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Constitutional Law--First Amendment--No Constitutional Right to Vote for Donald Duck: The Supreme Court Upholds the Constitutionality of Write-in Voting Bans in Burdick v. Takushi

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CONSTITUTIONAL LAW—FIRST AMENDMENT—NO CONSTITUTIONAL RIGHT TO VOTE FOR DONALD DUCK: THE SUPREME COURT UPHOLDS THE CONSTITUTIONALITY OF WRITE-IN VOTING BANS IN *BURDICK V. TAKUSHI*

INTRODUCTION

Write-in voting, while not a common means of selecting elected officials, plays a role in American electoral politics. On occasion, write-in candidates are elected to office.[1] The more common use of write-in votes may be to express dissatisfaction with candidates on the ballot and the political positions those candidates represent.[2]

Write-in ballots also give voters the opportunity to vote for the candidate they most prefer, even when that candidate has been unable to reach the ballot.[3] However, the opportunity to cast a write-in vote is not universally available throughout the United States. Three states, Hawaii, Nevada, and South Dakota, prohibit voters from casting write-in votes in any election.[4] At least twenty-four other states place some type of limitation on the ability to cast write-in votes.[5] A

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1. During the past 40 years, four members of Congress have been elected via write-in candidacies. *See Voters' Speech Rights—Federal District Courts Mandate Availability of Write-in Voting*, 104 HARV. L. REV. 657, 660 n.31 (1990) [hereinafter *Voters' Speech Rights*]. Furthermore, Strom Thurmond was elected to the United States Senate in 1954 after a write-in campaign in South Carolina. In 1989, Jackie Stump, a miners' union official running a write-in campaign, defeated a 20-year Democratic incumbent to win a seat in the Virginia legislature. Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 194 n.142 (1991).

2. *See, e.g.*, Laura A. Kiernan, *Nader's Battle for 'None of the Above'*, BOSTON GLOBE, Feb. 11, 1992, at 22 (describing Ralph Nader's campaign in the 1992 presidential primaries). Nader was campaigning as the "none of the above" candidate and hoped that an overwhelming write-in vote for him in the primaries would "send the candidates [on the ballot] packing and order a new election." *Id.*

3. *See* Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 782 n.10 (4th Cir. 1989).

4. *See* HAW. REV. STAT. §§ 16-1, 16-22, 12-1 to -2 (1988); NEV. REV. STAT. § 24-293.270 (1987); S.D. CODIFIED LAWS ANN. § 12-16-1 (1982 & Supp. 1992).

5. Eight states ban write-in votes from primary elections. *See* ALASKA STAT. § 15.25.070 (1988); FLA. STAT. ANN. ch. 101.011(6) (Harrison 1989); GA. CODE ANN. § 34A-1124 (Michie 1988); MD. ANN. CODE art. 33, § 5-3(f) (1987); TEX. ELEC. CODE ANN. § 172.112 (West 1986); WIS. STAT. § 8.17(3)(a) (1986). Fifteen states require some form of pre-registration by write-in candidates. *See* ARIZ. REV. STAT. ANN. § 16-312 (1984 & Supp. 1992); ARK. CODE ANN. § 7-7-305 (Michie Supp. 1989); CAL. ELEC. CODE § 7300 (West 1977 & Supp. 1992); COLO. REV. STAT. § 1-4-102 (1989 & Supp. 1992); CONN. GEN. STAT. § 9-373(a) (1991); IDAHO CODE § 34-702A (Supp. 1992); MO. REV.

Hawaii voter, repeatedly thwarted in his attempts to cast write-in votes in state elections, recently contested the constitutionality of blanket write-in bans. The United States Supreme Court heard his challenge in its 1991-92 Term and determined that states could constitutionally ban all write-in voting.[6]

At issue in resolving the question of the constitutionality of blanket write-in bans was the tension between the states' broad right to regulate elections[7] and the voters' First and Fourteenth Amendment interests in expressing their political opinions and support by casting a vote for a particular candidate.[8] Prior to the Supreme Court decision in *Burdick v. Takushi*,[9] a number of lower courts found the write-in vote to be an important expression of political speech and association.[10] These courts found the opportunity to cast a write-in vote to be

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STAT. § 115.453(4) (1980 & Supp. 1992); MONT. CODE ANN. § 13-10-211 (1991); N.M. STAT. ANN. § 1-12-19.1 (Michie 1985); N.Y. ELEC. LAW § 6-164 (McKinney 1978 & Supp. 1992); OHIO REV. CODE ANN. § 3513.041 (Baldwin 1989); OR. REV. STAT. § 249.007 (1991); UTAH CODE ANN. § 20-7-20 (1991 & Supp. 1992); WASH. REV. CODE ANN. § 29.51.170 (West 1965 & Supp. 1992); WIS. STAT. § 8.16(2) (1986 & Supp. 1992).

6. Burdick v. Takushi, 112 S. Ct. 2059 (1992). A previous Supreme Court decision indicated that the Court might rule that the write-in vote is constitutionally protected. In Williams v. Rhodes, 393 U.S. 23 (1968), the Court indirectly mandated a write-in option by affirming the district court decision in Socialist Labor Party v. Rhodes, 290 F. Supp. 983 (S.D. Ohio 1968). The district court had ruled that although the Socialist Labor Party had not applied for its desired relief (ballot placement) in time for it to be granted, write-in space had to be afforded for that party in the upcoming election. *Williams*, 393 U.S. at 34-35. In a number of other cases, the Supreme Court pointed to the availability of write-in voting as a sufficient remedy for voters wishing to cast votes for candidates kept from the slate by ballot access requirements. *See, e.g.*, Storer v. Brown, 415 U.S. 724, 736 n.7 (1974) ("[W]e note that the independent candidate who cannot qualify for the ballot may nevertheless resort to the write-in alternative provided by California law."); Jenness v. Fortson, 403 U.S. 431, 434 (1971) ("There is no limitation whatever, procedural or substantive, on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted.").

7. This power is derived from Article I, Section 8, Clause 1 of the United States Constitution, which provides that the states can prescribe the "[t]imes, [p]laces, and [m]anner of holding [e]lections." U.S. CONST. art. I, § 8, cl. 1. State power to regulate elections is also found in the Tenth Amendment, which reserves to the states all powers not expressly delegated in the Constitution to the federal government. U.S. CONST. amend. X. Such authority has been found to be wide ranging because "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer*, 415 U.S. at 730.

8. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 786-87 (1983) (identifying the First Amendment right of association as contained in the vote and applicable to the states through the Due Process Clause of the Fourteenth Amendment); *see also* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979); Lubin v. Panish, 415 U.S. 709, 716 (1974); *Williams*, 393 U.S. at 30.

9. 112 S. Ct. 2059 (1992).

10. *See* Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776 (4th

constitutionally guaranteed because the First and Fourteenth Amendment interests of write-in voters outweighed the states' interests in regulating elections.[11] By contrast, the Supreme Court found the voters' interests in casting a write-in vote to be of minimal importance.[12]

This Note will examine the Supreme Court decision in *Burdick* in detail and question the Court's conclusion that the voters' interest in casting write-in votes is so slight that write-in bans are presumptively valid. The Note will conclude that the *Burdick* decision is both inconsistent with the Court's previous ballot access jurisprudence, and restricts the electoral process at a time when voters are clamoring for more diverse choices in the voting booth.[13]

Section I of the Note will briefly review a number of cases that considered the constitutionality of legislation governing candidate access to election ballots. The ballot access cases are relevant because federal courts considering write-in voting restrictions have adopted a standard of review originally tailored for ballot access restrictions. Section II will describe the majority and dissenting opinions in *Burdick*.

Section III will analyze the nature of write-in voting as an expression of political speech and association protected under the First and Fourteenth Amendments of the Constitution. This section will challenge the *Burdick* Court's interpretation of the standard of review applied to ballot access cases. Finally, this section will demonstrate that the Supreme Court failed to correctly weigh the injury to voters imposed by the write-in ban against the relatively insignificant state interest in banning such votes.

I. BACKGROUND

A. *The Ballot Access Cases*

In the 1900's, concern arose that election ballots had become too lengthy and contained too many offices for one election.[14] A reform

Cir. 1989); Burdick v. Takushi, 737 F. Supp. 582 (D. Haw. 1990), *rev'd*, 937 F.2d 415 (9th Cir. 1991), *aff'd*, 112 S. Ct. 2059 (1992); Paul v. Indiana Election Bd., 743 F. Supp. 616 (S.D. Ind. 1990).

11. *Dixon*, 878 F.2d at 786; *Burdick*, 737 F. Supp. at 591; *Paul*, 743 F. Supp. at 625.

12. *Burdick*, 112 S. Ct. at 2066.

13. The popularity of the 1992 presidential campaign of political independent H. Ross Perot is the most obvious example of the voters' preference for more, not fewer, choices in the voting booth.

14. *See* Judith L. Elder, *Access to the Ballot by Political Candidates*, 83 DICK. L. REV. 387, 389 (1978) (stating that the ballot reform movement began out of a concern that voters do not give careful attention to all of the candidates when presented with a long list

movement led to the development of a number of ballot access restrictions.[15] Eventually, a number of these restrictions were challenged as infringements on the rights of candidates and voters.[16] These cases influenced both lower court and Supreme Court decisions regarding write-in voting in two important areas. First, they identified the content of the vote—that is the particular candidate chosen by the voter, as opposed to the simple ability to cast a vote—as an expression of First Amendment rights. Second, they devised a standard of review by which to evaluate ballot access legislation, which in turn has been adopted by courts evaluating write-in voting bans. Therefore, before turning to an in-depth discussion of *Burdick*, the next section will briefly discuss the holdings of the Supreme Court in ballot access decisions.

1. The Content of a Vote Implicates First and Fourteenth Amendment Interests

The notion that voters exercise First and Fourteenth Amendment rights when they cast their ballot for a particular candidate was developed in the ballot access cases.[17] In the first of this line of cases, *Wil-*

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of names and offices to be filled). For examples of ballot access restrictions, see *infra* note 16.

15. Ballot access restrictions made it more difficult for candidates to obtain a place on the ballot. Elder, *supra* note 14, at 389-90. However, this result may not have been the intent of the reformers: their concerns centered not around the number of candidates running for office, but rather the number of offices on each ballot. *Id.* at 390.

16. *See, e.g.*, Norman v. Reed, 112 S. Ct. 698 (1992) (striking down two Illinois Supreme Court rulings: that suburban candidates could not run under the banner of the Harold Washington Party, previously established only in the City of Chicago, and that failure to get enough suburban district signatures on ballot petition disqualified entire Harold Washington Party slate); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (striking down a requirement that candidates of independent or new parties in statewide elections procure over 25,000 signatures on a nominating petition, whereas established party candidates for statewide office had to acquire only 2500 signatures); Storer v. Brown, 415 U.S. 724 (1974) (upholding a law requiring independent candidates for office to have no affiliation with a political party for one year before running for election); Bullock v. Carter, 405 U.S. 134 (1972) (striking down a statute levying filing fees up to $8900 for placement on ballot); Jenness v. Fortson, 403 U.S. 431 (1971) (upholding a statute requiring independent candidates to submit a petition with the signatures of 5% of the total number of registered voters in the previous elections); Williams v. Rhodes, 393 U.S. 23 (1968) (striking down a statute that gave ballot placement only to candidates whose party had received 10% of the vote in the previous gubernatorial election or who submitted petitions with the names of 15% of the number of votes cast in the gubernatorial election).

17. Ballot access cases have focused on the infringements on rights of voters, not candidates. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 786-87 (1983); *Illinois State Bd. of Elections*, 440 U.S. at 184; *Williams*, 393 U.S. at 30. The reason for this emphasis is that the Supreme Court has never held that there is a fundamental right to candidacy. *See*

liams v. Rhodes,[18] voters challenged an Ohio statute that gave ballot placement only to candidates belonging to parties that had received ten percent of the vote in the previous gubernatorial election, or alternatively, submitted petitions with the names of fifteen percent of the number of votes cast in the gubernatorial election. The statute further required that petitions for placement on the presidential ballot be submitted nine months before the election.[19] The Court found the restrictions burdened "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."[20] The right of free association, the Court held, was protected under the First Amendment, which was made applicable to the states under the Fourteenth Amendment.[21] The *Williams* Court stated explicitly that the First Amendment required the opportunity to vote for candidates other than those of the two major parties.[22] However, the parameters of this right were

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Bullock, 405 U.S. at 143. However, legislation that impacts on candidates has been found to impact on voters:

> The rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. . . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.

Id.

18. 393 U.S. 23 (1968). Although *Williams* identified First Amendment rights as being at stake, the case was decided on an equal protection basis and not under the First Amendment. *Id.* at 26. The early ballot access cases all applied an equal protection analysis to ballot access rules. *See, e.g.*, *Bullock*, 405 U.S. at 141; *Jenness*, 403 U.S. at 440. Using this approach, the ballot access cases examined whether one group of candidates and their supporters who found it impossible to reach the ballot were being treated in an unconstitutionally discriminatory way. This strategy was abandoned in *Anderson v. Celebrezze* in favor of a substantive due process analysis. 460 U.S. at 786-87. The most recent ballot access case decided by the Supreme Court affirmed its reliance on the First and Fourteenth Amendments to resolve ballot access disputes. *See Norman*, 112 S. Ct. at 705 n.8. The First Amendment approach is less confusing since even those cases using an equal protection analysis identified the First and Fourteenth Amendment rights of free association and speech as issues in assessing the constitutionality of ballot access requirements. This part of the analysis strongly resembled a substantive due process/fundamental rights approach, although it was not identified as such. *See, e.g.*, Elder, *supra* note 14, at 403 ("It seems peculiar to speak of equal protection of a fundamental interest [which is] already constitutionally protected under the [F]irst [A]mendment . . . . It would be far less convoluted to rely on the [F]irst [A]mendment directly.").

19. *Williams*, 393 U.S. at 25-26.

20. *Id.* at 30.

21. *Id.* at 30-31. A right of free association has been found to be inherent in the First Amendment. *See, e.g.*, United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n., 389 U.S. 217 (1967); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958).

22. "[T]he right to vote is heavily burdened if that vote may be cast only for one of

left undefined by the Court.[23]

Later Supreme Court decisions in ballot access cases also found that the First Amendment right of free association was implicated in the exercise of the vote. For instance, in *Anderson v. Celebrezze*,[24] the Court determined that Ohio's refusal to place independent presidential candidate John Anderson on the ballot because he failed to comply with the state's unreasonably early filing deadline impaired Ohio voters' right to freely associate with Anderson. The *Anderson* decision indicated that the Court placed great significance on the exercise of political association reflected in the voter's ballot. According to the *Anderson* Court, supporters of independent candidates increase their political impact by casting votes for those candidates. Additionally, the Court said that the votes cast for such a candidate contribute to "diversity and competition in the marketplace of ideas."[25] This contribution, the Court said, is especially important because history shows that the unpopular views reflected in the vote for the independent candidate may eventually be accepted into the "political mainstream."[26] This language implies that the Court believed the vote could be used not only to elect office holders, but to communicate messages to the populace at large.

2. Standard of Review

Initially, the level of scrutiny applied in challenges to ballot access restrictions varied from case to case.[27] Thus, these cases have

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two parties at a time when other parties are clamoring for a place on the ballot." *Williams*, 393 U.S. at 31.

23. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 13-20 (2d ed. 1988). Professor Tribe observed that:

> *Williams* acknowledged that a statutory regime denying a group the fruits of their association—political impact—runs afoul of the [F]irst [A]mendment no less than one that precludes association itself . . . . But the Court failed to indicate whether a statute that encumbered the ballot access only of those groups that enjoyed no widespread support must also be regarded as so burdening association as to compel strict scrutiny.

Id. at 1104.

24. 460 U.S. 780 (1983).

25. *Id*. at 794.

26. *Id*.

27. For example, in both Williams v. Rhodes, 393 U.S. 23, 30-31 (1968), and Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184-85 (1979), the Court applied strict scrutiny in striking down the challenged restrictions. *Storer v. Brown* used the word "compelling" to describe the state's asserted interests and thus appeared to apply strict scrutiny in upholding a disaffiliation statute. 415 U.S. 724, 736 (1974). However, as the dissent noted, the majority opinion did not address whether the state used the least restrictive alternative to reach these compelling goals, which is also part of strict scrutiny

been described as "oblique and not wholly consistent."[28] In *Anderson v. Celebrezze*,[29] the Court developed the standard of review now used in ballot access cases.[30] The Court acknowledged the states' interest in running orderly elections and stated that not all impediments to the individual's right to vote were invalid. It announced the following test by which to evaluate the constitutionality of election laws:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[31]

Following its announcement, the *Anderson* standard was applied by courts evaluating the constitutionality of both ballot access legislation in general and write-in voting legislation in particular.[32] Nevertheless, results in write-in voting cases were inconsistent. Prior to the Supreme Court decision in *Burdick*, the constitutionality of write-in voting prohibitions was addressed by two federal appeals courts. The Court of Appeals for the Fourth Circuit determined in *Dixon v. Maryland State Administrative Board of Election Laws*[33] that limitations on the write-in vote were unconstitutional. The Court of Appeals for the Ninth Circuit in *Burdick v. Takushi*,[34] upheld Hawaii's blanket write-in ban. The Supreme Court granted certiorari in *Burdick* to "resolve

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analysis. *Id.* at 761 (Brennan, J., dissenting). *Bullock v. Carter* applied "close scrutiny." 405 U.S. 134, 143 (1972). *Jenness v. Fortson* did not specify what level of scrutiny it used to evaluate Georgia's ballot access restrictions. 403 U.S. 431 (1971). However, the level of review applied in that case has been described as "minimal scrutiny." TRIBE, *supra* note 23, at 1105.

28. TRIBE, *supra* note 23, at 1102.

29. 460 U.S. 780 (1983).

30. *See, e.g.*, Burdick v. Takushi, 112 S. Ct. 2059, 2063 (1992); Norman v. Reed, 112 S. Ct. 698, 705 (1992).

31. *Anderson*, 460 U.S. at 789.

32. *See, e.g.*, *Burdick*, 112 S. Ct. at 2062 (write-in voting); *Norman*, 112 S. Ct. at 705 (ballot access); Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 780 (4th Cir. 1989) (write-in voting).

33. 878 F.2d 776 (4th Cir. 1989). See *infra* notes 101-05 and accompanying text for a summary of the facts and holding in *Dixon*.

34. 937 F.2d 415 (9th Cir. 1991), *aff'd*, 112 S. Ct. 2059 (1992).

the disagreement on this important question."[35]

II. *Burdick v. Takushi*: The Supreme Court Decision[36]

Burdick began its long road to the Supreme Court when the appellant, Alan Burdick, discovered that only one candidate had filed nominating papers to run for the seat representing his district in the Hawaii House of Representatives. Burdick inquired about the possibility of casting a write-in vote in a Hawaii election. He was informed by the Attorney General's office that Hawaii did not allow write-in voting.[37] Burdick commenced a lawsuit, claiming the write-in ban violated his First Amendment rights to free speech and association. His suit eventually reached the United States Supreme Court.[38]

A. *Majority Opinion*[39]

At the outset, the Court emphasized that not every restriction on voting rights is subject to strict scrutiny.[40] It confirmed that the appropriate standard of review for voting restrictions was set out in *Anderson v. Celebrezze*.[41] The Court clarified the *Anderson* standard by

35. *Burdick*, 112 S. Ct. at 2062.

36. 112 S. Ct. 2059 (1992).

37. *Id*. at 2061.

38. Burdick's lawsuit reached the Supreme Court via a long and tortuous route. Burdick initially filed suit in the United States District Court for the District of Hawaii. The district court agreed with Burdick's position and granted a preliminary injunction ordering the state to provide for the casting of write-in votes in the November 1986 election. *See* Burdick v. Takushi, 846 F.2d 587 (9th Cir. 1988). The government appealed the injunction and the Court of Appeals for the Ninth Circuit entered a stay, because it was unclear whether Hawaii's statutes actually banned write-in voting. *Id.* at 588. The court of appeals ordered the district court to abstain. *Id*.

On remand, the district court certified three questions to the Supreme Court of Hawaii aimed at determining whether Hawaii's constitution allowed the state to preclude write-in voting and if so whether the state's election statutes had the effect of banning such votes. Hawaii's high court held that Hawaii's election laws both banned write-in voting and were consistent with the state's constitution. Burdick v. Takushi, 776 P.2d 824 (Haw. 1989). After this decision, the district court granted Burdick's renewed motion for summary judgment, but stayed the relief pending appeal. Burdick v. Takushi, 737 F. Supp. 582 (D. Haw. 1990). The Ninth Circuit then reversed the district court decision, holding that Burdick had no constitutional right to cast a write-in vote in state elections. Burdick v. Takushi, 927 F.2d 469 (9th Cir. 1991). Burdick requested a rehearing en banc, which was denied. However, the court's opinion was vacated and replaced with only minor changes. Burdick v. Takushi, 937 F.2d 415 (9th Cir. 1991).

39. The *Burdick* opinion was written by Justice White and was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Souter, and Thomas. *Burdick*, 112 S. Ct. at 2061.

40. *Id*. at 2062-63.

41. 460 U.S. 780, 789 (1983). See *supra* notes 29-32 and accompanying text for a discussion of the *Anderson* standard.

stating that only if a voting restriction places a "severe" burden on First and Fourteenth Amendment interests will it be examined to determine whether it is "narrowly drawn to advance a state interest of compelling importance."[42] On the other hand, if the contested legislation imposes a "reasonable, nondiscriminatory restriction[ ]" on a voter's rights, it will be upheld as long as the state can advance an important regulatory interest.[43] Thus, the essential question for the *Burdick* Court to decide was the degree of burden imposed on the First and Fourteenth Amendment rights of voters when a state maintains a write-in ban.

The Court determined that the burden imposed by a write-in ban was negligible. It was unimpressed with the appellant's argument that a write-in vote is a protected method of political expression. The purpose of voting, the Court said, is to "winnow out and finally reject all but the chosen candidates."[44] Therefore, to "[a]ttribut[e] to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently."[45] The election booth, the Court said, is not a venue for registering political protest: "There are other means available . . . to voice . . . generalized dissension from the electoral process; and we discern no adequate basis for our requiring the State to provide and to finance a place on the ballot for recording protests against its constitutionally valid election laws."[46] Thus, the Court dismissed Burdick's contention that he should be able to vote for the candidate of his choice, whether that candidate is on the ballot or not, and that to deprive him of that opportunity would be to deprive him of a meaningful means of political protest. It also determined that the ban did not force Burdick to speak against his will by voting for candidates he did not truly support.[47]

The Court similarly dismissed Burdick's claim that a write-in prohibition deprives voters of their First Amendment right to associate with candidates of their choice.[48] The Court made this determination through a review of Hawaii's ballot access laws. According to the

42. *Burdick*, 112 S. Ct. at 2063 (quoting Norman v. Reed, 112 S. Ct. 698, 705 (1992)).

43. *Id.* at 2063-64 (quoting *Anderson*, 460 U.S. at 788).

44. *Id.* at 2066 (quoting Storer v. Brown, 415 U.S. 724, 735 (1974)).

45. *Id.* (quoting *Storer*, 415 U.S. at 730).

46. *Id.* at 2067.

47. *Id.* at 2065.

48. See *supra* notes 17-26 and accompanying text for a discussion of previous Supreme Court decisions regarding the relationship between ballot access and freedom to associate.

Burdick Court, Hawaii provides extremely easy access to the ballot.[49] The Court opined that because of these liberal provisions, all candidates with a modicum of support will be able to reach the primary ballot if they make their decision to run sufficiently in advance of the primary election. It reasoned that the only burden to voters was to choose the candidate to support in enough time for him or her to gain ballot placement.[50] Having decided that the vote serves no expressive function, and that the burden on association was limited to depriving voters of the opportunity to wait until the "eleventh hour" to choose their candidate,[51] the Court went on to the second part of the *Anderson* test—an evaluation of the state's interest in banning write-in votes.[52]

The Court emphasized that since the write-in prohibition imposed only a minimal burden, the state did not have to demonstrate a compelling interest in the ban.[53] Hawaii had advanced two interests in maintaining the write-in ban: preventing party factionalism and preventing party raiding.[54] The Court held that both interests provided sufficient justification to uphold the write-in ban.[55]

The Court first discussed Hawaii's professed goal of preventing party factionalism. The state asserted that a write-in ban helps foster

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49. *Burdick*, 112 S. Ct. at 2064-65. The Court reviewed the three ways Hawaii provides for candidates to reach the primary ballot in the state. *Id.* The first is the new party method. If a party petition signed by one percent of Hawaii's registered voters is filed 150 days before the primary, candidates of that party will be placed on the ballot provided that they file nominating papers containing the signatures of a specified number of registered voters 60 days before the primary. The number of signatures required varies according to the office sought: 25 for candidates for statewide or federal office and 15 for state legislative and county offices. *Id.* at 2064 (citing HAW. REV. STAT. §§ 11-62, 12-2.5 to -7 (1985)).

Second, a candidate can reach the ballot via the established party route. If a party has qualified by petition for three consecutive elections and received a certain percentage of votes in the preceding election, it does not have to file a party petition. *Id.* (citing HAW. REV. STAT. § 11-61 (1985)). Candidates for these parties must file nominating papers 60 days before the primary. *Id.* (citing HAW. REV. STAT. §§ 12-2.5 to -7 (1985)).

Finally, non-partisan candidates can be placed on the ballot by filing nominating papers containing 15 to 25 signatures, depending on the office sought, 60 days before the primary. *Id.* at 2065 (citing HAW. REV. STAT. §§ 12-3 to -7 (1985)). Non-partisan candidates can advance to the general election only if they receive 10% of the primary votes, or the number of votes sufficient to nominate a partisan candidate, whichever is lower. *Id.* (citing Hustace v. Doi, 588 P.2d 915, 920 (Haw. 1978)).

50. *Id.* (stating that "any burden on voters' freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary").

51. *Id.* at 2066.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 2067.

party unity in two ways. First, it prevents "sore-loser" candidacies (a candidate who has lost the primary cannot launch a write-in campaign against the primary winner). The *Burdick* Court agreed that the write-in ban is an effective means of averting "divisive" sore-loser candidacies.[56] Second, Hawaii claimed the ban preserves the state's practice of automatically seating in office primary winners who are unopposed in the general election.[57] The Court concurred that this practice encourages party unity because it "focuses the attention of voters upon contested races in the general election."[58]

The Court also agreed that the write-in ban protects Hawaii's interest in preventing party raiding, "the organized switching of blocs of votes from one party to another in order to manipulate the outcome of the other party's primary election."[59] The Court ruled that this interest was sufficient to support a write-in ban, even though Hawaii has an open primary system which allows voters to vote in whichever primary they choose despite their usual party affiliation. Therefore, it is possible, the Court said, for write-in voters to raid a party by writing in votes for a non-party member in the party primary (e.g., Democrats write-in a Democrat in the Republican primary). Hawaii, the Court said, has a "legitimate interest in preventing these sorts of maneuvers."[60] The Court concluded that "the legitimate interests asserted by the State are sufficient to outweigh the limited burden that the write-in voting ban imposes upon Hawaii's voters."[61]

The Court went one step further and announced that prohibitions on write-in bans are presumptively valid as long as a state's ballot access laws are otherwise constitutional.[62] The Court reasoned that this presumption was appropriate "since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access

56. *Id.* at 2066.

57. *Id.* In Hawaii, candidates who run unopposed in primary elections are automatically seated in office. *Id.* (citing HAW. REV. STAT. §§ 12-41 to -42 (1985)).

58. *Id.*

59. *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 n.9 (1983)). The following hypothetical illustrates a possible operation of party raiding: Republicans, hoping to pick a weak Democratic presidential candidate for George Bush to run against in the 1992 election, register en masse to vote in the Democratic primaries. They then vote for Jerry Brown, who they believe cannot win a general election. In that way, they could have an impact on the eventual Democratic candidate, meanwhile subverting the will of genuine members of the Democratic party.

60. *Id.* at 2067.

61. *Id.*

62. *Id.*

scheme."[63] In announcing this presumption, the Court implied that in the future a state banning write-in voting will not have to advance any state interests to justify the ban. Rather, the Court indicated that all write-in bans will be presumed valid unless a state's election laws are otherwise subject to constitutional attack.

In the final footnote to its opinion, the Court stated that, while the opportunity to cast a write-in vote is not constitutionally required, states are free to provide its voters with this option. States should not, the Court said, read its opinion in *Burdick* to discourage such provisions.[64]

B. *The Dissent*[65]

The dissent's disagreement with the majority did not center around the expressive value of the write-in vote.[66] It too, concluded that individual voters have no First Amendment right to cast "protest votes" and have them counted and reported.[67] Instead, the dissent asserted that the "right at stake here is the right to cast a meaningful vote for the candidate of one's choice."[68] It found that the write-in ban imposed a significant burden on this right, "depriv[ing] some voters of any substantial voice in selecting candidates for the entire range of offices at issue in a particular election."[69]

Hawaii's ballot access laws, the dissent contended, compound, rather than mitigate this burden. It noted that the Democratic Party is so dominant in Hawaii state politics that Democratic candidates frequently run unopposed.[70] Many voters, rather than cast votes for unopposed candidates, leave their ballots blank.[71] The dissent contended

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63. *Id.*

64. *Id.* at 2067 n.11.

65. Justice Kennedy, joined by Justices Blackmun and Stevens, dissented from the majority opinion. *Id.* at 2068.

66. *See supra* notes 44-47 and accompanying text.

67. *Burdick*, 112 S. Ct. at 2069 ("[T]he purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression.").

68. *Id.* The dissent did not specify from what constitutional provision the right to cast a meaningful vote was derived. Since it used the *Anderson* test to evaluate the legitimacy of the write-in ban, it presumably believed the right was grounded in the First Amendment. However, the dissent does not mention the First Amendment throughout the opinion except to state when it does not apply. *See id.* at 2068-72.

69. *Id.* at 2070.

70. *Id.* at 2068. In Hawaii's 1986 elections, 33% of statewide races were uncontested. In 1984, the figure was 39% and in 1982, it was 37.5%. *Id.*

71. *Id.* In 1990, 29% of the voters who voted in other races did not cast votes in uncontested state senate races; in the same year 27% of voters in other races did not cast votes in uncontested state house races. *Id.*

that these facts belie the majority's contention that Hawaii voters have adequate choices because of liberal ballot access laws. Instead, according to the dissent, Hawaii elections have a "haunting similarity" to the sham elections of other countries where the ballot bears the name only of the candidate from the ruling party.[72]

The dissent also noted that burdens unrelated to ballot access laws arise when write-in voting is banned. It argued that a write-in ban infringes on voters' choices when "late-developing issue[s] arise[]" or when "new information is disclosed about a candidate late in the race."[73] If such developments occur when it is too late for other candidates to qualify for the ballot (in Hawaii this deadline occurs, at the latest, two months before the primary), the write-in ban forces voters to "either . . . vote for a candidate whom they no longer support, or to cast a blank ballot."[74] The dissent maintained that write-in availability "provides a way out of the quandary" by allowing voters to cast votes for non-ballot candidates.[75] In such circumstances, the write-in option provides the only means to "preserve the voters' right to cast a meaningful vote in the general election."[76]

Having determined that the burden imposed on voters by the write-in ban was significant, the dissent went on to weigh Hawaii's

72. *Id.* at 2069. The dissent explained why it believed Hawaii's election laws limit, rather than expand, the number of candidates able to reach the ballot. First, it said that while new parties need only a small number of signatures to reach the primary ballot, the early filing deadline (five months before the primary election) impedes small parties from organizing in time to achieve ballot placement. *Id.* at 2068-69. The dissent also argued that it is not easy for independent candidates to achieve a place on the ballot for the general elections. It conceded that requirements for independent candidates to reach the primary ballot are "not onerous." *Id.* at 2068. However, it noted that primary voters must choose one ballot (e.g., Republican, Democratic, etc.) when voting in the primary election. If voters choose the independent ballot, they are precluded from voting for established party candidates in any race:

> [I]n practical terms the voter who wants to vote for one independent candidate forfeits the right to participate in the selection of candidates for all other offices. This rule . . . presents a substantial disincentive for voters to select the nonpartisan ballot. A voter who wishes to vote for a third-party candidate for only one particular office faces a similar disincentive.

Id. at 2069.

The dissent added that this problem was compounded because of the dominance of the Democratic Party in Hawaii. Hawaii's ballot access laws allow for a non-opposed primary winner to be automatically seated in office. Consequently, the primary is the final election for many offices. This increases the disincentive for voters to choose a nonpartisan or third party ballot at the primary stage, because by doing so, they may lose their opportunity to have a say in whom the final victor will be. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

asserted interests in upholding the ban. At the outset, the dissent sharply objected to the Court's holding that write-in bans were presumptively valid if a state's ballot access laws are otherwise constitutional.[77] First, the dissent argued, the "presumption is circular" because the availability of write-in voting is one factor to be considered in determining whether a state's ballot access laws are constitutional.[78] Furthermore, the dissent maintained that the majority's presumption requires a state banning write-in votes to defend only its ballot access laws and not the write-in prohibition itself.[79] The dissent opined that the standard set forth in *Anderson*, at a minimum, requires states to identify the precise interests served by a write-in ban.[80]

The dissent did not specify what level of scrutiny these precise interests must satisfy because it maintained that Hawaii had failed to justify the write-in ban under "any level of scrutiny."[81] The dissent argued that the interests advanced by Hawaii, some of which were "puzzling," were not advanced by the write-in ban, and thus could not provide its justification.[82]

The dissent first examined Hawaii's asserted interest in preventing party factionalism. It agreed that a write-in ban could be of some use in preserving the integrity of the party primary system because it would foreclose sore-loser candidacies. However, the dissent noted that sore-loser candidacies are not possible during Hawaii's all important primary elections because no one has lost an election yet. Thus, this interest cannot serve to justify the write-in ban during this phase of the election process. As for the general election, the dissent stated that the total ban on write-in voting was overinclusive because it banned not just sore-loser candidacies but serious candidacies as well.[83]

The dissent had a harsher evaluation of what it identified as Hawaii's second asserted interest—enforcing its policy of permitting un-

77. *Id.* at 2070-71. See *supra* notes 62-63 and accompanying text for a discussion of the majority's presumption that write-in bans are constitutionally valid.

78. *Id.* at 2071 (citing Storer v. Brown, 415 U.S. 724, 736 n.7 (1974) and Jenness v. Fortson, 403 U.S. 431, 438 (1971)).

79. *Id.*

80. *Id.* See *supra* notes 29-32 and accompanying text for a discussion of the *Anderson* standard.

81. *Id.*

82. *Id.*

83. *Id.* The dissent suggested that Hawaii could "implement a narrow provision" aimed at preventing sore-loser candidacies to effect its goal. *Id.* This prompted the majority to accuse the dissent of employing strict scrutiny in its analysis, despite its claim that it was using "some minimal level of scrutiny." *Id.* at 2067 n.10.

opposed victors in primaries to be automatically seated in office—stating that "[i]t makes no sense."[84] The dissent noted that because the primary winner automatically obtains office, no general election for that office takes place and thus there is no opportunity for a voter to cast a write-in vote. Thus, the state's policy of automatically seating primary winners cannot possibly be advanced by the write-in ban. According to the dissent, the fact that so many primary elections are dispositive because of the state's automatic seating policy highlights the need for write-in votes.[85]

The dissent had no more regard for the state's asserted interest in preventing party raiding: "It is ironic for the State to raise this concern when the risk of party raiding is a feature of the open primary system the State has chosen."[86] Moreover, the dissent said, the write-in ban cannot possibly advance the state's professed interest because state law requires candidates in party primaries to be party members. If a non-party member was written in as a party candidate, the dissent believed that state law would require the write-in candidate to be disqualified.[87]

The dissent also dismissed Hawaii's asserted interest in educating voters about the candidates, contending that "[t]he State has it backwards."[88] It argued that "voters who go to the trouble of seeking out [write-in] candidates and writing in their names are [likely to be] well informed."[89] Finally, the dissent dismissed Hawaii's asserted interest in combating fraud and enforcing nomination requirements because the state had not explained how a write-in ban advanced these interests. It concluded by asserting that "the State's proffered justifications for the write-in prohibition are not sufficient under any standard to justify the significant impairment of the constitutional rights of

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84. *Id.* at 2071.

85. *Id. See also* Burdick v. Takushi, 737 F. Supp. 582, 591 (D. Haw. 1990), *rev'd,* 937 F.2d 415 (9th Cir. 1991), *aff'd,* 112 S. Ct. 2059 (1992) ("If a write-in candidate can command so much attention that he poses a threat to an otherwise automatically-seated primary winner, then it is worth the extra time and money for the electorate to be exposed to increased debate and public discussion.").

86. *Burdick,* 112 S. Ct. at 2072.

87. *Id.*

88. *Id.*

89. *Id.* Preventing voter confusion has often been cited as a justification for ballot access laws. However, it does not seem to have the same force when advanced as a reason for write-in prohibitions. *See, e.g.*, Paul v. Indiana Election Bd., 743 F. Supp. 616, 624 n.22 (S.D. Ind. 1990) ("[The state] could not reasonably claim that banning write-in voting is necessary to prevent voter confusion. . . . While a long list of unfamiliar names may disorient a voter, no one is likely to be disoriented by a blank space on the ballot.").

voters."[90]

III. ANALYSIS

In Hawaii, voters in a general election are frequently presented with ballots containing the name of only one candidate for a particular office.[91] Nonetheless, the Supreme Court held that a Hawaii voter has no significant interest in casting a write-in vote for a person other than the single candidate listed on the ballot. The Court instead stated that the voter in this position has waited too long to choose a candidate for office and must either vote for the lone candidate, cast a blank ballot, or not vote at all.[92] Moreover, the Court's decision has given other states carte blanche to enact bans on write-in voting by ruling that such bans are presumptively valid.[93]

This Note will argue that the Supreme Court reached the wrong decision in *Burdick*. It will attempt to demonstrate that the *Burdick* Court unduly minimized the character and magnitude of the injury to voters when write-in voting is totally banned. It will first argue that the write-in vote has expressive qualities that are deserving of First Amendment protection. It will then demonstrate that the Court ignored its own previous language regarding the element of free association contained in the vote.

Further, this Note will contend that the *Burdick* Court erred in its determination that write-in bans are presumptively valid, thus apparently requiring the write-in voter to rebut the presumption that a state has legitimate interests in banning write-in votes. It will argue that the *Anderson* standard[94] requires states to advance the precise interests served whenever voting restrictions infringe on the First Amendment rights of voters. In conclusion, this Note will demonstrate that the voters' interests in casting write-in votes will generally outweigh a state's interests in banning them, and thus the opportunity to cast a write-in vote should be constitutionally required.

A. *Voting as Speech and Association*

The *Burdick* Court held that the sole burden imposed by Hawaii's write-in ban is that a voter cannot wait until "the eleventh

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90. *Burdick*, 112 S. Ct. at 2072.
91. *See supra* note 70.
92. *Burdick*, 112 S. Ct. at 2065.
93. *Id*. at 2067.
94. See *supra* text accompanying note 31 for the content of the *Anderson* standard.

hour" to decide which candidate to support.[95] The Court engaged in no discussion of the expressive power of the write-in vote except to say that the state is not required to "record, count and publish individual protests against the election system or the choices presented on the ballot."[96] With this, the *Burdick* Court dismissed the notion that voters exercise their constitutionally protected right to speech through use of the ballot box. However, since the "inviolability" of political speech is at "the core of the First Amendment"[97] and consequently requires the most rigorous constitutional protection,[98] the expressive quality of the write-in vote is deserving of a more comprehensive anal-

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95. *Burdick*, 112 S. Ct. at 2066.

96. *Id.* at 2067. In making this assertion, the Court seems to indicate that the write-in vote may contain a political statement, but that the ballot box is not a legitimate place to make that statement; in other words, the ballot box is not a public forum. The public forum doctrine defines the degree of regulation that the government can impose depending on the place where the speaker attempts to exercise his or her First Amendment rights. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). When a place is a traditional public forum, such as a street or park, the government's power to regulate speech is "severely circumscribed." *Id.* at 45. The government cannot impose content-based regulations on speech or association in a traditional public forum unless the regulation advances compelling state goals by narrowly tailored means. *Id.*

The voting booth obviously is not a street or a park. However, it may be a designated public forum, a place the state has "opened up for use by the public as a place for expressive activity." *Id.* It can be argued that the state, by holding elections, has opened up the voting booth as a place for expressing political beliefs and exercising associational rights. If this premise is accepted, impediments to voters become subject to the same limitations as when the government seeks to regulate First Amendment rights in a public forum: if the regulations are content-based they must survive strict scrutiny to be constitutional. *Id.* The *Burdick* Court, of course, believed there was nothing content-based about a write-in ban. *Burdick*, 112 S. Ct. at 2066. Therefore, even if the Court found that the voting booth was a designated public forum, it would not have applied strict scrutiny.

However, even content-neutral restrictions on speech in a designated public forum are limited to reasonable time, place and manner restraints. *Perry*, 460 U.S. at 46. When a state enacts a time, place or manner restriction, it must assure that it has left open alternative avenues of expression. *See* Burdick v. Takushi, 937 F.2d 415, 419 (9th Cir. 1991), *aff'd*, 112 S. Ct. 2059 (1992). Whether adequate alternate channels of communication are open to the voter wishing to, but prevented from, casting a write-in vote is arguable. Voters do have the option of asserting that none of the ballot candidates meets with their satisfaction in many other forums outside of the electoral booth. But as to the actual election, they are left without a voice. This leaves these voters without the ability to "positively influence the political process in any meaningful manner" and in a position where the "most effective means . . . to express[] dissent is not to vote at all, hardly a laudable goal in a democratic society." Warren I. Grody, Note, Burdick v. Takushi: *Death of Donald Duck as a Political Force?*, 21 CAP. U. L. REV. 297, 318 (1992).

97. Geary v. Renne, 911 F.2d 280, 283 (9th Cir. 1990) (citing San Francisco County Democratic Cent. Comm. v. Eu, 826 F.2d 814, 833 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989)).

98. *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1948). Professor Meiklejohn suggested that political speech is the *only* speech protected by the First Amendment: "The First Amendment . . . intends only to make men [sic] free to say what, as

ysis. Indeed, prior to the Supreme Court decision in *Burdick*, two federal district courts[99] and one federal appeals court[100] determined that impediments to write-in voting placed an unconstitutional limitation on voters' First Amendment right of free expression.

This position was strongly advocated by the Fourth Circuit in *Dixon v. Maryland State Administrative Board of Elections Laws*.[101] The *Dixon* court addressed a challenge to a Maryland election code provision requiring write-in candidates to pay a $150 filing fee or be certified as indigent.[102] If write-in candidates did not pay the filing fee, votes cast for them were not counted and reported.[103] The *Dixon* court found that the filing fee imposed an injury of great "character and magnitude" to the expressive rights of voters casting votes for write-in candidates who did not pay the filing fee.[104] It further held that Maryland's asserted interests could not serve to justify the filing fee.[105] The next segment of this Note will discuss the expressive as-

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citizens, they think, what they believe, about the general welfare." *Id.* at 87. The First Amendment, Meiklejohn states, is of particular importance in the electoral arena:

> As we vote we do more than elect men [and women] to represent us. We also judge the wisdom or folly of suggested measures. We plan for the welfare of the nation. Now it is these "judging" activities of the governing people which the First Amendment protects by its guarantees of freedom from legislative interference. Because, as self-governing women and men, we the people have work to do for the general welfare, we make two demands. First, our judging of public issues, whether done separately or in groups, must be free and independent—must be our own. It must be done by us and by no one else. And second, we must be equally free and independent in expressing, at the polls, the conclusions, the beliefs to which our judging has brought us. Censorship over our thinking, duress over our voting are alike forbidden by the First Amendment. A legislative body, or any other body which, in any way, practices censorship or duress, stands in "contempt" of the sovereign people of the United States.

Id. at 117.

99. Paul v. Indiana Election Bd., 743 F. Supp. 616 (S.D. Ind. 1990); Burdick v. Takushi, 737 F. Supp. 582 (D. Haw. 1990), *rev'd*, 937 F.2d 415 (9th Cir. 1991), *aff'd*, 112 S. Ct. 2059 (1992).

100. Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776 (4th Cir. 1989). *Dixon* did not rule directly on the constitutionality of a write-in ban, but rather addressed the constitutionality of limitations on write-in votes.

101. *Id.*

102. *Id.* at 777-78.

103. *Id.* at 778.

104. *Id.* at 781-82. It is noteworthy that the *Dixon* court rested its decision on the injury to the First Amendment right of free expression as opposed to free association. It explicitly did not find a significant injury to the associational rights of voters supporting the non-fee paying candidates. *Id.* at 781. The Supreme Court's previous ballot access decisions focused on the right of free association implicated by restrictions on for whom voters can vote, and did not mention freedom of expression. *See supra* notes 17-26 and accompanying text.

105. *Dixon*, 878 F.2d at 783-85. Maryland had raised interests in defraying the cost

pects of write-in voting as identified by the *Dixon* court.

1. The Messages in Write-in Votes

While the most obvious message communicated in voters' ballots is the name of the person they want to represent them in a particular office, write-in voters can use their ballots to communicate other messages as well. For instance, voters dissatisfied with all electoral choices might cast a vote for a person not even running for office as a means of protest.[106] Total dissatisfaction with ballot candidates is especially likely to occur in a state like Hawaii where one political party is dominant and so many elections are uncontested.[107]

Without the write-in option, voters who cannot support a ballot candidate are stymied in communicating their viewpoint in the election booth. If they stay home and do not vote at all, they send a muddled message. The public may misinterpret their failure to vote for apathy and disinterest in the electoral process. The voter's message is similarly unclear when he or she casts votes in some, but not all, races on the same ballot. The message communicated by this practice may be that the voter is simply uninterested in those particular races. Finally, voters can cast votes for the candidate they find least offensive, and thus completely disguise their message of dissatisfaction as support for one of the ballot candidates. The write-in option provides discontented voters with the most unambiguous means of communicating their message.[108]

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to the public and assuring the seriousness of candidates as justifications for the filing fee. *Id.* at 783.

106. *See Dixon*, 878 F.2d at 782 (quoting WILLIAM SHAKESPEARE, ROMEO AND JULIET, act III, sc. 1) (commenting that write-in voters express the opinion "[a] plague o' both your houses," when they refuse to cast votes for ballot candidates); *see also*, Kiernan, *supra* note 2, discussing Ralph Nader's "none of the above" campaign in the 1992 Democratic presidential primaries.

107. Burdick v. Takushi, 112 S. Ct. 2059, 2068 (1992) (Kennedy, J., dissenting).

108. For this speech to have an impact, write-in votes must be counted and reported. For this reason, some courts have emphasized that states must count and report write-in votes, as well as allow voters to cast them. *See Dixon*, 878 F.2d at 782-83:

> The refusal to report a vote because it is cast for a [write-in] candidate who has not paid a filing fee . . . completely undermines the right to vote. Voters voicing their preference for such a candidate have this right of political expression taken away from them when the State refuses to make their votes public. This is no different in effect from refusing to allow them to cast their ballots in the first place.

Id. See also Burdick v. Takushi, 737 F. Supp. 582, 592 (D. Haw. 1990), *rev'd*, 937 F.2d 415 (9th Cir. 1991), *aff'd*, 112 S. Ct. 2059 (1992) (stating that the right to cast write-in votes includes the right to have those votes counted and reported); Canaan v. Abdelnour, 710 P.2d 268, 276-77 (Cal. 1985) ("A right to 'express [one's] feelings' without legal effect

Write-in voters may sometimes choose to communicate their dissatisfaction with all candidates by casting votes for fictional or nonexistent characters. The *Dixon* court suggested that these votes for fictional characters, including Donald Duck, might be protected political expression.[109] A vote for a cartoon character can be a creative and sharp means of political commentary. For example, Louisiana voters, in their 1991 gubernatorial race had a choice between David Duke, a past member of the Ku Klux Klan, and Edward Edwards, a former governor with a history of serious political corruption. Some voters in that situation might want to use the ballot to say that Donald Duck would be a more intelligent choice to govern Louisiana.

Voters can speak through the election ballot to express messages other than protest—for instance, to try to convince a candidate to run for office. During the first Democratic primary to choose a candidate for the 1992 presidential election, supporters of New York Governor Mario Cuomo launched a campaign encouraging New Hampshire voters to write in his name on the primary ballot.[110] Commentators incorrectly predicted that Governor Cuomo would amass more votes than several of the major candidates.[111] Had this prediction been correct, the hopes of the write-in voters might well have been realized: Governor Cuomo may have entered the presidential race. Nonethe-

. . . is antithetical to the fundamental nature of the right to vote. . . . If the expression is so effectively muffled that no one can hear it, this guarantee is a hollow one.").

109. *Dixon*, 878 F.2d at 785 n.12.

> [A vote for Donald Duck] might, under appropriate circumstances, be meant as serious satirical criticism of the powers that be. . . . [W]e incline to the view that a vote for a fictitious character would be entitled to constitutional protection. Even were this not the case, however, the specter of Donald Duck as successful vote-getter does not persuade us to disregard the significant violation of protected constitutional rights that we discern here. Correcting this problem through censorship of the vote is utterly inconsistent with the principles under which our form of government operates.

Id. In *Paul v. Indiana Election Bd.*, the court was not inclined to agree, stating that: "This court expresses no opinion as to whether a vote for Donald Duck, Miss Piggy or Mr. Ed would be constitutionally protected." 743 F. Supp. 616, 625 n.29 (S.D. Ind. 1990).

110. *Cuomo Won't Try to Discourage a Write-in Campaign in New Hampshire*, BOSTON GLOBE, Feb. 11, 1992, at 22.

111. *Id.* Governor Cuomo actually garnered only four percent of the vote in the New Hampshire primary. Walter V. Robinson, *Bush Struggles Past Buchanan, Tsongas Leading Clinton in New Hampshire*, BOSTON GLOBE, Feb. 19, 1992, at 1, 12. Ironically, it may be the voters silence, not speech, that spoke louder in this instance: "[t]he low interest in Cuomo is almost certain to dampen any chance for a Democratic clamor that he join the field as a late entrant." *Id.* Exit polls indicated that consumer advocate Ralph Nader would accumulate three percent of the vote in his "none of the above" write-in campaign. *Id. See supra* note 2. This means that a total of seven percent of the votes cast in the New Hampshire primary were write-in votes, two percent less than the amount garnered by fifth place finisher, former California Governor Jerry Brown. Robinson, *supra*, at 1.

less, the availability of write-in voting in New Hampshire served to send a message. Prior to the primary, Governor Cuomo hinted that he might enter the race, given a strong write-in result.[112] By failing to cast write-in votes, the voters of New Hampshire spoke very effectively to Governor Cuomo.

The *Burdick* Court defended any intrusion on the voters' First Amendment rights on the grounds that the write-in ban was equally applied to all write-in votes and consequently was not content-based.[113] Thus, the Court appeared to concur with the Ninth Circuit's evaluation of the write-in ban as a reasonable time, place, and manner restraint.[114] However, even when regulatory intrusions on speech are content-neutral they must be "narrowly tailored to serve a significant governmental interest," and must "leave open ample alternative channels for communication of the information."[115] The *Burdick* Court did not require Hawaii to advance a "significant government interest," nor did it examine whether the write-in ban was narrowly tailored to fulfill these interests or whether there were ample alternative avenues of expression open to the frustrated write-in voter.

In summary, the write-in vote, as the *Dixon* court stated, contains expressive power of great character and magnitude.[116] The voters' ballot is in effect his or her final say in a political argument.[117] When

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112. Several days before the New Hampshire primary, Governor Cuomo stated that: "Every write-in vote is an embrace and a kiss you get from a stranger . . . . How can you be anything but grateful for that." Maralee Schwartz, David S. Broder, *Cuomo Asserts Deferment from Presidential Draft*, WASHINGTON POST, Feb. 22, 1992, at A-8. It was the view of the *New York Times* that by failing to disavow the write-in campaign being launched on his behalf, Governor Cuomo implicitly encouraged write-in votes. Kevin Sack, *The 1992 Campaign: Write-In; Cuomo Tells Presidential Draft Group to End Campaign*, NEW YORK TIMES, Feb. 22, 1992, at 1-8.

113. Burdick v. Takushi, 112 S. Ct. 2059, 2066 (1992). A content-based restriction is one that "limit[s] communication because of the message it conveys." Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987). A determination of whether a regulation that implicates First Amendment rights is content-neutral or content-based is extremely important because the distinction will determine what standard a reviewing court will use to evaluate a challenged restriction. *Id.* at 47-48.

114. Burdick v. Takushi, 937 F.2d 415, 419-20 (9th Cir. 1991), *aff'd*, 112 S. Ct. 2059 (1992). The Ninth Circuit never explained which element, time, place, or manner, was regulated by the write-in ban.

115. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). *But cf.* Stone, *supra* note 113, at 48-50 (enumerating seven different standards of review that he believes reviewing courts have used in evaluating content-neutral legislation that infringes on First Amendment rights).

116. Dixon v. Maryland State Admin. Bd. of Elections, 878 F.2d 776, 782 (4th Cir. 1989).

117. *See, e.g.*, *Voters' Speech Rights*, *supra* note 1, at 660 ("Political expression and voting are . . . linked as adjacent elements of the process of self-government: citizens vote to elect their representatives after selecting certain ideas through political expression. The

voters who do not support a ballot candidate cannot cast a write-in vote, they are prohibited from expressing their viewpoint in the election booth altogether.[118]

2. Voting as Association

Write-in voters may use their ballot to cast votes for candidates who have been unable to fulfill ballot access requirements, or cannot advance beyond the primary election.[119] The *Burdick* Court dismissed the voters' interest in supporting such candidates because, it claimed, those voters had waited too long to choose a candidate to support.[120] In making this determination, the *Burdick* Court did not refer to the strong language contained in previous Supreme Court decisions holding that voters have a constitutionally protected interest in associating with candidates in order to increase their political influence.[121] While the Supreme Court has never indicated that voters

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exercise of the franchise is, then, an expression of the voter's verdict on the political debate.").

118. When no one but major party candidates are on the ballot, the voter with unconventional ideas is precluded from "speaking" through the ballot box. *See* Teresa L. Grigsby, Anderson v. Celebrezze, *The Ascendancy of the First Amendment in Ballot Access Cases*, 15 U. TOL. L. REV. 363, 364 n.6 (1983) (stating that because candidates on the ballot tend to have mainstream ideas, voters with more unorthodox views are " 'effectively disenfranchised' unless they have the opportunity to vote for candidates with similar opinions").

119. See *supra* notes 49 and 72 for a discussion of Hawaii's system of eliminating independent or third party candidates from the general election ballot if they do not garner sufficient support at the primary stage.

120. Burdick v. Takushi, 112 S. Ct. 2059, 2066 (1992). The *Burdick* Court evaluated the injury to voters imposed by a write-in ban solely by examining Hawaii's particular ballot access scheme. It characterized the injury to the voter as being self-inflicted, i.e., if the voter had mobilized earlier he or she could have seen to it that the candidate reached the ballot. *Id.* at 2065. The *Burdick* Court did not evaluate any injury that might occur to a write-in voter if a state had different, but constitutionally valid, ballot access laws. However, by setting up a presumption in favor of the constitutionality of all write-in bans, the Court in effect ruled on the insignificance of any injury that might be imposed by various ballot access schemes without evaluating them. *Id.* at 2067. Perhaps the Court intended to discourage other potential plaintiffs with the same complaint as Burdick, by stating that even though its decision was grounded in a study of the particularities of the Hawaii election code, write-in bans would be upheld under most other schemes as well.

121. *See supra* notes 17-26. *See also* Tashjian v. Republican Party of Conn., 479 U.S. 208, 216 (1986) (limitations on voter choice in a primary involves "associational opportunities at the crucial juncture at which [it] may be translated into concerted action, and hence to political power in the community"); Anderson v. Celebrezze, 460 U.S. 780, 787-88 (1983) ("The exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens."); Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) ("The freedom to associate as a political party, a right we have recognized as fundamental, has diminished practical

have an absolute right to have the candidate of their choice placed on the ballot, the *Burdick* Court's decision that voters have no significant First Amendment associational interest in casting a write-in vote is bewildering for several reasons.

First, the Supreme Court has often pointed to the availability of the write-in option to mitigate the injury to voters when candidates are barred from the ballot by constitutionally valid ballot access restrictions.[122] This makes sense: if voters always have a write-in option available, they can always associate with the candidate of their choice, even when a state has satisfactory reasons to bar that candidate from the ballot. Second, when the Court has upheld ballot access legislation, it has weighed the injury to the voter against the interests advanced by the state to justify the legislation.[123] In contrast to this practice, the *Burdick* Court held that a state does not have to independently justify write-in voting bans, because the burden imposed by the bans "will be light."[124] The *Burdick* Court did not explain why the core interest in associating with the candidate of their choice is any different than voters wishing to cast a vote for a third party or independent candidate.[125] Write-in voters hope to increase their political influence and impact on the democratic process in the same way as voters who vote for ballot candidates.[126] While write-in voters (just like voters for third party or independent candidates) may not expect to prevail in the election, they "cast their ballots . . . in the hope, however slim, that their votes will succeed as efforts to propagate their view, and so increase their influence."[127]

In fact, the voters' interest in casting votes for non-ballot candidates deserves particular protection because such votes will usually be cast for candidates with little popular support.[128] The Supreme Court

value if the party can be kept off the ballot."); Lubin v. Panish, 415 U.S. 709, 716 (1974) ("[V]oters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed [against the state's]."); Williams v. Rhodes, 393 U.S. 23, 41 (1968) (Harlan, J., concurring) ("The right to have one's voice heard and one's view considered by the appropriate governmental authority [through the election process] is at the core of the right of political association.").

122. *See supra* note 6.

123. *See, e.g.*, American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971).

124. Burdick v. Takushi, 112 S. Ct. 2059, 2067 (1992).

125. See *supra* text accompanying note 122 for a discussion of the interest in free association implicated by ballot access legislation.

126. Indeed, voters occasionally have their hopes realized. *See supra* note 1.

127. Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 782 (4th Cir. 1989).

128. *See* Grigsby, *supra* note 118, at 364 n.6 (stating that major party candidates

has repeatedly emphasized the importance of the First Amendment in the protection of unorthodox and unpopular ideas.[129] Moreover, past Supreme Court decisions have placed importance on the voting booth and election campaigns as vehicles to promote diverse ideas.[130] In fact, the Court has viewed itself as a protector of the First Amendment rights of those who possess and advocate unorthodox ideas because of the danger that these groups "will be ignored in legislative decision-making."[131] Nevertheless, the *Burdick* Court has left the interests of voters who wish to associate with unconventional or radical candidates unable to reach the ballot without protection.

By leaving voters without the option to cast a write-in vote, the *Burdick* Court also intruded on the entire notion of popular sovereignty.[132] A look at Hawaii's electoral system in particular illustrates this point. Hawaii holds an inordinate number of single candidate races.[133] If, late in the race, new information was to be disclosed about an unopposed candidate (for instance, the candidate became involved in a serious political corruption scandal), Hawaii voters would be without recourse to elect another individual to that office.[134] The write-in option assures that voters will always be able to elect the can-

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"must appeal to broad spectrums of citizenry [so] are not able to suggest particularly innovative or dissident views"). *See also Dixon*, 878 F.2d at 782.

129. Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957) ("Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society."). *See also* Roth v. United States, 354 U.S. 476, 484 (1957). The *Roth* Court stated as follows:

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . [I]deas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties.

Id.

130. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 794 (1983) ("By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such [ballot access] restrictions threaten to reduce diversity and competition in the marketplace of ideas."); *Sweezy*, 354 U.S. at 251 ("History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted.").

131. *Anderson*, 460 U.S. at 793 n.16.

132. *See Voter's Speech Rights*, *supra* note 1, at 661 (stating that banning write-in votes intrudes on the "notion of self government that calls for the people themselves, and not the state, to shape the contours of the political process").

133. *See supra* note 70.

134. For a vivid illustration of how late-breaking events can effect elections, see *Anderson*, 460 U.S. at 791 n.11. The *Anderson* Court noted the unforeseen events surrounding the 1968 presidential election, specifically Lyndon Johnson's surprise announcement that he would not run for reelection and the assassination of candidate Robert F. Kennedy. *Id.*

didate they wish to represent them in a particular office, even when the unexpected occurs.[135]

In summary, the write-in vote can serve as a means of expression and a form of political association. It also can provide voters with their sole opportunity to cast a meaningful vote in elections where only one candidate is on the ballot or all ballot candidates are unacceptable to the voter. And, absent provisions providing for ballot access to all candidates who have at least one supporter, it is the only way to assure that all voters can vote for the candidate of their choice. Thus, the *Burdick* Court mischaracterized the injury imposed by write-in bans as an insignificant one.

The next section of this Note will argue that the *Burdick* Court also erred when it concluded that the injury imposed was so trivial that it was not necessary to "determine the legitimacy and strength" of each of the "precise interest[s]" put forth by a state to justify the ban, or to consider the "extent to which those interests make it necessary to burden the plaintiff's rights."[136] In doing so, the *Burdick* Court unnecessarily limited the utility of the standard of review provided in *Anderson*.

B. Anderson *Standard*

Although the *Burdick* Court began its analysis by stating that *Anderson* provided a "flexible standard" to evaluate ballot access cases,[137] it immediately thereafter provided a rigid interpretation of this standard by dividing voting cases into two categories—those that impose severe burdens on voters and those that do not. Legislation that imposes "severe" burdens, the Court said will be subject to strict scrutiny.[138] The Court then indicated that when a burden is anything less than severe it will subject the legislation to a far less stringent level of review.[139]

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135. This is in accord with the *Burdick* dissent's notion of the injury to voters imposed by the write-in ban. *See supra* notes 73-76 and accompanying text.

136. *Anderson*, 460 U.S. at 789.

137. Burdick v. Takushi, 112 S. Ct. 2059, 2063 (1992).

138. *Id.* (citing Norman v. Reed, 112 S. Ct. 698, 705 (1992)).

139. The *Burdick* Court never specified what level of review it was using to evaluate the write-in ban. However, the level of scrutiny seems to plummet throughout the course of the opinion. The Court initially quoted language from *Anderson*, stating that reasonable non-discriminatory regulations were normally justified by the "State's generally important regulatory interests." *Burdick*, 112 S. Ct. at 2063 (quoting *Anderson*, 460 U.S. at 788). The use of the word "important" to describe the state's interests indicated an intermediate level of review. Later, the Court indicated it used a pure balancing test, weighing the voters' interests against the state's interests. *Id.* at 2066. However, the Court went on to describe the state's asserted interests as "legitimate," indicating a minimal level of scrutiny.

A more literal reading of the *Anderson* test provides courts reviewing ballot access legislation with more flexibility in determining the constitutionality of such laws. It does not require courts to divide ballot access legislation into those that impose severe burdens (and thus are likely to be struck down) and those that do not. It instead directs courts to weigh the burden imposed on voters by the legislation against the strength of the state's "precise interests."[140] This is at heart a balancing test: that is, when the injury to the voter outweighs the importance of the state's interests, the legislation will be struck down. On the other hand, if the state's interests are weightier than those of the voters, the legislation will be upheld.[141]

This flexible reading of the *Anderson* test would seem to be more appropriate than the rigid two-tier system that the Supreme Court has decided to apply.[142] In fact, the *Anderson* standard was developed to

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Id. at 2067. Finally, the Court announced its presumption that write-in bans are valid as long as the state's ballot access scheme is otherwise constitutional, indicating that the state will not be required to advance any interests to justify the ban unless the plaintiff offers evidence to rebut the presumption. *Id.* It is uncertain, from the Court's opinion, whether the plaintiff will prevail even if he or she demonstrates that the state has no legitimate interest in enacting the write-in ban, because a decision regarding the constitutionality of the write-in ban will be based not on the particularities of the ban, but on the overall constitutionality of the state's ballot access scheme:

> The effect of the presumption . . . is to excuse a state from having to justify or defend any write-in ban. Under the majority's view, a write-in ban only has constitutional implications when the state's ballot access scheme is defective and write-in voting would remedy the defect. This means that the state needs to defend only its ballot access laws, and not the write-in restriction itself.

Id. at 2071 (Kennedy, J., dissenting).

140. *Anderson*, 460 U.S. at 789.

141. This type of balancing approach is not foreign to the Supreme Court's First Amendment jurisprudence. *See, e.g.*, Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983). Professor Shiffrin asserts that the Supreme Court has generally applied a balancing method that weighs "the impact of challenged regulations on [F]irst [A]mendment values against the seriousness of the evil that the state seeks to mitigate or prevent, the extent to which the regulation advances the state's interest, and the extent to which the interest might have been furthered by less intrusive means." *Id.* at 1252. In this way, the Court can accommodate the fact that the "values of speech interact with other values in . . . complicated ways [that require] discrete doctrinal tools to resolve particular problems." *Id.*

142. *See supra* notes 138-40 and accompanying text. It is uncertain how the *Burdick* dissent would interpret the *Anderson* test because it would have struck down the ban on the basis that it could not withstand the most minimal level of scrutiny. *See supra* note 81 and accompanying text. The *Dixon* court, on the other hand, appeared to read the *Anderson* test as requiring strict scrutiny if the injury to the voter was of significant character and magnitude. *See* Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 784-85 (4th Cir. 1989) (stating that while Maryland's asserted interests were "legitimate," the means used to achieve those interests were not necessary or sufficiently narrowly drawn to justify the burden to the voters).

resolve the difficulties that resulted from the Court's attempt to apply either strict scrutiny or rational basis scrutiny in the earlier ballot access cases.[143]

Furthermore, a more literal reading of the *Anderson* test allows courts to attribute some value to the voters' right to vote for the candidates of their choice, without stating that all impediments to that choice create a severe burden. Courts are understandably reluctant to label that right a fundamental one requiring strict scrutiny.[144] However, the danger of the approach taken by the *Burdick* Court is to undervalue the First Amendment interest of voters when the Court does not consider the infringement to be severe. The *Burdick* case itself presents an illustration of this problem. Hawaii's write-in ban arguably does not create a "severe" infringement on the First Amendment rights of voters in the state. However, as demonstrated above, the First Amendment interests of these voters are definitely implicated by the ban. By creating a presumption in favor of the validity of write-in bans, the *Burdick* Court has left First Amendment rights that are burdened somewhat less than severely, but burdened nevertheless, with almost no protection.

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143. *See supra* notes 27-28 and accompanying text. For a general discussion of the Supreme Court's attempt to apply traditional levels of scrutiny to ballot access legislation, see TRIBE, *supra* note 23, at 1101-11. Professor Tribe discussed the difficulties associated with the two-tier approach in considering the Court's application of strict scrutiny in Williams v. Rhodes, 393 U.S. 23 (1968), and a lesser standard in Jenness v. Fortson, 403 U.S. 431 (1971):

> The lesson of these ballot access cases appears to be that *Williams* and *Jenness* marked the end points of a continuum in the responsiveness of an election system to political flux . . . . From the viewpoint of political theory this result may be tolerable; as a pronouncement of doctrine under the equal protection clause, it is positively delphic.

TRIBE, *supra* note 23, at 1106. Professor Tribe read the *Anderson* standard as requiring a "weighing [of] all . . . factors." *Id.* at 1109. However, he anticipated a more rigid application of the *Anderson* standard, stating that "[i]t is still too early to predict whether [*Anderson* and ballot access cases decided subsequently] portend a general retreat from the rigid, two-tiered standard of equal protection review." *Id.* at 1110.

144. At least one commentator has expressed concern regarding the potential results if the right to vote for whichever candidate one chooses was labeled a fundamental right. *See The Supreme Court 1968 Term*, 83 HARV. L. REV. 7 (1969). In discussing Williams v. Rhodes, 393 U.S. 23 (1968), the commentator noted:

> If the interest were to be absolutely protected, a state would be required to place on its ballot all persons who claim to be candidates. That result would overturn the laws in every state that require potential candidates to demonstrate a certain degree of support before being put on the ballot.

Id. at 96.

However, the availability of write-in voting vitiates this concern: "Write-ins would . . . protect the *Williams*-voting interest of those who wish to express their preference for a person not a declared candidate." *Id.*

The presumption created in *Burdick* allows states to raise an unsupported specter of the collapse of their political system when voters merely desire more latitude in the voting booth.[145] Even if the voter's interest is not of tremendous magnitude, the *Anderson* test should require the state to show that protection of that interest would have some countervailing negative effect on the state. Hawaii did not and could not demonstrate such an effect when its write-in ban was challenged.[146] To the contrary, Hawaii's election system would seem to be threatened because of too few, not too many choices in the voting booth.[147]

The *Anderson* standard "means at least" that the state "must put forward the state interests which justify the burden."[148] Since Hawaii failed to assert any interests that were rationally advanced by the write-in ban,[149] the slightest injury to voters caused by the prohibition will outweigh the state's interest.[150] Thus, even accepting the *Burdick*

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145. For example, the *Burdick* Court suggested that allowing write-in votes might have a dramatic impact on the political stability of Hawaii. The Court was concerned that allowing the election booth to be used for political expression might undermine the electoral system and "sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry." Burdick v. Takushi, 112 S. Ct. 2059, 2065 (1992) (quoting Storer v. Brown, 415 U.S. 724, 736 (1974)).

146. *See supra* notes 82-90 and accompanying text.

147. See *supra* note 70 and accompanying text regarding the dominance of the Democratic party and the significant number of single candidate races in Hawaii state elections. The refusal to allow write-in votes under these circumstances may be more destabilizing to the system than allowing them. *See, e.g.*, Elder, *supra* note 14, at 392, noting the value of minor parties:

> Minor parties, through their representation of new and unpopular ideas actually may foster systemic stability by providing a release valve for the expression of views and pressures that would otherwise go unheard. If [the opportunity to vote for such candidates were not available] . . . then dissident pressure might explode in more destructive, far less legitimate ways.

Id.

148. *Burdick*, 112 S. Ct. at 2071 (Kennedy, J., dissenting).

149. *See supra* notes 81-90 and accompanying text.

150. Hawaii asserted preventing party factionalism and preventing party raiding as interests served by the write-in ban. Other interests have also been asserted by states to justify write-in bans. For instance, Maryland offered the cost of write-in candidates as a justification for requiring write-in candidates to pay a filing fee in order to be certified as official candidates. Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776 (4th Cir. 1989). The *Dixon* court held that the state's interest in saving money could not justify the injury imposed on voters by the filing fee. *Id.* at 783. This view is consistent with previous Supreme Court authority on the matter. *See, e.g.*, Tashjian v. Republican Party, 479 U.S. 208, 218 (1986) (maintaining that "the State [can] not forever protect the two existing major parties from competition solely on the ground that two major parties are all the public can afford"); Bullock v. Carter, 405 U.S. 134, 149 (1972) (while striking down a filing fee for primary candidates, the Court stated, "[w]ithout making light of the State's interest in husbanding its revenues, we fail to see . . . an element of necessity in the State's

Court's characterization of the injury to voters as trivial, the write-in ban should have been struck down. When looked at in light of the significant First Amendment qualities contained in a write-in vote,[151] the Court's failure to do so is even more distressing.

CONCLUSION

When voters cast their ballots, they choose candidates to represent them in office. Often, they also intend and hope to deliver other messages about their political beliefs and the persons who represent them in office. Write-in votes are particularly well suited for this kind of communication via the voting booth. By casting a write-in vote, voters can communicate that the election choices are unacceptable, that they support unconventional ideas, or urge a candidate who is not on the ballot to run for office. In prior decisions, the Supreme Court has weighed the voters' interests in associating with the candidate of their choice against the interests of the state.[152]

The Supreme Court, in its decision in *Burdick v. Takushi*, has decided that the voting booth is not a proper place to communicate political messages. Moreover, the Court has placed a limitation on the voters' right to associate with candidates of their choice. The Court has said that if a state so chooses, voters must limit themselves to the choice of candidates on the ballot—even if there is only one candidate on the ballot. In its decision, the Court failed to balance the interests of the state against the interests of the voters, as required by the stan-

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present means of financing primaries as to justify the resulting incursion on the prerogatives of voters").

Maryland also asserted preventing frivolous candidacies as a justification for its filing fee. *Dixon*, 878 F.2d at 784. The state's concern was two-fold. First, it feared that allowing and reporting write-in votes for frivolous candidates would offend the dignity of the election process. Second, the state was concerned that allowing such candidacies would create lengthy ballots filled with frivolous names and contribute to voter confusion. *Id.* However, this concern does not appear to be very weighty in the context of write-in voting. First, the dignity of the election process is less offended when a voter writes-in a frivolous name in the privacy of the election booth, as opposed to having that name listed on the ballot. Similarly, there can be little or no concern about voter confusion when write-in voting is at issue. *See supra* note 89.

Finally, at the appellate level, Hawaii raised voter education as a state interest. Burdick v. Takushi, 937 F.2d 415 (9th Cir. 1991), *aff'd*, 112 S. Ct. 2059 (1992). Because a voter casting a write-in vote must take the affirmative step of writing in the candidate's name, it can be assumed that the voter is informed about the candidate. *See supra* note 89 and accompanying text. Furthermore, "the electoral process contains its own cure for voters' ignorance about a particular candidate. Unknown candidates simply do not win large numbers of votes." Anderson v. Celebrezze, 460 U.S. 780, 789-90 n.25 (1983).

151. *See supra* notes 106-36 and accompanying text.

152. *See supra* notes 17-32 and accompanying text.

dard of review it purported to apply. Instead, the Court created a presumption that all bans on write-in voting are valid, and thus effectively allowed states to prevent voters from expressing their First Amendment rights in the place most inextricably linked to our system of democratic government.

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