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DOES THE CONSTITUTION PROVIDE MORE BALLOT ACCESS PROTECTION FOR PRESIDENTIAL ELECTIONS THAN FOR U.S. HOUSE ELECTIONS?

*Richard Winger**

INTRODUCTION

Both the U.S. Constitution and *The Federalist Papers* suggest that voters ought to have more freedom to vote for the candidate of their choice for the U.S. House of Representatives than they do for the President or the U.S. Senate.¹ Yet, strangely, for the last thirty-three years, the U.S. Supreme Court and lower courts have ruled that the Constitution gives voters more freedom to vote for the candidate of their choice in presidential elections than in congressional elections.² Also, state legislatures, which have been writing ballot access laws since 1888,³ have passed laws that make it easier for minor-party and independent candidates to get on the ballot for President than for the U.S. House. As a result, voters in virtually every state invariably have far more choices on their general election ballots for the President than they do for the House.

This Article argues that the right of a voter to vote for someone other than a Democrat or a Republican for the House is just as important as a voter's right to do so for President, and that courts should grant more ballot access protection to minor-party and independent candidates for the House.

I. THE DISPARITY IN NUMBER OF CANDIDATES ON BALLOTS FOR PRESIDENT VERSUS HOUSE

In the 2004, 2008, and 2012 elections, voters in every state except Oklahoma were given presidential general election ballots that included at

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1. U.S. CONST. art. I, § 2; THE FEDERALIST NO. 52 (James Madison).
2. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983).
3. Before 1888, there were no government-printed ballots and hence no ballot access laws. Voters were free to prepare their own ballots before 1888, but most voters accepted a ballot prepared by that voter's favorite political party. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992).

least three presidential candidates.⁴ The filing process for 2016 (at the time of the writing of this Article) has proceeded far enough that it is possible to know that every state will have at least three presidential candidates on its November 2016 ballots.⁵ Also, every state had at least four presidential candidates on its November ballots in 2000, 1996, 1992, and 1980; and every state had at least three in 1988.⁶ Voters' ability to vote for President for someone other than the Democratic and Republican nominees is well established.

By contrast, for the last twenty years, general election ballots for U.S. House usually have had only Democrats and Republicans on the ballot in approximately half the races. In November 2014, 235 of the 435 races had only Democrats and Republicans on the ballot.⁷ That equals 54 percent of all the races. Even worse, 28 of those 235 races (6.4 percent of the 435 seats) had only one candidate on the November ballot, and in another 8 of

4. See FEC, FEDERAL ELECTIONS 2004: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2005) [hereinafter FEC, FEDERAL ELECTIONS 2004], <http://www.fec.gov/pubrec/fe2004/federaelections2004.pdf> [<https://perma.cc/59BD-AJNH>]; FEC, FEDERAL ELECTIONS 2008: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2009) [hereinafter FEC, FEDERAL ELECTIONS 2008], <http://www.fec.gov/pubrec/fe2008/federaelections2008.pdf> [<https://perma.cc/VS7X-HWX9>]; FEC, FEDERAL ELECTIONS 2012: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2013) [hereinafter FEC, FEDERAL ELECTIONS 2012], <http://www.fec.gov/pubrec/fe2012/federaelections2012.pdf> [<https://perma.cc/E425-KA6Y>]. The Federal Election Commission (FEC) publishes election return books after each presidential and congressional election. The FEC distinguishes write-in votes for particular candidates from votes cast for candidates who were on the ballot.

5. As of September 9, 2016, Gary Johnson is on the ballot in all fifty-one jurisdictions. See *2016 Libertarian Party Candidates*, LIBERTARIAN, <http://www.lp.org/2016-libertarian-party-candidates> (last visited Nov. 19, 2016) [<https://perma.cc/X4XD-R7HL>].

6. FEC, FEDERAL ELECTIONS 1988: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (1989) [hereinafter FEC, FEDERAL ELECTIONS 1988], <http://www.fec.gov/pubrec/fe1988/federaelections88.pdf> [<https://perma.cc/6TXE-PHBK>]; FEC, FEDERAL ELECTIONS 1992: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (1993) [hereinafter FEC, FEDERAL ELECTIONS 1992], <http://www.fec.gov/pubrec/fe1992/federaelections92.pdf> [<https://perma.cc/4CLY-YFKZ>]; FEC, FEDERAL ELECTIONS 1996: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (1997) [hereinafter FEC, FEDERAL ELECTIONS 1996], <http://www.fec.gov/pubrec/fe1996/cover.htm> [<https://perma.cc/DG2Y-LDQ5>]; FEC, FEDERAL ELECTIONS 2000: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2001) [hereinafter FEC, FEDERAL ELECTIONS 2000], <http://www.fec.gov/pubrec/fe2000/cover.htm> [<https://perma.cc/RF28-Q38H>]; THOMAS E. LADD, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 4, 1980 (1981).

7. The races with only Democrats and Republicans in 2014 occurred in these states: Alabama (six), Arizona (five), California (forty-nine), Colorado (three), Connecticut (one), Florida (nineteen), Georgia (fourteen), Hawaii (one), Idaho (two), Illinois (sixteen), Indiana (one), Iowa (three), Kansas (three), Kentucky (five), Maryland (four), Massachusetts (eight), Minnesota (three), Nebraska (two), New Hampshire (two), New Jersey (one), New Mexico (three), New York (fifteen), North Carolina (twelve), Ohio (ten), Oklahoma (two), Pennsylvania (seventeen), Rhode Island (two), South Carolina (four), South Dakota (one), Texas (two), Virginia (two), Washington (ten), West Virginia (two), and Wisconsin (five). See KAREN L. HAAS, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION FROM OFFICIAL SOURCES FOR THE ELECTION OF NOVEMBER 4, 2014 (2015).

those 235 races (1.8 percent of the 435 seats), there were two candidates, but both were members of the same major party.⁸

Such a restricted choice for the branch of the national legislature in which all seats are contested in every election stands in sharp contrast to the two nations most similar to the United States: Canada and the United Kingdom. Both nations had parliamentary elections in 2015, and all districts had at least four candidates on the ballot.⁹ The Canadian Green Party has never been able to elect more than one member to the House of Commons, but the Green Party nonetheless qualified for the ballot in every district. Canada requires candidates of all parties, and independent candidates, to submit one hundred signatures and a filing fee of \$1,000.¹⁰ For its candidates, the United Kingdom requires ten signatures and a filing fee of £500.¹¹

II. THE FOUNDING FATHERS WANTED THE HOUSE TO BE THE MOST DEMOCRATIC BRANCH

Articles I and II of the U.S. Constitution originally did not require popular elections for President; they provided that each state should decide for itself how to choose presidential electors,¹² and those electors would choose the President.¹³ One third of all states have, at one point, allowed their legislatures to choose all of their presidential electors, including Alabama, Colorado, Connecticut, Delaware, Georgia, Indiana, Louisiana, Massachusetts, Missouri, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Vermont.¹⁴ Of the original thirteen states, the only ones that always let the voters choose presidential electors were Maryland and Virginia.¹⁵

Even today, the Constitution permits states to avoid a popular vote for presidential electors, an option that the Florida legislature almost chose in special session in December 2000.¹⁶ By contrast, the Constitution let voters

8. *See id.* Those races were in California and Washington, the two states that use the “top-two” system described *infra* notes 22–26, 49–51 and accompanying text.

9. For Canadian election returns and election laws, see ELECTIONS CANADA, <http://www.elections.ca/home.aspx> (last visited Nov. 19, 2016) [<https://perma.cc/695H-ABLW>].

10. *See How to Become a Candidate*, ELECTIONS CANADA, <http://www.elections.ca/content.aspx?section=pol&document=index&dir=can/bck&lang=e> (last visited Nov. 19, 2016) [<https://perma.cc/T9P8-ZNVG>].

11. *See Who Can Stand as an MP?*, PARLIAMENT.UK, <http://www.parliament.uk/about/mps-and-lords/members/electing-mps/candidates/> (last visited Nov. 19, 2016) [<https://perma.cc/2EGT-DH42>].

12. U.S. CONST. art. I, § 2.

13. *Id.* art. I; *id.* art. II.

14. *See* MICHAEL J. DUBIN, UNITED STATES PRESIDENTIAL ELECTIONS 1788–1860, at xi–xii (2002).

15. *See id.* at xii.

16. Bill 1-A, letting the legislature choose the electors, passed Florida’s House on December 12, 2000, by a vote of 79–41. *See* Jeffrey Gettleman, *Florida House OKs Slate of Electors Beholden to Bush*, L.A. TIMES (Dec. 13, 2000), <http://articles.latimes.com/2000/dec/13/news/mn-64909> [<https://perma.cc/U4LY-MULF>].

choose all members of the House.¹⁷ To this day, no one has ever served as a member of the U.S. House who was not elected by the voters.

The Federalist No. 52, by James Madison, says that

[a] representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election, be an inhabitant of the State he is to represent; and, during the time of his service, must be in no office under the United States. Under these reasonable limitations, the door of this part of the federal government *is open to merit of every description*, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.¹⁸

Madison obviously would have been deeply unhappy had he known that in the future, voters in U.S. House elections could vote for members of just two particular parties.

III. HOW U.S. LAWS STIFLE MINOR-PARTY AND INDEPENDENT CANDIDATES FOR U.S. HOUSE

The following states have far more stringent ballot access procedures for nonmajor party candidates for U.S. House than for nonmajor party candidates for President: Alabama, California, Florida, Georgia, Illinois, North Carolina, South Carolina, and Washington.

Alabama requires 5,000 signatures for independent presidential candidates¹⁹ but petitions of 3 percent of the last gubernatorial vote for independent and minor-party nominees for the U.S. House. The average House petition requirement in Alabama in 2016 is 5,059 signatures.²⁰ The petition deadline for the House in 2016 was March 1, and no petitioning independent or minor-party candidate for the House qualified.²¹

California requires 59,681 party members for a minor party to qualify for the presidential election (0.33 percent of the number of registered voters as of July 7, 2016), and 178,039 signatures for an independent presidential candidate to qualify (1 percent of the number of registered voters as of October 2014).²² These are stringent requirements, but they have permitted between six and eight presidential candidates to appear on the ballot for all

17. U.S. CONST. art. I, § 2.

18. THE FEDERALIST NO. 52 (James Madison) (emphasis added).

19. ALA. CODE § 17-14-31 (2006).

20. Three percent of the 2014 gubernatorial vote in Alabama, divided by seven. Alabama has seven U.S. House districts. The 2014 gubernatorial vote in Alabama was 1,180,413. See FEC, FEDERAL ELECTIONS 2014: ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2015) [hereinafter FEC, FEDERAL ELECTIONS 2014], <http://www.fec.gov/pubrec/fe2014/federaelections2014.pdf> [https://perma.cc/X334-ZY6X].

21. STATE OF ALA., CANVASS OF RESULTS: GENERAL ELECTION NOVEMBER 4, 2014 (2014), <http://alabamavotes.gov/downloads/election/2014/general/2014GeneralResults-WithWriteIn.pdf> [https://perma.cc/4RXF-SC76].

22. See CAL. SEC'Y OF STATE, REPORT OF REGISTRATION AS OF JULY 7, 2016, at 7 (2016), <http://elections.cdn.sos.ca.gov/ror/ror-pages/124day-gen-16/toc.pdf> [https://perma.cc/S25F-C3XL]. Note that the legal requirement is exactly 0.33 percent, see CAL. ELEC. CODE § 5100(b) (West 2016), not one-third of 1 percent; 0.33 percent of 18,084,999 equals 59,681.

elections from 1988 through 2012.²³ But for either branch of Congress, no one can get on the November ballot unless he or she places first or second in the June primary.²⁴ This “top-two” system has existed in California since 2011 and has resulted in only one minor-party candidate for Congress (out of 161 congressional races from 2012 to 2016) getting on the November ballot and only eight independent congressional candidates qualifying for the November ballot.²⁵ In seven of the nine instances when a nonmajor party member qualified, only one major party member had appeared on the ballot in the June primary.²⁶ Obviously, when there are only two candidates in the primary, both will also qualify for the November election in a system that puts the top two vote getters on the November ballot.

Florida lets any party on the ballot that submits a list of party officers and a copy of its constitution or bylaws.²⁷ For President, such a party can place its nominee on the ballot simply by being affiliated with a nationally organized party (which means it must have an affiliate in at least one other state). No fee is required; it simply must have twenty-nine candidates to serve as presidential elector.²⁸ But for Congress, a candidate must submit a fee of 3 percent of the annual salary of the office, which is \$10,440 for a minor-party candidate and \$6,960 for an independent candidate.²⁹

Georgia lets any independent presidential candidate or any minor-party presidential nominee on the ballot with 7,500 signatures and no fee.³⁰ But a candidate for the U.S. House needs a petition of 5 percent of the registered voters as of the previous election.³¹ For 2016, the average district requirement is 18,540 signatures.³² A filing fee of 3 percent of the annual

23. FEC, FEDERAL ELECTIONS 1988, *supra* note 6; FEC, FEDERAL ELECTIONS 1992, *supra* note 6; FEC, FEDERAL ELECTIONS 1996, *supra* note 6; FEC, FEDERAL ELECTIONS 2000, *supra* note 6; FEC, FEDERAL ELECTIONS 2004, *supra* note 4; FEC, FEDERAL ELECTIONS 2008, *supra* note 4; FEC, FEDERAL ELECTIONS 2012, *supra* note 4; LADD, *supra* note 6.

24. CAL. CONST. art. II, § 5.

25. See CAL. SEC’Y OF STATE, STATEMENT OF VOTE: NOVEMBER 6, 2012, GENERAL ELECTION (2012), <http://elections.cdn.sos.ca.gov/sov/2012-general/sov-complete.pdf> [<https://perma.cc/5Y62-Q9JF>]; CAL. SEC’Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2014, GENERAL ELECTION (2014), <http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf> [<https://perma.cc/Q6S9-LZSV>]; CAL. SEC’Y OF STATE, STATEMENT OF VOTE: JUNE 7, 2016, PRESIDENTIAL PRIMARY ELECTION (2016), <http://elections.cdn.sos.ca.gov/sov/2016-primary/2016-complete-sov.pdf> [<https://perma.cc/Q6ZD-AUQ4>].

26. See *supra* note 25.

27. FLA. STAT. ANN. § 97.021(19) (West 2016).

28. *Id.* § 103.021; see also FEC, FEDERAL ELECTIONS 2012, *supra* note 4.

29. FLA. STAT. ANN. § 99.092; see also *About Member of Congress Salaries*, LEGISTORM, https://www.legistorm.com/member_of_congress_salaries.html (last visited Nov. 19, 2016) [<https://perma.cc/57GA-JE3G>].

30. The 7,500 signature requirement comes from *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1373–74 (N.D. Ga. 2016).

31. GA. CODE ANN. § 21-2-170(b) (2001).

32. For the number of registered voters in Georgia in 2014, see GA. SEC’Y OF STATE, VOTING REGISTRATION FIGURES FOR GEORGIA (2014), http://sos.ga.gov/elections/VRStats/voter_registration_history.pdf [<https://perma.cc/8ZM3-LAYL>]. For the average number of signatures for an independent U.S. House candidate in Georgia in 2016, divide

salary (over \$5,000) also is required.³³ The 5 percent petition requirement has been law since 1943.³⁴ No minor-party nominee has ever managed to qualify, and no independent has met the 5 percent petition requirement since 1964.³⁵ Back then, the petition was not due until October, was not checked for validity, and did not need to be notarized.³⁶

Illinois lets a minor-party or independent presidential nominee on the ballot with 25,000 signatures.³⁷ But a minor-party or independent candidate for the House needs signatures equal to 5 percent of the last vote cast.³⁸ In 2016, no U.S. House petition has succeeded. The average district requirement is 9,911 signatures.³⁹

North Carolina permits an independent presidential candidate, or the presidential nominee of a previously unqualified party, to get on the ballot with a petition of 2 percent of the last gubernatorial vote.⁴⁰ This is a very difficult requirement, which requires 89,366 signatures. There is no filing fee for President, but an independent candidate for the House needs a filing fee of 1 percent of the annual salary of the office and a petition signed by 4 percent of the number of registered voters as of the current election.⁴¹ This year, the average district requirement is 19,942 signatures.⁴² No independent candidate for the House has ever appeared on a government-printed ballot in North Carolina.⁴³ One independent petition for the House

the number of registered voters in the state by fourteen (the number of U.S. House districts in the state), then take 5 percent of that number. GA. CODE ANN. § 21-2-170(b).

33. GA. CODE ANN. § 21-2-131(a).

34. 1943 Ga. Laws 292.

35. For election returns for Georgia and all states, see DUBIN, *supra* note 14. Dubin's book scrupulously lists all candidates who were on the ballot. *Id.* at xiii. There was a U.S. House election held in 1982 in Atlanta several weeks after the regular November election date, and it had an independent candidate, Billy McKinley. *See id.* at 729. But he was not required to submit the 5 percent petition because the district boundaries had been redrawn by a federal court in the summer, so special lenient qualification rules were in place for that election. *See id.*

36. The law in effect for independent petitions between 1943 and 1964 can be found in 1943 Ga. Laws 292. The procedures were stiffened in 1964 but were not in effect for the 1964 election. 1964 Ga. Laws 39, 95.

37. 10 ILL. COMP. STAT. 5/10-3 (2016).

38. *See id.*

39. *See* Gill v. Scholz, No. 16-cv-03221, 2016 WL 4487836, at *4 (C.D. Ill. Aug. 25, 2016). To reach the 9,911 figure, see HAAS, *supra* note 7, for the total votes cast in 2014 for each House race. The Illinois U.S. House total vote is 3,568,002. Divide that number by eighteen (the number of U.S. House districts in Illinois), then take 5 percent of that number.

40. N.C. GEN. STAT. § 163-107, -122 (2016).

41. *See id.* § 163-122.

42. For the number of registered voters in North Carolina in early 2016, see *NC Voter Statistics*, N.C. ST. BOARD ELECTIONS, http://enr.ncsbe.gov/voter_stats/ (last visited Nov. 19, 2016) [<https://perma.cc/K367-XQ7X>]. Because North Carolina has thirteen U.S. House districts, divide the number of registered voters in the state by thirteen, then take 4 percent of that number.

43. *See* DUBIN, *supra* note 14 (for elections between 1901 and 1996); *see also* FEC, FEDERAL ELECTIONS 1998: ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (1999), <http://www.fec.gov/pubrec/fe1998/cover.htm> [<https://perma.cc/9MX8-Q7CA>]; FEC, FEDERAL ELECTIONS 2000, *supra* note 6; FEC, FEDERAL ELECTIONS 2002: ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2003), <http://www.fec.gov/pubrec/fe2002/cover.htm> [<https://perma.cc/TUA6-KXVP>]; FEC,

did get enough valid signatures in 2010, but the petition had been sponsored by the Service Employees International Union, which had a staff of several hundred petitioners who went door to door to collect the signatures.⁴⁴ Ironically, the candidate named on the petition had not agreed to run, and even after the petition was successfully completed, he chose not to run.⁴⁵

South Carolina requires an independent candidate or a new party to obtain 10,000 signatures.⁴⁶ An independent candidate for the House also needs 10,000 signatures.⁴⁷ No independent candidate has ever qualified to appear on a government-printed ballot in South Carolina.⁴⁸

Washington, like California, uses a “top-two” system. Washington has used that system for all elections from 2008 through 2014.⁴⁹ No independent or minor-party candidate for the House has ever managed to qualify for the November ballot.⁵⁰ The Washington State November ballot for both houses of Congress during those years has included only Democrats and Republicans.⁵¹

IV. WHY MINOR-PARTY AND INDEPENDENT CANDIDATES FOR THE HOUSE MATTER

Ever since 1854, when the Republican Party became one of the two most important political parties, no new party or independent presidential candidate has ever come close to winning the presidency. The best showing for a minor or new party presidential candidate was in 1912, when the Progressive Party polled 27.4 percent.⁵² The best showing for an

FEDERAL ELECTIONS 2004, *supra* note 4; FEC, FEDERAL ELECTIONS 2006: ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2007), <http://www.fec.gov/pubrec/fe2006/federalelections2006.pdf> [<https://perma.cc/367B-VHFY>]; FEC, FEDERAL ELECTIONS 2008, *supra* note 4; FEC, FEDERAL ELECTIONS 2010: ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2011), <http://www.fec.gov/pubrec/fe2010/federalelections2010.pdf> [<https://perma.cc/VGB7-39AM>]; FEC, FEDERAL ELECTIONS 2012, *supra* note 4; FEC, FEDERAL ELECTIONS 2014, *supra* note 20.

44. *See generally* *Greene v. Bartlett*, No. 08-CV-088-GCM, 2010 WL 2812859 (W.D.N.C. July 15, 2010) (mentioning the Fant petition success).

45. For more information on the Fant petition, see Scharrison, *Is Wendell Fant Running, or Not?*, BLUENC (June 12, 2010, 7:17PM), <http://www.bluenc.com/content/wendell-fant-running-or-not>, and see also *North Carolina Independent Petition for U.S. House Has Enough Valid Signatures*, BALLOT ACCESS NEWS (June 4, 2010), <http://ballot-access.org/2010/06/24/north-carolina-independent-petition-for-u-s-house-has-enough-valid-signatures/> [<https://perma.cc/4LMY-ZTVV>].

46. S.C. CODE ANN. § 7-11-70 (2016).

47. *Id.*

48. *See supra* note 43.

49. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 442–44 (2008).

50. *See supra* note 43.

51. *See* FEC, FEDERAL ELECTIONS 2008, *supra* note 4; FEC, FEDERAL ELECTIONS 2012, *supra* note 4; FEC, FEDERAL ELECTIONS 2014, *supra* note 20.

52. *See* SVEND PETERSEN, A STATISTICAL HISTORY OF THE AMERICAN PRESIDENTIAL ELECTIONS 17–115 (1963).

independent presidential candidate was in 1992, when Ross Perot polled 18.9 percent.⁵³

But minor-party or independent candidates frequently get elected to the U.S. House. During the period 1900–2014, on average, two such candidates have been elected to the U.S. House per election.⁵⁴ It is good public policy to have a House with members who are not Republican or Democratic nominees. When nationally organized minor parties have even a single member in the House, there is a greater chance the members of that party feel represented. After the 1914 election, the membership of the House was 230 Democrats, 198 Republicans, 6 Progressives, 1 Socialist, 1 Prohibitionist, and 1 independent.⁵⁵ Having three minor parties represented in Congress would give members of the minor parties the satisfaction of knowing they had a spokesperson in the Capitol.

Furthermore, when the two major parties are polarized, and of approximately equal strength, it is always possible for minor parties or independents, or both of them together, to hold the balance of power in either branch of Congress. After the 1854 election, for example, neither the Democratic Party nor the Republican Party had a majority in the U.S. House. The House consisted of 100 Republicans, 83 Democrats, and 51 members of the American (“Know-Nothing”) Party.⁵⁶ The Democrats would not tolerate a Republican speaker, and the Republicans did not want a Democratic speaker, so Nathaniel Banks, a member of the American Party, became speaker.⁵⁷ After the 1878 election, the House had 141 Democrats, 132 Republicans, 13 Greenbackers, and 7 independents.⁵⁸ The minor-party and independent bloc made it possible for the Democrats to elect a speaker. After the 1916 election, the House had 215 Republicans, 214 Democrats, 3 Progressives, 1 Socialist, 1 Prohibitionist, and 1 independent.⁵⁹ The bloc of minor-party and independent members enabled the Democrats to elect a speaker.

Today, when Democratic and Republican members of Congress seem unwilling to work together, or even to recognize the legitimacy of the other major party’s ideas, Congress would likely benefit from having a bloc of members who were not of either party and who could determine who became speaker of the House or leader of the Senate. Professor Charles

53. *See id.*

54. *See Candidates Elected to the House, 1902–2000, Who Weren’t Nominees of the Democratic or Republican Parties*, BALLOT ACCESS NEWS (June 1, 2001), <http://ballot-access.org/2001/0601.html> (listing candidates elected to the U.S. House who were not nominees of the Republican or Democratic Parties) [<https://perma.cc/UR7K-2H37>].

55. *See Party Divisions of the House of Representatives: 1789–Present*, HIST. ART & ARCHIVES U.S. HOUSE REPRESENTATIVES, <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited Nov. 19, 2016) [<https://perma.cc/UBS5-83XT>].

56. *See* KENNETH C. MARTIS, *THE HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS: 1789–1989*, at 109–10 (1989).

57. *See List of Speakers of the House*, HIST. ART & ARCHIVES U.S. HOUSE REPRESENTATIVES, <http://history.house.gov/People/Office/Speakers-List/> (last visited Nov. 19, 2016) [<https://perma.cc/4Y4Q-T3XF>].

58. *See* MARTIS, *supra* note 56, at 133–34.

59. *See id.* at 171–72.

Wheelan and his Centrist Project have been working to elect independents to the U.S. Senate, which has been very closely divided between the two major parties this decade.⁶⁰ The Centrist Project believes a small number of independents in either house of Congress, who might hold the balance of power, would be helpful.⁶¹

V. FEDERAL COURTS ARE ACCELERATING THE BALLOT ACCESS SPLIT

Since 1983, federal courts have been responsible for accelerating the trend to make ballot access easier for presidential candidates but not for congressional candidates. The Supreme Court's decision in *Anderson v. Celebrezze*,⁶² which struck down Ohio's March 20 petition deadline for independent presidential candidates, held:

In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.⁶³

As a result of this language, lower courts have been invalidating onerous ballot access restrictions for minor-party and independent presidential candidates at a growing pace.⁶⁴ Also, even in the absence of litigation in their jurisdiction, state legislatures are aware of this language and have acted to ease presidential ballot access requirements but not to ease the requirements for other offices.⁶⁵

On March 17, 2016, a U.S. district court in Georgia invalidated the state's petition requirements for independent presidential candidates and the

60. For information on the Centrist Project, see CENTRIST, <http://www.centristproject.org> (last visited Nov. 19, 2016) [<https://perma.cc/2PWM-JUK2>].

61. See *Mission*, CENTRIST, <http://www.centristproject.org/mission> (last visited Nov. 19, 2016) [<https://perma.cc/2EMJ-XKE5>].

62. 460 U.S. 780 (1983).

63. *Id.* at 794–95.

64. See, e.g., *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1373 (N.D. Ga. 2016) (lowering the presidential petition threshold to 7,500).

65. The Virginia legislature lowered the presidential petition from 10,000 signatures to 5,000. VA CODE ANN. § 24.2-543 (2016). The California legislature lowered the number of registrants for a new party to get on the ballot from 1 percent of the last gubernatorial vote to 0.33 percent of the number of registered voters. CAL. ELEC. CODE § 5151 (West 2016). This helped minor-party presidential candidates but had no effect on minor-party candidates for other offices. The Oklahoma legislature lowered the number of signatures for a new party from 5 percent of the last vote cast to 3 percent of the last gubernatorial vote. OKLA. STAT. ANN. tit. 26, § 1-108 (West 2016). It had no realistic effect on any candidates except presidential candidates because both before and after that bill passed, independent candidates did not need any petition to get on the general election ballot, except for President.

presidential nominees of unqualified parties.⁶⁶ The law required the signatures of 1 percent of the registered voters—49,366 signatures.⁶⁷ Pending action by the Georgia legislature, the decision ordered that the 2016 requirement for presidential petitions will be 7,500 signatures.⁶⁸ That left in place a situation in which a presidential candidate can get on the ballot with substantially fewer signatures than a Georgia candidate for U.S. House. The House requirement, 5 percent of the number of registered voters, is approximately 18,500 signatures in the typical district.⁶⁹

On June 30, 2016, a U.S. district court in Pennsylvania lowered the petition requirement for minor-party and independent candidates for President and other statewide office from 21,775 signatures to 5,000 signatures.⁷⁰ The basis for the decision was that the court had previously struck down the state's system of checking petitions, and the legislature had subsequently ignored the decision and not changed the procedures.⁷¹ But even though the judge was asked to reduce the requirements for district office (including U.S. House), he declined to do so.⁷² Per the Pennsylvania statute that has been in effect since 1971,⁷³ Pennsylvania requires independent candidates for the House to submit signatures equal to 2 percent of the winner's vote in the previous election, which is a much higher percentage of the electorate than the new statewide requirement. For 2016, the average number of signatures for a House petition is 2,586 signatures.⁷⁴

On July 9, 2008, the Ninth Circuit struck down Arizona's independent presidential petition deadline of June 9.⁷⁵ The State asked for rehearing en banc but was denied. The State then asked for Supreme Court review, but that was also denied.⁷⁶ So the legislature moved the independent candidate deadline for presidential candidates to the first week in September, but for independent candidates for other office, it moved that deadline in the opposite direction, to May.⁷⁷

66. See *Green Party of Ga.*, 171 F. Supp. 3d at 1374.

67. For the method of calculation, see *supra* note 32.

68. See *Green Party of Ga.*, 171 F. Supp. 3d at 1374.

69. See *supra* note 32 and accompanying text.

70. See *Constitution Party of Pa. v. Cortes*, 116 F. Supp. 3d 486, 486 (E.D. Pa. 2015).

71. Pennsylvania HB 342 would have eased the ballot access requirements, and it did pass one house on June 23, 2016, but it never made any headway in the other house. See *House Bill 342; Regular Session 2015–2016*, PENN. GEN. ASSEMBLY, http://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?year=2015&sind=0&body=H&type=B&bn=342 (last visited Nov. 19, 2016) [<https://perma.cc/34YZ-HCHZ>].

72. See Brief of Petitioner, *Constitution Party of Pa.*, 116 F. Supp. 3d 486 (No. 12-cv-2726).

73. 1971 Pa. Laws 618.

74. To reach the 2,586 figure, see HAAS, *supra* note 7, for the total number of votes cast in 2014 for each candidate race, then take 2 percent of the winner's vote for any particular district.

75. See *Nader v. Brewer*, 531 F.3d 1028, 1040 (9th Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009).

76. See *id.*

77. ARIZ. REV. STAT. ANN. § 16-341 (2016).

As a result of similar court decisions, the latest filing deadlines in each state for presidential candidates who are running outside of the major parties are mostly in August, with a smaller number in July and September. Only four states have independent presidential deadlines in June, and one, Texas, is in May. The median deadline (comparing the later deadline in each state, independent or minor party) is August 7. If one looks only at the independent deadlines, the median is August 2.⁷⁸

VI. RESTRICTIVE DEADLINES FOR CONGRESSIONAL INDEPENDENT CANDIDATES

By contrast, deadlines for candidates running outside the major parties for Congress (again, comparing the latest deadline in each state, newly qualifying party or independent) are much earlier. The median of those deadlines is June 24.⁷⁹ Arkansas has the earliest deadline for nonpresidential independent candidates, an incredibly early November 9, 2015.⁸⁰ The Arkansas 2016 deadline for the petition for a new party that wants to run candidates for anything other than President is September 2, 2015.⁸¹ Other states with early deadlines for *nonpresidential* candidates running outside the major parties are California (January 4 for new parties that want to run congressional candidates and March 7 for independent candidates); Mississippi (January 8 for both new parties and independent candidates); Idaho (March 11 for independents); Alabama (March 1 for new parties and independents); Ohio (March 14 for independents); Utah (February 15 for new parties and March 17 for independents); and South Dakota (March 29 for new parties and April 26 for independents).⁸²

These early deadlines for congressional candidates effectively make it impossible for a major new party to arise in the spring or early summer of an election year. The Republican Party was founded on July 6, 1854, and because there were no government-printed ballots back then, it was free to nominate candidates very late in the year. In the autumn general election of 1854, the party won a plurality in the U.S. House. Such an event could not happen under today's ballot access laws. Ironically, in 2000, the U.S. State Department filed a human rights complaint against Azerbaijan, which had just passed an election law requiring parties to have been in existence at least six months before any election in order to compete in that election.⁸³

78. For a list of these deadlines in the petitioning chart, see *2016 Petitioning for President*, BALLOT ACCESS NEWS (June 1, 2016), <http://ballot-access.org/2016/07/10/june-2016-ballot-access-news-print-edition/> [<https://perma.cc/VZY9-AWK9>].

79. For the congressional independent filing deadlines, see FEC, 2016 PRESIDENTIAL PRIMARY DATES AND CANDIDATE FILING DEADLINES FOR BALLOT ACCESS 3–4 (Apr. 21, 2016), <http://www.fec.gov/pubrec/fe2016/2016pdates.pdf#search=2016%20congressional%20primary%20dates> [<https://perma.cc/Y5ZL-E4FH>].

80. *See id.*

81. *See* Libertarian Party of Ark. v. Martin, Docket No. 4:15-cv-00635 (E.D. Ark. July 15, 2016) (striking down the deadline for a new party to hold its nominating convention but denying injunctive relief).

82. For these deadlines, see *supra* note 78.

83. *US Attacks Azerbaijan's Electoral Law*, BBC NEWS (July 25, 2000, 00:26 GMT), https://news.bbc.co.uk/1/hi/english/world/americas/newsid_849000/849851.stm

VII. COURTS GENERALLY WILL NOT STRIKE DOWN
SEVERE RESTRICTIONS FOR CONGRESS

The severe restrictions on ballot access for nonpresidential candidates running outside the major parties are generally upheld in ballot access litigation. This is true for states that require a very large number of signatures, as well as for states that have very early deadlines for such candidates.

North Carolina requires so many signatures for the U.S. House that no independent candidate for the House has ever appeared on a government-printed ballot.⁸⁴ One independent candidate *petition* for the House did succeed in 2010.⁸⁵ Activists and employees of the Service Employees International Union circulated the petition on behalf of Wendell Fant.⁸⁶ The massive effort, which involved dozens of circulators going door to door to get signatures, was wasted when Fant refused to run.⁸⁷ Yet despite the fact that the Fant petition is the only one to ever succeed for an independent for the House,⁸⁸ the Fourth Circuit upheld the petition requirement of signatures equal to 4 percent of the number of registered voters.⁸⁹ The court held that because one effort had succeeded, the law is constitutional.⁹⁰ The decision did not even mention the admonition of the Supreme Court in *Storer v. Brown*⁹¹ that ballot access laws that are so difficult that they are seldom used are probably unconstitutional.⁹²

Georgia requires so many signatures for the House that ever since the petition requirement was passed in 1943, no new or minor party has ever managed to place a candidate for that office on the ballot, and no independent has completed the 5 percent petition since 1964.⁹³ Yet the Eleventh Circuit upheld the law in *Coffield v. Kemp*.⁹⁴ The court acknowledged that no one had completed the 5 percent (of the number of registered voters as of the previous election) petition, but it noted perhaps that was because no one except the plaintiff-candidate, Faye Coffield, had ever tried.⁹⁵ Actually the plaintiffs were aware of four other serious

[<https://perma.cc/28M4-7GTD>]. The State Department spokesman, Philip Reeker, said that although the new legislation was an improvement on earlier drafts, it did not remove a restriction that prevented political parties registered in the last six months from contesting elections scheduled for November. *Id.*

84. *See supra* note 43 and accompanying text.

85. *See supra* notes 43–45 and accompanying text.

86. *See supra* notes 43–45 and accompanying text.

87. *See supra* notes 43–45 and accompanying text.

88. *See supra* note 43 and accompanying text.

89. *See generally* *Greene v. Bartlett*, 449 F. App'x 312 (4th Cir. 2011); *see also* *Greene v. Bartlett*, No. 5:08-CV-088-GCM, 2010 WL 3326672, at *7 (W.D.N.C. Aug. 24, 2010) (discussing the Fant petition success).

90. *See Greene*, 449 F. App'x at 314.

91. 415 U.S. 724 (1974).

92. *See id.* at 745.

93. *See supra* note 35.

94. 599 F.3d 1276 (11th Cir. 2010).

95. *See id.* at 1277 (stating “but she does not allege how many candidates have tried”). This statement seems to suggest that if she had demonstrated that some candidates had tried, the outcome might have been different.

attempts to qualify a U.S. House candidate in Georgia, but that information was not in evidence and had not been brought up by either side in the trial court, so it was too late to get that fact into the record.⁹⁶

California's "top-two" system keeps independent and minor-party candidates for Congress off the November ballot unless they file by March and unless they place first or second in the June primary.⁹⁷ As noted above, the only minor-party candidate for Congress who has appeared on the November ballot since the top-two system began ran in a race in which only one major party person appeared on the primary ballot.⁹⁸ Of the eight independent candidates for Congress who qualified for the November ballot, six of them also ran in races in which only one major party member filed.⁹⁹ Confining independent and minor-party candidates to races that are so uninteresting that only one major party candidate filed is a severe burden. But in *Rubin v. Padilla*,¹⁰⁰ the California State appellate court upheld the top-two system in a case filed by three minor political parties. The court said that the purpose of the top-two system was to enable independent voters to be able to vote in the primary and that additional voting freedom for independents in the June primary counterbalanced the harm done to voter choice in November.¹⁰¹ The court was not aware that in the ten years before the top-two system was put in place (in other words, the elections of 2002 through 2010), independent voters were *already* permitted to vote in all Democratic and Republican primaries for Congress.¹⁰² Therefore, the top-two system was not needed for that purpose. But even after the court was made aware of its error, it did not reconsider its

96. The candidates who made serious attempts to petition for the U.S. House in Georgia were Maceo Dixon, Socialist Workers Party nominee, in 1982; Libertarian Wayne Parker in 2002; independent Jeff Anderson in 2010; and Faye Coffield herself in the year she filed this lawsuit. See Brief in Support of Motion for Temporary Restraining Order at 1, *Dixon v. Poythress*, No. C-92177 (Ga. Super. Ct. Nov. 30, 1982); see also *Parker v. Barnes*, No. 1:01-CV-1883-BBM (N.D. Ga. July 30, 2002). For more information on Anderson's attempt to petition, see *Georgia Independent Candidate Denied Ballot Access, Will Pursue Strong Write-In Campaign*, BALLOT ACCESS NEWS (Aug. 12, 2010), <http://ballot-access.org/2010/08/12/georgia-independent-congressional-candidate-denied-ballot-access-will-pursue-strong-write-in-campaign/> [https://perma.cc/GZ82-ER5Z]. The information about Coffield was obtained by the author through interviews with Faye Coffield, the plaintiff, in Lithonia, Georgia, on March 3, 2010, and in Atlanta, Georgia, on March 4, 2010, as well as an interview with Gary Sinawski, Coffield's attorney, also in Atlanta on March 4, 2010.

97. See CAL. CONST. art. II, § 5.

98. See *supra* note 25.

99. See *supra* note 25.

100. 183 Cal. Rptr. 3d 373 (Ct. App. 2015).

101. See *id.* at 390.

102. See *History of Political Parties That Have Adopted Party Rules Regarding No Party Preference Voters*, CAL. SECRETARY ST., <http://www.sos.ca.gov/elections/political-parties/no-party-preference/history-political-parties-have-adopted-party-rules-regarding-no-party-preference-voters> (documenting that in 2004, 2006, 2008, and 2010, both the Democratic and Republican Parties told the state to let independents vote in their congressional and state office primaries) (last visited Nov. 19, 2016) [https://perma.cc/A3SM-P76X]; see also RICHARD SCAMMON, *AMERICA VOTES 61* (2002) (noting that the 2002 California primary was "[s]emi-open" because independent voters "could participate in the primary of the Democratic, Republican, American Independent or Natural Law parties").

decision.¹⁰³ The California State Supreme Court and the U.S. Supreme Court both refused to hear the case.¹⁰⁴

CONCLUSION

Under the Constitution, Congress and the President are of equal importance. It is fortunate that, due to the Supreme Court's decision in *Anderson v. Celebrezze*,¹⁰⁵ ballot access barriers to presidential candidates running outside the Republican and Democratic Parties have begun to fall. Public opinion concerning the presidential election of 2016, with approximately 15 percent of the voters telling pollsters that they intend to vote for someone other than Hillary Clinton or Donald Trump, shows how important it is to give voters alternative choices. Without such voter freedom, the very legitimacy of American elections is at risk. It is poor policy to deny voters alternative choices in congressional elections, particularly when the Constitution and the ideas expressed in *The Federalist Papers* made it clear that the Founders intended the U.S. House to be the most democratic institution of the federal government.

103. The author was in the audience during the state court of appeals hearing in *Rubin*. Afterward, he copied the page from the California Secretary of State's webpage proving that independent voters could vote in Democratic and Republican congressional and state office primaries. The author made copies for each of the three judges and the attorneys for both sides. The author hand delivered this evidence, along with a one-page letter explaining why he was submitting the evidence, within two hours after the hearing was over. Therefore, the author knows that the court was informed of its error.

104. See *Rubin v. Padilla*, 136 S. Ct. 320 (2015) (denying certiorari).

105. 460 U.S. 780 (1983).