

# Death by a Thousand Signatures: The Rise of Restrictive Ballot Access Laws and the Decline of Electoral Competition in the United States

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## I. INTRODUCTION: DEMOCRACY AND THE COUNTERMAJORITARIAN PROBLEM

When Saddam Hussein was re-elected President of Iraq in October of 2002, he claimed what undoubtedly ranks as the greatest electoral victory of all time, winning 100% of the vote in an election in which 100% of the electorate voted.<sup>1</sup> This remarkable performance edged out Hussein's own previous best, when he received only 99.96% of the vote in 1995.<sup>2</sup> Few regard these elections as legitimate, of course; Hussein is widely understood to have been a dictator, not a democratically-elected president. Hussein ran unopposed in both elections, and voters' only choices were "Yes" or "No" in a referendum on whether to extend Hussein's absolute power for another seven-year term.<sup>3</sup> As the world knows, words like fraud and intimidation do not begin to capture the conditions under which these elections took place.<sup>4</sup>

The sham elections in Iraq under Saddam Hussein are perhaps the best recent evidence of what has been called the "nonnegotiable political status" of democracy in the modern era: the idea that democracy has attained an "obligatory character" because it is demonstrably superior to other forms of government.<sup>5</sup> Today even absolute dictators seldom reject

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1. John F. Burns, *11 Million Voters Say the Iraqi President is Perfect*, N.Y. TIMES, Oct. 17, 2002, at 19.

2. *Id.*

3. *Id.*

4. *Id.*

5. IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY 1* (Princeton Univ. Press 2003).

democracy outright, but argue instead that their people are not yet ready for democracy or, as in Hussein's case, that their governments are actually more democratic than they appear.<sup>6</sup>

But if democracy has attained near-unanimous endorsement as a political ideal, considerably less agreement exists as to what democracy actually entails. When the Greeks coined the term *demokratia* to describe the government of their city-states some 2500 years ago, the system was distinguished from the aristocracies that preceded it by the political equality of each citizen.<sup>7</sup> The word *demokratia* means "rule of the people," or as we say today, majority rule. These two concepts, political equality and majority rule, remain fundamental to any modern theory of democracy, and no political system that does not aspire to both can rightly be called democratic. But democracy remains a contested ideal because these fundamental concepts are in tension. The tension arises because majority rule can produce outcomes that infringe upon the political equality of the minority: most obviously, it can prevent the minority from participating in the political process.<sup>8</sup> When and how to protect the minority in a system of majority rule—the "countermajoritarian problem" of democracy—is an ongoing question for any democratic state.

This Article explores one instance of the countermajoritarian problem in American democracy: how to protect the rights of minor parties and independent candidates participating in an electoral system dominated by two major parties. In particular, this Article focuses on the effect of modern ballot access laws on candidates' rights, arguing that courts ought to treat these laws as a presumptively impermissible form of "collusion in restraint of democracy."<sup>9</sup> Although the article borrows the language of antitrust law, this argument is rooted in core constitutional principles and rights guaranteed under the First and Fourteenth Amendments. Nevertheless, the analogy to antitrust law is useful as a means to address the decline of electoral competition in the United States and its consequences for the democratic character of our government. Antitrust

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6. *Id.* See also Burns, *supra* note 1 at 19 (A spokesperson for the Iraqi government defended the claimed turnout and 100% mandate as a "true" figure. "Don't evaluate this from an intellectual viewpoint, or make comparisons from your experience in the West; Iraq is quite different," the spokesperson told reporters.). See also ROBERT DAHL, ON DEMOCRACY 100 (Yale Univ. Press 1998) (stating that "V.I. Lenin once asserted: 'Proletarian democracy is a million times more democratic than any bourgeois democracy; Soviet government is a million times more democratic than the most democratic bourgeois republic.'").

7. DAHL, *supra* note 6, at 11–12. The chief characteristic of the Greek city-state was an assembly in which all citizens were entitled to participate, and in which each citizen had an equal opportunity to serve as the most important officer, who was chosen by random lottery.

8. See *infra* Part II.

9. See SHAPIRO, *supra* note 5, at 60–62 for an argument that some bipartisan legislation might constitute a form of "collusion in restraint of democracy."

law also provides a legal framework for distinguishing between nonpartisan and bipartisan legislation, as the analogy helps distinguish between legitimate regulation of the political process by the state and collusion in restraint of democracy by the two major parties.<sup>10</sup>

Part II begins with a discussion of elections' function in a democracy, addressing the lack of electoral competition in the United States and identifying prominent anticompetitive features of American democracy, mainly modern ballot access laws. Part II provides a brief history of ballot access laws in the United States and an analysis of their justification. Part III analyzes the Supreme Court's modern ballot access jurisprudence, starting with the first minor party challenge to a modern ballot access law in 1968 and tracing the erosion of candidates' rights since then. Finally, Part IV sketches an approach to ballot access jurisprudence that offers greater protection to candidates' rights by analyzing ballot access laws according to the principles of antitrust law.

## II. THE ROLE OF ELECTIONS IN DEMOCRACY

Most of the important decision-making in the Greek city-states was performed by an Assembly, to which all citizens were admitted.<sup>11</sup> In this form of democracy, political equality was secured to the extent that each citizen had an equal opportunity to participate directly in the decisions by which he would be bound.<sup>12</sup> While direct democracies still exist (for example, in the local governments of some New England states), practical considerations strictly limit their size.<sup>13</sup> Modern democratic governments are therefore representative; the sheer number of people involved makes the direct participation of each person impossible. For this reason, the election of representatives can be considered the fundamental transaction of modern democracy, because elections are the primary means by which citizens participate in the government that represents them.

The reasons democracy remains a contested ideal become apparent when the mechanics of the fundamental voting transaction are fleshed out. It is not clear, for example, exactly how elections bring about a representative government. Under one view, elections ensure that government represents the people by causing elected officials to be responsive to voters.<sup>14</sup> Under this view, a representative government is one that

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10. *See id.*

11. *See* Jon Elster, *Accountability in Athenian Politics*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 259–60 (Cambridge Univ. Press 1999).

12. Women, slaves, and resident aliens were all excluded from political participation. *See id.*

13. *See* DAHL, *supra* note 6, at 105–12, for an account of the practical limitations of direct democracy.

14. *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 10 (Adam Przeworski, Susan Stokes, & Bernard Manin eds., Cambridge Univ. Press 1999).

adopts the policies voters signal that they prefer. Alternatively, a government might be considered representative if elections enable citizens to hold elected officials accountable.<sup>15</sup> Under this view, a government is representative of whatever policies it adopts as long as voters can hold elected officials accountable by voting for or against them in the next election.<sup>16</sup>

Further disagreement exists over what counts as a representative government and what a government must do in order to represent the people. Some argue that elected officials must act on the wishes of the majority; others argue that officials should act in the way the officials think is best for the majority.<sup>17</sup> Some argue that officials should act as the majority wanted when a policy was adopted; others argue that officials should act as the majority would want in retrospect.<sup>18</sup> Disagreement exists even with regard to who constitutes the majority—is it the specific majority that elected a representative, or any majority? None of these questions has a definite answer; the only thing that seems clear is that a government is *not* representative if it acts in a way that no majority wants.<sup>19</sup>

One important fact cannot be overemphasized in light of these disagreements. Lack of theoretical consensus has not inhibited the development of democracy in the real world. Since 1980, at least eighty-one countries, thirty-three of them military dictatorships, have shifted from authoritarian to democratic rule.<sup>20</sup> Moreover, the basic formal structure of representative democracy has not changed for the last two centuries: in every representative democracy, citizens select representatives in elections; citizens are free to make demands, but not to issue binding instructions; and the representatives remain subject to periodic elections.<sup>21</sup> What this illustrates—the proliferation of democratic states and the historical stability of democratic structures—is that democracy is an eminently viable form of government, even if theorists cannot agree as to how or why.

Given the divergent views with respect to the basic purpose and mechanics of democratic government, perhaps the most that can be said

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. See generally *id.* at 4–10.

20. SHAPIRO, *supra* note 5, at 2. See also SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (Univ. of Okla. Press 1991) for an account of the spread of democracy through Africa, Asia, Latin America, South America, Eastern Europe and the former Soviet Union.

21. DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION, *supra* note 14, at 3.

with certainty about the role of elections in representative democracy is that they issue an authorization to rule.<sup>22</sup> But certain conditions follow from this basic fact that are consistent with *any* theory of democracy. First, if the authorization is to be valid, then it must be given freely—citizens must be free to vote for the candidate of their choice. Second, candidates must be free to participate in elections and compete for citizens' votes. Third, entry barriers should not be so great that candidates advocating alternative policies are excluded from the competition. To be sure, these "competitive conditions" prescribe an ideal that no actual democracy completely fulfills. Ultimately, however, a state is more democratic to the extent that it meets these conditions, and less democratic to the extent that it falls short of them.<sup>23</sup>

Generally speaking, the more restrictive the political process—the more citizens it excludes, and the more limitations it imposes on those who do participate—the less competitive the electoral system and the less democratic the government it produces.<sup>24</sup> At one extreme are autocratic states with sham elections; at the other is ideal democracy, in which every citizen enjoys an equal opportunity to participate directly in the decisions by which he or she is bound. Modern democratic states inevitably fall short of this ideal because they necessarily rely on a system of representation. Even within this limitation, however, states can become more democratic by adopting rules that enhance rather than restrict electoral competition.

#### *A. Electoral Competition and Anticompetitive Conditions in American Democracy*

This article began with an account of the sham elections that Saddam Hussein staged every seven years in Iraq. Those elections provide a stark illustration of a system that exhibits the formal characteristics of representative democracy—citizens choosing representatives in regularly scheduled elections—but which is utterly devoid of electoral competition. The Iraqi people may have elected Hussein, but they were not free to vote for another candidate, nor was Hussein compelled to compete against any other candidates. But if Hussein's sham elections represent one extreme on the democracy spectrum, it would be incorrect to suggest that American elections represent the other. In fact, a growing number of

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22. *Id.* at 22.

23. See generally *id.* See also SHAPIRO, *supra* note 5; DAHL, *supra* note 6. The notion that democracy requires "free, fair, and competitive elections" is so uncontroversial that many treat it as the definition of democracy itself. See, e.g., Larry Diamond, *Universal Democracy?*, POL'Y REVIEW ONLINE, <http://www.policyreview.org/jun03/diamond.html> (last visited Dec. 19, 2005).

24. See generally DAHL, *supra* note 6.

American elections have only one candidate, and competition is declining throughout our entire electoral system.

In Hawaii, for example, more than one-third of the elections for the state legislature routinely go uncontested.<sup>25</sup> Large numbers of voters in Hawaii, having no other options, often cast blank ballots to protest their lack of choice.<sup>26</sup> Yet Hawaii is not even in the top ten states nationally with the highest percentage of uncontested elections. In 2002, South Carolina topped that list, with 71.8% of its elections for the state legislature uncontested.<sup>27</sup> Alaska rounded out the 2002 list, coming in at number ten with 55% of its elections uncontested.<sup>28</sup> In 2004, Arkansas topped the list at 74.6%, and North Carolina was number ten with 52.4% of its elections uncontested.<sup>29</sup> But if these states represent the worst cases, then Hawaii represents the norm: the national average of uncontested elections for state legislatures was 36.9% in 2002, and 38.7% in 2004.<sup>30</sup>

Electoral competition is suffering at the federal level as well. Competition in Congressional elections, measured by the number of relatively close races, has been declining for more than fifty years. The 2002 and 2004 elections, respectively, were the least competitive yet. Of the 435 seats up for election in 2004, only twenty-two were decided by a margin of less than ten percentage points, while 172 were either uncontested or won by a margin of at least forty percentage points; incumbents, meanwhile, enjoyed a ninety-nine percent re-election rate in 2004.<sup>31</sup> Competition for control of the House itself now concentrates on a diminishing number of districts scattered across the country, while the number of safe seats that go uncontested has increased dramatically since the 1970s.<sup>32</sup>

The competitive situation of Senate elections is similar, if not quite as bleak. Of the twenty-eight incumbents that ran for re-election in 2000, only twelve faced significant competition.<sup>33</sup> In Arizona, not one of the 800,000 registered Democrats bothered to challenge Republican Senator Jon Kyl for his seat, and many other veteran Senators routinely run for re-election unopposed. For example, Senators such as Edward Kennedy of Massachusetts, Orrin Hatch of Utah, and Daniel Akaka of Hawaii

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25. *Id.*

26. See *Burdick v. Takushi*, 504 U.S. 428, 442–43 (1992) (Kennedy, J., dissenting).

27. *CTR. FOR VOTING AND DEMOCRACY*, *supra* note 25.

28. *Id.*

29. *Id.*

30. *Id.*

31. Alan I. Abramowitz, Brad Alexander, & Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, *J. OF POL.* (forthcoming Feb. 2006). See also Carl Weiser, *For Most Incumbents in Congress, Re-election is a Sure Bet*, *GANNETT NEWS SERVICE* (Oct. 20, 2000), available at [http://www.fairvote.org/op\\_ed/mort1000.htm#carl](http://www.fairvote.org/op_ed/mort1000.htm#carl).

32. *Id.*

33. Weiser, *supra* note 31.

usually face little or no opposition in their re-election bids.<sup>34</sup> The rate of re-election for incumbent Senators has not dropped below seventy-five percent since 1980, and is usually closer to ninety percent or higher.<sup>35</sup>

Competition is also declining in presidential elections. Incumbent presidential candidates do not run unopposed, of course, but competition is narrowed by other means. Most notably, the Electoral College functionally divides the race for President into forty-eight separate, statewide, winner-take-all elections (except for Nebraska and Maine, which allocate their electors according to the popular vote).<sup>36</sup> Because the same major party consistently wins most states, the popular vote is competitive in only a dozen or so battleground states.<sup>37</sup> Everywhere else, presidential candidates are free to treat the vote as a foregone conclusion.<sup>38</sup> And the situation is only getting worse: in 1960, twenty-four states were considered battlegrounds, but in 2004, only thirteen states were competitive, and competition is declining in five of those states.<sup>39</sup> Even the 2004 presidential election, which was considered so divisive, was no more competitive for its perceived acrimony. The same dynamic between safe states and battleground states played out, while the candidates were widely reported to converge on important policy issues rather than to compete by offering alternative positions.<sup>40</sup>

Many factors are to blame for the decline of electoral competition in the United States. Probably the most widely recognized is the high cost of running for office.<sup>41</sup> Since the Supreme Court's decision in *Buck-*

34. *Id.*

35. The Big Picture: Reelection Rates over the Years, <http://www.opensecrets.org/bigpicture/reelect.asp?Cycle=2002&chamb=S> (last visited Nov. 27, 2005).

36. U.S. CONST. art. II, § 1, cl. 2–3. However, it is important to note that the Constitutional provisions establishing the Electoral College do not prescribe a winner-take-all system. See Lee Mortimer, *Elections Give Voters Too Little Say*, FAIRVOTE.ORG (2000), available at [http://www.fairvote.org/op\\_ed/mort1000.htm#lee](http://www.fairvote.org/op_ed/mort1000.htm#lee).

37. See Mortimer, *supra* note 36.

38. *Id.*

39. See CTR. FOR VOTING AND DEMOCRACY, *THE SHRINKING BATTLEGROUND: THE 2008 PRESIDENTIAL ELECTIONS AND BEYOND*, available at [http://www.fairvote.org/media/perp/Shrinking\\_Battleground\\_Final.pdf](http://www.fairvote.org/media/perp/Shrinking_Battleground_Final.pdf) (last visited Nov. 27, 2005).

40. See, e.g., Michael Kranish & Yvonne Abraham, *As rivals focus, stances seem to blur*, BOSTON GLOBE, Sept. 5, 2004, at A29. "Rifts are few on big issues" was the sub headline on this story, which featured a sidebar detailing the similarities between the candidates' positions on issues like tax cuts, health care, Social Security, the war on terror, and jobs. Among the most obvious examples, both candidates favored the military occupation of Iraq by the United States, even though roughly half the population supported the withdrawal of American troops. See Interview by Gwen Ifill, PBS Newshour, with Andrew Kohut, Pew Research Center, in Washington, D.C. (Apr. 26, 2004), available at [http://www.pbs.org/newshour/bb/politics/jan-june04/public\\_04-26.html](http://www.pbs.org/newshour/bb/politics/jan-june04/public_04-26.html) (citing poll data indicating that 53% of Americans believe American troops should not remain in Iraq).

41. See CTR. FOR RESPONSIVE POL., *2004 ELECTION OVERVIEW: WINNING VS. SPENDING* (2005) [hereinafter *WINNING VS. SPENDING*], available at <http://www.crp.org/overview/bigspenders.asp?cycle=2004> (demonstrating that the top fifty candidates for seats in the U.S. House of Repre-

ley v. Valeo, which struck down limits on overall campaign expenditures,<sup>42</sup> the cost of running for office has spiked. Despite passage of the Bipartisan Campaign Finance Reform Act, otherwise known as the McCain-Feingold Bill, the cost is only increasing.<sup>43</sup> The 2004 presidential election, for example, was the most expensive in history, with the two major party candidates spending a combined total of more than \$650 million.<sup>44</sup> In the most expensive Senate race of 2004, two candidates from South Dakota spent a combined total of more than \$36 million.<sup>45</sup> In the most expensive House race of 2004, two candidates from Texas District 32 spent a combined total of more than \$9 million.<sup>46</sup> Since candidates who outspend their rivals nearly always win the election, the post-Buckley campaign finance system presents a strong disincentive for non-wealthy candidates to run.<sup>47</sup> The de facto exclusion of these candidates from the electoral system is now so prevalent that the phenomenon has become known as the “wealth primary.”<sup>48</sup>

Gerrymandering is another factor contributing to the decline of competition in American elections.<sup>49</sup> The process of drawing electoral maps in a manner that gives one party an advantage by diluting the opposition’s voting strength is nearly as old as American democracy itself, but it remains widespread today.<sup>50</sup> Since gerrymanders purposely aggregate like-minded voters, they render the outcome of the vote a foregone conclusion, effectively eliminating electoral competition in the gerrymandered district. The decline of competition in U.S. House elections bears this out: not only has the number of safe House seats risen dramatically in the last few decades, but the proportion of safe to competitive seats has increased with each redistricting process since 1980.<sup>51</sup>

Although they receive relatively little scrutiny, modern ballot access laws are probably the most obviously anticompetitive feature of the American electoral system. One reason for the inattention may be that

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sentatives commonly outspend the next highest vote-getter by a ratio of ten to one); see also JAMIN RASKIN & JOHN BONIFAZ, CTR. FOR RESPONSIVE POL., THE WEALTH PRIMARY (1994).

42. 425 U.S. 946 (1976).

43. See WINNING VS. SPENDING, *supra* note 41.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* See also RASKIN & BONIFAZ, *supra* note 41.

48. See RASKIN & BONIFAZ, *supra* note 41.

49. One of the most notorious recent examples occurred when Republicans gained control of the Texas House in 2002. Democratic Representatives actually fled the state en masse in order to deprive Republicans of the quorum necessary to vote on a newly gerrymandered electoral map. See *NewsHour with Jim Lehrer: Power Politics* (PBS television broadcast Dec. 25, 2003), available at [http://www.pbs.org/newshour/bb/politics/july-dec03/districts\\_12-25.html](http://www.pbs.org/newshour/bb/politics/july-dec03/districts_12-25.html).

50. See Abramowitz, Alexander, & Gunning, *supra* note 31.

51. *Id.*

these laws arose at different times and in different states across the nation over a span of more than fifty years.<sup>52</sup> Nevertheless, ballot access laws impose direct barriers to entry on minor party and independent candidates, and are far more restrictive than necessary to further any legitimate state interest.<sup>53</sup> Moreover, the laws discriminate based on party status, imposing different requirements on major party, minor party, and independent candidates.<sup>54</sup> Major party candidates are automatically listed on the ballot as long as their party achieved some percentage of the vote in the previous election.<sup>55</sup> Minor party and independent candidates, however, can rarely hope to qualify under this criterion and must overcome an increasingly burdensome battery of substantive and procedural barriers.<sup>56</sup>

The legal structure of modern ballot access laws appears at first to be value-neutral and its party-based classifications appear rational.<sup>57</sup> Well-established political parties should not be required to demonstrate over and over again what previous electoral results clearly show—that the parties enjoy a significant amount of voter support. Minor political parties and independent candidates, by contrast, have usually made no such showing, and ought to be required to demonstrate some measure of voter support before gaining the right to appear on the ballot. But this legal structure creates a conflict of interest for the major party politicians who enact ballot access laws through the state legislatures.<sup>58</sup> Since major party candidates need not comply with the laws' requirements, major party politicians have an incentive to exclude competitors by enacting

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52. See Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of Jenness v. Fortson*, 1 ELECTION L.J. 235, 236–37 (2002).

53. See KAREN M. MARKIN, FED. ELECTION COMM'N, *BALLOT ACCESS 3: FOR PRESIDENTIAL CANDIDATES* (1995) for a state-by-state guide to ballot access requirements for minor party and independent candidates. See also Bradley A. Smith, *Regulation and the Decline of Grassroots Politics*, 50 CATH. U. L. REV. 1, 5 (2000); Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167 (1991). Bradley A. Smith, a former Federal Election Commissioner, is openly critical of restrictive ballot access laws as lacking any legitimate state purpose.

54. See MARKIN, *supra* note 53.

55. See *id.*

56. A nearly exhaustive account of the hurdles facing minor party and independent candidates is available at <http://www.ballot-access.org> (last visited Nov. 15, 2005).

57. Except for Nebraska, which holds an officially nonpartisan election for its unicameral state legislature, the legislature of every state has been controlled by the Republicans and Democrats since at least 1938. Usually one of the major parties controls the legislature by virtue of its majority, but in some cases the legislature is split between the two major parties. See NAT'L CONF. OF STATE LEGISLATURES, *PARTISAN CONTROL OF STATE LEGISLATURES, 1938–2004* (2005), available at <http://www.ncsl.org/programs/legman/elect/hstptyct.htm>. Currently, fewer than two dozen of the 7382 state legislators are independent or minor party members. See *id.*

58. See *id.*

excessively restrictive laws.<sup>59</sup> And in fact, as ballot access laws have become more restrictive, the formerly “permanent minor parties” in the United States have appeared on fewer and fewer state ballots.<sup>60</sup>

The self-interested nature of ballot access legislation enacted by major party politicians is particularly troubling given that the laws are enforced by Secretaries of State who invariably are major party politicians themselves.<sup>61</sup> The decision to include particular candidates on the ballot thus presents these officials with a conflict of interest, since selective enforcement of ballot access laws can be an effective means of excluding candidates for partisan purposes. In its 2005 report, “Building Confidence in U.S. Elections,” the Commission on Federal Election Reform, a bipartisan body headed by former Democratic President Jimmy Carter and former Republican Secretary of State James Baker, noted the danger of this system:

Most other democratic countries have found ways to insulate electoral administration from politics and partisanship by establishing truly autonomous, professional, nonpartisan and independent national election commissions that function almost like a fourth branch of government. The United States, too, must take steps to conduct its elections impartially both in practice and appearance.<sup>62</sup>

Despite the Commission’s unequivocal language, the report never specifically addresses the conflict of interest that ballot access laws pose. But if American elections are to be conducted impartially, then the ability of self-interested incumbents to exclude competitors must be addressed. It is no coincidence that voter turnout in the United States has been declining steadily for decades as laws that restrict voter choice have increased.<sup>63</sup>

### *B. A Brief History of Ballot Access Laws in the United States*

The first elections in the United States were conducted orally or by a showing of hands, and thus required no ballot or ballot access laws.<sup>64</sup>

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59. *Id.*

60. See Winger, *supra* note 52, at 237 (noting that the nation’s “permanent minor parties” of the 1930s and 1940s, which included the Socialist, Prohibition, Communist, and Socialist Labor Parties, are appearing on fewer and fewer state ballots).

61. See generally The National Association of Secretaries of State, Secretary of State Biography Links, [http://www.nass.org/sos/sos\\_bios.htm](http://www.nass.org/sos/sos_bios.htm) (last visited Nov. 27, 2005).

62. See COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 49 (2005), available at [http://www.american.edu/ia/cfer/report/full\\_report.pdf](http://www.american.edu/ia/cfer/report/full_report.pdf).

63. See FED. ELECTION COMM’N, NATIONAL VOTER TURNOUT IN FEDERAL ELECTIONS: 1960–1996, <http://www.fec.gov/pages/htmlto5.htm> (last visited Nov. 27, 2005).

64. ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 1–6 (1917).

But the public nature of these elections lead to rampant intimidation and bribery of voters, and within twenty years, most states had shifted to elections conducted by paper ballot.<sup>65</sup> These first paper ballots were not subject to state regulation; rather, voters created their own ballots by writing a candidate's name on a piece of paper and delivering it to the polling station.<sup>66</sup> Paper ballots thus helped reduce intimidation and bribery by enabling voter privacy. Eventually, political parties began printing ballots listing only their candidates' names, and distributing them to as many voters as possible.<sup>67</sup> These ballots were brightly colored and distinctive, so that it was readily apparent which candidate a voter had selected.<sup>68</sup> The loss of voter privacy led once again to an epidemic of vote buying, as onlookers could easily verify a voter's choice. Fraud and harassment also became widespread: many voters were coerced into voting for particular candidates, or failed to vote altogether from fear of retribution.<sup>69</sup> As the Supreme Court has noted, "these early elections were not a very pleasant spectacle for those who believed in democratic government."<sup>70</sup>

The first official state ballots were not printed until 1888, when they were introduced in Massachusetts and New York.<sup>71</sup> They were known as "Australian ballots" because they originated in several Australian provinces that had experienced similar problems with voter intimidation and fraud.<sup>72</sup> The primary purpose of the Australian ballots was to restore voter privacy by including all candidates for office on one confidential official state ballot. Regulation of ballot access by the state arose only as a necessity incidental to this purpose. The intention was to grant free and easy ballot access to every candidate in order to ensure the confidentiality of every voter's choice. Many states did not impose substantive requirements on prospective candidates, but would list any group's candidate by simple request; other states required a small number of signatures on a petition—500 signatures was the most common requirement, and 1000 signatures the second most common.<sup>73</sup> In 1924, only 50,000 signatures were required to place a new party on the ballot in

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65. See *Burson v. Freeman*, 504 U.S. 191, 202 (1992) (citing ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 1–6 (1917); JOSEPH P. HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES 15–16 (1934); JERROLD RUSK, THE EFFECT OF THE AUSTRALIAN BALLOT REFORM ON SPLIT TICKET VOTING: 1876–1908, 8–11 (1968)).

66. *Burson*, 504 U.S. at 200.

67. *Id.*

68. *Id.*

69. See *id.* (citing SPENCER D. ALBRIGHT, THE AMERICAN BALLOT 14–20 (1942)).

70. *Id.* at 202.

71. *Id.* at 203.

72. *Id.*

73. See Winger, *supra* note 52, at 236.

forty-eight states, a figure representing 0.15% of the number of people who had voted in the previous election.<sup>74</sup>

Ballot access laws that imposed significant substantive requirements first arose in the twentieth century during the “red scare” that swept the nation after World War I. The fear of infiltration was so great that some states actually banned the Communist Party.<sup>75</sup> But while the red scare faded, ballot access laws imposing harsh substantive requirements on minor party and independent candidates proliferated. The most pervasive requirement is the signature petition. Prior to 1936, no state had ever required a candidate for president to submit more than 25,000 signatures to gain ballot access, and as late as 1948, the majority of states still granted ballot access to any candidate who submitted as few as 500 to 1000 signatures.<sup>76</sup> Today, however, many state petition requirements are defined as a percentage of the state’s registered or actual voters. Oklahoma, for example, requires signatures from five percent of the voters in the last presidential or gubernatorial election.<sup>77</sup> North Carolina requires signatures from two percent of its registered voters; California, Florida and Georgia require signatures from one percent of their registered voters.<sup>78</sup> While these percentages appear minimal, the gross figures represent a drastic increase in the number of signatures actually required: today Oklahoma requires more than 73,000 signatures; California requires more than 165,000; North Carolina and Florida require more than 100,000; and Georgia requires more than 40,000.<sup>79</sup> The number of signa-

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74. Richard Winger, *The Importance of Ballot Access*, LONG TERM VIEW (1994), reprinted in *BALLOT ACCESS NEWS*, <http://www.ballot-access.org/winger/iba.html> (last visited Nov. 27, 2005).

75. D. MAZMANIAN, *THIRD PARTIES IN PRESIDENTIAL ELECTIONS* 92 (Brookings Instit. 1974).

76. See Winger, *supra* note 52, at 236; see also WILLIAM B. HESSELTINE, *THE RISE AND FALL OF THIRD PARTIES* 103 (Pub. Aff. Press 1948). Although nominally a history of minor parties in America, Hesselstine’s book is more accurately an exhortation, aimed at liberals, to found a new political party. In this light, Hesselstine’s observation that “[i]n actual fact, [the] legal obstacles are more apparent than real” is revealing, given the publication date of his book.

77. See Press Release, OKBallotChoice.org, *No Openness in the House, Say Ballot Reformers* (2005), available at <http://www.jmbzine.com/okballotchoice/news030305.htm> (last visited Nov. 22, 2005).

78. See MARKIN, *supra* note 53. A federal judge declared North Carolina’s petition requirement for independent candidates unconstitutional in July 2004 because two percent of the number of registered voters is a figure significantly larger than the requirement imposed on minor party candidates, which is two percent of the voters in the last gubernatorial election. See *DeLaney v. Bartlett*, 370 F. Supp. 2d 373 (M.D.N.C. 2004). Legislation is apparently pending in North Carolina as a result of this case.

79. See OKBallotChoice.org, *supra* note 77, for Oklahoma figures. Other signature requirements were derived from the number of registered voters in each state as of 2004. See North Carolina State Bd. of Elections, *Reports & Data*, [http://www.sboe.state.nc.us/index\\_data.html](http://www.sboe.state.nc.us/index_data.html) (last visited Nov. 27, 2005); California Secretary of State, *Report of Registration*, [http://www.ss.ca.gov/elections/rot/reg\\_stats\\_10\\_18\\_04.pdf](http://www.ss.ca.gov/elections/rot/reg_stats_10_18_04.pdf) (2004); Florida Secretary of State, *County Registration by Party*, <http://election.dos.state.fl.us/voterreg/pdf/2004/2004genParty.pdf> (2004); Georgia Secretary

tures required to place a new party on the ballot in all fifty states today approaches 1,000,000.<sup>80</sup>

Many states also limit the timeframe in which potential candidates are permitted to collect petition signatures, and impose other limitations on the manner in which signatures may be collected and who may collect them.<sup>81</sup> Texas, for example, prohibits primary voters from signing petitions.<sup>82</sup> Hawaii prohibits primary voters from “splitting” their tickets by voting for candidates from more than one party, so that voters have a strong incentive not to vote for a non-major party candidate.<sup>83</sup> In addition, each state establishes its own complex set of formal procedures regulating details such as the size and type of paper on which signatures may be collected, and the manner in which pages must be labeled and numbered. These requirements, like the petition requirements themselves, invariably apply only to minor party and independent candidates.<sup>84</sup> The violation of any one of them is grounds for excluding prospective candidates from the ballot—a decision that is made at the discretion of a partisan Secretary of State.<sup>85</sup>

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of State, Voter Registration and Gender by Month, [http://www.sos.state.ga.us/elections/voter\\_registration/monthly\\_race\\_gender.pdf](http://www.sos.state.ga.us/elections/voter_registration/monthly_race_gender.pdf) (2005).

80. See *2004 Petitioning for President*, BALLOT ACCESS NEWS 19 (Feb. 2004), available at <http://www.ballot-access.org/2004/0201.html#14> (listing petition requirements state by state); Brian Falter, *Census Details Voter Turnout for 2004*, WASHINGTON POST, May 26, 2005, at A10, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/25/AR2005052501965.html> (reporting that 125 million Americans voted in the 2004 presidential election). Measured as a percentage of the voters in the most recent election, the total petition requirement represents an eight-fold increase over the 50,000 signature requirement of 1924; as a gross figure, today’s petition requirement represents a twenty-fold increase over the 1924 total.

81. See Winger, *supra* note 52 at 239; MARKIN, *supra* note 53.

82. See *American Party of Texas v. White*, 415 U.S. 767 (1974).

83. See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 671 (1998). Given the Democratic Party’s practical monopoly over Hawaii’s electoral process, voters who cast a vote for a minor party or independent candidate relinquish the right to vote for any other candidate in that election cycle.

84. See generally MARKIN, *supra* note 53. Major political parties are generally permitted to field a candidate by virtue of their candidate’s performance in the previous election, and are thereby exempted from compliance with the laws’ requirements for minor party and independent candidates.

85. In the 2004 presidential election, Oregon denied ballot access to independent presidential candidate Ralph Nader because petition pages were “flawed” according to “unwritten rules” applied by Oregon Secretary of State Bill Bradbury. Four years previously, Nader received five percent of the Oregon popular vote for president. See Charles Beggs, *No Spot on Oregon Ballot for Nader*, SEATTLE POST-INTELLIGENCER, Sept. 23, 2004, available at [http://seattlepi.nwsource.com/local/192048\\_nader23.html](http://seattlepi.nwsource.com/local/192048_nader23.html). Pennsylvania denied Nader ballot access because petition papers included fictitious names like “Mickey Mouse.” See Susannah Rosenblatt, *In PA., Fake Signatures Keep Nader Off Ballot*, LOS ANGELES TIMES, Oct. 14, 2003, at A13. If Nader had crossed these names out, that would have excluded the entire page of signatures. See MARKIN, *supra* note 53, at PA-4 (“The secretary is not to permit filing of the paper if it contains material errors or defects apparent on its face, or . . . if it contains material alterations made after signing without consent of the signers.”).

### C. American Democracy and the Two-Party System

In the roughly thirty-five years since the first modern ballot access case came before the Supreme Court,<sup>86</sup> states have advanced two primary interests to justify their various laws. The first is the interest in preventing voter confusion that might result from the appearance of too many candidates on the ballot. The second is the interest in promoting the stability of the political system.<sup>87</sup> The Court's uneven treatment of these interests will be discussed in Part III below, but as a preliminary matter, the interests are evaluated here on their own merits.

The state's interest in preventing voter confusion arises from the possibility that a ballot could become overcrowded if the state were required to include every person who requested a listing. Although historically many states did just that, today the strategic behavior of modern political parties renders this laissez-faire approach inadequate today.<sup>88</sup> For example, a party might seek ballot listing for numerous candidates with the same name as the rival party's candidate in an effort to confuse voters who wish to vote for the rival candidate. Modern ballot access requirements render such tactics obsolete in many states, but strategic behavior remains a persistent threat to the integrity of elections. In April 2004, a Denver attorney and registered Democrat organized two new political parties, the Pro-Life Party and the Gun Owners' Rights Party, presumably in an effort to siphon votes from traditionally Republican constituencies. Neither party actually nominated candidates for public office, but they remain eligible to do so in 2006.<sup>89</sup>

If state regulation of the ballot is necessary to prevent voter confusion in today's political climate, the crucial question is *how much* regulation is necessary. As late as 1995, many states imposed only minimal requirements. Tennessee, for example, required only twenty-five signatures to list an independent presidential candidate; Washington required 200; Utah required 300; Vermont and Rhode Island required 1000; and Wisconsin required 2000.<sup>90</sup> There is no indication that voters in these states experienced greater confusion during the presidential election than did voters in other states.<sup>91</sup> And with respect to statewide elections, no

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86. See *Williams v. Rhodes*, 393 U.S. 23 (1968).

87. See *id.* at 31–33.

88. See Winger, *supra* note 52, at 236, 245.

89. "Fake" Parties in Colorado Abstain, *BALLOT ACCESS NEWS* 20 (Sept. 2004), available at <http://www.ballot-access.org/2004/0901.html#18>.

90. MARKIN, *supra* note 53.

91. In fact, the most infamous case of voter confusion in a presidential election occurred in 2000 in Florida, a state with some of the most restrictive ballot access requirements in the country; the confusion arose not from a surfeit of candidates on the ballot but from the "butterfly" ballot's poor design. See CNN INSIDE POLITICS, NEWSPAPER: BUTTERFLY BALLOT COST GORE WHITE

state that required as few as 5000 signatures has ever listed more than eight candidates on the ballot.<sup>92</sup> While eight candidates approach the point of overcrowding, the problem of overcrowding is clearly alleviated by a reasonable signature requirement. As a Federal Elections Commissioner recently conceded, “State laws regulating ballot access [are] far more restrictive than any legitimate state interests would require.”<sup>93</sup> If preventing overcrowding and voter confusion is the goal, ballot access requirements ought to be strict enough to render strategic behavior by political parties unprofitable, but not so strict that the requirements routinely exclude otherwise legitimate candidates.

The second state interest advanced to justify ballot access laws—the interest in promoting the stability of the political system—comes in two varieties. In its strong form, the state asserts an interest in promoting political stability by channeling all political activity into the two major parties. In its weak form, the state asserts an interest in promoting political stability through a two-party system, but not in channeling all political activity into only two parties. The distinction is that the weak form allows some role for minor parties to play in the two-party system. But under either version, the state’s interest is to avoid the proliferation of minor parties by protecting the predominance of the two major parties.<sup>94</sup>

Both forms of the political stability argument are rooted in the notion that presidential democracies require a two-party system in order to function effectively, and only parliamentary democracies can function effectively with multi-party systems. Under this view, gridlock would likely result in a presidential democracy with a multi-party system because the president would lack support in a legislature comprised of many different parties, and the legislature would be unable to remove the president for anything but impeachable offenses. Thus, the tension between the executive and the legislature would produce a stalemate rather than a system of checks and balances. In a parliamentary democracy, by contrast, the legislature is likely to support the executive because parliament chooses the prime minister. Moreover, if the prime minister loses

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HOUSE (Mar. 11, 2001), available at <http://archives.cnn.com/2001/ALLPOLITICS/03/11/palmbeach.recount>.

92. See *Ballot Crowding Chart*, BALLOT ACCESS NEWS 20 (Sept. 2004), available at <http://www.ballot-access.org/2004/0901.html#4>. New York is an exception, having had a ballot with twelve names listed for one office at a time when the state’s ballot access law required 15,000 signatures. But New York allows “fusion” parties, in which the same person is listed on the ballot more than once as the candidate of two or more parties, and this was the case on the ballot in question.

93. Smith, *Regulation and the Decline of Grassroots Politics*, *supra* note 53, at 5.

94. Thus, for example, states often advance the interest in political stability as justification for limiting “sore loser” candidacies, wherein a candidate that loses one party’s nomination seeks to run as the nominee of another party. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Storer v. Brown*, 415 U.S. 724 (1974).

that support, parliament can hold a vote of no confidence and appoint a new prime minister. Thus, a parliamentary system can avert gridlock despite the presence of multiple parties.<sup>95</sup>

Put simply, the political stability argument is that American democracy requires a two-party system, and this justifies restrictive ballot access laws that discriminate against minor party and independent candidates. But the argument's conclusion does not follow from its premise. The American political system has existed since the nation's founding, long before restrictive and discriminatory ballot access laws were enacted. That system was not historically one in which only two parties existed, but rather was one in which two major parties predominated over several minor parties that actively participated in elections.<sup>96</sup> These minor parties played a limited but vital role in this system: limited because minor parties were often short-lived, but vital because the minor parties brought about change that the major parties often resisted.<sup>97</sup> For example, abolitionists formed the Liberty Party in 1840 when the major parties refused to condemn slavery. In the 1870s, the Greenback Party was first to promote a host of social reforms such as the eight-hour workday, the curtailment of child labor, women's suffrage, and the graduated income tax.<sup>98</sup>

Even if minor parties did not play an important historical role in the American two-party system, no evidence supports the conclusion that modern ballot access laws are necessary to promote political stability in the United States today. The United States enjoyed political stability for most of its history before 1888, when the first ballot access laws were enacted.<sup>99</sup> And in the rare case in which a major party was displaced—most recently when the Republicans replaced the Whigs in the mid-19th century—the two-party system remained stable. Moreover, in states where ballot access laws only impose minimal requirements on minor party and independent candidates, nothing suggests that the two-party

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95. See, e.g., Scott Mainwaring, *Presidentialism, Multipartyism, and Democracy: The Difficult Combination*, DEMOCRACY SOURCEBOOK 266 (MIT Press 2003). It should be noted, of course, that Parliamentary democracies with multi-party systems do not necessarily function effectively. They are able to because a mechanism exists for avoiding stalemate between the executive and legislative branches, though they do not always reach this potential.

96. See generally STEVEN ROSENSTONE, ROY BEHR, & EDWARD LAZARUS, *THIRD PARTIES IN AMERICA* 49 (Princeton Univ. Press 1984); HESSELTINE, *supra* note 76.

97. ROSENSTONE, BEHR & LAZARUS, *supra* note 96, at 43–44. Minor parties tend to coalesce around issues that the major parties ignore, and they tend to die when the major parties co-opt their platforms.

98. See generally *id.* at 63–67.

99. See Winger, *supra* note 52, at 236.

system, or political stability in general, is threatened.<sup>100</sup> The reason for this stability is that the two-party system is a function of structural features of American democracy; on this fact there is virtually no dispute.<sup>101</sup>

Under the single-member-district plurality system that governs American elections, particular candidates compete for particular offices, and the candidate who obtains the most votes wins the office outright. This type of electoral system is therefore popularly known as the “first-past-the-post” system.<sup>102</sup> In contrast to proportional representation systems, first-past-the-post systems provide no reward for second place. Thus, minor party candidates have little incentive to compete, and if they do compete despite the odds, the system discourages citizens from “throwing their votes away” on a candidate who has no hope to win.<sup>103</sup> The first-past-the-post system, therefore, not only discourages minor party participation in the electoral system, but generally favors two-party systems.<sup>104</sup> The tendency for first-past-the-post systems to produce two dominant parties is so well known, in fact, that it has a name: Duverger’s Law.<sup>105</sup>

Duverger’s Law does not explain why the same two parties predominate in American democracy, but other structural features do. First, the presidential election system discourages regional parties, which would not necessarily be discouraged by first-past-the-post systems.<sup>106</sup> Second, the emergence of direct primary elections permits competition within the major parties, reducing the incentive for those with new ideas to form new political parties.<sup>107</sup> Taken together, these structural features of American democracy virtually guarantee the persistence of the two-party system. In fact, a study of 107 single-member-district plurality nations showed that ninety percent had two-party systems. The exceptions were countries with strong regional minor parties, but the United States’ presidential system discourages these parties.<sup>108</sup>

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100. See generally Richard Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 367–71 (1997).

101. *Id.*

102. See ROBERT DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 56–58 (Yale Univ. Press 2003).

103. See *id.*

104. See *id.*

105. See Daniel Lowenstein, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*, in *THE UNITED STATES SUPREME COURT AND THE ELECTORAL PROCESS* 300 (Georgetown Univ. Press 2002).

106. *Id.* at 300–01.

107. *Id.*

108. See DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* 93–95 (Yale Univ. Press 1971); Lowenstein, *supra* note 105.

The American presidential system discourages regional minor parties because the Electoral College system operates on a winner-take-all basis.<sup>109</sup> The Electoral College therefore presents the same disincentive to minor party presidential candidates and their supporters as the first-past-the-post system does in every other election: the candidate that wins the most popular votes in a state wins all of the state's Electoral College votes.<sup>110</sup> Thus, minor party candidates, who rarely can hope to win a majority of the popular vote in any state, have little incentive to compete. John Anderson, for example, polled 6.6% of the national popular vote for president in 1980, but did not win a single Electoral College vote.<sup>111</sup> Since no minor party can hope to compete in an electoral system that makes it virtually impossible for its candidate to win the highest office in the land, the Electoral College functions as a disincentive to minor parties generally.

Given that the structural features of American democracy virtually guarantee the persistence of the two-party system in the United States, the state's interest in political stability offers little support for restrictive ballot access laws that discriminate against minor party and independent candidates. In fact, modern ballot access laws appear to be completely superfluous as a means of protecting the two-party system, or any other legitimate state interest.<sup>112</sup> The Supreme Court recognized this important fact when it first heard a challenge to a modern ballot access law in 1968.<sup>113</sup> Since then, however, the Court's increasing deference to states has led it to uphold unnecessarily restrictive and discriminatory ballot access laws precisely because they protect the two-party system.

### III. BALLOT ACCESS IN THE MODERN ERA: *WILLIAMS V. RHODES*

The first minor party challenge to a modern ballot access law came before the Supreme Court in 1968.<sup>114</sup> In *Williams v. Rhodes*, the Ohio American Independent Party challenged Ohio's statutory scheme, which required new party candidates to submit 433,100 signatures by February of an election year.<sup>115</sup> Former Alabama Governor George Wallace, the

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109. U.S. CONST. art. II, § 1, cl. 2-3. The Constitutional provisions establishing the Electoral College do not prescribe a winner-take-all system, but only two states—Nebraska and Maine—divide their electoral votes proportionally.

110. See generally DAHL, *supra* note 102.

111. ROSENSTONE, BEHR & LAZARUS, *supra* note 96, at 17. See also discussion *infra* Part II.B.

112. See Issacharoff & Pildes, *supra* note 83, at 680. See also Hasen, *supra* note 100.

113. *Williams v. Rhodes*, 393 U.S. 23 (1968).

114. The Court heard a challenge to Illinois' ballot access laws in 1948, but the Court rejected the challenge and the case has not played a significant role in the Court's modern ballot access jurisprudence. See *MacDougall v. Green*, 335 U.S. 281 (1948).

115. 393 U.S. 23.

American Independent Party's presidential candidate, submitted more than 450,000 valid signatures, but did so after the deadline passed, and Ohio excluded him from the ballot.<sup>116</sup> The Court found that Ohio's statutory scheme imposed a heavy burden on "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."<sup>117</sup> Because the First and Fourteenth Amendments protect these rights from "encroachment" or "infringement" by the government, the Court applied strict scrutiny and held Ohio's entire statutory scheme unconstitutional.<sup>118</sup>

In *Williams*, the Court elaborated a robust conception of voting rights characterized by two key features.<sup>119</sup> First, the Court distinguished the right to vote as a mere procedural formality from the right to vote *effectively*.<sup>120</sup> While the Court did not specify exactly what the right to "vote effectively" entails, for present purposes this can be understood as the right to vote freely for the candidate of one's choosing. Second, the Court noted that the right to vote effectively is interdependent with the right to associate for political purposes, because the ability of voters to exercise their rights is inextricably linked with the right of candidates to exercise theirs by appearing on the ballot.<sup>121</sup> As the Court explained:

The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.<sup>122</sup>

Thus, the Court found that Ohio's statutory scheme burdened the rights of both voters and candidates, because it gave Republican and Democratic candidates "a permanent monopoly on the right to have people vote for or against them."<sup>123</sup>

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116. Wallace's 450,000 signatures were almost certainly all valid because Ohio did not require signers to be registered voters in 1968, and duplicates had been eliminated from the petition. Interview with Richard Winger, Editor, Ballot Access News, in Washington, D.C. (Aug. 26, 2005). Regardless, Wallace's signatures were presumptively valid, because the only basis advanced for excluding Wallace from the ballot was his failure to meet the deadline. See *Williams*, 393 U.S. 23.

117. *Williams*, 393 U.S. at 29.

118. *Id.* at 32.

119. *Id.* at 30–31.

120. *Id.* at 30.

121. *Id.* at 31.

122. *Id.* at 31.

123. *Id.* at 32.

Having identified a substantial burden on constitutional rights, the Court's Equal Protection analysis consisted primarily of a searching inquiry into, and ultimate rejection of, the State's justification for its statutory scheme. Most notably, the Court rejected the State's interest in promoting political stability through a two-party system, reasoning that the law did not promote a two-party system, but rather promoted two parties in particular.<sup>124</sup> The Court also rejected the State interest in preventing voter confusion, which might result if too many candidates qualified for the ballot.<sup>125</sup> The Court found that this had never happened in Ohio before the adoption of the challenged regulations, nor had it ever happened in other states that required relatively few signatures from candidates seeking ballot access.<sup>126</sup> Thus, the Court rejected voter confusion as "no more than theoretically imaginable," and held it insufficient to justify "the immediate and crippling impact on the basic constitutional rights involved."<sup>127</sup>

The Court made clear that ballot access laws that applied differently to different groups would be subject to strict scrutiny: "In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest . . . can justify limiting First Amendment freedoms.'"<sup>128</sup>

Central to the Court's finding of an unequal burden was the fact that Ohio's laws effectively granted major party candidates automatic ballot access by virtue of their party's performance in the previous election.<sup>129</sup> Thus, Ohio's signature requirement applied only to "new parties struggling for existence," and gave "the two old, established parties a decided advantage."<sup>130</sup> The State argued that its interests in ensuring majority rather than plurality election winners, as well as preventing party factionalism, justified the requirement.<sup>131</sup> The Court rejected the argument not because the interests were not important, but because they could not be achieved without imposing an impermissible burden on the rights of new parties.<sup>132</sup>

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124. *Id.*

125. *Id.* at 33.

126. *Id.*

127. *Id.* ("Ohio claims that its highly restrictive provisions are justified because without them a large number of parties might qualify for the ballot, and the voters would then be confronted with a choice so confusing that the popular will could be frustrated.")

128. *Id.* at 31.

129. *Id.*

130. *Id.*

131. *Id.* at 32.

132. *Id.* at 32-33.

*Williams* was decided at the height of the civil rights era, and came at the end of a string of cases in which the Court struck down a variety of state laws infringing the right to vote.<sup>133</sup> In 1960, the Court found that an Alabama law redefining the city boundaries of Tuskegee was a device to disenfranchise blacks in violation of the Fifteenth Amendment because it changed “the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure” which removed from the city “all save four or five of its 400 Negro voters while not removing a single white voter or resident.”<sup>134</sup> In 1962, the Court found that black voters had standing to challenge Tennessee’s apportionment of seats in the state’s General Assembly because the apportionment caused the voters “debasement of their votes” in violation of the Fourteenth Amendment’s Equal Protection Clause.<sup>135</sup> In 1964, the Court ordered Alabama to reapportion its voting districts on similar grounds.<sup>136</sup> In 1965, the Court upheld the Voting Rights Act, which prohibits states from enacting regulations or qualifications on the right to vote that have the purpose or effect “of denying or abridging the right to vote on account of race or color.”<sup>137</sup> In 1969, the Court held that a law requiring that signatures on a petition be spread evenly across counties violated the principle of “one man, one vote.”<sup>138</sup>

These cases all give content to the *Williams* Court’s distinction between the right to vote and the right to vote effectively. Each represents an instance in which the right to vote effectively, as opposed to the right to vote as a mere procedural formality, imposed a limit on state regulatory power. The *Williams* Court specifically rejected the State’s assertion of absolute power to regulate elections: the Constitution grants states regulatory power, the Court acknowledged, but “always subject to the limitation that [it] may not be exercised in a way that violates other specific provisions of the Constitution.”<sup>139</sup> Thus, the Court held Ohio’s entire statutory scheme unconstitutional not because it prevented people from voting, but because it undermined their right to vote effectively.

Viewed in its immediate historical context, *Williams* can be understood as one more case in which the civil rights era Court, under the

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133. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Moore v. Ogilvie*, 394 U.S. 814 (1969).

134. *Gomillion*, 364 U.S. at 342.

135. *Baker*, 369 U.S. at 187.

136. *Reynolds*, 377 U.S. 533.

137. 42 U.S.C. § 1973c (2004); See *Katzenbach*, 383 U.S. 301.

138. *Moore*, 394 U.S. at 818–19.

139. *Williams v. Rhodes*, 393 U.S. 23, 28–29 (1968). In *Williams*, the State’s power was granted by Article II, Section 1, which provides that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .” to choose a President and Vice President. U.S. CONST. art. II, § 1.

leadership of Chief Justice Earl Warren, protected minority voting rights from infringement by the states. Certainly the Court was aware that states had used ballot access laws in the past to exclude racial minorities from an election,<sup>140</sup> and that they had engaged in more insidious efforts to achieve the same end without taking official state action.<sup>141</sup> But the Court's decisions in the 1960s were concerned primarily with state action that undermined minority voting rights by counting minority votes in a way that diminished their value.<sup>142</sup> In *Williams*, the Court was concerned with state action that undermined the rights of all voters by excluding candidates from the ballot and narrowing voters' choices. Unlike the other civil rights era cases, the facts in *Williams* did not suggest an overtly racial dimension. Nevertheless, *Williams*' association with these cases may explain why it has turned out to be anomalous in the Court's ballot access jurisprudence. Whatever the explanation, *Williams* has not been followed; in subsequent ballot access decisions, the Court has exhibited a tendency toward non-intervention and a deference to state legislative judgments that contrasts markedly with its decision in *Williams*.

#### A. Distinguishing *Williams*: *Jeness v. Fortson*

The Court's next ballot access case came three years after *Williams*, in 1971. In *Jeness v. Fortson*,<sup>143</sup> the Georgia Socialist Workers Party candidates for Governor and the House of Representatives, together with voters, sued in a class action on behalf of themselves and "all other registered voters in the State of Georgia desirous of having an opportunity to consider persons on the ballot other than nominees of the Democratic and Republican parties."<sup>144</sup> The Court did not specify the standard of review it applied, but it gave scant consideration to the constitutional rights central to its opinion in *Williams*.<sup>145</sup> Nor did the Court inquire into the state interests asserted to justify Georgia's statutory scheme. Instead, the Court simply compared Georgia's statutory scheme with Ohio's in an effort to distinguish *Williams* by showing that Georgia's scheme, unlike Ohio's, allowed minor party candidates a realistic possibility to gain ballot access and thus did not "operate to freeze the status quo."<sup>146</sup>

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140. See *Nixon v. Herndon*, 273 U.S. 536 (1927).

141. See *Nixon v. Condon*, 286 U.S. 73 (1932).

142. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Moore v. Ogilvie*, 394 U.S. 814 (1969).

143. 403 U.S. 431 (1971).

144. *Id.* at 433 n.3.

145. *Id.* at 438.

146. *Id.*

The apparent differences between the Ohio and Georgia statutory schemes, which the Court emphasized in upholding the Georgia scheme, are not as dramatic as the Court suggested.<sup>147</sup> Most notably, the Court compared the signature requirements of each state, suggesting that Georgia's five percent requirement was more reasonable than Ohio's fifteen percent requirement.<sup>148</sup> But here, the Court was comparing apples and oranges: Georgia required signatures from five percent of the eligible voters in the previous election, whereas Ohio required fifteen percent of the actual voters in the previous election. An unfortunate fact of every election is that the pool of eligible voters is always far greater than the pool of actual voters. Thus, Georgia's five percent requirement was much greater than the Court evidently realized. In fact, Georgia required the plaintiff Jenness to collect 88,175 signatures—significantly fewer than Ohio's requirement of 433,100 signatures, but still five times that of forty-two states, and at least fifty times that of sixteen states.

In light of Georgia's restrictive signature requirement, the differences the Court noted between the Ohio and Georgia statutory schemes meant relatively little. Because Georgia's signature requirement was independently sufficient to exclude candidates, it hardly mattered whether candidates could fulfill the other requirements. In fact, Georgia's signature requirement was particularly onerous because, unlike Ohio, which allowed one signature to count for a party's entire slate of candidates, Georgia required the same person to sign fourteen different petitions to qualify a party's entire slate.<sup>149</sup> Nevertheless, the bulk of the Court's short opinion was devoted to distinguishing Georgia's statutory scheme from Ohio's on the basis of requirements other than the signature petition. Thus, the Court noted that Ohio prohibited write-in voting, but Georgia did not; Ohio prohibited independent candidacies, but Georgia did not (and in fact, Ohio only prohibited independent candidates for president, but not for any other office);<sup>150</sup> Ohio's petition deadline was unreasonably early, but Georgia's was not; and Ohio required all parties to hold primaries, but Georgia did not.<sup>151</sup>

Whether or not the *Jenness* Court underestimated the burden Georgia's scheme imposed, its analytic approach has been more important to the development of the law. In contrast to the Court's scrutiny and rejection of the state interests advanced to justify Ohio's statutory scheme in

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147. See Smith, *Judicial Protection of Ballot-Access Rights*, *supra* note 53, at 183; Winger, *supra* note 52, at 235.

148. Winger, *supra* note 52, at 439.

149. See Smith, *Judicial Protection of Ballot-Access Rights*, *supra* note 53, at 183.

150. See Winger, *supra* note 52.

151. *Jenness*, 403 U.S. at 438.

*Williams*, in *Jenness*, the Court accepted a generalized state interest in regulating the ballot without further inquiry. The Court in *Jenness* devoted only one conclusory line to the subject:

There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.<sup>152</sup>

The point is undoubtedly correct, but sidesteps the crucial issue of what constitutes “a significant modicum of support” without imposing an impermissible burden. As the Court noted in *Williams*, “the experience of many states . . . demonstrates that no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as one percent of the electorate, is required.”<sup>153</sup> In fact, Georgia itself was one of those states: since it started printing official ballots in 1922, Georgia has never had more than six candidates on the ballot for any statewide election.<sup>154</sup>

The Court's refusal to inquire into alternatives implies a formalistic dichotomy the Court would invoke explicitly in subsequent cases: that the state faces a choice between the challenged statutory scheme and chaos. The refusal to inquire into alternatives also reflects a shift in the Court's equal protection analysis to a minimal standard of review. Under *Williams*, a ballot access law violates equal protection where it imposes substantially unequal burdens on new parties and cannot be justified even by a compelling state interest. Under *Jenness*, however, ballot access laws are upheld as long as they do not “operate to freeze the political status quo.”<sup>155</sup> *Williams* held that Ohio's statutory scheme violated equal protection by granting the old, established parties automatic ballot access while requiring new parties to collect hundreds of thousands of signatures. The Court in *Jenness*, faced with the same statutory structure imposing a significantly unequal burden, nevertheless found no equal protection violation:

From the point of view of one who aspires to elective public office in Georgia, alternative routes are available to getting his name printed on the ballot. He may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization. We

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152. *Id.* at 442.

153. *Williams v. Rhodes*, 393 U.S. 23, 33 (1968).

154. *Winger*, *supra* note 52, at 238.

155. *Jenness*, 403 U.S. at 438.

cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other.<sup>156</sup>

Under *Jenness*, no equal protection violation exists where a candidate may choose to seek the nomination of a political party, thereby gaining automatic ballot access, or to collect 88,175 signatures in hope of gaining ballot access as a minor party. Georgia law, however, defines “political party” so that only the Republicans and Democrats qualify.<sup>157</sup> Candidates who do not wish to register as a Republican or Democrat thus have no alternative but to circulate nominating petitions. The Court’s finding that this statutory scheme does not violate equal protection cannot be reconciled with *Williams*, which invalidated Ohio’s signature requirement precisely because it applied only to “new parties struggling for existence,” and gave “the two old, established parties a decided advantage.”<sup>158</sup>

The Court’s effort in *Jenness* to distinguish *Williams* constituted the bulk of the opinion, but *Jenness* essentially overruled *Williams*.<sup>159</sup> After *Jenness*, the Court no longer applied strict scrutiny in ballot access cases, although it purported to do so in the two cases that immediately followed.<sup>160</sup> The state interests that the Court scrutinized and rejected in *Williams* it later accepted as legitimate without inquiry. One predictable result is that states appear to have taken notice: in the first fifteen years after *Jenness*, seventeen states raised their signature requirements for minor party candidates—more than had raised them in the preceding thirty years.<sup>161</sup>

### B. Ballot Access Jurisprudence after *Jenness*

Three years after *Jenness*, the Court decided *Storer v. Brown*, a case it characterized as falling between the extremes of *Williams* and *Jenness*.<sup>162</sup> In *Storer*, two Communist Party members sought listings on

156. *Id.* at 440–41.

157. Under Georgia law, a political party is any party that polled at least twenty percent of the vote in the previous gubernatorial or presidential election. *See id.* at 433.

158. *Williams*, 393 U.S. at 31.

159. *See Jenness*, 403 U.S. at 434–42.

160. *See American Party of Texas v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 415 U.S. 724 (1974).

161. *See Smith, Judicial Protection of Ballot-Access Rights, supra* note 53, at 187. The seventeen states were Alabama, Arizona, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, and Virginia.

162. *Storer*, 415 U.S. 724. This survey omits *American Party of Texas*, which the Court decided on the same day, because *Storer* concerns substantially similar issues. In *American Party of Texas*, the Court upheld Texas’ statutory scheme regulating ballot access against an equal protection

California's ballot as independent candidates for President and Vice-President. Two members of another party joined the litigation, seeking ballot access as independent candidates for Congress. The candidates challenged California statutory restrictions on independent candidates. The challenged provisions forbade ballot listing to independent candidates who had been registered with a political party within one year of the primary election; required independent candidates to submit signatures of five percent of the total number of voters in the previous general election; prohibited primary voters from signing petitions; and limited the time in which signatures could be collected to a 24-day period following the primary.<sup>163</sup> The Court struck down the provision preventing non-partisan primary voters from signing petitions, upheld the others, and remanded to the District Court to determine "whether . . . the 325,000-signature requirement, to be satisfied in 24 days, is too great a burden."<sup>164</sup>

The Court acknowledged that the California statute required independent candidates to gather more than 13,500 signatures per day for 24 days straight, but concluded that this requirement did not "appear to be an impossible burden."<sup>165</sup> The Court remanded the issue only to determine whether 325,000 signatures, measured as a proportion of eligible signers after the exclusion of primary voters from the pool, was unconstitutionally burdensome.<sup>166</sup> As the dissent pointed out, however, this information was already available with respect to the candidates for Congress. If primary voters were excluded from the pool, then 325,000 signatures was equal to 9.5% of those eligible to sign—a figure nearly twice that required by the Georgia statute in *Jenness*.<sup>167</sup>

In *Storer*, the Court purported to apply strict scrutiny, but an oft-cited passage suggests a more deferential standard at work.<sup>168</sup> "There must be a substantial regulation of elections if they are to be fair and

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challenge on the ground that it did not operate to freeze the status quo, but struck down a provision excluding minor party and independent candidates from absentee ballots. *American Party of Texas*, 415 U.S. 767.

163. *Storer*, 415 U.S. at 726–27.

164. *Id.* at 740.

165. *Id.*

166. *Id.*

167. *Id.* at 764 (Brennan, J., dissenting) ("The total number of registered voters on September 14, 1972—the last day appellants were permitted to file nomination petitions—was 9,953,124 . . . Of that number, 6,460,220 registered voters could not sign petitions because they had voted in the 1972 primary elections . . . Thus, the total pool of registered voters available to appellants was reduced to approximately 3,492,904, of which the required 331,670 signatures was 9.5%." (citations omitted)).

168. *See id.* at 729–33; *American Party of Texas v. White*, 415 U.S. 767, 780 (1974) (holding that the validity of a state's statutory scheme regulating ballot access "depends upon whether they are necessary to further compelling state interests").

honest and if some sort of order, rather than chaos, is to accompany the democratic processes,” the Court observed, explicitly invoking the dichotomy implicit in *Jenness*. As in *Jenness*, in *Storer* the Court failed to inquire into less burdensome alternatives.<sup>169</sup> But the Court’s deference in *Storer* went one step beyond *Jenness*, accepting as valid justification the same state interests specifically rejected in *Williams*. The Court cited both *Williams* and *Jenness* for the proposition that states have a legitimate interest in regulating the number of candidates on the ballot, and concluded, “the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting.”<sup>170</sup> *Williams* hardly stands as authority for this statement: *Williams* rejected the last interest as impermissible *per se*, rejected voter confusion as a mere theoretical possibility, and never addressed the clogging of machinery.<sup>171</sup>

*Storer*’s treatment of voting rights is difficult to reconcile with *Williams*. The Court’s concept of voting rights in *Williams* was characterized by its distinction between the right to vote and the right to vote effectively, and by its recognition that the associational rights of voters and candidates are separate but interdependent.<sup>172</sup> In *Storer*, by contrast, the Court altogether failed to distinguish these rights, holding that a citizen who votes in a party primary thereby relinquishes the right to sign a petition for another candidate.<sup>173</sup> This suggests that the rights are mutually exclusive, but a voter who supports a particular candidate does not relinquish the right to hear other candidates in an election. By the same token, a minor party candidate in a general election has the right to solicit support from every voter—even those who voted in a party primary. As the Court recognized in *Williams*, all voters, regardless of party affiliation, benefit from the participation of minor party candidates in a two-party system.<sup>174</sup>

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169. See *Storer*, 415 U.S. at 761 (Brennan, J., dissenting) (“I have searched in vain for even the slightest evidence in the records of these cases of any effort on the part of the State to demonstrate the absence of reasonably less burdensome means of achieving its objectives.”).

170. *Id.* at 732.

171. *Williams v. Rhodes*, 393 U.S. 23, 32–33 (1968).

172. *Id.*

173. *Storer*, 415 U.S. at 741.

174. See *Williams*, 393 U.S. at 39 (“In our political life, third parties are often important channels through which political dissent is aired: ‘All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted . . . . The absence of such voices would be a symptom of grave illness in our society.’” (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250–51 (1957))).

The next important ballot access case came a decade later, when the Court decided *Anderson v. Celebrezze* in 1983.<sup>175</sup> The case came before the Court after Ohio denied ballot listing to John Anderson, an independent candidate for President in the 1980 election. Anderson satisfied Ohio's substantive requirement by submitting 14,500 signatures on May 16, 1980, but Ohio's Secretary of State refused the petition because the deadline was March 20th of that year.<sup>176</sup> The issue before the Court was whether Ohio's March deadline imposed an unconstitutional burden on the voting and associational rights of Anderson and his supporters.<sup>177</sup>

In *Anderson*, the Court explicitly rejected the notion that ballot access laws necessarily trigger strict scrutiny.<sup>178</sup> Instead, the Court articulated a balancing test to determine the appropriate standard of review.<sup>179</sup> Under this test, the Court weighs "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."<sup>180</sup> Strict scrutiny applies under this test only if the rule imposes a severe burden to the plaintiff's rights. But where the rule imposes "reasonable, nondiscriminatory restrictions," a more deferential standard of review applies, under which "the State's important regulatory interests are generally sufficient to justify" the restrictions.<sup>181</sup>

The Court struck down Ohio's March deadline, holding that the deadline impermissibly burdened the associational rights of independent candidates and their supporters and violated the Equal Protection Clause by burdening independents more than major party candidates.<sup>182</sup> Within the context of a presidential election, the Court reasoned, Ohio's deadline implicated an important national interest because it restricted voting in one state, which would affect voting in other states.<sup>183</sup> The Court consid-

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175. 460 U.S. 780 (1983). This survey omits *Illinois State Bd. of Elections v. Socialist Workers Party* because the case has been relatively unimportant to the development of the Court's ballot access jurisprudence. *Illinois State Bd. of Elections* involved an equal protection challenge, under which the Court struck down a provision of the Illinois statutory scheme regulating ballot access that required candidates for office in Chicago to collect significantly more signatures than candidates for statewide office. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

176. *Anderson*, 460 U.S. at 786-87.

177. *Id.*

178. *Id.* at 788.

179. *Id.* at 789.

180. *Id.*

181. *Id.* at 788.

182. *Id.* at 806.

183. *Id.* at 794-95.

ered and rejected three interests advanced by the state to justify the deadline—most notably, the Court rejected the state’s interest in “political stability” as amounting to a desire to protect the existing political parties from competition from independent candidates.<sup>184</sup> While *Anderson* suggested a renewed willingness to intervene in ballot access cases, the test the Court articulated has yet to trigger strict scrutiny because the Court has found the requisite burden on constitutional rights lacking.<sup>185</sup>

In *Munro v. Socialist Workers Party*, decided in 1986, the Socialist Workers Party challenged Washington’s ballot access laws, which required that a candidate receive one percent of the primary vote in order to be placed on the general ballot.<sup>186</sup> Citing *Anderson*, the Court applied a minimal standard of review and held that the burden on the plaintiffs’ First Amendment rights did not outweigh the state’s interest in restricting access to the ballot. “Associational rights are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively,” the Court observed, while noting *Storer’s* dichotomy between state regulation and chaos.<sup>187</sup> As in *Storer*, the Court in *Munro* accepted the interests specifically rejected in *Williams*, but took deference to the state one step further: in *Munro*, the Court held that the state need not show its asserted interests have any basis in actual fact:

To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the evidence . . . . Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.<sup>188</sup>

Once again, the Court employed a formalistic dichotomy, this time between endless court battles and total deference to the legislative judgment with respect to state interests. The Court suggested that any alternative “would necessitate that a State’s political system sustain some level of damage before the legislature could take corrective action.”<sup>189</sup> But a state’s political system could surely survive a minimal standard requiring

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184. *Id.* at 802–07. The other two interests were promoting voter education by providing voters a longer period in which to evaluate candidates, and promoting equal protection, since the deadline was the same for all candidates.

185. See SAMUEL ISSACHAROFF, PAMELA KARLAN, & RICHARD PILDES, *THE LAW OF DEMOCRACY* 421 (Foundation Press 1998) (suggesting that the Court does not follow *Anderson* because few state laws would withstand scrutiny under its test).

186. 479 U.S. 189, 189–90 (1986).

187. *Id.* at 193 (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

188. *Id.* at 195.

189. *Id.*

that state interests have a basis in actual fact. And as the *Williams* Court recognized, excessive deference to state legislative judgments can also endanger the political system.<sup>190</sup> Nevertheless, the deference the Court exhibited in *Munro* set the stage for two cases decided in the next decade which, taken together, threaten to choke off all competition from minor party and independent candidates, enabling the two old, established parties to achieve the monopoly that the Court sought to prevent in *Williams*.

In 1992, the Court decided *Burdick v. Takushi*, a case in which it upheld Hawaii's prohibition on write-in voting.<sup>191</sup> Perhaps the appellant's choice of candidate detracted from his claim, for the Court suggested that writing in Donald Duck took the right to vote to an absurd extreme.<sup>192</sup> The function of the electoral process is not primarily "a means of giving vent to short-range political goals, pique, or personal quarrels," the Court observed.<sup>193</sup> Citing *Anderson*, the Court applied minimal review, finding that Hawaii's ban on write-in voting imposed "only a limited burden on voters' rights to make free choices and to associate politically through the vote."<sup>194</sup>

Writing for the dissent, Justice Kennedy argued that the ban imposed a significant burden on voters not because it deprived them of the right to vote for Donald Duck, but because it deprived them of the right to vote for the candidate of their choice.<sup>195</sup> This was particularly true in Hawaii, which prohibits "split-ticket" voting—wherein voters vote for candidates from different parties in different elections. Because the Democratic Party dominates the Hawaiian primary process, a voter who votes for a non-Democratic candidate for one office is likely to be precluded from voting in any other election.<sup>196</sup> In light of this result, Kennedy observed, Hawaii's elections had a "haunting similarity" to "sham elections in which the name of the ruling party candidate [is] the only one on the ballot."<sup>197</sup>

Kennedy reminded the Court that all elections in the United States were conducted by write-in vote until voter harassment and intimidation

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190. See *Williams v. Rhodes*, 393 U.S. 23, 31–34 (1968) (addressing the pervasive damage to the political system resulting from its monopolization by the two major parties).

191. 504 U.S. 428, 441–42 (1992).

192. *Id.* at 437–38.

193. *Id.* at 438.

194. *Id.* at 439.

195. *Id.* at 444.

196. *Id.* at 443–45.

197. *Id.* at 444. Hawaii's prohibition on "split tickets," in which the same voter votes for candidates from different parties, means that a voter who votes for any non-Democratic candidate must choose between doing so and participating in what will be the dispositive election for many offices.

made official ballots necessary.<sup>198</sup> Moreover, Kennedy argued, write-in voting plays a critical role in modern elections as a baseline protection of the right to vote effectively.<sup>199</sup> Write-in voting enables voters to express dissatisfaction with the candidates on the ballot by rejecting those candidates and voting for a candidate of their choice, or to react to late-breaking news in a campaign.<sup>200</sup> Nevertheless, in *Burdick*, the Court held for the first time that a state could limit voters' choices in an election to a preset field of candidates.<sup>201</sup>

The Court's rationale in *Burdick* is a model of consistency and, in keeping with precedent, the Court's deferential posture caused it to sidestep the crucial issue. "Voting is of the most fundamental significance under our constitutional structure," the Court observed.<sup>202</sup> But, citing *Munro*, the Court continued, "it does not follow . . . that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute."<sup>203</sup> The Court did not explain why write-in voting is tantamount to an "absolute" right to vote, but noted instead the states' constitutional power to regulate elections and, citing *Storer*, recalled the chaos that would result in the absence of state regulation.<sup>204</sup> However, apart from the holding, the Court never addressed the particular issue of whether state regulatory power includes the power to ban write-in voting.

The Court's most recent ballot access case was decided in 1997.<sup>205</sup> In *Timmons v. Twin Cities Area New Political Party*, the Court upheld Minnesota's ban on "fusion" parties, or separate parties that nominate the same candidate.<sup>206</sup> The *Timmons* Court found that the ban imposed only a minor burden on the new party's associational rights because the candidate it favored was already on the ballot, and only slightly burdened its

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198. *Id.* at 446–48.

199. *See id.* at 446. Ohio's ban on write-in voting weighed heavily into the Court's holding in *Williams* that the statutory scheme was unconstitutional. *See Williams v. Rhodes*, 393 U.S. 23, 35–36 (1968) (Douglas, J., concurring) ("Ohio, through an entangling web of election laws, has effectively foreclosed its presidential ballot to all but Republicans and Democrats. It has done so initially by abolishing write-in votes so as to restrict candidacy to names on the ballot; it has eliminated all independent candidates through a requirement that nominees enjoy the endorsement of a political party; it has defined "political party" in such a way as to exclude virtually all but the two major parties.").

200. *Burdick*, 504 U.S. at 444–45.

201. *See ISSACHAROFF, KARLAN & PILDES, supra* note 185, at 352.

202. *Burdick*, 504 U.S. at 433 (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

203. *Id.* at 433.

204. *Id.*

205. This survey omits *Norman v. Reed*. In *Norman*, the Court held that Illinois could not deny a party the use of its name on the assumption that it lacked the requisite permission from the party founders, nor could the state deny the party's entire slate of candidates ballot access just because some of the candidates failed to qualify. *Norman v. Reed*, 502 U.S. 279 (1992).

206. 520 U.S. 351 (1997).

political speech because the primary purpose of a ballot is to elect candidates, not to provide a forum for political speech.<sup>207</sup> Citing *Anderson*, the Court applied minimal scrutiny.<sup>208</sup> “We have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activities at the polls,” the Court observed.<sup>209</sup> However, it was the Court’s opinion with respect to regulations that are not “politically neutral” that broke new ground. In *Timmons*, the Court made clear for the first time that favoring the two major parties is a legitimate state interest that justifies regulation of the ballot.<sup>210</sup>

“American politics has been organized around two parties since the time of Andrew Jackson,” the Court observed in an opinion by Chief Justice Rehnquist.<sup>211</sup> “The Constitution permits the . . . Legislature to decide that political stability is best served through a healthy two-party system.”<sup>212</sup> What the Court failed to mention was that ballot access laws favoring the two-party system are a modern invention, and that the two-party system was perfectly stable before these laws ever existed.<sup>213</sup> The two-party system is stable even in states that have not enacted laws discriminating against minor party and independent candidates. The Court also neglected to mention that the legislature’s decision in such cases is self-interested.<sup>214</sup> The Court effectively held that Republicans and Democrats, by virtue of being older, have a greater claim to the constitutional rights that *Williams* protected for all citizens “regardless of their political persuasion.”<sup>215</sup>

#### IV. JUDICIAL REVIEW AND CANDIDATES’ RIGHTS

The Court’s retreat from *Williams* has resulted in a confused body of law that is difficult and perhaps impossible to reconcile. Moreover, the central question that ballot access cases present remains unresolved: what limits do candidates’ rights place upon state power to regulate the ballot? Since *Williams*, the Court has repeatedly upheld ballot access laws that infringe candidates’ rights, while saying little about what limits those rights impose upon state power. The result is that states today may

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207. *Id.* at 363–66.

208. *Id.* at 358.

209. *Id.* at 369 (citing *Burdick*, 504 U.S. at 437–38).

210. *Id.* at 369–70.

211. *Id.* at 367.

212. *Id.*

213. See generally Winger, *supra* note 52, at 236.

214. See NAT’L CONF. OF STATE LEGISLATURES, *supra* note 57 (stating that “the importance of party control in legislatures cannot be overstated. If one party controls both chambers of a legislature, they can use their majorities to shape policy in line with party philosophy.”).

215. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

enact laws that discriminate according to party status and impose significantly unequal burdens on minor party and independent candidates;<sup>216</sup> they can do so without advancing any facts to support the need to impose those burdens;<sup>217</sup> they can do so for the explicit purpose of excluding minor party and independent candidates,<sup>218</sup> and states can even bar those candidates who have been excluded from running as write-in candidates.<sup>219</sup>

In light of this precedent, the deferential standards the Court has articulated—that states may not enact laws that operate to freeze the status quo<sup>220</sup> or impose impossible burdens<sup>221</sup>—lack practical force. In Georgia, for example, no minor party or independent candidate has ever fulfilled the requirements to be placed on the ballot for the U.S. House since the state increased them in 1943.<sup>222</sup> Yet Georgia is the very state in which *Jenness* originated to challenge those requirements, and where the Court upheld them because they did not operate to freeze the status quo.<sup>223</sup> Since 1964, no independent candidate for the U.S. House has ever achieved ballot listing in North Carolina or South Carolina, either.<sup>224</sup> In fact, only four candidates for the U.S. House have ever overcome a signature requirement of greater than 10,000 to achieve ballot listing.<sup>225</sup> Signature requirements many times greater than 10,000 therefore impose a burden that appears to be practically impossible.<sup>226</sup>

The primary legal obstacle facing minor party and independent candidates who challenge such requirements on equal protection grounds

216. See *Jenness v. Fortson*, 403 U.S. 431 (1971).

217. See *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986).

218. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

219. See *Burdick v. Takushi*, 504 U.S. 428 (1992).

220. See *Jenness*, 403 U.S. 431.

221. See *Storer v. Brown*, 415 U.S. 724 (1974).

222. Voter Freedom Act of 2003, H.R. 1941, 108th Cong. (2003).

223. *Jenness*, 403 U.S. at 433 n.3.

224. See Voter Freedom Act of 2003, H.R. 1941, 108th Cong. (2003).

225. *Id.*

226. See *id.* This bill, H.R. 1941 of the 108th Congress, which was introduced by Rep. Ron Paul (R – TX) but never enacted, would have provided ballot access to any candidate for the U.S. House who submitted 1000 signatures and complied with the Act's other requirements. Currently, Georgia requires independent candidates for the U.S. House to submit signatures equal in number to five percent of the registered voters. North Carolina requires signatures equal in number to four percent of the registered voters. South Carolina requires 10,000 signatures. In the November 2004 election, 4,951,955 Georgians were registered to vote. An independent candidate for the U.S. House from Georgia therefore must collect nearly 247,597 signatures to achieve ballot access. See Georgia Secretary of State, Voter Registration Figures for Georgia, [http://www.sos.state.ga.us/acrobat/Elections/voter\\_registration\\_history.pdf](http://www.sos.state.ga.us/acrobat/Elections/voter_registration_history.pdf) (last visited Nov. 11, 2005). North Carolina had 5,519,992 registered voters in 2004. An independent candidate for the U.S. House from North Carolina therefore must collect 220,799 signatures to achieve ballot access. See North Carolina State Board of Elections, NC Voter Registration, <http://www.sboe.state.nc.us> (last visited Nov. 11, 2005).

is the Court's unwillingness to recognize these candidates as a class that merits equal protection.<sup>227</sup> No court would uphold the unequal burdens many state laws impose if the laws discriminated according to race or gender. But because the Court does not recognize minor party and independent candidates as a class that merits equal protection, states are free to impose significantly unequal burdens on these candidates under the guise of impartial procedural regulation. In *Jenness*, for example, the Court upheld Georgia's ballot access scheme, which imposed significantly unequal burdens on minor party and independent candidates, based on its finding that these candidates could run as major party candidates.<sup>228</sup> But if minor party and independent candidates merit equal protection as a class, they should not have to become major party candidates to avoid an unequal burden, and a law that discriminates against them is unconstitutional whether or not they have this option.

The Court, of course, has held otherwise in numerous ballot access cases.<sup>229</sup> Sometimes, as in *Jenness*, the Court entirely fails to recognize minor party and independent candidates as a class.<sup>230</sup> The Court has upheld laws that impose unequal burdens based on its finding in *Anderson* that, "the State's important regulatory interests are generally sufficient to justify reasonable, *nondiscriminatory* restrictions."<sup>231</sup> In other cases, the Court has recognized minor party and independent candidates as a class, but refuses to hold that the unequal burden imposed upon them violates the Equal Protection Clause.<sup>232</sup> Presumably, in these cases the Court re-

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227. See discussion *supra* Part III.

228. See *Jenness v. Fortson*, 403 U.S. at 440–41. Candidates in Georgia had two options to achieve ballot listing. They could win the nomination of one of the major parties, or they could collect 88,175 signatures. The Court concluded, "We cannot see how Georgia has violated the Equal Protection Clause . . . by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other." *Id.*

229. The Court has struck down ballot access laws on equal protection grounds since *Williams*, but such cases are the exception. For example, in *Illinois State Board of Elections v. Socialist Workers Party*, the Court struck down a law that required candidates in a mayoral election to collect more signatures than candidates running for statewide office. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). And in *Anderson v. Celebrezze*, the Court struck down Ohio's March deadline for submitting signature petitions, holding that it burdened independents more than major party candidates. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

230. *Jenness*, 403 U.S. at 440–41.

231. *Anderson*, 460 U.S. at 788 (emphasis added). See, e.g., *Munro v. Socialist Worker's Party*, 479 U.S. 189 (1986); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Timmons v. Twin Cities Area New Political Party*, 520 U.S. 351 (1997). Each of these cases relies on *Anderson* as a basis for upholding laws that impose unequal burdens on minor party and independent candidates.

232. See, e.g., *Storer v. Brown*, 415 U.S. 724 (1974). Although California granted major party candidates for President automatic ballot listing while requiring independent candidates to collect 325,000 signatures in twenty-four days, the Court was unwilling on these facts to find an equal protection violation. "Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden," the Court found, and remanded for a determination whether the signature re-

lied on its finding in *Williams* that the Equal Protection Clause is directed only at “invidious” classifications.<sup>233</sup> But in *Williams*, the Court held Ohio’s ballot access scheme did violate the Equal Protection Clause, because it discriminated against new parties and gave the two old, established parties a decided advantage.<sup>234</sup>

Although the Court has retreated from *Williams* in subsequent ballot access cases, the Court has reaffirmed that discrimination against a class of candidates is unconstitutional in two recent cases arising under the Qualifications Clauses. In *U.S. Term Limits v. Thornton*, the Court struck down an amendment to the Arkansas state constitution that prohibited the name of any candidate from appearing on the ballot who had already served three terms in the U.S. House of Representatives or two terms in the U.S. Senate.<sup>235</sup> The Court held that the amendment violated the Qualifications Clauses of the Constitution, because those clauses exclusively determine the qualifications for members of Congress, and states may not add further qualifications under the guise of procedural regulation.<sup>236</sup> Distinguishing the “broad power to set qualifications from the limited authority [granted to states] under the Elections Clause,” the Court found that the Elections Clause only grants states “authority to issue procedural regulations . . . [but not] to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.”<sup>237</sup>

The Court reaffirmed that states may not “favor or disfavor a class of candidates” in *Cook v. Gralike*.<sup>238</sup> In *Gralike*, a state was again engaged in an effort to promote term limits. This time, an amendment to Missouri’s state constitution directed the state’s congressional representatives to “use all their powers” to pass a term limits amendment to the U.S. Constitution.<sup>239</sup> The state amendment provided that if candidates refused, a notification would appear next to their names on the ballot indicating that the candidates either “disregarded voters’ instructions” or

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quirement amounted to a higher percentage of the pool of eligible signors than the Court had approved in *Jeness*.

233. See *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (citing the following as examples of invidious discrimination: *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriages prohibited); *Brown v. Board of Education*, 347 U.S. 483 (1954) (“separate but equal” public education facilities); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (facially neutral law enforced in racially discriminatory manner)).

234. *Williams*, 393 U.S. at 30–34.

235. 514 U.S. 779 (1995).

236. *Id.* at 838. The Qualifications Clauses are located in U.S. CONST. art. I, § 2, cl. 2, and art. I, § 3, cl. 3.

237. *Id.* at 833–34.

238. 531 U.S. 510, 523 (2001).

239. *Id.* at 514.

“declined to pledge to support term limits.”<sup>240</sup> Noting that the Elections Clause authorized states to enact “procedural” regulations only, the Court observed that this power included choosing a time and place for holding elections, as well as matters like “notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.”<sup>241</sup> But the Missouri amendment, the Court found, “simply is not authorized by the Elections Clause.”<sup>242</sup> The Court found the amendment was not procedural, but an attempt to disfavor a class of candidates, and held it unconstitutional.<sup>243</sup>

*Thornton* and *Gralike* thus stand in sharp contrast to the Court’s ballot access jurisprudence. In these Qualifications Clause cases, the Court struck down laws precisely because the laws disfavored a class of candidates. But in its ballot access jurisprudence, the Court routinely upholds laws that disfavor minor party and independent candidates. The Court’s finding that minor party and independent candidates do not merit equal protection as a class is implicit in the holding of earlier ballot access cases like *Jenness* and *Storer*, which sustained significantly unequal burdens on these candidates.<sup>244</sup> The Court finally made this finding explicit in *Timmons*, when it declared that states may enact laws which have not only the effect but the purpose of disfavoring minor party and independent candidates.<sup>245</sup>

In *Thornton* the Court distinguished its ballot access jurisprudence on the basis that the laws challenged therein “regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position” (italics in original).<sup>246</sup> The Court’s distinction turned on the fact that petition requirements are not a qualification for serving office, but only a procedure for regulating ballot access.<sup>247</sup> Thus, any candidate who submits the required number of signatures and complies with other require-

240. *Id.* at 514–15.

241. *Id.* at 523–24 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

242. *Id.* at 526.

243. *Id.*

244. See *Jenness v. Fortson*, 403 U.S. 431, 440–41 (1971) (denying equal protection challenge where minor party candidates were required to collect 88,175 signatures and major party candidates were granted automatic ballot listing); *Storer v. Brown*, 415 U.S. 724 (1974) (declining to find equal protection violation where independent candidates were required to collect 325,000 signatures and major party candidates were granted automatic ballot listing).

245. *Timmons v. Twin Cities Area New Political Party*, 520 U.S. 351, 367 (1997).

246. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995) (citing, among other cases, *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983); *Storer*, 415 U.S. 724 (1974); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194–195 (1986); *Burdick v. Takushi*, 504 U.S. 428 (1992)).

247. *Id.*

ments is eligible for ballot listing. By contrast, under the Arkansas amendment in *Thornton*, any candidate who had served a certain number of years in the U.S. House or Senate was automatically disqualified, regardless of compliance with procedures for gaining ballot access. The Court thus provided a legal basis for distinguishing *Thornton* from its ballot access jurisprudence, but the rationale on which the Court relied in *Thornton* applies equally to ballot access cases.<sup>248</sup> The Court's overriding concern in *Thornton* was the state's effort "to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints" under the guise of procedural regulation.<sup>249</sup> Ballot access cases, which arise because states impose unequal burdens on particular classes of candidates, likewise implicate this concern.<sup>250</sup>

*Gralike* further blurred the distinction between *Thornton* and the Court's ballot access jurisprudence. In *Gralike*, the substantive qualification at issue was not incumbency but simply whether candidates supported a term limits amendment to the U.S. Constitution.<sup>251</sup> Thus unlike *Thornton*, *Gralike* did not involve the automatic disqualification of a class of candidates, but only the burdening of a class of candidates—those unwilling to support term limits.<sup>252</sup> But whether a candidate supports term limits is no more a substantive qualification than whether a candidate supports the Republican or Democratic parties. The legal basis the Court articulated in *Thornton* for distinguishing ballot access cases thus disappears in *Gralike*. Yet in *Gralike* the Court held that the state exceeded its power under the Elections Clause by burdening a particular class of candidates,<sup>253</sup> whereas in ballot access cases, the Court routinely holds that states have the power under the Elections Clause to burden particular classes of candidates.<sup>254</sup> This tension between the Court's Qualifications Clause cases and its ballot access cases is perhaps the most compelling evidence yet that the Court's ballot access jurisprudence has been inadequate to protect the constitutional rights of minor party and independent candidates. The Court has declared unequivocally that states do not have the power to disfavor a class of can-

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248. *Id.*

249. *Id.* at 834.

250. Recall, for example, the burden imposed on candidates in *Storer*, who were required to collect 13,500 signatures a day for 24 days straight in order to achieve ballot access. *See Storer*, 415 U.S. at 740. If this is not a substantive requirement in the same sense as incumbency is, the signature requirement is surely no less an attempt to exclude a class of candidates under the guise of procedural regulation, which the Court rejected in *Thornton*.

251. *Cook v. Gralike*, 531 U.S. 510, 518–19 (2001).

252. *Id.*

253. *Id.* at 524.

254. *U.S. Term Limits*, 514 U.S. at 835.

didates: surely this remains true when the class is composed not of major party but minor party and independent candidates.

*A. Ballot Access Laws as Collusion in Restraint of Democracy*

The Court's failure to protect candidates' rights in its ballot access jurisprudence has led some scholars to urge a return to strict scrutiny in this area of the law.<sup>255</sup> The Court, however, has explicitly rejected this suggestion.<sup>256</sup> The Court's rationale is rooted in the familiar notion that substantial regulation of elections is necessary if order is to prevail over chaos.<sup>257</sup> Surely this is correct, as far as it goes. Given the necessity for comprehensive and highly complex regulatory codes, it is unrealistic to suppose that each regulatory provision should be subject to strict scrutiny simply because it affects candidates' rights in some way.<sup>258</sup> But it should also be clear that the Court's increasingly deferential posture has been inadequate to protect those rights, and it simply strains credulity to suggest that self-interested legislation enacted by major party politicians is the only alternative to chaos.

What is needed to ensure adequate judicial protection of candidates' rights is not strict scrutiny of every law that affects those rights, but rather a means to distinguish self-interested legislation by the major parties from legitimate regulation of the political process by the state. As a practical matter, state action may be indistinct from the concerted action of the two major parties that dominate the legislatures, but it is not indistinguishable.<sup>259</sup> The distinction can be characterized as the difference between nonpartisan and bipartisan legislation.<sup>260</sup> Nonpartisan legislation furthers a legitimate state interest; bipartisan legislation, by contrast, furthers the political interests of the parties themselves. Thus, where the two parties behave as a duopoly, exempting themselves from laws that impose unnecessary burdens on their competitors and lack any justification in a legitimate state interest, the Court should find the laws presump-

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255. See, e.g., Smith, *Judicial Protection of Ballot-Access Rights*, *supra* note 53. More generally, scholars have advocated heightened scrutiny of "partisan lock-ups" of the political market and the entrenchment of the two-party duopoly in the United States. See, e.g., Issacharoff & Pildes, *supra* note 83; Hasen, *supra* note 100.

256. See *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

257. *Id.* at 788 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

258. See *id.*

259. Of 7382 seats in the state legislatures, minor party and independent representatives occupied only eighteen, while Republicans and Democrats occupied the rest. See NAT'L CONF. OF STATE LEGISLATURES, 2005 PRE-ELECTION PARTISAN COMPOSITION OF STATE LEGISLATURES (2005), available at <http://www.ncsl.org/ncsl/db/elect98/partcomp.cfm?year=2005> (last visited Nov. 22, 2005).

260. See SHAPIRO, *supra* note 5.

tively unconstitutional.<sup>261</sup> This sort of legislation amounts to a form of collusion in restraint of democracy.<sup>262</sup>

Distinguishing bipartisan collusion from legitimate state action need not involve the Court in inappropriate second-guessing of judgments that are better left to the political branches. Collusion is only possible in the limited situations in which legislators have a direct interest, in their capacity as legislators, in the legislation that they pass governing the political process. Most other modern democracies have recognized the danger that this form of collusion poses to democratic government, and have taken steps to guard against the threat.<sup>263</sup> Moreover, in antitrust cases, the Court regularly distinguishes legitimate business activities from those that have no purpose apart from their anticompetitive effects.<sup>264</sup> Likewise, collusion in restraint of democracy can be identified as bipartisan action that has no purpose apart from its anticompetitive effects on the political process.

This antitrust model of judicial review is most closely associated with John Hart Ely, who derived an entire theory of judicial review from the insight of Justice Stone's famous footnote four in *Carolene Products Co. v. United States*.<sup>265</sup> Justice Stone suggested that heightened judicial scrutiny was appropriate for "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."<sup>266</sup> In such cases, Justice Stone proposed a "narrower scope for operation of the presumption of constitutionality."<sup>267</sup> Ely thus advocated a "participation-oriented, representation-reinforcing" ap-

261. *See id.* at 60–62.

262. *Id.*

263. *See* COMM'N ON FED. ELECTION REFORM, *supra* note 62, at 49; Issacharoff & Pildes, *supra* note 83, at 690 (stating that "the German Court has taken a far more aggressive approach to the oversight of political competition, assuming precisely the opposite review posture to that of the American Supreme Court: 'Parliament's discretion is severely limited when legislating on the right to elect representatives to legislative bodies: this [limitation] follows from the principles of formal voter equality and equal opportunity of parties'").

264. *See, e.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (upholding that a price fixing agreement among thousands of artists because it reduced transaction costs and made mass marketing of performance rights feasible); *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958) (holding that tying agreements serve hardly any purpose beyond the suppression of competition); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (holding that any combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity is illegal *per se*); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918) (upholding a rule that all commodities traders must trade commodities after hours at the market closing price, because the rule forced all transactions into an atmosphere where relevant information was equally available to all participants).

265. 304 U.S. 144, 153 n.4 (1944). *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 75–77 (Harvard Univ. Press 1980).

266. *Caroline Products*, 304 U.S. at 153 n.4.

267. *Id.*

proach to judicial review, under which the role of the Court is to correct the political processes when they malfunction.<sup>268</sup> The primary incidence of malfunction Ely identified is “when the process is undeserving of trust, when the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.”<sup>269</sup>

Ely did not address modern ballot access legislation, but a better real-world example of a malfunctioning political process is hard to find. Discriminatory and restrictive ballot access laws constitute self-interested bipartisan action. They are unnecessary to promote any legitimate state interest; they infringe upon the constitutional rights of candidates and voters; and they impose anticompetitive restrictions on the political process, undermining its democratic character and purpose by excluding legitimate candidates and limiting the role of voters. Far from deferring to legislative judgment in these cases, the Court should recognize that that judgment is suspect and invalidate legislation where it reflects a partisan abuse of state power.

One of the most striking aspects of the Court’s ballot access jurisprudence, however, is its failure to acknowledge that ballot access laws present a conflict of interest for the politicians who enact them. The Court never acknowledges that the state to which it so often defers in ballot access cases is indistinct for practical purposes from the two major parties.<sup>270</sup> “The Constitution permits the . . . Legislature to decide that political stability is best served through a healthy two-party system,” the Court observes, but nowhere acknowledges that the legislature is comprised entirely of the Republicans and Democrats who dominate that system.<sup>271</sup> The Court’s failure to distinguish between bipartisan collusion and legitimate state regulation of the ballot is particularly striking in the context of an equal protection challenge brought by a minor party or independent candidate. The crux of such a complaint is that no legitimate state interest justifies the discriminatory legislation being challenged. The legal issue is, in effect, whether the challenged action is properly attributable to the state itself or to the two parties acting under color of state authority. Deference to the legislature prior to a showing that a legitimate state interest is implicated therefore begs the above question

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268. ELY, *supra* note 265, at 73–104.

269. *Id.* at 103.

270. See NAT’L CONF. OF STATE LEGISLATURES, *supra* note 57. The vast majority of state legislatures currently have no minor party or independent representatives. Vermont is a notable exception, with seven out of 150 representatives in the state House classified as “independent/other.”

271. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). In the Minnesota legislature, which made the determination in question, there are currently no minor party or independent representatives in the state House, and only one non-major-party representative in the Senate. See NAT’L CONF. OF STATE LEGISLATURES, *supra* note 57.

because if the action is properly attributable to the two parties rather than to the state, judicial deference is improper. It is the legislature, not the political parties, to which the Court should defer under our constitutional democracy.

The application of antitrust principles to the actions of political parties may seem to involve an extension of antitrust law to a “market” it was never intended to govern. In fact, the *Noerr-Pennington* doctrine clearly states that antitrust laws do not prohibit people from conspiring to convince the legislature to take action, even if the action is anticompetitive.<sup>272</sup> Presumably this doctrine would exempt Republicans and Democrats from prosecution under the antitrust laws for conspiring to convince the Legislature to exclude minor party and independent candidates from the ballot. The argument advanced here, however, is not that the antitrust statutes should be extended to apply to political parties, but simply that antitrust law provides an analytic framework for identifying instances of antidemocratic collusion by political parties. Politicians cannot be trusted to enforce their own compliance with the rules of the competitive game any more than corporations can be trusted to enforce theirs, and there is no reason that the Court should not recognize this simple truth when analyzing ballot access laws.<sup>273</sup>

The virtue of applying antitrust principles to the limited sphere of legislation governing the political process is that it provides the Court with a means of identifying self-interested legislation that does not require strict scrutiny of every law affecting candidates’ rights. The Court’s ballot access jurisprudence is afflicted with a formalism that obscures plain facts that everyone knows about the real world—first and foremost, that self-interested legislation is likely to reflect the self-interest of the legislators enacting it.<sup>274</sup> But there is an alternative to modern ballot access laws other than chaos, and there is an alternative to

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272. See *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). In these cases, the Court held that the antitrust laws were not intended to prohibit people from petitioning the government for political purposes or otherwise exercising their First Amendment rights.

273. SHAPIRO, *supra* note 5, at 64–77. See also Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) (arguing that the antitrust laws themselves have a political dimension—that they were intended not only to embody economic considerations but also to promote “certain political values,” including “a fear that excessive concentration of economic power will breed antidemocratic political pressures”).

274. See *United States v. Ricciardi*, 357 F.2d 91, 97 (2d Cir. 1966) (“Judges are not necessarily to be ignorant in Court of what everyone else, and they themselves out of Court, are familiar with.”). For example, the most recent amendment to the Constitution, which prohibits Congress from enacting pay raises that take effect before its members face re-election, reflects our well-founded mistrust of self-interested legislation. U.S. CONST. amend. XXVII (“No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”).

total deference to state legislatures other than endless court battles over the sufficiency of evidence. Where self-interested legislation is found to constitute antidemocratic collusion, the burden ought to be on the state to demonstrate that the legislation furthers a legitimate state interest; otherwise, the legislation should be found unconstitutional. In close cases, the deference traditionally due the legislative judgment should tip the balance in favor of a law's legitimacy. Antitrust law, with its focus on legitimate purposes and anticompetitive effects, provides the Court with a ready-made legal framework for distinguishing between state regulation and antidemocratic collusion.

To be sure, the approach advocated here would result in the invalidation of restrictive and discriminatory modern ballot access laws, but this would comport with the original purpose of ballot access regulation by the state, which was to ensure ballot listing for every legitimate candidate.<sup>275</sup> It would also bring uniformity to the Court's modern ballot access jurisprudence, which is lacking, and it would reconcile these cases with the Court's recent Qualifications Clause jurisprudence. Of course, given the expansive language of the Constitution, the Court's ballot access cases might be left to stand as they are. But where the Constitution admits of conflicting interpretations, the better interpretation is the one that promotes, rather than restrains, political equality, which is not only a fundamental democratic principle, but also a moral value that renders the Constitution worth defending.<sup>276</sup>

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275. See discussion *supra* Part II.C.

276. See David Lyons, *Substance, Process, and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745, 762 (1987), for an argument that the Constitution ought to be interpreted in a manner that promotes the moral justification of the resultant decisions.