1999

Political Speech—Restrictions on Ballot-Initiative Petitions, Buckley v. American Constitutional Law Foundation

Mark L. Rienzi
The Catholic University of America, Columbus School of Law

others from entering those areas, or to conceal illegal activities."[94] But courts seeking guidance on the roles and interplay of notice, discretion, and constitutional rights in vagueness doctrine will find no similar succor. Regardless whether the Court would have decided that the police guidelines cured the ordinance's fatal vagueness had it considered the regulation more carefully, the Court should have analyzed the precedential support for, and the logical consequences of, an invalidation due to discretionary vagueness alone. Had the Court done so, it might have identified a coherent internal logic to the doctrine that could explain the past and guide the future.

D. Freedom of Speech

Political Speech — Restrictions on Ballot-Initiative Petitions. — The Supreme Court has repeatedly noted that ballot and election regulations raise difficult questions about the interplay between the First Amendment's heightened protection for political speech, and states' need to regulate ballots and elections to ensure fair and orderly democracy.[1] When making the delicate judgments between protecting political speech and allowing states to regulate elections, the Court has traditionally stated precisely which test it was employing to evaluate individual restrictions.[2] Last Term, in *Buckley v. American Constitutional Law Foundation*,[3] the Court invalidated several of Colorado's restrictions on the signature-gathering process for ballot initiative petitions. In so doing, the Court failed to identify which level of scrutiny it was applying for each of the restrictions in question and relied instead on certain unreviewed restrictions to render unconstitutional the specific regulations before it. The lack of clarity in the resulting opinion will make it difficult for lawmakers, lower courts, and the Court to create and evaluate election regulations.

In 1993, the American Constitutional Law Foundation (ACLF) brought suit in the United States District Court for the District of Colorado to challenge Colorado's ballot initiative regulations.[4] The

---

[94] *Id.* at 1864–65 (O'Connor, J., concurring in part and concurring in the judgment).

[1] *See, e.g.*, Storer v. Brown, 415 U.S. 724, 729–30 (1974) ("[There is] no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of degree' . . . ." (citing Dunn v. Blumstein, 405 U.S. 330, 348 (1972))); Williams v. Rhodes, 393 U.S. 23, 30 (1968) (noting that a decision about the constitutionality of an election regulation involves careful consideration of "the fact and circumstances behind the law").

[2] *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 438 (1992); Burson v. Freeman, 504 U.S. 191, 198 (1992).

[3] 119 S. Ct. 636 (1999).

[4] *See id.* at 641; American Constitutional Law Found., Inc. v. Meyer, 870 F. Supp. 995 (D.

ACLF alleged that the following requirements were unconstitutional restrictions on the freedom of speech: petition circulators must be at least 18 years old; circulators must be registered voters; circulation may take place only for six months; circulators must wear badges showing their names; circulators must attach to each submitted petition an affidavit stating their names and addresses with statements that they have read and understand the laws governing the circulation of petitions; and initiative proponents must disclose at the time of filing the amount of money paid for gathering signatures, along with the name, address, county of voter registration, and the amount paid to each circulator, and must make monthly statements with similar information throughout the petition circulation period.[5]

After a bench trial, the district court struck down the badge requirement and portions of the disclosure provisions but upheld the age, affidavit, and circulation period requirements.[6] Although the district court found that the voter registration requirement "limits the number of persons available to circulate . . . and, accordingly, restricts core political speech," the court upheld the requirement because Colorado voters had passed it as a constitutional amendment, rendering it "not subject to any level of scrutiny."[7]

The United States Court of Appeals for the Tenth Circuit affirmed in part and reversed in part.[8] Although the court agreed that the age, circulation time, and affidavit requirements were reasonable restrictions on the ballot-initiative process, the court struck down the entire registered voter requirement and parts of the badge and disclosure requirements as unconstitutional encroachments on protected political expression.[9] The Tenth Circuit rejected the district court's suggestion that the registered voter requirement was not subject to scrutiny because it was passed by petition and noted that "[t]he voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly may by enacting legislation."[10]

The Supreme Court affirmed. Writing for the Court,[11] Justice Ginsburg began by reaffirming the Court's previous holding that petition circulation is "core political speech" for which First Amendment

---

Colo. 1994).

[5] *See Buckley*, 119 S. Ct. at 640–41.

[6] *See Meyer*, 870 F. Supp. at 1005.

[7] *Meyer*, 870 F. Supp. at 1002.

[8] *See* American Constitutional Law Found., Inc. v. Meyer, 120 F.3d 1092 (10th Cir. 1997).

[9] *See Meyer*, 120 F.3d at 1097–1107.

[10] *Id.* at 1100. The court of appeals found that the registered voter requirement imposed a severe burden and invalidated it because Colorado could not show "a compelling state interest to which its registration requirement is narrowly tailored." *Id.*

[11] Justices Stevens, Scalia, Kennedy, and Souter joined the majority opinion.

protection is "at its zenith."[12] Nonetheless, Justice Ginsburg recognized that states have considerable leeway in protecting the integrity and reliability of the ballot initiative process.[13] She added that there is no "litmus-paper test" to separate valid restrictions on ballot access from invalid restrictions on free speech.[14]

The Court then addressed the registered voter requirement.[15] Justice Ginsburg cited statistical evidence and trial testimony demonstrating that the requirement limited the number of voices that may convey an initiative's message.[16] The Court rejected Colorado's argument that the ease of registering softens the effect on speech,[17] noting that ease of registration does not lift the burden on speech for those for whom refusing to register "implicates political thought and expression."[18] The Court was similarly unconvinced by Colorado's argument that the registered voter requirement was necessary to ensure that circulators were amenable to the secretary of state's subpoena power.[19] The Court found that the state's "strong interest in policing lawbreakers" was already served by the affidavit requirement — upheld below and not reviewed by the Court — under which circulators must submit an affidavit attesting to, among other things, their place of residence.[20]

Next, the Court considered the requirement that petition circulators wear identification badges displaying their names. The Court found that the identification badge, by forcing circulators to reveal their identities in potentially protracted discussions that may invite "intense, emotional, and unreasoned" reactions,[21] burdened the exchange of political ideas.[22] Colorado argued that the badge "enables the public to

---

12 *Buckley*, 119 S. Ct. at 639–40 (citing Meyer v. Grant, 486 U.S. 414, 422, 425 (1988)).

13 *See id.* at 642.

14 *Id.* (citation omitted); *see supra* note 1.

15 The Court rejected cross-appeals from the ACLF as to the age, circulation period, and affidavit requirements, and therefore limited its analysis to the registered voter, badge, and reporting requirements. *See Buckley*, 119 S. Ct. at 642 n.10; *see also* American Constitutional Law Found. v. Meyer, 120 F.3d 1092 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 1045 (1998).

16 *See Buckley*, 119 S. Ct. at 643–44. When the case was before the district court, registered voters in Colorado numbered approximately 1.9 million; at least 400,000 persons eligible to vote were not registered. *See id.* at 643.

17 *See id.* at 644.

18 *Id.*

19 *See id.*

20 *Id.* at 644–45.

21 *Id.* at 645 (quoting *Meyer*, 120 F.3d at 1102) (internal quotation marks omitted).

22 In discussing the badge requirement, the Court analogized to its decision in *McIntyre v. Ohio*, 514 U.S. 334 (1995), in which the Court found a ban on anonymous distribution of campaign literature to be unconstitutional. *See Buckley*, 119 S. Ct. at 645. The *Buckley* Court held that, because the petition circulator engages in an even longer exchange — expressing a desire for political change and engaging in a discussion of the merits of the proposed change — the badge requirement presented a greater burden on political speech than the ban found unconstitutional in *McIntyre*. *See id.* at 646.

identify, and the State to apprehend, petition circulators who engage in misconduct."[23] Justice Ginsburg, however, reasoned that the affidavit requirement "is responsive to the State's concern[s]" because it provides law enforcers with the circulator's name, address, and signature.[24] The Court thus found that the badge requirement "discourages participation . . . without sufficient cause."[25]

Finally, the Court addressed the disclosure requirements that the Tenth Circuit had invalidated. The court of appeals had struck down the requirements of monthly and individual reporting for circulators and had left only the requirements of reporting the identities of proponents who paid circulators and of reporting the amount the proponents paid per signature.[26] Relying heavily on *Buckley v. Valeo*,[27] Justice Ginsburg explained that disclosure provides the electorate with important information "as to where political campaign money comes from and how it is spent."[28] Justice Ginsburg noted that *Buckley v. Valeo* nonetheless requires "exacting scrutiny" of campaign-related financial disclosure requirements.[29] The Court then judged the validity of the month and name reports in the context of those disclosure requirements that the lower court had upheld.[30] Ultimately, the Court found that disclosure of sponsors' names and the amount they spent sufficiently served the public interest; any added benefits of monthly reports of names and total pay of individual circulators had "not been demonstrated."[31]

Justice Thomas concurred in the judgment. He began by articulating the "now-settled approach" that "severe burdens" on core political speech can be tolerated only under a law that is "narrowly tailored to serve a compelling state interest."[32] For less severe burdens, a state's important regulatory interests usually provide sufficient justification.[33] Finding that each of the requirements in question presented a "severe burden," Justice Thomas argued that the majority should have evaluated each under strict scrutiny.[34] Under this more exacting standard, Justice Thomas agreed with the Court that Colorado's re-

---

[23] *Buckley*, 119 S. Ct. at 645.

[24] *Id.*

[25] *Id.* at 646.

[26] *See id.* The Court did not review the Tenth Circuit's approval of these requirements. *See id.* at 642 n.10.

[27] 424 U.S. 1 (1976).

[28] *Buckley*, 119 S. Ct. at 647 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)) (internal quotation marks omitted).

[29] *Id.*

[30] *See id.*

[31] *Id.*

[32] *Id.* at 649 (Thomas, J., concurring in the judgment).

[33] *See id.*

[34] *Id.* at 649.

strictions violated the First Amendment.[35]

Justice O'Connor concurred in the judgment in part and dissented in part. In an opinion joined by Justice Breyer, Justice O'Connor argued that some regulations of the ballot initiative process do not directly burden the communicative aspect of petition circulation and therefore "should be subject to a less exacting standard of review."[36] Because Justice O'Connor found that the badge requirement *did* impose a severe burden on speech, she invalidated the provision under the standard of strict scrutiny.[37] However, she would have upheld under a reduced level of scrutiny the registered voter and reporting requirements, finding their burdens on speech to be only "indirect[] and insignificant[]."[38] Justice O'Connor determined that Colorado's legitimate interests in combating fraud and conveying information to the public were "surely sufficient" to justify the requirements.[39]

Chief Justice Rehnquist dissented. He argued that states should be able "to ensure that local issues of state law are decided by local voters, rather than by out-of-state interests."[40] Chief Justice Rehnquist challenged the Court's conclusion that the decision not to register "implicates political thought and expression" by arguing that such a relation to thought and expression is simply untrue for most people.[41] Moreover, the Chief Justice argued that restricting petitions to circulation by state residents, American citizens, or adults also "limits the number of voices available" to convey the initiative proponents' message; he worried that the majority's decision would make even basic residency and citizenship requirements unconstitutional.[42] In closing, Chief Justice Rehnquist agreed that the badge requirement was unconstitutional, but maintained that the disclosure requirement, which added only the amount paid to each circulator to the information conveyed in the affidavit, was valid.[43]

Although the outcome of the Court's holdings is clear — that each of the three regulations is unconstitutional — the opinion provides lower courts and state legislatures with scant explanation of how the Court reached these conclusions. The majority's silence about what level of scrutiny it employed renders the decision unclear for decisionmakers seeking to understand and predict the Court's treatment of ballot access restrictions. This type of silence from the Court regard-

---

[35] *See id.* at 653.

[36] *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

[37] *See id.* at 654.

[38] *Id.* at 655.

[39] *Id.* at 657.

[40] *Id.* at 659 (Rehnquist, C.J., dissenting).

[41] *Id.* at 660 (quoting *Buckley*, 119 S. Ct. at 644) (internal quotation marks omitted).

[42] *Id.* at 661.

[43] *See id.* at 662.

ing which test should be used would be troubling in any situation; it is especially disturbing in the ballot access area, which as the Court has repeatedly noted, involves particularly difficult decisions. This problem is complicated by the fact that the opinion, although vague concerning the standard of scrutiny, is precise in its reliance on existing yet unscrutinized regulations to render the rules in question unconstitutional. Oddly, the Court ultimately relied upon the regulations it chose *not* to review in order to invalidate those it did review. Together, the Court's silence about what standard it employed and its reliance on unscrutinized regulations render the opinion unlikely to provide lawmakers with any useful guidance.

The majority's silence regarding the level of scrutiny being applied represents a marked and unsettling departure from past practice. As the Court has repeatedly recognized in ballot access cases, "[r]egulations imposing severe burdens . . . must be narrowly tailored and advance a compelling state interest."[44] In comparison, "[l]esser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."[45] Although the Court has noted that no clear line separates permissible from impermissible regulations, it has in the past stated clearly which level of scrutiny it was applying. For example, in *Timmons v. Twin Cities Area New Party*,[46] the Court found that the burdens imposed by banning fusion candidates "though not trivial[,] are not severe."[47] Because the burdens were less than severe, the Court did not look for a narrowly tailored and compelling justification.[48] Similarly, in *Burdick v. Takushi*,[49] the Court explicitly found that a Hawaii election law imposed "only a limited burden" and therefore "the State need not establish a compelling interest to tip the constitutional scales in its direction."[50] In contrast, in cases such as *Bur-*

---

[44] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)) (internal quotation marks omitted).

[45] *Id.* at 358.

[46] 520 U.S. 351 (1997).

[47] *Id.* at 363. Fusion candidates are candidates who are nominated by more than one political party for the same office in the same general election. *See id.* at 353 n.1.

[48] *See id.* at 364.

[49] 504 U.S. 428 (1992).

[50] *Id.* at 439. The Court provided a helpful summary of the weighing that should be conducted in such situations:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Id. at 434 (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

son v. Freeman,[51] *Meyer v. Grant*,[52] and *Williams v. Rhodes*,[53] the Court clearly stated that the burden was severe enough to merit stricter scrutiny and explicitly required a "compelling interest" to justify the law.[54]

Although the majority made a point of responding to Justice Thomas's opinion by adopting the words of strict scrutiny in a footnote,[55] the text of the opinion itself nowhere evaluates the restrictions in such terms. In fact, the majority conducted no explicit inquiry whether Colorado's interests rose to the level of being "compelling" or whether the restrictions at issue were "narrowly tailored" to serve those interests. Rather, for each of the three restrictions considered, the Court, after finding a burden — which it did not explicitly classify as either minor or severe — moved directly to considering whether the contested regulations were necessary in light of the unreviewed regulations.[56] At no point did the majority articulate the standard against which the state interest was measured.[57] Rather than adopting terms

---

[51] 504 U.S. 191 (1992).

[52] 486 U.S. 414 (1988).

[53] 393 U.S. 23 (1968).

[54] *See Burson*, 504 U.S. at 198 (requiring the state to demonstrate that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 469 U.S. 37, 45 (1983) (internal quotation marks omitted)); *Meyer*, 486 U.S. at 425 (deeming the state's burden under strict scrutiny "well-nigh insurmountable"); *Williams*, 393 U.S. at 31 (finding that the burden on voting rights could only be justified by "a compelling state interest in the regulation of a subject within the State's constitutional power to regulate" (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)) (internal quotation marks omitted)).

[55] *See Buckley*, 119 S. Ct. at 642 n.12. Cryptically, the Court stated: "Our decision is entirely in keeping with the 'now-settled approach' that state regulations 'impos[ing] severe burdens on speech . . . [must] be narrowly tailored to serve a compelling state interest.'" *Id.* (quoting *id.* at 649 (Thomas, J., concurring in the judgment)). However, this statement, like the rest of the opinion, does not indicate which of the regulations at issue, if any, impose severe burdens and consequently must be justified by narrowly tailored rules that serve compelling interests. By merely restating the rule, without explicitly stating when, whether, or how it is to be applied, the Court did little to clarify its holding.

[56] *See id.* at 644–46, 647.

[57] Although the Court was silent about the standard used for the registered voter and badge requirements, it did repeat the Tenth Circuit's use of the phrase "exacting scrutiny" at one point when evaluating the disclosure requirements. *Id.* at 648 (quoting American Constitutional Law Found. v. Meyer, 120 F.3d 1092, 1105 (10th Cir. 1997)) (internal quotation marks omitted). The Court did not, however, explicitly adopt the Tenth Circuit's standard in its analysis. Furthermore, the majority did not explain what level of state interest satisfies "exacting scrutiny," a standard that has been unsettled in meaning ever since its first articulation in *Buckley v. Valeo*, 424 U.S. 1, 64–65 (1976), and used in several cases with seemingly different meanings. In *Burson v. Freeman*, 504 U.S. 191, 198 (1992), for example, "exacting scrutiny" and "strict scrutiny" were used as synonyms. In other cases, however, "exacting scrutiny" seems to require something other than a narrowly tailored rule serving a compelling state interest. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (requiring an "overriding" state interest); Buckley v. Valeo, 424 U.S. at 64 (discussing how "substantial relation" or "relevant correlation" between the law and the governmental interest is needed to satisfy "exacting scrutiny").

generally associated with strict scrutiny or any other well-established standard, the Court used the nebulous terms "without impelling cause" (registration requirement),[58] "without sufficient cause" (badge requirement),[59] and "no more than tenuously related to the substantial interests" (disclosure provisions).[60]

The Court's silence as to which standard it employed may be due to the peculiar composition of the majority — Justices Stevens, Kennedy, Scalia, Souter, and Ginsburg. Aside from the unanimous opinion in *Meyer v. Grant*,[61] most of the recent cases cited in *Buckley* have evinced sharp disagreements among these five Justices in judging the severity of burdens and the applicability of different levels of scrutiny. In *Timmons*, for example, Justices Kennedy and Scalia found the burden imposed by a ban on fusion candidates to be "not severe," and thus applied lesser scrutiny,[62] while Justices Stevens, Souter, and Ginsburg found the burden to be "intolerable" and demanded a "correspondingly heavy burden of justification if the law is to survive judicial scrutiny."[63] In *McIntyre v. Ohio Elections Commission*,[64] four of the five believed the burden of a ban on anonymous distribution of campaign literature to be significant enough to demand "exacting scrutiny" to determine the law was "narrowly tailored to serve an overriding state interest,"[65] but Justice Scalia found the law to present "virtually no imposition at all" and mocked the Court's holding, proclaiming that "it may take decades" to clarify the majority's rule.[66] In *Burdick*, Justices Scalia and Souter found that a ban on write-in voting "impose[d] only a limited burden" (and thus required lesser scrutiny),[67] while Justice Stevens joined Justice Kennedy in a dissent that refused to specify a level of scrutiny but deemed the law unconstitutional under any standard.[68] Finally, in *Burson*, the *Buckley* majority was splintered into three different camps over a law that prohibited campaigning within 100 feet of the entrance to a polling place. Justice Kennedy joined a plurality of the Court to proclaim that the restriction must and does survive "strict scrutiny,"[69] Justice Scalia concurred in

---

58 *Buckley*, 119 S. Ct. at 645.

59 *Id.* at 646.

60 *Id.* at 648.

61 486 U.S. 414 (1988) (finding that Colorado's ban on paying petition circulators was unconstitutional).

62 Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997).

63 *Id.* at 374 (Stevens, J., dissenting).

64 514 U.S. 334 (1995).

65 *Id.* at 347.

66 *Id.* at 381 (Scalia, J., dissenting).

67 Burdick v. Takushi, 504 U.S. 428, 439 (1992).

68 *See id.* at 448 (Kennedy, J., dissenting).

69 Burson v. Freeman, 504 U.S. 191, 199 (1992) (plurality opinion).

the judgment but found the application of the plurality's standard "inappropriate,"[70] and Justices Stevens and Souter dissented, believing that strict scrutiny was required but not satisfied.[71] In short, the five justices in the *Buckley* majority have historically exhibited an inability to agree on the severity of burdens or acceptability of state interests.

Given this history, the emergence of this particular set of Justices in a majority opinion that states a conclusion without establishing a standard raises the question whether they agreed on a single standard at all. Perhaps unsurprisingly, the majority opinion left even other Justices on the Supreme Court without a clear understanding of the majority's position. Justice O'Connor wrote a partial concurrence and dissent, in which Justice Breyer joined, to argue that two of the three regulations should not have been subject to strict scrutiny and were constitutional because they survived lesser scrutiny.[72] Both Justices clearly believed that the majority evaluated at least one of the regulations under a strict scrutiny test.[73] Justice Thomas, on the other hand, wrote his concurrence for precisely the opposite reason: although he agreed with the majority's conclusion that all three restrictions were unconstitutional, he wrote solely to protest the majority's *failure* to employ strict scrutiny.[74]

Even if the Court had been clearer about which tests it was applying, the majority opinion would still be hampered by another, subtler problem. Regardless which standard the Court adopted, the opinion demonstrates a strange reliance on restrictions that the Court decided *not* to review to fuel its analysis. In the case of each validating restriction, the Court found the asserted state interest already served by an unreviewed law and — seemingly on this basis alone — deemed additional requirements unconstitutional.

In evaluating the voter registration requirement, for example, the Court rejected Colorado's interest in policing lawbreakers because that interest was already served by the requirement that circulators submit an affidavit attesting to, among other things, their names and ad-

---

[70] *See id.* at 214 (Scalia, J., concurring in the judgment).

[71] *See id.* at 217 (Stevens, J., dissenting).

[72] *See Buckley*, 119 S. Ct. at 653 (O'Connor, J., concurring in the judgment in part and dissenting in part).

[73] *See id.* at 654 ("I agree with the Court that requiring petition circulators to wear identification badges . . . should be subject to, and fails, strict scrutiny."). Furthermore, the general emphasis on the notion that not all regulations should receive the same scrutiny implies that Justices O'Connor and Breyer believed that the majority applied strict scrutiny to all the regulations. *See id.* at 654–57.

[74] *See id.* at 649 (Thomas, J., concurring in the judgment) ("The Court today appears to depart from this now settled approach [that laws imposing severe burdens be subject to strict scrutiny]. In my view, Colorado's badge, registration, and reporting requirements each must be evaluated under strict scrutiny.").

dresses.[75] Similarly, the Court found that the badge requirement was unconstitutional because the affidavit requirement "is responsive to the State's concern" about identifying and apprehending circulators who engage in misconduct.[76] Finally, the Court found that the monthly disclosure requirements and naming of circulators were unnecessary because other reporting requirements, upheld below but not reviewed by the Court, satisfied the State's interest in informing voters.[77]

The Court's reliance on the affidavit and disclosure requirements is surprising. Both requirements were upheld below, but the Court rejected a petition that would have allowed it to scrutinize and affirm those regulations.[78] On the one hand, the Court made a point of responding to Justice Thomas's call for strict scrutiny in all cases by at least implying that it might be using strict scrutiny,[79] a test it described in an earlier petition case as "well-nigh insurmountable."[80] On the other hand, the Court relied almost exclusively on restrictions that it had not scrutinized at all. If laws that burden the free speech of initiative petition circulators are to be reviewed with strict scrutiny, then the Court should be very hesitant to rest its decisions on restrictions it has not scrutinized. The Court's reliance on these unscrutinized restrictions is even stranger given the fact that it had the opportunity to review them as part of the same case but chose not to do so.[81] The Court thus confusingly deemed some restrictions to be unworthy of its consideration but at the same time so important that they justified its conclusion that a given state interest did not justify the restrictions deemed worthy of review.

Not only does this reasoning give the Court's opinion the appearance of lacking a real foundation, it also makes the opinion even less helpful for lawmakers seeking guidance in the future. Because the Court's justification for rejecting a given regulation is that the governmental interest is served in some other way, the opinion presents an

---

[75] *See Buckley*, 119 S. Ct. at 644 ("The interest in reaching law violators, however, is served by the requirement, upheld below, that each circulator submit an affidavit setting out, among several particulars, the address at which he or she resides, including the street name and number, the city or town, [and] the country." (alteration in original) (quoting COLO. REV. STAT. § 1-40-111(2) (1998)) (internal quotation marks omitted)).

[76] *Id.* at 645.

[77] *See id.* at 647.

[78] *See id.* at 642 n.10.

[79] *See id.* at 642 n.12. *But see supra* note 57 (distinguishing the Court's approach from strict scrutiny).

[80] Meyer v. Grant, 486 U.S. 414, 425 (1988).

[81] *See Buckley*, 119 S. Ct. at 642 n.10 (rejecting the opportunity to review the remaining age, affidavit, and disclosure requirements). The Court did state at one point that "the Tenth Circuit correctly separated necessary or proper ballot-access controls from restrictions that unjustifiably inhibit" free speech, *id.* at 649, but such conclusory statements about regulations not before the Court hardly constitutes the type of constitutional analysis required to balance sensitive interests.

indeterminate circular logic. The badge and registration requirements were held unnecessary because the affidavit requirement exists, and the Court treated that unreviewed requirement as constitutional. But if the affidavit requirement had been reviewed first, with the presumption that the registration and badge requirements were constitutional, then the affidavit requirement might have seemed duplicative and been rejected. Similarly, the Court used one part of the disclosure requirement to invalidate other parts. Lawmakers are thus left to guess in which order the Court will review restrictions or which ones it will treat as presumptively constitutional and part of the statutory background in evaluating others.

As a result of both the Court's silence regarding what standard it employed and its awkward reliance on the constitutionality of provisions it could have explicitly upheld but chose not to review, the Court crafted an opinion that is unlikely to help future decisionmakers. If the Justices in the majority agreed on a single standard, then they should have stated it explicitly. If all five agreed on the outcome and *not* on the standard, then at least one of them should have explained the disagreement. The majority's chosen course — silence — leaves lawmakers, commentators, and even fellow members of the Court uncertain about how to evaluate the constitutionality of state regulations of the democratic process.

E. Seventh Amendment

Section 1983 — Seventh Amendment Right to Jury Trial. — In 1871, Representative Lowe described a nation in which "whippings and lynchings and banishment have been visited upon unoffending American citizens, [while] local administrations have been found inadequate or unwilling to apply the proper corrective."[1] Section 1 of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, was "meant to protect and defend and give remedies for their wrongs to all the people"[2] and permits parties who feel that they have been deprived of a federal right under the color of state law to seek relief in federal court.[3] Because § 1983 was designed to provide a broad

---

[1] CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (statement of Rep. Lowe).

[2] Monell v. Department of Soc. Servs., 436 U.S. 658, 684 (1978) (quoting CONG. GLOBE, 42d Cong., 1st Sess., app. 68 (1871) (statement of Rep. Shellabarger)).

[3] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1994).