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Elections Right of Suffrage and Regulation Thereof - Official Ballots; Validity of Ballot Access and Ballot Position Restrictions

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ELECTIONS—RIGHT OF SUFFRAGE AND REGULATION THEREOF—OFFICIAL BALLOTS; VALIDITY OF BALLOT ACCESS AND BALLOT POSITION RESTRICTIONS

Harley McLain, an independent candidate in North Dakota's 1978 general election,[1] brought an action to challenge three North Dakota election statutes,[2] alleging that his first and fourteenth amendment rights had been violated. The United States District

1. McLain v. Meier, 637 F.2d 1159, 1160 (8th Cir. 1980). McLain ran as an independent candidate for North Dakota's congressional seat. In the summer of 1978 he attempted to file as the party candidate for "Chemical Farming Banned," a political group organized by McLain. *Id.* at 1161. He was disqualified as a new party candidate because he failed to submit 15,000 signatures before the June 1 deadline. *See* N.D. CENT. CODE § 16-04-20 (4) (1971) (current version at N.D. CENT. CODE § 16.1-11-30 (4) (Interim Supp. 1981)); *see also* explanatory reference in note 2 *infra*. McLain was, however, able to qualify as an independent, non-party candidate by submitting 300 signatures not less than 40 days before the general election. N.D. CENT. CODE § 16-03-02 (1971) (current version at N.D. CENT. CODE § 16.1-11-39 (Interim Supp. 1981)); when McLain first viewed the ballot, he registered a complaint that each independent candidate was not given a separate column on the ballot. *Id.* at 1161-62.

2. The statutes provide:

> The following political parties shall be provided with separate columns on primary election ballots:
>
> 1. The Republican party;
> 2. The Democrat party;
> 3. Any party which cast five percent of the total votes cast for governor at the last general election; and
> 4. *Any other party, if a petition signed by fifteen thousand or more electors of this state is filed with the secretary of state before four o'clock p.m. on June first of any primary election year, asking that a column be provided for such party, naming it, and stating the platform principles thereof. If such petition is mailed it shall be in the possession of the secretary of state before four o'clock p.m. on June first. Candidates of such party shall be entitled to the same rights and privileges as those of other parties.*
>
> Columns shall be arranged so that any column shall be in an inverted position when the adjacent column or columns are in an upright position.

N.D. CENT. CODE § 16-04-20 (1971) (current version at N.D. CENT. CODE § 16.1-11-30 (Interim Supp. 1981)) (emphasis added).

Court for the District of North Dakota dismissed the complaint, finding that the statutes were reasonably related to legitimate state interests and that they did not violate any constitutional rights.[3] The United States Court of Appeals for the Eighth Circuit, in part and affirming in part, *held* that North Dakota's ballot access restrictions[4] were unnecessarily oppressive, and hence unconstitutional,[5] and that the favoritism of the "incumbent first" statute[6] burdened the fundamental right to vote in violation of the fourteenth amendment.[7] The court found, however, that the ballot arrangement of the independent column statute[8] was a

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> The ballot provided for in section 16-11-05 shall be arranged as follows: *The names of the candidates of the party casting the highest number of votes in the state for members of Congress at the last preceding general election shall be arranged in the first or left-hand column of such ballot;* of the party casting the next highest number of votes in the second column; of the party casting the next highest number of votes in the third column; and of such other party as the secretary of state may direct for state officers. In presidential years, the names of electors of president and vice-president of the United States, presented in one certificate of nomination, shall be arranged in a group enclosed in brackets to the right and opposite the center of which shall be printed in bold type the surname of the presidential candidate represented. To the right and in a line with such surname, near the margin, shall be placed a single square, and a mark within such square shall be designated a vote for all the electors, and such group shall be placed at the head of the column under the party designated or represented in such certificate.

N.D. CENT. CODE § 16-11-06 (1971) (current version at N.D. CENT. CODE § 16.1-06-07.1 (Interim Supp. 1981)) (emphasis added).

> The official ballots provided for in this title for partisan election at general elections in precincts in which voting machines are not used shall be prepared as follows:
>
> 1. The ballots shall be of sufficient width to contain all of the tickets to be voted for, under the appropriate party designation for each;
> 2. On the left-hand side of such ballot shall be a column designating the office to be voted for, and on the same line, in the column under the appropriate party designation of each, all of the names of the candidates duly nominated for that office shall be printed;
> 3. The names of candidates under headings designating each official position shall be alternated on the official ballot in the printing in the same manner as is provided in the primary election ballot;
> 4. *The names of all persons nominated by petition shall be placed in one column under the designation of "independent nominations" in the lines respectively specifying the offices for which they are nominated;* and
> 5. The size of type shall be as specified by the secretary of state.
>
> In precincts in which voting machines are used, the list of offices and candidates and the statements of measures and questions to be submitted to the voters shall be arranged in a manner and form approximating as far as possible the requirements of this section.

N.D. CENT. CODE § 16-11-05 (1971) (current version at N.D. CENT. CODE § 16.1-06-05 (Interim Supp. 1981)) (emphasis added).

The statutes dealt with in *McLain* have since been repealed and replaced by North Dakota Century Code title 16.1 (Interim Supp. 1981). A discussion of the current versions of these statutes is contained in note 128 *infra*.

3. McLain v. Meier, 496 F. Supp. 462, 469, 473 (D.N.D. 1980).

4. N.D. CENT. CODE § 16-04-20 (4) (1971) (current version at N.D. CENT. CODE § 16.1-11-30 (4) (Interim Supp. 1981)). This statute will be referred to as North Dakota's "ballot access" statute.

5. McLain v. Meier, 637 F.2d 1159, 1165 (8th Cir. 1980).

6. N.D. CENT. CODE § 16-11-06 (1971) (current version at N.D. CENT. CODE § 16.1-06-07.1 (Interim Supp. 1981)). This statute will be referred to as North Dakota's "incumbent first" statute.

7. 637 F.2d at 1167.

8. N.D. CENT. CODE § 16-11-05 (1971) (current version at N.D. CENT. CODE § 16.1-06-05

matter of choice for the state, and was therefore constitutionally permissible as written.[9] *McLain v. Meier,* 637 F.2d 1159 (8th Cir. 1980).

The three statutes challenged in *McLain* concerned two distinct restrictions on political candidates—ballot access and ballot position. The constitutional problems fostered by these restrictions have plagued the courts for some time. *Williams v. Rhodes*[10] was the United States Supreme Court's first major decision involving ballot access restrictions. Under an Ohio law a new political party seeking ballot access had to obtain signatures from fifteen percent of the voters in the last gubernatorial election, and had to file these petitions early in February of the election year.[11] The *Williams* Court found that, because the fundamental rights to associate and to cast votes effectively were involved, the statute would have to be examined under a strict scrutiny standard of review, and therefore, the State would have to show a compelling interest for the legislation.[12] The state interests in preserving the two-party system,[13] forcing a confrontation of candidates in the primary,[14] assuring a majority vote to the winner,[15] and preventing voter confusion,[16] were found insufficient to show any compelling interest for the burden placed on candidates' access to the ballot.[17] Since the State had failed to show any compelling interest, the statute was invalidated.[18]

The United States Supreme Court again addressed the issue of ballot access restrictions in *Jenness v. Fortson.*[19] *Jenness* involved a challenge to a Georgia statute that required third parties and independent candidates to file nominating petitions containing signatures from five percent of the registered voters in the last general election for that office, in order to gain access to the general election ballot.[20] Unlike the *Williams* Court, the Court in *Jenness* did

(Interim Supp. 1981)). This statute will be referred to as North Dakota's "independent column" statute.

9. 637 F.2d at 1169.

10. 393 U.S. 23 (1968).

11. Williams v. Rhodes, 393 U.S. 23, 24-28 (1968) (citing OHIO REV. CODE ANN. § 3517.01 (Page 1960)). The Ohio American Independent Party, which was formed in January of 1968, had secured the 15% signature requirement, but was denied placement on the ballot because the February filing deadline had expired. 393 U.S. at 26-27. The Socialist Labor Party could not meet the 15% signature requirement. Both parties challenged the Ohio election laws as violative of the equal protection clause of the fourteenth amendment. *Id.* at 26.

12. *Id.* at 31.

13. *Id.* at 31-32.

14. *Id.* at 32-33.

15. *Id.* at 32.

16. *Id.* at 33.

17. *Id.* at 31.

18. *Id.* at 34.

19. 403 U.S. 431 (1971).

20. Jenness v. Fortson, 403 U.S. 431, 432 (1971). In *Jenness* the Court defined "political

not discuss the alleged infringement of fundamental rights. Instead, the *Jenness* Court compared the burden on candidate access created by the Georgia statute it was addressing and that of the statute at issue in *Williams*. It determined that the Georgia legislation entailed a less restrictive burden to access, which in no way froze the political status quo.[21] The *Jenness* Court seemed to require only a rational connection between the state's interests and the purpose of the statute;[22] it recognized an important state interest in requiring some showing of a "significant modicum of support" before printing the candidate's name on an election ballot. The Court also acknowledged the state's legitimate interest in preventing voter confusion.[23] Thus, the Court held that the statute imposed no arbitrary restrictions on candidates and upheld the five percent signature requirement.[24]

In *Bullock v. Carter*[25] the Court further explained the relationship between fundamental rights and restrictions on candidacies. The Court noted that it had never attached "such fundamental status to candidacy as to invoke a rigorous standard of review."[26] Instead, it advocated examining the candidate

parties" as those parties which received at least 20% of the vote in the last gubernatorial or presidential election, and advanced the winner of their primary to the subsequent general election. *Id.* at 433-34 (citing GA. CODE ANN. § 34-1010 (1970)). A third party or independent candidate could have his name printed on the general election ballot by filing the nominating petition. The time allowed for circulating the petitions was 180 days. *Id.* at 433 (citing GA. CODE ANN. § 34-1010 (1970)). The petitions had to be filed on the second Wednesday in June, the same deadline that a candidate filing in a party primary was required to meet. *Id.* at 433-34.

21. *Id.* at 438. The reasoning of the Court was stated:

> But the *Williams* case, it is clear, presented a statutory scheme vastly different from the one before us here. Unlike Ohio, Georgia freely provides for write-in votes. Unlike Ohio, Georgia does not require every candidate to be the nominee of a political party, but fully recognizes independent candidacies. Unlike Ohio, Georgia does not fix an unreasonably early filing deadline for candidates not endorsed by established parties. Unlike Ohio, Georgia does not impose upon a small party or a new party the Procrustean requirement of establishing elaborate primary election machinery. Finally, and in sum, Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo. In this setting we cannot say that Georgia's 5% petition requirement violates the Constitution.

Id.

22. *Id.* at 442. The Court stated:

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Id.

23. *Id. But cf. Williams,* 393 U.S. at 33 (rejecting prevention of voter confusion as a valid state interest).

24. 403 U.S. at 442.

25. 405 U.S. 134 (1972). Under Texas law a candidate must pay a filing fee as a condition to having his name placed on the ballot in the primary election. *Id.* at 135 (citing TEX. ELEC. CODE ANN. arts. 13.07a, 13.08, 13.08a, 13.15, and 13.16 (Vernon Supp. 1971)). The statutory scheme provided no alternative methods of access, and additionally required payment of fees as high as $8,900. *Id.* at 134-40.

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

restrictions in terms of the extent of the burden placed on the voters' free choice.[27]

Storer v. Brown[28] and *American Party of Texas v. White*[29] were decided by the United States Supreme Court in 1974, with Justice White writing both opinions for the Court. The minority parties and independent candidates in *Storer* and *American Party* asserted that the ballot restrictions in question violated their associational rights and denied them equal protection under the laws.[30] In both cases the majority noted that ballot access restrictions had to be "necessary to further compelling state interests"[31] that "cannot be served equally well in significantly less burdensome ways."[32] Although the "compelling interest" test was recognized by the Court, neither *Storer* nor *American Party* discussed any individual fundamental rights impaired by the ballot access restrictions.

The California statutes challenged in *Storer* required that all independent candidates be disaffiliated from a qualified political party for one year.[33] They also required that an independent candidate's nominating petitions be signed by qualified voters totaling at least five percent of the entire vote cast in the preceding general election.[34] All signatures had to be obtained in a twenty-four day period following the primary.[35] The *Storer* Court enunciated a new test for the signature requirement and filing deadline restrictions. It suggested that courts consider whether a "reasonably diligent independent candidate" could be expected to meet the requirements and gain access to the ballot.[36] When

27. *Id.* at 143. The Court stated that "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Id.*

28. 415 U.S. 724 (1974).

29. 415 U.S. 767 (1974).

30. Storer v. Brown, 415 U.S. 724, 727, 729 (1974); American Party of Texas v. White, 415 U.S. 767, 771 (1974).

31. 415 U.S. at 780, 780 n.11 (citing *American Party*, 415 U.S. at 729-33).

32. 415 U.S. at 781. In *Storer* the Court implicitly recognized that the state must use the least alternative means to accomplish its goals. 415 U.S. at 736. The disaffiliation statute, however, was not subjected to the more thorough analysis used in *American Party* because alternative means for ballot access were available to independent candidates through the write-in statute. *Id.* at 736 n.7.

33. 415 U.S. at 726 (citing CAL. ELEC. CODE § 6830 (d) (West Supp. 1974)). The California Elections Code prohibits an independent candidate from obtaining a position on the ballot if he had a registered affiliation with a qualified political party within one year prior to the immediately preceding primary election. *Id.*

34. *Id.* at 726-27 (citing CAL. ELEC. CODE § 6831 (West 1961)).

35. *Id.* (citing CAL. ELEC. CODE § 6833 (West Supp. 1974)).

36. 415 U.S. at 742. The test developed by the Court was stated as follows:

> [C]ould a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.

Id. See Mandel v. Bradley, 432 U.S. 173, 177-78 (1977). (Maryland statutes required nominating petitions signed by 3% of the state's registered voters to be filed 70 days before the party primary in

candidate qualifications are at issue, the Court recognized the legitimate state interest of requiring a significant modicum of support.[37] Relying on *Jenness,* the Court also recognized the state interests of avoiding voter confusion, assuring that the winner is the choice of the majority, and protecting the integrity of the political process.[38] The Court upheld the one year disaffiliation requirement, stating that the prevention of government factionalism and party splintering furthers the compelling state interest of political stability.[39]

In *American Party* the Court addressed a Texas law that provided for four methods of nominating candidates in the general election.[40] Candidates of parties whose gubernatorial choice polled more than 200,000 votes in the last general election were nominated by primary elections only.[41] Candidates whose parties polled less than 200,000, but more than two percent of the total vote cast for governor, were nominated by primary election or nominating conventions.[42] If the first two methods did not apply, precinct conventions could nominate party candidates, and if the required support was not evidenced at the conventions, signature petitions were required.[43] Finally, independent candidates could qualify by filing a petition containing signatures of a specified percentage of the last gubernatorial vote.[44] The American Party of Texas challenged the third method, which required either a nominating convention or a one percent signature requirement.[45] The Court again acknowledged the state's legitimate interests of preventing voter confusion, protecting the integrity of the electoral process, and requiring a significant modicum of support.[46] The requirement that minority parties hold nominating conventions was upheld because majority parties followed an equally burdensome procedure in the primary election.[47] Similarly, the one

order for an independent candidate to qualify for the general election ballot). The *Mandel* Court accepted the *Storer* test of a "reasonably diligent independent candidate" and remanded the case for application of that test. *Id.*

37. 415 U.S. at 732.

38. *Id.* at 732-33 (citing *Jenness,* 403 U.S. at 442).

39. 415 U.S. at 736. The Court remanded the signature requirement and filing deadline challenges for proceedings consistent with its opinion. *Id.* at 746. The Court lacked information on the number of signatures required in the 24-day period, and the total pool from which they could be drawn. *Id.* at 742.

40. 415 U.S. at 772-75.

41. *Id.* at 772 (citing TEX. ELEC. CODE ANN. arts. 13.02, .03 (Vernon 1967)).

42. *Id.* at 773 (citing TEX. ELEC. CODE ANN. art. 13.45 (1) (Vernon 1973)).

43. *Id.* at 774 (citing TEX. ELEC. CODE ANN. art. 13.45 (2) (Vernon Supp. 1973)).

44. *Id.* at 775 (citing TEX. ELEC. CODE ANN. arts. 13.50, .51 (Vernon 1967)).

45. 415 U.S. at 777-80.

46. *Id.* at 782, 782 n.14.

47. *Id.* at 781. The Court considered the suggestion that the state has invidiously discriminated against the smaller parties by insisting that their nominations be by convention, rather than by primary election. *Id.* Rejecting the suggestion, the Court stated:

percent signature requirement was upheld because the majority parties also had to show significant support among voters to be placed on the general election ballot.[48] The Court concluded by noting that Texas election laws "in no way [freeze] the status quo . . ." because they provide minority parties a real and equal opportunity for ballot access.[49]

The most recent ballot access case decided by the United States Supreme Court was *Illinois Elections Board v. Socialist Workers Party*.[50] Illinois law required new politcal parties and independent candidates to obtain 25,000 signatures to qualify for the ballot in statewide elections.[51] Moreover, a five percent signature requirement was mandated for ballot access in state subdivision elections.[52] The application of the latter provision to a Chicago mayoral election produced the result that a new party or independent candidate needed substantially more signatures than would be needed for ballot access in a statewide election.[53] Significantly, the Court recognized the importance of fundamental rights,[54] which had not been thoroughly discussed by the Court in the ballot access cases since *Williams*.[55] In finding that the vital individual rights to associate and to cast votes effectively were at stake, the Court applied a compelling interest test.[56] The Court acknowledged the state's legitimate interest in regulating ballot access and, thus, in designing means for measuring candidate

> [W]e are wholly unpersuaded by the record before us that the convention process is invidiously more burdensome than the primary election, followed by a runoff election where necessary, particularly where the major party, in addition to the elections, must also hold its precinct, county, and state conventions to adopt and promulgate party platforms and to conduct other business.

Id. (footnote omitted). The Court also recognized that statutes may permissibly create different classifications; it is only "invidious discrimination" which violates the equal protection clause. *Id.*

48. *Id.* at 782-83.

49. *Id.* at 787-88. The Court stated:

> In sum, Texas "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." It affords minority political parties a real and essential equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more.

Id. (citation omitted).

50. 440 U.S. 173 (1979).

51. *Id.* at 175 (citing ILL. ANN. STAT. ch. 46, § 10-2 (Smith-Hurd Supp. 1978)).

52. *Id.* at 176 (citing ILL. ANN. STAT. ch. 46, § 10-3 (Smith-Hurd Supp. 1978)).

53. Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 177 (1979).

54. *Id.* at 184. The Court stated that two fundamental rights were burdened by restrictions on access to the ballot: the freedom to associate for advancement of political beliefs, and the right of voters to cast their votes effectively. *Id.* In concluding its discussion of fundamental rights, the Court stated that, "for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." *Id.*

55. 393 U.S. at 30. The freedom to associate and the right to vote effectively were discussed by the Court. Both were ranked "among our most precious freedoms." *Id.*

56. 440 U.S. at 184. "When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest." *Id.*

seriousness by requiring a showing by the candidate or party of a "significant modicum of support."[57] The state may not, however, unnecessarily restrict individual liberties. It must adopt the "least drastic means" to achieve the state's objectives.[58] The Court struck down the statutes, finding no compelling state interest for the restriction and that the state had not used the least restrictive means available.[59]

Ballot access jurisprudence has undergone considerable development since 1968, when the United States Supreme Court decided *Williams v. Rhodes*.[60] Confusion has resulted, however, due to the Court's failure to enunciate a consistent standard of review for ballot access cases.[61] The Court began with a "strict scrutiny" analysis in *Williams*,[62] but then apparently retreated to a "rational basis" test in *Jenness*.[63] The *Storer* Court applied the "compelling interest" test, but added the "reasonably diligent candidate"

57. *Id.* at 185. The State has an interest in assuring that the winner of an election is the choice of the majority, or at least a strong plurality. Consequently, statutes which require a showing of a "significant modicum of support" before placing a candidate or party on the ballot have been upheld by the Court. *Id. See* Jenness v. Fortson, 403 U.S. at 442 (finding that some preliminary showing of a significant modicum of support avoids confusion, deception, and even frustration of the electoral process); *see, e.g.,* American Party of Texas v. White, 415 U.S. at 789.

58. 440 U.S. at 185. *See* MacBride v. Exon, 558 F.2d 443, 448 (8th Cir. 1977). "The measures adopted by a state may not go beyond what the state's compelling interests actually require, and broad and stringent restrictions or requirements cannot stand where more moderate ones would do as well." *Id. See, e.g.,* Williams v. Rhodes, 393 U.S. at 30-31.

59. 440 U.S. at 186. The Court stated that the signature requirements for Chicago city elections "are plainly not the least restrictive means of protecting the State's objectives." *Id.* In striking down the statute, the Court noted that the State "has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago." *Id.*

60. 393 U.S. 23 (1968).

61. Neither the courts nor legal scholars have been able to clearly enunciate a consistent standard of review for ballot access restrictions. The most recent Eighth Circuit decision, prior to *McLain v. Meier,* applied the compelling interest test. In MacBride v. Exon, 558 F.2d 443 (8th Cir. 1977), a Nebraska statute required independent candidates to obtain signatures from one percent of the voters in the last gubernatorial election and to certify those petitions 90 days before the primary election (nine months before the general election). *Id.* at 446 (citing NEB. REV. STAT. §§ 32-4,108, 32-504, 32-526, 32-556 (1943)). The court mentioned that restrictive measures must be supported by a compelling interest, and the least restrictive means must be used to accomplish the statutes' objectives. *Id.* at 448. The court noted that the statute arbitrarily restricted voters from voting for the candidates of their choice, and that it was no defense to argue that all political parties face the same obstacle. *Id.* at 449. The most significant problem presented by the Nebraska statute was the absence of an alternative means to get on the ballot. *Id.* Thus, although the state has a compelling interest in requiring a petition to show the sincerity of the candidacy, and to show voter support for the candidate, a state cannot completely prohibit access to the ballot by not offering any alternative means of access. *Id.* It is important to note that this opinion was written by Circuit Judge Henley, who also wrote the opinion in *McLain v. Meier. See* Anderson v. Celebrezze, 499 F. Supp. 121 (S.D. Ohio 1980) (applying the compelling interest test and containing an analysis of the very recent lower court decisions); Anderson v. Quinn, 495 F. Supp. 730 (D. Me. 1980) (compelling interest test). *Cf.* Hall v. Austin, 495 F. Supp. 782 (E.D. Mich. 1980) (applies the "reasonable diligence" test of *Storer).*

Discussion of the various principles involving ballot access may be found in the following commentaries: Elder, *Access to the Ballot by Political Candidates,* 83 DICK. L. REV. 387 (1979); Note, *A New Dimension to Equal Protection and Access to the Ballot: American Party v. White and Storer v. Brown,* 24 AM. U.L. REV. 1293 (1975); Note, *Nominating Petition Requirements for Third-Party and Independent Candidate Ballot Access,* 11 SUFFOLK U.L. REV. 974 (1977); *Developments in the Law — Elections,* 88 HARV. L. REV. 1111, 1114-1212 (1974).

62. *See supra* notes 10 to 18, and accompanying text.

63. *See supra* notes 19 to 24, and accompanying text.

test.[64] The Court also used the "compelling interest" test in *American Party,* but it added the inquiry of whether the political status quo had been frozen by the challenged ballot access provision.[65] Finally, in *Illinois Board,* the Court applied a stricter "compelling interest" test based upon its finding that fundamental rights were implicated.[66] The apparent inconsistency of the standard of review applied by the Court in these decisions arguably indicates that the Court may continue to analyze ballot access restrictions on a case-by-case basis.

A second burden that may be placed on a political candidate's potential for success in an election is the regulation of ballot position. Statutes regulating ballot position generally provide that the incumbent candidates are to be placed first on the ballot, thereby denying to other candidates whatever vote advantage there may be in holding the first position.[67] Ballot position statutes are usually challenged as violative of the equal protection clause of the fourteenth amendment, on the theory that they unreasonably discriminate against nonincumbent candidates.

Two distinct trends have developed in the analysis of ballot position regulations. The first trend has been developed by the United States Court of Appeals for the Seventh Circuit.[68] To determine the constitutionality of ballot placement procedures under the equal protection clause, the Seventh Circuit adopted a two-part test. First, the plaintiff must show that the top placement on the ballot has an advantageous effect in an election. Second, the plaintiff must prove an "intentional or purposeful discrimination."[69] This test was applied in *Sangmeister v. Woodward,*[70] a case in which the court declared unconstitutional the Illinois county clerks' practice of placing their party's candidate first on the ballot.[71]

64. *See supra* notes 28 to 39, and accompanying text.

65. *See supra* notes 40 to 49, and accompanying text.

66. *See supra* notes 50 to 59, and accompanying text.

67. For discussion of the vote advantage attributed to the first position on the ballot, *see* Taebel, *The Effect of Ballot Position on Electoral Success,* 19 AM. J. POL. SCI. 519 (1975); Note, *Equal Protection in Ballot Positioning,* 28 U. FLA. L. REV. 816 (1975); Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents,* 45 SO. CAL. L. REV. 365 (1972).

68. Bohus v. Board of Election Comm'rs, 447 F.2d 821 (7th Cir. 1971).

69. *Id.* at 822.

70. 565 F.2d 460 (7th Cir. 1977).

71. Sangmeister v. Woodard, 565 F.2d 460, 467 (7th Cir. 1977). The court of appeals found sufficient evidence of ballot position advantage. *Id.* at 466. Although the court was uncertain of the exact proof requirements of "intentional or purposeful discrimination," it decided that the facts of the case must certainly satisfy that requirement. *Id.* at 467. Seeking to support its conclusion the court pointed out "that the practice at issue here has been carried out for at least 100 years in DuPage, 40 years in Will and 30 years in Cook County." *Id.* "Such systematic and widespread exclusionary practices by State officials satisfy even the strictest intent requirement." *Id.*

The Seventh Circuit recently upheld an Illinois ballot position statute by applying the *Bohus* test in Board of Election Comm'rs v. Libertarian Party, 591 F.2d 22 (7th Cir.), *cert. denied,* 422 U.S. 918

The other trend, which applies a rational basis test, has had a more widespread application. *Williamson v. Fortson*[72] dealt with a Georgia statute which required that the incumbency of a candidate be indicated on the ballot.[73] The court applied a rational basis test,[74] and found that the statute was justified as an attempt to provide useful information to ill-informed voters.[75] *Gould v. Grubb*[76] was another ballot position case that involved a challenge to an "incumbent first" statute. Reasoning that the fundamental right to vote was infringed by the statute,[77] the court in *Gould* applied a strict scrutiny test and invalidated the statute.[78] *Clough v. Guzzi*[79] was also a case involving a challenge to an "incumbent first" statute. The court in *Clough* specifically rejected *Gould* and found insufficient impact on the right to vote to warrant the strict scrutiny standard; therefore, the court applied the rational basis test.[80] The state interests of using the "incumbent first" method as an informational device and as a way to avoid voter confusion were found sufficient to uphold the statute.[81] A ballot position statute was also recently upheld in *Socialist Workers Party v. March Fong Eu.*[82]

(1979). Cook County proposed a "two-tier" ballot placement plan that placed "established political parties" in the top ballot positions, and "new political parties" below the establishment political parties in the order in which they filed their petitions. *Id.* at 23. Although the two-tier system consistently placed the Democratic and Republican parties in the first two positions, the court found no showing of an intentional or purposeful discrimination. *Id.* at 25. It upheld the statute, stating that "[a]ll the evidence in the record supports the conclusion that its purpose was to prevent voter confusion, to serve voter convenience, and less important but still relevant, to aid in the convenient tallying of results." *Id.*

72. 376 F. Supp. 1300 (N.D. Ga. 1974).

73. Williamson v. Fortson, 376 F. Supp. 1300, 1301 (N.D. Ga. 1974).

74. *Id.* The court recognized the discrimination present, but found that it was not invidious and could be supported by rational state interests. *Id.* at 1301-02. "This discrimination, however, is not grounded in a suspect classification, and the statute need only satisfy the 'rational basis' test in order to avoid constitutional infirmity." *Id.* at 1303.

75. *Id.* The rational basis test was met because the State "advanced as a justification for the statute a claim that it represents an attempt to provide useful information to ill-informed voters." *Id.*

76. 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975).

77. Gould v. Grubb, 14 Cal. 3d 661, 670, 536 P.2d 1337, 1343, 122 Cal. Rptr. 377, 383 (1975). The court found that the "classification scheme imposes a very 'real and appreciable impact' on the equality, fairness, and integrity of the electoral process." *Id.* It also found that "the challenged provision effectively undermines the fundamental democratic electoral tenet of a majority rule." *Id.*

78. *Id.* at 673, 536 P.2d at 1344, 122 Cal. Rptr. at 384. The court stated "that the instant classification scheme, which substantially dilutes the weight of votes of those supporting nonincumbent candidates, must be subjected to 'strict judicial scrutiny.' " *Id.* The only compelling interest asserted by the State was that placing all incumbents at the top of the ballot facilitated efficient, unconfused voting. *Id.* Since the State could have employed less discriminatory alternatives to accomplish its goal, the statute was found unconstitutional. *Id.* at 673-74, 536 P.2d at 1345, 122 Cal. Rptr. at 385.

79. 416 F. Supp. 1057, 1058-59 (D. Mass. 1976) (statute challenged in *Clough* placed incumbents first on the ballot) (citing MASS GEN. LAWS ANN. ch. 53, §§ 34, 45, ch. 54 §§ 33, 41, 42 (West 1975)).

80. Clough v. Guzzi, 416 F. Supp. 1057, 1067 (D. Mass. 1976). *Clough* rejected the reasoning of *Gould,* stating that the actual dilution of votes cannot be accurately measured. The dilution effect is attenuated because "non-incumbents and their supporters have access to those voters and may . . . so educate them as to eliminate the donkey vote and thus eliminate the statistical position bias." *Id.*

81. *Id.* at 1068. In recognizing that the designation of incumbency was material, the court stated, "[T]he fact that some statistical advantage may at the same time accrue to one of the candidates by virtue of his or her incumbency does not for constitutional purposes invalidate that otherwise legitimate purpose. . . ." *Id.*

82. 591 F.2d 1252 (9th Cir. 1978), *cert. denied,* 441 U.S. 946 (1979).

In that case a California law specified that independent candidates be designated only as "independent" on the general election ballot, which precluded the designation of any party affiliation.[83] The court applied the rational basis test because it had found no impairment of fundamental rights.[84] The court upheld the statute, finding it rationally related to the state's legitimate interest in regulating its electoral process.[85] Thus, with the exception of the Seventh Circuit, the rational basis test is accepted as the proper standard of review for ballot position restrictions.[86]

The North Dakota ballot access and ballot position statutes were challenged in *McLain v. Meier.*[87] The court first addressed the challenge to the ballot access statute,[88] and found that "the fundamental right to vote is inseparable from the right to have the candidate of one's choice on the ballot."[89] Relying on the recent United States Supreme Court decision in *Illinois Board*[90] and the prior Eighth Circuit case of *MacBride v. Exon,*[91] the court adopted a compelling interest test. The court acknowledged the difficulty with ballot access analysis when it noted that the appropriate standard of review is not always easy to discern.[92] Although the court adopted the *MacBride* compelling interest test, the basis of the court's

83. 591 F.2d at 1254 (citing CAL. ELEC. CODE § 10210 (West 1977)).

84. 591 F.2d at 1261.

85. *Id.* at 1262.

86. Other courts have also applied a rational basis test. The court in Ulland v. Growe, 262 N.W.2d 412 (Minn. 1978), rejected the strict scrutiny approach of *Gould* and applied the rational basis test enunciated in *Clough. Id.* at 416-17. The court found that, since the Minnesota statutes were less burdensome than those in *Clough,* the rational basis test must be applied. *Id.* at 417. Finding that the state has an interest in identifying the major party candidates for the voters, the court stated that "[t]he method selected by the legislature to assist partisan voters in locating their candidates on the ballot cannot be overturned by this court merely because we think a rotational system would be marginally more fair." *Id.* at 418. Krasnoff v. Hardy, 436 F. Supp. 304 (E.D. La. 1977), involved a claim by an independent candidate that the voting machine ballot gave an advantage to Democratic and Republican candidates in violation of the equal protection clause. *Id.* at 306-07. The court adopted the reasoning of *Clough* and proceeded to "determine whether Louisiana has a legitimate, rational reason for treating [the plaintiff] differently from the major parties' candidates." *Id.* at 308. The advantage conferred by the incumbency position was viewed as minimal and did not outweigh the State's interest in revealing which candidates on the ballot are incumbents, and in placing the incumbents in the first position. *Id.* (citations omitted).

87. 637 F.2d 1159 (8th Cir. 1980).

88. N.D. CENT. CODE § 16-04-20(4) (1971) (current version at N.D. CENT. CODE § 16.1-11-30(4) (Interim Supp. 1981)). The ballot access statute provides for a single method of ballot access for a "new" political party. Such a party must file a petition signed by 15,000 North Dakota voters (equalling approximately 3½% of North Dakota's electorate). The filing deadline is more than 90 days before the primary election. N.D. CENT. CODE § 16-04-01 (1971) (current version at N.D. CENT. CODE § 16.1-11-30(4) (Interim Supp. 1981)).

89. 637 F.2d at 1163.

90. 440 U.S. 173 (1979). The *McLain* court relied on *Illinois Board* for the proposition that voting is a fundamental right. The court in *Illinois Board* stated that "we have often reiterated that voting is of the most fundamental significance under our constitutional structure." *Id.* at 184.

91. 558 F.2d 443 (8th Cir. 1977). The *McLain* decision was written by the same judge who rendered the *MacBride* decision (Circuit Judge Henley). *Id.* at 445. The test used in *MacBride* for ballot access restrictions was that such restrictions "must be reasonable and must be justified by reference to a compelling state interest." *Id.* at 448.

92. 637 F.2d at 1163.

analysis in *McLain* was apparently derived from *Storer.*[93] The *McLain* court stated that, when addressing the ballot access issue, courts must consider the history of restrictions created by the ballot access law, the individual interests of the candidates, and the interests the State claims to be protecting.[94]

The *McLain* court began its analysis of the North Dakota ballot access law by considering the statute's past effect on third party candidacies. The court applied the *Storer* "reasonably diligent candidate" test when it examined the past success of third party candidates.[95] It found that no third party candidate had regularly qualified for a ballot position in the last thirty years, regardless of how "diligent" an individual candidate may have been.[96] Thus, the court concluded that the statute's history established that it was too restrictive[97] and thereby created an undue burden on third party access to the ballot.[98] Turning to a second area of analysis, the court examined the individual interests of the candidates affected by the ballot access law. It discussed the impact of the signature requirement and filing deadline on candidates' rights.[99] In its discussion of the signature requirement under the North Dakota law, the court attempted to distinguish *Jenness* by noting that the three and one-third percent requirement is lower than the five percent requirement held valid by the United States Supreme Court in *Jenness.*[100] Additionally, the court noted that only four states had percentage signature requirements as high as North Dakota's.[101] The court looked to *American Party,* in which the Supreme Court indicated that a one percent signature requirement might be the maximum showing of support the state could justify.[102] While the *McLain* court found weaknesses in the three and one-third percent signature requirement, it recognized that the holding in *Jenness* precluded an invalidation of the North Dakota

93. 415 U.S. 724 (1974).

94. 637 F.2d at 1163 (citing *Storer,* 415 U.S. at 730).

95. 637 F.2d at 1165 (citing *Storer,* 415 U.S. at 742).

96. 637 F.2d at 1165. An affidavit from an American Party candidate who had participated in past North Dakota elections indicated that the burden placed on these candidates is quite severe. He testified that "[i]n order to obtain 15,000 signatures, you have to contact many, many more than that number in order to obtain the required number. . . ." *Id.* The affiant indicated that well over 1,500 man hours were needed to obtain 15,000 signatures. *Id.*

97. *Id.* The court in *McLain* followed *Storer's* use of experience as a helpful guide. 415 U.S. at 742; *see supra* note 36.

98. 637 F.2d at 1165.

99. *Id.* at 1164-65.

100. *Id.* at 1163 (citing Jenness v. Fortson, 403 U.S. 431 (1971)).

101. 637 F.2d at 1163 n.9. *Jenness* considered only the validity of the five percent signature requirement. 403 U.S. at 432.

102. 637 F.2d at 1163-64. The Court in *American Party* stated that "the required measure of support — 1% of the vote for governor at the last general election and in this instance 22,000 signatures — falls within the outer boundaries of support the State may require before according political parties ballot position." 415 U.S. at 783.

ballot access statute based upon the signature requirement alone. The court distinguished *Jenness* by applying the "totality" approach, enunciated in *Storer*.[103] Under this approach, the signature requirement and the filing deadline could be considered together to determine their impact on candidates' rights to ballot access.

When analyzing the impact of the filing deadline, the court rejected the State's suggestion that the early filing deadline for third party candidates is offset by a later filing deadline for independent candidates.[104] The court reasoned that the effect of the different filing deadlines was to force party candidates to adopt independent status.[105] Access requirements for all candidates must be reasonable, and a party candidate should not be compelled to change his status to obtain access to the ballot.[106]

The court supported its reasoning by examining the practical effects of the filing deadline on the origins of third party support. Third party candidates generally develop support when voters become dissatisfied with the platforms and candidates offered by the major parties.[107] Thus, the only time to properly measure third party support is during the time major parties are campaigning and for a period of time after major party candidates have been selected in the primary.[108] The court concluded that the filing deadline was unnecessarily removed from the most active campaigning period for major party candidates.[109] The court examined the effect of the signature requirement and the filing deadline together and found that the restrictions created a severe impact on the third party candidates' access to the ballot.

In its final area of analysis, the court explored the interests which the State claimed were protected by the ballot access restrictions. The court found that the state has a valid interest in preventing frivolous, fraudulent, or confusing candidacies.[110] The court determined, however, that there was only a remote danger of these fragmentary practices by candidates.[111] Because the danger was remote, the court recognized no justification for restricting the

103. 637 F.2d at 1164 n.11. The Court in *Storer* stated that the concept of totality means that "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." 415 U.S. at 737. *See* American Party of Texas v. White, 415 U.S. at 781; Williams v. Rhodes, 393 U.S. at 34.

104. 637 F.2d at 1165 n.12. Party candidates must file 90 days before the primary, while independent candidates must file 40 days before the general election. *Id.*

105. *Id.* at 1165.

106. *Id.*

107. *Id.* at 1164.

108. *Id.*

109. *Id.*

110. *Id.* at 1165.

111. *Id.*

fundamental right to vote for a third party candidate.[112]

The *McLain* court relied upon *Storer* to employ the compelling interest test as the standard of review for the ballot access statute.[113] Significantly, the court recognized the existence of a fundamental right to vote for a third party candidate.[114] The court intimated that the signature requirement and the filing deadline had an unreasonable impact on third party candidates and voters. Finding no compelling reason to justify the restriction on ballot access,[115] the court declared that the statute did not employ the least restrictive means to protect the state's interests.[116] Thus, the court concluded that the North Dakota ballot access statute was unconstitutional.[117]

Turning to the North Dakota ballot position statutes, the *McLain* court considered whether independent candidates were disadvantaged by their placement on the ballot. The first challenge involved the "incumbent first" statute[118] and the possible vote advantage accruing to the candidate whose name appears first on the ballot. The court accepted the district court's finding that a ballot advantage did inure to the candidate in the first position.[119] Because of this inherent unfairness, the court examined whether the statute violated equal protection.

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112. *Id.* The Court stated that "[t]he remote danger of multitudinous fragmentary groups cannot justify an immediate and crippling effect on the basic constitutional right to vote for a third party candidate." *Id.*

113. *Id.* at 1163. Under the *Storer* analysis the Court considers " 'the facts and circumstances behind the [access] law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' " *Id.* (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

114. 637 F.2d at 1163, 1165. The court commenced its discussion by stating that " 'voting is of the most fundamental significance under our constitutional structure' and requires jealous protection." *Id.* at 1163. It concluded by noting that there is a "basic constitutional right to vote for a third party candidate." *Id.* at 1165.

115. *Id.* The only state interest offered was that of preventing frivolous, fraudulent, or confusing candidacies. Since the court found this insufficient to justify the restriction on rights, the compelling state interest test was not satisfied. *Id.*

116. *Id.* "[I]t seems clear to us that North Dakota's access requirements go beyond what is required by the State's valid interest in the effective functioning of the electoral process." *Id.*

117. *Id.*

118. N.D. CENT. CODE § 16-11-06 (1971) (current version at N.D. CENT. CODE § 16.1-06-07.1 (Interim Supp. 1981)). The statute reserves the first or left-hand column of the ballot for the party receiving the most votes in the last congressional election, the second column to the party with the next highest number of votes, and so forth. The effect of this statute is that the party winning North Dakota's lone congressional seat in one election is listed first for *all* positions in the next election. The statute does not mention independent candidates, who thus are left with the last column on the ballot. 637 F.2d at 1166.

119. 637 F.2d at 1166. The State claimed that the district court's finding was incorrect. The *McLain* court stated that it would not overturn the district court's finding on this matter unless it was clearly erroneous. Impressed by the figures presented and the testimony of an expert witness for McLain, the court noted that the State had not presented any evidence to refute "a definitive statistical advantage accruing to a candidate whose name appears first." *Id.* The court substantiated its agreement with the finding of positional bias by citing similar holdings by other courts. *Id.* at 1166-67. *See* Note, *Equal Protection in Ballot Positioning,* 28 U. FLA. L. REV. 816, 821, 842 (1976) (stating that the order in which names appear on the ballot can influence the outcome of elections, and suggesting that such statutes be subjected to a compelling interest test).

The *McLain* court applied the "rational basis" test, noting that the statute's effect on the fundamental right to vote was attenuated.[120] In applying this test, the court noted that the only justification offered for the North Dakota ballot arrangement was the state interest in making the ballot as convenient and intelligible as possible for the majority of voters.[121] The court reasoned that this justification admitted a favoritism to voters supporting the incumbent and major party candidates. The result was a burdening of the fundamental right to vote possessed by supporters of the independent candidates. Therefore, the court concluded that the statute abridged fourteenth amendment rights.[122]

The final challenge to the North Dakota ballot position statutes involved the "independent column" provision.[123] That provision gives party candidates their own column on the ballot while the independent candidates are grouped together in a separate column. The court again employed the rational basis test as the standard of review.[124] No evidence was presented to support McLain's claim that the status of independent candidates is diminished by the ballot design.[125] The court upheld the statute as necessary to protect the state's legitimate interest in maintaining a manageable ballot. The statute was further justified by the state's interest in informing the voters of those candiates who have not shown the level of support necessary to qualify as a party candidate.[126] Thus, the court found that the "independent column" statute was rationally related to the attainment of legitimate state interests and was therefore constitutional.[127]

120. 637 F.2d at 1167. The court adopted the rational basis test, which appears to be the majority position. It did, however, note the "intentional or purposeful discrimination" test developed by the Seventh Circuit. *Id.*

121. *Id.*

122. *Id.* The court examined the trend in other courts to support its holding that the "incumbent first" statute is unconstitutional. *Id.*

123. N.D. CENT. CODE § 16-11-05 (4) (1971) (current version at N.D. CENT. CODE § 16.1-06-05 (Interim Supp. 1981)).

124. 637 F.2d at 1168 n.16. The court explained: "We accept the rational basis standard as the appropriate level of review for the simple reason that the fundamental right to vote is somewhat remotely implicated." *Id.* at 1168 n.16.

125. *Id.* at 1168. McLain claimed that the effect of the statute is to make independents appear as mere bit performers on a stage dominated by two "stars," the Republicans and Democratic Party candidates. *Id.* The Court noted that the affidavit of McLain's expert statistician addressed only the effect of top placement on the ballot. *Id.* However, the record shows that if each candidate were given a separate column in the 1976 presidential election, 11 columns would have been needed. This evidence supported the State's contention that it was necessary to group the independents to provide for a manageable ballot. *Id.*

126. *Id.*

127. *Id.* at 1169. To substantiate its holding, the court alluded to the fact that the weight of authority approves of this type of disparate treatment between independent and party candidates. *Id.* at 1168.

The court indicated that a single column listing all independent candidates may not be the best arrangement. It suggested instead that all of the independent candidates could be listed in one column, while changing the order on a rotating basis. *Id.* at 1169.

The result of *McLain* is the invalidation of both the ballot access statute[128] and the incumbent first statute.[129] There is some question, however, about which statutes were in effect at the time of the *McLain* decision because the entire election law had been referred to the voters.[130] The North Dakota Legislature has now enacted new statutes to fill the void created by the *McLain* decision.[131] The Forty-Seventh Legislative Assembly of North Dakota has amended the ballot access and incumbent first statutes in an attempt to correct the unconstitutional provisons.

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128. N.D. CENT. CODE § 16-04-20 (1971) (current version at N.D. CENT. CODE § 16.1-11-30 (Interim Supp. 1981)).

129. N.D. CENT. CODE § 16-11-06 (1971) (current version at N.D. CENT. CODE § 16.1-06-07.1 (Interim Supp. 1981)).

130. *See* Bott, *North Dakota's New Election Code*, 57 N.D. L. REV. 427 (1981).

131. The new ballot access statute reads as follows:

> The following political parties shall be provided with separate columns on primary election ballots:
> 1. The republican party.
> 2. The democratic party.
> 3. Any party which cast five percent of the total votes cast for governor at the last general election.
> 4. Any other party, if a petition signed by at least seven thousand electors of this state is filed with the secretary of state before four p.m. of the fifty-fifth day prior to a primary election, asking that a column be provided for such party, naming it, and stating the platform principles thereof. If such petition is mailed it shall be in the possession of the secretary of state before four p.m. on the fifty-fifth day. Candidates of such party shall be entitled to the same rights and privileges as those of other parties.
>
> Columns shall be arranged so that any column shall be in an inverted position when the adjacent column or columns are in an upright position.

N.D. CENT. CODE § 16.1-11-30 (Interim Supp. 1981). The new incumbent first statute reads:

> The ballot provided for in section 16.1-06-05 shall be arranged as follows:
> 1. Initially, the names of the candidates of the party casting the highest number of votes in the state for members of Congress at the last preceding general election shall be arranged in the first or left-hand column of such ballot; of the party casting the next highest number of votes in the second column; of the party casting the next highest number of votes in the third column; and of such other party as the secretary of state may directi in the fourth and successive columns.
> 2. In printing each set of official ballots for the various election precincts, all columns in subsection 1 shall be rotated so that an equal number of ballots shall be printed with each in the first or left-hand position.
> 3. After the ballots are printed as prescribed in subsection 2, they shall be kept in separate piles and then rearranged by taking one from each pile and placing it upon the new pile. This rearrangement for political party column rotation shall be done in conjunction with the required rotation of names within the political party columns. After the rearrangement is completed, the ballots shall be cut and packaged for the various election precincts.
> 4. In presidential election years the names of presidential electors presented in one certificate of nomination shall be arranged in a group enclosed in brackets to the right and opposite the center of which shall be printed in bold type the surname of the presidential candidate represented. To the right and in a line with such surname, near the margin, shall be placed a single square, and a mark within such square shall be designated a vote for all the electors, and such group shall be placed at the head of the column under the party designated or represented in such certificate.
> 5. In precincts in which voting machines or electronic voting systems are used, the rotation of columns required by this section, or any rotation necessary to carry out the intent of this section when a different ballot format is used with electronic voting systems, shall be performed in the same manner as provided for the rotation of names on the primary election.

N.D. CENT. CODE § 16.1-06-07.1 (Interim Supp. 1981).

The new ballot access statute changes from 15,000 to 7,000 the number of signatures required.[132] This reduces the required percentage from three and one-third percent to approximately one and one-half percent.[133] This significant reduction lowers the North Dakota signature requirement to a level that appears to avoid unreasonable burdens on third-party candidates' efforts to show voter support.[134] The *McLain* court did not, however, invalidate the ballot access statute based solely on the signature requirement. It used the *Storer* "totality" approach and examined the impact of the filing deadline to find the overall burden excessive.[135] The legislature recognized this by moving the filing deadline from more than ninety days to only fifty-five days before the primary.[136] Thus, the signature requirement problem appears to be corrected, based on the significant reduction of the signature requirement and the change of the filing deadline. The validity of the proposed ballot access statute will be determined by the validity of the new filing deadline.

Unlike the issue of permissible signature requirements, the United States Supreme Court has never directly ruled on a challenge to a filing deadline. Although there is no controlling precedent, two state interests have emerged as justifications for early filing deadlines. The first is the preservation of the integrity of the primary election as a final expression of the will of the party majority.[137] A candidate who loses in the primary might attempt to use the petition process to circumvent the results of the primary. This justification is inapplicable, however, to ballot access in North Dakota because the state already has a "sore loser" statute[138] to serve this purpose.

The second justification for an early filing deadline is the need for sufficient time to prepare the printed ballot.[139] North Dakota provides fifty-five days before the primary to enable the secretary of

132. N.D. CENT. CODE § 16.1-11-30(4) (Interim Supp. 1981).

133. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 515 (100th ed. 1979). North Dakota's voting age population is listed as 461,000; 7,000 signatures are approximately 1.5% of the voting population.

134. 637 F.2d at 1163. The *McLain* court recognized that in 1968, 42 states had signature requirements of one percent or less. *Id.* at 1163 n.9. Furthermore, the United States Supreme Court upheld a five percent signature requirement in *Jenness*. 403 U.S. 431, 442 (1971).

135. 637 F.2d at 1164 n.11, 1165. *See supra* notes 103-04 and accompanying text.

136. N.D. CENT. CODE § 16.1-11-30(4) (Interim Supp. 1981).

137. *See* Salera v. Tucker, 399 F. Supp. 1258, 1267 (E.D. Pa. 1975), *aff'd mem.*, 424 U.S. 959 (1976) (defeated primary candidate's use of petitioning method would undermine the integrity of the primary election process).

138. N.D. CENT. CODE § 16.1-13-06 (Interim Supp. 1981). The "sore loser" statute provides that a defeated primary candidate is ineligible to have his name printed on the general ballot. *Id. Cf.* State v. Hall, 73 N.D. 428, 15 N.W.2d 736, 741 (1944) (declared a similar North Dakota "sore loser" statute unconstitutional).

139. 399 F. Supp. at 1267 (state contended that the early filing deadline is necessary for orderly preparation of ballot).

state to print the ballot and validate the filed signatures.[140] Thus, the time period between the filing deadline and the primary election seems fair and adequate.

If the validity of the filing deadline was based entirely on these two state interests, the fifty-five day deadline might be upheld. North Dakota, however, has a unique provision concerning third party candidates. It requires that *all* parties must participate in the primary election to be eligible for access to the general election ballot.[141] A different light is shed upon the validity of the filing deadline when the third party primary requirement is considered in the context of the *McLain* court's analysis of the ballot access statute.

The court in *McLain* based its invalidation of the ballot access statute in part on the early filing deadline. The court found that third party support is most accurately measured when voters become dissatisfied with the major party candidates chosen in the primary.[142] The court reasoned that the early filing deadline required third party candidates to qualify at a time when the individual's candidacy may be purely potential and contingent on later developments.[143] Thus, the proper time for third party candidates to obtain signatures is after the primary. The court failed, however, to discuss the implications of North Dakota's requirement that all parties must participate in the primary election process.[144] Obviously, a third party candidate cannot gather signatures after the primary if the candidate must participate in the primary. Although the court disapproved of a procedure that requires third party candidates to gather signatures before the primary to gain access to the general election ballot, the new ballot access law[145] still requires signature gathering before the primary.[146] Thus, the new statute fails to correct a detrimental

140. N.D. CENT. CODE § 16.1-11-30(4) (Interim Supp. 1981).

141. N.D. CENT. CODE § 16.1-11-39 (Interim Supp. 1981). Section 16.1-11-30(4) sets out the only nomination procedure available to third parties — the petition process. N.D. CENT CODE § 16.1-11-30(4) (Interim Supp. 1981). Section 16.1-11-39 allows persons nominated in the primary to be candidates on the general election ballot. N.D. CENT. CODE § 16.1-11-39 (Interim Supp. 1981). Section 16.1-13-04 requires certificates of nomination from all candidates for the general election. N.D. CENT. CODE § 16.1-13-04 (Interim Supp. 1981). Sections 16.1-15-23 and 16.1-15-40 provide for issuance of certificates of nomination for persons in the primary election. N.D. CENT. CODE §§ 16.1-15-23, -40 (Interim Supp. 1981). *Cf.* N.D. CENT. CODE § 16.1-12-02(5) (Interim Supp. 1981) (section 16.1-12-02(5) requires independents to file petition with 1000 signatures in statewide elections and 300 signatures in less than statewide elections in order to obtain certificate of nomination). Taken together, these provisions have the effect of requiring all party candidates to participate in the primary in order to obtain access to the general election ballot.

142. 637 F.2d at 1164.

143. *Id.*

144. *See supra* note 141. The court recognized the existence of this restriction when it stated: "The North Dakota access statute . . . provides a *single method* of ballot access for a 'new' political party." 637 F.2d at 1162 (emphasis added).

145. N.D. CENT. CODE § 16.1-11-30 (Interim Supp. 1981).

146. *Id.* In view of the court's analysis of the burden on third party candidates to obtain

effect specified by the court when it invalidated the early filing deadline.

Another problem with the new law is that the legislature has actually lengthened the time the candidates have to file before the general election. The *McLain* court found that the ninety day deadline before the primary and the one hundred fifty day deadline before the general election were unconstitutional.[147] North Dakota recently has moved the primary election to the second Tuesday in June.[148] Although the filing deadline is fifty-five days before the primary, it is now more than one hundred eighty days before the general election. Thus, third party candidates must now obtain signatures at a time even further removed from the general election than that which *McLain* found unconstitutional. Although the court has shown a strong disfavor for a filing deadline before the primary, the new ballot access law retains such a deadline.[149] Additionally, the state lengthened the time period between filing and the general election.[150] Thus, the new ballot access statute[151] has failed to correct the filing deadline restrictions on third party candidates found unconstitutional in *McLain.* A problem unresolved by the new election law, and not discussed by the *McLain* court, is the unequal treatment of third party candidates, compared to independent candidates, in terms of ballot access restrictions.[152] A third party candidate must file a petition with 7,000 signatures fifty-five days before the primary election.[153] The third party candidate must then participate in the primary in order to gain access to the general ballot.[154] Independent candidates, however, can gain access to the general election ballot by filing a petition with one thousand signatures in statewide elections and three hundred signatures in less than statewide elections fifty-five days before the general election.[155] The legislature apparently intends to prevent

signatures before the primary, 637 F.2d at 1164, even the 7,000 signature requirement may be too high. The court strongly favored the gathering of signatures after the primary. *Id.*

147. 637 F.2d at 1163-65. Section 16-04-01 provided that the primary election was on the first Tuesday in September of general election years. N.D. CENT. CODE § 16-04-01 (1971) (current version N.D. CENT. CODE § 16.1-11-01 (Interim Supp. 1981)). Section 16-06-01 provided that the general election take place on the first Tuesday after the first Monday in November of each even-numbered year. N.D. CENT. CODE § 16-06-01 (1971) (current version at N.D. CENT. CODE § 16.1-13-01 (Interim Supp. 1981)).

148. N.D. CENT. CODE § 16.1-11-01 (Interim Supp. 1981). The date for the general election remains the same. *See* N.D. CENT. CODE § 16.1-13-01 (Interim Supp. 1981).

149. N.D. CENT. CODE § 16.1-11-30(4) (Interim Supp. 1981).

150. N.D. CENT. CODE §§ 16.1-11-01, -13-01 (Interim Supp. 1981).

151. N.D. CENT. CODE § 16.1-11-30(4) (Interim Supp. 1981).

152. The court discussed the approval of disparate treatment between independent and party candidates, but only in terms of ballot position. 637 F.2d at 1168.

153. N.D. CENT. CODE § 16.1-11-30(4) (Interim Supp. 1981).

154. *See supra* note 141.

155. N.D. CENT. CODE § 16.1-12-02(5) (Interim Supp. 1981) (signature requirement); N.D. CENT. CODE § 16.1-12-04 (Interim Supp. 1981) (55-day deadline).

third parties from gaining automatic access to the primary ballot, a position enjoyed by parties that receive five percent of the total vote cast for governor in the last election.[156] The restrictions imposed on third party candidates make the independent candidate status more favorable. If the third party candidate chooses to run as an independent, the Democratic and Republican parties benefit, because regardless of the percentage of vote the independent candidate receives, that candidate will not have automatic ballot access in the immediately subsequent election. Furthermore, that candidate is placed in a separate column designated as "independent nominations."[157] The effect of the North Dakota election law appears to be to discourage third party candidacies. Considering all the implications of North Dakota's election law, as well as the court's analysis in *McLain,* the ballot access law[158] apparently remains unconstitutional.

The North Dakota legislature also revised the "incumbent first" statute[159] in light of the *McLain* holding that this ballot position format was unconstitutional.[160] The legislature corrected the problem by setting out a printing and compiling procedure that rotates the first position on the ballot among all parties.[161] With the initiation of this procedure, North Dakota will no longer reserve the first position for incumbents. The unconstitutional aspects of the statute in that respect appear to have been repaired.

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156. N.D. CENT. CODE § 16.1-11-30(3) (Interim Supp. 1981).

157. N.D. CENT. CODE § 16.1-06-05(4) (Interim Supp. 1981).

158. *See* N.D. CENT. CODE § 16.1-11-30 (Interim Supp. 1981). For the text of section 16.1-11-30 see *supra* note 131.

159. N.D. CENT. CODE § 16.1-06-07.1 (Interim Supp. 1981).

160. 637 F.2d at 1167.

161. N.D. CENT. CODE § 16.1-06-07.1(2), (3) (Interim Supp. 1981). Robert O. Wefald, North Dakota Attorney General, issued an opinion on August 17, 1981, which concluded that all general election ballot columns, including the independent column, be rotated. 81-88 Op. N.D. Att'y Gen. (Aug. 17, 1981). The opinion based its conclusion on this language in *McLain*:

> [T]he fairest remedy for a constitutionally defective placement of candidates would appear to be some form of ballot rotation whereby "first position" votes are shared equitably by all candidates. . . . However, due to cost and efficiency factors and voting machine design, this system has proved difficult to implement. . . . In any case, we do not now undertake on this record to determine which rotation arrangement is financially and administratively feasible, although we feel obliged to stress the constitutional requirement that position advantage must be eliminated as much as is possible.

637 F.2d at 1169 (citations omitted).

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