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# Is the Party Over? Examining the Constitutionality of Proposition 14 as It Relates to Ballot Access for Minor Parties

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**IS THE PARTY OVER?  
EXAMINING THE CONSTITUTIONALITY OF  
PROPOSITION 14 AS IT RELATES TO  
BALLOT ACCESS FOR MINOR PARTIES**

*Jessica A. Levinson\**

*The U.S. Supreme Court must reexamine its deeply flawed ballot access jurisprudence. California voters passed Proposition 14 on June 8, 2010. This law reduces ballot access for minor parties. This Article argues that the Court has historically overestimated the government interests at stake in restricting ballot access, while derogating the important role that minor parties can play in elections. This must stop. This Article further argues that the Court should apply strict scrutiny to ballot access restrictions and use a holistic approach when examining such restrictions.*

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## INTRODUCTION

U.S. Supreme Court case law surrounding ballot access for minor parties is nothing less than a muddled morass. Mired in inconsistencies and ill-conceived notions, Proposition 14, passed by California voters in June 2010, will not only create open primary, top-two elections in the Golden State but will also give the Supreme Court another opportunity to determine the constitutional bounds of restrictions on minor parties' abilities to reach election ballots. Under Proposition 14, any registered voter will be able to vote for any candidate in the primary election.<sup>1</sup> Candidates will list their party preference, or lack of preference, on the ballot.<sup>2</sup> The top two vote-getters, regardless of party preference, will proceed to the general election.<sup>3</sup> Therefore, in some districts two candidates who designate the same party preference could compete in the general election.

For some minor parties in California, Proposition 14 could sound the death knell by making it harder for them to retain ballot-qualified status. This may pose constitutional problems because candidates can only list their party preference for a ballot-qualified party.<sup>4</sup> This problem is compounded by the fact that Proposition 14 prohibits the counting of ballots cast for write-in candidates in the

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1. S. Constitutional Amendment 4, 2009 Leg., Reg. Sess. (Cal. 2009), available at <http://www.sos.ca.gov/elections/ballot-measures/pdf/sca-4-bill-20090219-chaptered.pdf>. Senate Constitutional Amendment 4 appeared on the June 8, 2010, California Statewide Ballot as Proposition 14, see *California Proposition 14, Top Two Primaries Act (June 2010)*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_14\\_Top\\_Two\\_Primaries\\_Act\\_\(June\\_2010\)](http://ballotpedia.org/wiki/index.php/California_Proposition_14_Top_Two_Primaries_Act_(June_2010)), and applies to state legislative and congressional elections, but not to presidential elections. S. Constitutional Amendment 4. California Proposition 14 is now codified as CAL. CONST. art. II, §§ 5–6.

2. CAL. CONST. art. II, §§ 5–6.

3. *Id.*

4. *Id.* Pursuant to California Elections Code section 13107, candidates do not have to include any ballot designation. CAL. ELEC. CODE § 13107 (West 2010). A candidate can get her name on the primary election ballot in California by following a number of procedural steps, including paying a filing fee or gathering a certain number of signatures. For instance, candidates for state legislature can pay a filing fee equal to 1 percent of the first year's salary of a state legislator. *Id.* §§ 8103, 8105. The California Elections Code also provides that in lieu of a filing fee, candidates can submit a petition containing signatures of registered voters depending on the office sought. Assembly candidates must obtain 1,500 signatures. *Id.* § 8106(a)(1). State Senate and Congressional candidates must obtain 3,000 signatures. *Id.* § 8106(a)(2). Candidates for statewide office must obtain 10,000 signatures. *Id.* § 8106(a)(3). Further, candidates seeking the nomination of a qualified party whose registered voters constituted less than 5 percent of all the registered voters eligible to vote in the previous statewide election, can submit a petition containing 150 signatures or the signatures of 10 percent of the registered voters of that party in the district in which she seeks nomination. *Id.* § 8106(a)(6).

general election.<sup>5</sup> The write-in prohibition further reduces voters' ability to cast ballots for candidates of their choosing and makes the ballot access scheme that Proposition 14 imposes even more restrictive. The question is: Does Proposition 14, in conjunction with other California ballot access laws, act to unconstitutionally infringe on minor parties' ballot access rights and voters' rights to cast meaningful votes and to associate with others to further common political beliefs?<sup>6</sup>

Part I of this Article explains why Proposition 14 will make it more arduous for minor parties to remain ballot qualified in California. Part I also briefly discusses the issue of write-in voting. Part II of this Article summarizes and analyzes the U.S. Supreme Court's jurisprudence concerning analogous restrictions, those related to a minor party's or an independent candidate's ability to obtain ballot access. The Supreme Court has never reviewed a ballot access issue that is identical to the one presented in this Article, where candidates can obtain a place on the ballot but may not be able to list their preferred party designation. However, it is important to analyze the Court's thinking on similar restrictions, in part because lower courts follow the Supreme Court's lead when analyzing identical restrictions. Part II also focuses on level-of-support requirements, one type of ballot access restriction, and briefly discusses two filing-fee cases that inform the Court's level-of-support jurisprudence.<sup>7</sup> Part III of this Article summarizes and

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5. CAL. CONST. art. II, §§ 5–6.

6. There are other, potentially viable, constitutional challenges that can be made against Proposition 14. First, similar to claims made in ongoing litigation in Washington State concerning a similar open-primary, top-two electoral system, some may claim that voters are confused and think that the candidates who proceed to the general election are that parties' nominee(s). This would infringe on political party associational rights. *Grange v. Wash. Republican Party*, 552 U.S. 442, 451 (2008); *California v. Jones*, 530 U.S. 567, 582–86 (2000). Second, some may contend that Proposition 14 infringes on political party trademark rights with respect to party names. Third, there has already been a complaint filed, which contends that, among other things, Proposition 14 will disenfranchise and discriminate against a class of voters because it does not allow for the counting of votes cast for write-in candidates. See Complaint at 2, *Field v. Bowen*, No. CGC-10-502018 (Cal. Super. Ct. Aug. 16, 2010). On September 14, 2010, California Superior Court Judge Charlotte Woolard dismissed the plaintiffs' request for a preliminary injunction. Richard Winger, *Lower California Court Temporarily Rules That Write-In Space Is Not to Be Printed on November Ballots for Congress and State Office*, BALLOT ACCESS NEWS (Sept. 13, 2010), <http://www.ballot-access.org/2010/09/13/lower-california-court-tentatively-rules-that-write-in-space-is-not-to-be-printed-on-november-ballots-for-congress-and-state-office/>. The prohibition against the counting of write-in votes will be discussed in this Article.

7. This Article is not a comprehensive review of the Court's ballot access case law. For instance, this Article omits a discussion of cases dealing with anti-fusion laws.

analyzes lower court cases that address the same type of restriction presented by the California Elections Code, namely restrictions that prevent candidates from designating their preferred party on the ballot. Part IV of this Article argues that the Court must apply strict scrutiny to the ballot access issue raised by Proposition 14. In doing this, the Court should recognize the importance of candidates' ability to designate a minor-party preference. The Court should additionally recognize that (1) the importance of the governmental interests at issue in ballot access cases are routinely overestimated and (2) many of those governmental interests are not even implicated by Proposition 14 and California's ballot access laws. Part V of this Article proposes a quick fix to the California Elections Code that would alleviate many of the ballot access problems that Proposition 14 creates.

I. WHAT TYPE OF ELECTORAL SYSTEM DOES PROPOSITION 14 IMPLEMENT AND WHAT CONSEQUENCES WILL IT HAVE ON BALLOT ACCESS ISSUES?

California's lawmakers agreed to put Proposition 14 on the June 2010 election ballot in order to secure then-State Senator Abel Maldonado's vote on California's 2010 budget.<sup>8</sup> The measure's proponents claim that an open primary, top-two election system will increase: (1) voter choice in the primary; (2) primary voter turnout; (3) competition; and (4) the number of moderate politicians in the legislature because successful candidates will have to appeal to a larger spectrum of the electorate.<sup>9</sup> The measure's opponents contend that Proposition 14 will actually decrease voter choice because only two candidates will appear on the general election ballot, and the proposition prohibits the counting of write-in votes in the general

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8. Wyatt Buchanan, *Will Prop. 14 Open Elections, or Close Them?*, SFGATE.COM (May 22, 2010), [http://articles.sfgate.com/2010-05-22/news/20909425\\_1\\_congressional-races-elections-prop](http://articles.sfgate.com/2010-05-22/news/20909425_1_congressional-races-elections-prop).

9. Torey Van Oot, *Bowen: "Army of Lawyers" at the Ready If Prop 14 Passes*, SACRAMENTO BEE (June 8, 2010), <http://blogs.sacbee.com/capitolalert/latest/2010/06/bowen-army-of-l.html>; see also ERIC MCGHEE, PUB. POLICY INST. OF CAL., OPEN PRIMARIES 4, 5 (2010), available at [http://www.ppic.org/content/pubs/atissue/AL\\_210EMAI.pdf](http://www.ppic.org/content/pubs/atissue/AL_210EMAI.pdf) (recognizing that the "most commonly cited goal . . . is to make it easier for relatively moderate candidates to be elected to public office"); Ryan Wessels, *Open Primaries in California: The Future of Proposition 14*, ROSE INST. OF STATE AND LOCAL GOV'T (Mar. 11, 2010, 8:27PM), <http://rosereport.org/20100311/open-primaries-in-california-the-future-of-proposition-14/> (comparing the proposed Proposition 14 to Washington State's Initiative No. 872 and California's failed Proposition 62).

election.<sup>10</sup> Opponents also contend that Proposition 14 could lead to: (1) voter confusion because voters will erroneously think they are voting for a party nominee in the general election; (2) more expensive elections because candidates will have to appeal to the entire electorate in both the primary and the general elections;<sup>11</sup> and (3) party raiding, a phenomenon in which voters will vote for the weakest candidate in the opposing party during the primary election to help their party's candidate win the general election.<sup>12</sup>

Regardless of the propriety of those claims, Proposition 14 could spell the demise of some minor parties in California. Currently there are six recognized political parties in California: Democratic, Republican, American Independent, Green, Libertarian, and Peace and Freedom.<sup>13</sup> Democrats, Republicans, and voters who are registered as Decline-to-State currently make up 95.5 percent of the electorate.<sup>14</sup> Put another way, members of minor parties constitute 4.5 percent of registered voters.<sup>15</sup>

*A. Proposition 14 Will Eliminate the Easiest Route for  
Minor Parties to Remain Ballot Qualified*

Recognized parties can remain ballot qualified by one of three routes. First, parties can poll 2 percent of the vote for any statewide race in a nonpresidential (midterm) year on a general election ballot.<sup>16</sup> Second, parties can obtain registration numbers of 1 percent of the previous gubernatorial vote.<sup>17</sup> Third, parties can garner petition signatures from at least 10 percent of registered voters.<sup>18</sup>

It is much easier for minor parties to remain ballot qualified via the first route, the two-percent-participation test, than the other two routes. In the 2006 gubernatorial election, the 2 percent participation

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10. Van Oot, *supra* note 9.

11. Wessels, *supra* note 9.

12. MCGHEE, *supra* note 9.

13. CAL. SEC'Y OF STATE, QUALIFIED POLITICAL PARTIES FOR THE JUNE 8, 2010, STATEWIDE DIRECT PRIMARY ELECTION (2010), available at <http://www.sos.ca.gov/elections/orr/orr-pages/15day-prim-10/qual-pol-parties.pdf>.

14. CAL. SEC'Y OF STATE, 15-DAY REPORT OF REGISTRATION (2010), available at <http://www.sos.ca.gov/elections/orr/orr-pages/15day-prim-10/hist-reg-stats.pdf>.

15. *Id.*

16. CAL. ELEC. CODE § 5100 (West 2010).

17. *Id.*

18. *Id.*



threshold was just shy of 175,000 votes.<sup>19</sup> With respect to the second route, the one-percent-registration test, history has shown that it is an arduous task for many small parties to obtain enough registered members to remain ballot qualified.<sup>20</sup> A little less than 9 million people voted in the 2006 gubernatorial election.<sup>21</sup> That means that to maintain ballot-qualified status, a minor party must have almost 90,000 registered members.<sup>22</sup> The third route, garnering petition signatures from 10 percent of registered voters, is an all-but-impossible hill for third parties to climb.<sup>23</sup>

Two of the four qualified minor parties in California, the Peace and Freedom Party and the Libertarian Party, would fail to retain ballot-qualified status if they were required to satisfy the second test, the one-percent-registration test.<sup>24</sup> There are approximately 55,000 registered Peace and Freedom Party members<sup>25</sup> and 85,000 registered Libertarian Party members.<sup>26</sup> Hence each of these parties falls short of the 90,000 registered members needed under the one-percent-registration test. Only the American Independent Party, with a little over 380,000 members, and the Green Party, with about 110,000 members, would remain ballot qualified under the one-percent-registration test.<sup>27</sup>

Under Proposition 14, the two-percent-participation test, the easiest mechanism for minor parties to remain ballot qualified, would

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19. John Seiler, *Will Prop. 14 Kill Third Parties?*, CAL WATCHDOG (Oct. 19, 2010), <http://www.calwatchdog.com/2010/02/19/new-will-prop-14-kill-third-parties>.

20. Richard Winger, *The Hidden Zinger in Prop. 14*, S.F. BAY GUARDIAN (June 1, 2010, 11:47 AM), <http://www.sfbg.com/2010/06/01/hidden-zinger-prop-14>.

21. The 2006 California gubernatorial election saw 8,899,059 voters. CAL. SEC'Y OF STATE, HISTORICAL VOTER REGISTRATION AND PARTICIPATION IN STATEWIDE GENERAL ELECTIONS 1910–2009 (2009), available at <http://www.sos.ca.gov/elections/sov/historical-voter-reg/hist-voter-reg-and-part-general-elections-1910-2009.pdf>.

22. It is important to look beyond the raw numbers, as it is easier to obtain participation as opposed to registration.

23. Seiler, *supra* note 19.

24. Wyatt Buchanan, *Ballot Measure Would Provide Open Primaries*, SFGATE.COM (Mar. 11, 2010), [http://articles.sfgate.com/2010-03-11/news/18384775\\_1\\_freedom-party-california-elections-candidates](http://articles.sfgate.com/2010-03-11/news/18384775_1_freedom-party-california-elections-candidates); see also Winger, *supra* note 20 (recognizing that it is easier for minority parties to remain ballot qualified by polling 2 percent of the vote, but that it is more difficult for minority parties to register 1 percent of the voters in the previous general election).

25. *Party: Peace and Freedom*, JOINCALIFORNIA, <http://www.joincalifornia.com/party/Peace%20and%20Freedom> (last visited Oct. 19, 2010).

26. *Party: Libertarian*, JOINCALIFORNIA, <http://www.joincalifornia.com/party/Libertarian> (last visited Oct. 19, 2010).

27. Buchanan, *supra* note 8.

be effectively eliminated. Members of minor parties would rarely be among the top two vote-getters in the primary election, and therefore would not proceed to the general election under Proposition 14.<sup>28</sup> Because it is more arduous to remain ballot qualified under the one-percent-registration test and half the minor parties in California would fail to retain ballot-qualified status under that test, the enactment of Proposition 14 could be constitutionally problematic.

Why is a party's ability to maintain ballot-qualified status important under Proposition 14, which leaves candidates free to designate their party preference? Under other provisions of the California Elections Code, members of unqualified parties cannot list their party preference on a primary election ballot.<sup>29</sup> Therefore, for a candidate to designate her preference for a minor party on the electoral ballot, that party must retain its ballot-qualified status. Based on recent data, half of the ballot-qualified minor parties in California would lose that status, and candidates wishing to list their preference for any of those parties would be barred from doing so.

#### *B. Proposition 14 Prohibits the Counting of Write-in Votes*

Adding insult to injury, a law passed to implement Proposition 14 specifically prohibits the counting of write-in votes in the general election.<sup>30</sup> The wrinkle here is that the ballot access

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28. It should be noted that if parties remain ballot qualified, Proposition 14 could help ballot-qualified minor parties garner more votes in the primary election than under California's current electoral system, as minor-party candidates could garner votes from all registered voters, not just those who are registered members of a minor party.

29. Senate Bill 6 ("SB 6") requires that candidates must register to vote and identify a political party with which they choose to identify. California Elections Code section 338 defines a political party as an organization or party that is ballot qualified. CAL. ELEC. CODE § 338 (West 2010); S. 6, 2009 Leg. Reg. Sess. (Cal. 2009) (version passed by Senate); *see also* Winger, *supra* note 20 (stating that members of unqualified minor parties will not be able to list their party preference).

30. On February 19, 2009, the legislature amended and passed SB 6, which was intended to implement Proposition 14. *See* S. 6, *supra* note 29; Matthew Yi & Wyatt Buchanan, *State Legislature Passes Emergency Budget Plan*, SFGATE.COM (Feb. 19, 2009), [http://articles.sfgate.com/2009-02-19/news/17190540\\_1\\_budget-plan-state-income-tax-gop-vote](http://articles.sfgate.com/2009-02-19/news/17190540_1_budget-plan-state-income-tax-gop-vote); *see also* Complaint, *Field v. Bowen*, No. CGC-10-502018, (Cal. Super. Ct. July 28, 2010), *available at* <http://gautamdutta.files.wordpress.com/2010/07/sb-6-complaint-7-28-102.pdf> (illustrating the legal difference between existing law and SB 6); SENATE RULES COMM., SENATE BILL ANALYSIS FOR SB 6, at 2 (2009), *available at* [http://info.sen.ca.gov/pub/09-10/bill/sen/sb\\_0001-0050/sb\\_6\\_cfa\\_20090219\\_031945\\_sen\\_floor.html](http://info.sen.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sb_6_cfa_20090219_031945_sen_floor.html) (prohibiting the counting of write-in votes in a general election). SB 6 prohibits the counting of write-in ballots in the general election. S. 6, *supra* note 29. This may be in conflict with a California Elections Code provision that states that "[e]ach voter is entitled to write the name of any candidate for any

restriction discussed in this Article focuses on a candidate's ability to designate her party preference in the primary (as minor-party candidates are unlikely to be among the top-two vote-getters to proceed to the general election), and the write-in ban applies in the general election. As stated, the write-in prohibition adds to the restrictive nature of California's ballot access scheme and hence should at least be acknowledged in this Article.

This write-in ban means that voters will likely have no way of casting a vote for a candidate wishing to designate her preference for a nonqualified party in the general election. This is problematic because, as discussed in this Article, the Supreme Court has upheld certain ballot access restrictions on the grounds that those restrictions provide for write-in votes.

Under the 1992 Supreme Court decision *Burdick v. Takushi*,<sup>31</sup> there is no constitutional right to cast a write-in vote.<sup>32</sup> Justice White, writing for the majority, found that Hawaii's ban on write-in voting did not unreasonably infringe on petitioner's First Amendment rights of expression and association.<sup>33</sup> The Court upheld the ban on write-in votes in large part because it found there were suitable alternative mechanisms through which a candidate could obtain access to the primary ballot.<sup>34</sup>

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public office, including that of President and Vice President of the United States, on the ballot of any election." CAL. ELEC. CODE § 15340 (West 2010).

31. 504 U.S. 428 (1992).

32. *Id.* at 430, 437, 440.

33. *Id.* at 440.

34. *Id.* at 436. The Court later emphasized that Hawaii's election code provided candidates with "adequate ballot access" and that therefore the ban on write-in voting gave rise to only a minimal burden on voters' rights. *Id.* at 438-39. Justice Kennedy, in his dissent, vehemently disagreed with the Court's conclusion on this issue, stating instead that "Hawaii's ballot access laws taken as a whole impose a significant impediment to third-party or independent candidacies." *Id.* at 443 (Kennedy, J., dissenting). As Justice Kennedy asserts in his dissent, "For those who are affected by write-in bans, the infringement on their right to vote for the candidate of their choice is total." *Id.* at 447. In the majority opinion, Justice White listed what he viewed as the suitable alternatives to ballot access. First, any group who obtained the signatures of at least 1 percent of Hawaii's registered voters could file a party petition 150 days before the primary. *Id.* at 435 (majority opinion). The dissent points out that the majority paid little heed to the early filing deadline to gather signatures for a party petition—a deadline that is five months before the primary election, which is before some groups may have an organizational structure in place to meet such a requirement. *Id.* at 443 (Kennedy, J., dissenting). Second, a candidate could appear on the Hawaii primary ballot by being a member of an established party. *Id.* at 435-36 (majority opinion). Established parties are those parties that qualified by petition for three back-to-back elections and received a certain percentage of the vote. Third, a candidate could appear on the primary ballot through the nonpartisan ballot. *Id.* at 436. Candidates could be placed on the nonpartisan ballot by filing nominating papers containing fifteen to twenty-five signatures sixty

The Court found that Hawaii's ban on write-in voting served a number of state interests.<sup>35</sup> First, the Court stated that the prohibition served to avoid the potential of "unrestrained factionalism at the general election."<sup>36</sup> To that end, the Court found that the prohibition could serve to eliminate the possibility of sore-loser candidacies in the general election.<sup>37</sup>

The Court also found that Hawaii's ban against write-in voting was necessary to avoid "party raiding."<sup>38</sup> The dissent found this state interest to be "suspect" because, by allowing open primaries, the state created the party-raiding problem.<sup>39</sup> The dissent's point is equally applicable to California's Proposition 14 scenario.

Another state interest that the Court found to be furthered by Hawaii's ban on write-in votes is inapplicable to the issue discussed in this Article. The Court found that Hawaii's law served to allow unopposed winners to hold office without having to participate in a general election.<sup>40</sup> First, this conclusion is indeed curious. If Hawaii eliminated general elections, a voter would have no ability to cast a write-in vote.<sup>41</sup> Second, this interest is not implicated under California law, as Proposition 14 dictates a general election regardless of the percentage of the votes garnered by either of the top-two vote-getters.<sup>42</sup>

The Court went further than merely upholding Hawaii's law and found that when a state's ballot access laws impose "only reasonable burdens" on a voter's First Amendment rights, "a prohibition on

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days before the primary. *Id.* The dissent noted that while the requirements to obtain a position on a nonpartisan ballot were not overly burdensome, voters could only choose one ballot, and therefore voters in Hawaii faced a difficult choice. *Id.* at 443–44 (Kennedy, J., dissenting). Once a voter opts to use a nonpartisan ballot, that voter has to give up the chance to vote for a candidate from an established party in every other race. *Id.* at 444.

35. Some of these interests bear on the issues raised by Proposition 14, and others do not.

36. *Id.* at 439 (majority opinion) (citing *Munro v. Socialist Workers Party*, 415 U.S. 189, 196 (1986)).

37. *Id.*

38. *Id.*

39. *Id.* at 449 (Kennedy, J., dissenting).

40. *Id.* at 439 (majority opinion).

41. *Id.* at 449 (Kennedy, J., dissenting).

42. *See, e.g.,* Wessels, *supra* note 9 (discussing Proposition 14's provision for a mandatory runoff election between the top-two primary vote-getters regardless of their party affiliation). However, there is no runoff in a special election wherever one candidate gets a majority of the votes in the primary election. CAL. ELEC. CODE § 10706 (West 2010).

write-in voting will be presumptively valid.”<sup>43</sup> In dissent, Justice Kennedy rejected this presumption, correctly explaining that it is circular because the ability of voters to cast write-in votes must be one factor that is weighed when determining whether a state’s ballot access laws pass constitutional muster.<sup>44</sup> Hence the Court’s reasons for upholding the write-in prohibition in *Burdick* do not apply with equal force to California’s prohibition on the counting of write-in votes in the general election. However, because of Justice White’s proclamation that bans on write-in voting can be presumptively valid, the Court could uphold California’s prohibition.

## II. WHAT HAS THE SUPREME COURT SAID ABOUT BALLOT ACCESS RESTRICTIONS?

While there are few, if any, bright-line rules that apply to Supreme Court decisions surrounding ballot access for minor parties, some things remain clear. Most of the Supreme Court’s recent jurisprudence underestimates the importance of minor parties in American democracy and protects the duopoly that the two major parties have over the political process.<sup>45</sup> The Supreme Court has incorrectly found that there is little expressive value in a citizen’s ballot-box decision of whom to vote for or against and has instead held that elections are only about picking a winning candidate.<sup>46</sup> Similarly, the Court fundamentally misreads the importance of minor parties to an open and robust political debate. In addition, the Court has given undue weight to claims by state legislatures (made up overwhelmingly of members of the two major parties) that minor parties threaten stable and orderly elections.<sup>47</sup> By doing this, the

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43. *Burdick*, 504 U.S. at 441.

44. *Id.* at 447 (Kennedy, J., dissenting).

45. See generally Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court’s Understanding of Elections*, 85 B.U. L. REV. 1277, 1277–78 (2005) (arguing that the Supreme Court’s ballot access rulings often disfavor minor parties and protect the two dominant parties); see also Jamie Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America’s Structural Democracy Deficit*, 3 ELECTION L.J. 559, 570 (2004) (“When states have created discriminatory statutory mechanisms that interfere with the freedom of third party and Independent voters and candidates to participate in elections, the Court has upheld them as ‘reasonable’ regulations in favor of the ‘two party system,’ an imaginary construct with no basis in our Constitution, which does not mention parties, much less two specific parties or a ‘two party system.’”).

46. Evseev, *supra* note 45, at 1280.

47. *Id.*; see also Raskin, *supra* note 45, at 572 (“Right now the Supreme Court reasons backwards and upside-down from the imagined needs of the ‘two party system’ or ‘political

Court has failed to properly weigh the justifications that legislators proffer in favor of ballot access restrictions. If ever there were an area in which heightened judicial review of legislators' decisions were justified, it is one in which legislators' decisions can directly increase or decrease their chances of reelection. Even if minor-party candidates cannot realistically unseat incumbents, such candidates can make reelection bids more arduous for certain incumbents.<sup>48</sup>

Ballot access cases implicate both the First Amendment's expressive and associational rights and the Equal Protection Clause's protections against discrimination. The Court's decisions have alternatively rested on one or both of these rights.

*A. Supreme Court Case Law, While Distinguishable,  
Informs the Current Inquiry*

Supreme Court case law addressing the level of support a candidate or minor party needs in order to obtain access to the ballot is slightly different from the level-of-support issue raised in this Article for two reasons. First, the Supreme Court has yet to review the issue presented by this Article: a ballot-qualified candidate's ability to designate her preferred party on the ballot. The only restriction that the Supreme Court has reviewed is the restriction that prevents a minor-party or independent candidate from appearing on a ballot. However, it is important to review the Supreme Court's decisions because lower courts rely on Supreme Court rulings. In addition, the Court's thinking on similar ballot access restrictions portends its analysis of the issue raised by this Article.

One question posited throughout this Article is if a candidate obtains a position on the ballot without being able to list her party preference, is it similar to preventing her from obtaining any position on the ballot at all, particularly given many voters' lack of knowledge about anything related to candidates other than their party affiliations.

Second, there is another, more minor, distinction between the Supreme Court case law discussed in this section and the restrictions that will befall minor parties and those who wish to vote for minor-

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stability,' rather than forward and ground-up from the essential political rights of the citizen, the only standpoint from which a truly open and competitive democracy can grow."').

48. See generally Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of Jenness v. Fortson*, 1 ELECTION L.J. 235, 236-37 (2002) (discussing the proliferation of state laws to hinder the ability of minor-party candidates to gain ballot access).

party members after the implementation of Proposition 14. Supreme Court case law dealing with the level of support that a minor-party or independent candidate must achieve prior to obtaining ballot access typically addresses access to the *general* election ballot. Often in those cases, though not always, the general election ballot is the only opportunity for a minor-party or independent candidate to reach a statewide ballot.

In California minor parties must demonstrate a certain level of support in order for candidates to be able to list their party preference on the *primary* election ballot. Then, to obtain a position on the general election ballot, a candidate has to be among the top-two vote-getters.<sup>49</sup> However, under open-primary, top-two election systems, the primary election is akin to a general election, because it determines only who proceeds to the top-two runoff election, and there is not a party-nomination process. Similarly, the general election is akin to a runoff election.<sup>50</sup> In addition, the primary election ballot is likely the only ballot to which minor-party members will obtain ballot access. Therefore, that Supreme Court case law

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49. It is quite difficult to determine how many votes a candidate would have to garner to be among the top-two vote-getters. This depends on a number of factors that are hard to model and predict, given that California now operates within a semi-closed primary electoral system. For instance, the determination of the top-two vote-getters depends on the number of candidates appearing on the primary election ballot and voter behavior in a new electoral system—one in which any voter can vote for any candidate, regardless of party preference or affiliation. In any event, it does seem unlikely that minor-party members would be among the top-two vote-getters. As the media has reported, Proposition 14 “is likely to exclude third-party candidates from the runoff ballot in virtually all contested elections.” Bob Egelko, *Prop. 14 Open Primary Survives First Challenge*, S.F. CHRON., Sept. 15, 2010, at C-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/09/14/BAS01FDVRA.DTL>.

50. There would be no doubt, the Washington district court found in reviewing an open-primary, top-two election system, that on certain ballot access grounds Washington’s election system would be constitutional “if the ‘primary’ were renamed a ‘general election,’ and the ‘general election’ were renamed a ‘runoff.’” *Wash. State Republican Party v. Wash. State Grange*, No. C05-0927-JCC, at 13 (W.D. Wash. Aug. 20, 2009), available at [http://www.sos.wa.gov/\\_assets/elections/DistrictCourtOrder82009.pdf](http://www.sos.wa.gov/_assets/elections/DistrictCourtOrder82009.pdf) (issuing an order granting in part and denying in part the defendants’ motion to dismiss; granting in part and denying in part the Democratic Party’s motion to amend and supplement its complaint and the Republican Party’s motion for leave to file a supplemental and amended complaint; and granting in part and denying in part the state of Washington’s motion to recover attorney fees and costs). The Court concluded that “the constitutionality of the election statute cannot turn on the identifiers used for its various provisions.” *Id.* In support of this conclusion the Court pointed to *California v. Jones*, 530 U.S. 567 (2000), in which the Court approved of a top-two general election following nonpartisan primaries. *Wash. State Republican Party*, at 13. It should be noted that the difference between the hypothetical scheme approved of by the *Jones* Court and the Washington and California election systems is that primaries held in Washington and California are not nonpartisan, but rather most candidates designate their party preference. *Id.*

deals with access to the general election, and that this Article addresses access to the primary election, makes little difference.

Other than the following brief discussion, this Article leaves for another day the question of whether a top-two general-election system impermissibly infringes on the rights of minor parties and their members to obtain general-election access. At first blush this appears less constitutionally problematic than the issue of access to the primary election ballot. In 2009, a district court in Washington State reviewing that state's open-primary, top-two election system, granted a motion to dismiss the Libertarian Party's claim that the top-two general-election system acted to impermissibly limit its ability to reach the general election ballot.<sup>51</sup> The district court found much of the Court's ballot access case law distinguishable because in those cases "the general election was a minor party's *only* opportunity to reach the statewide electorate by ballot."<sup>52</sup> The district court's ruling rested on the fact that Washington's scheme, in contrast to the laws reviewed by the Supreme Court, "virtually guarantee[d]" minor-party access to the primary election ballot.<sup>53</sup> In Washington, candidates can designate their preference for any party.<sup>54</sup> Hence the district court upheld the law based on a finding that a minor party having access to at least one ballot is constitutionally sufficient.

The key difference between the Washington election system upheld in *Washington State Republican Party v. Washington State Grange*<sup>55</sup> and the election system under Proposition 14 is that minor parties are not virtually guaranteed access to at least one election ballot under the latter system. To the contrary, as it stands, half of the minor parties that are now ballot qualified would fail to retain that status. Hence, while minor-party candidates could appear on the ballot, candidates who wished to designate their party preference for either of those parties (the Libertarian Party or the Peace and Freedom Party) would be prohibited from doing so on the primary

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51. Wash. State Republican Party v. Wash. State Grange, No. C05-0927-JCC (W.D. Wash. Aug. 20, 2009), *available at* <http://www.sos.wa.gov/assets/elections/DistrictCourtOrder82009.pdf>.

52. *Id.* at 12 (emphasis added).

53. *Id.* at 12–13.

54. *See id.* at 10.

55. No. C05-0927-JCC (W.D. Wash. Aug. 20, 2009).



election ballot and would be unlikely to be among the top-two vote-getters to proceed to the primary.

This Article, instead of focusing on access to the general election ballot, addresses—in part by analyzing Supreme Court case law dealing generally with access to the general election—whether California laws impermissibly infringe on ballot access rights by preventing candidates from listing their preference for a nonqualified party in the primary election. However, as described above, this difference is less important than initially meets the eye. First, because in open-primary, top-two election systems the primaries do not select a party nominee but determine only who makes it to the top-two runoff, the general election is therefore essentially a runoff election.

Second, many of the Supreme Court cases—as is the situation in California—address a minor-party or independent candidate's only chance to obtain a position on the statewide ballot, whether it be the primary or general election ballot. Hence, the Court's analysis is on point to determine the validity of California's ballot access laws.

*B. The Court's "Level of Support"  
Jurisprudence Is a Muddled Morass*

This section of the Article focuses on the Court's ballot access case law that concerns restrictions that burden new or small parties, or independent candidates. This case law requires that independent candidates or minor parties display a certain level of support prior to obtaining a place on the ballot.

The Court too often upholds level-of-support requirements on the basis that they purportedly serve the important state interests: "[in] protecting the integrity of their political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of runoff elections."<sup>56</sup> Indeed, much of the Court's level-of-support jurisprudence evidences great deference to the states when the government claims that the restrictions "protect the integrity and reliability of the electoral process itself."<sup>57</sup>

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56. *Clements v. Fashing*, 457 U.S. 957, 965 (1982).

57. *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).

The Court, misperceiving the benefits and burdens that these restrictions impose on minor parties, typically strikes down level-of-support requirements only when it believes that those requirements completely freeze minor-party members out of a place on the ballot.<sup>58</sup> The Court wholly underestimates the injury these restrictions pose to minor parties and the important role that minor parties and those wishing to support minor-party candidates can play in elections. Unfortunately, the Court's current analysis turns the Court's first modern ballot access case, *Williams v. Rhodes*,<sup>59</sup> on its head.

In *Williams* the Court struck down ballot access restrictions that in essence prohibited any minor party from obtaining a place on the ballot.<sup>60</sup> The Court, however, did not find that making it all but impossible for minor parties to obtain ballot access was the necessary threshold required for striking down ballot access laws. The *Williams* Court merely found that the restriction at issue prevented all but the major-party members from achieving ballot positions and that the law was invalid.<sup>61</sup> Not until the Court's misreading of *Williams* three years later in *Jenness v. Fortson*<sup>62</sup> did the Court set an unreasonably high threshold for striking down ballot access laws.<sup>63</sup> Case law following the Court's ill-fated *Jenness* decision displays, with few exceptions, hostility toward minor parties' right to obtain ballot access.<sup>64</sup>

The Court eventually adopted a balancing test applicable to ballot access restrictions.<sup>65</sup> This ad hoc balancing test gives the Court doctrinal cover to underestimate minor parties' rights and overestimate states' interest in restricting minor parties' access to electoral ballots.

### 1. *Williams v. Rhodes*—The High-Water Mark of the Court's Ballot Access Protection

The modern era of ballot access cases began in 1968 with *Williams*. Justice Black, writing for the majority of the Court, struck

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58. *Clements*, 457 U.S. at 965.

59. 393 U.S. 23 (1968).

60. *Id.* at 34.

61. *Id.*

62. 403 U.S. 431 (1971).

63. *Id.* at 441.

64. Winger, *supra* note 48, at 235–36.

65. *Storer v. Brown*, 415 U.S. 724 (1974); *see infra* Part II.B.4.

down a series of Ohio election laws on equal protection grounds. In Ohio, among other “substantial additional burdens,” a new party had to obtain petitions signed by qualified electors, equal to at least 15 percent of the number of ballots cast in the last gubernatorial election, in order “to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States.”<sup>66</sup> In *Williams*, members of a new party desired a place on the Ohio ballot for the November general election.<sup>67</sup>

The Court held that the Ohio election laws made it “virtually impossible” for any party other than the Republican and Democratic Parties to qualify for the ballot.<sup>68</sup> Hence, the law barred new political parties or small established political parties from the state ballot.<sup>69</sup>

In analyzing Ohio’s ballot access laws, instead of parsing through each provision to see if it, standing alone, was constitutional, the Court took a totality-of-the-circumstances approach.<sup>70</sup> The Court specifically acknowledged that its analysis looked at the “totality of the Ohio restrictive laws taken as a whole.”<sup>71</sup>

*Williams* firmly established that the rights of both candidates and voters are implicated when states impose ballot access restrictions.<sup>72</sup> The Court explained that Ohio’s laws placed burdens on both “the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their

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66. *Williams*, 393 U.S. at 24–25.

67. *Id.* at 26.

68. *Id.* at 25.

69. The Court noted that Republican and Democratic Parties faced fewer burdens because they could maintain their positions on the ballot by garnering 10 percent of the votes in the last gubernatorial election, but did not need to obtain signature petitions. *Id.* at 25.

70. *Id.* at 34.

71. *Id.* at 34. The Court emphasized the importance of the right to vote. “Other rights, even the most basic, are illusory if the right to vote is undermined.” *Id.* at 30 (citations omitted).

72. In 1974, in *Lubin v. Panish*, 415 U.S. 709 (1974), the Court specifically acknowledged that both parties’ and candidates’ rights and voters’ rights to cast a ballot for the candidate and party of their choosing are implicated by ballot access restrictions. *Id.* at 716. The Court noted that the right to vote is burdened if a vote can only be cast in the primary for one of two candidates while other candidates are seeking a position on the ballot. *Id.* In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court began by discussing the fundamental rights of both voters and candidates to participate in elections. *Id.* at 786–88. The Court emphasized that “laws that affect candidates always have at least some theoretical, correlative effect on voters.” *Id.* at 786 (quoting *Bullock v. Carter*, 405 U.S. 134 (1972)). The *Anderson* Court held that its “primary concern” with restrictions on a candidate’s ballot access is that such restrictions act to “limit the field of candidates from which voters might choose.” *Id.*

political persuasion, to cast their votes effectively.”<sup>73</sup> These are the two interests always at play in ballot access decisions.

The Court found that the Ohio laws gave the Republican and Democratic Parties marked advantages over new parties and imposed a heavy burden on the right to vote and the right to associate of those not affiliated with either major party.<sup>74</sup> Concluding that the laws imposed a heavy burden, the Court applied a rigorous strict scrutiny standard, finding that there must be a compelling state interest to justify the restriction.<sup>75</sup> The Court held that there was no such interest.<sup>76</sup>

Ohio principally asserted that it could “promote a two-party system in order to encourage compromise and political stability.”<sup>77</sup> The Court found that Ohio’s laws did not just promote the two-party system but rather promoted two particular parties and gave those parties a complete duopoly.<sup>78</sup> The state additionally asserted that, among other things, Ohio’s laws were necessary to prevent voter confusion and frustration, which could result from a large number of parties qualifying for the ballot.<sup>79</sup> The Court, however, concluded that few parties attempted to qualify for the ballot, even when the threshold for qualification was much lower.<sup>80</sup>

It is important to note Justice Stewart’s powerful dissent in this landmark ballot access case because his views soon became those of the majority of the Court. Justice Stewart called for more deference

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73. *Williams*, 393 U.S. at 31. In *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), the Court acknowledged that restrictions on ballot access burden two fundamental rights, voters’ right to association for the furtherance of political beliefs and voters’ right to cast their votes regardless of political preference. *Id.* at 184. The Court has thus recognized that the rights of voters to vote and associate themselves with others for a political purpose, and the rights of candidates to appear on the election ballot are inextricably intertwined. *Id.*

74. *Williams*, 393 U.S. at 31. In support of that conclusion the Court first famously found that the right to form a political party “means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes.” *Id.* Second, and equally significantly, the Court found that “the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.” *Id.*

74. *Id.*

75. *Id.*; Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 186 (1991).

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

77. *Id.* at 31–32.

78. *Id.* at 32.

79. *Id.* at 33.

80. *Id.*

to the legislature's judgments and categorized the majority's opinion as imposing the justices' own ideas of wise policy upon the states.<sup>81</sup>

The Court's conclusion in *Williams* was the correct one.<sup>82</sup> However, many of the Court's post-*Williams* rulings demonstrate a "retreat from the broad implications of *Williams*."<sup>83</sup> *Williams* applied strict scrutiny and hence performed a searching review of the state's asserted interests. This is the appropriate standard to employ when dealing with questions related to the fundamental rights to cast a meaningful ballot and to associate with others to advance common political beliefs. *Williams* also correctly applied a totality-of-the-circumstances approach, taking a holistic view of how the law, as a whole, affected third parties' rights.

## 2. *Jeness v. Fortson*—The Court Reverses Course

Three years after and one hundred and eighty degrees from *Williams*, the Court upheld a Georgia law that provided that a candidate who did not enter and win a party's primary election (i.e., a nonparty or independent candidate) could have her name on the general election ballot only if she filed a nominating petition signed by at least 5 percent of the number of registered voters at the last

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81. *Id.* at 48. Justice Stewart thought the majority engaged in an inappropriate "second guessing" as to the proper level of the qualifying threshold, and he espoused a less stringent level of review for ballot access restrictions. *Id.* at 54 (Stewart, J., dissenting). Justice Stewart stated that a law violates the Equal Protection Clause only when a "classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* at 51. In applying this standard, Justice Stewart also adopted a permissive view of what can qualify as a sufficiently important state interest to justify the restriction on ballot access rights. Justice Stewart found that the Ohio law furthered a proper state objective "[b]y preventing parties that have not demonstrated timely and widespread support from gaining places on its ballot." *Id.* at 53. Justice Stewart found that Ohio's restrictions therefore helped to prevent (1) the possibility that minor parties would garner sufficient support to block the major-party candidates from obtaining a majority of the vote; and (2) the resulting possibility that the winner of the election garnered only a plurality and is preferred by less than the majority of the voters. *Id.* at 53–54. Justice Stewart laid out an unquestionably narrow view of the limits placed on state legislatures in making ballot access law. Justice Stewart noted that a state legislature was limited by three constitutional amendments in choosing its preferred process for appointing electors: (1) the Fifteenth Amendment, which prevents voters from being excluded on the basis of race; (2) the Nineteenth Amendment, which prevents voters from being excluded on the basis of sex; and (3) the Twenty-Fourth Amendment, which prevents voters from being excluded on the basis of failure to pay taxes. *Id.* at 50. Justice Stewart further admitted that the Fourteenth Amendment "imposes some limitations upon a state legislature's freedom to choose a method for the appointment of electors." *Id.* at 51.

82. Smith, *supra* note 75, at 180.

83. *Id.* at 181.

general election for the office in question.<sup>84</sup> For purposes of comparison, it is important to note that Georgia's requirement was "at least five times that of forty-two states, and at least fifty times that of sixteen states."<sup>85</sup>

Justice Stewart, the powerful dissenter in *Williams*, wrote the majority opinion in *Jenness*, which set forth "[t]he undemocratic doctrine of defining anti-third party legislation as reasonable electoral regulation."<sup>86</sup> The ruling "constitutionalized political discrimination across the land."<sup>87</sup>

The specter of *Williams* loomed large over the *Jenness* opinion, as Justice Stewart went to pains to distinguish the case with which he so vehemently disagreed. While the *Williams* Court "focused on infringements of fundamental rights," the *Jenness* Court "scarcely even considered such rights."<sup>88</sup> The Court's analysis primarily consisted of drawing distinctions between the Ohio statute and the Georgia statute.<sup>89</sup> This is a departure from the holistic approach taken by the Court in *Williams*. In *Jenness*, the Court parsed through the statutes, took each provision individually and found that each, standing alone, was constitutional, as opposed to looking at the restrictions as a whole.

In distinguishing the Ohio laws in *Williams* from the Georgia statute at issue in *Jenness*, the Court concluded that "Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo."<sup>90</sup> This is a fundamental misreading of *Williams*, which did not require that in order to be declared unconstitutional a law had to "freeze the political status quo," but rather found that the Ohio laws did so in that case. The Court, therefore, set an unreasonably high bar for a finding of unconstitutionality.

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84. *Jenness v. Fortson*, 403 U.S. 431, 432 (1971). The Court's about-face is surprising, as the five justices who voted in the majority in *Williams* to strike down the law also voted in the majority in *Jenness* to uphold the law. Smith, *supra* note 75, at 185.

85. Smith, *supra* note 75, at 183.

86. Raskin, *supra* note 45, at 570.

87. *Id.* at 571.

88. Smith, *supra* note 75, at 181.

89. *Id.* The Court explained that Georgia, unlike Ohio, (1) provides for write-in votes; (2) recognizes independent candidates and does not require that every candidate be the nominee of a political party; (3) does not mandate an early filing deadline for those candidates who are not endorsed by established political parties; and (4) does not require small parties or new parties to establish complex primary election machinery. *Jenness*, 403 U.S. at 438.

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

The *Jenness* Court found that the Georgia statute passed constitutional muster on both First Amendment and Equal Protection Clause grounds.<sup>91</sup> Justice Stewart, displaying his permissive view of a state interest sufficient to uphold ballot access restrictions, concluded,

[t]here is *surely* an important state interest in requiring some preliminary showing of a *significant modicum* of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.<sup>92</sup>

The *Jenness* Court therefore, “never seriously considered the possibility that such interests might not be valid.”<sup>93</sup>

In sum, Justice Stewart's application of a minimal level of scrutiny, expansive view of a sufficiently important state interest, and deferential approach to the state legislature “put a halt to virtually all successful litigation against onerous ballot access laws . . . .”<sup>94</sup>

### 3. *Rosario v. Rockefeller*<sup>95</sup>—The Court Pays Little Heed to the Rights of Voters

In 1973, two years after the Court's decision in *Jenness*, Justice Stewart, again writing for a majority of the Court, upheld a New

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91. With respect to a candidate's equal protection claim, the Court failed to accept what it viewed as the premise of the claim, that it is harder for a candidate to gather signatures of 5 percent of the electorate than it is to win a majority of the party primary. *Id.* at 440. In Georgia, a “political party” was an organization that obtained 20 percent of the vote at the most recent gubernatorial or presidential election. All other political organizations were deemed “political bodies.” Political parties automatically got the names of their candidates on the primary election ballot and the name of the winner of the primary on the general election ballot. With respect to a political body's equal protection claim, the Court found that a political body could not claim that its interests would be furthered if the state forced it to adhere to the complex organizational requirements that are a precondition of competing in Georgia's primary elections, rather than requiring that it obtain the requisite number of signatures. *Id.* at 441. The Court concluded that there were obvious differences between large, established political parties with broad-based support and new or small political organizations, and that it need not treat different organizations in the same way. *Id.* at 441–42.

92. *Id.* at 442 (emphasis added).

93. Smith, *supra* note 75, at 182. Indeed, the Court “never explain[ed] why political parties should have to convince pedestrian non-supporters to sign their petitions simply in order to run for office.” Raskin, *supra* note 45, at 571.

94. Winger, *supra* note 48, at 237.

95. 410 U.S. 752 (1973).

York statute that required a voter to join her preferred party approximately eight to eleven months prior to the primary election in order to be eligible to vote in that election.<sup>96</sup> The Court's rationale in this case—even though the case is not a level-of-support case—helps to explain its subsequent jurisprudence in that area. For instance, as in later level-of-support cases, the *Rosario* Court gave little credence to petitioners' claims that their right to vote was impermissibly infringed on and, conversely, gave undue deference to the state's asserted claims that the restriction acted to prevent party raiding. Further, similar to its decisions in the level-of-support cases, the Court failed to elucidate a standard of review and seemed to require absolute disenfranchisement before it would grant relief. It is no surprise that few restrictions have reached that dangerously high level.

In *Rosario*, the petitioners unsuccessfully claimed that the delayed-enrollment system unconstitutionally deprived them of their fundamental right to vote in the primary election of their preferred political party.<sup>97</sup> The Court upheld the New York statute, finding that it “did not *absolutely disenfranchise* the class to which the petitioners belong—newly registered voters who were eligible to enroll in a party before the previous general election.”<sup>98</sup> Instead, the Court found that the law merely delayed the time when a class of citizens could exercise its right to vote.<sup>99</sup>

The Court's rationale is disturbingly flawed. First, those who do not enroll in their preferred party by the general election are in fact totally disenfranchised from voting in the next primary election.<sup>100</sup> As

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96. *Rosario*, 410 U.S. 752. The law “provides an exemption from this waiting period for certain classes of voters, including persons who have attained voting age after the last general election, persons too ill to enroll during the previous enrollment period, and persons who moved from one place to another within a single county.” *Id.* at 754.

97. *Id.* at 756.

98. *Id.* at 757 (emphasis added). The Court found that the cases on which petitioners relied were all distinguishable because in those cases, decided on equal protection grounds, “the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote.” *Id.* The Court concluded that the New York law was not a ban on the freedom of association but rather a mere “time limitation on when they had to act in order to participate in their chosen party's next primary.” *Id.* at 758. Again, based on this language, the Court would have been sympathetic to the petitioner's view only if the state law constituted a total ban on First Amendment rights of association.

99. *Id.*

100. *Id.* at 757.



Justice Power noted in his dissent, “Deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be tantamount to its denial.”<sup>101</sup> Second, even if one were to agree with the Court’s conclusion, the Court set a perilous precedent for determining when a state law infringes on an individual’s First Amendment associational rights—when the state law *absolutely disenfranchises* one or more persons. The Court followed this precedent in subsequent level-of-support cases. Justice Powell, dissenting, stressed that the Court had never required a total ban on voting or associational rights prior to finding a statute unconstitutional.<sup>102</sup>

The Court, finding that the law did not impress a heavy burden on First Amendment rights,<sup>103</sup> failed to apply strict scrutiny and further neglected to identify any standard of review.<sup>104</sup> The Court held that New York’s delayed-enrollment scheme served the state interest of preventing party “raiding,” “whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party’s primary.”<sup>105</sup>

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101. *Id.* at 766.

102. *Id.* at 766–67.

103. The Court held that the time limitation was not “so severe as itself to constitute an unconstitutionally onerous burden” on petitioners. *Id.* at 760. The Court squarely rejected the petitioners’ arguments that the statute burdened their rights by requiring party enrollment before potential voters had the requisite knowledge of candidates or issues to be involved in the next election. *Id.*

104. *Id.* at 767.

105. *Id.* The Court concluded that the prevention of party raiding served to preserve the integrity of the electoral process, which is a “legitimate and valid state goal.” *Id.* at 761. The Court determined that the delayed-enrollment scheme would deter party raiding because if potential voters were allowed to enroll in a party after the general election, it “would not put the voter in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another.” *Id.* at 762. Constitutional issues, however, should not be based on what the Court hypothesizes could be unseemly. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 n.9 (1983) (citing *Rosario*, 410 U.S. at 752) (upholding restrictions that prevent “party raiding,” “the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party’s primary election”); *Kusper v. Pontikes*, 414 U.S. 51, 54–55 (1973). In addition, because the Court failed to apply strict scrutiny, the majority did not address the question of whether the state’s interest in preventing party raiding could be protected by less severe measures. *Rosario*, 410 U.S. at 770. A voter’s failure to comply with this severe deadline should not be used to support the denial of a fundamental constitutional right. *Id.* at 765. As Justice Powell’s dissent noted, “Numerous prior decisions impose on us the obligation to protect the continuing availability of the franchise for all citizens, not to sanction its prolonged deferment or deprivation.” *Id.* at 765 (Powell, J., dissenting).

4. *Storer v. Brown*<sup>106</sup>—The Creation of a New Balancing Test That Provides Few Protections for Minor Parties

Justice White, a dissenter in *Williams*, writing for a majority of the Court in 1974, upheld a California ballot access law. The provisions of the California Elections Code at issue required that independent candidates for Congress, president, and vice president who sought a position on the general election ballot had to: (1) disaffiliate from political parties (meaning candidates could not vote for or be registered with a political party) at least one year before the preceding primary; and (2) file nominating papers signed by voters totaling at least 5 percent and not more than 6 percent of the total vote cast in the prior general election in the position for which the candidates wanted to run.<sup>107</sup> The California law required that the signatures be collected during a twenty-four-day period occurring after the primary and sixty days before the general election.<sup>108</sup> Those who voted in a partisan primary election could not sign the nomination papers.<sup>109</sup> Candidates failing to meet these requirements had no opportunity to appear on either state election ballot.

Instead of relying on the Court's previous case law addressing equal protection challenges to provisions of elections laws, Justice White fashioned a new standard for reviewing such restrictions, stating that the Court's rule "provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause."<sup>110</sup> This idea of the Court having no litmus test to evaluate equal protection claims based on ballot access restrictions is a theme that runs throughout the

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106. 415 U.S. 724 (1974).

107. *Storer v. Brown*, 415 U.S. 724, 726 (1974).

108. *Id.* at 726–27.

109. *Id.* at 727.

110. *Id.* at 730. In *Clements v. Fashing*, 457 U.S. 957 (1982), Justice Rehnquist cited to *Storer* for the proposition that the Court does not employ a litmus test when analyzing ballot access restrictions, and that the Court must look to the "facts and circumstances behind the law," the State's interests, and the nature of the interests burdened by the law. *Id.* at 968. In addition, in 1979, in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), the Supreme Court employed the *Storer* balancing test to strike down a statute, on equal protection grounds, which required a new party or an independent candidate in Chicago to obtain more signatures to get a place on the ballot than a party or candidate for statewide office. *Id.* at 177. The Court's decision in *Illinois State Board of Elections* was based more on the disparity between the two signature requirements than on the actual merits of the signature-requirement standing alone.

Court's subsequent ballot access cases. This language, oft quoted in subsequent cases, has in essence allowed the Court to employ an ad hoc balancing test based on the particular facts underlying each challenge. This balancing test is particularly problematic in the area of ballot access restrictions on minor parties where the courts should employ a searching level of review to restrictions that can clearly benefit incumbent legislators and that burden the fundamental rights of voters to vote and associate for the furtherance of common political beliefs.

While purportedly relying on the Court's prior decisions, under the new standard for analyzing ballot access restrictions, the Court stated that judgment on these issues is "a matter of considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."<sup>111</sup> The Court's balancing test leaves a hazardous amount of discretion for a judge's personal predilections as to the propriety interests of the state and of those disadvantaged by the law.

In applying this test, the *Storer* Court gave great deference to the balancing test's state's-interest prong.<sup>112</sup> The Court found that states have an interest in preventing overcrowded ballots.<sup>113</sup> The Court concluded that California's one-year disaffiliation provision furthers the compelling state interest in promoting the stability of the political system, which outweighed the interest of the candidate and her supporters in being able to make, as the Court categorized it, a late

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111. *Storer*, 415 U.S. at 723–24 (internal quotation marks omitted) (citing *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972)).

112. The *Anderson* Court, relying on *Storer*, noted that the rights of voters and candidates to participate in elections are not absolute and that the states can regulate elections "if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer*, 415 U.S. at 730).

113. *Storer*, 415 U.S. at 732 (quoting *Bullock v. Cater*, 405 U.S. 134, 145 (1972)). The Court found that an overcrowded ballot could lead to (1) clogging of the election machinery; (2) confusing the voters; and (3) electing a candidate who is neither the choice of the majority nor even the plurality. *Id.* The Court upheld California's law on the grounds that the route to the ballot that California laid out for independent candidates was merely an alternative to being nominated in a party primary. *Id.* at 733. The Court noted that while independent candidates did not have to be elected in a primary election, they still had to demonstrate "substantial public support." *Id.*

decision to obtain a position on the ballot as an independent candidate.<sup>114</sup>

The Court applied something far short of strict scrutiny, and hence never asked if less-drastic means were available to serve the state's interest.<sup>115</sup> Justice Brennan began his dissent by stating in emphatic terms that under prior cases, the Court must employ strict scrutiny, not a balancing test, to determine the validity of laws regulating candidate access to the ballot.<sup>116</sup> Justice Brennan emphasized that the burden of demonstrating that such a law survived strict scrutiny was on the state.<sup>117</sup> Justice Brennan chastised the Court's deferential approach to this ballot access restriction and found the record devoid of any evidence of the state attempting to demonstrate "the absence of reasonably less burdensome means of achieving its objectives."<sup>118</sup>

5. *American Party of Texas v. White*<sup>119</sup>—The Court's Erosion of the Rights of Minor Parties Continues, a Piecemeal Approach to Evaluating Ballot Access Cases

In 1974 Justice White again wrote for the majority of the Court. The Court upheld a portion of the Texas Elections Code that appellants claimed infringed on their First Amendment right of association and impermissibly discriminated against new and minor political parties by excluding those groups from general elections in violation of the Equal Protection Clause.<sup>120</sup> Once again, in this case appellants' only chance to obtain a position on a state election ballot was on the general election ballot.

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114. *Id.* at 736. The Court found that states are entitled to limit voters to voting in one nomination process "to maintain the integrity" of that process. *Id.* at 741. The Court remanded the case to the district court to determine if the California laws were reasonable. *Id.* at 738.

115. Smith, *supra* note 75, at 188.

116. *Storer*, 415 U.S. at 756.

117. Justice Brennan also took a markedly different view of the burdens resulting from the restriction, noting that the California law "absolutely denies ballot position to independent candidates who, at any time within 12 months prior to the immediately preceding primary election, were registered as affiliated with a qualified political party." *Id.* at 757 (Brennan, J., dissenting). Justice Brennan found that it was an impermissible burden that independent candidates affiliated with a recognized political party had to take steps towards candidacy seventeen months before the election, when "they cannot know either who will be the nominees of the major parties, or what the significant election issues may be." *Id.* at 758.

118. *Id.* at 761. Justice Brennan found the Court's purported examination of "less drastic means" to be "wholly inadequate." *Id.* at 760.

119. 415 U.S. 767 (1974).

120. *Am. Party of Tex. v. White*, 415 U.S. 767 (1974).

In Texas, there were four ways to nominate candidates for the general election ballot in addition to writing in the name of a candidate.<sup>121</sup> The political parties that questioned the law in *American Party* had to avail themselves of the option open to candidates whose party's candidate polled less than 2 percent of the total gubernatorial vote in the previous general election or whose party did not nominate a candidate for governor.<sup>122</sup> Those candidates could be nominated at precinct nominating conventions and had to demonstrate the support of at least 1 percent of the total vote cast for governor in the last general election.<sup>123</sup> If candidates could not show the requisite amount of support at a nominating convention, the party could circulate petitions for signatures.<sup>124</sup>

The Court stated that it applied strict scrutiny and that the ballot access laws must be "necessary to further compelling state interests."<sup>125</sup> However, the standard of review employed was, in reality, far less searching than strict scrutiny. The Court's analysis showed little regard for the practical hurdles minor parties face at nominating conventions or in petition drives. Further, the Court's analysis was based on conclusory assertions rather than a factual record.

The majority found that the state's compelling interests in preserving the electoral process's integrity and avoiding voter

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121. First, candidates of political parties whose gubernatorial candidate obtained more than 200,000 votes in the previous general election could only be nominated in the primary election and were automatically placed on the ballot. *Id.* at 772. Second, candidates of political parties whose candidate polled more than 2 percent of the total vote cast for governor in the previous general election but obtained less than 200,000 votes could be nominated by primary election or nominating conventions. *Id.* at 773. Third, nonpartisan or independent candidates could qualify by filing an application or petition signed by a certain percentage of the votes cast for governor in the relevant electoral district in the previous general election. *Id.* at 777.

122. *Id.* at 774.

123. *Id.*

124. *Id.* Under the law there were two ways to satisfy the one-percent-signature requirement. *Id.* at 777. First, at the precinct nominating conventions, the party could prepare a list of all of the convention participants. These participants had to be qualified voters. *Id.* at 778. Second, if the party could not get enough signatures at the convention, the party could circulate supplemental petitions for signature during the fifty-five days after the primary election date (there was a pre-primary ban on petition circulation). *Id.* Only voters who did not participate in another party's primary election or nominating process could sign the petition. *Id.* Signatories were required to sign an oath that had to be notarized. *Id.* The political parties challenged a number of provisions, including (1) the one-percent-support requirement; (2) the pre-primary ban on petition circulation; (3) the requirement that all voters who sign the petition did not participate in another party's nominating process; (4) the fifty-five-day limitation on obtaining signatures; and (5) and the notarization requirement. *Id.* at 779.

125. *Id.* at 780.

confusion by limiting the number of candidates on the ballot were sufficient to uphold the restrictions.<sup>126</sup> The Court, however, failed to engage in an analysis as to whether the electoral process's integrity would be harmed, or whether voters would be confused, without the restrictions at issue. Further, the Court failed to discuss the availability of less-burdensome alternatives.<sup>127</sup>

The Court set an unreasonably high bar for the type of ballot access law that would pose an impermissible restriction. Justice White cautioned that ballot access restrictions “may not be so excessive or impractical as to be in reality a mere device to *always, or almost always*, exclude parties with significant support from the ballot.”<sup>128</sup> While this may appear to be a limiting principle, in effect Justice White proclaimed that ballot access laws are constitutionally valid so long as they do not “always, or almost always” bar parties with nonfrivolous support from appearing on the ballot.

As compared to the totality-of-the-circumstances approach taken by the *Williams* Court, the *American Party* Court, like the *Jeness* Court, parsed through each of the petitioner's challenged sections separately to determine whether it, alone, was constitutional.<sup>129</sup> This approach greatly increases the chances that a scheme will pass muster, as each provision taken separately may not be unduly burdensome, but all the provisions as a whole may pose an unreasonable restriction.

Justice Douglas, in a short opinion, concluded that “the *totality* of the requirements imposed upon minority parties works an

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126. *Id.* at 782.

127. The Court concluded that the Texas law did not discriminate against smaller parties by requiring that they nominate their candidates through party conventions rather than primary elections. *Id.* The Court found that there was no evidence that party conventions were “invidiously more burdensome” than primary elections. *Id.* Again, it is unclear what the Court's conclusions were based on.

128. *Id.* at 783 (emphasis added).

129. For instance, as to the one-percent-support requirement, the Court concluded that the requirement, which in 1972 was the equivalent of 22,000 votes, “falls within the outer boundaries of support the State may require before according political parties ballot position.” *Id.* at 782. The Court also accorded some weight to the fact that two political parties had qualified for the general election under the challenged provision. Further, as to the requirement that supplemental signatures be gathered in fifty-five days, the Court found that this was not an unduly short time for circulating the supplemental petitions. In addition, with respect to the requirement that those who signed the supplemental petition sign an oath, which had to be notarized, the Court relied on the district court ruling, which “found no alternative if the State was to be able to enforce its laws to prevent voters from crossing over or from voting twice for the same office.” *Id.* at 787.

invidious and unconstitutional discrimination.”<sup>130</sup> Justice Douglas’s approach stood in stark contrast to the majority’s. Again, the majority parsed through each provision of the Texas law to determine whether it, in isolation, passed constitutional muster, and only then concluded that taken as a whole the law was permissible. Justice Douglas, in contrast, followed the approach elucidated in *Williams* and took into account the overall burdens that the Texas law placed on candidates and parties.

6. *Anderson v. Celebrezze*<sup>131</sup>—The Court Creates Another Balancing Test to Analyze Ballot Access Restrictions

In *Anderson v. Celebrezze*—a case addressing early-filing deadlines—the Court articulated its current test for analyzing ballot access restrictions (at least those that do not pose severe burdens).<sup>132</sup> While not a level-of-support case, the decision informs the Court’s level-of-support case law. In 1983, nine years after Justice White laid out the *Storer* balancing test, the Court appeared to clarify that test in *Anderson*.

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130. *Id.* at 797 (Douglas, J., dissenting in part) (emphasis added).

131. 460 U.S. 780 (1983).

132. *Id.* at 787–89. The *Anderson* balancing test is utilized in a number of different ballot-related situations. Employing the *Anderson* balancing test, Justice Marshall, writing for a majority of the Court in 1986 in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), struck down Connecticut’s closed-primary statute on First Amendment grounds. *Id.* at 211. Under a 1956 Connecticut law, voters in any political party primary had to be registered members of that party. *Id.* at 210. In 1984, the Republican Party of Connecticut enacted a party rule that allowed independent voters to vote in Republican primaries for federal and statewide offices. *Id.* The Republican Party claimed that Connecticut’s 1956 law infringed on its First Amendment “right to freedom of association for the advancement of common political objectives.” *Id.* at 213. The Court rejected, as either insufficient or not implicated, the three state interests that the state argued justified the 1956 law. First, the Court addressed the state interest in avoiding party raiding. *Id.* at 219. While acknowledging that this interest was found to be sufficient in *Rosario*, the Court found that the interest was “not implicated” by the Connecticut statute. Second, the Court addressed the state interest in avoiding voter confusion. *Id.* While acknowledging the legitimacy of this interest, as evidenced by its decision in *Anderson*, the Court cited to *Anderson* and stated that “[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.” *Id.* at 220. Third, the Court addressed the state interest in the protection of the integrity of the two-party system. *Id.* at 222. The Court found that it was not its role to determine whether the state legislature acted wisely in passing the 1956 law, or if the Republican Party made a sage decision in trying to depart from that law. The Court acknowledged that it upheld the sufficiency of that interest in *Storer* and *Rosario*, but held that those regulations “imposed certain burdens upon the protected First and Fourteenth Amendment interests of some individuals, both voters and potential candidates in order to protect the interests of others. In the present case, the state statute is defended on the ground that it protects the integrity of the Party against the Party itself.” *Id.* at 224.

*Anderson* dictates, as *Storer* did, that courts balance the burdens that ballot restrictions place on minor parties against the state's interest in implementing those restrictions. First, courts must "consider the character and magnitude" of the plaintiff's asserted injury to her First Amendment rights.<sup>133</sup> Second, a court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule."<sup>134</sup> The Court in *Anderson* cautioned that, in weighing these two interests, a 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."<sup>135</sup> This balancing test appears to impose a level of judicial review close to intermediate scrutiny.

Applying this test to the Ohio law at issue, which required independent presidential candidates to file a statement of candidacy and nominating petition in March to appear on the November general election ballot, Justice Stevens, writing for the majority, found that Ohio's early filing deadline failed to pass constitutional muster.<sup>136</sup>

Despite its application of a balancing test, *Anderson* represents a temporary return of the Court's protection of ballot access for minor-party candidates. *Anderson* demonstrates that the Court need not employ strict scrutiny in order to strike down laws hostile to the rights of independent candidates and third parties. Subsequent level-of-support cases, however, employ *Anderson* while misunderstanding minor parties' role in political campaigns.

#### 7. *Munro v. Socialist Workers Party*<sup>137</sup>—The Court Finds That Access to Any Statewide Ballot Is Enough

Justice White, writing for a majority of the Court in 1986, upheld a Washington statute that required that minor-party candidates running for partisan offices receive at least 1 percent of

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133. *Anderson*, 460 U.S. at 780.

134. *Id.* at 789.

135. *Id.*

136. First, with respect to the plaintiffs' asserted injury, the Court found that Ohio's early filing deadline "places a particular burden on an identifiable segment of Ohio's independent-minded voters." *Id.* at 792. Second, the Court found that the interests put forward by the state were not sufficient to uphold the restriction. The Court identified three interests—voter education, equal treatment for partisan and independent candidates, and political stability—each of which the Court found to be insufficient. *Id.* at 796.

137. 479 U.S. 189 (1986).



votes cast in the primary election in order for their names to appear on the general election ballot.<sup>138</sup> In *Munro v. Socialist Workers Party*, the Court upheld the requirements as applied to candidates for statewide offices in light of the state's interest in restricting access to the general election ballot.<sup>139</sup>

While the Court's holding may be narrow, its analysis is dangerously deferential to state legislatures. The Court, applying the *Storer* and *Anderson* balancing tests, required very little of the state in the way of proffering an interest sufficient to outweigh the burden this restriction placed on First Amendment rights.<sup>140</sup> The Court noted, "We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access."<sup>141</sup> The Court found that putting the burden of proof on the state would lead to "endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate."<sup>142</sup> Put another way, the state need only claim that its restriction serves to promote the "integrity of the political process" without actually proffering any proof.<sup>143</sup>

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138. *Munro v. Socialist Workers Party*, 479 U.S. 189, 191 (1986).

139. *Id.* at 193.

140. *Id.* at 194 (internal quotation marks omitted) (citing *Anderson*, 460 U.S. at 788 n.9).

141. *Id.* at 194–95.

142. *Id.* at 195.

143. The Court found it sufficient that the record "suggest[ed]" that the statute was related to the "legislature's perception that the general election ballot was becoming cluttered with candidates from minor parties who did not command significant voter support." *Id.* at 196 (emphasis added). The Court cited to evidence that the year before the law was enacted, the largest number of minor parties in Washington's history appeared on the general election ballot. *Id.* In and of itself, this should not have been sufficient to cause the Court to uphold a statute that impinged on the fundamental rights to associate and cast a ballot effectively. With respect to the State's interest, the Court concluded that Washington was "clearly entitled to raise the ante for ballot access, to simplify the general election ballot, and to avoid the possibility of unrestrained factionalism at the general election." *Id.* at 189 (emphasis added). The problem, as Justice Marshall pointed out in his dissent, is that while Washington's law may reduce overcrowding of the general election ballot, it does so at the expense of the primary election ballot. *Id.* at 203 (Marshall, J., dissenting). Justice Marshall, in his dissent, stated that "[t]he statute streamlines the general election, where overcrowding and confusion appear never to have been much of a problem before the [law was passed], at the expense of an already cumbersome primary ballot." The Court, therefore, upheld a law that "exacerbates the very problem it claims to solve." *Id.* at 204. Under this scenario, the law at issue does not even pass a rational basis level of scrutiny. *Id.* Justice Marshall powerfully stated, "The Court evidently deems legitimate the State's decision to befuddle the voters in the only election that now matters to minor-party candidates and their adherents in order to guarantee a negligible increase in ballot clarity at the general election." *Id.*

Though the Court demonstrated great deference to the state's proffered interests, the Court's holding likely hinged on the fact that under Washington's law candidates had access to the primary ballot, and the only question was access to the general election ballot.<sup>144</sup> This is the crux of the problem presented by Proposition 14: under that proposition, candidates who prefer to affiliate with minor parties that are not ballot qualified may be prevented from listing their party preference on any ballot.

In applying the balancing test, the Court failed to articulate a level of scrutiny.<sup>145</sup> Instead, the Court merely stated that the government's interests were sufficient, and the First Amendment rights at issue were not strong enough to overcome those interests. The Court, therefore, simply balanced the two competing interests and found that the state's interest was greater than the minor parties' First Amendment interests.<sup>146</sup>

The Court's balancing of the interests, however, seems improper even under *Anderson*. The Court gave undue credence to the state's interest and short shrift to burdens imposed on the First Amendment rights of minor parties and their candidates. This case, therefore, demonstrates the dangers of the *Anderson* balancing test. The Court should apply strict scrutiny to ballot access restrictions infringing on a minor party candidate's ability to list her party preference on a ballot. There is a great danger of abuse when the legislature, which is dominated by members of the major parties, makes laws that restrict minor-party members' ability to compete in elections.<sup>147</sup>

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144. *Id.* at 199 (majority opinion). The *Munro* Court found that “[i]t can hardly be said that Washington’s voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election.” *Id.* Indeed, “[c]entral to the Court’s holding was an equating of the primary ballot with the general election ballot.” Smith, *supra* note 75, at 191.

145. *Munro*, 479 U.S. at 200 (Marshall, J., dissenting). In his dissent, Justice Marshall stated, “The Court fails to articulate the level of scrutiny it applies in holding that the Washington one percent primary vote requirement is not an unconstitutional ballot access restriction.” *Id.* at 200.

146. The Court wholly failed to address whether the law is properly tailored to serve the state's interest. *Id.* at 203. In his dissent, Justice Marshall stated, “It still remains for the State to demonstrate that the statute is ‘properly drawn,’ employing the ‘least drastic means’ to achieve the State’s ends.” *Id.* The law is narrowly tailored only to protect members of major parties from competition from minor parties on the general election ballot. *Id.* at 205. Justice Marshall stated, “The only purpose this statute seems narrowly tailored to advance is the impermissible one of protecting the major political parties from competition precisely when that competition would be most meaningful.” *Id.* This approach leaves the lower courts with very little direction, but broad discretion.

147. *Id.* at 201 (“The necessity for this approach becomes evident when we consider that major parties, which by definition are ordinarily in control of legislative institutions, may seek to

*C. Filing-Fee Cases—The Court’s Consistent Approach to Economic Barriers to Ballot Access*

The Court’s rulings on laws requiring filing fees in order to obtain ballot qualification shed light on those cases dealing with the issue addressed in this Article—ballot qualification based on participation, registration, or petition signatures. In two seminal filing-fee cases, *Bullock v. Cartner*<sup>148</sup> and *Lubin v. Panish*,<sup>149</sup> both authored by Chief Justice Burger, the Court acknowledged that a candidate’s ability to pay a filing fee has little to do with that candidate’s ability to be elected, whereas level-of-support requirements can demonstrate whether a candidate is a viable contender.<sup>150</sup>

The filing-fee cases help to inform the current inquiry because they (1) elucidate the Court’s expansive view of what a sufficiently important state interest is (both cases focus on the states’ interest in restricting the size of the ballot); and (2) demonstrate the Court’s failure to define or apply a consistent standard of review to ballot access restrictions.

For instance, in 1972 in *Bullock*, the Court found that a Texas filing-fee law must be “closely scrutinized” and that it must be “reasonably necessary” to accomplish a legitimate state interest because the impact on the “exercise of the franchise” was “real and appreciable.”<sup>151</sup> It is not clear what level of scrutiny the Court employed in analyzing this restriction. The Court appeared to employ something short of strict scrutiny, which requires a compelling state interest to which the law at issue must be narrowly tailored.

With respect to the state’s interest, Chief Justice Burger recognized that the state had a “legitimate interest in regulating the

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perpetuate themselves at the expense of developing minor parties. The application of strict scrutiny to ballot access restrictions ensures that measures taken to further a State’s interest in keeping frivolous candidates off the ballot do not incidentally impose an impermissible bar to minor-party access.”).

148. 405 U.S. 134 (1972).

149. 415 U.S. 709 (1974).

150. The Court’s filing-fee case law addresses restrictions that prevent a candidate’s access to the primary election ballot, while, as stated, the Court’s level-of-support case law primarily deals with restrictions that prevent a candidate’s access to the general election ballot. The cases are, however, analogous because in both situations, the Court has reviewed restrictions that would prevent a candidate’s only ability to appear on a statewide ballot.

151. *Bullock*, 405 U.S. at 144.

number of candidates on the ballot.”<sup>152</sup> The Court found that the state properly wished to “prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections.”<sup>153</sup> These are the same interests the Court discussed when addressing ballot access restrictions based on participation, registration, or signatures.

In addition, in 1974 in *Lubin*, the Supreme Court struck down a California filing-fee statute.<sup>154</sup> The Court again discussed the state’s interest in limiting the number of candidates on a ballot for the same reasons laid out in *Bullock*.<sup>155</sup>

Chief Justice Burger, apparently without engaging in any empirical investigation, stated, “That ‘laundry list’ ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion.”<sup>156</sup> Chief Justice Burger further asserted, without support, that “[r]ational results within the framework of our system are not likely to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospects of success.”<sup>157</sup> The Court worried that if the ballot listed too many candidates, the winner would not represent the majority’s will. Without any empirical evidence, the Court’s assertions are conclusory.

Further, the Court once again failed to elucidate a standard of review. The Court appeared to apply an “undue burden” standard, stating that the state’s interest “must be achieved by a means that does not unfairly or unnecessarily burden either a minority party’s or an individual candidate’s equally important interest in the continued availability of political opportunity.”<sup>158</sup>

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152. *Id.* at 145.

153. The Court found that the law failed for lack of tailoring, stating that if the law was designed to “regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal.” *Id.* at 146.

154. *Lubin*, 415 U.S. 709. The Court struck down the law as a violation of equal protection rights, finding that it was not appropriate to determine the seriousness of a candidate based solely on that candidate’s ability to pay a filing fee. *Id.* at 716.

155. *Id.* at 712–13 (citations omitted).

156. *Id.* at 715.

157. *Id.* at 715–16.

158. *Id.* at 716. Justice Rehnquist, writing for a plurality in *Clements v. Fashing*, 457 U.S. 957 (1982), cited to *Lubin* for the principle that “[t]he inquiry is whether the challenged restriction unfairly or unnecessarily burdens the ‘availability of political opportunity.’” *Id.* at 964 (quoting *Lubin*, 415 U.S. at 716)).

### III. WHAT HAVE THE LOWER COURTS SAID ABOUT SIMILAR RESTRICTIONS?

It is no surprise that lower courts, bound to rely on the Supreme Court's thinking, have, with only one exception, failed to properly weigh the benefits and burdens of restrictions on a candidate's ability to designate her preferred party on the ballot.

At first glance, the weight of the lower court case law appears to indicate that it is permissible to prevent a candidate from designating her party preference and that therefore Proposition 14 is likely to be found constitutional. However, when one delves into the specifics of the lower court case law, it is clear that a number of the cases upholding the validity of such prohibitions are distinguishable from the present issue.<sup>159</sup>

#### A. *Do Candidates Have a Right to List Themselves as "Independent"?*

*Socialist Workers Party v. March Fong Eu*<sup>160</sup> was the first case to address the issues of whether candidates have a right to list their party designation on a ballot and whether voters have a right to be informed of candidates' party affiliations.<sup>161</sup> There the Ninth Circuit upheld a California Elections Code provision that provided that candidates of political parties that were qualified to participate in California's primary election would be designated by their party affiliation on the general election ballot, while candidates qualifying for the general election ballot through an independent-petition procedure would merely be identified as "Independent."<sup>162</sup>

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159. While at first blush seeming to provide guidance on the instant issue, a Tenth Circuit decision upholding an Oklahoma statute that provided that only recognized parties could identify their candidate on the ballot with a party label is also not on point. *Rainbow Coal. v. Okla. State Election Bd.*, 844 F.2d 740 (10th Cir. 1988). There, the law provided that

[a] political body desiring to obtain recognized party status must file petitions with the Board bearing the signatures of registered voters equal to at least five percent (5%) of the total votes cast in the last General Election either for Governor or for electors for President and Vice President. The party has one year to circulate the petitions, and must file them no later than May 31 of an even-numbered year.

*Id.* at 741–42 (internal quotation marks omitted). The court applied the *Anderson* balancing test and rested its holding on "the administrative burden on the state that would result from permitting designation of minority party affiliation . . ." *Id.* at 747. This finding rested on the lack of computer technology available in Oklahoma. *Id.* Now, of course, that is no longer the case.

160. 591 F.2d 1252 (9th Cir. 1978).

161. *Id.* at 1260.

162. *Id.* In California, political parties could qualify on a statewide basis only to participate in any primary election if

The court recognized that the law “has possible effects on both associational and voting rights,” “fail[s] to inform voters fully[,] and possibly can contribute to misunderstanding by some voters.”<sup>163</sup> However, the court—assuming for the sake of argument that the law affected fundamental rights and heavily relied on Supreme Court case law—found that the provision did not impose a substantial burden and hence failed to apply strict scrutiny.

The court’s ruling is distinguishable from the issue presented in this Article because the holding rested in large part on the fact that candidates did in fact have a party designation—Independent. The court found that “‘Independent’ has a clear meaning in the context of California ballot qualification procedure.”<sup>164</sup> The court specifically distinguished the California law from one that would prevent the use of a party name, which is the situation this Article addresses.<sup>165</sup> There is, therefore, no indication that the Ninth Circuit would have upheld the restrictions if candidates could not list any designation. Hence *Eu* should not be used to support the validity of California’s current electoral scheme.

Similarly, the 1992 Sixth Circuit decision *Rosen v. Brown*<sup>166</sup> is also not directly on point. However, the court’s rationale in that case can and should be applied by the lower courts and the Supreme Court when they are faced with the issue raised by this Article—whether certain candidates can list their party affiliation on the ballot. In *Rosen*, the court struck down a law that prohibited a nonparty candidate from having the ballot designation “Independent” on the general election ballot if that candidate obtained a position on the ballot as a result of a nominating petition.<sup>167</sup>

Relying on expert testimony, the Sixth Circuit struck down the law, finding that “party identification is the single most important

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(1) any of its candidates in the last gubernatorial election for statewide office receive at least two percent of the vote; (2) 135 days before the primary election, the party possessed registration equal to one percent of the entire vote of the state in the last gubernatorial election; or (3) 135 days before the primary election voters equal to ten percent of the entire vote at the last gubernatorial election sign a petition in support of qualification of the party.

*Id.* at 1254–55.

163. *Id.*

164. *Id.* at 1261.

165. *Id.* at 1262.

166. 970 F.2d 169 (6th Cir. 1992).

167. *Id.*

influence on political opinions and voting.”<sup>168</sup> The court correctly found that “[w]ithout a designation next to an Independent’s name on the ballot, the voter has no clue as to what the candidate stands for.”<sup>169</sup> This finding applies with additional force to a candidate without *any* designation next to her name.

The court applied the *Anderson* balancing test. In evaluating the plaintiffs’ injury, the court cited to a 1983 Eleventh Circuit case, *Dart v. Brown*,<sup>170</sup> discussed below, where the court acknowledged that a candidate’s lack of party affiliation on the ballot could impair a voter’s right to cast a meaningful vote or meaningfully associate, but it also found that no evidence pointed to those conclusions.<sup>171</sup> The *Rosen* court concluded that there was such evidence before it in the form of expert testimony.<sup>172</sup> The court held that “the State infringes upon the right of supporters of Independent candidates to meaningfully vote and meaningfully associate by providing a ‘voting cue’ to Democratic and Republican candidates which makes it virtually impossible for Independent candidates to prevail in the general election.”<sup>173</sup>

With respect to the state’s-interest prong of the *Anderson* analysis, the court found that Ohio’s interests in “minimizing ballot-generated voter confusion and in producing a manageable ballot” were “specious” and represented Ohio’s “deliberate attempt” to ensure the success of the major-party candidates.<sup>174</sup> The court was suspicious of Ohio’s claim that it was helping the voters to make wise decisions by restricting the amount of information voters could receive.<sup>175</sup> It is indeed a strange tactic to argue that voters should obtain less information about candidates on the ballot in order to reduce voter confusion. The court also correctly found that Ohio did

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168. *Id.* at 172. Another expert also explained why the lack of party affiliation can be vitally important for minor-party candidates, stating that “party candidates are afforded a ‘voting cue’ on the ballot in the form of a party label which research indicates is the most significant determinant of voting behavior.” *Id.*

169. *Id.* The court further found that “the state affords a crucial advantage to party candidates by allowing them to use a designation, while denying the Independent the crucial opportunity to communicate a designation of their candidacy.” *Id.*

170. 717 F.2d 1491 (11th Cir. 1983).

171. *Rosen*, 970 F.2d at 176.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 177.

not produce a shorter or more manageable ballot by omitting “voting cues.”<sup>176</sup>

*B. The Court Addresses Restrictions Preventing Candidates from Listing Their Party Affiliations*

*Dart v. Brown*, a 1983 Eleventh Circuit decision, is on point and addresses the same issue this Article raises. However, the court, relying in large part on the Supreme Court’s flawed reasoning, underestimated the burdens such laws place on the voters and overestimated the state’s interest in enacting a portion of the Louisiana Election Code. The code provided that candidates affiliated with unrecognized political parties could only designate themselves as “not affiliated with a recognized political party” or “NP” (for no recognized party).<sup>177</sup> Louisiana, like California, held open-primary elections.<sup>178</sup> In *Dart*, appellants unsuccessfully mounted an equal protection challenge, contending that the distinction Louisiana made between recognized and unrecognized parties was impermissible, and a First Amendment challenge, claiming that the law impermissibly burdened their rights to meaningfully vote and associate.<sup>179</sup>

The court, relying on Supreme Court case law, failed to apply strict scrutiny.<sup>180</sup> The court found a distinction between Supreme Court cases that address restrictions preventing candidates’ names from appearing on the ballot and the issue at bar, laws preventing candidates from listing a party designation.<sup>181</sup> The court held that the two constitutional rights identified in *Anderson*, the right to cast a meaningful vote and the right of voters to associate for the advancement of their political beliefs, were not “invaded in a case of this kind—the voters had a full choice of candidates . . . .”<sup>182</sup>

The court’s conclusion rested on the following findings:

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176. *Id.*

177. *Dart v. Brown*, 717 F.2d 1491, 1492 (11th Cir. 1983). In Louisiana, a political party was recognized if “one of its candidates for presidential elector received at least five percent of the votes cast in this state for presidential electors in the last presidential election, or if at least five percent of the registered voters in the state are registered as being affiliated with the political party.” *Id.* at 1495.

178. *Id.* at 1494.

179. *Id.* at 1498.

180. *Id.* at 1499.

181. *Id.*

182. *Id.*



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Although the words “Libertarian Party” did not appear under [Appellant] Dart’s name, the Libertarian Party was not denied access to the ballot. The ballot’s only significance was in electing candidates. It was a candidate, not a party, ballot . . . . As Dart was granted access to the ballot, so was the Libertarian Party.<sup>183</sup>

The court’s rationale is flawed for a number of reasons. First, the Libertarian Party was denied access to the ballot.<sup>184</sup> Its name appeared nowhere on the ballot, and many, if not most, voters would not know that the appellant, Dart, was affiliated with that party.<sup>185</sup> As the court found in *Rosen*, party affiliation is the most important cue a voter can receive. Dart’s access to the ballot is simply not the same as the Libertarian Party’s access to the ballot.

Second, ballots have significance beyond electing candidates. Ballots and elections give voters the chance to cast a meaningful vote for the candidate and party of their choosing—and allow voters to meaningfully associate with likeminded people—which includes the right to support the party of their choosing.

In sum, though the court’s conclusory assertions were to the contrary, the right to effectively vote and the right to associate for the advancement of political beliefs were both burdened (and not just minimally so) by this restriction. Therefore, the court should have applied strict scrutiny.<sup>186</sup> While the court believed that “[t]here was no denial of the right to have the candidate of one’s choice on the ballot or to vote for such candidate,”<sup>187</sup> this finding flies in the face of common sense and practical experience. Many voters do not encounter the candidates until they see their names in the ballot box.<sup>188</sup> Further, a large percentage of voters make their decisions not based on a candidate’s name but on her party affiliation.<sup>189</sup> The court’s conclusion makes sense only in an idealized world where voters are aware and educated as to each candidate’s party affiliation. Hence, while a party’s candidate may appear on an electoral ballot,

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183. *Id.*

184. *Id.*

185. *Id.* at 1498.

186. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

187. *Dart*, 717 F.2d at 1501.

188. *See Rosen v. Brown*, 970 F.2d 169, 175 (6th Cir. 1992)

189. *See id.* at 172.

this Article argues that without a party designation the party is for all intents and purposes denied access to the ballot.

The court, in fact, seems almost to acknowledge as much. The court found that “perhaps” the restriction “diminishes the [appellant’s] chances of success in any given election.”<sup>190</sup> The court noted that if that were true, “the lack of party designation might arguably be said to impair the ability to cast a meaningful vote, or to meaningfully associate for the enhancement of political beliefs.”<sup>191</sup> The court, however, failed to give credence to that argument, instead finding a lack of “evidence[,] literature or facts of common knowledge” supporting that proposition.<sup>192</sup>

The court’s rationale rested in part on the fact that Louisiana had and continues to have an open-primary system similar to the one created by Proposition 14.<sup>193</sup> The court found that this electoral structure watered down claims that the law stood on constitutionally infirm grounds. An open-primary system means that a candidate’s party affiliation on the ballot does not indicate that the party selected or supports the candidate.<sup>194</sup> The court found that candidates who are unable to designate their party affiliation are therefore not seen as lacking party support or having less party support than other candidates.<sup>195</sup> The court concluded that a ballot in an open-primary system “is a candidate ballot, the only significance of which is the election of individual candidates, not party nominees as such.”<sup>196</sup>

The court’s rationale, however, misses the point. As the Sixth Circuit found, “[m]any voters do not know who the candidates are or who they will vote for until they enter the voting booth. Without a label, voters cannot identify the nonparty candidates or know what they represent.”<sup>197</sup> When candidates are prevented from listing their party affiliation, the burden on voters is real, regardless of whether

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190. *Dart*, 717 F.2d at 1505.

191. *Id.*

192. *Id.* The Sixth Circuit in *Rosen v. Brown* cited to this language in the court’s decision and found that “such evidence does appear in the record before this court in the form of the affidavits from plaintiffs’ three expert witnesses.” *Rosen*, 970 F.2d at 176.

193. *Dart*, 717 F.2d at 1494. However, in Louisiana, a general or runoff election would only occur in the event that one of the top two vote-getters did not get a majority of the votes. *Id.* at 1495.

194. *Id.* at 1505.

195. *Id.*

196. *Id.*

197. *Rosen*, 970 F.2d at 172 (citing expert testimony for the proposition).

the primaries are open or closed. Again, the court appeared to see the errors of its ways by acknowledging that “[p]erhaps over a period of time a ‘minor’ party would benefit from the ‘exposure’ attendant to having its name appear on the ballot, but this is wholly speculative.”<sup>198</sup>

With respect to the state’s interest, the court found that interest to be avoidance of “confusion” or “deception” on the ballot.<sup>199</sup> The court acknowledged that this interest is typically implicated where the question is whether a candidate can appear on the ballot, not whether a candidate can designate her party affiliation.<sup>200</sup> However, the court concluded that the potential for voter confusion and deception exists where there are no restrictions on what constitutes a political party for ballot-designation purposes.<sup>201</sup> Simply put, the court is wrong. Washington State, which also has an open-primary, top-two election system, disagrees. There, candidates can list any party affiliation they choose.<sup>202</sup> Voting cues are important, whether candidates run in open or closed primaries, as this leads to information, not confusion. The fear of confusion and deception seems greater in a system where voters are denied information, as opposed to one in which misuse of information is possible.

In rejecting the appellant’s argument that there is no need for certain candidates to list their party designation on the ballot, the court ironically elucidated the very reasons that it is important for all candidates to be able to list their party affiliation. The court concluded that “the fact that Louisiana’s electoral scheme gives no formal or structural significance to party nomination or endorsement tends to increase, rather than decrease, the need for *some* ballot information concerning party affiliation.”<sup>203</sup> While the court did not extend this logic to all candidates’ ability to list their party affiliation, regardless of the level of support that party obtained, the court’s rationale should certainly apply to such an argument.

A 2001 Sixth Circuit decision also addresses the issue discussed in this Article. Like the Eleventh Circuit’s rationale in *Dart* almost

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198. *Dart*, 717 F.2d at 1505.

199. *Id.* at 1508.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1509.

twenty years earlier, the Sixth Circuit relied on faulty assumptions in Supreme Court cases to uphold the same provision struck down in *Rosen*.<sup>204</sup> In *Schrader v. Blackwell*,<sup>205</sup> an Ohio law prevented a ballot-qualified candidate from listing his party affiliation with the Libertarian Party on the ballot because the party was not ballot qualified.<sup>206</sup> The *Schrader* court noted that while Ohio reenacted the provision struck down in *Rosen*, it complied with the dictates of that case by asking candidates who obtained ballot access through the independent-petition procedure if they wanted to be listed as an Independent.<sup>207</sup> Because Schrader obtained ballot access through the independent-petition procedure, he was placed on the ballot as an independent candidate.<sup>208</sup>

The court employed the *Anderson* balancing test, finding that the restriction was not so severe as to trigger strict scrutiny.<sup>209</sup> With respect to the plaintiff's injury, it was the district court that correctly determined that "the associational interests of Schrader and the Libertarian Party of Ohio to obtain a ballot cue were *even stronger* than those of independent candidates, because Schrader actually represents a specific ideology that he would like to have conveyed through a voting cue on the ballot."<sup>210</sup> The Sixth Circuit, however, relying on *Storer*, found a difference between the roles of independent candidates and political parties such that the law presented a minimal injury to Schrader and the Libertarian Party.

As to the state's interest, the court gave credence to the plaintiff's specious claims that "denying party labels to candidates of unqualified political parties minimizes voter confusion, prevents voter deception, and promotes political stability."<sup>211</sup> The court's conclusion rested on the belief that allowing candidates who obtained ballot access through the independent-petition procedure to designate their chosen party affiliation would deny Ohio the right to regulate the formation of political parties.<sup>212</sup> This analysis ignores the

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204. *Schrader v. Blackwell*, 241 F.3d 783 (6th Cir. 2001).

205. 241 F.3d 783.

206. *Id.* at 784.

207. *Id.* at 785.

208. *Id.* at 786.

209. *Id.* at 788.

210. *Id.* at 789 (emphasis added).

211. *Id.*

212. *Id.* at 790.

state's interest in providing voters with vital information about candidates.

In sum, the court found that *Rosen* was distinguishable, buying the plaintiff's argument that "the state's interests in regulating political-party candidates is inherently greater than its interests in regulating independent candidates."<sup>213</sup> The opposite, however, is true for the reasons articulated by the district court.

Hence, only *Dart* and *Schrader* address the issue this Article presents. Those cases, relying on faulty assumptions dictated by the Supreme Court, failed to acknowledge the burdens such restrictions place on voters' abilities to meaningfully cast a ballot and associate with others for the advancement of their common beliefs. Further, the court illogically gave credence to states' specious claims that denying voters the most important voting cue they can receive serves to prevent voter confusion and deception.

#### IV. THE COURT SHOULD APPLY STRICT SCRUTINY TO CALIFORNIA'S BALLOT ACCESS RESTRICTIONS

The Supreme Court should employ heightened judicial review to ballot access restrictions. Currently the Court applies the *Anderson* balancing test to "reasonable, nondiscriminatory restrictions," while the Court applies strict scrutiny to "severe restrictions."<sup>214</sup> Hence the determination as to whether a restriction is "severe" often dictates whether it will be upheld.

This Article argues that courts should apply strict scrutiny to ballot access restrictions that prevent a candidate from listing her party preference. First, such restrictions address the fundamental rights to meaningfully cast a vote and to associate with others for the furtherance of one's political beliefs. These rights stand at the very core of our democracy. Given the weight of the interests at issue, the Court should require more of the states than merely demonstrating that their interests are "generally sufficient to justify the restrictions."<sup>215</sup>

Second, logic dictates that ballot access restrictions, such as the one addressed in this Article, give rise to equal protection concerns

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213. *Id.* at 787.

214. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

215. *Id.* (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

and are in fact implemented for “discriminatory” reasons.<sup>216</sup> These restrictions, which burden members of minor parties, are passed by members of the legislature who are overwhelmingly members of the major parties.<sup>217</sup> Heightened judicial review is necessary where, as in this case, incumbent legislators may act to insulate themselves from challengers.<sup>218</sup> Simply stated, “[i]ncumbent politicians of the two major political parties generally can agree on at least one thing—the desirability of keeping new parties and independent candidates off the ballot through burdensome access restrictions.”<sup>219</sup> State legislatures, facing little scrutiny by the Supreme Court, have an opportunity to ward off would-be challengers by implementing ballot access restrictions burdening minor parties.<sup>220</sup>

In sum, both because fundamental rights are at play and because the legislature’s motives should be heavily scrutinized, the Court should employ strict scrutiny to ballot access restrictions, which burden minor parties by preventing candidates from listing their party affiliation. When applying strict scrutiny the Court should take a holistic view as to how a restriction operates to burden the rights of candidates and voters instead of parsing through a law, provision by provision.

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216. “States should not be allowed to discriminate against minor parties to favor the two-party system unless they can put forward more evidence of the system’s benefits than the last generation of political scientists has been able to do.” Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 826 (2001).

217. *Id.* at 838–39 (“Courts should scrutinize these requirements carefully because the legislature that passes them is made up almost entirely of Democrats and Republicans, who have a common interest in maintaining high barriers to entry by other parties.”).

218. Evseev, *supra* note 45, at 1279.

219. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 521 (1997). Klarman further stated,

To compound the entrenchment problem, not only do incumbents have something to gain by restricting outsider competition; [but] they [also] may have little to lose. If incumbents of both major political parties share a self-interested commitment to imposing onerous ballot access restrictions, how are dissatisfied voters to express their frustration at the polls? The only candidates on the ballot, by hypothesis, have endorsed the restrictions. The Supreme Court on several occasions has explicitly acknowledged that ballot access restrictions warrant close judicial scrutiny because of the potential they create for incumbent self-dealing.

*Id.* at 522.

220. Evseev, *supra* note 45, at 1284; Winger, *supra* note 48, at 237.

A. *The Governmental Interests at Issue Are Weak*

In applying strict scrutiny, the Court should first look to whether there is a compelling state interest to justify the restriction on fundamental rights. This Article argues that this will rarely be the case.<sup>221</sup> The days of the Court's wholesale acceptance of states' conclusory and self-serving assertions related to their enacted ballot access restrictions should be over. The Court must conduct a much more searching review of states' asserted interests.

Further, regardless of the standard of review employed, as the following demonstrates, California's election laws do not even implicate many of the states' proffered interests—here the question is not whether candidates will appear on the ballot but whether they will be able to list their party affiliation.<sup>222</sup> The Court's rulings generally rest on a few asserted state interests, which in addition to the broad and amorphous assertion of promoting the integrity of the political and electoral processes,<sup>223</sup> include (1) preventing frivolous or fraudulent candidacies,<sup>224</sup> (2) avoiding an overcrowded ballot that could lead to voter confusion,<sup>225</sup> (3) avoiding the cost and burden of runoff elections,<sup>226</sup> (4) avoiding party raiding,<sup>227</sup> and (5) ensuring that the winner of the election was the choice of at least a strong plurality, if not a majority, of the voters.<sup>228</sup>

The first three interests are not implicated by California's ballot access laws. First, as to the prevention of frivolous candidacies, these

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221. See Hasen, *supra* note 216, at 838 (“[T]he government rarely has a legitimate, much less compelling, reason to place onerous burdens on minor parties.”).

222. In addition, the governmental interest is less here, where the primary issue is ballot access in the primary election. Because minor candidates almost never win elections in California, “there is not much of a government interest at stake when it comes to regulating minor parties’ primaries.” *Id.*

223. “Despite the repeated claim that the two-party system promotes political stability, this contention remains unproven.” *Id.* at 823.

224. *Storer v. Brown*, 415 U.S. 724, 733 (1974); *Bullock v. Carter*, 405 U.S. 134, 146 (1972); see *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 189 (1979) (Rehnquist, J., concurring).

225. *Clements v. Fashing*, 457 U.S. 957, 965 (1982); *Storer*, 415 U.S. at 732; *Bullock*, 405 U.S. at 145.

226. *Clements*, 457 U.S. at 965; *Ill. State Bd. of Elections*, 440 U.S. at 185 (majority opinion); *Bullock*, 405 U.S. at 145.

227. *Clingman v. Beaver*, 544 U.S. 581, 593–94 (2005); *Burdick v. Takushi*, 504 U.S. 428, 439–40 (1992); *Storer*, 415 U.S. at 735; *Kusper v. Pontikes*, 414 U.S. 51, 59–61 (1973); *Rosario v. Rockefeller*, 410 U.S. 752, 760–62 (1973); see *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 377 (1997).

228. *Bullock*, 405 U.S. at 145.

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laws will not operate to reduce the number of candidates but will merely determine whether certain candidates can list their preferred party designation.

Second, as to the interest in preventing the overcrowding of the ballot and the ensuing voter confusion that a lengthy ballot could cause, that interest is also not implicated. In fact, candidates' ability to list their preference for their preferred party will actually serve to reduce voter confusion. The party designation will give voters an important cue—the most important cue they can receive—about the candidates on the ballot.

Third, California's ballot access laws will do nothing to prevent runoff elections. Under Proposition 14, there will always be a general election, regardless of whether the top-two vote-getters include one candidate who received 99 percent of the vote and another who received 1 percent of the vote, or two candidates who each received less than 10 percent of the vote.

Fourth, the potential for party raiding will arise because of an open-primary system, not because candidates can designate their preference for a party. Specifically, it is much easier for party raiding to occur when any voter can vote for any candidate, regardless of party affiliation. While a well-organized party-raiding strategy could be made easier if candidates are able to designate their party preference, this attenuated argument hardly appears to rise to the level of a compelling state interest sufficient to infringe on fundamental rights.

Fifth, the one interest that arguably seems to be implicated by California's ballot access law is ensuring that the winner of the election was the choice of at least a strong plurality. The following example is illustrative: Imagine there are four candidates running for state assembly. Candidate 1 prefers the Democratic Party and is polling 30 percent of the vote. Candidate 2 prefers the Democratic Party and is polling 15 percent of the vote. Candidate 3 prefers the Republican Party and is polling 25 percent of the vote. Candidate 1 and Candidate 3 would be the top-two vote-getters and would proceed to the general election. Candidate 4 then enters the race, prefers the Libertarian Party, and is polling 11 percent of the vote. Most of Candidate 4's support comes from Candidate 3, who is now polling 14 percent of the vote. Now Candidate 1 and Candidate 2 are the top-two vote-getters.



Arguably Candidate 4 would not have been able to garner as much support, and hence siphon off as many voters from Candidate 3, if she were not able to designate her party preference. Her ability to do so, therefore, has contributed to the fact that the top-two vote-getters may not be the first choice of the plurality of voters, who would prefer Candidate 3 were Candidate 4 not in the race. However, the fact that voters changed their votes because they received the information necessary to cast a meaningful ballot hardly seems to dictate that candidates should not be allowed to give the voters information about their party designation.

When analyzing the governmental interests that the Court has found to be sufficient in ballot access cases and comparing them to interests that could be served under California's ballot access laws, it becomes clear that California's laws could not survive a heightened level of review and would likely even fail under the *Anderson* balancing test.

*B. The Importance of Candidates' Ability to  
List Their Party Preference*

When employing strict scrutiny, the Court should determine whether the ballot access restrictions are narrowly tailored to serve compelling governmental interests, assuming there are compelling governmental interests at play. In doing so, the Court must determine whether there are less burdensome alternatives to achieve the states' asserted goals, without burdening the rights of candidates wishing to list their party affiliation for a nonqualified political party and the rights of voters wishing to cast their ballot for such candidates. In doing this, the Court must acknowledge the important role that third parties play in elections.<sup>229</sup>

Again, while third-party candidates will be able to appear on the primary ballot in California, those candidates may be unable to designate their party preference. Hence, many minor-party members and voters inclined to vote for minor-party candidates may not know that they have an opportunity to do so.<sup>230</sup> This Article argues that, in

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229. See Hasen, *supra* note 216, at 838 (“[M]inor parties play an important role in our electoral process by enriching the political debate and thereby providing an additional reason for protection.”).

230. Justice Kennedy in *Burdick* noted that “the right to vote for one’s preferred candidate exists regardless of the likelihood that the candidate will be successful.” *Burdick v. Takushi*, 504 U.S. 428, 447 (1992).

certain circumstances, lack of party affiliation may be equivalent to total lack of access.

When the Court considers a party-affiliation prohibition, it should properly weigh the candidate's right to indicate the party of her choosing and the voters' right to cast a meaningful ballot and effectively associate with like-minded people against the asserted state interests. Justice Marshall, in both *Illinois State Board of Elections v. Socialist Workers Party*<sup>231</sup> and *Munro*, explained the importance of third-party members' ability to participate in elections. Justice Marshall pointed to the "significant role that third parties have played in the political development of the Nation."<sup>232</sup> Justice Marshall described elections as "a means of disseminating ideas *as well as* attaining political office."<sup>233</sup>

Justice Marshall explained that minor parties can "broaden political debate, expand the range of issues with which the electorate is concerned, and influence the positions of the majority, in some instances ultimately becoming majority positions."<sup>234</sup> Minor parties give "an outlet for voters to express dissatisfaction with the candidates or platforms of the major parties."<sup>235</sup>

While the Court should employ strict scrutiny, even under a lower level of review such as the *Anderson* balancing test the Court must give due deference to the important role that third parties can play and have played in elections.

#### V. CALIFORNIA SHOULD CHANGE THE ELECTIONS CODE

In addition to employing strict scrutiny, and therefore giving more credence to voters' and minor parties' rights and less deference to states' asserted interests, there is a quick and straightforward fix to many of the problems Proposition 14 creates. The legislature should change the elections code, specifically the qualification threshold. Parties should be able to maintain ballot-qualified status based on the number of votes a party member obtains in the primary rather than the general election.

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231. 440 U.S. 173 (1979).

232. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. at 185.

233. *Id.* at 186 (emphasis added).

234. *Munro v. Socialist Workers Party*, 415 U.S. 189, 200 (1986).

235. *Id.*

Minor parties could actually fare better under this proposal. Under Proposition 14, any voter can vote for any candidate. This means that candidates who have designated a preference for a minor party on the ballot can appeal to all primary voters, not just those voters who are registered members of that minor party.

Further, California should change its elections code to allow for the counting of write-in votes in the general election. This will reduce the restrictive nature of California's ballot access laws and allow some voters to support the candidates of their choosing in both elections. Even assuming write-in candidates will not succeed, "it can never be right to deny citizens the ultimate right to cast ballots for the candidates of their choice."<sup>236</sup>

#### CONCLUSION

With the passage and enactment of Proposition 14, the Supreme Court may have another opportunity to evaluate its deeply flawed approach to ballot access restrictions. Prior Supreme Court case law has demonstrated undue deference to the states' asserted interests in passing such laws and little regard for the important role that minor parties can play in campaigns. The Court should employ strict scrutiny to ballot access restrictions that target minor parties and properly scrutinize the states' proffered interests in passing these restrictions.

In California, few of the governmental interests the Court has found to be sufficient are even implicated by the passage of Proposition 14 and related provisions of the California Elections Code. Hence, the Court should strike down California's ballot access laws as unconstitutional infringements on minor-party members' and voters' rights. In addition, or in the alternative, California should change its elections code to allow parties to remain ballot qualified based on votes obtained in the primary election and should allow for write-in votes.

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236. Raskin, *supra* note 45, at 572.