MINORITY PARTY ACCESS TO THE BALLOT

Relatively little attention has been devoted to the question of minority party access to the ballot through the petition process, primarily because of the predominant two-party system which prevails in the United States. Not since the Republican emergence in the late 1850's has any third party actually been successful in permanently realigning existing political loyalties, and only in those relatively rare instances when a third party has presented a serious presidential candidate have the laws dealing with access to the ballot been given much consideration.[1] Thus, it is not surprising that the presidential campaign of George Wallace and his American Independent Party in 1968 generated a flurry of judicial activity.[2] With both liberal and conservative political factions currently expressing a willingness to contest the reign of the established parties in 1972, litigation involving access to the ballot will likely increase rather than diminish in the future. Until recently the judiciary has been reluctant to consider the problems in this area, adhering to the principle that the issue was a political question[3] and therefore nonjusticiable.[4] This view was based on the fear that if the courts were to become involved in political matters, relief, if given, might do more harm than good.[5] Although some remnants of the doctrine remain,[6]

1. *See generally* Note, *Legal Obstacles to Minority Party Success*, 57 YALE L.J. 1276 (1948).

2. The Wallace campaign was directly responsible for the landmark case of Williams v. Rhodes, 393 U.S. 23 (1968). See notes 35-48 *infra* and accompanying text.

3. The political question doctrine was most succinctly described by Mr. Justice Frankfurter:

> [T]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In . . . [such situations] relief must come through an aroused popular conscience that sears the conscience of the people's representatives. Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

4. *See* Colegrove v. Green, 328 U.S. 549 (1946).

5. MacDougall v. Green, 335 U.S. 281, 286 (1948) (Rutledge, J., concurring), *over'd* Moore v. Ogilvie, 394 U.S. 814 (1969). In *MacDougall* the Supreme Court was called upon to determine the constitutionality of an Illinois statute requiring that at least 200 of the 25,000 signatures needed for a nominating petition had to come from each of 50 different counties. The Court held that the requirement did not violate the due process, equal protection, or privileges and immunities clauses of the fourteenth amendment. The only really surprising aspect of the case was that the Court was willing to reach any decision at all on the merits. By the time the decision was handed down, only 12 days remained until the national election of 1948, a factor clearly increasing the reluctance of the Court to grant affirmative relief. The requirement of 25,000 signatures remains in effect. See note 86 *infra* and accompanying text.

6. The political question doctrine has been a vital aid to the federal courts in escaping the

its strength has waned considerably since the landmark case of *Baker v. Carr*,[7] in which the Supreme Court held legislative malapportionment to present a justiciable issue. Were the political question doctrine still dominant, cases dealing with access to the ballot through the petition process could not receive a thorough hearing on the merits. Having once breached the political thicket, however, it was probably inevitable that the federal judiciary would soon find itself confronted with a controversy concerning minority party access to the ballot. The first serious effort to overcome inequities in state petition requirements was undertaken in *Williams v. Rhodes*,[8] but two more recent decisions, *Socialist Workers Party (SWP) v. Rockefeller*[9] and *Georgia Socialist Workers Party (GSWP) v. Fortson*,[10] have elaborated extensively upon the principal issues. This note will examine the latter cases in detail.

SWP v. Rockefeller involved an attack on various sections of the New York State Election Law.[11] The Socialist Workers Party sought to have placed on the 1970 general election ballot a slate of candidates for election to various state-wide and local offices. Under New York law, however, the organization could not even be termed a political party, in that it had failed to poll at least 50,000 votes in the preceding gubernatorial election.[12] Instead, the SWP was forced to settle for designation as an "independent body,"[13] a characterization requiring it to utilize petitions to obtain a place on a New York ballot.[14] When forced to proceed by this route, the Socialist Workers Party, encountering difficulties in satisfying the statutory requirements, brought an action to have the requirements stricken and presented three primary arguments in favor of its position.

First, it contended that the Election Law discriminated against and placed unreasonable burdens upon independent or minority

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unpleasant task of dealing with issues revolving around the Vietnamese war. *E.g.*, Eminente v. Johnson, 361 F.2d 73 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 929 (1966). The possible presence of a political question is often acknowledged even when the doctrine itself is not followed. *See* Powell v. McCormack, 395 U.S. 486 (1969).

7. 369 U.S. 186 (1962).

8. 393 U.S. 23 (1968).

9. 314 F. Supp. 984 (S.D.N.Y.), *aff'd mem.*, 400 U.S. 806 (1970).

10. 315 F. Supp. 1035 (N.D. Ga. 1970), *appeal docketed sub nom.* Jenness v. Fortson, 39 U.S.L.W. 3229 (U.S. Oct. 26, 1970), *argued* 39 U.S.L.W. 3386 (U.S. Mar. 1, 1971) (No. 5714).

11. N.Y. ELECTION LAW §§ 1-422 (McKinney 1964).

12. *Id.* § 2(4).

13. *Id.* § 2(11).

14. *Id.* § 138(1).

parties, thus impeding their participation in the electoral process.[15] Second, the requirements were portrayed as interfering with the right to associate freely for the advancement of political beliefs.[16] Third, it was maintained that enforcement would impair the right of all registered voters to have an equal opportunity to cast their ballots for the candidates of their choice.[17] The three-judge district court struck down or qualified nearly all the provisions challenged by the SWP,[18] including a vital section of the Election Law which required that all nominating petitions be signed by at least 50 voters in each county of the state of New York.[19]

GSWP v. Fortson[20] deals with the number of voter signatures needed for a valid nominating petition. Under Georgia law the requirement is set at "not less than five percent of the total number of electors eligible to vote in the last election for the filling of the office the candiate is seeking. . . ."[21] Due to its poor record in previous

15. Severe drains on financial and manpower resources were the burdens to which the SWP referred. 314 F. Supp. at 989.

16. *Id.*

17. *Id.*

18. *Id.* at 997. Injunctive relief against enforcement of state statutes was asked, thus requiring a three-judge district court. 28 U.S.C. § 2281 (1964).

The only challenged provision that was not at least questioned was section 168 of the Election Law, which establishes minimum literacy requirements for New York voters. N.Y. ELECTION LAW § 168 (McKinney 1964). The court found no conflict between that section and Supreme Court holdings involving the literacy issue, the most important of which is Katzenbach v. Morgan, 384 U.S. 641 (1966).

The court considered and declared invalid another provision of the Election Law which allowed lists of registered voters to be delivered free of charge to any county party chairman. N.Y. ELECTION LAW § 376(5) (McKinney 1964). This provision was found to constitute a denial of equal protection. The problem, of course, was that the phrase "county party chairman" could refer only to the chairman of a political organization whose candidate had received over 50,000 votes in the preceding gubernatorial election. See note 12 *supra* and accompanying text. Because of the unique nature of the section and its relatively tenuous relationship to the petition process, it will not be discussed further in this note.

19. N.Y. ELECTION LAW § 138(5)(a) (McKinney 1964). One intriguing provision of this section permits "the counties of Fulton and Hamilton to be considered as one county." Such are the ways of politics.

20. 315 F. Supp. 1035 (N.D. Ga. 1970).

21. GA. CODE ANN. § 34-1010(b) (Supp. 1969). The Georgia statute refers to eligible voters in general, rather than to the number who actually voted in the preceding election. A statute such as that in Illinois, which requires independent candidates for political office within any district or subdivision of the state to file petitions containing signatures equaling not less than five percent of the number of persons who voted in the last election, 46 ILL. REV. STAT. 10-3 (Supp. 1971), would appear to represent a lighter burden on minority parties. The Illinois requirement was recently upheld in Jackson v. Ogilvie, ___ F. Supp. ___ (N.D. Ill. 1971). Independent candidates for statewise office in Illinois, however, must file petitions containing

elections, the GSWP found itself confronted with the necessity of meeting this requirement in order to obtain a place on the ballot.[22] It brought an action alleging that the provision represented a violation of the equal protection clause of the fourteenth amendment and was an unconstitutional burden on their freedoms "of speech, petition, and association, as well as on their 'right to vote.' "[23] As a subsidiary claim, the GSWP also attacked the state's requirement of a qualifying fee, amounting to five percent of the annual salary of the office for which a candidate is running.[24]

In *Fortson* the five percent signature requirement was upheld on the ground that it did not constitute invidious, intentional, or purposeful discrimination.[25] Unlike the court in *SWP v. Rockefeller*, the *Fortson* court was apparently reluctant to attack statutory provisions relating to the petition process. However, the GSWP's candidates were relieved of the obligation to pay a qualifying fee, on the ground that the joint effect of petition and fee requirements represents an unreasonable burden on minority parties.[26]

If access to the ballot is to be considered an integral part of the voting process, an approach that clearly was adopted in *SWP v. Rockefeller*,[27] the equal protection analysis that has been applied in a series of cases dealing with electoral matters becomes relevant. The cases include *Baker v. Carr*,[28] *Gray v. Sanders*,[29] *Wesberry v.*

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the names of 25,000 qualified voters. 46 ILL. REV. STAT. § 10-3 (Supp. 1971). See note 86 *infra* and accompanying text.

22. Any political organization in Georgia which receives less than 20 percent of the vote in the preceding gubernatorial or presidential election is classed as a "political body" rather than a "political party." GA. CODE ANN. § 34-103(s)-(u) (1970). In order for a political body to nominate a candidate for public office, it must file nominating petitions meeting the five percent requirement. *Id.* § 34-1001. The GSWP apparently did not make any affirmative effort to satisfy these requirements prior to bringing suit; however, the court evidently did not view this as a standing criterion.

23. 315 F. Supp. at 1037.

24. *Id.* at 1040-41; GA. CODE ANN. § 34-1013 (1970).

25. 315 F. Supp. at 1040.

26. See note 67 *infra* and accompanying text.

27. 314 F. Supp. at 989.

28. 369 U.S. 186 (1962). The Court held that those persons who are adversely affected by legislative malapportionment have a justiciable cause of action.

29. 372 U.S. 368 (1963). Georgia's county-unit elective system, which permitted the residents of counties having a small population to exert substantially more influence at the polls than residents of more heavily populated counties, was held to be in violation of the equal protection clause.

Sanders,[30] and *Reynolds v. Sims*.[31] In these cases the Supreme Court developed and emphasized certain fundamental principles that have had an effect on all questions touching upon the right to vote. Central among these principles is the following:

> No right is more precious in a free country than that of having a voiee in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.[32]

Since the right to vote is so vital, any law which might adversely affect this right is likely to be viewed with disfavor. When a party must resort to the petition process in order to obtain a place on the ballot for its candidates and the requirements of the process are so stringent as to be unduly burdensome, then the voters who wish to cast their ballots for the candidates of the minority party are suffering invidious discrimination.[33] This situation violates the second fundamental principle inherent in the right to vote—that "the Constitution visualizes no preferred class of voters. . . ."[34]

The application of an equal protection analysis to the petition process in *Williams v. Rhodes*[35] was a logical extension of the Supreme Court's emphasis on voting rights. *Williams* arose as a result of efforts by the American Independent Party to obtain a place on the 1968 Presidential ballot in Ohio. The Ohio statutes required that any party which failed to receive 10 percent of the vote in the last gubernatorial election submit petitions containing the names of qualified voters amounting to at least 15 percent of the total vote in that election to obtain a place on a subsequent ballot.[36] Complex

30. 376 U.S. 1 (1964). Relying extensively on *Baker v. Carr*, the Court ruled that congressional districts must be apportioned in such a way that a vote in one district in a congressional election will have the same weight as a vote in another district.

31. 377 U.S. 533 (1964). Elaborating on *Baker v. Carr*, the Court held that both houses of a bicameral legislature must be apportioned substantially on the basis of population in order to avoid a violation of the equal protection clause. Some commentators contend that *Reynolds* was the single most important case in the equal protection series; one has even maintained that the case "opened a new era of constitutional political theory. . . ." Barton, *The General-Election Ballot: More Nominees or More Representative Nominees?*, 22 STAN. L. REV. 165, 178-79 (1970).

32. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

33. *See* 314 F. Supp. at 989 and cases cited therein.

34. Gray v. Sanders, 372 U.S. 368, 380 (1963).

35. 393 U.S. 23 (1968).

36. OHIO REV. CODE ANN. § 3517-01 (1960). For a discussion of the subsequent history of this provision, see note 75 *infra* and accompanying text.

organizational requirements also had to be satisfied.[37] The United States Supreme Court concluded that "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which . . . is an invidious discrimination, in violation of the Equal Protection Clause."[38]

Amalgamating the principles established in the equal protection cases,[39] the *Williams v. Rhodes* opinion emphasized "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[40] The Court reasoned that the Ohio statutes, by establishing such stringent requirements for placing third-party candidates on the ballot, put substantially heavier burdens on persons wishing to promote and elect such candidates than on persons who favored one of the two major parties. In effect, a preferred class of voters was created. Having failed to show a compelling justification for this,[41] Ohio was ordered to place the names of the presidential electors of the American Independent Party on the ballot.

A major freedom of association issue was also present in *Williams v. Rhodes*, although the Court did not posit its holding on that ground.[42] However, the majority opinion does seem to have been prepared with an acute awareness that political parties may be the ultimate example of the associational freedom.[43] Indeed, the Court

37. *Id.* §§ 3517.02-.04 (establishment of party committees); 3505.10 (requirement of a national convention); 3513.11 (state convention requirement); 3513.191 (party loyalty requirement). Ohio was recently enjoined from the enforcement of the first three provisions in this list, on the ground that they represented an unreasonable burden on minority parties. Socialist Labor Party v. Rhodes, 318 F. Supp. 1262 (S.D. Ohio 1970), *appeal filed sub nom.* Rhodes v. Sweetenham, 39 U.S.L.W. 3350 (U.S. Jan. 14, 1971) (No. 1104). The opinion stated that *Williams v. Rhodes* had already expressly declared the provisions to be unconsitutional. *Id.* at 1266. This statement was in error; indeed, *no* specific statutory requirement was rejected in *Williams*. The language used by the Supreme Court in that case relied heavily on generalities. See note 38 *infra* and accompanying text. For further discussion of *SLP v. Rhodes*, see notes 75 & 83 *infra*.

38. 393 U.S. at 34.

39. See notes 28-33 *supra* and accompanying text.

40. 393 U.S. at 30.

41. The interests asserted by Ohio were: the promotion of a two-party system to encourage compromise and political stability; the avoidance of a situation in which the runner-up in a multi-candidate election might have been preferred over the plurality winner by a majority of the voters; and the prevention of confusion that might result by having a large number of parties listed on the ballot. Ohio also contended that any disaffected group would actually have a chance to present its views more effectively within the framework provided by the major parties. For a discussion of these arguments, see *id.* at 31-34.

42. For an excellent discussion of the background of the freedom of association issue, see 20 CASE W. RES. L. REV. 892, n. 12 (1969).

43. For a brief but thorough discussion by a political scientist of the function of political parties in the United States, see A. SINDLER, POLITICAL PARTIES IN THE UNITED STATES (1966).

reaffirmed its conviction that the freedom to associate in organizations, whether political or otherwise, is an implied first amendment right.[44] As such, it is incorporated into the fourteenth amendment and entitled to "protection from infringement by the States."[45]

In his discussion of freedom of association in the majority opinion, Justice Black clearly had in mind the sort of rigid compelling state interest test that is often equated only with equal protection problems. In an earlier case dealing with freedom of association, Black had written that

> laws which actually affect the exercise of . . . [such] . . . vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.[46]

In *Williams* he expanded this idea with the statement that Ohio had "failed to show any 'compelling interest' which justifies imposing . . . heavy burdens on the right to vote *and to associate*."[47] The conclusion seems inescapable that the freedom of association issue in *Williams* is unalterably bound to the principal holding centering on equal protection.[48]

SWP v. Rockefeller[49] and *GSWP v. Fortson*[50] combine to provide a detailed analysis of the major problems involved in the use of the petition process to gain access to the ballot. Although the *Williams* decision established the basic law on the subject, *Rockefeller* and *Fortson* provide a review of specific issues that is considerably more complete.[51] These issues include:

> What qualifications must be met by a voter in order to be a valid signer of a petition?

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44. For earlier discussions of the point, see United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958).

45. 393 U.S. at 30-31. Freedom of association has repeatedly been included within the purview of the fourteenth amendment, sometimes of its own force but more often as a necessary adjunct of free speech. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 276-77 (1964), and cases cited therein.

46. United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967).

47. 393 U.S. at 31 (emphasis added).

48. For the sake of convenience, it may be permissible to refer to freedom of association as an "ancillary issue" in *Williams*. *See* Barton, *supra* note 31, at 175. However, such language should not be allowed to obscure the true importance of the issue.

49. 314 F. Supp. 984 (S.D.N.Y. 1970).

50. 315 F. Supp. 1035 (N.D. Ga. 1970).

51. Although *Rockefeller* and *Fortson* deal with the issues as they relate to elections for state

> What sanctions, if any, are permissible when a voter signs more than one nominating petition for a particular office?
>
> What degree of thoroughness is required—or acceptable—in the investigation of the residency of signers?
>
> May a minority party candidate be forced to pay a qualifying fee as well as comply with petition requirements?
>
> What degree of geographic distribution of the petition signers may a state require?
>
> How many signatures may be required for a valid petition?

The first concern in the preparation of any nominating petition is to assure that the persons who sign are qualified voters under state law. This step is deceptively difficult. In New York, for example, state law had long required that the only voters who could sign nominating petitions were those who had been registered to vote in the last general election held in the state.[52] Prior to the decision in *SWP v. Rockefeller* this provision was upheld on a number of occasions.[53] The *Rockefeller* court ignored these precedents, however, and held the New York statute unconstitutional on the ground that it created

> arbitrary classifications with respect to new voters who may sign major party primary designating petitions, [denied] otherwise qualified voters the opportunity to support candidates of their choice and [barred] minority parties from seeking the support of these new voters without compelling justification therefor.[54]

A state is also apparently limited in the sanctions it may impose when a voter signs more than one nominating petition for a particular office. The plaintiffs in *SWP v. Rockefeller* attacked as defectively overbroad that provision[55] of the New York Election Law "which discounts the signature of a voter on a nominating petition if that voter's name appears upon another petition designating or nominating the same or different person for the same office."[56] The SWP feared that this provision permitted the state to strike the name of such a voter from *all* petitions for the particular office involved,

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offices, the holdings are relevant to presidential elections as well, since state statutes also control access to the ballot in those elections.

52. N.Y. ELECTION LAW § 138(6) (McKinney 1964).

53. *See* Emanuel v. Power, 25 N.Y.2d 962, 252 N.E.2d 854, 305 N.Y.S.2d 356 (1969); Davis v. Board of Elections, 5 N.Y.2d 66, 153 N.E.2d 879, 179 N.Y.S.2d 513 (1958). The *Davis* decision cited administrative necessity as a satisfactory basis for the prior registration requirement. In *Emanuel* the court simply upheld the requirement without comment.

54. 314 F. Supp. at 992-93.

55. N.Y. ELECTION LAW § 138(6) (McKinney 1964).

56. 314 F. Supp. at 993.

thus preventing the voter's signature from being accepted even on the first petition he signed.

In answer to this argument the *Rockefeller* court indicated that requiring the assurance of each independent party which puts forward a candidate for a specific office that it is supported by qualified voters who do not dilute their support by assisting other candidates is a permissible state interest. For this reason, the court maintained that New York's statutory requirement was calculated to promote, rather than hinder, voter independence.[57] However, the *Rockefeller* decision carefully noted that the state judiciary had long required only that the name of "a person signing a petition 'shall not be counted' on a second *valid* and *effective* petition nominating the same or a different candidate for the same office."[58] In other words, the voter may be certain that his signature will at least be counted on the first valid petition he signs. The court then set forth a clear warning:

> As so construed, this provision would be constitutionally permissible. Of course, should this approach not be adopted by the State, then the provision in question would be "defectively overbroad." For it would be impermissible on less than a showing of a compelling state interest to deny a voter the right to support a candidate of his choice and to deny such support to that candidate. . . .[59]

The court also approved the New York statutory provision requiring authenticating witnesses to ascertain the residency and voter qualifications of signers.[60] However, if such a requirement were literally applied, it could present a harrowing bottleneck to the rapid and orderly preparation of nominating petitions. An in-depth examination of the background of signers would pose severe administrative difficulties for partics using the petition process and might cause the voters themselves unnecessary inconvenience. The holding in *SWP v. Rockefeller* states, therefore, that the knowledge requirement may be satisfied by a simple oral inquiry and nothing more.[61] This procedure, of course, tends to emasculate the basic requirement. Nevertheless, it represents a necessary compromise between the American tradition of personalized politics and the realities of an increasingly urbanized life style. In an era when it is

57. *Id.*
58. *Id.*
59. *Id.* at 993-94.
60. N.Y. ELECTION LAW § 138(3) (McKinney 1964).
61. 314 F. Supp. at 994.

impossible for most candidates to meet even a small fraction of their potential constituents and campaigning is increasingly dependent on the mass media, it would be illogical to expect subscribing witnesses to actually have personal knowledge of the background of the petition signers. Such a requirement belongs to another century.[62]

The burdens that often accompany the petition process, which the *Rockefeller* court sought so diligently to lighten, are accentuated when a minority party candidate is required to pay a qualifying fee to have his name listed on the ballot. At the same time, the fee presents no particular hardship to the major political parties and may even provide an indirect benefit for them.[63] Therefore, although not directly a part of the petition process, the qualifying fee is an integral factor in the overall problem of access to the ballot.

At least three purposes have been set forth as grounds for the fee requirement,[64] all of which result from an unfavorable reaction to multi-candidate elections. From a purely practical standpoint, it is feared that complex voting machinery would break down under the strain of a mass influx of candidates. Secondly, the states arguably have a legitimate interest in making certain that only those candidates who are serious and acting in good faith should obtain places on the ballot.[65] Finally, proponents of the qualifying fee argue that the collected funds serve valuable purposes. For example, they may be used by the state government for the financing of elections or channeled to the executive committees of the qualified parties to strengthen the existing party system. The latter use has received special praise,[66] even though it is glaringly inequitable to minority parties struggling to challenge the two-party tradition.

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62. The New York Court of Appeals had apparently already approved the limited authentication procedure outlined in *Rockefeller*. *See* Schaller v. McNab, 16 N.Y.2d 976, 212 N.E.2d 776, 265 N.Y.S.2d 290 (1965). The *Schaller* holding was directly concerned with section 135 of the Election Law, which requires that the witnesses of a petition must sign a statement containing the words "I know each of the voters whose names are subscribed to this petition. . . ." N.Y. ELECTION LAW § 135(3) (McKinney 1964). However, the *Rockefeller* court found it to be equally applicable to section 138(3).

63. See text accompanying note 66 *infra*.

64. *See* Wetherington v. Adams, 309 F. Supp. 318 (N.D. Fla. 1970).

65. This argument is a simple one:

> In order to insure serious political candidates, it is justifiable to require a reasonable filing fee. 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 support for a person's candidacy. *Id.* at 321.

66. *Id.*

Under current judicial developments, the candidate may be relieved of the twin burdens of the petition process and the fee payment. In *GSWP v. Fortson* the court weighed the issues and concluded:

> [T]o require of an indigent independent candidate in a general election that he come forward with both a nominating petition and a qualifying fee, with no other means of getting on the ballot, is a violation of equal protection.[67]

Whether the same logic will be applied to candidates of all independent and newly-developing parties, regardless of indigency, remains to be determined. However, it is inappropriate and shortsighted to "say as a matter of law that one's candidacy is not serious or that he does not have the right to run merely because he does not have or has thus far failed to attract a certain amount of money."[68]

The last two issues involved in the petition process—the necessary geographic distribution of the petition signers and the required number of signatures—clearly illustrate the essentially opposing positions taken by *SWP v. Rockefeller* and *GSWP v. Fortson* regarding the scope of the Supreme Court's decision in *Williams v. Rhodes*. Therefore, these two issues should be considered jointly. It has previously been noted that *SWP v. Rockefeller* invalidated New York's requirement of fifty signatures per county.[69] Citing *Moore v. Ogilvie*,[70] the three-judge court in New York found the existing formula to be rigid, arbitrary, and totally inequitable. Unlike the *Rockefeller* case, *GSWP v. Fortson* gave extensive consideration to the number of signatures that may be required for a valid petition. This figure may be determined through the use of a percentage figure or an absolute number, and Georgia presently requires signatures amounting to five percent of the total number of voters eligible in the last election to cast ballots for the particular office for which a petition is being prepared.[71] *Fortson* upheld this provision, which admittedly appears much fairer than Ohio's requirement, viewed with disfavor in *Williams v. Rhodes*,[72] of 15 percent of the total vote in the

67. 315 F. Supp. at 1041. *See also* Jenness v. Little, 306 F. Supp. 925 (N.D. Ga. 1969), *appeal dismissed sub nom.* Mattews v. Little, 397 U.S. 94 (1970).

68. 315 F. Supp. at 1041.

69. See note 19 *supra* and accompanying text.

70. 394 U.S. 814 (1969). Illinois distribution requirements were held to discriminate against residents of populous counties.

71. GA. CODE ANN. § 34-1010(b) (1970).

72. See notes 35-38 *supra* and accompanying text.

last election. However, the *Fortson* decision arguably failed to match the spirit if not the letter of *Williams*.[73]

The *Fortson* case clearly interprets the *Williams* holding as being strictly limited to its specific facts. On the other hand, the *Rockefeller* decision was evidently based on the view that *Williams* represents a mandate for the judiciary to insure that all restrictions on the petition process and access to the ballot must be reasonable and justifiable. In its resolution of the issues, including the distribution problem, the *Rockefeller* court favored the minority party on almost every important point.

As suggested in *Fortson*,[74] the Supreme Court invited this confusion when it failed to strike down the Ohio petition requirements in *Williams*.[75] Indeed, since the American Independent Party had apparently been successful in gathering more than the necessary 433,100 signatures before the case even reached the Supreme Court,[76] there is admittedly some basis for the contention that the *Williams* decision was the product of the party's substantial compliance with the Ohio statutes, rather than the inherent unreasonableness of the statutes themselves.

Having already affirmed the *Rockefeller* decision,[77] the Court will soon be reviewing *GSWP v. Fortson*.[78] Hopefully, the interpretive argument regarding *Williams* can then be settled with some degree of finality. The broad approach taken in *SWP v. Rockefeller* is likely to prevail in *Fortson* and in any similar cases which may arise, for the *Williams* decision is simply not one that easily lends itself to a narrow construction. Even some of the justices who dissented in *Williams* felt that the decision would play a broad rather than a narrow role in future developments relating to access to the ballot, thus extending its impact far beyond the particular facts of the case: "The rationale of the opinion of the Court, based both on the Equal Protection Clause

73. See note 85 *infra* and accompanying text.

74. 315 F. Supp. at 1039.

75. However, the unfavorable attitude of the Supreme Court in *Williams* caused the Ohio legislature to lower the fifteen percent requirement to seven percent. OHIO REV. CODE ANN. § 3517.01 (Supp. 1970). This provision has been declared unconstitutional by a three-judge district court on the ground that it was too burdensome on the "right to political association and the right of qualified voters to cast their ballots effectively." Socialist Labor Party v. Rhodes, 318 F. Supp. 1262, 1268 (S.D. Ohio 1970). Also see notes 36 *supra* and 83 *infra*.

76. 393 U.S. at 45 (Harlan, J., concurring).

77. 400 U.S. 806 (1970).

78. 315 F. Supp. 1035 (N.D. Ga. 1970).

and the First Amendment guarantee of freedom of association, will apply to all elections, national, state, and local."[79]

Certainly the affirmance of *SWP v. Rockefeller* indicates that rigid distribution formulas are now unacceptable. Of course, an argument can be made that a modicum of statewide electoral support is not altogether an anachronism even in this age of increasing urbanization,[80] when economic power and population growth are becoming heavily centralized in metropolitan areas. Indeed, a majority of the Supreme Court has indicated in at least one decision that a balancing of urban and rural interests is not necessarily bad.[81] However, a failure to make some adjustment for increasing urbanization will lead to the same sort of serious inequities in the petition process that brought about the legislative reapportionment decisions. If a state does not recognize the problem and take remedial action itself,[82] litigation represents the only real hope for a solution.[83] Otherwise, it is not difficult to imagine a candidate who enjoys

79. 393 U.S. at 63 (Warren, C.J., dissenting).

80. *See* Moore v. Ogilvie, 394 U.S. 814, 821 (1969) (Stewart, J., dissenting).

81. *See* Dusch v. Davis, 387 U.S. 112, 117 (1967). The case arose out of the consolidation of the city of Virginia Beach, Virginia, and Princess Anne County. The consolidation plan provided for a governmental council of 11 members, all of whom were to be elected at large. Four could be chosen without regard to residence, while the seven others each had to reside in a separate borough. The boroughs varied considerably in population. However, the Supreme Court held that the overall plan reflected "a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside." *Id.* at 117.

82. At least one state that had an extremely inequitable petition procedure has seen fit to make sweeping changes. Until recently Idaho permitted no more than 150 signatures from any one county on a valid petition for statewide office. Act of April 10, 1967, ch. 360, § 34-612 C, [1967] Idaho Laws 1031 (repealed 1971). In application, this rather innocuous sounding requirement meant that one Idaho county with a population of 675 could at least technically exert as much influence on the petition process as the most populous county, which has a population 162 times as great. 1971 WORLD ALMANAC 447. In a tacit acknowledgement of the unreasonableness of this provision, a blanket repeal of this and related provisions has just gone into effect. IDAHO CODE ANN. § 34-612A-D (Cum. Supp. 1970), *repealing* ch. 360, § 34-612A-D, [1967] Idaho Laws 1016.

83. A prime example is Michigan, which required that:

> The petitions shall be signed by at least 100 residents in each of at least 10 counties of the state and not more than 35% of the minimum required number of the signatures may be by resident electors of any one county. MICH. COMP. L. ANN. § 168.685 (1967).

This requirement was held to be in clear violation of the equal protection clause of the fourteenth amendment. Socialist Workers Party v. Hare, 304 F. Supp. 534 (E.D. Mich. 1969). Moreover, an Ohio Statute, OHIO REV. CODE ANN. § 3513.258 (1970), requiring that gubernatorial candidates representing independent parties present petitions containing the signatures of at least 200 qualified voters from each of 30 counties has been held to violate the principle of one man, one vote. Socialist Labor Party v. Rhodes, 318 F. Supp. 1262, 1272 (S.D. Ohio 1970).

enormous metropolitan support facing critical obstacles because of implacable rural opposition. The district court's holding in *SWP v. Rockefeller* recognized this predicament. Even former Chief Justice Warren's insistence on "a substantial showing of voter interest in the candidate"[84] does not necessitate a substantial showing in every county. Although the analogy may be an oversimplification, it appears self-evident that broad distribution requirements in the petition process are as unacceptable as malapportioned state legislatures. Whether the complete invalidation of all distribution requirements should be undertaken is uncertain; some sort of "reapportionment" may suffice in many instances.

If the *Rockefeller* approach to *Williams* is adopted, the constitutionality of the Georgia percentage requirement upheld in *Fortson* also becomes doubtful. In a portion of the *Williams* opinion, Justice Black suggested that a formula setting the necessary number of signatures at one percent of the total electorate be employed.[85] This one percent suggestion is presently the only hint that the Court has offered concerning a satisfactory figure; by that standard the principal holding in *GSWP v. Fortson* is open to reversal.

The states which utilize an absolute figure for the number of signers, rather than a percentage, seem to have more reasonable requirements, although no empirical evaluation of this has been made. It may simply be that the percentages were chosen without careful thought regarding the actual number of voters such percentages might represent. At any rate, the highest absolute number is only 25,000.[86] Moreover, in no instance does any numerical requirement exceed five percent of the registered voters.[87] Among those states employing the percentage method, on the other hand, are found such severe requirements as the one in North Carolina, where nominating petitions must be "signed by qualified voters of the political division in which the office will be voted for equal in number to twenty-five percent (25%) of those who, in the last gubernatorial election in the same political division, voted for Governor."[88] The continued survival

84. Williams v. Rhodes, 393 U.S. 23, 63 (1968) (Warren, C.J., dissenting).

85. 393 U.S. at 33 (dictum). Justice Black noted that a large number of states require signatures amounting to only one percent of the electorate, and that such states have not encountered any significant problems. *Id.*, n.9.

86. 46 ILL. REV. STAT. § 10-3 (Supp. 1971).

87. 20 CASE W. RES. L. REV. 902 n.31.

88. N.C. GEN. STAT. § 163-122(1) (Cum. Supp. 1969).

of this requirement is very doubtful. It is substantially more burdensome than even the Georgia percentage approved in *GSWP v. Fortson*[89] and clearly does not satisfy the formula proposed by Justice Black[90] in *Williams v. Rhodes*. Indeed, the percentage provision alone appears sufficient to make the totality of North Carolina's petition process a serious handicap to freedom of association and to the right of all voters to equal protection under the law.

Based on the preceding analysis, the basic framework of the petition process will eventually be characterized by the nonexistence or liberalization of distribution provisions and by low numerical requirements. Some observers believe that this situation will encourage the growth of minority parties, which they contend would be an abhorrent development.[91] Should this fear be warranted and if the two-party system is worth preserving for the overall welfare of the nation, then the judiciary must prepare itself for an unpleasant and perhaps unresolvable choice between the preservation of a valued political concept on the one hand and important constitutional protections on the other.[92] It is more logical to conclude, however, that no matter what happens, the two-party system will continue unabated. The previous failure of even the strongest third-party movements gives no reason to believe otherwise.[93]

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89. See notes 71-72 *supra* and accompanying text.

90. See note 85 *supra* and accompanying text.

91. *See* Bickel, *Is Electoral Reform the Answer?*, COMMENTARY, Dec. 1968, at 41, 44, 51.

92. The Supreme Court has been reluctant to consider the petition problem at all when such consideration would tend to conflict with time-honored limits on the authority of the courts to grant relief. For example, mootness has been held to prevent the granting of a writ of a mandamus in a petition matter, even though the Court knew that a similar case was likely to arise again. *See* Brockington v. Rhodes, 396 U.S. 41 (1969).

93. For a concise and readable discussion of the history of party politics in the United States, with some relatively surprising predictions for the future, see Reichley, *That Elusive Political Majority*, FORTUNE, March 1971, at 69.