost their argument that the fees were unconstitutional per se.\textsuperscript{84} The argument initially met with little success. The only case in which the argument was accepted was \textit{Carter}, which dealt with the exceptionally high Texas assessments.\textsuperscript{85} In the other cases the courts were simply unwilling to hold that, as a matter of law, the amount of the fees they were considering was excessive.\textsuperscript{86}

The problem lies not in the argument but rather in the reluctance of the courts to be involved in setting precise dollar limits on reasonableness. Indeed, though the fees examined in the federal cases were all much higher than the three per cent figure used in the model, only the Supreme Court in \textit{Carter} was willing to find the fee excessive. Thus, although the argument may have theoretical validity, in practice it may be quite difficult to convince a court that any fee is excessive.

B. Due Process

In the filing fee cases the plaintiffs, whether candidates or voters, almost uniformly asserted that the fees denied them a right secured by the privileges and immunities or due process clause of the fourteenth amendment. The courts were equally uniform in their response, relying on \textit{Snowden}\textsuperscript{87} to dispose of the claim.\textsuperscript{88} \textit{Snowden} involved allegations that the Canvassing Board of Cook County had failed to place the plaintiff’s name on the general election ballot even though he had been duly nominated in the Republican primary. Because of the proportional representation plan then in effect in Illinois, an agreement between the parties had already assured the plaintiff the election.\textsuperscript{89} The plaintiff therefore alleged that the action of the

\textsuperscript{84} For example, in \textit{Carter} it was claimed that even if there were state interests compelling enough to justify a fee, the particular fee involved was “exorbitant, arbitrary, capricious, irrelevant, unreasonable, outrageously high ... [and] without any reasonable relation to any legitimate legislative purpose.” 321 F. Supp. at 1360.

\textsuperscript{85} See note 70 supra.

\textsuperscript{86} State courts that have considered this problem have seldom voided filing fees as excessive. Several courts have, however, used the somewhat related standard of arbitrariness to void them. These courts have held that the fee was not related to any legislative purpose. It should be noted that few of these courts considered ballot regulation as a permissible state objective. See Kelso v. Cook, 184 Ind. 173, 110 N.E. 987 (1916); State ex rel. Boomer v. Nichols, 50 Wash. 529, 97 P. 733 (1908); People ex rel. Breackon v. Board of Election Commrs., 221 Ill. 9, 77 N.E. 321 (1906).

\textsuperscript{87} 321 U.S. 1 (1943).


\textsuperscript{89} The parties had agreed that two Republicans and one Democrat would be
Board deprived him of his state office without due process. The Court concluded that the right to state office was not protected by due process or the privileges and immunities clause since this right was an incident of state rather than federal citizenship. The Court then affirmed the judgment against the plaintiff on the ground that the complaint failed to state a cause of action since "the right asserted by the petitioner is not one secured by the Fourteenth Amendment." Although Snowden has not been recently tested, it is apparently still considered valid by the Court. Snowden is not, however, dispositive of all due process claims. A different characterization of due process problems was accepted by the court in Briscoe v. Kusper. In that case twelve independent candidates for alderman alleged that the Chicago Board of Elections sustained objections to their nominating petitions without giving the candidates an adequate chance to answer the charges. The court held that their claims under the due process clause were sufficient to state a cause of action:

[In this instance, we perceive the complaint of these candidates and voters as transcending mere assertion of state created rights. The thrust of their challenge . . . rests upon the effect which denial of ballot placement has upon their enjoyment of rights of free association and petition for the redress of grievances. For this reason, and because of the developments in the body of constitutional law dealing with "political rights," we also conclude that Snowden v. Hughes does not preempt consideration of plaintiffs' constitutional due process claims.]

The only court presented with this due process-rights of association argument in the filing fee context was Spillers v. Slaughter and it disposed of the argument by relying on Snowden. This holding in Spillers is obviously at odds with Briscoe and therefore is open to serious doubt. A legitimate argument might well be made on the associa-

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nominated for the three seats in the district. Plaintiff had received the second highest number of votes in the Republican primary. 321 U.S. at 5-5.

90. 321 U.S. at 6-7.
91. 321 U.S. at 13.
93. 435 F.2d 1046 (7th Cir. 1970).
94. 435 F.2d at 1053. The Briscoe court justified this approach by reference to a statement made by the Court in a per curiam opinion, Egan v. City of Aurora, 365 U.S. 514, 514-15 (1961): "Insofar as any right claimed stems from petitioner's status as mayor under Illinois law it is precluded from assertion here by Snowden v. Hughes . . . . But as we read the complaint, the rights which petitioner claims he was deprived of are those that derive from the Fourteenth Amendment, particularly the right of free speech and assembly."
95. 325 F. Supp. 550 (M.D. Fla. 1971), discussed in note 83 supra.
tion and petition issues, circumventing the *Snowden* decision.\(^6\) It should be recognized, however, that due process claims have not been eagerly accepted by the courts. While it may be that the concept is beginning to breathe new life,\(^9\) it is nonetheless clear that under the current constitutional doctrine equal protection arguments are a more readily accepted form of attack. More importantly, the equal protection rubric provides a means of resolving the real conflict between electoral simplicity and ballot access.

C. Equal Protection

If the courts have been unstinting in their determination to reconcile inconsistent positions on the filing fees, it may be more a function of a basic disagreement on the meaning of equal protection than of intellectual deceit. Justice Harlan, in his dissent in *Shapiro v. Thompson*,\(^8\) carefully delineated the standards to be applied to statutory classifications alleged to be in violation of the equal protection clause. Under traditional doctrine a statute is found to violate equal protection only when it results in discrimination against a certain class of people and the classification is not rationally related\(^9\) to any legitimate state policy. But the traditional standard gives way to a more exacting test under special circumstances. Thus “[s]tatutory classifications which either are based upon certain ‘suspect’ criteria or affect ‘fundamental rights’ will be held to deny equal protection unless justified by a ‘compelling’ governmental interest.”\(^10\) A stricter scrutiny and a higher level of justification may be triggered then by the scheme of classification or the interests involved. The Court has already concluded that classification based on wealth must be deemed “suspect.”\(^11\) In the context of the poll tax cases the Court noted: “Wealth, like race, creed, or color, is not germane to one’s ability to...

\(^6\) A further limitation on *Snowden* might also be noted. It applies only to state elections since it is based on the difference between federal and state citizenship. In a case involving a federal office, it should be possible to state a cause of action under due process without fear of a *Snowden*-type holding. *But see Fowler v. Adams*, 315 F. Supp. 592, 595 (M.D. Fla. 1970).


\(^9\) Justice Harlan described the extent of the relationship required as follows: A legislative measure will be found to deny equal protection only if “it is without any reasonable basis and is therefore purely arbitrary.” . . . It is not enough that the measure results incidently “in some inequality,” or that it is not drawn with “mathematical nicety” . . . ; the statutory classification must instead cause “different treatments . . . so disparate, relative to the difference in classification, as to be wholly arbitrary.” 394 U.S. at 692 (citations omitted).

\(^10\) 394 U.S. at 692.

participate intelligently in the electoral process.”102 It would be hard to deny that the model filing fee system imposes a standard of wealth on candidates since it requires the candidate to meet an assessment in order to get on the ballot. It seems clear therefore that filing fees create a classification based on a “suspect” criterion and should be justified only by a countervailing and compelling state interest.

The same conclusion is reached if filing fees are viewed with respect to Harlan’s second category, the impairment of a fundamental right. Its applicability is perhaps best demonstrated by Williams v. Rhodes,103 a case dealing with another restriction on candidates’ access to the ballot. The plaintiffs, two independent parties, challenged the validity of an Ohio statute that set up a petition procedure to be followed by small independent parties desiring to place candidates on the general ballot.104 In determining the proper equal protection standard to apply, the Court found:

[T]he state laws place burdens on two different, although overlapping, kinds of rights—the right of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. . . . Similarly we have said with reference to the right to vote: “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined . . . .”105

103. 393 U.S. 23 (1968).
104. No. 101, § 1, [1930] Ohio Laws 335 (now OHIO REV. CODE ANN. § 3517.01 (Baldwin 1971)). The statute applied to any small party that did not receive 10% of the votes cast in the preceding gubernatorial election. It required such parties to obtain petitions signed by qualified voters equal to 15% of the total number of votes cast in the preceding gubernatorial election in order to have their candidates listed on the ballot.
105. 393 U.S. at 30-31 (1966) (footnotes omitted). The Court appears to be saying that the stricter scrutiny is triggered by what Justice Harlan would classify as the impairment of a fundamental right. In his dissent in Shapiro, however, Justice Harlan analyzed Williams in slightly more complex terms:

Analysis is complicated when the statutory classification is grounded upon the exercise of a “fundamental” right. For then the statute may come within the first branch of the “compelling interest” doctrine because exercise of the right is
The *Williams* decision thus sets out two "fundamental" rights that may be violated by restricting candidate access to the ballot: the right to associate and the right to vote. The concern here, as it was with the "suspect" criterion standard, must be whether the model filing fee system sufficiently impairs these rights to call for use of the "compelling interest" standard.

The right to "engage in association for the advancement of beliefs and ideas"\(^\text{106}\) is guaranteed against state action by the first and fourteenth amendments.\(^\text{107}\) To impose a filing fee is to create an obstacle in the path of any party seeking to "advance" its "beliefs and ideas" through the political system. A fee, by restricting the ballot to those able to pay, would of necessity impair the right to associate since, as recognized in *Williams*, "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the ballot and thus denied an equal opportunity to win votes."\(^\text{108}\)

A fee system also impairs the right to vote by making an individual's vote less effective. While it may be that there is some psychological value in the mechanical act of voting, the courts have long recognized that the right to vote is of political value only if the vote has an effect on the system. Thus in the reapportionment case of *Reynolds v. Sims*,\(^\text{109}\) great emphasis was placed on ensuring that all voters had an approximately equal voice in choosing their representatives. As the Court in *Carter* pointed out,\(^\text{110}\) *Reynolds* was concerned with the *quantitative* effectiveness of the vote. The effort was to ensure that the *extrinsic* value of all votes was equal. Filing fees do not impinge on the quantitative effectiveness of the vote since all votes are given the same weight. They may, however, reduce the effectiveness of the vote in a *qualitative* sense. Just as a vote is effective only if it carries weight in the system, it is likewise effective only if it adequately reflects the individual's policy preferences. In other words, the system must strive to ensure that a citizen's vote is *intrinsically* valuable to him as an expression of his political choices.\(^\text{111}\)

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\(^\text{108}\) 393 U.S. at 31.
\(^\text{109}\) 394 U.S. at 660-61 n.9.
\(^\text{110}\) 397 U.S. at 533 (1964).
\(^\text{111}\) 40 U.S.L.W. at 4214.
The Williams Court recognized this fact when it remarked that "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."\(^{112}\) To rephrase this passage in the context of a filing fee, the right to vote is burdened if that vote may be cast only for candidates who can afford a filing fee at a time when poorer candidates are clamoring for a place on the ballot. Unless a person can find on the ballot a candidate who reflects to some extent his policy preferences, it cannot be said that he is voting effectively. Although this does not mean that every voter must find a candidate to his liking on the ballot, it certainly requires that every voter have an equal opportunity to place a candidate of his choice on the ballot. This goal is significantly impinged upon by fee systems such as our model. For such a system to be effective, it must eliminate some poorer candidates who may reflect the attitudes of a significant portion of the population. Since the result is seriously to reduce the intrinsic value of a person's vote as well as to abridge the right of association, it is incumbent upon the state to demonstrate the compelling interest that it is championing under such a fee system.\(^{113}\)

In the federal cases on filing fees the courts recognized either implicitly or explicitly that a stricter scrutiny had been triggered by the classifications and the rights involved. They did not, however, agree on the exact standard that the state must meet under the stricter scrutiny. The three courts that upheld the fees, Wetherington, Fowler, and Spillers, used a different standard from that used by the four courts that struck down such fees. In none of the cases in the former group was the "compelling interest" standard used. Instead of the "compelling interest" test, this group used a test based on a passage from Williams: "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and interests of those who are disadvantaged by the classification."\(^{114}\) Relying on this passage, the three courts applied a traditional balancing test to determine which interests should prevail.

But the "compelling state interest" test involves much more than

\(^{112}\) 393 U.S. at 31.

\(^{113}\) This analysis was accepted in essence by the Court in Carter. The Court was careful, however, to point out that the mere existence of a burden on the right to vote does not of itself trigger the higher standard; one must look to the extent and nature of the impact of the burden on the voter to determine whether strict scrutiny is required. 40 U.S.L.W. at 4214. While the 3% fee posited in the model is perhaps not as "patently exclusionary" as the Texas fee, it seems probable that it would be of such a magnitude as to be beyond the reach of the personal resources of many poor candidates. In any event, the distinction suggested by the Court between an inability to pay and an unwillingness to pay is a dubious one. See text accompanying notes 125 & 128-31 infra.

\(^{114}\) 393 U.S. at 30.
a simple balancing of the equities. It initially requires that the end that the state seeks to attain be of “compelling” importance. This means more than a showing that the goal is a legitimate state concern; it demands that the state show “pressing public necessity” \(^{115}\) for the achievement of the goal since “[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.” \(^{116}\) In addition, the test requires that the state action be “necessary, and not merely rationally related” to the accomplishment of that state interest. \(^{117}\) Each of the courts that struck down a filing fee scheme used this test. Moreover, the passage from the Supreme Court opinion in *Williams* that was used by the three courts upholding fee systems was taken out of context. The *Williams* court did not intend to say that a simple balancing test was all that was needed, but instead agreed with earlier cases by requiring that the state interest be “compelling.” \(^{118}\)

It seems clear that the different tests used by the courts had a significant impact on the decisions. As a proper application of the compelling interest test will demonstrate, the putative state interests behind a filing fee cannot be deemed to outweigh the harm caused to the voter and candidate.

a. *Harm to the individual.* Harm to the voter is difficult to measure. No adequate empirical measure exists to gauge the harm caused by the failure of a voter to find his candidate on the ballot. The *Carter* Court has nevertheless indicated that it is the harm to the voter that provides the axis of analysis in the case of filing fees—although this constitutional harm is in fact a function of the harm done to the would-be candidate. Ultimately then it is the effect of the fees upon the candidate that must be assessed. Harm to the individual candidate can be examined from two perspectives. The first is empirical. One can look to the available data on candidate financing to establish whether the imposition of filing fees would truly disadvantage any candidates. The primary source of these data is information on the campaign expenditures of candidates for various offices. From the available information on this subject, it appears that a three per cent fee used in the model would constitute a very small percentage of the total campaign expenditures of most serious candidates. It was estimated that the cost of running an effective campaign in 1970 would be $100,000 for the House of Representatives and $250,000

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118. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that “only a compelling state interest in the
These estimates may in fact be somewhat low. Some primary campaign expenditures for races in major states were reportedly in excess of $1,000,000. Obviously these expenses are exceptional, but even in smaller states the campaign expenses for a major office are not insignificant. Moreover, although the data are not nearly as complete, it appears that a fee such as proposed by the model would not be a very large part of campaign expenditures for minor offices. One can safely conclude that such fees would be rather inconsequential to the majority of those who seriously contemplate running for office.

Yet harm may, as stated above, be viewed from two perspectives. While it may be true that from an empirical perspective filing fees do not hinder the majority of candidates, it does not necessarily follow that the harm is insignificant from a constitutional perspective. The validity of state action is not to be measured simply by the usual impact on the average man but must also take into account the impact on particular groups or individuals who are specially affected by the state’s act. When viewed from this perspective, there can be little doubt that at least some indigent candidates are affected by filing fee systems. One need only look to the plaintiffs in the fee cases to find examples of individuals allegedly disadvantaged by such schemes. There is, however, the troubling suggestion in Carter that the Court may draw a distinction between the effect of a filing fee upon those individuals who are unable to pay and those who are unwilling to pay. The distinction appears to rest on the premise that an unwillingness to pay a fee reflects upon the candidate’s seriousness, a premise that is untenable for constitutional purposes. A fee need not completely obstruct a candidate; it is sufficient that it simply create a disincentive to political candidacy. Either result would produce constitutionally cognizable harm to the candidate and voter.

b. The state interests. The Progressive concern for voting ration-


122. Perhaps the best collection of studies in this field is 2 Citizens Research Foundation, Studies in Money in Politics (H. Alexander ed. 1970). Although these studies are based on 1964-1966 elections, they support the general conclusion that a 3% filing fee would not be a significant percentage of most candidates' election expenses.

123. See text accompanying notes 128-31 infra.

124. The effect of a fee would be most strongly felt on the level of local elective offices. Even a relatively modest fee might dissuade an otherwise serious candidate from seeking office, particularly if other political factors already weigh against him.
ality, as reflected in the fees, focused on the interests of the majority rather than of the individual. That is, the Progressives believed that the interests of the majority should be preserved by an electoral system that was understandable by and responsive to the citizenry. If this meant that certain groups or individuals were denied access, the Progressives felt justified in that they were merely protecting the democratic idea of majority rule.

Viewed from this vantage point, the equal protection issue turns on whether the state’s and therefore the majority’s interests are to be given precedence over those of the individual. Three state interests have been advanced to justify the imposition of filing fees: (1) to raise revenue to defray the costs of staging the election; (2) to limit the ballot to serious candidates; and (3) to control ballot size.

The argument early raised in defense of filing fees was that of revenue production. Analogizing the fee to user taxes, the state claimed that it was only proper that the candidates pay part of the cost of the election that was staged for their benefit. Some early state court cases adopted this argument. Under the “compelling interest” test, however, the argument is quite inadequate. The reason was well stated by the lower court in Carter: “The collection of revenue is, of course, a permissible and legitimate interest but under these circumstances not a compelling state interest. These assessments are not necessary to insure the collection of revenue.”

A second state interest that the fees allegedly serve is that of limiting the ballot to serious candidates. The underlying premise of this argument is that a “serious candidate for public office has traditionally attracted money for his candidacy. The inability to pay a reasonable filing fee might indicate lack of potential political support for a person’s candidacy.” The empirical data available appear to support this conclusion. One of the leading authorities on the subject of campaign financing has written:

The necessity for obtaining essential election funds has its most profound importance in the choosing of candidates. The monies can usually be assured, and often can be withheld, by a relatively small corps of political specialists whose job it is to raise money. If the

125. See, e.g., 49 U.S.C. § 1742 (1970), which provides that the proceeds of federal taxes on aviation fuel and air transportation shall be used solely for the improvement of the nation’s airways.

126. See Munsel v. Hennegan, 182 Md. 15, 31 A.2d 640 (1943); Riter v. Douglas, 32 Nev. 400, 109 P. 444 (1910). The strength of this argument is shown by the fact that some courts struck down fees that they felt were not directed toward raising revenue. Cf. Kelso v. Cook, 184 Ind. 173, 110 N.E. 987 (1910); Johnson v. Grand Forks County, 16 N.D. 363, 113 N.W. 1071 (1907).

127. 321 F. Supp. at 1361. On appeal, the Supreme Court specifically rejected the argument that the candidates should “pay that share of the cost which they have occasioned.” 40 U.S.L.W. at 4215.

prospective candidate cannot get assurances of the support necessary to meet the basic costs of a campaign, he may as well abandon hope of winning.\textsuperscript{129}

But this argument, like the revenue argument before it, misses the mark. It is an attempt to equate success with seriousness, a connection which, at least in constitutional thought, is erroneous. The Court has consistently held that a man’s sincerity cannot be measured by his material possessions.\textsuperscript{130} The conclusion is inescapable: Although a state may indeed have an interest in ensuring that only serious candidates get on the ballot, filing fees are neither necessary nor rationally related to the furtherance of that state interest.\textsuperscript{131}

The final argument advanced to justify the fees presents perhaps the clearest example of the clash between the value of access and the Progressive drive for restriction. It is the problem of ballot control, which formed the basis for many of the ballot reform efforts of the Progressives and their ideological descendants. This argument has been phrased by various courts as a desire to minimize voter confusion,\textsuperscript{132} to limit the number of run-off elections,\textsuperscript{133} to curb “ballot flooding,”\textsuperscript{134} and to prevent the overwhelming of voting machines.\textsuperscript{135}

In essence the ballot size argument stands for the proposition that an orderly and compact electoral process will lessen political manipulation and ensure that the election results in a truer expression of the will of the majority.

The argument is not a frivolous one; the reasoning behind it is demonstrably sound. There is no question that the state has an interest in assuring such ends.\textsuperscript{136} The problem is that it con-


\textsuperscript{130} See Boddie v. Connecticut, 401 U.S. 371, 381 (1971); Turner v. Fouche, 396 U.S. 346, 353-54 (1970). But cf. Bullock v. Carter, 40 U.S.L.W. 4211, 4215 (U.S. Feb. 24, 1972), for the suggestion that “[t]here may well be some rational relationship between a candidate’s willingness to pay a filing fee and the seriousness with which he takes his candidacy . . . .” To use this relationship, however, to justify a filing fee would necessitate a significant departure from the Court’s position in Boddie and Turner.

\textsuperscript{131} The seriousness argument was refuted in Thomas v. Mims, 317 F. Supp. 179, 182 (S.D. Ala. 1970), as follows:

There is difficulty in how it is to be determined whether a candidate is serious. Is a “serious” candidate one who is able to expend a good deal of money on his campaigning? If so, this is unacceptable as a standard. The wealth of the individual candidate is too cynical a test to be applied to the legitimacy of his effort. A poor man may be as “serious” in his campaign as a wealthy one, and has the right to seek office with or without capital outlay. It is no answer that those candidates without money cannot “seriously” hope to win. It may be that modern politics is such that low budgets lose elections; but, with those low budgets are entitled to try.


flicts with another widely held notion: equal access to the ballot. This conflict is in reality a disagreement on means, since advocates of both positions share the common goal of making the political system more responsive to citizen demands. The issue, translated into equal protection terminology, is whether the values behind the state interest are “compelling” enough to justify infringement on the values of equal access to the political system. Under present doctrine, the answer is no. Although there admittedly is a legitimate state interest in ballot control, fees are neither necessary nor rationally connected to that end. Wealth is not related to any personal characteristic that would justify keeping individuals off the ballot. It does not accurately reflect a candidate’s seriousness in running for office. In this respect it is therefore arbitrary: there is no more reason to justify restricting the ballot on the basis of wealth than there is to restrict it on the basis of occupation, hair color, or the size of an individual’s rock collection. Moreover, there is some indication that the Court does not feel that ballot control itself is a compelling interest. 137

On the other hand, our strong aversion to classifications based on wealth does give reason to strike down such fees. This reasoning was illustrated by the Court in the poll tax cases: “To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an ‘invidious discrimination’ . . . .” 138 Other methods exist that are equally effective in regulating the ballot yet do not impose such discrimination. 139 Reasonable petition requirements, for example, create classifications that are not only less offensive but are also related to the state interest they are serving. 140 For these reasons, it appears that the ballot control

137. Finally Ohio claims that its highly restrictive provisions are justified because without them a large number of parties might qualify for the ballot, and the voters would then be confronted with a choice so confusing that the popular will could be frustrated. But the experience of many States . . . demonstrates that no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required. It is true that the existence of multitudinous fragmentary groups might justify some regulatory control but in Ohio at the present time this danger seems to us no more than “theoretically imaginable.”


139. The Court has recognized the availability of alternative means of achieving the state’s goal as a factor to be considered in judging the validity of state restrictions. In Boddie v. Connecticut, 401 U.S. 371, 381-82 (1971), the Court struck down entry fees for divorce cases partially on the ground that “other alternatives exist to fees and cost requirements as a means for conserving the time of courts and protecting parties from frivolous litigation.”

140. Petitions will require that a candidate demonstrate at least minimal public support. Therefore, restriction of the ballot on that basis will be likely to keep off the ballot only those candidates with no public support. Assuming that the state has some interest in keeping candidates with no public support off the ballot, a petition requirement bears some relation to the state interest it purports to serve. See Jenness v. Fortson, 403 U.S. 431, 442 (1970).
argument will not be found compelling enough to outweigh the imposition made on access to the electoral system. The filing fee system posited in the model then cannot withstand constitutional scrutiny. Yield it must to the rights of the elector and the candidate guaranteed by the equal protection clause.

c. *Abandoning the model.* It remains only to determine whether any variations on the basic model would render a filing fee system compatible with the requirements of equal protection. The model system imposed fees on general elections. The lower courts have generally felt that the imposition of fees in primary elections is acceptable. This distinction cannot be sustained. The Court has consistently held that in view of the part played by primaries in the over-all electoral scheme, constitutional safeguards are equally applicable to both primary and general elections.141 It can no longer be argued that the primary election may be conducted by the state without fulfilling equal protection requirements; when the state acts to provide and promote primaries, it must comply with the commands of equal protection.142 Nor can it be argued that primaries are exempt from equal protection strictures if voters are free to choose whomever they wish in the general election. As the Court noted in *United States v. Classic,*143 "the practical operation of the primary law . . . is such as to impose serious restrictions upon the choice of candidates by voters save by voting at the primary election."144 Moreover, even if choice were not so restricted, the great practical importance of party affiliation in the general election will lead the Court to apply the full equal protection guarantee to primary elections.145

Indeed, it may be that the individual harm is greater in primaries than in general elections since primary candidates are often forced to rely more heavily on their own resources. One observer, after examining several congressional races in California concluded that

the level of public interest was much lower during the primary campaign, making it more difficult to mobilize resources. Only after campaigns had reached a high level in the autumn did the inexperienced workers, small contributors, and the normally nonpolitical groups volunteer or even respond to the candidates pleas for help. Consequently, candidates could rely less upon the resources that the

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143. 313 U.S. 299 (1941).

144. 313 U.S. at 313.

public, parties, or groups could contribute, and had to rely more upon their own personal resources. 146

In any event, it is now clear that no filing fee scheme for primary elections can be upheld if a similar fee in general elections is unconstitutional.

Neither should a fee be saved if it is collected by the party rather than the state since "the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State." 147 Likewise, fees that are used to pay for election expenses will be viewed in the same light as those whose proceeds go to the general fund. As pointed out above, 148 the collection of revenue is not a sufficiently compelling state interest to justify the harm caused by the fees to individual candidates.

The amount of the fee appears on the surface to be relevant to the equal protection argument. As a logical matter, the amount of the harm should decrease as the amount of the fee decreases. There are indications in the *Carter* decision that the Court may have adopted this logic, 149 but careful analysis shows that this approach cannot be sustained. Just as the harm would decrease with the amount of the fee, the value of the fee in furtherance of a state interest would also decrease at a roughly proportional rate. Although there is less harm in smaller fees, there is also less justification for their imposition. 150 Even if this were not the case, the apparent judicial dislike for determining the reasonableness of fees 151 would suggest that courts will hesitate to draw lines at the other end of the spectrum to serve as a basis for determining harmlessness.

The final manner in which several fee systems differ from the model is in their provision for some reasonable alternative method for a candidate to appear on the ballot. The courts that struck down filing fees stated that such a provision would save the constitutionality of the scheme.

146. D. LEUTHOLD, ELECTIONEERING IN A DEMOCRACY: CAMPAIGNS FOR CONGRESS 37-38 (1968). For a further discussion of the importance of primary elections in the democratic system, see Comment, supra note 13, at 132-33.


148. See text accompanying notes 125-27 supra.

149. See 40 U.S.L.W. at 4215-16.

150. For example, a fee of $5 may indeed be less damaging to a candidate than a fee of $500. But that fee would also be much less effective in furthering the state's interest in raising revenue, ensuring serious candidates, and controlling the ballot. In terms of the compelling interest test, the smaller fees would be even less "necessary to" or "related to" a state interest than would the large fees. Cf. Turner v. Fouche, 396 U.S. 346, 363 (1970).

151. See pt. IV. A. supra.
tionality of the fee system. None, however, stated why these systems would be more compatible with equal protection. The probable cause of such omissions is that there is no way to reconcile such options with the requirements of equal protection.

In analyzing the effect of an option provision in filing fee systems, the initial question is whether strict scrutiny is required. Any such provision would, on the basis of Justice Harlan’s terminology, create a “suspect” classification based on wealth by forcing poor candidates to take a different path to the ballot than their wealthy opponents. The crucial question is whether there is a state interest behind the alternative “compelling” enough to outweigh the harm caused to individual voters and candidates.

One device that may be used to create an option is a provision allowing a voter to write in the name of any candidate not on the ballot. But this mechanism does not lessen the harm caused a candidate or voter by a filing fee system since it is in reality no option at all. Justice Douglas recognized this in his concurring opinion in Williams: “[T]he write-ins are no substitute for a place on the ballot” for “[t]o force a candidate to rely on write-ins is to burden him with disability. It makes it more difficult for him to get elected, and for voters to elect him.” In a similar vein an earlier observer remarked that the right is of no value except when exercised in a concerted movement, when it sometimes results in the nomination or election of the candidate. It should be pointed out, though, that this is infrequent, and the candidate whose name is not printed on the ballot stands little chance of election or nomination, as the case may be.

The effective result is that the classification caused by the fee is unchanged, and the system remains void under the equal protection clause.


153. See text accompanying notes 98-101 supra.

154. The Court has often held that a scheme need not completely eliminate electoral rights in order to violate equal protection. See, e.g., Williams v. Rhodes, 393 U.S. 23 (1969); Reynolds v. Sims, 377 U.S. 559 (1964).

155. See text accompanying note 114 supra.

156. See, e.g., Mich. Stat. Ann. § 6.1737(4) (1956), which reads: “If the elector wishes to vote for a candidate not on any ticket, he may write or place the name of such candidate on his ticket opposite the name of the office and make a cross (X) in the circle under the party name.”


A second proposed option is to allow a candidate to file a pauper's affidavit in lieu of paying the fee.\textsuperscript{159} It may be argued that such a provision greatly reduces any harm by allowing a poor candidate an easy method of getting on the ballot. The stigma of filing such an affidavit, however, will cause some initial harm by deterring candidates from filing; further, it may lessen their chance of success by lowering their public reputation. More importantly, such a scheme destroys whatever initial justification there is for fees. If, as noted above, the only possible justification for a filing fee is to control ballot size, a system that allows candidates to get on the ballot by filing an affidavit cannot truly be said to reach that goal. It can instead be intended only to stigmatize and discredit poor candidates\textsuperscript{160} or to raise revenue from the wealthy,\textsuperscript{161} both of which are improper objectives for an electoral regulation. This option therefore is not justified by a compelling state interest and is ineffective to save the constitutionality of a fee system under the equal protection clause.

The final and most widely used option would allow a candidate to submit a filing fee in lieu of nominating petitions.\textsuperscript{162} This plan would reduce the individual harm by allowing a poor candidate to reach the ballot without any particular stigma attaching to nonpayment of the fee. The fact remains, however, that a poorer candidate is put at a definite disadvantage by law since he must demonstrate a degree of support prior to the election while a person paying the fee need demonstrate none. The harm, though reduced, is still sufficient to outweigh the state interest since the latter is even less compelling under this plan than under a mandatory fee system. Under a mandatory plan, the fee could at least be justified as a method of controlling ballot size. The petition option does not offer that justification since ballot control will be achieved primarily through petitions rather than fees. The state has thus recognized the availability and validity of petitions as a method of control. The only justification for the fees under the plan would be to reduce the state's workload in validating and checking the petitions. This

\textsuperscript{159} Presently the only statute with such a provision is Tex. Election Code art. 13.07a (Supp. 1971), which provides:
If a candidate is unable to pay the deposit or filing fee . . . in lieu of payment he may file . . . a petition of voters . . . [which] shall be accompanied by the following affidavit: "I am not financially able to pay the filing fee required to file for the office set forth in the attached petition. In lieu thereof I submit the following petition . . . ."

\textsuperscript{160} The Court has in the past struck down statutes that tend to stigmatize or embarrass certain groups. Cf. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).


\textsuperscript{162} See, e.g., Mich. Stat. Ann. § 6.1163 (Supp. 1971), which reads in part: "To obtain the printing of the name of any person . . . upon the official primary ballots . . . there shall be filed . . . nominating petitions . . . . In lieu thereof, a filing fee of $100.00 . . . ."
would clearly be an insufficiently compelling interest to justify the disadvantage to which poorer candidates are put. 103

V. SUMMARY

The Progressive movement gave great impetus to the belief that the democratic ideal could be attained only if the mechanics of the electoral process allow the voter to make a reasoned choice at the polling place. This goal could be best achieved by making the operation of voting as simple as possible and by ensuring close supervision of elected officials. In later years, many segments of the society came to view access to the political system as the best way of carrying forward democratic principles. Although these ideas are not mutually exclusive, they did come into conflict upon the question of candidate filing fees.

The courts have now been forced under the rubric of the equal protection doctrine to consider this conflict in values. While they have differed in their outcomes, a proper analysis of the problem under equal protection doctrine shows that ballot access is given priority by the Constitution. This analysis also discloses that all fee systems presently in use, despite their individualized and differing content, are invalid under equal protection standards.

103. See Shapiro v. Thompson, 394 U.S. 618, 634-35 (1969), in which the Court rejected the argument that such administrative considerations are compelling state interests.