The Constitution And The Ballot Box: Supreme Court Jurisprudence And Ballot Access For Independent Candidates

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I. INTRODUCTION

Between 1968 and 1983, the United States Supreme Court decided eight cases in which the principal issue was the constitutionality of state-imposed restrictions on access to the general election ballot for independent and third-party candidates.[1] Those decisions spawned a small, but lively body of articles that criticized the Court's ballot access rulings for distinct, but related reasons.[2]

Some political scientists argued that the Court's decisions frequently failed to consider the importance of restricted ballot access to the development of a strong two party political system and, in turn, the importance of strong two party politics to the preservation of representative democracy.[3] These comentators argued that the Court's decisions reduced the difficulty of ballot

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1. Anderson v. Celebrezze, 460 U.S. 780 (1983); Illinois State Bd. of Elections v. Socialist Workers Party, 400 U.S. 173 (1979); American Party of Texas v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Jenness v. Fortson, 403 U.S. 431 (1970); and Williams v. Rhodes, 393 U.S. 23 (1968).

2. Moeller, *The Federal Courts' Involvement In The Reform Of Political Parties*, 40 W. POL. Q. 717 (1987); Richard P. Roberts, Note, *Ballot Access For Third Party And Independent Candidates After Anderson v. Celebrezze*, 3 J. L. & POL. 127 (1986); Tricia A. Blank, Note, *Ballot Access Restrictions—Anderson v. Celebrezze*, N. KY. L. REV. 137 (1985); Note, *Strict Scrutiny of Ballot Access Restrictions Assures Easier Access for Independent Presidential Candidates*, 24 SANTA CLARA L. REV. 209 (1984); Thomas S. Chase, Note, *Early Filing Deadline Unconstitutional: A Trend Toward Strict Scrutiny in Ballot Access Cases*, 18 SUFFOLK U. L. REV. 24 (1984); McCleskey, *Parties at The Bar: Equal Protection, Freedom of Association And The Rights of Political Organizations*," 46 J. POL. 346 (1984); George Frampton, Jr., *Challenging Restrictive Ballot Access Laws On Behalf Of The Independent Candidate*, 10 N.Y.U. REV. L. & SOC. CHANGE 131 (1980-81); Judith L. Elder, *Access to the Ballot by Political Candidates*," 83 DICK. L. REV. 387 (1979).

3. *See generally*, Moeller, *supra* note 2; McCleskey, *supra* note 2.

qualification for independent candidates, thereby providing candidates an incentive to pursue the independent course, rather than to engage in the type of party politics that nurtures representative democracy.[4] This phenomenon led one political scientist to observe, "It is now easier for third parties and independent candidates to enter the political contest and thus those candidates do not have to work through and support the political parties."[5]

Another political scientist argued that the Court's ballot access decisions were inconsistent, therefore, their implications for political parties were difficult to discern.[6] He observed that "[D]ecisions advantageous to parties are offset by those which impede their functioning and which discourage reliance on party politics."[7] In this commentator's view, such inconsistency resulted from "considerable judicial confusion about the organizational prerequisites of democratic politics in general and of American politics in particular."[8]

Legal commentators shared the view that the Court had failed to articulate a clear and consistent standard by which to judge the constitutionality of state ballot access restrictions.[9] Specifically, they complained that the Court appeared to rely on a different standard from one ballot access case to the next, "see-sawing" between standards from its decision in *Williams v. Rhodes*[10] to its decision in *Anderson v. Celebrezze*.[11] Indeed, in *Anderson*, the Court left in doubt the appropriate standard of review in ballot access cases by citing approvingly cases representing conflicting standards of review.[12]

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4. *See*, McCleskey, *supra* note 2 at 354 (referring to Anderson v. Celebrezze, 460 U.S. 780 (1983)).

5. Moeller, *supra* note 2, at 732.

6. McClesky, *supra* note 2, at 354.

7. *Id.* at 366.

8. *Id.* at 367.

9. This view has been expressed most recently in Bradley A. Smith, *Judicial Protection Of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 186-87 (1991); and Terry Smith, *Election Laws And First Amendment Freedoms— Confusion And Clarification by the Supreme Court*, 1988 ANN. SURVEY OF AM. L. 597, 610, 621-22 (1988). For earlier expressions of this view, see Note, *Santa Clara L. Rev.*, *supra*, note 2 and Chase, *supra* note 2, at 26-27, 30.

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

11. 460 U.S. 780 (1983). *See also*, Note, Santa Clara L. Rev., *supra* note 2, at 215.

12. *See*, Chase, *supra* note 2, at 30.

Unfortunately, neither political scientists nor legal commentators have paid close attention to the Supreme Court's ballot access jurisprudence since *Anderson*.[13] This is curious because between 1983, when the Court decided *Anderson*, and 1992, the Court revisited the ballot access issue in *Munro v. Socialist Workers Party*,[14] and *Norman v. Reed*,[15] and has addressed, for the first time, the related matter of the constitutionality of a state's ban on write-in voting in *Burdick v. Takushi*.[16] The recent decisions clearly warrant an update of the Court's activity concerning ballot access and a reexamination of the aforementioned critiques.

Moreover, events outside the courtroom of late have heightened the significance of ballot access jurisprudence. Republican presidential candidate Patrick Buchanan was unable to challenge President Bush in the April, 1992 New York Primary because he could not clear the formidable hurdle presented by New York State's ballot access law.[17] New York law required both the President and Mr. Buchanan to collect 1,250 signatures in each of thirty-four (now thirty-one, after reapportionment) congressional districts in a period of approximately five weeks (December 31 to the first week in February) in order to gain a ballot position.[18] To make matters worse, once a Republican voter signed one candidate's petition, the law prohibited that voter from signing a petition for another candidate.[19]

By the time that Mr. Buchanan, who announced his candidacy in November, 1991, began to organize a petition drive, President Bush's petition drive was well underway; hence, many Republicans who might otherwise have signed a Buchanan petition were no longer eligible to do so.[20] Mr. Buchanan thus failed to earn a spot on the primary election ballot.[21] Democratic presidential candidate Paul Tsongas had

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13. The only recent scholarship concerning the ballot access cases decided after Anderson, which has been written exclusively by lawyers, is B. Smith, *supra*, note 9, and T. Smith, *supra*, note 9.
14. 479 U.S. 189 (1986).
15. 112 S.Ct. 698 (1992).
16. 112 S.CT. 2059 (1992).
17. Gottlieb, *New York Ballot Rules Help Clear Bush's Path*, N. Y. TIMES, Apr. 7, 1992 at A22.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

to go to court in order to secure a spot on New York's Democratic Primary ballot because of a "tortuous, line-by-line challenge from the New Alliance Party to the signatures on his [ballot] petitions."[22] He narrowly escaped Mr. Buchanan's fate in New York.[23]

Independent presidential candidate H. Ross Perot expended a considerable amount of money in order to fund a Perot Petition Committee, the purpose of which was to secure him a position on the general election ballot in all fifty states.[24] Due in part to his massive personal fortune, Mr. Perot achieved that goal, even in New York, where he had to open an office for the sole purpose of facilitating the gathering of twenty-thousand signatures, including one-hundred each from half of the state's congressional districts.[25] None of the New York signatures could come from voters who had signed petitions for any of the candidates in the Democratic Presidential Primary or from any of the delegates who had been selected to attend the Republican National Convention.[26]

This commentary updates and reassesses Supreme Court ballot access jurisprudence. Section II identifies the principal forms of ballot access restriction that states employ, and briefly traces their historical development. Section III reviews the Court's ballot access decisions through *Anderson v. Celebrezze*, and Section IV discusses post-*Anderson* developments in the ballot access and write-in voting cases, respectively.[27]

Section V argues that the Supreme Court's ballot access decisions have been substantially more consistent and better protect the two major political parties than political scientists and legal commentators have recognized. Section V argues that the Court has erred in this field—not by being overly solicitous of third party and independent candidates, but rather, by overvaluing the states' asserted policy interests in regulating

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22. Sam H. VerHovek, *Election-Law Revisions: The Time May Be Now*, NEW YORK TIMES, March 8, 1992 at A38.

23. Rockefeller, *Primaries Are a Protection Racket*, NEW YORK TIMES, Sept. 15, 1992 at A27.

24. Martin Gottlieb, *Perot Forces Appear To Bend Election Barriers*, NEW YORK TIMES, Apr. 28, 1992 at B1-B2.

25. *Id.* at 131.

26. *Id.*

27. The decisions prior to and including *Anderson* are cited *supra*, note 1. The post-*Anderson* ballot access cases are *Norman v. Reed*, 112 S. Ct. 698 (1992); and *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). The lone write-in voting case is *Burdick v. Takushi*, 112 S. Ct. 2059 (1992).

ballot access and undervaluing the First Amendment rights of voters to vote for the candidate of their choice.

A similar argument concerning the Court's recent write-in voting decision follows in the *Burdick* discussion. This commentary recommends that, in ballot access cases the Court return to, and in write-in voting cases the Court adopt, the strict scrutiny of state ballot restrictions that it used in *Williams v. Rhodes*.[28] Section VI presents these conclusions and recommendation in summary form.

II. BALLOT ACCESS RESTRICTIONS

Typically, state ballot access statutes specify that parties that received a designated percentage or number of votes in the last general election will automatically be placed on the ballot for the succeeding general election.[29] This means that most independent, new party and third party candidates, who commonly cannot meet the minimum vote requirement, must gather a predetermined number of signatures on nominating petitions in order to earn a ballot position.[30]

Most often, the required number of signatures equals a specified percentage of either the registered voters in the State or the total number of votes cast in the previous general election.[31] The required number varies considerably from state to state. As a result, placing a third party candidate for the United States Senate on the ballot in 1990 required anywhere from two-hundred signatures in New Jersey to 181,421 in Florida.[32] In either case, a petition drive is necessary; indeed, the petition drive is the basic substantive obstacle to ballot access that third party and independent candidates face.[33]

Some states raise a hurdle that independent candidates must clear by imposing procedural restrictions on the gathering of petition signatures.[34] Twelve states require persons who sign a petition to swear that they belong to the party named in the petition, that they will vote for the candidates listed, or that they will otherwise support the party's nominee.[35] Texas

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28. 393 U.S. 23 (1968).
29. B. Smith, *supra*, note 9, at 175.
30. *Id.*
31. *Id.* at 175-176.
32. *Id.* at 176.
33. *Id.*
34. *Id.*
35. *See* CAL. ELEC. CODE § 6430 (West 1977); DEL. CODE ANN. tit. 15, § 3001

and South Carolina require those persons who sign petitions to include on the petitions their voter affidavit numbers.[36] Similarly, Kentucky and Delaware require that the signers' social security numbers appear on the petitions.[37] Eight states require independent and third party candidates who wish to appear on statewide ballots to obtain a certain number of signatures from different congressional or legislative districts.[38] Seventeen states limit the time frame during which petition signatures may be gathered.[39]

The limited petitioning period is typically accompanied by a filing deadline. The long petitioning period is made more stringent by a filing deadline for the general election that precedes the major party primaries, while a short petitioning period is made more generous by a filing deadline that is close to the general election.[40]

(1981); HAW. REV. STAT. § 11-62 (a) (2) (Supp. 1992); IND. CODE ANN. § 3-8-6-5 (5) (Burns Supp. 1992); ILL. ANN. STAT. ch. 46, para. 10-2 (Smith-Hurd 1991); MD. ELEC. CODE ANN. art. 33, § 4B-1 (a) (1990); N.C. GEN. STAT. § 163-96 (6) (1987); N.J. REV. STAT. § 19:13-4 (West 1989); N.Y. ELEC. LAW § 6-140 (McKinney 1978); OHIO REV. CODE ANN. § 3517-011 (Anderson 1988) (petition required by Secretary of State regulations); OR. REV. STAT. § 249.732 (1) (1991); and UTAH CODE ANN. § 20-3-2.5(2)(b)(1) (Supp. 1991).

36. *See* S.C. CODE ANN. § 7-11-80(3)(c) (Law. Co-op. Supp. 1989); TEX. ELEC. CODE ANN. § 141.063(2)(b) (Vernon 1986). A voter affidavit number is the number given to a voter when the voter signs an affidavit to certify elegibility to register to vote in a particular state. The Texas statute has been held unconstitutional with respect to third parties, but the state has continued to enforce it against independent candidates. In September, 1990, the statute kept an independent candidate off the Texas ballot for failure to include affidavit numbers on her petitions. B. Smith, note 9, *supra*, at 177 n.48.

37. *See* DEL. CODE ANN. tit. 15, § 3002(c)(2) (1981); KY. REV. STAT. ANN. § 118.315(2) (Michiel Bobbs-Merrill Supp. 1992).

38. *See* MICH. COMP. LAWS § 168.685(1) (West 1989); MO. ANN. STAT. § 115.315(4) (Vernon Supp. 1992); MONT. CODE ANN. § 13-10-601(2) (1989); NEB. REV. STAT. § 32-526(1) (1988); N.H. REV. STAT. ANN. § 655.42(1) (1986); N.Y. ELEC. LAW § 6-142.1 (McKinney 1978); N.C. GEN. STAT. § 163-96(a)(2) (1987); VA. CODE ANN. § 24.1-168 (Mitchie Supp. 1989).

39. *See* ARIZ. REV. STAT. ANN. §§ 16-341C+6 (Supp. 1986) (10 days); ARK. STAT. ANN. § 7-7-103(c) (3) (Mitchie 1990) (60 days); COLO. REV. STAT. §§ 1-4-801 (e)-(h) (Supp. 1989); FLA. STAT. ANN. § 99.0955(1) (West Supp. 1993); GA. CODE ANN. § 21-2-170(e) (Mitchie 1987); ILL. ANN. STAT. ch. 46, ¶ 10-4 (Smith-Hurd 1991) (90 days); MD. ELEC. CODE ANN. art. 33, § 4B-1(a) (1990); MICH. COMP. LAWS § 168.685(1) (West 1989); MINN. STAT. § 204B.08 subd. 1 (Supp. 1989) (14 days); N.Y. ELEC. LAW § 6-138(4) (McKinney 1978) (6 weeks); OKLA. STAT. ANN. tit. 26, § 1-108(2) (West Supp. 1991); PA. STAT. ANN. tit. 25, § 2913 (Purdon Supp. 1992); R.I. GEN. LAW § 17-14-1 (Supp. 1992); TEX. ELEC. CODE ANN. § 181-006 (Vernon Supp. 1991); VA. CODE ANN. § 24.1-168 (Mitchie Supp. 1992); WIS. STAT. § 8-20(8)(a) (West 1986); WYO. STAT. § 22-4-201 (Supp. 1989).

40. Roberts, note 2, *supra*, at 156-157.

The recent failure of environmental lawyer Larry Rockefeller to secure a ballot position for New York's Republican U.S. Senate Primary illustrates the combined challenge posed by the signature requirement and the limited petitioning period.[41] Delays resulting from redistricting shortened the petitioning period to 18 days, during which New York law required Mr. Rockefeller to secure 10,000 signatures.[42]

In addition to the hurdles described above, in 1980, independent presidential candidate John Anderson faced "disaffiliation" laws.[43] Disaffiliation laws deny general-election ballot access to independent candidates who have voted in the primary election immediately preceding the general election for which such candidates seek a ballot position. Even if independent candidates did not vote in the primary election immediately preceding the general election in which they seek candidacy, such candidates may be ineligible if they have been registered with a ballot-qualified political party within a specified period of time before the primary.[44]

However onerous the above requirements may seem, the U.S. Supreme Court has often found them to be constitutional.

A. *History*

Statutory provisions of the type discussed above proliferated after the 1912 elections.[45] In that year, former President Theodore Roosevelt's Progressive Party garnered a larger number of popular votes in the presidential election than did the Republican Party—voters elected fourteen Progressives to Congress.[46] The Socialist Party received a record six percent of the presidential vote, and a handful of Socialists won U.S. congressional seats. Additionally, Socialists captured 79 mayoralties and over 1200 other local offices throughout the United States.[47]

State legislatures, frightened by Roosevelt's strong showing and by the post-World War I stirrings of the Communist Party,

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41. Rockefeller, *supra* note 19.
42. *Id.*
43. Frampton, note 2, *supra*, at 131.
44. *Id.*
45. One commentator referred to this election as the "last major hurrah" of third parties. Smith, note 9, *supra*, at 170.
46. *Id.*
47. *Id.*

enacted new, or fortified existing ballot access laws during the late 1910's and early 1920's. This resulted in ballot access becoming substantially more difficult for independent and third party candidates than for Democrat and Republican candidates.[48]

In the 1930's and 1940's, states enacted a second set of restrictive ballot access statutes, some of which explicitly banned the Communist Party. Others stopped at making ballot access more difficult for Communist and other non-traditional party and independent candidates by requiring large numbers of signatures on nominating petitions.[49] Occasionally, non-traditional candidates challenged ballot-access statutes in state courts, but federal courts avoided the issues raised in those challenges until 1968.[50] In that year, the Supreme Court responded to presidential candidate George Wallace's challenge to an Ohio law that threatened to keep him off that state's general election ballot.[51]

Since 1968, states have defended their ballot access restrictions on the basis of their interests in ensuring a stable political system, an electoral victor supported by a majority of voters, and simple ballots that neither confuse voters nor discourage their political participation.[52] States have also argued that facilitating ballot access for the two major political parties and making access more difficult for third party and independent candidates serves their compelling interest in promoting political stability.[53] In the states' view, two-party dominance promotes a moderate, stable politics of coalition formation and accommodation instead of the ideological, unstable politics of fragmentation that is characteristic of multi-party political systems.[54]

Similarly, states have maintained that their interest in political stability warrants limiting the ballot access of third party and independent candidates because the presence of such candidates increases the likelihood that an election will fail to produce a winner who commands majority support.[55] Finally,

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48. *Id.* at 173-74.
49. *Id.*, at 174.
50. *Id.*
51. *Id.*
52. Elder, note 2, *supra*, at 390-99.
53. *Id.*, at 390-91.
54. *Id.*
55. *Id.*, at 393.

states have contended that they have a compelling interest in preventing voter confusion and the voter apathy that might result from the presence of numerous marginal or even frivolous candidates on election ballots.[56] This interest is supposedly served by limiting the ballot access of third party and independent candidates whose candidacies are often marginal and/or frivolous.[57]

III. THE EARLY CASES: 1968-1983

A. Williams v. Rhodes

The Supreme Court first addressed the constitutionality of ballot access restrictions in *Williams v. Rhodes*.[58] At issue in *Williams* were several provisions of Ohio law that made it virtually impossible for any party to qualify for the general election ballot except the Republican and Democratic Parties.[59] Notable in *Williams* was the provision that candidates from new political parties seeking access to the general election ballot must file petitions signed by qualified electors totalling fifteen percent of the number of ballots cast in the preceding gubernatorial election.[60] By contrast, the Democratic and Republican Parties automatically retained their ballot positions if they obtained at least ten percent of the vote in the preceding gubernatorial election.[61]

Another provision required new parties to conduct primary elections "conforming to detailed and rigorous standards."[62] As a result, George Wallace's American Independent Party (AIP) and the Socialist Labor Party were required to file their peti-

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56. For a discussion of this argument, *see Id.*, at 396. For an example of this argument, *see* Williams v. Rhodes, 393 U.S., at 33.

57. In *Bullock* 405 U.S., at 145, and *Lubin*, 415 U.S., at 715-16, the Supreme Court agreed with this argument, yet struck down required filing fees as means of pursuing the states' interest in avoiding voter confusion and apathy. The *Lubin* Court held that "[t]his legitimate state interest . . . must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity." 415 U.S., at 716. The Court added that "the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars." *Id.*

58. 393 U.S. 23 (1968).

59. *Id.*, at 25 n.1.

60. OHIO REV. CODE ANN. § 3517.01 (Anderson 1968).

61. 393 U.S., at 25-26.

62. *Id.* at 27.

tions for inclusion on the Ohio Presidential ballot two months before the major party primaries and nine months prior to the general election.[63]

The AIP gathered substantially more than the required 433,100 signatures, but failed to meet the early deadline. Hence, Ohio denied Wallace access to the ballot.[64] The AIP responded by challenging the petition and primary requirements, as well as the early filing deadline, on the ground that they denied the AIP and its supporters the equal protection of the laws guaranteed by the Fourteenth Amendment.[65]

Justice Black, writing for the six-member majority, observed that the challenged statutory provisions burdened two different, but intimately related, constitutional rights.[66] First, the right of individuals to associate in order to advance shared political beliefs is protected.[67] Second, qualified voters have the right to cast their votes effectively, regardless of their political persuasion.[68] Justice Black noted that "both of these rights, of course, rank among our most precious freedoms."[69]

Consequently, the Court determined that strict scrutiny of Ohio's ballot access scheme was in order.[70] Under strict scrutiny, Ohio would be permitted to unequally burden non-major parties only if it could demonstrate a compelling interest was served.[71] Moreover, even after proving a compelling interest, Ohio would also have to show that the challenged provisions were less restrictive of the rights to associate and vote effectively than any available alternative.[72]

In the Court's view, none of the four interests that Ohio asserted was sufficiently compelling to uphold the statute.[73] The interest in promoting a two-party system failed because Ohio law favored not two-party politics generally, but rather, the Democrats and Republicans specifically.[74] In addition, Ohio's two-party favoritism existed primarily because of the two

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63. *Id.* at 26-27.
64. *Id.*
65. *Id.* at 27.
66. *Id.* at 30.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 31.
71. *Id.*
72. *Id.* at 31-33.
73. *Id.* at 31.
74. *Id.* at 31-32.

major parties' traditional prominence in American political life.[75]

The Court found Ohio's interest, which was to ensure that the general election winner was the choice of the majority, a legitimate one.[76] Even so, permitting Ohio to pursue that interest by denying ballot access to a third party until that party is strong enough to win would deprive the party of the most effective means of building strength—namely, the opportunity to contest elections.[77]

The interest in providing potential third party supporters with "a choice of leadership as well as issues"[78] was not found compelling because "Ohio's burdensome procedures, requiring extensive organization and other election activities by a very early date, operate to prevent such a group from ever getting on the ballot."[79] The Ohio system thus "denies the 'disaffected' not only a choice of leadership but a choice on the issues as well."[80]

Finally, the interest in restricting the number of candidates on the ballot in order to prevent voter confusion failed because the Court concluded that this danger was "no more than 'theoretically imaginable.'"[81] Thus, the Court determined that Ohio's ballot access provisions imposed a burden on the voting and associational rights of third party supporters that amounted to "invidious discrimination, in violation of the Equal Protection Clause."[82]

B. Jenness v. Fortson

Two years after deciding *Williams* the Supreme Court, in *Jenness v. Fortson*[83] considered the constitutionality of Georgia's ballot access law. The Georgia statute prevented a candidate who had not entered and won a primary election from gaining access to the general election ballot until the candidate presented a nominating petition signed by five per-

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75. *Id.* at 32.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 33.
80. *Id.*
81. *Id.*
82. *Id.* at 34.
83. 403 U.S. 431 (1970).

cent of the preceding election's registered voters.[84] The *Jenness* appellants were three candidates nominated by the Socialist Workers Party and two registered Georgia voters interested in a wider choice of candidates. They argued that the signature requirement abridged their First Amendment freedoms of speech and association.[85] The appellants also argued that the signature requirement denied to third party candidates Fourteenth Amendment equal protection because primary winners were automatically printed on the general election ballot, whereas other candidates had to submit petitions in order to secure a ballot position.[86]

Justice Stewart, writing for a unaminous Court in *Jenness*, rejected both of the appellants' arguments, principally because of the distinctions between the Ohio law at issue in *Williams* and the Georgia scheme.[87] Those distinctions caused the Court to reject the *Williams* strict scrutiny standard and to conclude that Georgia's asserted interest in requiring candidates to demonstrate support in order to gain a ballot position justified the five percent signature rule. Justice Stewart observed:

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.[88]

In Justice Stewart's view, the Georgia ballot access law served the above-mentioned goal without being unduly restrictive of First or Fourteenth Amendment rights.[89] Unlike the Ohio law in *Williams*, the Georgia law: 1) provided for write-in votes, 2) permitted independent candidates, 3) set a reasonable deadline for the filing of signature petitions by candidates not endorsed by established parties, 4) permitted small and new parties to nominate candidates without establishing elaborate primary election mechanisms, 5) allowed voters to sign a petition for a third party candidate despite having signed others

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84. *Id.*, at 432.
85. *Id.* at 432 n.3; *See also*, *id.* at 434.
86. *Id.* at 434.
87. *Id.* at 438-42.
88. *Id.* at 442.
89. *Id.* at 432-42.

and to vote in a party primary despite having signed the petition of an independent candidate and 6) enabled candidates to submit petitions that contained non-notarized signatures.[90] Therefore, according to Justice Stewart, Georgia's ballot access laws, unlike Ohio's, did not "freeze the political status quo."[91] Not only did the five percent signature requirement pass the "freeze" test, it also passed muster on Equal Protection grounds because it was no more burdensome for a candidate to gather the signatures of five percent of the eligible electorate than it was to win a majority of the votes cast in a party primary.[92] Justice Stewart observed, "a candidate for Governor in 1966 and a candidate for President in 1968 gained ballot designation [in Georgia] by nominating petitions, and each went on to win a plurality of the votes cast at the general election."[93]

C. Storer v. Brown

Four years after *Jenness*, the Court faced a First and Fourteenth Amendment challenge to five provisions of the California Election Code in *Storer v. Brown*.[94] Among other plaintiffs, two independent congressional candidates challenged a statutory provision that denied ballot positions to independent candidates who had been registered with a ballot-qualified political party within one year prior to the preceding primary.[95]

The Court answered the petitioners' challenge by first observing that its decision in *Williams v. Rhodes*[96] did not invalidate every substantial restriction on the rights to associate and vote.[97] Justice White, writing for a six-member majority, noted that *Williams* was consistent with article I, section 2, clause 1 of the Constitution, which assigns to states the task of determining the qualifications of the voters who elect Congress.[98] That constitutional provision states, "[t]he House of Representatives shall be composed of member chosen every second Year by the People of the several States, and the Elec-

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90. *Id.* at 438-39.
91. *Id.* at 438.
92. *Id.* at 440-441.
93. *Id.* at 439 n. 21-22.
94. 415 U.S. 724 (1974).
95. *Id.* at 726-27.
96. 393 U.S. 23 (1968).
97. *Lubin*, 415 U.S. at 729.
98. *Id.* at 729-30.

tors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[99]

The Court also observed that article I, section 4, clause 1 authorizes states to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives."[100] Moreover, states must be permitted to regulate elections if elections are to be fair, honest and orderly, notwithstanding the strict judicial scrutiny of such regulations called for in *Williams*.[101]

In the Court's view, the one-year disaffiliation requirement passed constitutional muster.[102] The disaffiliation requirement satisfied Fourteenth Amendment equal protection requirements because it denied ballot access to independents, as well as party candidates, who had been affiliated with another political party during the one-year time period.[103] The disaffiliation requirement also satisfied First Amendment scrutiny—it furthered California's compelling interest in preserving the stability of its political system, and this interest outweighed a candidate's interest in making a late decision to seek ballot access as an independent.[104]

It is not clear, however, whether the disaffiliation requirement was also less restrictive than the alternative means of ensuring political stability because the Court in *Storer* did not examine that traditional component of strict scrutiny.[105] It was sufficient for the Court that the rule prevented defeated primary candidates from running as independents in the general election, thereby serving California's compelling interest in political stability.[106] Justice White reasoned, "[t]he general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds."[107] Consequently, California could limit its voters to participating in one of the two alternative procedures for nominating candidates to the general election ballot: (1) voting in a party primary, or (2) signing a

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99. U.S. Const. art. I, § 2 cl. 1.
100. 415 U.S. at 730 (citing art. I, § 4, cl. 1).
101. *Id.*
102. *Id.* at 736.
103. *Id.* at 733-34.
104. *Id.* at 736.
105. *Cf. Williams*, 393 U.S. at 31-33.
106. 415 U.S. at 735.
107. *Lubin*, 415 U.S. at 735.

petition for an independent candidate.[108]

D. American Party of Texas v. White

The same day that the Court decided *Storer*, it also decided *American Party of Texas v. White*[109], wherein Justice White wrote a majority opinion from which only Justice Douglas dissented. The petitioners were third parties and their candidates, qualified voters supporting those candidates, and independent candidates.[110] They claimed that several provisions of the Texas Election Code violated their First and Fourteenth Amendment rights to associate for the advancement of political beliefs, and invidiously discriminated against new and minority political parties and independent candidates.[111]

Under Texas law, candidates for governor who had polled less than 200,000 votes but more than two percent of the total vote in the previous general election could qualify for the general election ballot by winning the support of their respective parties at either a primary election or a nominating convention.[112] Parties whose candidates had polled less than two percent, as well as parties that had not nominated a candidate in the preceding gubernatorial election could still qualify for the general election ballot.[113] In these cases, a candidate qualified if persons numbering one percent of the preceding general election votes demonstrated support at a precinct nominating convention or by means of petition signatures.[114]

The petitioners challenged the one percent support requirement and its attendant conventions and petition apparatus. They also challenged four other provisions of the Texas law: the ban on circulating petitions prior to the primary elections, the disqualification of voters who had voted in a party primary from signing a ballot access petition, the limitation of the signature-gathering period to fifty-five days and the requirement that all signatures be notarized.[115]

The Court rejected the American Party's contention that

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108. The Court discusses the alternatives available to voters and candidates in California. *Id.* at 733-35.
109. 415 U.S. 767 (1974).
110. *Id.* at 770.
111. *Id.* at 771.
112. *Id.* at 773.
113. *Id.* at 774.
114. *Id.* at 777-78.
115. *Id.* at 779.

the one percent support requirement and the accompanying convention and petition mechanisms discriminated against third parties and their candidates in violation of the Equal Protection Clause.[116] It held that the convention/petition process is no more burdensome to third parties than primary and runoff elections are to the major parties.[117] This is especially true "where the major party, in addition to the elections, must also hold its precinct, county and state conventions to adopt and promulgate party platforms and to conduct other business."[118] Similarly, it is no more burdensome to require third parties to demonstrate the support of one percent of the electorate in order to secure a ballot position than it is to require the major parties to demonstrate significant support in the previous election in order to retain their ballot positions.[119]

The Court also rejected the petitioners' argument that the disqualification of primary voters from signing ballot petitions violated their First Amendment rights to associate and to vote effectively. It noted that a state "may determine that it is essential to the integrity of the nominating process to confine voters to supporting one party and its candidates in the course of the nominating process."[120] As it did in *Storer*, the Court in *American Party* departed from traditional strict scrutiny principles by not inquiring whether the challenged ballot access limitation was less restrictive of First and Fourteenth Amendment rights than all available alternatives.[121] The Court also rejected the petitioners' challenges to the fifty-five day petitioning period, concluding that it was not unduly short, and their challenge to the notarization requirement, holding that it was the only means available of enforcing Texas's important interest in ensuring fair elections by preventing voters from voting twice.[122]

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116. *Id.* at 780-81.
117. *Id.* at 781.
118. *Id.*
119. *Id.* at 782-83.
120. *Id.* at 786.
121. *Cf. Williams v. Rhodes*, 393 U.S. at 31-33.
122. *American Party*, 415 U.S. at 786-87.

E. Bullock v. Carter

During the period that the Supreme Court decided *Storer v. Brown* and *American Party of Texas v. White*, it also decided two cases in which states had denied ballot access to candidates who were unable to pay a required filing fee. In *Bullock v. Carter*,[123] the Court considered the claims of candidates for County Commissioner, County Judge and Land Office Commissioner. Those candidates challenged a Texas statute that made payment of a filing fee a prerequisite for inclusion on the primary ballot, alleging that the required filing fee violated the First and Fourteenth Amendments.[124]

Chief Justice Burger, writing for a unanimous Court, observed that because the Texas statute contained no reasonable alternative means of ballot access for the indigent candidate, it substantially limited voters' choices of candidates. The choices of less affluent voters, whose favorite candidates could be expected to be disproportionally burdened by the filing fee requirement, were especially limited.[125] Conversely, the filing fee gave to the affluent disproportionate power to choose candidates they favored.[126] This disparate impact on the exercise of the franchise occasioned strict scrutiny of the Texas law,[127] although that scrutiny was arguably less strict than that employed in *Williams v. Rhodes*.[128] Unlike in *Williams*, where the Court had required Ohio to demonstrate a "compelling interest" (the traditional standard under strict scrutiny) in its ballot restrictions, the *Bullock* Court required Texas to show that its filing fee merely served "legitimate state objectives."[129]

Nonetheless, the Court concluded that the Texas filing fee was unconstitutional because it did not serve the legitimate state objectives of avoiding overcrowded ballots and preventing frivolous candidates from getting on the ballot.[130] The Texas rule, in basing ballot access upon a candidate's ability to pay a filing fee, potentially excluded some legitimate candidates from

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123. 405 U.S. 134 (1972).
124. *Id.* at 135-37. 146.
125. *Bullock*, 405 U.S. at 144.
126. *Id.*
127. *Id.* at 144.
128. 393 U.S. 23 (1968).
129. *Bullock*, 405 U.S. at 144.
130. *Id.* at 146.

the ballot, but provided ballot access to arguably frivolous candidates who could afford the filing fee.[131] Justice Burger observed: "If the Texas fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal."[132]

F. Lubin v. Panish

In *Lubin v. Panish*,[133] the Court considered the claim of an indigent candidate for County Supervisor. The candidate argued that a California statute requiring payment of a $701.60 fee to appear on the primary election ballot, but that did not provide an alternative means of ballot access, violated his First Amendment freedoms of expression and association and his Fourteenth Amendment right to equal protection of the laws.[134] As in *Bullock*, the *Lubin* Court held that states have a legitimate interest in denying ballot access to frivolous candidates. The Court held, however, that states cannot pursue that end through means that unfairly or unnecessarily burden the equally important interests of third parties and individual candidates in the continued availability of political opportunity.[135] Like the Texas law in *Bullock*, the California law in *Lubin* failed the Court's test because it might operate to exclude potentially serious candidates from the ballot, while simultaneously permitting a "wealthy candidate with not the remotest chance of election to secure a place on the ballot by writing a check."[136] Thus, "in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate a filing fee he cannot pay."[137]

G. Illinois State Board of Elections v. Socialist Workers Party

Several years passed before the Court's next ballot access decision, which came in *Illinois State Board of Elections v. Socialist Workers Party*.[138] That case featured a challenge by

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131. *Id.*
132. *Id.*
133. 415 U.S. 709 (1974).
134. *Id.* at 710.
135. *Id.* at 716.
136. *Id.* at 717.
137. *Id.* at 718.
138. 440 U.S. 173 (1979).

the Socialist Workers Party to several provisions of the Illinois Election Code on the ground that they violated the Equal Protection Clause of the Fourteenth Amendment.[139]

One of the challenged provisions required new political parties and independent candidates seeking access to the general election ballot in statewide elections to obtain the signatures of 25,000 qualified voters.[140] A different requirement for the State's political subdivisions existed—the signatures of five percent of the number of persons who voted in an office's previous election.[141] The incongruous result of that dual standard was that in Chicago, a new party needed substantially more signatures (over 10,000 more in 1977) to gain access to the Chicago city ballot than it needed for access to the Illinois statewide election ballot.[142]

The Supreme Court responded to that incongruity with the clearest example of strict scrutiny since *Williams v. Rhodes*.[143] Justice Marshall, writing for a unanimous Court, observed that "voting is of the most fundamental significance under our constitutional structure"[144] and that where a right so fundamental as the right to vote is at stake, "a State must establish that its classification is necessary to serve a compelling interest."[145] Moreover, even when pursuing a legitimate interest, such as requiring ballot aspirants to demonstrate the modicum of popular support that befits a "serious" candidate, States must adopt the least drastic means of achieving their ends.[146]

The signature requirements for new parties and independent candidates pursuing offices in Chicago were clearly not the least restrictive means of attaining the State's legitimate aim of avoiding a ballot overloaded with candidates.[147] There was no reason at all, let alone a compelling reason, why that goal could only be achieved by erecting a substantially higher

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139. *Id.* at 175-78.

140. ILL. ANN. STAT. ch. 46, para. 10-2 (Smith-Hurd Supp. 1978) required individuals desiring to form a new political party throughout the state to file with the State Board of Elections a petition "signed by not less than 25,000 qualified voters." *See also Illinois State Bd. of Elections*, 440 U.S. at 175, n. 1.

141. 440 U.S. at 175-176.

142. *Id.* at 183-84.

143. *Williams*, 393 U.S. 23.

144. *Illinois State Bd. of Elections*, 440 U.S. at 184.

145. *Id.*

146. *Id.* at 185.

147. *Id.* at 186.

minimum signature requirement for Chicago's municipal elections than for statewide contests in Illinois.[148] The Court concluded, "the Illinois Election Code is unconstitutional insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago."[149]

H. Anderson v. Celebrezze

The Court's next ballot access decision came in *Anderson v. Celebrezze*,[150] the last and perhaps the most important decision addressed in this section. It is significant because it marks the abandonment of the strict scrutiny standard upon which the Court had relied only four years earlier in *Illinois State Board of Elections*, in favor of a considerably more nebulous "balancing" standard.[151]

The question presented in *Anderson* was whether Ohio's early deadline for the filing of declarations of candidacy by independent candidates had placed an unconstitutional burden on the voting and associational rights of the supporters of independent presidential candidate John Anderson.[152] On April 24, 1980, when Mr. Anderson abandoned his quest for the nomination of the Republican Party and announced his independent candidacy, Ohio's statutory deadline for filing a statement of candidacy had passed. Hence, when Mr. Anderson's supporters presented Ohio Secretary of State Celebrezze with a nominating petition and a statement of candidacy on May 16, 1980, Mr. Celebrezze refused to accept the documents.[153]

Justice Stevens, writing for a five-member majority, announced a three-part balancing test for cases presenting constitutional challenges to election laws.[154] The new test would require the Court to: 1) consider the character and magnitude of the asserted injury to First and Fourteenth Amendment rights; 2) identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule; and 3) determine the legitimacy and strength of each of those interests and consider the extent to which such inter-

148. *Id.*
149. *Id.* at 187.
150. 460 U.S. 780 (1983).
151. *Id.* at 788-89.
152. *Id.* at 782.
153. *Id.* at 782-83.
154. *Id.* at 789.

ests make it necessary to burden the petitioner's individual rights.[155]

In adopting the new test, the Court abandoned strict scrutiny, as well as the equal protection analysis of which strict scrutiny is part.[156] Equal protection analysis focuses on the alleged discriminatory impact of a particular ballot-access restriction upon particular groups, such as third parties, independent candidates or indigent candidates.[157] The Court replaced this equal protection focus in *Anderson* with a due process approach which tried to determine whether the interests asserted by the State in restricting ballot-access were sufficiently powerful and well-served by specific First Amendment restrictions enacted to render such restrictions constitutional.[158]

Applying the first prong of the new test, the Court observed that Ohio's early filing deadline for independent candidates inflicts a serious injury on First and Fourteenth Amendment rights by excluding from the general election ballot a late-emerging independent presidential candidate whose issue positions could command widespread community support.[159] In this way, the Ohio law "denies the 'disaffected' not only a choice of leadership but a choice on the issues as well."[160] Moreover, the Ohio early-filing deadline places a significant State-initiated restriction on a national election. This restriction seems unjustified since the State has a substantially less important interest in regulating presidential elections than in regulating statewide or local elections.[161]

Under the second prong of the new test, the Court rejected Ohio's argument that its interest in voter education necessitated the early filing deadline.[162] The Court observed, "[i]n the modern world it is somewhat unrealistic to suggest that it takes more than seven months to inform the electorate about the qualifications of a particular candidate simply because he lacks a partisan label."[163] It also rejected Ohio's argument that its early filing deadline treats all candidates alike by re-

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155. *Id.*
156. *Cf. Williams*, 393 U.S. at 30-31.
157. *Id.*
158. *Anderson*, 460 U.S. at 789.
159. *Id.* at 792.
160. *Id.*
161. *Id.* at 795.
162. *Id.* at 796.
163. *Id.* at 797.

quiring candidates participating in primaries to file their declarations of candidacy on the same date that independents file theirs.[164] The Court noted that the need to hold primaries well in advance of the national party nominating conventions justifies early filing deadlines for primary candidates, but that no such need exists with regard to independent candidates in a general election.[165] Finally, the Court rejected Ohio's contention that its interest in political stability warranted the early filing deadline, noting that the State's interest in stability is considerably less in a presidential election than in a statewide or local election. "[N]o State could singlehandedly assure 'political stability' in the Presidential context."[166]

In disposing of Ohio's arguments, the Court employed the third prong of its balancing test and concluded that the interests asserted by Ohio did not justify the injuries inflicted by Ohio's early filing deadline.[167] That conclusion was by no means a total victory for independent candidates, nor was it a stunning defeat for State interests. It most certainly was not "anti-party." The due process approach used in *Anderson* accords greater weight to State interests than strict scrutiny/equal protection analysis did and it endeavors to balance State interests against voters' First Amendment rights instead of almost automatically subordinating the former to the latter.[168]

IV. THE RECENT CASES: 1986-1992

A. Munro v. Socialist Workers Party

The Supreme Court's first ballot-access decision after *Anderson* came in *Munro v. Socialist Workers Party*.[169] At issue in *Munro* was a Washington state statute that required third-party candidates for offices subject to partisan elections to receive at least one percent of the primary votes in order to secure a ballot position in the general election.[170] The nominee of the Socialist Workers Party for United States Senator,

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164. *Id.* at 799.
165. *Id.* at 800.
166. *Id.* at 804.
167. *Id.* at 796-806.
168. Note, *Anderson v. Celebrezze: The Ascendancy Of The First Amendment In Ballot Access Cases*, 15 TOLEDO L. REV. 363, 400 (1983).
169. 479 U.S. 189 (1986).
170. *Id.* at 191-92 (citing WASH. REV. CODE § 29.18.110 (1985)).

who had qualified for the primary ballot but failed to qualify for the general election ballot, joined the Party in arguing that the one percent requirement violates the First and Fourteenth Amendments.[171]

Justice White, writing for a seven-member majority, reiterated what the Court had noted in *Jenness*, *American Party* and *Anderson*, namely, that states possess an "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot."[172] That state interest is so powerful, according to the *Munro* Court, that a state need not prove prior voter confusion, overcrowded ballots or the prevalence of frivolous candidacies in order to justify the imposition of "reasonable ballot access restrictions" like Washington's one percent rule.[173] As a result, a state that enacts such a rule is not only spared strict judicial scrutiny of that rule, thanks to *Anderson*, but, after *Munro*, is also spared from having to make a particularized showing of damage to its electoral process absent the rule.[174]

Applying that standard, the *Munro* Court upheld the Washington statute. The Court observed, "Washington was clearly entitled to raise the ante for ballot access, to simplify the general election ballot, and to avoid the possibility of unrestrained factionalism at the general election."[175] Moreover, requiring a third-party candidate to receive one percent of the primary vote in order to secure a position on the general election ballot is no more onerous than the customary requirement of obtaining petition signatures.[176] This is especially true in Washington, which conducts a "blanket primary" where registered voters may vote for any candidate of their choice, regardless of the candidate's political party affiliation. This procedure enables third party candidates to seek support from the entire pool of registered voters in the State.[177] For all these reasons, the Court concluded in *Munro* that Washington's one percent rule satisfied the requirements of the First and Fourteenth Amendments.[178]

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171. *Id.* at 192-93.
172. *Id.* at 193-94.
173. *Id.* at 195-96.
174. *Id.* at 195-96.
175. *Id.* at 196.
176. *Id.* at 197.
177. *Id.*
178. *Id.* at 197-98.

B. Norman v. Reed

The Supreme Court's most recent ballot-access decision came in *Norman v. Reed.*[179] At issue in *Norman* was the constitutionality of an Illinois law that regulated ballot access for new political parties.[180] The petitioners, who had organized the Harold Washington Party, named for the late Mayor of Chicago, sought to expand the party's influence by running for various offices in Cook County, of which Chicago is part, in November, 1990.[181]

The Party had previously contested elections only in the City of Chicago, hence, Illinois law required it to qualify as a "new party" in order to contest countywide elections.[182] In order to qualify, the petitioners were required to obtain 25,000 petition signatures from each of Cook County's two districts, the "city district," encompassing Chicago, and the "suburban district," encompassing the remainder of the County.[183] They gathered 44,000 signatures in the city district, but only 7,800 signatures in the suburban district. This shortfall precipitated a challenge to the petition and to the slate of candidates they filed with the Cook County Electoral Board.

Justice Souter, writing for a seven-member majority, made it clear that strict scrutiny of laws that restrict ballot access is not dead.[184] He observed that the freedom of association guaranteed by the First and Fourteenth Amendments protects the right of citizens to create and develop new political parties.[185] To "thwart this interest by limiting the access of new parties to the ballot,"[186] states must demonstrate "a corresponding interest sufficiently weighty to justify the limitation"[187] and any severe restriction on the freedom of association must be "narrowly drawn to advance a state interest of compelling importance."[188]

Applying this standard, the Court first reversed the Illinois

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179. 112 S. Ct. 698 (1992).
180. *Id.* at 702.
181. *Id.*
182. *Id.* at 703.
183. *See Id.* (citing ILL. REV. STAT. ch. 46, para 10-2 (Smith-Hurd 1989).
184. *Id.* at 705.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*

Supreme Court's ruling that the petitioners were prohibited by state law from representing the "Harold Washington Party" in countywide elections because there already was a party by that name in the City of Chicago.[189] According to the Illinois Supreme Court, Illinois law[190] prohibited the petitioners from running in county elections under the banner of the Harold Washington Party because its Chicago component was "an established political party."[191]

Justice Souter observed that the Illinois Supreme Court's reading of the statutory prohibition of the use of the name of an established party was so "draconian" as to bar candidates running in one political subdivision from using the name of a political party established only in another political subdivision.[192] Therefore, unless a new party possessed the resources to run a statewide campaign, it would be permanently foreclosed from contesting elections outside the political subdivision in which it was established.[193] Such foreclosure hardly constituted the narrowly tailored means of achieving Illinois's legitimate interests in preventing electoral fraud and voter confusion required by the First and Fourteenth Amendments.[194] Illinois could have avoided these ills merely "by requiring the candidates to get formal permission to use the name from the established party they seek to represent, a simple expedient for fostering an informed electorate without suppressing the growth of small parties."[195]

Similarly, the Court reversed the decision of the Illinois Supreme Court that disqualified the Harold Washington Party from contesting Cook County elections for failure to gather 25,000 petition signatures in both the urban and suburban districts of the County.[196] In the High Court's view, Illinois failed to choose the least restrictive means of advancing its legitimate interest in requiring candidates to demonstrate a reasonable distribution of support throughout a county.[197]

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189. *Id.* at 705-706.
190. ILL. REV. STAT. ch. 46, para. 10-5 (1989) (states in part "[a] political party shall not bear the same name as, nor include the name of any established political party.").
191. *Norman*, 112 S. Ct. at 705.
192. *Id.* at 706.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 707-08.
197. *Id.* at 708.

Justice Souter noted that after *Illinois State Board of Elections*, the Illinois Legislature had amended its ballot-access statute to cap at 25,000 the number of petition signatures required to be gathered by a new political party within any district or political subdivision.[198]

Under the amended law, a new political party wishing to field candidates in a large county not divided into districts would need to gather no more than 25,000 petition signatures.[199] The amended law was designed to comply with the decision in *Illinois State Board of Elections*, which forbade Illinois from requiring candidates seeking ballot access in Cook County from having to gather twice as many signatures as were necessary for a statewide race.[200]

In Justice Souter's view, the Illinois Supreme Court ignored both the rule announced in *Illinois State Board of Elections* and the intent of the Illinois Legislature when it interpreted paragraph 10-2 of the Illinois Revised Statutes[201] to require the Harold Washington Party to gather 25,000 signatures from each of Cook County's districts for a total of 50,000 signatures.[202] The best support for Justice Souter's conclusion is that the 50,000 signatures required of the Harold Washington Party in Cook County amounted to twice the number the Party would have been required to gather for ballot access in a statewide race.[203] Moreover, in a statewide race, unlike in a Cook County race, the Party could have collected all 25,000 signatures in the City of Chicago.[204] Justice Souter acknowledged that Illinois was entitled to require a new party to demonstrate a fair distribution of support throughout Cook County in order to get on the ballot. However, he concluded that to do so in a constitutional manner, Illinois should have "required some minimum number of signatures from each of the component districts while maintaining the total signature requirement at 25,000."[205]

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198. *Id.* at 707.
199. *Id.*
200. *Id.*
201. ILL. REV. STAT. ch. 46, para. 10-2 (Smith-Hurd 1989).
202. *Norman*, 112 S. Ct. at 707.
203. *Id.*
204. *Id.* at 708.
205. *Id.*

C. Burdick v. Takushi

The Supreme Court also ventured into the related field of write-in vote cases in 1992, when it decided *Burdick v. Takushi*.[206] At issue in *Burdick* was Hawaii's prohibition on write-in voting. The petitioner argued that this prohibition infringed unreasonably upon its citizens' rights under the First and Fourteenth Amendments.[207] In the petitioner's view, the United States Constitution required Hawaii to provide for the casting, tabulation and publication of write-in votes.[208]

Justice White, writing for a six-member majority, began his opinion by observing that although "voting is of the most fundamental significance under our constitutional structure," it does not necessarily follow that any burden placed on the right to vote must be subject to strict scrutiny or that the right to vote in any manner and the right to associate politically through the ballot are absolute.[209] He added that to examine every voting regulation with strict scrutiny and require it to be narrowly tailored and advance a compelling state interest "would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[210] Instead, a court faced with a challenge to a state election law should weigh the gravity of the constitutional injury asserted against the justifications offered by the State, using the *Anderson* balancing test.[211] Thus, in the same year the Court applied strict scrutiny in *Norman*, it used the *Anderson* balancing test in *Burdick* to decide, even though petitioners in both cases claimed that their rights to associate for political purposes and to vote effectively had been infringed.[212]

The *Burdick* Court concluded that Hawaii could ban write-in voting, partly because the ban imposed only a "very limited" burden on constitutional rights.[213] Hawaii law provides three mechanisms by which the candidate of one's choice can gain a ballot position, including a nonpartisan primary for candidates

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206. 112 S.Ct. 1059 (1992).
207. *Id.* at 2061.
208. *Id.*
209. *Id.* at 2062-3 (citing *Illinois*, 440 U.S. at 184).
210. *Id.* at 2063.
211. *Id.*
212. Cf. *Norman*, 112 S. Ct. at 705.
213. *Bundick*, 112 S. Ct. at 2065.

unaffiliated with any political party.[214] Those options assure disaffected voters a sufficient vehicle for political expression. Hence, the Constititution does not compel Hawaii to furnish the additional option of casting a write-in vote.[215]

Moreover, Hawaii's interests in restricting the size of the general election ballot, averting divisive, "sore-loser" candidacies by unsuccessful primary contestants, and preventing "party raiding" (the organized switching of blocs of voters from Party A to Party B in order to manipulate the results of Party B's primary) are sufficient to outweigh the limited burden that the write-in voting ban imposes upon Hawaii's voters.[216] Indeed, Justice White closed the majority opinion by stating that whenever a State's ballot access laws impose the light burden on constitutional rights that Hawaii's do, if that State also bans write-in voting, the ban will be presumptively valid.[217]

V. ANALYSIS AND RECOMMENDATIONS

The Supreme Court's ballot-access jurisprudence has been more consistent and more favorable to the two major political parties than the political science and legal commentaries indicate. Careful examination reveals that regardless of the standard used, the Court has consistently supported the constitutional claim of a third party or independent candidate only in cases where the challenged ballot-access restrictions served no arguably legitimate state interest, let alone a compelling one, and virtually precluded electoral activity by those candidates. The Court has consistently decided the "easy" cases, featuring excessively burdensome restrictions on ballot access, in favor of the "outsiders." The "easy" cases are *Williams, Bullock, Lubin, Illinois State Board of Elections, Anderson,* and *Norman.* The Supreme Court has just as consistently decided the "hard" cases, presenting more narrowly tailored restrictions, in favor of the state and, in turn, the Democrat and Republican Parties. The cases of *Jenness, Storer, American Party, Munro,* and *Burdick* illustrate this point.

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214. *Id.* at 2064.
215. *Id.* at 2066.
216. *Id.*
217. *Id.* at 2067.

A. *The* Williams-Anderson *Line of Cases*

Certainly Ohio's requirements, invalidated in *Williams*, that new parties present petitions signed by a number of qualified electors equal to fifteen percent of the ballots cast in the preceding general election and conduct primary elections, and that their presidential candidates file petitions for ballot positions were overdrawn and punitive.[218] These provisions precluded the post-primary emergence of an alternative candidate in response to voter dissatisfaction with the major party nominees.

The Texas and California filing fees that the Court struck down in *Bullock* and *Lubin* were overdrawn because they conditioned ballot access upon the candidate's ability to pay the requisite fee, a condition wholly unrelated to the seriousness of the candidate or the degree of that candidate's public support. A wealthy, frivolous candidate could readily gain access to the ballot, but a serious candidate of limited means might be denied access.[219] Moreover, the fees discriminated against candidates who could not draw upon political party resources, thereby placing a disproportionally heavy burden on third party and independent candidates.

The Illinois geographic distribution requirements for petition signatures invalidated in *Illinois State Board of Elections* and *Norman* were similarly flawed. The Court found that both Illinois laws were overdrawn, if not irrational, because they required new political parties to demonstrate substantially more support in order to qualify for the general election ballot in a political subdivision than to qualify for the statewide ballot in the state of which that subdivision is part.[220] No legitimate electoral purpose is achieved by requiring a new political party to secure 10,000 more petition signatures for a Chicago election than for a statewide election in Illinois, as did the statutory restriction struck down in *Illinois State Board of Elections*.[221] Similarly, there is no legitimate electoral purpose to be achieved by requiring a new party to gather 25,000 more petition signatures for a Cook County election than for a statewide

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218. *See supra* note 56 and accompanying text.

219. *Lubin*, 415 U.S. at 717; *See also Bullock*, 405 U.S. at 146.

220. *See generally Norman*, 112 S. Ct. 698 (1992); *Illinois State Board of Elections*, 440 U.S. at 177, n. 3.

221. *See Illinois State Bd. of Elections*, 440 U.S. at 175, n. 1 (citing ILL. ANN. STAT. ch. 46 (Smith-Hund 1978)

election, as did the Illinois Supreme Court's statutory interpretation voided in *Norman*.[222] Moreover, the geographic distribution requirements frustrated the efforts of candidates who were neither Democrats nor Republicans to gain access to the ballot in Chicago and Cook County.

Even Ohio's March filing deadline, which provoked a 5-4 split of the *Anderson* Court, lacked any legitimate electoral purpose. Admittedly, the deadline date was later than the February 7 date invalidated in *Williams* and it was not accompanied by the party organizational requirements that George Wallace had successfully challenged in *Williams*.[223] Nevertheless, like its predecessor, the filing deadline challenged in *Anderson* prevented an independent candidate from launching a post-primary drive for the Presidency as a result of the candidate's and the public's dissatisfaction with the Democrat and Republican nominees. Surely, in the modern era of mass communications, it is unnecessary to require independent presidential candidates to declare their intentions four or five months prior to the nominations of their major party opponents in order to serve a state's asserted interest in voter education.[224]

B. The Jenness-Burdick *Line of Cases*

In contrast to the ballot-access restrictions discussed, the restrictions the Court upheld in *Jenness*, *Storer*, *American Party* and *Munro*, and the write-in voting ban it affirmed in *Burdick*, cannot be summarily rejected as overdrawn, irrational or punitive. State laws requiring third party and independent candidates to demonstrate a modicum of public support, either by means of petition signatures as in *Jenness* and *American Party* or primary votes as in *Munro* to gain ballot access bear a rational relationship to a state's legitimate interest in keeping frivolous or fraudulent candidates off the ballot. Similarly, a law requiring independent candidates to disaffiliate from political parties for a statutorily prescribed period as in *Storer* is

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222. *Norman*, 112 S. Ct. at 707.

223. The deadline date at issue in *Anderson* was March 20; regarding the party organizational requirements that Governor Wallace challenged in *Williams*, *See Williams* 393 U.S. at 25, n. 1.

224. *Anderson*, 460 U.S. at 797.

rationally related to a state's interest in avoiding repeating the primaries by preventing losers of primaries from running independently in immediately succeeding general elections. A law banning write-in voting as in *Burdick* is also reasonable, especially where the state's other ballot laws afford a variety of mechanisms by which third party and independent candidates can readily gain access to the ballot.

The foregoing discussion demonstrates that the Supreme Court's ballot access jurisprudence has been neither inconsistent nor anti-party, as political science and legal commentators have charged.[225] Despite using different legal standards in different cases, the Court has consistently favored the constitutional claims of third party and independent candidates when state ballot-access restrictions served no legitimate electoral interest and were obviously designed to keep candidates other than Democrats and Republicans off the ballot. The Court has been equally consistent in favoring the electoral interests of the states when the ballot access restrictions challenged could be credibly defended as necessary to some legitimate state purpose. This treatment has benefitted the Democrat and Republican parties by making it more difficult for third party and independent candidates to challenge Democrats and Republicans in general elections and for voters dissatisfied with the two major parties to cast write-in votes for non-traditional candidates.

Although the Court cannot be criticized for inconsistency or for hostility to the two major political parties, it should be criticized for underestimating the importance of the plaintiff's interests and for overestimating the importance of the asserted state interests in the *Jenness-Burdick* line of cases. In *Jenness*, the Court upheld Georgia's requirement that non-ballot-qualified parties submit nominating petitions signed by at least five percent of the State's registered voters. Unlike the Ohio law invalidated in *Williams*, the Georgia law offered a realistic possibility for third party and independent candidates to obtain a place on the ballot.[226] The Georgia statute, unlike its Ohio counterpart, did not prohibit write-in voting or independent candidacies, nor did it require third parties to establish elaborate party machinery.[227]

Nevertheless, Georgia's signature requirement was argu-

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225. *See supra*, note 2.
226. *Williams*, 403 U.S. at 438.
227. *Id.*

ably as punitive as Ohio's because Ohio's provision called for signatures amounting to fifteen percent of the ballots cast in the previous election, whereas Georgia's called for signatures equal to five percent of a typically much larger number, namely, registered voters.[228] Georgia's ballot retention rule was also more stringent than Ohio's. Once a party was ballot-qualified in Ohio, it could remain so by receiving ten percent of the vote in the succeeding election, while in Georgia, a party had to receive twenty percent of the vote in order to remain ballot-qualified.[229] Finally, while an Ohio party could qualify all of its candidates for the ballot by filing one petition, a Georgia party wishing to nominate a full complement of candidates for state constitutional offices plus both houses of Congress had to obtain signatures on fourteen separate petitions.[230] If the Georgia scheme did not, like its Ohio counterpart, "freeze the political status quo," surely it solidified the status quo, that is, Democrat and Republican supremacy, sufficiently to merit the same result the Court had reached in *Williams*.[231]

In *Storer*, the Court upheld California's one year party disaffiliation requirement because it regarded as "compelling" the State's interest in preventing candidates who had lost party primaries from gaining ballot-access for general elections as independents.[232] Indeed, the Court was so convinced of the gravity of the State's interest that it ignored the customary follow-up inquiry under strict scrutiny, namely, whether less drastic means were available to achieve the State's interest.[233] Had it made that inquiry, the Court might well have concluded that California could achieve the same end merely by prohibiting candidates who had lost party primaries from running as independents in immediately succeeding general elections. Such a rule would serve the State's asserted interest in avoiding primary re-runs, yet still permit general election ballot-access for a candidate who had recently, but sincerely, renounced party affiliation in favor of political independence.

In *American Party*, the gravity of Texas's interest in ensuring that "political parties appearing on the general ballot

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228. B. Smith, *supra* note 9, at 182.
229. *Id.* at 183.
230. *Id.*
231. *Jenness*, 403 U.S. at 438.
232. *Storer*, 415 U.S. at 735.
233. *Id.* at 736.

demonstrate a significant, measurable quantum of community support" similarly impressed the Court.[234] As a result, the Court did not inquire whether the State could achieve that aim by means less constitutionally restrictive than requiring new parties to: 1) hold precinct nominating conventions and 2) gather petition signatures equalling one percent of the previous gubernatorial vote within 55 days, after the major party primaries, and exclusively from voters who had neither voted in a primary nor signed another nominating petition.[235] Had the Court so inquired, it might well have determined that the one percent signature requirement, standing alone, sufficiently demonstrated a new party's "community support," and the additional requirements only hindered ballot-access for third-parties.

In *Munro*, the Court stated that states possess an "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot."[236] That right derives from the states' interests in avoiding confusion, deception and frustration of the democratic process at the general election.[237] Those interests are so powerful, in the view of the *Munro* Court, that states need not demonstrate actual voter confusion, ballot overcrowding or frivolous candidacies in order to justify the imposition of "reasonable restrictions on ballot access."[238] Thus, Washington's requirements that third parties nominate candidates prior to the State's blanket primary and that those candidates receive at least one percent of the votes cast for their respective offices in the primary in order to appear on the general election ballot passed constitutional muster.[239]

In *Munro*, as in *Storer* and *American Party*, the Court accepted a state's interest in regulating ballot access as important, but neglected to make the necessary inquiry whether the

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234. *American Party*, 415 U.S. at 782.

235. *Id.* at 779. After examining each of the challenged provisions of the Texas statute, the Court concluded that "Texas in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life. *Jenness v. Fortson*, 403 U.S. at 439. It affords minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more." *Id.* at 787.

236. *Munro*, 479 U.S. at 194 (citing *Anderson*, 460 U.S. at 788-789).

237. *Id.*

238. *Id.* at 195.

239. *Id.* at 199.

means employed to achieve the State's interest was the least restrictive alternative.[240] Had the *Munro* Court so inquired, it may have concluded that Washington could have ensured that ballot-qualified third-parties enjoyed a reasonable degree of public support by requiring them to submit petition signatures equalling one percent of the vote cast for a specified office at a specified election. Had the Court reached that conclusion, it would also have determined that requiring such parties to win one percent of the primary vote in order to gain ballot access was unnecessary to the State's aims and unduly burdensome to the parties.

In *Burdick*, the Court acknowledged that "voting is of the most fundamental significance under our constitutional structure."[241] The Court nonetheless proceeded to observe that states' interests in assuring that elections are operated equitably and efficiently is so important that not every barrier tending to limit the field of candidates from which voters may choose warrants strict scrutiny.[242] Not surprisingly, the majority concluded that the prohibition on write-in voting imposed only a slight burden on First Amendment rights and was a legitimate means of preventing losers of primaries from contesting general elections. It was also held to be a legitimate means of preventing party raiding.[243]

In rejecting strict scrutiny, the Court declined in *Burdick*, as it had in *Storer*, *American Party* and *Munro*, to inquire whether the means employed to realize the State's ballot law goals were the least restrictive means available.[244] Had the majority conducted that inquiry, it quite possibly would have concluded, as Justice Kennedy did in dissent, that "[i]f the State desires to prevent sore loser candidacies, it can implement a narrow provision aimed at that particular problem."[245] Specifically, Hawaii could have invalidated write-in votes cast for individuals who had been unsuccessful primary candidates.

This inquiry might also have led the Court to conclude that Hawaii created its claimed "party raiding" threat by permitting "open" primaries and the least restrictive means of negating

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240. *Cf. Norman*, 112 S. Ct. at 705; *Illinois State Bd. of Elections*, 440 U.S. at 185.
241. *Bendick*, 112 S. Ct. at 2063.
242. *Id.*
243. *Id.* at 2066-67.
244. *Id.* at 2063-64.
245. *Id.* at 2071.

that threat would be to restrict participation in each party's primary to voters registered with that party or, perhaps, to permit each party to do so. That inquiry would perhaps have also caused the Court to conclude that permitting write-in voting helped, rather than hindered, Hawaii's interest in informed voting.[246] This is because a voter who votes for a person who, in the manner of most write-in selections has not actively campaigned, is arguably more, not less, likely to be well-informed.[247] Finally, more careful scrutiny may well have produced the conclusion, which Justice Kennedy drew, that Hawaii had failed to explain how write-in voting increases the likelihood of election fraud.[248]

The Supreme Court should unreservedly apply strict scrutiny in ballot-access and write-in vote cases, and insist that state-imposed limitations be the least restrictive means available of pursuing compelling state interests. In returning to strict scrutiny, the Court would reaffirm the importance it has historically accorded rights of third parties to ballot access and the rights of voters to support those parties. In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the Court stated:

> Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted.[249]

In *Williams*, the Court observed that "[t]he decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[250]

A return to strict scrutiny would also reaffirm the Court's adherence to the principle of the "equal liberty of expression" that is inherent in the First Amendment. In *Moseley*, the petitioner, who picketed peacefully near a school while carrying a

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246. *Id.* at 2072.
247. *Id.*
248. *Id.*
249. *Id.* at 250-51.
250. 393 U.S. at 31 (citing *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1965)).

sign protesting "black discrimination," sought to enjoin enforcement of an ordinance that prohibited picketing within 150 feet of a school during school hours.[251] The challenged ordinance contained an exception for peaceful picketing of any school involved in a labor dispute.[252]

The Supreme Court, with Justice Marshall writing for the majority, struck down the ordinance as a violation of the Fourteenth Amendment's Equal Protection Clause.[253] Justice Marshall wrote that "there is an 'equality of status in the field of ideas,'"[254] therefore "government must afford all points of view an equal opportunity to be heard."[255] That is, "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[256] Hence, any time, place or manner restriction that selectively excludes speakers from a public forum must survive strict scrutiny to ensure that it is the least restrictive means available of furthering a compelling state interest.[257] Because an election ballot is "the supreme political forum,"[258] the principle of equal liberty of expression announced in *Moseley* "guarantee[s] a place on the ballot to anyone who meets the qualifications of the office in question unless the exclusion of that person is necessary to achieve a compelling state interest."[259]

As a practical matter, a return to strict scrutiny would ensure that ballot access and write-in voting restrictions are legislative responses to real threats against the public's interest in fair elections, not perceived threats against the legislators' incumbency.[260] This is because judges using strict scrutiny would require states seeking to justify ballot access restrictions on the basis of a need to preserve stable two-party politics to demonstrate why the already stable two-party system that dominates the politics of most states requires the

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251. 408 U.S. 92 (1972) at 93-94.
252. *Id.* at 94.
253. *Id.* at 95-96.
254. *Id.* at 96 (citing A. Meiklejohn, POLITICAL FREEDOM: THE CONSTITUTION AND POWERS OF THE PEOPLE 27 (1948).
255. *Id.*
256. *Id.*
257. *See generally* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment* 43 U. CHI. L. REV. 20 (1975).
258. *Id.* at 59.
259. *Id.*
260. B. Smith, *supra* note 9, at 217.

assistance of ballot restrictions on third parties.[261] If the two-party system promotes political stability in the United States, it will likely survive, with or without such restrictions.[262] Moreover, judges would likely consider the possibility that easing ballot-access restrictions would be the most effective means of fostering political stability "by providing a release valve for the expression of views and pressures that would otherwise go unheard."[263] At the very least, they would probably conclude that less restrictive means, such as run-off elections, are available for preserving a state's interest in political stability.[264]

Judges employing strict scrutiny would also be likely to require states seeking to restrict ballot access to "serious" candidates to define seriousness in a reasonable way.[265] They might well decide that, short of excluding fictitious or fraudulent candidacies, the measure of a candidate's seriousness should be left up to the voters on Election Day.[266] Those judges would also likely conclude that states could more effectively and more appropriately serve state interests in educating voters and preventing voter confusion by disseminating informational pamphlets concerning candidates and their public policy views, than by restricting ballot access.[267]

In so doing, they would breath new life into the Supreme Court's powerful observation of nearly thirty years ago in *Reynolds v. Sims*,[268] "the right to vote freely for the candidate one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[269]

VI. CONCLUSION

Political scientists and legal commentators have incorrectly criticized Supreme Court jurisprudence in ballot access cases

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261. Elder, *supra* note 2, at 391.
262. *Id.*
263. *Id.* at 392.
264. *Id.* at 394.
265. *Id.* at 396.
266. *See* Chris Hocker, *Legal Barriers To Third Parties*, 10 N.Y.U. REV. L. & SOC. CHANGE 125, 130 (1980-81).
267. Elder, *supra* note 2, at 399.
268. 373 U.S. 533 (1964).
269. *Id.* at 555.

for inconsistency and for hostility to the two-party system.[270] A careful review of High Court ballot-access decisions reveals that the Court has consistently favored the First and Fourteenth Amendment interests of third parties and independents only when the challenged ballot restriction bore no rational relationship to a legitimate state interest.[271]

The Court has been equally consistent in upholding ballot restrictions that bear even minimal relationship to legitimate state ends, even where those restrictions constrain constitutional freedoms unduly and unnecessarily.[272] In the latter cases, the Court's decisions have directly benefitted the two major political parties by making it more difficult for third-party and independent candidates to challenge Democrats and Republicans in general elections.[273] The Court should reverse that trend by subjecting state restrictions on ballot access and write-in voting to strict scrutiny and by insisting that those restrictions be the most narrowly tailored means available of achieving compelling state interests.[274]

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270. *See supra* note 2.

271. *See supra* discussion at pp. 34-36.

272. *See supra* discussion at pp. 36-42.

273. *Id.*

274. Ballot access rules that would be likely to satisfy the "least restrictive means" standard include: a) the proposal of a 1974 Brookings Institution report that the petition requirement should not exceed 2% of the electorate and the filing deadline should be no more than two months prior to the election, DANIEL A. MAZMANIAN, THIRD PARTIES IN PRESIDENTIAL ELECTIONS 151 (1974) and b) the proposal of the American Civil Liberties Union, first advanced in 1940, advocating a petition requirement of 1/10 of 1% of registered voters and automatic ballot access for parties that received 1% of the vote in the last election. *See* AMERICAN CIVIL LIBERTIES UNION, MINORITY PARTIES ON THE BALLOT (1943).

On the federal level, U.S. Representative John Conyers (D-Mich.) has introduced, in the past several Congresses, a bill that closely tracks the A.C.L.U. model, but includes a maximum petition requirement of 1,000 signatures and a retention requirement of 20,000 votes. This bill would only apply to candidates for federal office. B. Smith, *supra* note 9, at 216 and note 255 discussing H.R. 1582, 101st Cong. 1st Sess. (1989).