Constitutional Law—State May Not Require Filing Fee from Indigent Candidate as Prerequisite to Ballot Placement—Lubin v. Panish, 415 U.S. 709 (1974)

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Petitioner Lubin desired to be placed on the ballot in the primary election for nomination to a position on the Los Angeles County Board of Supervisors. He was denied the papers requisite to ballot placement, however, because he was unable to pay the filing fee, a mandatory precondition to ballot placement in California. Although California statutes permit write-in votes, they are not counted unless the write-in candidate pays the filing fee prior to the election. Seeking invalidation of the statutes, Petitioner filed suit in the Los Angeles County Superior Court, alleging that he was a serious candidate who did not pay the filing fee solely because he was indigent. The superior court upheld the state's requirement, finding that the fees were reasonable, as a matter of law. The California Court of Appeals and the California Supreme Court denied Petitioner's application for a writ of mandate; the United States Supreme Court granted certiorari, and

1. Lubin was assessed $701.60. Lubin v. Panish, 415 U.S. 709, 710 (1974).
2. CAL. ELEC. CODE § 6551 (West 1961) provides:
   All forms required for nomination and election to all congressional, state and county offices shall be furnished only by the county clerk. . . . The forms shall be distributed without charge to all candidates applying for them, upon the prepayment of the filing fees provided for in Sections 6552, 6553 and 6554. The filing fees shall not be refunded in the event the candidate fails to qualify as a candidate.

Id. § 6552 (West Supp. 1974) provides:
   The following fees for filing declarations of candidacy shall be paid to the Secretary of State by each candidate:
   (a) Two percent of the first year salary for the office of United States Senator or for any state office. The fee prescribed in this subdivision does not apply to the office of State Senator or Assemblyman or to an office to be voted for in a district comprising more than one county.
   (b) One percent of the first year salary for the office of Representative in Congress or for any office to be voted for in any district comprising more than one county, except the office of State Senator or Assemblyman.
   (c) One percent of the first year salary for the office of State Senator or Assemblyman.

At the time Petitioner's suit was commenced, the fees were $192 for State Assembly, $425 for Congress, $850 for U.S. Senator and $982 for Governor. 415 U.S. at 1317.

CAL. ELEC. CODE § 6555 (West 1961) provides:
   When a person for whom a declaration of candidacy has not been filed is nominated for an office by having his name written on the ballot, he shall pay the same filing fee that would have been required if his declaration had been filed. If he does not pay that fee his name shall not be printed on the ballot at the ensuing general election.

This note analyzes the Lubin decision and its probable impact upon state election laws. It is suggested that the decision will result in the use of "optional fee schemes" to qualify candidates for ballot positions. Under such schemes, nonindigents must pay filing fees and indigents must evidence voter support by such methods as submitting petitions signed by a specified percentage of voters or winning the nomination of an established political party.³ It is argued that this optional fee scheme should not withstand constitutional attack because the use of a filing fee as a method of candidate qualification is not reasonably related to the state's legitimate interests in regulating candidate placement on the ballot. Moreover, the scheme imposes inherently unequal burdens upon candidates seeking ballot position solely on the basis of financial ability. It is submitted that these relative burdens are not justified in light of the existence of an alternative method of candidate qualification which furthers the state's interest in limiting ballot position to "genuine" candidates who command voter support and operates without regard to the wealth of the prospective candidate, viz.: the requirement that all candidates evidence voter support.

I. BACKGROUND: A FRAMEWORK FOR ANALYSIS

The constitutionality of statutes regulating candidate ballot placement has been evaluated by the Supreme Court with regard to the impact of such regulations upon the right to vote.⁴ The right to vote

³. An established political party is a party that received a specified number of votes at a recent election. See American Party of Texas v. White, 415 U.S. 767, 772–74 (1974); Jenness v. Fortson, 403 U.S. 431, 433 (1971). The various methods of demonstrating voter support are discussed at note 40 infra.

⁴. The United States Supreme Court has declined to recognize a constitutional right to be considered for public office. However, it has held that candidates have a constitutional right to be considered for public office without the imposition of invidiously discriminatory disqualifications. Turner v. Fouche, 396 U.S. 346, 362–63 (1970); Williams v. Rhodes, 393 U.S. 23, 29 (1968); Snowden v. Hughes, 321 U.S. 1, 7 (1944).

Recently, some state courts and lower federal courts have held that there is a right to run for public office protected by the first amendment. In Minielly v. State, 242 Ore. 490, 411 P.2d 69 (1966) (en banc), the Oregon Supreme Court held that "running for public office is one of the means of political expression which is pro-
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occupies a unique position in a democracy; it has been described as the bedrock of our political system, the "right . . . preservative of all rights." The importance of the right to vote is emphasized by its characterization as "fundamental" for the purposes of equal protection analysis. As a fundamental right, the Court subjects to strict scrutiny any state action that burdens or denies its exercise. To withstand this scrutiny, state regulations must be shown necessary to the promotion of a compelling state interest.6


6. Chief Justice Warren wrote for the Court in Reynolds v. Sims:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. 377 U.S. 533, 561-62 (1964) (emphasis added). See also Harper v. Virginia Board of Elections, 383 U.S. 663, 667 (1966); Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School District, 395 U.S. 621 (1969); Carrington v. Rash, 380 U.S. 89 (1965); but see McDonald v. Board of Election Comm'n's, 394 U.S. 802, 807-08 (1969).

The Supreme Court has developed two tests for deciding equal protection claims.

Under the "rational basis" test, state legislation will be upheld if its classification bears a "reasonable relation" or a "fair and substantial relation" to the achievement of a legitimate state goal. See, e.g., Dandridge v. Williams, 397 U.S. 471 (1970); Reed v. Reed, 404 U.S. 71 (1971); McGowan v. Maryland, 366 U.S. 420, 425-28 (1961). When, however, the legislation affects a fundamental right, or is based on suspect criteria (e.g., race or national origin), the Court applies the "strict scrutiny" test and upholds the legislation only if a state can show that the classification is necessary to the achievement of some "compelling state interest." See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969); McLaughlin v. Florida, 379 U.S. 184 (1964); Korematsu v. United States, 323 U.S. 214, 216 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Michelman, Foreward: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7, 19-33 (1969).

This "two-tiered" approach to equal protection analysis has been under attack in recent years as too rigid to cope with the complex issues before the Court. Few statutes can survive strict scrutiny, and most statutes are upheld under the more lenient rational relation standard. Thus, the choice of the test almost invariably determines the outcome of the cases. Critics have argued that the Court should adopt a "sliding scale approach" in which the Court variegates the degree of scrutiny depending upon, in the words of Mr. Justice Marshall, "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting). See generally Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting). See also Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring); Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court; A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972).

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The rationale underlying the Court's use of the right to vote in testing the constitutionality of state regulation of candidate ballot placement is articulated in *Williams v. Rhodes.* In that case, the Court held unconstitutional Ohio statutes which erected such insurmountable barriers to ballot position for minority party candidates that their placement on the ballot was "virtually impossible." The effect of the Ohio scheme was to deny a sizeable number of members of minority parties the right to "vote effectively," that is, for a candidate representative of the voter's political choice. Determining 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," the Court invalidated the Ohio statutes and required the state to provide freer access to minority parties. Thus, on the grounds that the voters' right to cast their votes "effectively" must not be impaired, the Court ruled that ballot access must be provided to candidates reflecting the range of voter preferences.

The strict standard of review has also been utilized in cases testing the constitutionality of state restrictions upon the placement of candidates on the ballot. See *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Bullock v. Carter*, 405 U.S. 134, 144 (1972). In cases decided the same day as *Lubin*, the Supreme Court reaffirmed the applicability of the strict standard for reviewing candidate qualification statutes. In *American Party of Texas v. White*, 415 U.S. 767, 780 (1974), the Court stated:

"Whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discriminations against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests, *Storer v. Brown* [415 U.S. 724, 729-33 (1974)] . . . ."

7. 393 U.S. 23 (1968).
8. *Id.* at 24. The Ohio system tended to provide the Republican and Democratic Parties a complete monopoly. *Id.* at 32. Under Ohio election laws, a new political party seeking ballot position in presidential elections was required to submit by February of the election year petitions signed by voters totaling 15 percent of the number of ballots cast in the last gubernatorial election. Party candidates were required to show that they received the nomination of a group which qualified as a "political party" within the meaning of Ohio law. To qualify as a political party, a group of electors must erect elaborate political machinery, establish a central committee and designate as delegates and alternates for a national convention people who did not vote in any other party primary during the preceding 4 years. For a detailed discussion of the Ohio election laws, see 393 U.S. at 35-37 (Douglas, J.).
9. *Id.* at 30.
10. *Id.* at 31.
11. The opportunity to run for office was thus protected as a means of preserving the right to vote. As the Court was later to observe, "the rights of voters and the rights of candidates do not lend themselves to neat separation: laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972).
Not all restrictions on ballot placement are unconstitutional, however. The right to vote effectively does not mean that every voter is entitled to find his or her preferred candidate on the ballot. The Court has taken the position that while the state must recognize "the potential fluidity of American political life" and grant ballot access to a representative diversity of candidates, the state has a compelling interest in limiting the ballot to a reasonable length and in screening unqualified candidates to avoid "confusion, deception, and even frustration of the democratic process. . . ." The Court has recognized as compelling the state's interest in restricting ballot access in order to avoid flooding the election machines, to increase voter rationality, to ensure that the winner is the choice of the majority of voters and to protect the integrity of the elective process by excluding frivolous and fraudulent candidates.

Thus, any challenge to a candidate qualifying scheme necessarily involves a conflict between the voters' interest in an open ballot and the state's interest in limiting ballot access. The Court resolves this tension by requiring that the state deny ballot position to candidates only pursuant to its legitimate interests in ballot control. For example, candidates who are unable to demonstrate minimal support among voters can be excluded, because their exclusion furthers the legitimate state interest in preventing the voter confusion that results from a lengthy ballot containing many candidates with no prospects of suc-

12. States have broad powers to regulate elections. 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 Place of Chusing Senators. For decisions recognizing the breadth of power enjoyed by the states on this subject, see, e.g., Evans v. Cornman, 398 U.S. 419 (1970); Carrington v. Rash, 380 U.S. 89, 91 (1965). The power to regulate elections is subject to the restraint of other constitutional provisions, however, and must be exercised in a manner consistent with the equal protection clause. Bullock v. Carter, 405 U.S. 134, 141 (1972).

13. It has been recognized that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730 (1974).


15. The trend to limit ballot size is traceable to the Progressive Movement of the early 20th century. For historical accounts, see Note, The Constitutionality of Candidate Filing Fees, 70 Mich. L. Rev. 558 (1972), and sources cited therein.


cess. On the other hand, the state may not require ownership of land as a qualification for membership on a school board, because lack of such ownership bears no relation to the state's interest in limiting the office to persons legitimately concerned with the community and its educational values. Nor may a state exclude a candidate with significant public support solely because he is a member of a minor political party, since such a denial furthers no compelling state interest.

In *Bullock v. Carter*, the Court first addressed the question of whether a candidate may be excluded from the ballot for failure to pay a filing fee. At issue was a Texas qualifying scheme which conditioned ballot placement upon the payment of fees ranging as high as $8,900. While the Court recognized that the state had an interest, if not a duty, to protect the integrity of its political processes from frivolous candidates, it found the Texas fee requirement ill-fitted to the goal of eliminating spurious candidates. The Court stated that while

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22. Candidates for most district, county, and precinct offices were required to pay the filing fee set by the county executive committee of the political party conducting the primary. Committees for counties with a population of one million or more could require payment of up to 10% of the aggregate annual salary for candidates for offices of 2-year terms, and up to 15% of the aggregate annual salary for candidates for offices of 4-year terms. There were no percentage limitations in smaller counties. In the May 2, 1970, Democratic primary one candidate was assessed $6,250, or 99.7% of the annual salary of the office he was seeking. 405 U.S. at 138 n.10. There was no alternative procedure by which a potential candidate could get on the primary ballot. *Id.* at 137. The filing fee requirement was limited to party primary elections, but because the mechanism of such elections is the creature of legislative choice, it is "state action" subject to application of the fourteenth amendment. *Id.* at 140. See also Gray v. Sanders, 372 U.S. 368 (1963); Nixon v. Herndon, 273 U.S. 536 (1927).

The Court "strictly scrutinized" the statute because (1) the excessive size of the fees substantially limited the voters' choice of candidates, thereby depriving them of the right to cast their votes effectively; and (2) the impact of the fee requirement was related to the resources of the voters supporting a particular candidate. 405 U.S. at 143–44.

23. *Id.* at 145. The Court rejected the state's argument that it had a compelling interest in exacting the filing fees in order to relieve the state treasury of the cost of conducting the primary elections. The Court said that recovering costs is a legitimate state objective, but that the state failed to meet the strict standard of review applicable because there was no showing of necessity. *Id.* at 147. The Court also rejected the state's theory that candidates who avail themselves of the primary process can be required to pay the share of the cost they have occasioned. The Court concluded that elections are held for the benefit of all voters, and hence costs should be spread "among all of the voters in an attempt to distribute the influence without regard to wealth." *Id.* at 148.

24. *Id.* at 146.
the unwillingness of financially able candidates to pay a filing fee indicated a lack of seriousness that justified the denial of ballot position, the failure of indigents to pay the fee was not an accurate measure of qualification, as it resulted solely from lack of financial resources. The entire scheme in Bullock was invalidated, both as it applied to indigents and nonindigents, because the fees denied ballot position to indigent candidates and were unreasonably large even for nonindigent candidates. The Court did not, however, invalidate filing fees per se and cautioned that it did not intend to cast doubt upon the constitutionality of the exaction of reasonable candidate filing fees.

The Bullock Court invited future litigation when it failed to articulate whether the defect of the Texas scheme was solely that its fees were excessively high, solely that no alternative means of access was provided or that the two characteristics appeared in combination. Lubin resolved the ambiguity by holding that the constitutionality of filing fees does not depend upon their size but upon whether their payment is mandatory to indigents.

25. Id.
26. Id. at 149.
27. Fee schemes that were not nearly as excessive as the upper limits of the Texas scheme were invalidated subsequent to Bullock. See, e.g., Dillon v. Fiorina, 340 F. Supp. 729 (D. N.M. 1972) (6% of first year salary); Chote v. Brown, 342 F. Supp. 1353 (N.D. Cal. 1972) (1% of first year salary); Jenness v. Miller, 346 F. Supp. 1060 (S.D. Fla. 1972) (10 cents per name on certification petition); Harper v. Vance, 342 F. Supp. 136 (N.D. Ala. 1972) (2% of first year salary).
28. Soon after Bullock, a suit was brought in Washington challenging the state's filing fee requirement, Wash. Rev. Code § 29.18.050 (1963). The challenged statute provided:

A fee of one dollar must accompany each declaration of candidacy for a precinct office without a salary; a fee of ten dollars for any office with a compensation attached of one thousand dollars per annum or less; a fee equal to one percent of the annual compensation for any office with a compensation attached of more than one thousand dollars per annum. . . .

In Swanson v. Kramer, 82 Wn. 2d 511, 512 P.2d 721 (1973), the Washington Supreme Court upheld the fee scheme, distinguishing Bullock on two grounds. First, the fees in Washington, ranging from $150 to $425, were considerably smaller than those invalidated in Bullock. Second, Washington, unlike Texas, allows an individual to run for office as a write-in candidate without payment of a filing fee. Wash. Rev. Code § 29.51.170 (Supp. 1973). Having distinguished Bullock, the Washington court applied the “rational relation” test—a questionable practice in light of Bullock's express use of the strict standard of review (see note 22 supra)—and upheld the statute. The Court stressed the caveat in Bullock that “nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts.” 82 Wn. 2d at 517, 512 P.2d at 725, quoting 405 U.S. at 149 (emphasis in Swanson).
29. Bullock did not dispose of the issue presented in Lubin because, unlike the fees challenged in the latter case, Bullock involved fees that were so excessive as to be “patently exclusionary.” 415 U.S. at 715 n.4.
II. THE CURRENT STATUS OF MANDATORY FILING FEES

A. Lubin v. Panish

In Lubin the Court granted certiorari to consider the petitioner's claim that the California statute requiring payment of a $701.60 filing fee,\(^{30}\) while providing no alternative means of access to the ballot, deprived an indigent person of equal protection guaranteed by the fourteenth amendment and rights of expression and association guaranteed by the first amendment.\(^{31}\) Chief Justice Burger, writing for the Court, noted that inherent in any mandatory fee scheme is the conflict between the state's need to restrict ballot access and the voters' and candidates' need for an open political system hospitable to candidates without regard to their economic status. Recognizing the essential role of each interest in achieving an effective and representative political system, the Court perceived its task to be one of accommodating those interests, rather than balancing their relative importance and choosing between them.\(^{32}\)

The state defended the statute as necessary to prevent frivolous candidates from overwhelming the ballot, arguing that the filing fee was intended to test the seriousness of aspiring candidates, not the size of their financial resources.\(^{33}\) The Court rejected the state's claim, reiterating its observation in Bullock that the failure of indigent candidates to pay a filing fee does not attest to a lack of seriousness, but only to a lack of financial ability. The Court invalidated the scheme as applied to indigents because the means by which the state sought to achieve its interests operated to exclude potentially serious candidates from the ballot on grounds irrelevant to legitimate state interests.

In contrast to Bullock, the Court in Lubin did not invalidate the entire fee payment scheme, but instead nullified the scheme only insofar as it applied to indigents.\(^{34}\) The Court thereby revealed that the constitutional permissibility of a fee requirement depends not upon fee size but upon whether payment is mandatory to indigents. The Court's decision to focus upon the lack of alternative means to the ballot

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30. See note 2 supra.
31. 415 U.S. at 710.
32. Id. at 714.
33. Id.
34. Id. at 718.
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rather than on fee size is explained by two considerations. First, it is impossible to set a standard fee size that is reasonable for all candidates. In order to implement the state's objective in limiting ballot access, fees must be large enough to discourage frivolous candidates; yet a fee of any size excludes indigents from the ballot solely on the basis of lack of funds. The Court observed that Lubin would make the same claim if he were assessed $1, $100, or $700, and that in each case his status as an indigent would prevent his placement on the ballot.35 Thus, the interests of the state in imposing fees and the interests of voters in a political system open to candidates regardless of their economic status cannot be reconciled by setting a maximum allowable fee.

Second, because the impact of fee requirements on indigents and nonindigents is conceptually severable, and because indigents can be distinguished from nonindigents with relative ease,36 the Court chose to sanction a qualification scheme that imposed different requirements upon the two classes. The Court was able to cure the constitutional defect of California's scheme by requiring that an alternative, nonpecuniary method of candidate qualification be devised for indigents. The Court could then uphold the fee requirement for nonindigents because it believed that the fees furthered the legitimate state interest in ballot control37 and because California's fees were reasonable in light of their purpose.38

B. The Impact of Lubin

Lubin requires that states which assess a candidate filing fee provide an alternative, nonpecuniary means of ballot access for indigents. The Court cites as an example of permissible alternatives the requirement that minor political parties or individual candidates demonstrate the existence of voter support by filing petitions signed by a significant number of voters.39 The voter petition requirement is one of several

35. Id. at 714.
36. This can be accomplished by the use of pauper's affidavits.
37. 415 U.S. at 717.
38. California's fees were considerably smaller than those collected in Texas. See notes 2 & 22 supra.
39. 415 U.S. at 718-19. The signature requirements are usually set at a percentage of the number of ballots cast in a previous election or the number of registered voters. The Court has not set a maximum for the percentage a state may require. Mr. Justice
methods approved by the Court which precondition ballot placement upon the demonstration of voter support for the candidate. These procedures, whose efficacy in promoting the state's interests in ballot control will be discussed later in this note, do not exclude candidates on the basis of wealth but make ballot placement a function of voter support—a desirable effect in view of the fact that the Court's rationale for affording constitutional protection to the process of candidate qualification is to protect the interest of voters in having a meaningful choice of candidates.

The Court apparently rejected a write-in procedure as a viable alternative, stating, in dictum, that such an option would be "dubious at best".

Harlan, concurring in the result of Williams v. Rhodes, 393 U.S. 23 (1968), said that determination of the number of signatures to be required should be left to the state legislatures. Id. at 48. In Williams, however, the Court invalidated an Ohio statute which required a new party to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the preceding gubernatorial election. Id at 24–25. In Jenness v. Fortson, 403 U.S. 431 (1971), the Court upheld a Georgia law requiring a candidate who does not enter and win a political party's primary election to submit a petition signed by at least 5% of the number of registered voters at the last general election. The Court said that the 5% figure is "somewhat higher than the percentage of support required to be shown in many States as a condition for ballot position, but this is balanced by the fact that Georgia has imposed no arbitrary restrictions ... upon the eligibility of any registered voter to sign as many nominating petitions as he wishes." Id. at 442. In American Party of Texas v. White, 415 U.S. 767 (1974), decided the same day as Lubin, the Court upheld Texas' requirement that independent candidates submit petitions with signatures of from 1% to 5% (depending on the office sought, with a maximum of 500 signatures for local offices) of the ballots cast for governor at the last general election. 415 U.S. 775–76 n.7. The Court upheld the 5% figure despite the restriction in the Texas statute that "[n]o person shall sign the application of more than one candidate for the same office" and "no person who has voted at either the general primary election or the runoff primary election of any party shall sign an application in favor of anyone for an office for which a nomination was made at either such primary election." Id. at 776–77 n.7. quoting TEX. ELEC. CODE art. 13.50 (1967). For an account of percentage requirements imposed by states, see Williams v. Rhodes, 393 U.S. 23, 47 n.10 (1968)(Harlan, J., concurring).

Methods of demonstrating voter support which have been approved by the Court include: (1) winning the primary election of a political party whose candidates at the most recent gubernatorial or presidential election received a significant number of votes (403 U.S. at 433; 415 U.S. at 772); (2) winning the nominating convention of a political party whose candidates received a significant number of votes at the last general election (id. at 773); (3) winning the precinct nominating convention of a party polling less than 2% of the gubernatorial vote in the preceding general election, and if the required support is not evidenced at the conventions, the circulation of petitions for signatures (id. at 774); (4) submission of petitions signed by a specified percentage of registered voters (403 U.S. at 433; 415 U.S. at 775). For a discussion of the number of signatures that may be required, see note 39 supra.

40. Methods of demonstrating voter support which have been approved by the Court include: (1) winning the primary election of a political party whose candidates at the most recent gubernatorial or presidential election received a significant number of votes (403 U.S. at 433; 415 U.S. at 772); (2) winning the nominating convention of a political party whose candidates received a significant number of votes at the last general election (id. at 773); (3) winning the precinct nominating convention of a party polling less than 2% of the gubernatorial vote in the preceding general election, and if the required support is not evidenced at the conventions, the circulation of petitions for signatures (id. at 774); (4) submission of petitions signed by a specified percentage of registered voters (403 U.S. at 433; 415 U.S. at 775). For a discussion of the number of signatures that may be required, see note 39 supra.

41. See text following note 68 infra.

42. See note 11 and accompanying text supra.

43. 415 U.S. at 719 n.5. The Court's footnote five marks a shift in its analysis of restrictions on candidate ballot placement. The Court seems to focus on the right of the
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It would allow an affluent candidate to put his name before the voters on the ballot by paying a filing fee while the indigent, relegated to the write-in provision, would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot.\textsuperscript{44}

In view of the Court's forceful suggestion\textsuperscript{45} that it will reject as inadequate the write-in alternative, and the concurrence in this position by seven justices, states are ill-advised to adopt this method in meeting \textit{Lubin}'s constitutional mandate.\textsuperscript{46}

A third alternative, but one unlikely to be widely adopted, is simply to provide ballot position to indigents who submit an affidavit attesting to their lack of funds.\textsuperscript{47} This method eliminates the harm
candidate to run for office free of burdensome restrictions, rather than upon the right of voters to be protected by unencumbered ballot access. This may signify a willingness to recognize running for public office as a constitutionally protected right. For cases recognizing that right, see note 4 \textit{supra}. Alternatively, it could be argued that the Court has extended the right to vote to include not merely the right to "vote effectively" (see notes 9–11 and accompanying text \textit{supra}), but also the right to cast a ballot in a manner that does not prejudice the chances for the preferred candidate to be elected.

Washington Supreme Court Justice Utter, dissenting in \textit{Swanson v. Kramer}, 82 Wn. 2d 511, 512 P.2d 721 (1973), also rejected as inadequate the write-in alternative, observing that the alternative is really no alternative at all: "The purpose here is \textit{placement on the ballot} and not merely another method of receiving votes. . . . The write-in may permit a candidate to continue campaigning for office, but it does not provide access to name placement on the ballot and thus cannot serve as a reasonable alternative to the filing fee." \textit{Id.} at 534–35, 512 P.2d at 735 (emphasis in original). \textit{See Williams v. Rhodes}, 393 U.S. 23, 37 (1968) (Douglas, J., concurring).

44. 415 U.S. at 719 n.5.

45. Although the statement is dictum, it was considered such an essential part of the Court's holding that Mr. Justice Blackmun, joined by Mr. Justice Rehnquist, wrote an opinion "concurring in part" arguing that a write-in procedure is an adequate alternative. 415 U.S. at 722–23.

46. The continued vitality of \textit{Swanson v. Kramer}, 82 Wn. 2d 511, 512 P.2d 721 (1973), discussed at note 28 \textit{supra}, which upheld Washington's filing fee scheme because a write-in candidacy required no filing fee, is thus questionable. A recent Washington Attorney General Opinion applying \textit{Lubin} to Washington's statute said that without \textit{Lubin}'s footnote five the Washington provision for write-in candidacies without payment of a fee would constitute an acceptable alternative means of ballot access. However, "[i]n view of this clear warning from the highest court as to the probable success of a future argument based upon the availability of the write-in alternative even where no filing fee is required," the Attorney General found the requirements of \textit{WASH. REV. CODE} § 29.18.050 (1963) no longer constitutionally enforceable. 1974 Op. WASH. ATT'Y GEN. No. 12 at 7.

47. Pauper's affidavits are likely to be used, however, as an interim measure before state legislatures, whose mandatory fee schemes are invalid after \textit{Lubin}, enact new methods of ballot control for indigents. Pauper's affidavits are presently being used in Washington. The state attorney general has stated that the secretary of state's authority under \textit{WASH. REV. CODE} § 29.04.080 (Supp. 1974) to adopt regulations consistent with federal and state laws permits him to require submission of an affidavit attesting to
caused to indigents by fee requirements, but it is not recommended because it undermines the state's interest in ballot control by guaranteeing ballot position to virtually all indigents willing to submit a pauper's affidavit.

Given the inefficacy of a pauper's affidavit in furthering the state's interest in ballot regulation and Lubin's warning that a write-in procedure will be held inadequate, states can best comply with Lubin's mandate by conditioning the ballot placement of indigent candidates upon demonstration of significant voter support for their candidacy. States are unlikely, however, to abandon use of filing fees as a means of screening nonindigent candidates because fee collection is both an administratively convenient method of screening candidates and a revenue producing mechanism. Thus, for all practical purposes, Lubin erects an "optional fee scheme" in which nonindigents must pay a filing fee and indigents must submit evidence of voter support.

III. LUBIN'S OPTIONAL FEE SCHEME: A RATIONAL RESULT?

The Court's sanction of an optional fee scheme is unfortunate. A more critical examination of the state's legitimate interests in ballot regulation indicates that a filing fee collected from anyone is an arbitrary, and hence unconstitutional, method of implementing the state's interests. Moreover, while the optional fee scheme does not operate to exclude an indigent candidate from the ballot on the basis of wealth, it utilizes the criterion of ability to pay in determining the nature of the qualification the candidate must meet. Thus, it imposes unequal burdens upon candidates according to their economic status.

inability to pay the fee. The secretary of state does not, however, have the power to create additional substantive requirements, and, therefore, use of petitions signed by voters as a means of ballot placement must be enacted by the legislature. 1974 Op. WASH. ATT'Y GEN. NO. 12 at 9.


49. In contrast to the relatively simple procedure of fee collection, the processing of voter petitions involves a more demanding administrative task. Signatures on voter petitions must be checked to ensure that only the names of registered voters appear, and that the names appear only once. It should be noted, however, that a staff already exists to check petitions for initiative measures, that only a sampling of the signatures is customarily checked, and that most of this work is now performed by computers.
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Not all pecuniary classifications are impermissible or even suspect, but because wealth classifications are "traditionally disfavored," especially when they appear in legislation affecting fundamental interests, a strict examination of the necessity for the scheme is warranted. The availability of a nonpecuniary alternative for achieving the state's interests should prompt the invalidation of wealth-based legislation and the adoption of the less burdensome alternative. The requirement that all candidates demonstrate voter support should be substituted for the optional fee scheme because it is better suited to the promotion of the state's legitimate interests in restricting ballot access, and because it has the desirable feature of imposing equal burdens upon all candidates regardless of their economic status.

50. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (upholding state statutory system for financing public education based on ad valorem tax on property within the school district); James v. Valtierra, 402 U.S. 137 (1971) (sustaining a provision of the California constitution that no low rent housing project be developed by a state public body without approval by a majority of those voting at a community election); Dandridge v. Williams, 397 U.S. 471 (1970) (upholding a state administrative regulation imposing a maximum limit on the total amount of aid any one family unit can receive in connection with the Federal Aid to Families With Dependent Children program).

51. Dandridge v. Williams, 397 U.S. 471 (1970). For discussion of equal protection analysis adopted by the Court which may involve classification of rights as "fundamental" or classifications of groups as "suspect," see note 6 supra.


53. Voting is a fundamental interest. See note 6 supra.

54. Griffin v. Illinois, 351 U.S. 12 (1956). In McDonald v. Board of Election Commissioners, the Court noted that "a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." 394 U.S. 802, 807 (1969) (dictum) (citations omitted).

A. The State's Interests

In Lubin, the Court identified the state's interest in ballot regulation as preventing the ballot from being overwhelmed with frivolous or otherwise "nonserious" candidates:56

That "laundry list" ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion. The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not.

The Court's phrasing of the state's interest is misleading because it combines without distinction what have been identified as three separate interests:57 (1) the interest in eliminating frivolous or nongenuine candidates;58 (2) the interest in limiting ballot access to candidates who command public support;59 and (3) the interest in preventing lengthy ballots.60 These interests should be examined separately because close inspection reveals that only the first two are valid state concerns, and because only the requirement of voter support promotes the two interests that merit protection.

The state has an interest in setting candidate qualifications so as to limit the ballot to candidates who are "genuine" in their desire to win the election and perform the duties of the office.61 The assertion of this first interest is necessary to preserve the integrity of the electoral process by denying ballot position to, and preventing the possible election of, persons seeking ballot position solely for the purpose of advertising their names in the community for business or professional rea-

56. 415 U.S. at 715.
57. The interest in recovering election costs is not a compelling state interest justifying exclusion of candidates who cannot pay a fee. See note 23 supra. Lubin excludes mention of the state's financial interests from the discussion of legitimate goals.
61. Commenting on the need to limit the ballot access to genuine candidates, the Court in Lubin stated:

A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence tend to impede the electoral process.

415 U.S. at 715.
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sons. Such frivolous candidates must be excluded in order to avoid the voter confusion and miscast votes caused by listing candidates who have no "platform" that is communicated to the public. It is, of course, difficult to identify with precision the intentions of all prospective candidates; however, the interest in limiting ballot position to "genuine" candidates is substantially served by the imposition of a qualifying mechanism which requires applicants for ballot position to demonstrate in some way that they are motivated by a sincere desire to undertake the responsibilities of the offices they are seeking.

The state also has a compelling interest in requiring a demonstration that the candidate commands support among a significant number of voters. This interest is worthy of protection because a ballot limited to the names of candidates with significant voter support minimizes the fragmentation of voter choice and concentrates the attention of the electorate on a manageable number of candidates. Such a ballot avoids voter confusion and miscast votes and affords the voters opportunity to be more discerning in their exercise of the franchise.

Providing ballot access only to candidates who are genuine and command a measure of public support are the only legitimate interests of the state in ballot regulation. The state does not have a separate interest in keeping to a minimum the number of candidates appearing on the ballot. The assertion of the first two interests operates in itself to prevent an "overcrowded" ballot. The tolerable length of a ballot cannot be measured in terms of the number of candidates which appear. A scheme which results in the placement of four candidates for one position, two of whom are frivolous, have no voter support or are running for office only for the advertisement of their names, is too long. But a scheme resulting in placement of four candidates for the position when there are seven genuine candidates who have significant support among the voters is too short. Voter confusion results not

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62. This analysis is supported by Williams v. Rhodes, 393 U.S. 23 (1968), in which the Court noted that the experience of many states is 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." Id. at 33. Thus, the danger that many fragmentary groups will overwhelm the ballot is no more than "theoretically imaginable" and does not justify the imposition of severe restrictions on ballot access. Id.

In a separate opinion in Williams, Mr. Justice Harlan stated that the existence of as many as eight candidates for a position "cannot be said, in light of experience, to carry a significant danger of voter confusion." Id. at 47 (Harlan, J., concurring).
from a lengthy ballot per se but from ballots listing names of persons who have no support among the electorate and who do not communicate their "platform" to the public.

In summary, only legislation designed to permit ballot placement to (1) "genuine" candidates who (2) command voter support is acceptable, because only such legislation promotes the state's legitimate interest in ballot regulation without burdening voters' interests in unencumbered placement of candidates.

B. The Relation of Means to Ends

Filing fees collected from anyone should not be sustained as a constitutional method of ballot control because their collection is not reasonably related to the state's interest in limiting ballot access to candidates who are genuine and command public support. As Chief Justice Burger observed in Lubin:63

A wealthy candidate with not the remotest chance of election may secure a place on the ballot by writing a check. Merchants and other entrepreneurs have been known to run for public office simply to make their names known to the public.

Despite recognition of the evil, Lubin permits the practice to continue. Fee payment does not indicate a candidate's genuineness in his desire to hold public office because it does not require him to engage in activity that is an integral part of the electoral process. Fee payment is, in the Court's words, a "neutral fact."64 It takes place wholly apart from the political arena. Payment shows a willingness to act detrimentally to the candidate's immediate financial interests but it does not thereby reveal a sincere motivation to serve in the office the candidate is presumably seeking. A professional or entrepreneur seeking name recognition will pay a fee merely because it is insubstantial in relation to the return he anticipates.65 In other cases, because a fee requirement forces a prospective candidate to weigh his desire to seek and occupy the public office against the price it will cost him, an aspirant

63. 415 U.S. at 717.
64. Id. at 718.
65. Indeed, name recognition is sought by precisely those persons—professionals, businessmen and the like—who are able to pay, and for whom the expected financial return justifies the outlay. Permitting persons to appear on the ballot simply on payment of a fee can thus be said to encourage the practice of using the ballot for business or professional purposes.
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might reveal a lack of genuineness by deciding that the race is not worth payment of the fee. More often, however, such a decision is determined not by the genuineness of his intentions to occupy the office, but by the size of his financial resources.

Neither does fee payment promote the state's second interest, that of restricting ballot access to serious candidates who command public support. The requirement that filing fees be of reasonable size will enable more candidates to raise the fee from their own resources and avoid dependence upon the contributions of supporters. Thus, financially able candidates are not required to show in any way that they command voter support. For those candidates who must turn to their supporters for contributions, the ability to raise the fee does not indicate the existence of sizeable support as much as the relative affluence of their supporters. If a candidate and his backers are wealthy, no sizeable public support is necessarily shown by the ability to raise the fee; if they are not, a substantial number of contributors must exist.

66. Weighing the desire to become a candidate against the willingness to pay a fee is analogous to weighing one's desire to vote against the cost of casting it, and Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) forbids the latter inquiry. In Harper, the Court considered a Virginia statute which denied the right to cast a ballot to voters who did not pay a $1.50 poll tax. While only indigents were necessarily excluded by the tax, the Court struck the tax for all voters regardless of ability to pay. Commentators have observed that the decision does not rest merely on the discrimination against the poor occasioned by the requirement, but rather indicates that "no fee may validly be collected in exchange for admission to the vote . . . ." Michelman, Forward: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 24 (1969) (emphasis in original). It has been suggested that the principal vice of such conditioning of the exercise of the ballot is not merely that it operates to exclude poor voters but that it invites each voter, regardless of his means, to weigh the value of his vote. And, "if he is human, he is likely to weigh it in terms of its return to him, failing to consider or, at least undervaluing, the importance to society of an open political system responsive to his and others' wishes." Comment, The Constitutionality of Qualifying Fees for Political Candidates, 120 U. Pa. L. Rev. 109, 121 (1971).

67. The requirement that fees must be of reasonable size is deduced from the fact that the Court invalidated the entire fee scheme in Bullock, in part because the fees were exorbitant, but the Court in Lubin upheld California's use of fees for nonindigents when the fees were significantly less than those in Bullock. See text accompanying note 26 supra and notes 2 & 22 supra.

68. District Court Judge Arnow suggested that a filing fee is a reasonable method of measuring the existence of voter support because "[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." Wetherington v. Adams, 309 F. Supp. 318, 321 (N.D. Fla. 1970). Chief Justice Burger apparently rejected this reasoning, and attempted to remove the requirement that a candidate prove the existence of substantial campaign funds in order to run for office. Burger wrote, "Even in this day of high budget political campaigns some candidates have demonstrated that direct contact with thousands of voters by
conditioning ballot placement upon payment of a filing fee, then, skews the field of candidates, and hence public officials, in favor of the wealthy or those who have wealthy supporters.

In contrast, a requirement that candidates demonstrate the existence of voter support is well suited to the promotion of the state’s interests because it accurately tests both the candidate’s genuineness and the substantiality of his support. First, unlike fee payment, proving public support indicates the genuineness of a candidate’s desire to serve in the office he is seeking because it requires him to engage in the initial step of the elective process. Demonstrating support requires the candidate to formulate a political platform, present his position to the voters and persuade a sizeable number to signify their support. Unlike the case with fee payment, the motive is unambiguous: the only practical reason to engage in the arduous process of gathering a political constituency is to attain public office. It can reasonably be inferred that a candidate willing to undergo the arduous process is motivated by a sincere desire to hold public office.

Second, a candidate’s public support is demonstrated by his ability to collect the required number of signatures or win the nomination of a major political party. The method is not only the best for promoting the state’s interest, but has the added virtue of creating a classification that does not impose a wealth standard at any stage of the electoral process.

C. Relative Burdens

The optional filing fee scheme suffers the additional defect of imposing, according to ability to pay, inherently unequal burdens upon candidates seeking ballot position. First, all candidates are not required to meet the same qualifications. Indigents must demonstrate


69. The method is, of course, subject to abuse. Arguably, the process of demonstrating voter support is not as arduous for people with money who can hire persons to canvass the community soliciting signatures. But a drive for support must be accompanied by the articulation of some platform on which the candidate proposes to run. Thus, in contrast to fee requirements, the availability of money alone does not suffice to attain ballot position; there must be in addition a demonstration that the candidate is willing to participate in some phase of the electoral process. This requirement should function to discourage and almost eliminate the practice of seeking ballot position for the purpose of name advertisement.
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both genuineness and the existence of voter support through fulfillment of the petition or party requirement, while nonindigent candidates are not required to demonstrate their public support, and their genuineness is tested only in marginal cases.\(^7\) Second, the process that indigent candidates must undertake to attain ballot position is inherently more burdensome.\(^7\) Signature collection by its nature requires a concerted effort to canvass the community in search of support, a process which involves the commitment of both time and resources. The payment of fees, on the other hand, does not by its nature involve such effort.

The question remains, however, whether the imposition of different burdens necessarily requires invalidation of an optional fee scheme. In *Jenness v. Forston*,\(^7\) the Court upheld the use of alternative qualifying mechanisms for different classes of candidates.\(^7\) In *Jenness* the winner of the primary of a political party that polled 20 percent or more of the vote in the most recent gubernatorial or presidential election was guaranteed placement on the general election ballot. A candidate who was either an independent or the nominee of a political organization which did not poll 20 percent of the vote cast in the last election could achieve ballot placement only by filing nominating petitions signed by at least 5 percent of the registered voters.

In *Jenness*, each alternative route to ballot placement was designed to serve the state's interest in restricting ballot access to genuine candidates who commanded public support. The genuineness of major party candidates was demonstrated by their victory in the primary and their intention to continue to the general election; the substantiality of their public support was demonstrated by their ability to win the nomination of a party which polled at least 20 percent of the votes in the last election. The genuineness and support of all other candidates were tested by means of a nominating petition requirement.

These features distinguish the *Jenness* scheme from that suggested

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70. See text accompanying notes 64–69 *supra*.
73. Id. The Court upheld a similar scheme upon the same grounds in *American Party of Texas v. White*, 415 U.S. 767 (1974). The alternate methods of ballot placement sustained in *American Party* are described at note 40 *supra*. 

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in *Lubin* and reveal the optional fee scheme's inadequacy. Under the optional fee scheme, the alternative routes to ballot placement are not designed to measure the same qualifications. Moreover, the use of disparate treatment in the *Jenness* scheme rested on grounds that were relevant to the differences among candidates seeking ballot position. Candidates of parties which demonstrated substantial voter support in the past will almost certainly enjoy the continued support of party members, and thus a showing of voter support would be unnecessarily duplicative. Independents and candidates of minor parties, by contrast, have not shown voter support in the past and thus should be required to demonstrate it prior to ballot placement. The disparate treatment occasioned by the *Jenness* scheme, then, is based on factors which are relevant to the achievement of the state's objective in limiting the ballot to genuine candidates commanding public support. *Lubin* lacks this justification; alternative treatment is accorded solely on the basis of wealth, a factor wholly irrelevant to the election process.

IV. CONCLUSION

The Court has attempted in *Lubin* to provide indigent candidates an equal opportunity to seek public office by holding that the state cannot exclude their names from the ballot solely because of their failure to pay a filing fee. Far from providing equal ballot access, however, the Court has merely substituted one form of wealth-based discrimination against indigent candidates for another. Rather than invalidate the collection of a filing fee as a method of candidate qualification, the Court approved the use of an "optional fee scheme" in which states may require as a condition to ballot placement that non-indigents pay a filing fee and indigents demonstrate the existence of voter support. Under this scheme, the state's legitimate objective in restricting ballot access to genuine candidates who have demonstrated voter support is satisfied only by indigents; nonindigents are virtually guaranteed ballot position simply upon payment of a reasonable fee, regardless of the seriousness of their candidacies.

The "optional fee scheme" in *Lubin* should not stand because it bears no relation to the state's legitimate interest in restricting ballot position to genuine candidates who have demonstrated voter support, because it utilizes the criterion of ability to pay for candidate qualification, and because it places inherently unequal burdens upon the
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poor. Only the invalidation of a filing fee collected from any class of candidates and the adoption of a requirement that all candidates evidence voter support achieves the state's interests in ballot control while providing a political system hospitable to all candidates regardless of economic status.

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