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CAN UNITED STATES VOTERS STILL RECRUIT SOMEONE TO RUN FOR PRESIDENT AS AN INDEPENDENT AFTER THE IDENTITIES OF THE MAJOR PARTY PRESIDENTIAL CANDIDATES ARE KNOWN?

*Richard Winger**

SYNOPSIS: In 1983 the United States Supreme Court ruled that early petition deadlines for independent and minor party presidential candidates are unconstitutional. Between 1983 and 2001, all lower courts that heard cases on this issue were unanimous that petition deadlines for “outsider” presidential candidates must be later than early July. However, starting in 2002, all courts that have considered the constitutionality of early deadlines have upheld them (except that the Sixth Circuit struck down a deadline that was a year before the election). This article criticizes the reasoning of the post-2001 deadline decisions that upheld early qualifying deadlines.

On May 30, 2006, a new organization called Unity08 issued a press release, “New Organization Offers Voters an Answer to Partisan Paralysis, Seeks to Elect Bipartisan Unity Ticket to White House in ’08 Ticket to be Chosen via Online Convention.” Because experienced political leaders¹ launched Unity08, the new organization’s plan to run a mainstream independent presidential candidate drew considerable publicity. This article examines a series of little-noticed court decisions issued 2002 through 2006 that will make it more difficult for such an independent candidate to step forward as late as May 2008.

I. INTRODUCTION

Practically speaking, the voters of the United States have been choosing the president of the United States since 1828.² Also, ever since 1828

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1. These leaders include Angus King (independent Governor of Maine 1995–2003), Hamilton Jordan (chief of staff to President Jimmy Carter), and Doug Bailey (founder of the *Political Hotline*).

2. Technically, of course, the voters choose the presidential electors, and the presidential electors then choose the president. The voters chose the presidential electors in some of the states as early as the first presidential election in 1789. But it has only been since 1828 that every state, or virtually every state, let the voters choose the presidential electors. Colo-

there have been two major political parties and a substantial number of minor political parties. The Democratic Party, starting in 1828 if not earlier, has always been one of those major parties. The other major party has been, sequentially, the National Republican Party (1828–1834), the Whig Party (1835–1854), and the Republican Party (1854 on).

Between 1828 and 1907, the voters enjoyed unfettered freedom to support an independent presidential candidate, to form a new political party with its own presidential candidate, and to make either choice *after* the two major parties had chosen their presidential nominees. Between 1907 and 1931, a handful of states made it difficult or impossible for a presidential candidate from outside the two major parties to get on the ballot if he or she had entered the race after the two major parties had chosen their nominees. Between 1931 and 1976, the number of states that barred late entrants from outside the ranks of the two major parties grew, so that in 1976, fourteen states³ had shut the door to such outsider candidates who did not submit petitions by July 1 of an election year.

In 1983, however, the United States Supreme Court seemingly restored the flexibility that had existed before 1907, when it ruled in *Anderson v. Celebrezze*⁴ that early petition deadlines for independent presidential candidates, and for new political parties seeking to run a presidential candidate, are unconstitutional.⁵ During the years 1984 to 2001, all lower courts, when confronted with such a petition deadline earlier than mid-July, followed *Anderson* and struck down such deadlines.⁶

Yet, starting in 2002, in a little-noted development, lower courts changed course and upheld presidential petition deadlines that are earlier than July of election years. These decisions, from Arizona⁷, Illinois, Ohio, and Texas, threaten to end the flexibility that voters had won at the United States Supreme Court in 1983. The new trend cannot be explained easily. Since 1983, the United States Supreme Court has said nothing whatsoever about petition deadlines, and lower courts continue to pay lip service to *Anderson*,⁸ but they no longer follow its teachings. However, *Anderson* is still

rado in 1876 was the last instance at which a state legislature chose that state's presidential electors.

3. States barring late entrants included Alabama, Arkansas, Georgia, Idaho, Kansas, Kentucky, Maine, Maryland, Michigan, Nevada, New Jersey, Ohio, Utah, and West Virginia.

4. 460 U.S. 780 (1983).

5. *Id.* at 806.

6. In *Rainbow Coalition of Okla. v. Okla. State Election Board*, a United States district court, and the Tenth Circuit, upheld Oklahoma's May 31 petition deadline for new parties, but the case had been filed in a mid-term year and concerned ballot access in that mid-term year, not a presidential election year. 685 F. Supp. 1193 (D. Okla. 1986), *aff'd* 844 F.2d 740 (10th Cir. 1988).

7. The Arizona case is still pending in the Ninth Circuit.

8. 460 U.S. 780 (1983).

good law, and the lower courts should continue to apply its holding to strike down early qualifying deadlines as unconstitutional.

II. PRESIDENTIAL PETITION DEADLINES BEFORE 1907

Before 1889 there were no government-printed ballots in the United States. Voters were free to make their own ballots, but most voters simply chose a ballot printed by one of the political parties. Voters were free to alter a party-printed ballot by scratching out the names of candidates they did not like, and writing in alternate names. In 1888, the Massachusetts legislature passed the first state law mandating government-printed ballots, which became effective in 1889. By 1922, all states except South Carolina⁹ were using government-printed ballots.¹⁰ Obviously, once the government began printing ballots, it needed a law to describe which parties and which candidates' names should be printed on those ballots. The original laws on this subject, without exception, permitted newly-organized political parties, or independent candidates, to qualify as late as September or October of an election year, and such lenient deadlines were in effect in 1892, 1896, and 1900.¹¹ Mississippi adopted an earlier deadline for new parties in 1902, but the state continued to let independent candidates qualify as late as October.¹²

Thus, for all United States history before 1907, the voters were free to support the presidential nominee of a newly-emerging political party, or an independent presidential candidate, even if such candidate did not declare his candidacy until August or even September of an election year. Voters used this flexibility. In 1854, the Kansas-Nebraska Act ("Act") was signed into law in May. The Act, reversing an older federal law, the "Compromise

9. South Carolina did not use government-printed ballots until 1950. 1950 S.C. Acts 2082.

10. A United States Supreme Court decision, *Burson v. Freeman*, describes the development of government-printed ballots. 504 U.S. 191, 200 (1992). The development of the "Australian" ballot in the United States is taught in history textbooks. Unfortunately, the story is still not as well-known as it should be. Even knowledgeable authors such as Kevin Phillips and former United States Supreme Court Chief Justice William H. Rehnquist wrote books that say Abraham Lincoln (in 1860) "was not even on the ballot in most southern states." WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* 73 (2004); KEVIN PHILLIPS, *AMERICAN THEOCRACY* 174 (2006). There was no ballot for Lincoln to be on or off in 1860. Lincoln did not receive popular votes in most Southern states in 1860 because in most Southern states the Republican Party did not nominate candidates for presidential elector nor nominees for other public office. The party simply was not organized in most Southern states. If the party had been, it would have been free to distribute its own ballots to anyone who wanted one.

11. For a chart showing the petition deadline in each state in every presidential election year starting in 1892, see Richard Winger, *How Many Parties Ought to be on the Ballot?: An Analysis of Nader v. Keith*, 5 *ELECTION L.J.* 170, 191 (2006).

12. 1902 Miss. Laws 105-107.

of 1850," changed Kansas and Nebraska Territories from free soil to places in which the inhabitants would decide whether to permit slavery or outlaw it. Northerners opposed to the extension of slavery were outraged and reacted by forming the new Republican Party on July 6, 1854. At the autumn 1854 congressional elections, the Republican Party won more seats in the United States House of Representatives than any other party, although the new party did not win a majority. The Democrats, also lacking a majority, blocked the Republicans from electing the new Speaker of the House, and the Republicans blocked a Democratic speaker. Therefore, the speaker who took office in 1855, Nathaniel Banks, was a member of the nation's third largest party, the American "Know-Nothing" Party.

Other groups that entered the presidential election later than July 1 included the Peoples ("Populist") Party of 1892, which nominated its first presidential candidate on July 5 in Omaha; the National ("Gold") Democratic Party of 1896, which nominated its presidential candidate on September 2 in Indianapolis; and William Randolph Hearst's Independence Party of 1908, which nominated its presidential candidate on July 29 in Chicago.

III. PRESIDENTIAL PETITION DEADLINES 1907-1977

In 1907, Oklahoma was admitted to the union. Unlike all of its sister states, Oklahoma did not give any flexibility for presidential candidates (outside the major parties) who chose to enter the race in July or later. Oklahoma election law, from the start of statehood, required all parties to nominate by primary. Since the Oklahoma primary was in August, new parties were required to qualify no later than June. Oklahoma election laws did not require a new party to submit a petition; the new party merely had to inform the state that it had organized and desired to have the state hold a primary for it. But the new party route was the only route to the ballot for presidential candidates running independently, since the state had no procedure for an independent presidential candidate to get on the ballot.

Theodore Roosevelt was the first victim of Oklahoma's inflexible law. He was defeated for the Republican Party nomination at the Republican convention in Chicago, held June 18-22. He walked out and announced the formation of a new party, the Progressive ("Bull Moose") Party. It formally organized and nominated him for president, also in Chicago, on August 5. The Progressive Party, or Theodore Roosevelt himself, then qualified for the ballot in forty-seven of the forty-eight states, but not in Oklahoma. He sued, but the Oklahoma Supreme Court upheld the law,¹³ and Oklahoma voters were the only voters who could not vote for Roosevelt in November.

13. *Persons v. Penn*, 127 P. 384 (Okla. 1912).

In 1924, United States Senator Robert La Follette, a progressive Republican from Wisconsin, declared his independent, progressive candidacy on July 4, when he correctly perceived that the progressive Democrat running for president¹⁴ would fail in his quest to be the Democratic presidential nominee.¹⁵ Like Theodore Roosevelt, Robert La Follette won a place on the ballot in every state but one.¹⁶ Even though he had missed a few deadlines, he was able to overcome them. For instance, he missed the West Virginia deadline, but the Secretary of State, Houston G. Young, said that the deadline was unclear and that he would construe it to be August 15.¹⁷ La Follette would have had trouble with the Oklahoma deadline, but fortunately for him, the Socialist Party (which was already a qualified party in that state) had nominated him for president, even though La Follette declared that he was not a socialist.¹⁸ La Follette would also have had trouble with California, since in 1924 the California Supreme Court had ruled that it was legally impossible for a presidential candidate to use the independent petition method, and the deadline for a new party to qualify was in June.¹⁹ But, again, the Socialist Party, already ballot-qualified in California, saved La Follette by nominating him.

During the 1930s, several states increased the severity of their ballot access laws for new parties and independent candidates. United States Senator Huey Long, a Democrat from Louisiana, had been planning to run for president in 1936 as the candidate of his own new party, but he was assassinated in 1935. However, his followers organized the Union Party in 1936 and informally chose North Dakota Congressman William Lemke for presi-

14. William G. McAdoo, Woodrow Wilson's son-in-law, ran as the progressive Democrat candidate.

15. The 1924 Democratic national convention is famous for being the most lengthy presidential convention in United States history. It lasted from June 24 to July 9. The convention finally chose John W. Davis, an attorney best known for representing large banks and stock brokers.

16. The one state that kept La Follette off the ballot was Louisiana. The problem was not an early deadline. Instead, Louisiana required 1,000 signatures due in September. La Follette failed to collect these signatures because the law said that the signatures were invalid if the signers were registered members of a qualified party. La Follette simply could not find enough signers who were registered independents.

17. N.Y. TIMES, July 19, 1924, at A2.

18. In 1924, La Follette was nominated for president by the Socialist Party, and by the Farmer-Labor Party (both were nationally-organized parties at the time), and these nominations were in addition to his independent progressive candidacy (neither La Follette nor anyone else organized a national Progressive Party in 1924; "progressive" was just his ballot label in most states).

19. *Spreckels v. Graham*, 228 P. 1040 (Cal. 1924). In 1927, the California legislature amended the law to provide that independent presidential candidates could use the independent petition procedure.

dent on June 19.²⁰ By then it was already too late to get on the ballot in Florida, Kansas, Maryland, Michigan, New Jersey, Oklahoma, and West Virginia.²¹

Henry Wallace, who had been vice president of the United States from 1941–1945, decided to help organize a new party, the Progressive Party, and to run as its presidential candidate in 1948. Because Wallace and his allies were aware of hostile changes in ballot access laws since 1924, they started working to get on the ballot in 1947 and did not miss the ballot in any state because of a too-early petition deadline. But the other important presidential candidate who ran outside the major parties in 1948, Strom Thurmond of the States' Rights Democratic Party, was injured by early deadlines. Thurmond did not decide to run as the presidential candidate of a new party until July 14, 1948, when the Democratic National Convention put a strong civil-rights plank in the platform. Thurmond's new States' Rights Democratic Party nominated him for president in Birmingham on July 17. Already he was too late to get on the ballot in Maryland and Oklahoma. He sued both states, although he lost both lawsuits.²²

In 1967, former Alabama Governor George C. Wallace also decided to run for president as an independent. Like Henry Wallace, he started early in September 1967 and had no deadline trouble, except in Ohio. Ohio required 433,100 signatures of adult-resident citizens, who did not need to be registered voters,²³ due February 7, 1968. Wallace actually obtained enough signatures, but he was not able to complete the petition until July 1968. He sued, and the United States Supreme Court put his party, the American Independent Party, on the general election ballot.²⁴ The Supreme Court decision said that the Ohio ballot access laws, considered in their totality, were too restrictive. The state responded by lowering the number of signatures needed for a new party and permitting independent presidential candidates, but it never amended its law to relax the early petition deadline for new parties. However, because the Supreme Court had said that the February deadline was "very early," one could argue that the Supreme Court had ruled against that deadline.²⁵

20. Lemke was not formally nominated for president until August 13 in Cleveland.

21. Lemke was able to be listed on the Michigan ballot because a party that had already qualified for the ballot nominated him. Lemke was not on the ballot in the other states, *supra*, and votes credited to him by elections officials were write-in votes.

22. The Maryland case was *Vaughan v. Boone*, 62 A.2d 351 (Md. Ct. App. 1948); the Oklahoma case was *Lillard v. Cordell*, 198 P.2d 417 (Okla. 1948).

23. This was established at oral argument in the United States Supreme Court in *Williams v. Rhodes*, 393 U.S. 23 (1968).

24. *Williams*, 393 U.S. at 35.

25. *Id.*, 393 U.S. at 33.

In 1976, the United States Supreme Court, for the first time, agreed to hear a ballot access case in which the sole issue was whether the petition deadline was too early. The decision, issued in 1977, said that early petition deadlines are probably unconstitutional if the record shows that few minor parties or independents ever qualify, but otherwise they are probably constitutional. The case arose in Maryland, which at the time required petitions equal to three percent of the number of registered voters to be submitted in March of presidential election years.²⁶ The Court remanded the case for more fact-finding, and in 1978, the United States district court declared the deadline unconstitutional since few independents or minor parties successfully qualified in Maryland at the time.²⁷

Thus, the status of state election laws as of 1977 meant that any presidential candidate, who hoped to run independently of the two major parties, had to get an early start.²⁸ The *Mandel*²⁹ precedent could not be counted on to invalidate all early deadlines; it could only be used against early deadlines in states in which few minor party or independent presidential candidates ever qualified. As of January 1980, twelve states had presidential deadlines earlier than July: Idaho, Kansas, Kentucky, Maine, Maryland³⁰, Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Utah, and West Virginia. The earliest of these deadlines were Maryland's March 3, 1980 deadline and New Mexico's March 4, 1980 independent deadline.³¹

IV. ANDERSON'S LEGAL VICTORIES RESTORE FLEXIBILITY

On April 24, 1980, John B. Anderson, a leading Republican member of the United States House of Representatives, declared as an independent presidential candidate. Earlier, he sought the Republican presidential nomi-

26. *Mandel v. Bradley*, 432 U.S. 173 (1977). The Maryland case involved an independent candidate for United States Senate.

27. *Bradley v. Mandel*, 449 F. Supp. 983, 989 (D. Md. 1978).

28. Former United States Senator Eugene McCarthy declared his 1976 independent candidacy for the presidency in December 1974.

29. 432 U.S. 173.

30. Even though Maryland lost in *Bradley v. Mandel*, in 1979 the legislature responded by providing that one-third of the needed signatures were due by the original March deadline, whereas the other two-thirds could be submitted by August. Therefore, Maryland still excluded presidential candidates who had not jumped into the race before March.

31. Oddly, New Mexico let new parties on the ballot with a petition of only 100 signatures, due in May, so Anderson could have circumvented the independent petition deadline if he had formed a new party within New Mexico. New Mexico's policy of requiring 170 times as many signatures for an independent presidential candidate (relative to a new party), and requiring the independent to file petitions more than two months before new party petitions were due, was so irrational that Anderson sued New Mexico first, before he filed any of his other ballot access lawsuits. He was more confident of winning his New Mexico case than any other case, and he wanted to ensure that he won his first case.

nation, but by late March, it was obvious that former California Governor Ronald Reagan was going to be the Republican nominee. Anderson immediately began circulating petitions to get his name on the ballot as an independent in almost all states.³² In the five states in which he turned in petitions after the deadline, he sued, seeking a judgment that such early petition deadlines were unconstitutional. He won all these lawsuits³³ and appeared on the ballot in all states.

In 1983, the United States Supreme Court affirmed one of those lower court decisions³⁴ and said that early petition deadlines for independent and new or minor party presidential candidates are unconstitutional for three reasons. First, early petition deadlines for groups outside the major parties put them at a competitive disadvantage since such early deadlines force them to choose their tickets early in the year,³⁵ by comparison, the major parties need not nominate until summer. Second, the early petition deadlines for independent and minor party presidential candidates make it difficult for them to get on the ballot at all, since they need more than 500,000 valid signatures and it takes time to get these signatures; by comparison, Democratic and Republican candidates seeking a major party presidential nomination never need more than 25,000 signatures nationwide to get themselves on all presidential primary ballots.³⁶ Third, early petition deadlines can damage the harmony of the two major parties by motivating dissident groups within the major parties to bolt prematurely, instead of remaining to fight an intra-party battle.³⁷

32. Anderson circulated petitions to create a new party in Michigan and North Carolina instead of circulating independent candidate petitions. He qualified the Anderson Coalition Party in Michigan because, at the time, Michigan had no procedures for an independent presidential candidate to get on the ballot. He circulated petitions to qualify the Independent Party in North Carolina because North Carolina only required 10,000 signatures for a new party but required 166,383 signatures for a statewide independent. In New York, Anderson did not submit any petition because the Liberal Party, which was already ballot-qualified, agreed to nominate him as its presidential candidate.

33. *Anderson v. Hooper*, 498 F. Supp. 898 (D. N.M. 1980); *Greaves v. Mills*, 497 F. Supp. 283 (D. Ky. 1980), *rev'd*, 664 F.2d 600 (6th Cir. 1981); *Anderson v. Morris*, 636 F.2d 55 (4th Cir. 1980); *Anderson v. Quinn*, 495 F. Supp. 730 (D. Me. 1980); and *Anderson v. Celebrezze*, 499 F. Supp. 121 (D. Ohio 1980), *rev'd*, 664 F.2d 554 (6th Cir. 1981).

34. *Anderson*, 460 U.S. 780.

35. *Id.*, 460 U.S. at 791.

36. *Id.*, 460 U.S. at 792.

37. *Id.*, 460 U.S. at 805. The Court cited historian Alexander Bickel for this idea. Bickel wrote that when the deadlines are late, groups fight their battles inside one of the two major parties, confident that if they lose badly, they are always free to split later and organize their own new party or their own independent candidacy. But if such groups know that the deadlines are early, they will separate out from a major party quite early in the election season, not daring to wait. Thus, ironically, early petition deadlines might result in more splintering of the major parties than would occur with late deadlines.

V. PRESIDENTIAL PETITION LITIGATION 1983-1993

Starting in late 1983, lower courts in states in which John B. Anderson had not needed to sue began routinely striking down early petition deadlines that affect presidential candidates. The first of these lawsuits was in Indiana, where the legislature had moved the petition deadline from September to February in 1980, effective 1983.³⁸ The Socialist Workers Party filed a lawsuit, resulting in invalidation of the February deadline.³⁹

In 1984, various minor party and independent presidential candidates sued Massachusetts,⁴⁰ New Jersey,⁴¹ Pennsylvania,⁴² and Utah,⁴³ the only four remaining states with deadlines in which all routes to the presidential ballot required petitions earlier than June. Pennsylvania and Utah state officials did not even contest the lawsuits and conceded that their deadlines were too early. Massachusetts and New Jersey tried to defend their deadlines, but the deadlines were ruled unconstitutional.

In 1986, a United States District Court declared the Nevada April petition deadline for new parties to be unconstitutional.⁴⁴ This case was filed in 1986, a mid-term election year, not a presidential election year. Therefore, strictly speaking, this case is not relevant to this article's topic of presidential elections. The case is notable, however, because Nevada required all political parties, even new parties, to nominate by primary, and the state set a deadline in April to give time to prepare for a new party's primary. This case is important because it concluded that a state's interest in requiring a primary is less important than a new party's interest in qualifying its nominees for the November ballot. In this case, the plaintiff Libertarian Party nominated its candidates by convention. In 1987, the Nevada legislature changed the law to provide that new parties should nominate by convention, not by primary, thus making it practical for the state to have a petition deadline for new parties that is later in the year.

In 1988, the New Alliance Party threatened to sue the North Carolina State Board of Elections ("Board") over its May petition deadline for new parties. In response to the threat, the Board decided to accept new party peti-

38. 1980 Ind. Acts 23.

39. *Warrick v. Condre*, No. IP 83-810-C (S.D. Ind. Sep. 6, 1983). The Indiana legislature responded by moving all independent and minor party petition deadlines to August 1. 1987 Ind. Acts 135. In 1988 the deadline was changed to July 15. 1988 Ind. Acts 502.

40. *Serrette v. Connolly*, No. 68172 (Suffolk Super. Ct. Mass. June 19, 1985).

41. *LaRouche v. Burgio*, 594 F. Supp. 614 (1984).

42. *Libertarian Party of Pa. v. Davis*, Civil Action No. 84-0262 (June 13, 1984).

43. *LaRouche v. Monson*, 599 F. Supp. 621 (1984).

44. *Libertarian Party of Nev. v. Swackhamer*, 638 F. Supp. 565 (Nev. 1986).

tions as late as July, notwithstanding the law. The Board re-iterated this policy in 1992.⁴⁵

Also in 1988, Ron Paul, Libertarian Party candidate for president, sued Kansas over its June independent petition deadline, and the state conceded that June was too early and did not contest the lawsuit.⁴⁶ In response, the legislature moved the petition deadline to July. In 1992, several minor party and independent candidates sued Nevada over its June petition deadline and won injunctive relief.⁴⁷ Also, the Libertarian Party sued Alaska over its early August deadline and won injunctive relief.⁴⁸ No declaratory relief was sought, and the legislature did not amend the law. Conversely, a federal court⁴⁹ upheld Florida's July 15 petition deadline on the grounds that the state needed the deadline to be that early because the number of signatures, 60,312, was so large that the state needed several months to determine if the signatures were valid.

As a result of these court decisions, the law seemed to be settled: petition deadlines affecting new party and independent presidential candidates were unconstitutional if they were earlier than mid-July. With one exception, all of the states with deadlines earlier than mid-July and that had not been sued, voluntarily moved their deadlines to July or a later date.⁵⁰ The one exception was Texas, which in 1986 had moved its new party and independent candidate petitions from July to May.⁵¹ However, no one sued Texas over its new May petition deadlines, in any presidential election from 1988 through 2000. No independent presidential candidate, and no minor party, that set out to qualify in Texas during the presidential election years from 1988 through 2000 failed to qualify, so there was no occasion for anyone to sue over the Texas May deadline.⁵²

45. Copies of the letters from the North Carolina Board of Elections setting forth this policy are on file with author.

46. *Merritt v. Graves*, 702 F. Supp. 828 (D. Kan. 1988). In response, the legislature moved the independent petition deadline to August.

47. *Fulani v. Lau*, CV-N-92-535-ECR (D. Nev. Oct. 1, 1992).

48. *Libertarian Party v. Coghill*, Case No. 3AN-92-8181 CI (Sup. Ct. Alaska, Sept. 17, 1992).

49. *United States Taxpayers Party of Fla. v. Smith*, 871 F. Supp. 426 (D. Fla. 1993). Injunctive relief was denied in 1992. *Id.* at 437.

50. "Deadlines," in this sentence, means that at least one of the routes to the November ballot had a deadline in July or later (not necessarily that all the routes to the ballot had deadlines that late).

51. See TEX. CODE ANN. § 41.001 (Vernon 2006).

52. Texas changed one of its petition deadlines almost absent-mindedly. The 1986 bill moved the primary from May to March. The petition deadline for new parties was described in the Texas Election Code as a certain number of days after the primary, rather than a certain number of days before the general election. So the act of moving the primary automatically shifted the new party deadline from July to May. However, the same bill consciously moved

VI. 1993–2006: STATE LEGISLATURES REVERT TO EARLY DEADLINES

The advantageous deadlines for new party and independent presidential candidates that prevailed between 1984 and 1992 did not last. Starting in 1993, ten states⁵³ changed deadlines that pertain to minor party or independent presidential candidates to June or even earlier months. The reasons for each of these changes varied from state to state, but the national trend was against late deadlines.

Arizona had always required independent candidate petitions to be submitted in October or September of an election year, from the start of territorial government until 1993. The original government-printed ballot of 1891 had set the deadline at twenty days before the general election.⁵⁴ In 1909, this was changed to ten days after the September primary.⁵⁵

In 1993, the independent petition procedures of Arizona were changed.⁵⁶ The new law required independent petitions to be submitted on the same day in June on which candidates seeking a place in the primary were required to submit their petitions. The bill to make this change was prompted by a feeling on the part of state legislators that it was unfair to let independent candidates qualify after the primary was over. However, no one seems to have considered the plight of presidential independents who had no connection with the Arizona direct primary election.

Also in 1993, the Texas legislature added a provision to the election law requiring a new party that intended to petition to give notice on January 2 of any election year.⁵⁷ Thus, even a new party that only intended to run a presidential candidate, and no candidates for other office, was now required to have organized itself by the first day of the year as a condition of even trying to obtain a place on the November ballot. This little-noticed change had fatal consequences for the Ralph Nader 2004 campaign.

In 1995, the New Mexico legislature changed the deadline for a new party to submit its petitions from July to April.⁵⁸ The Democratic majority in the state legislature was angry because at the November 1994 gubernatorial election, the Republicans won the gubernatorial election, and this was attributed to the fact that the Green Party ran its first gubernatorial candidate.

the independent presidential petition deadline from the second Monday in July to the second Monday in May.

53. The ten states were Alabama, Arizona, Colorado, Illinois, Indiana, New Mexico, North Carolina, Oklahoma, South Dakota, and Texas.

54. 1891 Ariz. Sess. Laws 83.

55. 1909 Ariz. Sess. Laws 66. Arizona has always held its primary, for offices other than president, in mid-September.

56. ARIZ. REV. STAT. ANN. § 16-341 (2005).

57. TEX. ELEC. CODE ANN. § 181.0041 (Vernon 2003).

58. 1995 N.M. Laws, ch. 124, p. 934 & 949.

The Green, Robert Mondragon, polled 10.3%, and the Republican won with only 49.8%. The same bill that moved the new party petition deadline from July to April also made it more difficult for a party to remain qualified and the same bill also doubled the number of signatures needed for each nominee of a new party.⁵⁹ There seemed to be no election administration-related reason to move the new party petition from July to April. Independent petitions continued to be due in September. It seems obvious that if the state could cope with independent candidate petitions in September, it certainly did not need new party petitions to be submitted in April.

In 1999, Illinois moved its petition deadline for new party candidates, and its petition deadline for independent presidential candidates from August to June.⁶⁰ New party petitions and independent presidential petitions were always due in October,⁶¹ September,⁶² or August⁶³ of election years. Why was the change made? Illinois requires 25,000 signatures for a statewide slate of minor party or independent candidates.⁶⁴ Illinois elections officials do not check petitions.⁶⁵ The State assumes all petitions are valid unless a private individual challenges the petition.⁶⁶ In 1998, various Republican Party officials challenged the statewide petitions of the Libertarian and Constitution Parties.⁶⁷ The process took so long that it was difficult for the State to get its ballots printed on time. However, the challenge procedure, and the requirement of 25,000 signatures, had been in effect since 1931; it is

59. New Mexico required one petition to qualify a party, which then nominated by convention; and then New Mexico required each nominee to submit still another petition.

60. Illinois petition deadlines for independent candidates for office other than president continued to be in December of the year before the election. This deadline is extraordinarily early. However, since that deadline does not concern presidential candidates, this paper will not discuss it.

61. The original government-printed ballot in Illinois set a deadline of thirty days before the general election. 1891 Ill. Laws 107.

62. In 1929, the deadline was moved to fifty days before the general election. 1929 Ill. Laws 422.

63. In 1947, the deadline was moved to seventy-eight days before the general election (late August). 1947 Ill. Laws 896. In 1967, it was moved to ninety-two days before the general election (early August). 1967 Ill. Laws 601.

64. 10 ILL. COMP. STAT. ANN. 5/10-2 (West 2002).

65. 10 ILL. COMP. STAT. ANN. 5/10-8 (West 2002).

66. *Libertarian, Taxpayers Parties off in Illinois*, BALLOT ACCESS NEWS (Richard Winger, San Francisco, CA) Nov. 8, 1998, available at <http://web.archive.org/web/20030216075416/http://ballot-access.org/1998/1108.html#05>.

67. *Id.* Since 1934, it has been very common for minor party statewide petitions to be challenged in Illinois. Challenges removed the Communist Party from the ballot in all years 1934–1942; removed the Socialist Party from the ballot in 1944; removed the Progressive Party from the ballot 1948–1952; removed the Prohibition Party from the ballot in 1952; removed the Socialist Labor Party from the ballot in 1964; removed a slate of independent presidential electors pledged to Eugene McCarthy in 1968; removed the Socialist Workers Party in 1972; and removed the Socialist Labor Party in 1974.

difficult to understand why similar past challenges had not caused this problem.

Also in 1999, South Dakota moved its independent candidate petition deadline from August to June. There seems to have been no election administration-related reason for the change. South Dakota independent petitions had always been in August or a later month.⁶⁸ However, in 1999, the state legislators decided that it was not fair that independent candidates could qualify to run against them after the June primary. Like the Arizona change made in 1993, the legislature seems not to have given any thought to the effect on independent presidential candidates.

A third change in 1999 occurred in Arizona where the legislature changed the deadline from late June to early June.⁶⁹ This change was made indirectly when the legislature changed the petition deadline for candidates seeking a place on the September primary ballot from seventy-five to ninety days before the primary. Because the 1993 law set the independent petition deadline on the same day that primary petitions were due, the change automatically moved the deadline for independents as well, even though independent candidates did not participate in the primary.

In 2000, the Arizona legislature moved the deadline for new parties from May to March.⁷⁰ Also in 2000, the North Carolina State Board of Elections ended its policy of accepting new party petitions as late as July and started enforcing the May statutory deadline that was disregarded in 1988 and 1992.

In 2001, the Indiana legislature moved the petition deadline for minor party and independent candidates from July 15 to June 30.⁷¹ Indiana already had one of the most difficult petition requirements in the nation; it was one of only seven states in which Ralph Nader failed to get on the ballot in 2000.⁷² Since 1983, Indiana has required a petition signed by two percent of the last vote cast for Secretary of State, which is usually approximately 30,000 signatures. No statewide minor party or independent candidate has successfully petitioned in Indiana since 2000. It is not known why the Indiana legislature moved the deadline in 2001.

68. The original 1891 deadline was thirty days before the general election. 1891 S.D. Sess. Laws 154. In 1918, it was advanced to ninety days before the general election. 1918 S.D. Sess. Laws 50. In 1971, it was set at a later time, sixty-five days before the general election. 1971 S.D. Sess. Laws 90. In 1977, it was moved back to August. 1977 S.D. Sess. Laws 153.

69. ARIZ. REV. STAT. ANN. § 16-311 (1999).

70. ARIZ. REV. STAT. ANN. § 16-803 (2000). The old law required party petitions 115 days before the primary election; the new law became 180 days before the primary election.

71. IND. CODE § 3-8-6-10 (2006).

72. The other states in which Nader failed to get on the ballot in 2000 were Georgia, North Carolina, Oklahoma, Idaho, Wyoming, and South Dakota.

Also in 2001, the Alabama legislature moved the petition deadline for new parties from mid-July to early June.⁷³ Alabama, like Indiana, has one of the most difficult petition requirements in the nation for minor parties and non-presidential independent candidates. Since 1997,⁷⁴ that requirement is three percent of the last gubernatorial vote (usually about 40,000 signatures). In the nine years that the three percent requirement has been in place, only one statewide petition has succeeded.⁷⁵ It is not known why the Alabama legislature changed the deadline in 2001.

In 2003, the Oklahoma legislature moved the deadline for new parties from May 30 to May 1.⁷⁶ The reason was that Oklahoma requires all parties to nominate by primary, and the legislature was moving the primary from late August to late July.

In 2005, the Colorado legislature moved the deadline for independent presidential candidates to qualify from July to June.⁷⁷ The Secretary of State requested the change because in 2004 the old formula of 120 days before the general election worked out to be July 4, a federal holiday. The Socialist Party presidential candidate submitted his documents on July 5. After the Secretary of State ruled that the candidate filed too late, the candidate won a court order putting him on the ballot on the grounds that when the deadline is on a holiday, the actual filing day is the next day. Of course, the problem (if there was one) could have been solved without setting the deadline twenty days earlier than it had been.

Also in 2005, the New Mexico legislature changed the petition deadline for independent presidential candidates from September to June.⁷⁸ This change was made because in 2004 Ralph Nader used the independent presidential petition to get on the ballot. Although the validity of his signatures was not challenged, his opponents sued the Secretary of State to remove him on the grounds that he could not be an independent presidential candidate in New Mexico while he was the Reform Party presidential candidate in cer-

73. 2001 Ala. Laws 1211.

74. The Alabama petition was increased from one percent of the last gubernatorial vote to three percent in 1995, but it did not take effect until 1997. 1995 Ala. Laws 1872.

75. The only statewide three-percent petition ever successfully completed in Alabama was the Libertarian Party's petition in 2000. Libertarians also appeared on the ballot in 2002, but not because they petitioned that year; instead they had polled enough votes in 2000 to retain their spot on the 2002 ballot.

76. 2003 Okla. Sess. Laws ch. 485, sec. 1.

77. The deadline was changed from 120 days before the general election to 140 days before the general election. 2005 Colo. Sess. Laws 1398.

78. The petition deadline changed from fifty-six days before the general election to the day after the early June primary. 2005 N.M. Laws, ch. 270, sec. 55.

tain other states around the nation.⁷⁹ Both the New Mexico Supreme Court and a United States District Court ruled in favor of Nader. However, because this litigation was not undertaken until after Nader submitted his signatures on September 7 (the old statutory deadline), the State was hard-pressed to print the ballots in the short time remaining for that task after the lawsuits were settled.

VII. 1996–2001: DEADLINE LITIGATION

As noted above, during the years 1983 through 1993, courts always struck down presidential petition deadlines (whether independent, or new party deadlines) that were filed earlier than July 15. This trend continued from 1996 to 2001, although there were fewer cases. In 1996, a United States district court invalidated Arkansas's January petition deadline for new parties.⁸⁰ Also in 1996, the West Virginia Supreme Court construed the State's deadline for an independent or minor party presidential candidate to file a declaration of candidacy to be August 1, not July 1.⁸¹

In 2000, a United States district court invalidated South Dakota's new June petition deadline for independent presidential candidates.⁸² The South Dakota legislature then changed the independent presidential deadline petition back to August.⁸³ That same year, a United States district court in Illinois issued an injunction against the State's June deadline, allowing the Green Party to submit signatures on August 7.⁸⁴ However, the Green Party's attorneys never returned to court to obtain declaratory relief so the June deadline remained in the law.

Also in 2000, the Green Party sued North Carolina over its May petition deadline.⁸⁵ The U.S. District Court denied injunctive relief, however, since the evidence tended to show that even if the deadline had been later, the Green Party still would not have been able to obtain the needed 51,324

79. In the New Mexico Supreme Court, the case was *Nader v. Griego*, No. 28,900 (N.M. Sept. 28, 2004). Nader's case in federal court on the same issue was *Gladstone v. Vigil-Giron*, No. CV-04-1078 JC/DJS (D. N.M. Sept. 28, 2004). Neither is reported.

80. *Citizens to Establish a Reform Party in Ark. v. Priest*, 970 F. Supp. 690 (E.D. Ark. 1996).

81. *State ex rel Browne v. Hechler*, 476 S.E.2d 559 (W. Va. 1996). Everyone agreed that the petition deadline was August 1, but whether a presidential candidate had to submit a declaration of candidacy earlier than August 1 was unclear. *Id.* at 561.

82. *Nader 2000 Primary Committee, Inc. v. Hazeltine*, 110 F. Supp. 2d 1201 (D. S.D. 2000).

83. 2001 S.D. Sess. Laws, ch. 68, sec. 2.

84. *Nader 2000 Primary Committee, Inc. v. Ill. State Bd. of Elections*, No. 00-C-4401 (N.D. Ill. Aug. 25, 2000).

85. *Nader 2000 Primary Committee, Inc. v. Bartlett*, No. 5:00-CV-348-BR (E.D.N.C. Aug. 9, 2000).

signatures. The court did not decide the constitutionality of the North Carolina deadline.

VIII. 2002–2006: LOWER COURTS BEGIN UPHOLDING EARLY DEADLINES

In 2002, the Arizona Supreme Court upheld Arizona's early June petition deadline for independent presidential candidates.⁸⁶ The court wrote:

The national political process has evolved toward a system of ever-earlier presidential primary elections with the result that, by the middle of June in an election year, the identities and positions of the major party candidates have largely been determined. Thus, the concern in *Anderson* that independent voters disaffected from existing political parties would not have sufficient time to coalesce into viable groups is not present here.⁸⁷

No brief in this case suggested that the nation's political system had changed since *Anderson v. Celebrezze* was issued in 1983. There was no evidence in the case on this point.

When evidence is examined, however, one learns that the nation's system had not changed. Even in 1980, the identity of the major party presidential candidates was known in March or April. *The New York Times* index has these 1980 entries for the Republican presidential nomination under the general category of "Presidential Election of 1980": "Consensus Among Influential Republicans is that Ex-President Ford's decision not to run has removed the main obstacle to Ronald Reagan's nomination. March 17, 1980." Also, "Ronald Reagan appears virtually impossible to beat for the Republican nomination following his victory in Illinois. March 20, 1980." Two entries for the Democratic race, both in the April 24 issue, are, "Carter now has 1,136 of the 1,666 needed; Kennedy 593," and "Bob Strauss says Carter's re-nomination is a virtual certainty." Indeed, the reason John B. Anderson decided to run as an independent on April 24 was because he and others had concluded that the major party races were settled. The two major party nominees were going to be Jimmy Carter and Ronald Reagan.

Virtually nothing has changed since 1980. In 1996, 2000, and 2004, the identities of the major party presidential candidates were known as soon as the March primaries were over. Yet courts struck down all challenged May and June presidential deadlines during the years 1984 through 2001.⁸⁸ Somehow, starting in 2002, previously impermissible dates suddenly be-

86. *Browne v. Bayless*, 46 P.3d 416, 408 (Ariz. 2002).

87. *Id.* at 419.

88. In 2001, the Arizona State Court of Appeals struck down Arizona's June petition deadline. *Browne v. Bayless*, 25 P.3d 749 (Ariz. App. Ct. 2001).

came permissible, even though the United States Supreme Court did not issue an intervening decision.

The idea that changes in the nation's presidential primary system made *Anderson* obsolete was also expressed by a United States district court in Texas in 2004. The Texas decision upheld the early May petition deadline for independent presidential candidates, stating, "[a]t the time of *Anderson*, there was no March 'Super Tuesday,' which has resulted in many states' presidential primaries, including Texas's, to be held much earlier in the year."⁸⁹ The Fifth Circuit affirmed this decision.⁹⁰

The Texas Nader decision was especially surprising because the independent presidential deadline was two weeks earlier than the deadline for new party petitions.⁹¹ Nader had pressed two points against the deadline: not only that an early May deadline was illegitimate under *Anderson*, but also that the deadline was discriminatory and obviously not needed for any practical purpose because Texas permitted new parties to submit their petitions two weeks later.⁹² Yet the court said the state was not discriminating against independent presidential candidates, relative to minor or new party presidential candidates, because presidential candidates of new or minor parties were required to file a declaration of candidacy in January, whereas independent presidential candidates were not. The court was mistaken; Texas election law does not require the presidential candidate of a new or minor party to file any declaration in January or at any other time.⁹³ If Texas law required such a declaration of candidacy by a presidential candidate in January, then such a law would obviously be unconstitutional under *Anderson*.

Another adverse deadline decision was rendered by a United States District Court in Ohio. The court upheld Ohio's new party petition deadline, even though that deadline was an entire year before the election.⁹⁴ The decision said

89. *Nader v. Connor*, 332 F. Supp. 2d 982 (W.D. Tex. 2004).

90. *Nader v. Connor*, 388 F.3d 137 (5th Cir. 2004).

91. Another discriminatory feature was that in 2004, Texas required forty-one percent more signatures for an independent presidential candidate than for an entire new party (45,540 versus 64,077). Since the new party petition required fewer signatures and had a later deadline, Nader could have organized a new party in Texas just for the purpose of having an easier route to the ballot. He did not decide to run for president until February 2004, however, and the law passed in 1993 requiring new parties to notify the state on January 2 of an election year if they intended to circulate a petition that year blocked that route to the ballot.

92. Nader complied with the late May petition deadline for new party petitions.

93. See Richard Winger, *An Analysis of the 2004 Nader Ballot Access Federal Court Cases*, 32 *FORDHAM URB. L. J.* 567 (2005), for a more extended discussion of this flaw in *Nader v. Connor*.

94. *Libertarian Party of Ohio v. Blackwell*, Case No. 2:04-cv-08 (S.D. Ohio Aug. 31, 2004). The deadline was November 3, 2003. Ohio required new parties to nominate all its candidates in a primary held in March of the election year.

Plaintiffs nonetheless overlook the facts of this case and instead argue that “a group seeking to qualify as a minor party should not be required to file its qualifying petition a full year before the general election and should not be required to select its candidates eight months before that election if it does not wish to do so.” Such a statement begs the question: *Why not?* States, including Ohio, can permissibly impose regulatory burdens on parties seeking to involve themselves in Ohio’s political process. What is impermissible is when these burdens operate to impose unfair conditions. The “severe burden” that Plaintiffs assert here—that the early filing deadline “prevents new candidacies and new political coalitions from emerging in response to political developments that occur later in the election cycle”—is endemic to *any* filing deadline. There will always be a possibility that any filing deadline, no matter how late in the election cycle it comes, will preclude some candidate or some political coalition from obtaining recognition on the ballot. Ohio has navigated that slippery slope without running afoul of constitutional concerns. Although the state has imposed a burden on political parties, it is a reasonable, nondiscriminatory burden that seeks to maintain the order and integrity of the process while affording due access to the ballot when the proper requirements are met No state is constitutionally required to promote a system designed to accommodate at all times excessive factionalism of the electorate.⁹⁵

The United States district court did not mention any ballot access precedents (from any court) other than *Williams v. Rhodes*,⁹⁶ *Anderson v. Celebrezze*,⁹⁷ and *Jenness v. Fortson*.⁹⁸ The Libertarian Party’s petition was intended to place its presidential nominee on the ballot with the label “Libertarian.” Ohio election laws did not permit the party to place its presidential nominee on the November ballot with the party label unless it submitted 32,290 valid signatures by November 3, 2003. Therefore, the challenged law harmed presidential candidates because pursuant to *Mandel v. Bradley*,⁹⁹

95. *Id.* (citations omitted) (emphasis in original).

96. 393 U.S. 23 (1968).

97. 460 U.S. 780 (1983).

98. 403 U.S. 431 (1971). This case was a challenge to the number of signatures needed in Georgia, not a challenge to the deadline. The plaintiff Socialist Workers Party did not complain about the Georgia petition deadline, which was in September when the case was filed, but which was moved to June while the case was pending.

99. 432 U.S. 177 (1977).

432 U.S. 177 (1977), courts are supposed to evaluate early petition deadlines by noting how often the petition is successfully used. No new or minor party petitions have succeeded in Ohio at any time during the last sixty-five years, unless they were victorious in a ballot access lawsuit, except in 1982, 1996, and 2000.¹⁰⁰ Since the deadline at issue in that case was several months *earlier* than the Ohio deadlines that had been declared unconstitutional in two United States Supreme Court opinions, the district court decision can only be thought of as a defiance of precedent.

On September 6, 2006, the Sixth Circuit reversed the United States district court.¹⁰¹ The Sixth Circuit found that the very early deadline, combined with the substantial number of signatures (one percent of the last vote cast, which in 2004 was 32,290 signatures), imposed a severe burden on the ability of new parties to appear on the ballot. The decision points out that only the Democratic and Republican Parties appeared on the Ohio ballot in 2004, 2002, and all years from 1984 to 1994. However, the decision does not say that an early deadline for new parties is unconstitutional *per se*. Nor does the decision mention that many significant parties in United States history were formed during the spring and summer of presidential election years. The decision implies that Ohio may keep its early deadline if it significantly reduces the number of signatures. Although the decision is final, as of publication, no bills were introduced in the Ohio legislature to alter the new party petition procedures.

In 2004, an Illinois United States district court refused to grant injunctive relief to independent presidential candidate Ralph Nader, even though the same court granted him relief against the identical deadline in 2000. The Seventh Circuit also denied injunctive relief.¹⁰² The Seventh Circuit did not make a decision about the deadline's constitutionality, but suggested that the deadline is necessary because Illinois's challenge procedure tends to be time-consuming. The court did not mention that Illinois requires petitions for candidates to get themselves on primary ballots and that Illinois uses that same challenge procedure for primary petition disputes. Yet Illinois law only requires primary petitions to be submitted ninety-two days before the primary.¹⁰³ If the challenge procedure permits primary petition disputes to be settled in a timely fashion, it seems unnecessary that general election petitions must be submitted 134 days before the general election given that Illinois elections officials always receive far more primary petitions than general election petitions.¹⁰⁴

100. See also Richard Winger, *Ballot Format: Must Candidates be Treated Equally?*, 45 CLEV. ST. L. REV. 87 (1997) (discussing Ohio ballot access law).

101. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006).

102. *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004).

103. 10 Ill. Comp. Stat. 5/7-12 (2006).

104. 10 Ill. Comp. Stat. 5/10-6 (2006).

In 2006, a United States district court in Arizona upheld the State's early June petition deadline for independent presidential candidates.¹⁰⁵ The discussion of the deadline is only two pages long. It says the State needs the period between early June and early November to check the petitions. As in the Illinois case discussed immediately above, the court did not acknowledge that Arizona requires petitions in order to place candidates on primary ballots, and the state only requires primary petitions to be submitted ninety days before the primary. Like Illinois, Arizona has far more primary petitions to check than it has independent candidate petitions,¹⁰⁶ yet Arizona requires 146 days between the independent petition deadline and the November election. If the State can cope with a ninety-day primary petition deadline, it seems obvious that it should be able to cope with a ninety-day general election petition deadline as well.

The Arizona federal court also asserted, "[t]he presidential primary process has changed since *Anderson* was decided more than [twenty] years ago. In 2004, ten states held their primary elections on 'Super Tuesday,' which fell on March 2nd Many of the concerns raised in *Anderson* do not have the same significance today." This argument is not persuasive, since even in 1980, the Republican Party nomination was virtually locked up for Ronald Reagan in March and the Democratic nomination for President Jimmy Carter in April.¹⁰⁷ Also, of course, the vice-presidential nomination of a major party is always in suspense until the date of the national conventions, or perhaps a week earlier.¹⁰⁸ For example, in 2000, Al Gore did not announce that Senator Joseph Lieberman was his choice for vice-president until August 7.¹⁰⁹ George W. Bush did not announce that Dick Cheney was his choice for vice-president until July 25, although the news leaked out a day earlier.¹¹⁰ Finally, no one knows what a major party's platform will be until the convention itself. In 2004, there was considerable uncertainty about the Democratic Party's position on U.S. military involvement in Iraq until the convention itself passed the platform.

105. *Nader v. Brewer*, No. CV-04-1699-PHX-FJM, 2006 WL 1663032, at *6 (D. Ariz. June 8, 2006).

106. Since 1993, when Arizona moved the independent petition deadline from September to June, no independent presidential candidates have qualified for the Arizona ballot and only one (Nader in 2004) turned in any petitions for that purpose. There is very little burden on Arizona election officials to check independent petitions because so few are ever submitted.

107. See *supra* Part VIII for more detail.

108. Except that there is seldom any suspense when a president is running for re-election since no sitting vice-president has been denied re-nomination since 1944.

109. Katharine Q. Seelye, *The 2000 Campaign: The Vice President; Lieberman will run with Gore; First Jew on a Major U.S. Ticket*, N.Y. TIMES, Aug. 8, 2000, at A1.

110. See Alison Mitchell, *The 2000 Campaign: The Running Mate; Bush is Reported Set to Name Cheney as Partner on Ticket*, N.Y. TIMES, July 26, 2000, at A.21.

One of the ironies of recent court acceptance of early deadlines for minor party and independent presidential candidates is that state laws have been changed recently to give qualified political parties even more time in which to formally choose their presidential and vice-presidential candidates. In 2002, the Republican Party set the dates of its 2004 national convention as August 30 through September 2. During 2003, the party persuaded the state legislatures of seven jurisdictions to change their deadlines for qualified parties to certify the names of their presidential and vice-presidential candidates.¹¹¹ Without the changes, state law would have required the Republican Party to certify the names of its national ticket before it had formally chosen that ticket. In 2008, the Republican national convention will be even later, taking place September 1–4. It is ironic that all states will permit an old party to wait until September 4 to formally choose its candidates, yet Texas requires an independent presidential candidate to have finished petitioning four months earlier. It is even more ironic that lower federal courts do not consider such policy to be discriminatory.

In 2003 and 2005, the United States Supreme Court was asked to hear *Browne v. Bayless*¹¹² and *Nader v Connor*,¹¹³ but it refused to hear both cases. Since it is not likely that the Texas legislature will voluntarily ease ballot access requirements for independent presidential candidates in 2007, no independent presidential candidate will be able to qualify in Texas in 2008, unless he or she submits 74,108 signatures by May 10, 2008. However, the petition cannot begin to circulate until after the March 2008 primary, and voters who voted in that primary may not sign the petition.

IX. CONSEQUENCES OF THE 2002–2006 COURT DECISIONS

Since no incumbent president will be running for re-election in 2008, both major parties will have intensely competitive presidential nomination races. Although it is normal for the early presidential primaries to settle these races, one cannot know that the 2008 early presidential primaries will settle them. One can easily imagine a scenario in the Republican 2008 contest in which social conservatives back one candidate, and those who disagree with the social conservatives solidify behind another candidate. The social conservative candidate might win the Southern and prairie state primaries, while the other leading candidate might win the “blue state” primaries. It is possible that the cumulative results of all the primary contests will be

111. Alabama, California, Delaware, Illinois, Maryland, Utah, and the District of Columbia.

112. 537 U.S. 1088 (2002), cert. denied. The issue was Arizona’s early June petition deadline for independent presidential candidates.

113. 544 U.S. 921 (2005), cert. denied. The issue was Texas’s early May petition deadline for independent presidential candidates.

close, and that the Republican National Convention itself will make the meaningful choice on September 3 or September 4, 2008. By then, it will be far too late for an independent or the nominee of a new party to enter the race.

The United States Supreme Court said in 1974 that “[i]t is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues.”¹¹⁴ Virtually all nations that are considered to have free elections always give their voters a choice of at least five or six parties.¹¹⁵ Since many Republican and Democratic state legislators support election laws that prevent a free range of choices in November, the courts should continue to follow *Anderson v. Celebrezze*.

114. *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

115. Mexico's 2006 presidential election had five candidates on the ballot. Each of the last three British House of Commons has had an average of six parties on the ballot in the average district. Canada has twelve ballot-qualified parties.