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Burdick v. Takushi: The Anderson Balancing Test to Sustain Prohibitions on Write-in Voting

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Note

Burdick v. Takushi: The *Anderson* Balancing Test to Sustain Prohibitions on Write-In Voting

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[1]

I. Introduction

The right to vote is unquestionably a fundamental right.[2] However, the right to vote for the candidate of one's choice by executing a write-in vote may not be similarly protected.[3] In *Burdick v. Takushi*,[4] the United States Supreme Court held that a ban on write-in voting would be presumptively valid when ballot access laws[5] were constitutional, such that only reasonable burdens were placed on the right to vote.[6] In that context, any burden placed on the voter's rights would be reasonable and would be justified by the same interests that justified the ballot access laws.[7]

In 1986, only one candidate from the petitioner's district ran in the Hawaii State House of Representatives's primary election.[8] The petitioner, Burdick, did not want to vote for the one unopposed candidate; rather, he sought to cast a write-in

1. Reynolds v. Sims, 377 U.S. 533, 555 (1964).
2. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).
3. Burdick v. Takushi, 112 S. Ct. 2059, 2063 (1992).
4. 112 S. Ct. 2059 (1992).
5. *See infra* notes 295-305 and accompanying text.
6. *Burdick*, 112 S. Ct. at 2067.
7. *Id.*
8. *Id.* at 2061.

vote.[9] Burdick was advised that Hawaii's election laws did not allow write-in voting[10] and filed suit in the Federal District Court for the District of Hawaii challenging the election laws.[11] The issue presented in *Burdick* was whether Hawaii's prohibition on write-in voting infringed on a citizen's constitutionally protected right to vote.[12] Central to this decision was the application of the analytical framework and the manner in which the law would be evaluated.

Part II of this Casenote traces the history of voting in general, as well as the evolution of write-in voting. Additionally, Part II examines the ballot access cases that preceded *Burdick*, with special attention to the analysis used in *Anderson v. Celebrezze*.[13] The development and refinement of the *Anderson* balancing test is traced through other ballot access cases to its culmination in *Burdick v. Takushi*, the most recent ballot access case in which the Supreme Court applied this test. Part III discusses the procedural history, and the majority and dissenting opinions of *Burdick*. Part IV analyzes the decision in *Burdick* and the analytical framework used by the Court to reach its conclusion. Part V considers whether the statutory election scheme of New York, which currently allows write-in voting, could survive a constitutional challenge under *Burdick* if write-in voting were prohibited. Part VI concludes that write-in voting is not a constitutionally protected right and asserts that future challenges to ballot access will be evaluated in the context of the entire election laws of that state.

II. Background

A. *General History of the Right to Vote*

The United States Constitution gives states the power to regulate procedures for elections.[14] This allocation of power was intentional as the framers of the Constitution believed that each state should retain its own requirements for determining

9. *Id.*
10. *Id.*; *see also infra* notes 306-09 and accompanying text.
11. *Burdick*, 112 S. Ct. at 2061.
12. *Id.*
13. 460 U.S. 780 (1983).
14. U.S. CONST. art. I, § 2.

the qualifications of voters.[15] During the nation's early years, only white males who also met other criteria such as owning property, paying taxes, and attaining a minimum age were eligible to vote at the state level.[16] Since that time, Congress has acted to reduce the restrictions on the right to vote.

For example, the right to vote was extended to black men in 1870,[17] and further extended to women in 1920.[18] In 1964, the Twenty-fourth Amendment was added to the Constitution to prohibit the payment of a poll tax as a qualification to vote.[19] The Voting Rights Act of 1965[20] further protected the right to vote by defining national standards[21] for the electoral process and preventing the manipulation of election laws to disenfranchise voters in areas with low electoral participation.[22] The Twenty-sixth Amendment, ratified in 1971, was the most recent amendment to the Constitution concerning voting rights. This amendment provided that individuals over eighteen years of age could not be denied the right to vote because of their age.[23]

In addition to congressional actions, the decisions of the United States Supreme Court have reinforced the fundamental nature of the right to vote[24] and to participate in the electoral

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15. MARCHETTE CHUTE, THE FIRST LIBERTY: A HISTORY OF THE RIGHT TO VOTE IN AMERICA, 1619-1850, at 252-57 (1969). Prior to drafting the Constitution, each colony had ratified its own constitution. *Id.* at 185-236. Some of the colonies' constitutions included eligibility requirements for voting, while others relied on existing laws governing the qualifications of voters. *Id.*; *see also* Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (stating that the framers of the Constitution intended the states to keep the power to regulate elections).

16. BURT NEUBORNE & ARTHUR EISENBERG, THE RIGHTS OF CANDIDATES AND VOTERS 19-20 (1980); *see also* CHUTE, *supra* note 15, at 252-57.

17. U.S. CONST. amend. XV, § 1.

18. U.S. CONST. amend. XIX.

19. U.S. CONST. amend. XXIV, § 1; *see also* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that the requirement of paying a tax as a qualification to vote was unconstitutional).

20. Pub. L. No. 89-110, 79 Stat. 445 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

21. NEUBORNE & EISENBERG, *supra* note 16, at 89. National standards included the availability of absentee balloting for presidential elections and bilingual ballots for linguistic minorities. *Id*; *see also* 42 U.S.C. §§ 1973aa-1(c), 1973b(f)(4) (1988).

22. 42 U.S.C. § 1973b(f)(2) (1988); *see also* NEUBORNE & EISENBERG, *supra* note 16, at 89-102. *See generally* U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT (1965).

23. U.S. CONST. amend. XXVI, § 1.

24. *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

process.[25] The right to vote is express in the Constitution and its amendments, while the right to participate is protected by the freedom of association.[26] Although freedom of association was not explicit in the Bill of Rights,[27] the Supreme Court has clearly stated that "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."[28] These guaranteed freedoms provide the basis for the right to participate in elections by casting a vote.[29]

B. *Evolution of Write-In Voting*

The procedure for write-in voting dates back to the founding of this country.[30] Until the late 1800s, elections were conducted using hand-written ballots.[31] Voters prepared their own ballots or used color-coded, pre-printed ballots prepared by political parties.[32] This essentially unregulated election process led to widespread fraud and abuse during campaigns and elections.[33] Efforts by states to enhance the integrity of elections led to the introduction of the secret ballot, known as the Austra-

25. Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

26. *Id.* (stating that a voter has a "constitutionally protected right to participate in elections . . . ."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-1, at 1062 (2d ed. 1988).

27. NAACP v. Alabama, 357 U.S. 449, 460 (1958) (stating that freedom to engage in association for the advancement of beliefs derives from the First Amendment freedoms of speech and assembly, and is protected by the Due Process Clause of the Fourteenth Amendment); TRIBE, *supra* note 26, § 12-26, at 1010 (explaining that the Supreme Court has stated that the freedom of association derives from the First Amendment freedoms of speech, press, petition, and assembly).

28. Kusper v. Pontikes, 414 U.S. 51, 57 (1973) (citing Williams v. Rhodes, 393 U.S. 23, 30 (1968)); Williams v. Rhodes, 393 U.S. 23, 30 (1968) ("[T]he right of individuals to associate for the advancement of political beliefs . . . [is] protected against federal encroachment . . . .") (footnote omitted); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.31(a), at 818-19 (4th ed. 1991) (stating that the First Amendment freedom of association protects the right to participate in the electoral process).

29. Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (stating that each voter has a "constitutionally protected right to participate in elections . . . ."); *see also* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (stating that the Constitution guarantees the right to vote and to have that vote counted).

30. *See generally* CHUTE, *supra* note 15.

31. L. E. FREDMAN, THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM 20-22 (1968).

32. *Id.*

33. *Id.* at 22-24. Abuses included ballot box stuffing, bribery and intimidation. *Id.*

lian ballot system.[34] Under this system, states prepared a pre-printed ballot from which voters selected candidates and then confidentially deposited their ballots into a ballot box.[35] The disadvantage of this new system was that it restricted voters' choices to only those candidates whose names appeared on the pre-printed ballot.[36] To remedy this restriction, several state courts validated the right to cast a write-in vote.[37]

Currently, the election laws of thirty-five states, and the District of Columbia, permit write-in voting in all elections.[38] Six states permit write-in voting at general elections only,[39] four states permit it in specific circumstances,[40] and five states,

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34. *See id.* at 30-31. In 1888, Massachusetts was the first state to adopt a law requiring the use of the Australian ballot system. *Id.* at 39. By 1892, 38 states had adopted the Australian ballot system for use in their elections. *Id.* at 83; *see also* JOHN H. WIGMORE, THE AUSTRALIAN BALLOT SYSTEM 23-38, 50-57 (1889).

35. *See* FREDMAN, *supra* note 31, at 46-52, 83; *see, e.g.*, WIGMORE, *supra* note 34, at 58-89 (discussing the Massachusetts act to implement the Australian ballot system).

36. *See* FREDMAN, *supra* note 31, at 46.

37. *See* Patterson v. Hanley, 68 P. 821 (Cal. 1902); Sanner v. Patton, 40 N.E. 290 (Ill. 1895); Bowers v. Smith, 17 S.W. 761 (Mo. 1891); People v. Shaw, 133 N.Y. 493, 31 N.E. 512 (1892); Oughton v. Black, 61 A. 346 (Pa. 1905).

38. ALA. CODE § 17-8-5 (1987); ALASKA STAT. § 15.15.030(5) (Supp. 1993); ARIZ. REV. STAT. ANN. § 16-448 (1984); CAL. ELEC. CODE §§ 7300-7304 (West Supp. 1993); COLO. REV. STAT. § 1-4-1101 (Supp. 1992); CONN. GEN. STAT. ANN. § 9-373a (West 1989); DEL. CODE ANN. tit. 15, § 4502 (1981); D.C. CODE ANN. § 1-1312(r) (1992); FLA. STAT. ANN. § 99.061(3) (West Supp. 1993); GA. CODE ANN. § 21-2-358 (Michie 1993); IDAHO CODE § 34-702A (Supp. 1993); ILL. COMP. STAT. ANN. ch. 10, § 5/18-9.1 (Michie/Bobbs-Merrill 1993); IND. CODE ANN. § 3-11-11-7 (Burns 1993); IOWA CODE ANN. § 49.31(4) (West 1991); KAN. STAT. ANN. § 25-612 (1986); KY. REV. STAT. ANN. § 117.265 (Michie 1993); ME. REV. STAT. ANN. tit. 21-A, §§ 601-602 (West 1993); MASS. GEN. L. ch. 54, § 33E (1991); MICH. COMP. LAWS ANN. § 168.737(d) (West 1989); MO. ANN. STAT. § 115.439 (Vernon 1980) and § 115.453 (Vernon Supp. 1993); MONT. CODE ANN. § 13-12-208 (1993); N.H. REV. STAT. ANN. §§ 656:12, :23 (1986); N.J. STAT. ANN. § 19:15-28 (West 1989); N.Y. ELEC. LAW § 7-104 (McKinney Supp. 1993); N.D. CENT. CODE § 16.1-13-25 (1991); OHIO REV. CODE ANN. § 3513.041 (Anderson 1988); OR. REV. STAT. § 254.500 (1991); PA. STAT. ANN. tit. 25, § 3063 (Supp. 1992); S.C. CODE ANN. § 7-13-1380 (Law. Co-op. 1976); TENN. CODE ANN. § 2-7-117 (Supp. 1992); UTAH CODE ANN. § 20-7-20 (Supp. 1992); VT. STAT. ANN. tit. 17, §§ 2362, 2471 (1982); WASH. REV. CODE ANN. § 29.51.170 (West Supp. 1993); W. VA. CODE §§ 3-5-13, -6-2 (Supp. 1992); WIS. STAT. ANN § 7.50 (West 1986 & Supp. 1992); WYO. STAT. §§ 22-6-119 - 22-6-120 (1992).

39. ARK. CODE ANN. § 7-5-205 (Michie 1991); MD. ANN. CODE art. 33, § 4D-1 (1990); MINN. STAT. ANN. § 204B.36 (West 1992); N.C. GEN. STAT. § 163-151 (1991); TEX. ELEC. CODE ANN. § 146.001 (West 1986) and § 146.025 (West Supp. 1993); VA. CODE ANN. § 24.2-644 (Michie 1993).

40. MISS. CODE ANN. § 23-15-365 (1990) (write-in voting is permitted in the event that a candidate dies, resigns, withdraws or is removed from the ballot);

including Hawaii, prohibit all write-in voting.[41] The predecessor of the current Hawaii election law was enacted as a reform measure to redress the abuses resulting from previously unregulated elections.[42]

C. *Equal Protection Challenges to States' Regulations of Elections*

The United States Constitution grants states the power to govern their own elections.[43] As a practical matter, elections must be regulated to ensure that they are conducted fairly and honestly.[44] In our political process, a citizen has the opportunity to be a candidate, and to have his name printed on an election ballot, however, his ballot access may be subject to reasonable requirements.[45] This state regulation of ballot access and elections, however, cannot violate the Equal Protection Clause of the Fourteenth Amendment.[46]

Early challenges to the ballot access provisions of states' election laws were brought by candidates and/or parties as in-

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NEB. REV. STAT. § 32-428 (1988) (write-in voting is permitted at primary elections except for the offices of delegate to county convention, delegate to national convention, and director of public power district and at general elections for the offices of President, Vice President, director of public power district, director of reclamation district, member of board of education service unit, and director of natural resources district); N.M. STAT. ANN. § 1-12-19.1 (Michie 1991) (write-in voting permitted at general elections) and N.M. STAT. ANN. § 1-8-36.1 (Michie 1991) (write-in voting permitted at primary elections for "any office voted upon by all voters of the state"); Serpas v. Trebucq, 1 So. 2d 346 (La. Ct. App. 1941) (write-in candidates must file a statement prior to the general election that they consent to be voted for, however, a candidate who participated in a primary election is ineligible to become a write-in candidate at the general election).

41. NEV. REV. STAT. § 293.270 (1991); OKLA. STAT. ANN. tit. 26, § 7-127 (West 1991 & Supp. 1993); R.I. GEN. LAWS § 17-19-31 (Supp. 1993); Chamberlin v. Wood, 88 N.W. 109, 109-10 (S.D. 1901) (write-in votes are not permitted since the Australian ballot law requires that all candidates be printed on the official ballot); *see infra* notes 306-09 and accompanying text.

42. Respondents' Brief at 9 n.8, Burdick v. Takushi, 112 S. Ct. 2059 (1992) (No. 91-535) (citing L. E. FREDMAN, THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM (1968)).

43. *See supra* notes 14-15 and accompanying text.

44. Storer v. Brown, 415 U.S. 724, 730 (1974).

45. Williams v. Rhodes, 393 U.S. 23, 32 (1968); *see also Storer*, 415 U.S. at 728 (stating that a state must provide feasible means for candidate to access the ballot); Lubin v. Panish, 415 U.S. 709, 717 (1974) (finding that a state cannot limit access based on economic factors).

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

fringements of the Fourteenth Amendment's Equal Protection Clause.[47] The challengers claimed that the laws restricted their First Amendment freedom of association.[48] In deciding these cases, the Supreme Court recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."[49] This was because restrictions on ballot access resulted in two types of constitutional infringements: "the right of individuals to associate for the advancement of political beliefs, and the right of . . . voters . . . to cast their vote effectively."[50] The rights of candidates and voters were further intertwined since "voters can assert their preferences only through candidates or parties . . . ."[51] Because of the close relationship between these rights, the Court has frequently considered the infringement of a supporter's right to vote in situations restricting a candidate's access to the ballot.[52]

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47. Clements v. Fashing, 457 U.S. 957, 959 (1982); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 178 (1979); American Party v. White, 415 U.S. 767, 780 (1974); *Storer*, 415 U.S. at 727; *Lubin*, 415 U.S. at 710; Bullock v. Carter, 405 U.S. 134, 141 (1972); Jenness v. Fortson, 403 U.S. 431, 434 (1971); *Williams*, 393 U.S. at 26.

48. *Clements*, 457 U.S. at 971; *Illinois State Bd. of Elections*, 440 U.S. at 180; *American Party*, 415 U.S. at 780; *Storer*, 415 U.S. at 727; *Lubin*, 415 U.S. at 710; *Jenness*, 403 U.S. at 434; *see also* NAACP v. Alabama, 357 U.S. 449, 460 (1958) (stating that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment . . . .").

49. *Bullock*, 405 U.S. at 143.

50. Williams v. Rhodes, 393 U.S. 23, 30 (1968). The Supreme Court has found that election laws that inhibited a candidate's ability to access the ballot had a correspondingly restrictive effect on a voter's freedom to associate due to the voter's inability to vote for the restricted candidate. *See Bullock*, 405 U.S. at 143 (finding that the barriers to candidate access limited the choice of voters); *see also* Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986); Anderson v. Celebrezze, 460 U.S. 780, 787-88 (1983); *Illinois State Bd. of Elections*, 440 U.S. at 184; *Lubin*, 415 U.S. at 716.

51. *Illinois State Bd. of Elections*, 440 U.S. at 184 (quoting Lubin v. Panish, 415 U.S. 709, 716 (1974)).

52. *Id.* (quoting *Lubin*, 415 U.S. at 716); *Lubin*, 415 U.S. at 716 (finding that the right to vote was "heavily burdened" when a vote could only be cast for one of two candidates when others sought ballot position); *Bullock*, 405 U.S. at 144 (finding that the ballot access restriction posed a "real and appreciable impact" on voting because voters were substantially limited in their choice of candidates); *Williams*, 393 U.S. at 30-31 (finding a heavy burden on the right of voters to cast their vote effectively).

In deciding the first ballot access cases, the Court formulated an analytical framework that survived for fifteen years.[53] To determine whether an election law violated the Equal Protection Clause, the Court applied strict scrutiny[54] with its attendant assessment of the availability of less drastic means to achieve the states' interests[55] and considered three factors: the circumstances behind the law, the interests that the state claimed to be protecting, and the interests of those who were disadvantaged by the denial of ballot access.[56]

Several interests were frequently advanced by states to justify their restrictions on ballot access. These interests included: protecting the integrity of the political process;[57] limiting the number of candidates on the ballot to prevent voter confusion and to ensure that the winner was the majority's choice;[58]

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53. Williams v. Rhodes, 393 U.S. 23 (1968), was the first case challenging a ballot access law that reached the United States Supreme Court. Kim A. Craddock, Comment, *Write-In Voting: Whose Vote Is It Anyway?*, 22 CUMB. L. REV. 311, 314-15 (1992).

54. *Illinois State Bd. of Elections*, 440 U.S. at 184 (requiring that the state "establish that its classification is necessary to serve a compelling [state] interest"); Storer v. Brown, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting) (strictly scrutinizing ballot access laws to determine if they were "necessary to further compelling state interests"); *Bullock*, 405 U.S. at 147 (requiring that the ballot access scheme be a "necessary or reasonable . . . [means] for regulating the ballot"); *Williams*, 393 U.S. at 31 (citing NAACP v. Button, 371 U.S. 415, 438 (1963) (stating that "only a compelling state interest . . . can justify limiting First Amendment freedoms")).

55. *See Illinois State Bd. of Elections*, 440 U.S. at 185; American Party v. White, 415 U.S. 767, 781 (1974); *Lubin*, 415 U.S. at 718; *Bullock*, 405 U.S. at 146; *Williams*, 393 U.S. at 31-33.

56. *Williams*, 393 U.S. at 30.

57. *American Party*, 415 U.S. at 786 (asserting the interest of protecting the "integrity of the nominating process"); *Storer*, 415 U.S. at 733 (asserting the state policy of "maintaining the integrity of the various routes to the ballot"); *Lubin*, 415 U.S. at 718 (finding that "maintaining the integrity of elections" is an important and legitimate interest); *Williams*, 393 U.S. at 31-32 (state asserted the interest of promoting the "two-party system in order to encourage compromise and political stability").

58. *Illinois State Bd. of Elections*, 440 U.S. at 184-85 (explaining the state's "legitimate interest in regulating the number of candidates on the ballot" and assuring the winner "'is the choice of a majority, . . . of those voting . . . .'" (quoting *Bullock*, 405 U.S. at 145)); *American Party*, 415 U.S. at 781 (acknowledging "that the State may limit each political party to one candidate for each office"); *Lubin*, 415 U.S. at 715 (asserting the state interest in keeping the ballot "within manageable, understandable limits"); *Bullock*, 405 U.S. at 145 (asserting the state's interest to "avoid voter confusion, and assure that the winner is the choice of a

preventing fraudulent or frivolous candidacies;[59] and, requiring a preliminary showing of community support for the candidate.[60]

1. *Challenged Ballot Access Laws That Were Upheld*

In order to limit access in a manner consistent with the state's interests, some states enacted election laws that specified the number of voters' signatures required on a candidate's nominating petition. These laws were upheld,[61] even when restrictions were placed on the eligibility of the signers.[62] In *Jenness v. Fortson*,[63] the Court upheld a Georgia law that specified the number of signatures required on a nonparty candidate's nominating petition.[64] The law required that the petition be signed by a number of voters that was equal to at least five percent of the total number of voters who were eligible to vote in the last election for the office that the candidate was seeking.[65] In defense of the law, the Court recognized the state's interest in requiring some preliminary showing of a "significant modi-

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majority"); *Williams*, 393 U.S. at 33 (justifying ballot restrictions because "a large number of parties might qualify for the ballot" resulting in voter confusion).

59. *Lubin*, 415 U.S. at 714 (defending the state's interest as "necessary to keep the ballot from being overwhelmed with frivolous or . . . nonserious candidates"); *Bullock*, 405 U.S. at 145 (recognizing the state's interest in protecting the "political process from frivolous or fraudulent candidacies").

60. *Illinois State Bd. of Elections*, 440 U.S. at 185 (declaring that a state can "require a preliminary showing of a 'significant modicum of support'" before printing a name on a ballot (quoting Jenness v. Forston, 403 U.S. 431, 442 (1971)); *American Party*, 415 U.S. at 782 (asserting the state interest that political parties "demonstrate a significant, measurable quantum of community support" before appearing on the general election ballot); Jenness v. Fortson, 403 U.S. 431, 442 (1971) (noting an important state interest in "requiring some preliminary showing of a significant modicum of support" before printing the candidate's name on the ballot in an effort to avoid voter confusion). Although the state interest of requiring preliminary support may have originally been asserted to achieve another interest, it has evolved into an independently asserted interest to justify ballot access restrictions. *See* Munro v. Socialist Workers Party, 479 U.S. 189, 194 (1986).

61. Jenness v. Fortson, 403 U.S. 431 (1971); American Party v. White, 415 U.S. 767 (1974).

62. *American Party*, 415 U.S. at 780-81 (upholding restrictions that included signers not participating in another party's convention, and notarizing each signature).

63. 403 U.S. 431 (1971).

64. *Id.* at 442.

65. *Id.* at 433.

cum of support" before printing a candidate's name on the ballot.[66] The Court found no abridgement of the candidate's right to associate since the challenged law was no more burdensome than two other available methods of ballot access.[67] The Court held that the law did not impose restrictions on the ability of voters to sign a candidate's nominating petition, and that this adequately balanced the five percent signature requirement.[68] Overall, the Court noted that the statutory scheme for ballot access did not "freeze the political status quo."[69]

In a similar case, *American Party v. White*,[70] the Court upheld a Texas law that established qualifications for the signers of nominating petitions.[71] The law stipulated that a voter was ineligible to sign a candidate's nominating petition if that person had voted in another party's primary election.[72] In evaluating the law, the Court considered the state's interests in limiting the number of candidates on the ballot,[73] requiring a preliminary showing of community support,[74] and preserving the integrity of the election.[75] The Court applied a strict level of review[76] and found that the candidate's freedom to associate was not unduly burdened.[77] The Court further found that the signature requirements were necessary to achieve the state's vital objectives[78] and concluded that the state's interests could

66. *Id.* at 442. The Court found that this was an important state interest. *Id.*

67. *Id.* at 440-41. A candidate seeking a position on the ballot could compete in the primary of a political party or file a nominating petition as an independent candidate. *Id.* at 440.

68. *Id.* at 442.

69. *Id.* at 438 (noting that ballot access was not restricted to established parties).

70. 415 U.S. 767 (1974).

71. *Id.* at 786-87.

72. *Id.* at 774 n.6. The Texas law required that minor party candidates, if the party had not received two percent of the votes cast in the prior gubernatorial election, file nominating petitions signed by the equivalent of one percent of the votes cast in the prior gubernatorial election. *Id.* In addition, each signature on the petition must be notarized. *Id.* at 787.

73. *Id.* at 781-82.

74. *Id.* at 782-85.

75. *Id.* at 786.

76. *Id.* at 780.

77. *Id.*

78. *Id.* at 780-81.

not be equally well served by less burdensome means.[79] Therefore, the petition requirements, as well as the ballot access provisions in general, were found to be valid.[80]

Other types of restrictions on candidates' access to the ballot have also been upheld by the Supreme Court. In *Storer v. Brown*,[81] a California law required that an independent candidate not have a registered affiliation with a qualified political party for one year prior to the primary election in which he sought candidacy.[82] The Court acknowledged the totality approach[83] taken in other cases evaluating the constitutionality of statutory schemes, but found it inapplicable where the single disaffiliation requirement presented a total bar to an independent candidate.[84] Applying a strict standard of review,[85] the Court found that the state's interest in maintaining the integrity of the electoral process[86] was compelling.[87] This state interest outweighed the interests of a candidate, and his supporters, to make a late, rather than early, decision for independent ballot status.[88] Justice Brennan dissented because potential independent candidates were completely barred from participating in the electoral process if they decided to enter the race less than twelve months before the primary election.[89] This could effectively prevent someone registered with a qualified political party from entering a race as an independent can-

79. *Id.* at 781. In addition, the Court determined that the election laws offered minor party candidates a real and essentially equal opportunity to access the ballot. *Id.* at 787-88.

80. *Id.* at 780-81.

81. 415 U.S. 724 (1974).

82. *Id.* at 726.

83. *Id.* at 737. A "totality" approach is applicable when "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Id.*

84. Here, the singular disaffiliation requirement is a total bar to candidacy. *Id.*; *see* Williams v. Rhodes, 393 U.S. 23, 34 (1968) (stating that the burden imposed on voting rights was the result of the totality of the ballot access scheme, rather than a single requirement).

85. 415 U.S. at 736.

86. *Id.* at 733.

87. *Id.* at 736.

88. *Id.* The Supreme Court recognized that there must be a substantial regulation of elections to keep them fair and honest, *id.* at 730, and that an important function of the primary election process was to "winnow out" all but the chosen candidates. *Id.* at 735.

89. *Id.* at 757-58 (Brennan, J., dissenting).

didate.[90] He concluded that the disaffiliation requirement burdened the rights of potential supporters to associate for political purposes and to vote for the affected candidate.[91]

In *Clements v. Fashing*,[92] a similar law affecting candidates which included resign-to-run and automatic resignation requirements was also upheld.[93] The state asserted interests in maintaining the integrity of the officeholder's present office and avoiding the abuse or neglect of that office.[94] The Court departed from the pattern of strict scrutiny review and required only a "rational predicate" to sustain the law.[95] It found that the *de minimis* burden on potential candidates was justified by the state's interests.[96] Justice Brennan stated in dissent that the election laws infringed on the First Amendment rights of candidates and voters, and that too little consideration was given to the strict standard of review used in prior cases.[97]

2. *Challenged Ballot Access Laws That Were Invalidated*

The United States Supreme Court has struck down state election laws that burdened First Amendment rights and were not justified by the interests advanced by the state. For example, statutes that required a filing fee for nominating petitions, as the sole indication of a candidate's seriousness, were invalidated where no alternate means of gaining access to the ballot existed. In *Lubin v. Panish*[98] a California election law required a $700 filing fee,[99] and in *Bullock v. Carter*[100] a Texas law re-

90. *Id.* at 757.

91. *Id.* at 758. Justice Brennan, joined by Justices Douglas and Marshall, recognized that the state's interests were compelling, but he found that less drastic means were available to achieve the state's interests. *Id.* at 760-62.

92. 457 U.S. 957 (1982) (plurality opinion).

93. *Id.* at 960-61. This Texas law required that certain officeholders complete their current term of office before they could be eligible to run for the state legislature. *Id.*

94. *Id.* at 968.

95. *Id.*

96. *Id.* at 966-68.

97. *Id.* at 977 n.2 (Brennan, J., dissenting). Justice Brennan found no genuine justification for the classification and no meaningful relationship to the asserted state interests. *Id.* at 977-78.

98. 415 U.S. 709 (1974).

99. *Id.* at 710. This filing fee was required for candidates seeking the office of county supervisor. *Id.*

100. 405 U.S. 134 (1972).

quired a $1424 filing fee.[101] In these cases, the Court found that voters' rights were infringed because the filing fee requirement limited their choice of candidates.[102] In each case, the Court used a strict standard of review,[103] and held that the filing fee was not necessary to meet the states' objectives of maintaining the integrity of the electoral process and regulating the number of candidates on the ballot.[104]

Although some signature requirements for nominating petitions have been upheld,[105] the Court has invalidated signature requirements that were excessive or that varied based on the office sought. In *Williams v. Rhodes*,[106] an Ohio law's signature requirement,[107] along with other restrictions on ballot access, made it virtually impossible for new party candidates to access the ballot.[108] The Court found that these laws imposed severe restrictions on the voters' rights to "cast their votes effectively" and to associate for political purposes.[109] The Court evaluated the ballot access laws in their totality[110] and considered the state's asserted interests in encouraging political stability, ensuring that the winner was the majority's choice, and avoiding voter confusion.[111] The Court held that these interests were not

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101. *Id.* at 135-36. This fee was required for candidates seeking the office of county commissioner. *Id.* Nominating petition filing fees for other offices ranged up to $8900. *Id.* at 138 n.11.

102. *Lubin*, 415 U.S. at 715-16. The Court also focused on the impact of the requirement on voters' rights. *Id.*; *Bullock*, 405 U.S. at 144, 147. The Court considered the real and appreciable impact on voters. *Bullock*, 405 U.S. at 144. In both cases, the Court found that the right to vote was heavily burdened if a vote was substantially limited by the choice of candidates. *Lubin*, 415 U.S. at 716; *Bullock*, 405 U.S. at 144.

103. *Lubin*, 415 U.S. at 716; *Bullock*, 405 U.S. at 144.

104. *Lubin*, 415 U.S. at 717-18; *Bullock*, 405 U.S. at 147. The Court found there were alternative, less drastic means to test the seriousness of a candidate without requiring a filing fee. *Lubin*, 415 U.S. at 718. These alternatives included filing a nominating petition that demonstrated community support. *Id.* at 718-19.

105. *See supra* notes 63-69 and accompanying text.

106. 393 U.S. 23 (1968).

107. *Id.* at 24-25. The law required that the candidate of a new political party obtain signatures equalling 15% of the votes cast in the prior gubernatorial election. *Id.*

108. *Id.* at 25.

109. *Id.* at 30-32. The right to vote was heavily burdened when that vote could only be cast for one of two candidates when other parties were seeking a position on the ballot. *Id.* at 31.

110. *Id.* at 34; *see supra* note 83 for an explanation of the totality approach.

111. *Williams*, 393 U.S. at 31-34.

compelling enough to justify the substantial burden placed on the right to vote and the right to associate.[112]

In *Illinois State Board of Elections v. Socialist Workers Party*,[113] an election law required a different number of signatures on the nominating petition depending on the office sought.[114] Since voters express their political preferences by selecting candidates, the Court found that the signature requirement burdened voters' rights to associate for the advancement of political beliefs.[115] Using a strict standard of review,[116] the Court held that there were less drastic means to accomplish the state's goals of limiting the number of candidates on the ballot and assuring that the winner was the majority's choice.[117] The Court also found that there were no reasons to justify the disparate treatment between local and statewide offices.[118]

Although the Court had always examined the interests of those who were directly disadvantaged by the ballot access law, that is, candidates, only half of these ballot access cases considered the impact on the voter. When the Court had considered the impact on the voters' rights, it consistently found a significant burden on the right to vote.[119]

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112. *Id.* at 31-33.

113. 440 U.S. 173 (1979).

114. *Id.* at 175-76. This law applied to both new party and independent candidates. *Id.* The result of this requirement was that a petition for a local office, such as Mayor of Chicago, required more signatures than for a statewide office. *Id.* at 176-77.

115. *Id.* at 184 (citing Williams v. Rhodes, 393 U.S. 23, 30 (1968)). The Court found that voters' ability to express their political preferences was impaired. *Id.*

116. *Id.*

117. *Id.* at 186. The Court suggested that the more stringent requirement for cities than for suburbs, and limiting the geographic area from which signatures could be obtained, were not the least drastic means of meeting the state's objectives. *Id.* at 186-87.

118. *Id.* at 187.

119. *Id.* at 184 (finding the right to vote was burdened because "voters can assert their preferences only through candidates or parties or both" (quoting Lubin v. Panish, 415 U.S. 709, 716 (1974))); Lubin v. Panish, 415 U.S. 709, 716 (1974) (citing Williams v. Rhodes, 393 U.S. 23, 31 (1968)) (stating that the right to vote was "heavily burdened" if a vote could only be cast for one of two candidates when "other candidates are clamoring for a place on the ballot"); Bullock v. Carter, 405 U.S. 134, 144 (1972) (finding that the ballot access restriction presented a "real and appreciable impact" on voters because they were "substantially limited in their choice of candidates").

3. *Voters' Challenges to Election Laws*

In these cases, the challenged election laws established specific deadlines that affected a voter's ability to participate in a primary election. In *Kusper v. Pontikes*,[120] the Court struck an Illinois law that prohibited a voter from participating in a party's primary election if that voter had participated in a different party's primary election within the preceding twenty-three month period.[121] This requirement deprived a voter of the ability to choose another party's candidate, and substantially abridged his ability to associate with another political party during that twenty-three month period.[122] The Court used a strict standard of review[123] and held that the state's interest in protecting the integrity of the electoral process[124] did not justify preventing voters from exercising their constitutional right to associate.[125]

A similar New York law was upheld in *Rosario v. Rockefeller*.[126] There, the law required a voter to register with a political party at least eleven months prior to the party's primary election.[127] The Supreme Court found that this requirement did not burden a voter's rights, it merely imposed a time deadline for enrollment with a political party.[128] The Court held that the law accomplished the state's purposes of preventing party raiding[129] and preserving the integrity of the electoral process, and

120. 414 U.S. 51 (1973).

121. *Id.* at 61. The effect of this law required a voter to register with a political party 23 months prior to its primary election and not to participate in the primaries of any other parties. *Id.* at 57.

122. *Id.* at 58. The law restricted the voter's freedom to change party affiliation and served to "lock" the voter into a preexisting party affiliation for a substantial period of time. *Id.* at 57.

123. *Id.* at 59-61. The State must choose the least drastic means to achieve a legitimate state interest. *Id.* at 61.

124. *Id.* at 59-60. The state sought to protect the electoral process by curtailing party raiding. *Id.* Party raiding occurs when voters who are sympathetic to a particular candidate vote for a weaker candidate in another party's primary in order to give their favored candidate a better opportunity to win in the general election. TRIBE, *supra* note 26, § 13-24, at 1122; *see also* Rosario v. Rockefeller, 410 U.S. 752, 760 (1973).

125. *Kusper*, 414 U.S. at 61.

126. 410 U.S. 752, 762 (1973).

127. *Id.* at 760.

128. *Id.* at 757. Under this law, a voter could vote in a different party primary each year as long as he met the enrollment deadline. *Id.* at 759.

129. *See supra* note 124.

that these ends could not have been effectively achieved by other means.[130] In dissent, Justice Powell noted that the law imposed a substantial and unnecessary restriction on these particular petitioners since they were previously unaffiliated with any political party.[131] Employing strict scrutiny, he found that the state's interest was not substantial enough to justify the burden[132] and that there were less drastic means available to protect the state's asserted interests.[133]

D. *The Court's Consideration of Write-In Voting Provisions*

Although some of the election laws that were challenged allowed write-in voting,[134] these provisions were not prominent in the Court's analysis. In *Williams*,[135] the Supreme Court simply affirmed the district court's order that write-in voting be extended to the general election to remedy the restrictions placed on a new party's access to the ballot.[136] In a concurring opinion, Justice Douglas noted, however, that the availability of write-in votes was "no substitute for a place on the ballot."[137]

In *Lubin*,[138] the Court noted that write-in candidates were also required to pay a filing fee.[139] The Court suggested that allowing write-in candidates to receive votes, without the filing

130. *Rosario*, 410 U.S. at 760-62.

131. *Id.* at 763 (Powell, J., dissenting).

132. *Id.* at 770.

133. *Id.* at 770-71. The dissent noted that other states have shorter enrollment deadlines that have not adversely impacted on party structure. *Id.* at 771. The dissent noted, without reaching the issue, the petitioner's argument that less drastic means could include loyalty oaths, limitations for voters with pre-existing party affiliations, and criminal sanctions for fraudulent participation in electoral activities. *Id.* at 771 n.13.

134. American Party v. White, 415 U.S. 767, 772 n.3 (1974); Storer v. Brown, 415 U.S. 724, 736 n.7 (1974); Lubin v. Panish, 415 U.S. 709, 710-11 (1974); Bullock v. Carter, 405 U.S. 134, 137 n.6 (1972); Jenness v. Fortson, 403 U.S. 431, 434 (1971); Socialist Labor Party v. Rhodes, 290 F. Supp. 983, 986 (S.D. Ohio), *aff'd in part, modified in part sub nom.*, Williams v. Rhodes, 393 U.S. 23 (1968) (permitting write-in voting in primary elections only).

135. *See supra* notes 106-12 and accompanying text.

136. Williams v. Rhodes, 393 U.S. 23, 34 (1968). A write-in ballot would allow an individual to effectively exercise the right to vote. Socialist Labor Party v. Rhodes, 290 F. Supp. 983, 986-87 (S.D. Ohio), *aff'd in part, modified in part sub nom.*, Williams v. Rhodes, 393 U.S. 23 (1968).

137. *Williams*, 393 U.S. at 37 (Douglas, J., concurring).

138. *See supra* notes 98-99 & 102-04 and accompanying text.

139. Lubin v. Panish, 415 U.S. 709, 710-11 (1974).

fee, could present an alternative to the filing fee requirement.[140] Yet, the Court acknowledged that ballot access through write-in votes "falls far short of access" comparable to having a name printed on the ballot.[141] In a concurring opinion, Justice Blackmun would accept write-in voting as a remedy to the ballot access restriction imposed on candidates.[142] In *Bullock*,[143] the Texas law did not permit write-in votes at primary elections,[144] therefore, write-in votes were not considered as an alternative method of acquiring votes.

The Georgia law challenged in *Jenness*[145] also permitted write-in voting.[146] There, the Court mentioned the availability of write-in votes only to emphasize that the challenged signature requirement applied to nonparty candidates.[147] The Court did not consider write-in voting in its analysis of the case. The provision for write-in voting in *American Party*[148] was similarly disregarded as the Court merely mentioned the existence of the provision in a footnote.[149] The opinions in the other cases discussed above did not mention write-in voting.

E. *A Shift to First Amendment Analysis*

Anderson v. Celebrezze,[150] decided in 1983, marked the end of the Supreme Court's use of equal protection analysis to assess ballot access laws.[151] The Court stated that it relied on past opinions that evaluated ballot access laws under "the 'fundamental rights' strand of equal protection analysis."[152] The balancing test developed in *Anderson*, however, only considered

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140. *Id.* at 719 n.5.

141. *Id.*

142. *Id.* at 722 (Blackmun, J., concurring). Justice Blackmun speculated, however, that the majority would reject write-in votes as a viable alternative. *Id.* at 723.

143. *See supra* notes 100-04 and accompanying text.

144. Bullock v. Carter, 405 U.S. 134, 137 (1972).

145. *See supra* notes 63-69 and accompanying text.

146. Jenness v. Fortson, 403 U.S. 431, 434 (1971).

147. *Id.*

148. *See supra* notes 70-80 and accompanying text.

149. American Party v. White, 415 U.S. 767, 772 n.3 (1974).

150. 460 U.S. 780 (1983).

151. *Id.* at 786 n.7.

152. *Id. See generally* TRIBE, *supra* note 26, § 16-7, at 1454 (stating that classifications that result in infringements on fundamental rights are strictly scrutinized).

the infringement of rights protected by the First and Fourteenth Amendments.[153]

In *Anderson*, an independent presidential candidate challenged an Ohio law that required the filing of a nominating petition by March 20 to qualify for the upcoming November general election.[154] The Court stated that its primary concern was the impact that ballot access restrictions placed on the rights of voters.[155] The Court reiterated that the right to associate for the advancement of political beliefs and the right to cast votes effectively were fundamental freedoms.[156] The Court stated, however, that not all restrictions on candidates' access to the ballot impose unconstitutional burdens on voters' rights.[157] Here, the petitioner claimed that the early filing deadline was an unconstitutional burden on the voting and associational rights of his supporters.[158]

The *Anderson* Court developed a balancing test to consider challenges to the constitutionality of state ballot access laws.[159] First, the Court must "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments."[160] Second, the Court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by [the law]."[161] Third, in weighing the rights burdened and the state's interest, the Court

153. *Anderson*, 460 U.S. at 786 n.7. The prior cases applying the fundamental rights strand of equal protection analysis focused on the infringement of rights guaranteed by the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, which resulted in classifications that restricted a candidate's access to the ballot. *Id.*

154. *Id.* at 782-83. Anderson's supporters filed the requisite nominating petition and statement of candidacy approximately seven weeks after the statutory deadline. *Id.* at 782.

155. *Id.* at 786.

156. *Id.* at 787.

157. *Id.* at 788. The Court stated that reasonable, nondiscriminatory restrictions were generally sufficient to justify a state's important regulatory interests. *Id.* The Court cited *Jenness*, *American Party*, and *Storer* as examples of "generally applicable and evenhanded restrictions" on ballot access that were upheld by the Court. *Id.* at 788 n.9.

158. *Id.* at 782.

159. *Id.* at 789. The Court stated that constitutional challenges to election laws must be resolved through the analytical process used in ordinary litigation. *Id.*

160. *Id.*

161. *Id.*

"also must consider the extent to which those [state] interests make it necessary to burden the plaintiff's rights."[162]

Applying this balancing test, the Court first considered the nature of the injury to voters' rights by evaluating the impact of the total ballot access scheme on all candidates.[163] The Court found that the filing deadline placed a particular burden on Anderson's supporters because it infringed on their ability to associate for political purposes since they could not vote for him as an independent candidate.[164] The Court noted that the early filing deadline imposed an additional burden on the organizing efforts of an independent candidate since his positions on the issues must be established several months before the major parties have announced their platforms.[165] Since the major political parties do not select candidates or solidify party platforms until their conventions are held in the summer, they have more flexibility to respond to changing political sentiments.[166] An independent candidate, however, does not have the same flexibility since his candidacy, and appeal to supporters, must begin nearly five months before the major parties hold their conventions.[167] The Court concluded that a ballot access requirement which differentiated based on the type of candidate seeking ballot access resulted in a particular burden on voters.[168]

Applying the second part of the balancing test, the Court considered the "legitimacy" of each interest asserted by the state to justify the early filing deadline.[169] The state first asserted the interest in fostering an informed and educated electorate.[170] While the Court found that this was an "important and

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162. *Id.*

163. *Id.* at 790-92.

164. *Id.* at 792. The Court acknowledged that those individuals who supported Anderson as an independent candidate were readily identifiable. *Id.*

165. *Id.* at 791.

166. *Id.* at 790-91.

167. *Id.* at 791. The Court noted that, under Ohio's law, a late candidate who could potentially attract wide voter support would be precluded from entering the race. *Id.* at 792.

168. *Id.* at 792-93.

169. *Id.* at 796.

170. *Id.*

legitimate" interest, it did not justify a mandated seven-month period, preceding the election, to educate voters.[171]

Another interest advanced by the state was that of ensuring equal treatment among all candidates.[172] Although a party candidate participating in a primary election must declare his candidacy at the same time as an independent candidate, the Court noted that the consequences were different for these types of candidates.[173] A party's presidential candidate could still appear on the general election ballot, even if he had not participated in the primary election, yet an independent candidate would be precluded from participating in the general election if he had not filed a statement of candidacy before the March deadline.[174] The Court concluded that the interest of treating all candidates equally was not achieved by requiring all candidates to file nominating petitions in March.[175]

The final interest advanced by the state was to promote political stability by "protecting the two major parties from 'damaging intraparty feuding.'"[176] The Court determined that this interest was actually an attempt to reduce external competition for the established political parties.[177] Moreover, the Court stated that the deadline was "not precisely drawn" to promote political stability since the requirement applied to all independent candidates regardless of prior party affiliations,[178]

171. *Id.* at 796-97. The Court stated that advances in telecommunications and increased literacy levels among the general population indicated that seven months was excessive to ensure that voters would be informed and educated regarding the choice of candidates. *Id.* at 797.

172. *Id.* at 799.

173. *Id.*

174. *Id.*

175. *Id.* at 801.

176. *Id.* (citing Brief for Respondent at 41, Anderson v. Celebrezze, 460 U.S. 780 (1983) (No. 81-1635)). The state asserted that Anderson's decision to run as an independent candidate threatened the internal organization of the Republican Party. *Id.*

177. *Id.* The Court relied on *Williams*, and noted that voters' rights were outweighed by the state's attempts to protect established political parties. *Id.* at 802.

178. *Id.* at 805. The Court noted that the filing deadline could actually serve to defeat the state's interest since an early deadline would encourage minor candidates to compete with an existing party as an independent candidate rather than influence the party's views through internal mechanisms. *Id.*

and concluded that the early filing deadline did not promote political stability.[179]

The Ohio election law challenged in *Anderson* allowed write-in votes for independent candidates.[180] The Court stated, however, that the availability of write-in votes would not cure the restriction on ballot access since write-in votes were "not an adequate substitute for having the candidate's name appear on the printed ballot."[181]

The Court ultimately held that the burdens placed on voters' freedom of choice and association outweighed the state's "minimal" interest in requiring an early filing deadline.[182] Clearly, the Court was engaged in a balancing analysis, yet it was unclear if the Court intended to strictly scrutinize the ballot access restriction.[183] In evaluating the nature and extent of the infringement on voters' rights, the Court found that the ballot access laws resulted in a *particular* burden on the rights of Anderson's supporters,[184] but did not characterize this burden in terms generally associated with strict scrutiny analysis. The Court's recognition that an independent candidate could be excluded from the ballot[185] suggested that the burden was severe.

In applying the second prong of the *Anderson* balancing test, the Court did not require the state to advance a compelling or important interest to outweigh the burden imposed.[186] The Court required that the burden be justified by a legitimate state

179. *Id.* The Court noted that although a party candidate may not have participated in a primary election, he could still achieve ballot status in the general election. *Id.*

180. *Id.* at 799 n.26.

181. *Id.*

182. *Id.* at 806.

183. Terry Smith, *Election Law: Election Laws and First Amendment Freedoms - Confusion and Clarification by the Supreme Court*, 1988 ANN. SURV. AM. L. 597, 600 n.19.

184. *Anderson*, 460 U.S. at 792. The Court also noted that an unequal burden on independent candidates would infringe on a voter's freedom of association. *Id.* at 793-94.

185. *Id.* at 790.

186. *See* TRIBE, *supra* note 26, § 13-20, at 1108 n.47. Although the Court claimed to be relying on prior ballot access cases in developing the balancing test applied in *Anderson*, there was no mention in the Court's opinion of the need for a compelling state interest or least restrictive alternative. *Id.*

interest.[187] Although the last portion of the balancing test purports to examine the extent to which the state's interest makes it necessary to burden the voters' rights, this analysis was not undertaken because the interests advanced by the state did not justify the burden.

The Court's analysis suggested that the *Anderson* balancing test did not rise to the level of strict scrutiny because it did not require a compelling state interest to justify the severe burden imposed by the early filing deadline.[188] Following the Court's decision in *Anderson*, commentators reached conflicting conclusions regarding the impact of the balancing test on subsequent challenges to ballot access laws.[189] Subsequent applications of the balancing test reveal its durability in the resolution of ballot access cases and evince the evolution of a strict scrutiny component.

1. *Supreme Court Applications of the* Anderson *Balancing Test*

Munro v. Socialist Workers Party[190] was the first ballot access case to reach the Supreme Court after *Anderson*, yet neither the majority, nor the dissent, applied the *Anderson* balancing test. In *Munro*, the Supreme Court upheld a Washington state law that imposed restrictions on a minor party's

187. *Anderson*, 460 U.S. at 788-89. Further, the restriction must be narrowly tailored to achieve the state's legitimate interest. *Id.* at 806.

188. *See* Smith, *supra* note 183, at 610.

189. Thomas S. Chase, Case Comment, *Constitutional Law - Early Filing Deadline Unconstitutional; A Trend Toward Strict Scrutiny in Ballot Access Cases*, 18 SUFFOLK U. L. REV. 24, 30-31 (1984) (contending that ballot access restrictions on candidates would not be subject to strict scrutiny analysis under *Anderson*); Teresa L. Grigsby, Note, Anderson v. Celebrezze: *The Ascendancy of the First Amendment in Ballot Access Cases*, 15 U. TOL. L. REV. 363, 396-99 (1983) (speculating that the analysis used in *Anderson* may not be applied in future cases in favor of an individual case-by-case analysis); Lloyd E. Selbst, Casenote, *State Restrictions on Candidate Access to the Ballot in Presidential Elections*, 25 B.C. L. REV. 1117, 1136-38 (1984) (arguing that *Anderson* created different levels of strict scrutiny analysis for challenges to ballot access restrictions imposed on national and statewide elections); Kurt Wittenberg, Recent Cases, Anderson v. Celebrezze: *Ballot Access and the Due Process Clause - An Alternative to Equal Protection Analysis*, 33 DEPAUL L. REV. 411, 420, 426-27 (1984) (arguing that the Court actually applied strict scrutiny and did not provide adequate guidelines for the resolution of future ballot access cases).

190. 479 U.S. 189 (1986).

ability to access the general election ballot.[191] The law, passed in 1977, required that a minor party candidate receive at least one percent of the votes cast in the primary election to secure a position on the general election ballot.[192]

The Court reiterated that ballot access restrictions could infringe on the rights of individuals to associate for political purposes.[193] The challenged provision was found to affect the rights of "voters to cast their votes effectively" and could thereby render the restriction unconstitutional.[194] The Court noted, however, that voters were not restricted in their ability to make choices and concluded that their freedom of association was not infringed merely because the voters were required to express their preferences at primary elections.[195] Rather than fashioning a precise standard of review,[196] the Court compared the one percent requirement to the restrictions challenged in prior ballot access cases.[197] The Court found that the infringement on First Amendment rights was slight and did not rise to the level of a constitutional violation in light of the more severe restrictions that were upheld in other cases.[198]

The state advanced the interest in requiring candidates to show community support before printing their names on the

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191. *Id.* at 191.

192. *Id.* at 191-92. The minor party candidate challenging the law received approximately nine one-hundredths of one percent of the total votes cast and was denied a position on the general election ballot. *Id.* at 192.

193. *Id.* at 193.

194. *Id.* (citing Williams v. Rhodes, 393 U.S. 23, 30 (1968)).

195. *Id.* at 199. The minor party asserted that the ballot access restriction posed severe burdens on First Amendment rights. *Id.* at 196. The challengers based their position on the fact that only one minor party candidate had qualified for the general election ballot since the enactment of the one percent requirement. *Id.* at 196-97. They also sought to distinguish their case from prior cases concerning signature requirements since obtaining votes at a primary election was more difficult. *Id.* at 197. The Court found that the difference between these two methods of demonstrating community support was not of constitutional significance. *Id.*

196. *See also* Smith, *supra* note 183, at 617.

197. *Munro*, 479 U.S. at 200 (Marshall, J., dissenting). Justice Marshall noted that the majority did not articulate the standard of review applied in this case. *Id.*

198. *Munro*, 479 U.S. at 199. The Court found that the restriction did not pose an "insuperable barrier" to minor parties seeking to access the general election ballot. *Id.* at 197. The Court also stated that the restriction in this case was less severe than the requirements that had been upheld previously in *Jenness* and *American Party*. *Id.* at 199.

general election ballot.[199] The Court simply reaffirmed its holdings in *Jenness* and *American Party* that a state can require a candidate to make a "'preliminary showing of substantial [community] support'" as a prerequisite to ballot status.[200] The Court held that the ballot access restriction would be upheld since the slight burden posed by the one percent requirement was related to the state's asserted interest.[201]

Justice Marshall, in dissent, stated that the standard of review to be applied in ballot access cases was readily apparent: a law "that burden[ed] minor-party access to the ballot must be necessary to further a compelling state interest, and must be narrowly tailored to achieve that goal."[202] In applying this standard, he found that the law imposed an excessive burden on the associational rights of minor parties and their supporters.[203] Since the ballot access law burdened First Amendment rights, it had to be strictly scrutinized.[204] Justice Marshall concluded that the one percent requirement was not even rationally related to the state's interest, and therefore, could not pass constitutional muster.[205]

After *Munro*, the analytical framework to be applied in ballot access cases remained unclear.[206] The *Munro* Court stated that infringements on voters' rights may not survive strict scrutiny,[207] yet it did not apply that standard. The dissent similarly advocated using strict scrutiny analysis[208] and found that the requirement could not survive.[209] Nonetheless, neither the ma-

199. *Id.* at 194. The Court accepted the state legislature's rationale that the one percent requirement would reduce the number of candidates thereby alleviating the difficulty created by an overcrowded general election ballot. *Id.* at 196.

200. *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983)). The Court further stated that it has never required a state to prove actual voter confusion or frivolous candidacies as a prerequisite to requiring a showing of community support. *Id.* at 194-95.

201. *Id.* at 199.

202. *Id.* at 201 (Marshall, J., dissenting) (citing Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)).

203. *Id.* at 202-03. Justice Marshall found that the statute essentially excluded minor party candidates from general elections. *Id.*

204. *Id.* at 205.

205. *Id.* at 204-05.

206. *See* Smith, *supra* note 183, at 621-22.

207. *Munro*, 479 U.S. at 193.

208. *Id.* at 201 (Marshall J., dissenting).

209. *Id.* at 205.

jority, nor the dissent, employed the balancing test formulated in *Anderson*.

In *Tashjian v. Republican Party*,[210] a voters' rights case that was decided the same day as *Munro*, the Supreme Court applied the *Anderson* balancing test. In *Tashjian*, the Supreme Court struck down a Connecticut law that required voters who participated in a primary election to be registered members of that party.[211] This law conflicted with a Republican Party of Connecticut rule that allowed independent voters to vote in a Republican Party primary.[212]

To evaluate this law, the Court applied the balancing test developed in *Anderson*.[213] Under the first part of the test, the Court examined the impact of the requirement in the context of the Party's other activities within the electoral process.[214] The Court determined that the Party's First Amendment freedom to associate with others was infringed.[215] The Court concluded that the law limited the Party's associational opportunities "at the crucial juncture" when political power could be achieved through the consolidation of common beliefs.[216]

In applying the second part of the *Anderson* balancing test, the Court evaluated each of the interests asserted by the state to be compelling.[217] The state first asserted that the law prevented party raiding.[218] The Court noted that although this had been recognized as a legitimate state interest, it was not impli-

210. 479 U.S. 208 (1986).

211. *Id.* at 210-11, 229. This is also known as the closed primary system. *See id.* at 222 n.11.

212. *Id.* at 210, 212. For purposes of this discussion, the Republican Party will be referred to as the Party.

213. *Id.* at 214 (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)). The Court must weigh the character and magnitude of the asserted injury to First Amendment rights against the precise interest advanced by the state to justify the burden. *Id.* In weighing the rights burdened and the state's interest, the Court must also consider the extent to which the state interests make it necessary to burden the protected rights. *Id.*

214. *Id.* at 215.

215. *Id.* at 214. The Party argued that the law burdened the rights of its members to decide with whom they could associate for political purposes and inhibited their ability to broaden their base of public support. *Id.*

216. *Id.* at 216. Although the Court did not precisely characterize the nature of the burden, it suggested that the burden was severe since the law interfered with the Party's basic function of selecting political candidates. *See id.* at 215-16.

217. *Id.* at 217.

218. *Id.* at 219; *see supra* note 124.

cated in this case.[219] The Court stated that other provisions of the election law actually facilitated party raiding[220] and therefore, this interest could not be advanced to justify the exclusion of voters from a party primary.[221]

The state also argued that the closed primary system[222] advanced the interest of avoiding voter confusion since the public could be misled by a Republican general election candidate who was not selected solely by Republican voters.[223] The Court noted that the Party employed other mechanisms to ensure that a general election candidate conformed to the Party's platform.[224] The Court concluded that the burden imposed was not "necessary" to ensure that voters understood the ideological beliefs of general election candidates.[225]

The third interest advanced by the state was that of protecting both "the integrity of the two-party system and the responsibility of party government."[226] The state supported this interest since it protected "the integrity of the Party against the Party itself."[227] The Court concluded that it was not within the state's role to interfere with the Party's internal management.[228] The Court held that the interests advanced by the

219. *Tashjian*, 479 U.S. at 219. The Court acknowledged that the state interest in preventing party raiding was found to be legitimate in Rosario v. Rockefeller, 410 U.S. 752 (1973) and Kusper v. Pontikes, 414 U.S. 51 (1973).

220. *Tashjian*, 479 U.S. at 219. The Connecticut election law permitted independent voters to register with a party as late as the day before a primary election. *Id.* Under this provision, a raid could be organized by independent voters "at the 11th hour." *Id.*

221. *Id.*

222. *Id.* at 211 n.1. In a closed primary, only voters who are registered members of the party may vote in the election. *Id.*

223. *Id.* at 220.

224. *Id.* at 221. In order for a candidate to be listed on the primary election ballot, he must have obtained 20% of the votes cast at the Party's convention. *Id.* at 220. In addition, given the strength of the independent vote in Connecticut, the Party rule allowed the Party to ascertain independent voters' preferences for a general election candidate. *Id.* at 221.

225. *Id.* at 220-22.

226. *Id.* at 222. The state argued that its restriction on primary election voters promoted "responsiveness by elected officials and strengthen[ed] the effectiveness of the political parties." *Id.* It also argued that the law was designed to protect the Party from "conduct destructive of its own interests." *Id.* at 224.

227. *Id.* The Court noted that this state interest addressed the internal operations of the Party and would prevent the Party from managing its own internal affairs. *Id.*

228. *Id.*

state were "insubstantial," and that the law, as applied to the Party, was unconstitutional.[229]

The *Tashjian* Court's application of the *Anderson* balancing test did not provide conclusive guidance as to whether or not the balance rose to the level of strict scrutiny. The Court's finding of a burden "at the crucial juncture" when the Party could assert its political influence[230] suggested a substantial burden on the Party's associational rights. The Court, however, did not explicitly require a compelling state interest to sustain the law.

Applying the second part of the *Anderson* balancing test, the Court found that the state's interests were insubstantial.[231] As a result, the final consideration of the *Anderson* balance, that is, the extent to which the state's interest in avoiding voter confusion made it necessary to burden the rights, was a gratuitous addition to the analysis.[232]

Although the Court never stated that it was applying strict scrutiny, the decision was consistent with the application of a strict standard of review. This is because the law would still have been stricken under heightened scrutiny since the interests advanced by the state were insubstantial.[233] The subsequent case of *Eu v. San Francisco County Democratic Central Committee*[234] supports the position that the Court applied strict scrutiny in *Tashjian*. In *Eu*, the Court cited Connecticut's assertion of a compelling interest to support the use of a strict standard of review.[235] Thus, the Court apparently believed that it had applied strict scrutiny in *Tashjian*, even though it was not readily apparent from that opinion.

The *Eu* Court applied the *Anderson* balance, and explicitly included strict scrutiny analysis.[236] In *Eu*, a California law that prohibited the official governing body of a political party from

229. *Id.* at 225.

230. *Id.* at 216.

231. *Id.* at 225.

232. Although the Court explicitly stated that the interest in avoiding voter confusion did not make it necessary to infringe on protected rights, *id.* at 221-22, this may have been another way for the Court to express its finding that the state interest was not substantial.

233. *Id.* at 225.

234. 489 U.S. 214 (1989).

235. *Id.* at 222 (citing Tashjian v. Republican Party, 479 U.S. 208, 217 (1986)).

236. *Id.*

endorsing or supporting its own candidates in primary elections was invalidated.[237] The Court's analytical framework consisted of the first part of the *Anderson* balancing test to determine the nature and extent of the burden imposed by the law.[238] If the law was found to burden First Amendment rights, the Court stated that it could survive constitutional scrutiny "only if the State shows that it advances a compelling state interest."[239] In addition, the law must be "narrowly tailored to serve that interest."[240]

Applying the first part of the *Anderson* test, the Court examined the impact of the restriction on the Party's ability to participate in the electoral process and associate politically with its members.[241] The Court found that the prohibition on endorsements "directly hamper[ed]" a supporter's ability to learn of the party's views with respect to its candidates.[242] The Court found a clear restraint on associational rights and concluded that the law "suffocated" these rights.[243]

Because the prohibition burdened the party's free association, the state was required to establish that it served a compelling interest.[244] The first interest advanced by the state was to promote a stable government.[245] The Court conceded that this was a compelling state interest, however, the state did not show that banning party endorsements was related to a stable government.[246] The state further argued that party stability was

237. *Id.* at 216.

238. *Id.* at 222 (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

239. *Id.* (citing Tashjian v. Republican Party, 479 U.S. 208, 217, 222 (1986); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979); American Party v. White, 415 U.S. 767, 780 & n.11 (1974); Williams v. Rhodes, 393 U.S. 23, 31 (1968)).

240. *Id.* (citing *Illinois State Bd. of Elections*, 440 U.S. at 185; Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973); Dunn v. Blumstein, 405 U.S. 330, 343 (1972)).

241. *Id.* at 223.

242. *Id.* The Court also noted that the prohibition was an attempt to censor the party's political speech. *Id.* at 223-24. The Court stated that the endorsement prohibition prevented parties from "promoting candidates 'at the crucial juncture at which the appeal to common principles may be translated into concerted action'." *Id.* at 224 (quoting *Tashjian*, 479 U.S. at 216).

243. *Id.* at 224-25.

244. *Id.* at 225.

245. *Id.* at 225-26. The state argued that the prohibition served this interest since endorsements of specific candidates may create intraparty friction resulting in the party's defeat at the general election. *Id.* at 227.

246. *Id.* at 226.

an aspect of ensuring a stable government.[247] The Court was not persuaded that the interest of preserving the party's stability during a primary election campaign was as compelling as promoting a stable government.[248]

The second state interest asserted was the protection of voters from confusion and undue influence.[249] Although the Court acknowledged that fostering an informed electorate was a legitimate state interest,[250] the Court was suspicious of a law that resulted in a restraint of information to ensure informed decision making by voters.[251] The Court concluded that the interest of avoiding confusion and undue influence was not achieved by prohibiting a party from endorsing its own candidates.[252] Because the state failed to assert a compelling interest to justify prohibiting party endorsements, the Court held that the law was unconstitutional.[253] Thus, *Eu* conclusively established that election laws may be subjected to strict scrutiny analysis. The second part of the *Anderson* balancing test was effectively replaced with strict scrutiny review. This indicated that the first part of the *Anderson* balancing test may be a threshold test to determine if the analysis continued with the second part of *Anderson*, or was replaced with strict scrutiny.

The next ballot access case to reach the Supreme Court suggested that the *Anderson* balancing test was indeed a threshold test to trigger strict scrutiny analysis, although that analysis was not applied to the facts of the case. In *Norman v. Reed*,[254] the Court struck down an Illinois law that required new party candidates to obtain more signatures for ballot status in local elections than for statewide elections.[255] In establishing

247. *Id.* at 227.

248. *Id.* at 227-28. In fact, the Court responded that a purpose of primary elections is to finally settle disputes between competing factions within the party. *Id.* at 227.

249. *Id.* at 228.

250. *Id.*

251. *Id.* at 228-29.

252. *Id.* at 229.

253. *Id.*

254. 112 S. Ct. 698 (1992).

255. *Id.* at 708. The law required new parties to gather 25,000 signatures on nominating petitions from each district within a political subdivision to enter a candidate in an election for an office from that subdivision. *Id.* at 702. The effect of this law required a new party, which was establishing itself in a multi-district

the analytical framework, the Court cited to *Anderson* and stated that a ballot access restriction must be justified by a state interest that is "sufficiently weighty" to sustain the law.[256] The Court further required that a "severe restriction . . . be narrowly drawn to advance a state interest of compelling importance."[257]

The Court identified the burdened rights as the right of individuals to associate together as a new political party and the right of voters to express their views through favored candidates.[258] The Court, however, did not characterize the degree of the burden imposed by the nominating petition signature requirement. The state asserted that its interest in requiring electoral support in each political subdivision voting for a local office was sufficient to sustain the law.[259]

Before considering the interest advanced by the state, the Court reviewed its earlier decision in *Illinois State Board of Elections v. Socialist Workers Party*[260] which concerned the predecessor to the law challenged here.[261] Based on that decision, and an examination of the current ballot access laws, the Court concluded that the state could not require more signatures on a nominating petition for a local office than for a statewide office.[262] The Court simply held that the signature requirement was not "the most narrowly tailored means" of

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subdivision, to obtain more signatures than were required for a statewide office. *Id.* at 707; *cf.* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979).

256. *Norman*, 112 S. Ct. at 705 (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

257. *Id.*

258. *Id.*

259. *Id.* The Court considered this state interest since it was not raised in the earlier case as a basis for sustaining the ballot access scheme. *Id.* at 707-08.

260. *See supra* notes 113-18 and accompanying text. The Illinois State Legislature's response to the Court's decision in that case was to amend the statute by capping the required number of signatures from a political subdivision at 25,000. *Norman*, 112 S. Ct. at 707.

261. *Id.* at 707. The Court noted that the law remained "flawed" since the number of signatures required for some political offices still required more signatures than for statewide offices. *Id.*

262. *Id.*

achieving the state's goal of demonstrated electoral support in each subdivision.[263]

When the Court set out its analysis in *Norman*, it did not explicitly state the separate parts of the *Anderson* balancing test, but merely cited to the page of the *Anderson* opinion on which the test appeared.[264] While *Norman* clearly established that the *Anderson* balancing test was the first step in analyzing ballot access restrictions, it was not clear if the Court intended to apply all three parts of the test, or only the first part which evaluated the burden on the infringed right. *Norman* clarified, however, that when a severe burden was found, the analysis proceeded under a strict standard of review.[265] Although the Court did not expressly apply this analytical framework, it can be concluded that the Court found a severe burden on the right of association, thereby triggering strict scrutiny, since the Court required that the law be narrowly tailored.[266]

In the course of these cases, the Court developed and refined the analytical framework to be applied to First Amendment challenges to ballot access laws. These cases suggest that the first part of the *Anderson* balancing test is a threshold inquiry. If a severe burden is found, the analysis does not continue under the *Anderson* balancing test, rather, strict scrutiny is triggered. But, if the ballot access law poses only reasonable restrictions on First Amendment rights, the analysis continues under the *Anderson* balancing test.

2. *Lower Court Applications of the* Anderson *Balancing Test to Challenges of Write-In Voting Prohibitions*

Although the Supreme Court did not directly address restrictions on write-in voting, other courts have applied the *Anderson* balancing test to challenges of state write-in voting provisions.[267] In each case, the courts invalidated the statutes.

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263. *Id.* at 708. The Court suggested the alternative of requiring a minimum number of signatures from each subdivision while maintaining a total signature requirement of 25,000. *Id.*

264. *Id.* at 705 (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

265. *Id.*

266. *Id.* at 708.

267. Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 780 (4th Cir. 1989) (stating that a "restriction could 'only survive constitutional scrutiny if it serve[d] a compelling governmental interest . . . and [was] narrowly tai-

The courts found that the right to vote for the candidate of one's choice was greatly burdened,[268] and that this infringement was not outweighed by a sufficiently compelling state interest.[269]

In *Canaan v. Abdelnour*,[270] a San Diego ordinance banning write-in voting was challenged in California state court.[271] The Supreme Court of California found that the substantial injury to the right to vote for the candidate of one's choice[272] was not outweighed by the city's interests in assuring that candidates were qualified and willing to serve, fostering an educated electorate, and assuring the winner was the majority's choice.[273] Moreover, the prohibition on write-in voting was not the least restrictive alternative to meet the city's goals.[274]

In *Paul v. Indiana Election Board*,[275] an Indiana election law prohibiting all write-in voting was challenged in federal district court.[276] The court reviewed the analysis used in *Anderson* and *Eu* and concluded that "[t]he *Anderson* and *Eu* standards govern[ed] . . . [their] analysis."[277] The court found that the right to vote for the candidate of one's choice was substantially

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lored to serve that interest'.") (quoting Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (alterations in original)); Paul v. Indiana Election Bd., 743 F. Supp. 616, 622 (S.D. Ind. 1990) (applying the standards used in *Anderson* and *Eu*); Canaan v. Abdelnour, 710 P.2d 268, 277 (Cal. 1985) (stating that to justify burdening the right to vote, there must be "no less drastic alternatives"). It should be noted that Norman v. Reed, 112 S. Ct. 698 (1992), had not reached the Supreme Court at the time that these lower court cases were decided.

268. *Dixon*, 878 F.2d at 782-83 (finding that a refusal to report write-in votes created an injury of great magnitude); *Paul*, 743 F. Supp. at 625-26 (finding an extraordinary burden on the right to vote for the candidate of one's choice); *Canaan*, 710 P.2d at 277 (finding a substantial injury to the right to vote for the candidate of one's choice).

269. *Dixon*, 878 F.2d at 786; *Paul*, 743 F. Supp. at 625; *Canaan*, 710 P.2d at 281.

270. 710 P.2d 268 (Cal. 1985).

271. *Id.* at 270. The local ordinance prohibited write-in votes at municipal general elections, while state law permitted write-in voting in all elections. *Id.* at 269.

272. *Id.* at 277. The court noted that the ban "on write-in voting . . . prevents voters from exercising 'the free and pure expression of [their] choice of candidates.'" *Id.* at 276 (quoting Gould v. Grubb, 536 P.2d 1337, 1348 (Cal. 1975)).

273. *Id.* at 278-79.

274. *Id.* at 281. The court did not articulate any alternative means to achieve the city's interests.

275. 743 F. Supp. 616 (S.D. Ind. 1990).

276. *Id.* at 619-20.

277. *Id.* at 622.

burdened[278] and held that the state's "insufficient" interests in fostering an informed electorate and preventing frivolous candidates did not justify the blanket prohibition of write-in voting.[279]

In *Dixon v. Maryland Administrative Board of Election Laws*,[280] a challenge to an election law reached the United States Court of Appeals for the Fourth Circuit. This law required non-indigent write-in candidates to pay a filing fee to be designated as "official" write-in candidates and to have the votes that were cast for them publicly reported.[281] The Fourth Circuit also relied upon the Supreme Court's standards announced in *Anderson* and *Eu*.[282] The circuit court identified the right infringed upon as the right to cast an effective vote for the candidate of one's choice.[283] The court found that the state's refusal to report write-in votes created an injury of great magnitude and undermined the right to vote.[284]

Maryland asserted two interests to justify the filing fee requirement: defraying election costs and preventing frivolous candidacies.[285] The Fourth Circuit held that the state's interests were insufficient to justify the serious infringement on

278. *Id.* at 625. The court stated that "the right to vote for the candidate of one's choice, far from being a penumbral right, lies at the heart of the first amendment's protection." *Id.* at 623.

279. *Id.* at 624-25. The court also stated that the prohibition was "not narrowly tailored" because it banned all write-in voting. *Id.* at 625.

280. 878 F.2d 776 (4th Cir. 1989).

281. *Id.* at 777. All write-in votes cast in an election were counted; however, any write-in votes that were cast for an unofficial write-in candidate were not reported publicly. *Id.* at 784. The filing fee of $150 was mandatory unless a candidate could prove an inability to pay. *Id.* at 777-78.

282. *Id.* at 780. "[When] approaching candidate restrictions, it is essential to examine . . . the extent and nature of their impact on voters." *Id.* at 779 (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972)).

283. *Id.* at 781-82. The infringed right also included the right to express that no candidate was acceptable. *Id.* at 782.

284. *Id.* This was the same as not allowing the voter to cast a ballot at all. *Id.* at 782-83.

285. *Id.* at 783. The court found that although protecting the state's treasury could be a legitimate interest, the state offered no evidence that the filing fee was used to defray specific expenses associated with write-in candidates. *Id.* at 783-84. Moreover, the fact that the state waived the filing fee for indigent candidates undermined the argument that the fee was associated with increased expenses resulting from allowing write-in candidates to enter an election. *Id.* Regarding the state's interest in preventing frivolous or fraudulent candidates, the court recognized that a filing fee could not be used as the sole means of determining if a

First Amendment rights.[286] The court also found that there were other means available to determine if a candidate was serious and, therefore, concluded that the filing fee for write-in candidates was not sufficiently narrowly tailored.[287]

In sum, two lower federal courts and a state supreme court have held that a prohibition on write-in voting was invalid. These cases identified the burdened right as the right to vote for the candidate of one's choice, and found that the right was substantially burdened.[288] The courts concluded that the burden on the right to vote was not outweighed by the state's interests in protecting the integrity of the election process and fostering an informed electorate.[289] A similar challenge to a write-in voting provision reached the United States Supreme Court in *Burdick v. Takushi*.[290]

III. *Burdick v. Takushi*

A. *The Facts*

Alan Burdick, the petitioner, was a registered voter in Honolulu, Hawaii.[291] For several years, Burdick was unsatisfied with the choice of candidates listed on the state-prepared election ballot.[292] In 1986, Burdick wrote to state officials regarding the state's policy on write-in voting and was advised that Hawaii election laws prohibited write-in votes.[293] Burdick filed suit in federal district court and asserted that his inability to cast a write-in vote prevented him from expressing his opposi-

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candidate was serious. *Id.* at 784 (citing Lubin v. Panish, 415 U.S. 709, 716 (1974)).

286. *Id.* at 786.

287. *Id.* at 784.

288. *See supra* note 268.

289. *See supra* note 269.

290. 112 S. Ct. 2059 (1992).

291. *Id.* at 2061.

292. Brief for Petitioner at 4, Burdick v. Takushi, 112 S. Ct. 2059 (1992) (No. 91-535).

293. *Burdick*, 112 S. Ct. at 2061. An opinion letter issued by the Attorney General's Office in July 1986 indicated that Hawaii election laws did not contain provisions to permit write-in voting. Petitioner's Brief at 4-5, Burdick v. Takushi, 112 S. Ct. 2059 (1992) (No. 91-535). Therefore, neither the legislature nor election officials were constitutionally required to provide write-in voting. *Id.*

tion to the single candidate from his district listed on the primary ballot for the State House of Representatives.[294]

The election law at issue provided three methods for candidates to access the ballot. The first was the established party route.[295] Under this method, a political party was exempt from petition requirements if the party had demonstrated a history of broad support[296] or if the party was a new party that qualified through the petition process for the past three consecutive elections.[297] The second method was the new party petition route whereby a group of people could qualify as a new political party by filing the requisite nominating petition.[298] The final method was the nonpartisan primary[299] route whereby an independent candidate could access the nonpartisan primary ballot by complying with certain nominating petition requirements.[300] Independent candidates, as well as new party and established party candidates, could be required to file nominating petitions for the candidate's name to be printed on the ballot.[301]

The nominating petitions for state and federal offices required the signatures of twenty-five qualified voters[302] and nominating petitions for state legislative and county offices required the signatures of fifteen voters.[303] There were no limitations on the number of nominating petitions that each voter could sign for each office petitioned.[304] These nominating petitions were required to be filed no later than sixty days prior to a primary election.[305]

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294. *Burdick*, 112 S. Ct. at 2061.

295. HAW. REV. STAT. § 11-61(a) (Supp. 1992); HAW. REV. STAT. § 11-64 (1985).

296. HAW. REV. STAT. § 11-61(b) (Supp. 1992). In Hawaii, the Democratic, Republican, and Libertarian parties qualify as established parties for ballot access under this provision. *Burdick*, 112 S. Ct. at 2064.

297. HAW. REV. STAT. § 11-62(d) (Supp. 1992).

298. *Id.* § 11-62(a). To qualify as a new party, a group must submit a petition containing the signatures of at least one percent of registered voters. *Id.* § 11-62(a)(3).

299. *Id.* § 12-22, *repealed by* Act effective June 23, 1987, ch. 232, § 3, 1987 Haw. Sess. Laws 739, 740.

300. *Burdick*, 112 S. Ct. at 2065; Respondents' Brief at 9 n.8, Burdick v. Takushi, 112 S. Ct. 2059 (1992) (No. 91-535).

301. *Burdick*, 112 S. Ct. at 2064.

302. HAW. REV. STAT. § 12-5(a) (Supp. 1992).

303. *Id.* § 12-5(b).

304. *Id.* § 12-4 (1985).

305. *Id.* § 12-6(a) (Supp. 1992).

The Supreme Court of Hawaii had interpreted two sections of the ballot access laws as prohibiting write-in voting.[306] One provision required all candidates for elective offices to be nominated in accordance with the ballot access laws.[307] The other required candidates who appeared on the general election ballot to have been nominated in the preceding primary election.[308] Although the election laws did not expressly forbid write-in voting, a write-in candidate's name could not be placed on the ballot, and therefore, votes could not be cast for a write-in candidate.[309]

B. *Procedural History*

1. *The District Court*

Burdick filed suit in the United States District Court for the District of Hawaii challenging Hawaii's ban on write-in voting as violative of the First and Fourteenth Amendments of the United States Constitution.[310] Burdick filed a motion for summary judgment and permanent injunctive relief against the Director of Elections,[311] which was granted.[312] The court also entered a preliminary injunction ordering the casting and counting of write-in votes in the November 1986 general election.[313] The court denied the state's request for a stay of the injunction pending appeal.[314]

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306. Burdick v. Takushi, 776 P.2d 824, 825 (Haw. 1989); *see* Jensen v. Turner, 40 Haw. 604, 613 (1954) (holding that the legislature intended to prohibit write-in voting).

307. "All candidates for elective office, . . . shall be nominated in accordance with [the ballot access laws] . . . ." HAW. REV. STAT. § 12-1 (1985).

308. "No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary." *Id.* § 12-2.

309. *Burdick*, 776 P.2d at 826.

310. Burdick v. Takushi, 112 S. Ct. 2059, 2061-62 (1992).

311. Burdick v. Takushi, 737 F. Supp. 582, 584 (D. Haw. 1990). The suit was filed against Morris Takushi, Director of Elections, and the Lieutenant Governor in his official capacity as the Chief Elections Officer. *Id.* at 582, 584. Defendants hereinafter are referred to as the state.

312. The decision, order, and opinion of the district court is unreported. Petitioner's Brief at 2, Burdick v. Takushi, 112 S. Ct. 2059 (1992) (No. 91-535).

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

314. *Id.*

2. *The Circuit Court*

On appeal, the Ninth Circuit stayed the district court's injunction and vacated its judgment under the *Pullman* abstention doctrine.[315] The court employed a three-part test[316] to determine whether *Pullman* abstention was warranted.[317] The court found that the election laws involved in this case were "fairly subject to an interpretation"[318] that could make adjudication of the constitutional question unnecessary.[319] Therefore, the court of appeals remanded the case and ordered the district court to abstain from further consideration until the Supreme Court of Hawaii issued a definitive ruling on the state law aspects of the prohibition on write-in voting.[320]

3. *Remand to the District Court*

On remand, the district court certified three questions to the Supreme Court of Hawaii concerning the interpretation and validity of the state's election laws.[321] The certified questions were:

> 1. Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and re-

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315. Burdick v. Takushi, 846 F.2d 587, 587-88 (9th Cir. 1988) (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984) citing Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498, 501 (1941)). Federal courts should abstain from deciding a case when unsettled questions of state law must be decided before a federal question can be decided. *Id.* at 588.

316. *Id.* The three-part abstention test applied by the Ninth Circuit from *Pullman* is:

> First, the proper resolution of the state law question at issue must be uncertain. Second, a definitive ruling on the state [law] issue must potentially obviate the need for constitutional adjudication by a federal court. Third, the complaint must touch upon "a sensitive area of social policy upon which the federal courts ought not to enter unless [there is] no alternative . . . ."

Id. (quoting Bank of Am. Nat'l Trust and Savings Ass'n v. Summerland County Water Dist., 767 F.2d 544, 546 (9th Cir. 1985) (quoting Canton v. Spokane Sch. Dist. No. 81, 498 F.2d 840, 845 (9th Cir. 1974)).

317. *Id.*

318. *Id.* at 589.

319. *Id.* A "definitive resolution" of the actual prohibition on write-in voting could make the adjudication of the federal constitutional question unnecessary. *Id.*

320. *Id.*

321. Burdick v. Takushi, 737 F. Supp. 582, 585 (D. Haw. 1990).

quire Hawaii's election officials to count and publish write-in votes?

2. Do Hawaii's election laws require election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

3. Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?[322]

The Supreme Court of Hawaii answered each of these questions in the negative.[323] The Hawaii court held that, under the state's election laws, write-in votes could not be cast or counted in primary, general or special elections.[324]

Based on the Hawaii court's interpretation of the election laws, the district court applied the *Anderson* balancing test and the *Eu* strict scrutiny approach.[325] The court stated that "[t]he right to vote for the candidate of one's choice is a fundamental right"[326] and that Hawaii's election laws imposed a significant burden on that right.[327] The court then analyzed the interests asserted by the state.[328] The state advanced interests in confining intraparty feuds, fostering an informed electorate, and protecting the primary mandate and finality of the electoral process.[329] The court concluded that these interests were not sufficiently compelling to justify the enormous burden on the right to vote.[330] The district court held that the ban on write-in voting severely burdened Burdick's rights and was not justified

322. *Id.*

323. *Id.*; *see* Burdick v. Takushi, 776 P.2d 824, 825 (Haw. 1989).

324. *Burdick*, 737 F. Supp. at 585; *see Burdick*, 776 P.2d at 825.

325. *Burdick*, 737 F. Supp. at 586-87 (applying Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) and Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989)). The district court interpreted the *Anderson* balancing test and the strict standard of review used in *Eu* as separate tests used by the Supreme Court to evaluate challenges to ballot access laws. *Id.*

326. *Burdick*, 737 F. Supp. at 587. To support this position, the court determined that voting for the candidate of one's choice is the type of significant political expression that the First Amendment was designed to protect. *Id.*

327. *Id.* The court found that the ban on write-in voting directly burdened the right to vote freely for the candidate of one's choice by precluding that choice. *Id.*

328. *Id.* at 588-92.

329. *Id.* at 588.

330. *Id.* at 591-92.

by a compelling state interest.[331] The court reluctantly granted a stay of its injunction pending appeal.[332]

4. *Back to the Circuit Court*

On appeal, the Ninth Circuit reversed the ruling of the district court.[333] The court of appeals also applied the *Anderson* balancing test,[334] but explained that the test did not require a compelling state interest or narrowly tailored laws.[335] The court interpreted *Anderson* to merely require a showing that the state's interests justified the burden.[336] Applying this test, the circuit court found that the election laws did not place a substantial burden on the fundamental right to participate equally in an election.[337]

The court stated that although the right to participate in an election was a fundamental right, the right to vote for *any* candidate was not constitutionally protected.[338] The court further found that two of the three interests advanced by the state were compelling[339] and that the prohibition on write-in voting served those interests.[340] The circuit court held that although the pro-

331. *Id.* at 592. The district court granted Burdick's motion for summary judgment and permanent injunctive relief. *Id.*

332. *Id.* at 593.

333. Burdick v. Takushi, 937 F.2d 415, 416 (9th Cir. 1991).

334. *Id.* at 418.

335. *Id.* at 421.

336. *Id.* The circuit court did not provide a basis for this approach and did not mention the strict standard of review used by the district court below or by the Supreme Court in *Eu v. San Francisco County Democratic Central Committee.*

337. *Id.* at 419-20. Even if the circuit court had acknowledged the Supreme Court's strict standard of review in *Eu*, it is likely that the court would have come to the same result since it found an insubstantial burden such that strict scrutiny would not have been triggered.

338. *Id.* at 420. Although the restrictions on write-in voting may impinge on political speech, there were ample alternative channels available to Burdick to advance political views, therefore, any burdens on political speech were minimal. *Id.* at 419. The court did not give examples of the alternative channels available to Burdick.

339. *Id.* The state advanced the interests of political stability and "protecting against 'sore losers' and party raiding," fostering an informed electorate, and maintaining the internal structure of the election laws which permit automatic seating of an unopposed primary election winner. *Id.* A "sore loser" candidate is one who has lost at the primary election and seeks ballot status at the general election. *Id.* at 420 n.4. The court found that fostering an informed electorate was a legitimate interest. *Id.* at 420.

340. *Id.*

hibition on write-in voting placed some restrictions on the rights of expression and association, they were justified by the specific interests advanced by the state.[341]

The Ninth Circuit expressly rejected the Fourth Circuit's decision in *Dixon*[342] regarding write-in voting.[343] The Ninth Circuit found that the *Dixon* court had focused on the right to influence the electoral process and did not appropriately distinguish that right from the right to participate fully in an election.[344] Although the right to influence the outcome of an election may be constitutionally protected, the Ninth Circuit found that a prohibition on write-in voting would not substantially burden that right since there were other means available for advancing one's views.[345] The Supreme Court of the United States granted certiorari to resolve this disagreement in the circuits.[346]

C. *Majority Opinion*

The Court[347] began its analysis by describing the extent of a state's authority to regulate elections and by noting that ballot access regulations inevitably pose some burden on voters.[348] The Court concluded that subjecting ballot access laws to strict scrutiny when they placed any type of burden on the right to vote would impose too great a hardship on legislatures seeking to fairly regulate their elections.[349] The Court then fashioned the standard of review to be applied in cases that challenge ballot access laws.[350]

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341. *Id.*

342. *See supra* notes 280-87 and accompanying text.

343. *Burdick*, 937 F.2d at 421.

344. *Id.*

345. *Id.* at 415. The court found that Hawaii's election laws did not affect the multitude of opportunities to communicate one's political views or to increase one's influence. *Id.* at 421.

346. Burdick v. Takushi, 112 S. Ct. 635 (1991).

347. Burdick v. Takushi, 112 S. Ct. 2059 (1992). Justice White wrote the majority opinion joined by Justices Rehnquist, O'Connor, Scalia, Souter, and Thomas.

348. *Id.* at 2063. The Court has long recognized that a state retains the authority to regulate its own elections, and that "there must be substantial regulation" to ensure that elections are conducted fairly and honestly. *Id.* (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

349. *Id.* The majority rejected Burdick's contention "that a law that imposes *any* burden upon the right to vote must be subject to strict scrutiny." *Id.* at 2062-63 (emphasis added).

350. *Id.* at 2063.

Rather than use the strict standard of review advocated by Burdick,[351] the majority used the "more flexible standard" developed in *Anderson*.[352] After laying out the *Anderson* balancing test, the Court stated that the level of their review would depend upon the severity of the burden imposed on the protected rights.[353] The Court explained that when the right at issue was severely infringed, the law must be narrowly tailored to achieve a compelling state interest.[354] But, when the law resulted in only a reasonable burden on the right to vote, it would be sustained if justified by an important state interest.[355]

Applying their interpretation of the *Anderson* balancing test, the Court analyzed the nature of the right to vote and the burden imposed on that right by prohibiting write-in voting.[356] Burdick asserted that the ban on write-in voting "deprive[d] him of the opportunity to cast a meaningful ballot"[357] thereby infringing on his protected right to vote. Additionally, Burdick contended that the ban impermissibly discriminated against him "based on the content of the message"[358] expressed through his write-in vote.[359]

The Court characterized Burdick's challenge as a request for the state to record and to publish protest write-in votes against the system or against nominated candidates.[360] The Court stated that there were other means available for a voter to express his dissent and that the state was not required to provide a forum, via elections, for voters to express their dissatisfaction with the system.[361] The majority recognized voting as a constitutional right, however, it stated that "the right to vote

351. *Id.*

352. *Id.*

353. *Id.* at 2063.

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

355. *Id.* at 2063-64 (citing Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

356. *Id.* at 2062-66.

357. *Id.* at 2065.

358. *Id.*

359. *Id.* Burdick also asserted that he was constitutionally entitled to cast a protest vote for Donald Duck. *Id.*

360. *Id.* at 2067.

361. *Id.*

in any manner" was not absolute.[362] The Court emphasized that the function of an election was to choose those who would govern and not to provide a forum to express personal political ideals.[363] The Court concluded that the right to vote was burdened to some extent by limiting the range of candidates from which a voter could choose.[364]

The Court next evaluated the extent of the burden in the context of the total ballot access scheme. The Court reviewed the three methods by which a candidate may appear on a primary ballot.[365] Because of the overall ease of ballot access provided in the election laws, the Court concluded that the "burden on voters' freedom of choice and association [was] borne only by those who fail[ed] to identify their candidate of choice until days before the primary [election]."[366] The majority reasoned that Hawaii's ballot access scheme would not require the addition of a write-in voting provision to remedy an otherwise unconstitutional law because it did not place an unreasonable burden on the rights of voters.[367] The Court held that the nature of the burden imposed by the prohibition of write-in voting was very limited and not of constitutional significance because the laws governing access to the ballot were liberal.[368]

The Court considered the second part of the *Anderson* balancing test by evaluating the interests asserted by the state to justify the ban on write-in voting. Since the burden imposed on the voter's right was found to be slight, the Court did not require the state to establish a compelling interest.[369] The major-

362. *Id.* at 2063 (citing Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986)). The Court had already established that the difference between the rights of voters and candidates are slight and not easily distinguishable. *Id.* at 2065-66.

363. *Id.* at 2066. "[T]he function of the election process is 'to winnow out and finally reject all but the chosen candidates' . . . ." *Id.* (citing Storer v. Brown, 415 U.S. 724, 730, 735 (1974)).

364. *Id.* at 2063.

365. *See supra* notes 295-305 and accompanying text.

366. *Burdick*, 112 S. Ct. at 2065. As previously established, a candidate's interest to make a late decision to access an election ballot was given little weight. *Id.* at 2065 (citing *Storer*, 415 U.S. at 736). A voter would only have to gather 15 signatures on a nominating petition to have a candidate placed on the election ballot for state legislative and county races. *Id.* at 2064.

367. *Id.* at 2064-65. Burdick did not challenge the constitutionality of the state's methods for accessing the ballot. *Id.* at 2065.

368. *Id.* at 2066.

369. *Id.*

ity examined two interests asserted by the state: avoiding unrestrained factionalism and preventing party raiding.[370]

The Court found that the state's interest in avoiding factionalism was adequately served by the ban because it prevented sore loser candidates[371] and ensured that the general election would be reserved for major struggles rather than intraparty feuds.[372] The Court held that the interest in avoiding factionalism justified the prohibition on write-in voting and was a legitimate means of preventing sore loser candidates.[373] Further, the Court found that the prohibition on write-in voting was necessary to achieve this state interest.[374]

In evaluating the state's second interest, the Court found that the ban on write-in voting successfully prevented party raiding under the state's system of open primary elections.[375] The Court found that party raiding could easily be accomplished at a primary election by writing in a candidate who did not intend to seek nomination.[376] If Hawaii permitted write-in voting, an organized write-in campaign could result in a primary winner who was not a member of that party.[377] The Court held that preventing party raiding was a "legitimate interest" and that the prohibition on write-in voting was a reasonable means to achieve that interest.[378]

The Court concluded that the state's legitimate interests outweighed the limited burden placed on voters who could not execute a write-in vote.[379] The Court's analysis culminated in

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370. *Id.*

371. *See supra* note 339 for an explanation of sore loser candidates.

372. *Burdick*, 112 S. Ct. at 2066. In addition, the ban served to focus the public's attention on "contested races in the general election" by allowing unopposed candidates in the primary election to be designated as office holders prior to the general election. *Id.*

373. *Id.*

374. *Id.*

375. *Id.* An open primary election is held when a voter may vote in any primary without being a registered member of that party. *Id.*

376. *Id.* at 2067.

377. *Id.* at 2066-67. In addition, the Court found that a candidate who had not won a nomination at a primary election could be written in at a general election. *Id.* at 2067. *But see Burdick*, 112 S. Ct. at 2072 (Kennedy, J., dissenting) (stating that write-in candidates could file a declaration of candidacy to ensure eligibility as a less restrictive alternative to meet the state's objective).

378. *Burdick*, 112 S. Ct. at 2067.

379. *Id.*

the holding that when ballot access laws were constitutional, such that only reasonable burdens are placed on the right to vote, a ban on write-in voting would be presumed valid.[380] In that context, the prohibition was presumptively valid since any burden placed on the voter's rights would be reasonable and would be justified by the same interests that justified the ballot access laws.[381] Since Hawaii's ballot access laws provided constitutionally sufficient access to the ballot, the addition of a prohibition of write-in voting imposed only a slight burden on a voter's rights.[382] Furthermore, the slight burden on the right to vote was justified by the state interests that justified the entire ballot access scheme.[383]

D. *Dissenting Opinion*

Justice Kennedy, writing for the dissent,[384] agreed with the majority that the *Anderson* balancing test provided the appropriate analytical framework,[385] yet found a different result in its application. Under the first part of the *Anderson* balancing test, the dissent considered the character and magnitude of the asserted injury to the protected rights.[386] In considering the character of the injury, the dissent recognized the reality of the Democratic Party's dominance in Hawaii and that Democratic candidates often ran unopposed in statewide elections.[387] They stated that under these unusual circumstances, the voter could either vote for the unopposed candidate or leave the ballot blank.[388] Because Burdick could not write in a vote, the dissent

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380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* at 2068 (Kennedy, J., dissenting, joined by Blackmun & Stevens, JJ.).

385. *Id.* at 2069-70.

386. *Id.* at 2068-69.

387. *Id.* at 2068. In the election that gave rise to this case, Burdick was given only one choice on the ballot. *Id.* In state legislative elections held between 1982 and 1986, at least one-third of the candidates ran unopposed. *Id.* In 1990, over one-quarter of the voters did not cast votes in the uncontested state legislature races. *Id.* This led the dissent to conclude that some voters would have written in a vote if given the opportunity. *Id.*

388. *Id.* at 2069.

concluded that he had no means of casting a meaningful ballot.[389]

To determine the extent of this burden, the dissent evaluated the effect of the write-in voting restriction on a voter's ability to fully exercise the right to vote and found the result to be a total deprivation of that right.[390] They considered the prohibition on write-in voting in isolation, however, rather than as a single element in a larger ballot access scheme.[391] The dissent found that the prohibition placed a significant burden on the right of voters to select the candidate of their choice.[392]

The dissent took issue with the majority's view that the liberal nature of Hawaii's ballot access laws provided voters with adequate choices on election day.[393] According to the dissent, these very same ballot access laws actually limited a voter's choices.[394] The dissenters also challenged the majority's presumption that a ban on write-in voting would be valid if the ballot access laws themselves were constitutional. The dissent argued that the majority did not consider the prohibition of write-in voting as a factor in assessing the constitutionality of the ballot access scheme.[395] They claimed that, under the majority's reasoning, a state would only have to defend a prohibition on write-in voting when it was a remedial measure to cure an otherwise unconstitutional ballot access scheme.[396] The dissent concluded that the majority's position disregarded the burden that the prohibition placed on a voter and that a ban

389. *Id.* at 2068.

390. *Id.* at 2070.

391. *Id.* at 2071.

392. *Id.* at 2068.

393. *Id.*

394. *Id.* at 2069. Hawaii's open primary system precluded voters from choosing a candidate from an established party if the voter chose to vote from the nonpartisan ballot. *Id.* Because there may not be independent candidates competing for each office, there is no reason for a voter to chose the nonpartisan ballot. *Id.* Moreover, write-in voting could be a "safety mechanism" if a new issue emerged immediately prior to the election. *Id.* Under the current system, a voter would have to vote for a candidate that was no longer favored, cast a blank ballot, or not vote at all. *Id.* The dissent suggested that write-in voting would be a meaningful alternative in this situation. *Id.*

395. *Id.* at 2070-71.

396. *Id.* at 2071.

"should not be presumed valid" without showing the precise interest advanced by the restriction.[397]

Under the second part of the *Anderson* balancing test, the dissent did not specify the level of review used because "the State has failed to justify the write-in ban under any level of scrutiny."[398] Just as they examined the write-in ban in isolation, the dissent would require the state to justify the ban on write-in voting, rather than the entire ballot access law.[399] They found that the first interest advanced by the state focused on preventing sore loser candidates in general elections in order to protect the integrity of partisan primaries.[400] The dissent concluded that a complete ban on write-in voting was not justified since a prohibition on write-in voting limited to general elections would achieve the same purpose.[401] The interest in preventing party raiding was similarly found not to be justified by the ban since the system of open primaries actually facilitated party raiding.[402] Thus, the dissent held that the prohibition on write-in voting was unconstitutional because the significant burden on the right to vote was not outweighed by any interest advanced by the state.[403]

IV. Analysis

Burdick v. Takushi continued the approach of applying the *Anderson* balancing test to evaluate challenges to a state's ballot access laws, and clarified that the first part of the balancing test was a threshold level of review that could trigger strict scrutiny analysis.[404] The *Anderson* balancing test first considers the "character and magnitude" of the injury to a voter's

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* The interest in protecting the practice of allowing unopposed winners of party primaries to be seated prior to the general election actually supported the need to allow write-in votes since primary elections were often decisive. *Id.*

401. *Id.* The dissent, however, recognized that a ban on write-in voting at general elections may be overinclusive since it would bar legitimate candidates from seeking office. *Id.*

402. *Id.* at 2071-72.

403. *Id.* at 2072. The dissent noted that an additional interest of preventing fraud and enforcing nomination requirements by prohibiting write-in voting was not explained by the state at all. *Id.*

404. *Id.* at 2063-64.

rights to determine the appropriate level of scrutiny. If strict scrutiny was not triggered, the second part identifies, and evaluates, the interests advanced by the state to justify its ballot access law. In balancing the injured party's rights against the state's interest, the third part of the test considers the extent to which it is necessary to burden the voter's rights to achieve the state's interest.[405]

Burdick presented the first opportunity for the Court to apply the *Anderson* balancing test, in its entirety, to uphold a challenged law. In *Burdick*, both the majority and dissent agreed that the *Anderson* balancing test provided the appropriate analytical framework to evaluate the challenged law,[406] yet they reached different conclusions due to the manner in which they determined the burden placed on the voter's rights.[407]

The first part of the *Anderson* balancing test examines "the character and magnitude of the asserted injury to the [protected] rights . . . ."[408] In applying this portion of the test, the majority evaluated the prohibition of write-in voting as one aspect of the entire election law. They found the burden on the right to vote resulted from the limited range of candidates from which a voter could choose.[409] To determine the magnitude of this burden, the majority reviewed the methods by which a candidate could access the ballot.[410] The Court noted that independent candidates could be placed on the ballot by submitting nominating petitions with only fifteen signatures.[411] Based on the ease of ballot access, the Court concluded that the law did not present an unreasonable barrier to candidates and therefore, placed only a limited burden on voters who could not write-in a vote for the candidate of their choice.[412] The majority's reasoning implied that a disappointed voter could easily petition to have his candidate of choice placed on the ballot and thereby allow him to effectively exercise his right to vote for the candidate of his choice.

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405. *See supra* notes 159-62 and text accompanying.
406. *Burdick*, 112 S. Ct. at 2063-64, 2069-70.
407. *Id.* at 2067, 2072.
408. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
409. Burdick v. Takushi, 112 S. Ct. 2059, 2063 (1992).
410. *Id.*; *see also supra* notes 295-305 and accompanying text.
411. *See supra* note 303 and accompanying text.
412. *Burdick*, 112 S. Ct. at 2066.

The majority focused on a voter's ability to exercise the right to vote under the existing ballot access law, and found only a slight infringement due to the ease of ballot access.[413] This indicated that placing the onus on a voter who favored a particular candidate to gather fifteen signatures on a nominating petition, sixty days prior to the election, to have the candidate's name appear on the ballot would not result in a burden of constitutional significance.

The dissent also evaluated the burden on the right to vote for the candidate of one's choice.[414] The dissent, however, evaluated the singular aspect of the prohibition on write-in voting in light of the reality of the partisan politics that existed in Hawaii.[415] The dissent considered statistics on voting practices in prior elections and inferred that many voters had been unable to fully exercise their right to vote.[416] Because of the Democratic Party's dominance in Hawaiian politics, the dissent found that the inability to write-in a vote prevented a voter from casting a meaningful ballot and from fully exercising the fundamental right to vote.[417] The dissent characterized this burden on the right to vote as significant.[418]

In reaching their conclusion, the dissenters did not consider the extent to which a voter could effectively participate in an election under Hawaii's ballot access laws. Instead, they considered only the inability to write in a vote that would result in a total deprivation of the right.[419] Because of this singular restriction in the ballot access law, the dissent's reasoning suggested that a prohibition on write-in voting would always burden the right to vote regardless of the ease of ballot access. Moreover, it is likely that the severe burden resulting from this prohibition would not survive strict scrutiny analysis, and therefore, would always be unconstitutional.

These modes of analysis of the ballot access law present the fundamental difference between the majority's and dissent's reasoning. The majority's reasoning indicates that a challenge

413. *Id.* at 2064-66.
414. *Id.* at 2068-69 (Kennedy, J., dissenting).
415. *Id.* at 2068.
416. *See supra* note 387 and accompanying text.
417. *Burdick*, 112 S. Ct. at 2068 (Kennedy, J., dissenting).
418. *Id.*
419. *Id.* at 2068-69.

to a specific portion of an election law will be evaluated based on the entire ballot access scheme. The dissent, however, examined only the impact of the single restriction without regard to the rest of the ballot access provisions. The majority's evaluation of the burden on the right to vote, in light of its impact on the electoral process and the entire ballot access scheme, was more consistent with prior cases.

In *Anderson*, the Court evaluated the nominating petition filing requirements for an independent candidate in the context of the ballot access requirements for other types of candidates.[420] In *Tashjian*, the Court examined the impact of the restriction that a voter be registered with a political party, to participate in that party's primary election, in light of the overall activities of the political party.[421] Similarly, the *Eu* Court examined the entire electoral process to determine that a prohibition on political endorsements by a political party impermissibly burdened the party's rights.[422] In *Norman*, the Court considered the restrictions on a new party's access to the ballot within the context of the other provisions of the state's ballot access scheme rather than that singular requirement's burden on a protected right.[423]

The implications of these alternate methods of analysis are demonstrated as the remainder of the *Anderson* balancing test is applied. After the majority found a slight burden on the right to vote, they continued with the second part of the *Anderson* balancing test, rather than applying a strict standard of review.[424] Here, the Court found that the interests asserted by the state were legitimate and outweighed any limited burden imposed on voters because they could not write in a vote.[425] The Court also considered the extent to which the prohibition on write-in voting was necessary to achieve the state's interest and concluded that the prohibition was a necessary component of the ballot access scheme in order to achieve the state's goals.[426]

420. Anderson v. Celebrezze, 460 U.S. 780, 792-93 (1983).

421. Tashjian v. Republican Party, 479 U.S. 208, 215 (1986).

422. Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 223 (1989).

423. Norman v. Reed, 112 S. Ct. 698, 707 (1992).

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

425. *Id.* at 2066-67.

426. *Id.*

This portion of the Court's reasoning suggests that because write-in voting was not required to remedy an otherwise unconstitutional law, write-in voting could be constitutionally prohibited.

This reasoning led the Court to hold that when ballot access laws are constitutional, such that only reasonable burdens are placed on the right to vote, a ban on write-in voting will be presumptively valid. In that context, any burden placed on the voter's rights will be reasonable and will be justified by the same interests that justified the ballot access laws.[427] Since Hawaii's ballot access laws were found to provide easy access to the ballot, and were not unconstitutional, the burden was found to be justified by the same state interests that justified the entire ballot access scheme.[428]

In contrast, when the dissent applied the second part of the *Anderson* balancing test, they required the state to justify any limitation on the right to vote independent of the justifications for the entire ballot access law.[429] The dissent noted that there were less restrictive alternatives that could have been used to achieve the state's asserted interests.[430] This, coupled with the finding of a significant burden, suggested that the dissent was actually applying a strict standard of review.

The progression of these analyses turned on the manner in which the burden on the right to vote was evaluated. The majority analyzed the ballot access laws as a whole and found a limited burden,[431] while the dissent focused on the effect of the prohibition and found a severe burden.[432] The principal point of departure between the majority's and the dissent's analyses was the context in which the burdened right was evaluated. The majority focused on the extent to which a voter could still participate in an election, even though he could not write in a vote. The dissent focused on the inability of a voter to cast an effective vote when he did not favor any of the candidates listed on the ballot. Under the majority's reasoning, a voter must take

427. *Id.* at 2067.
428. *Id.*
429. *Id.* at 2071 (Kennedy, J., dissenting).
430. *Id.*
431. *Burdick*, 112 S. Ct. at 2064-66.
432. *Id.* at 2070-71 (Kennedy, J., dissenting).

the initiative to have the candidate of his choice placed on the ballot in order to fully realize his right to vote.

V. *Burdick* Applied

Burdick stands for the proposition that the constitutionality of a specific provision of a ballot access law will be evaluated in the context of the total ballot access scheme. Under this analysis, a restrictive provision may not render the law unconstitutional if the entire ballot access scheme does not impermissibly infringe on a voter's rights. Application of the reasoning used by the *Burdick* Court suggests that New York's ballot access laws would not withstand a constitutional challenge if the state were to prohibit write-in voting. This analysis focuses on the law governing access to the ballot for the New York State Assembly since that is equivalent to the election that gave rise to *Burdick*.

Under the first part of the *Anderson* balancing test, the entire ballot access scheme for New York State Assembly elections is evaluated. Political party candidates must file a designating petition[433] signed by the lesser of five percent or 500 of the voters enrolled in the party who reside in that assembly district.[434] The voters signing the petition must be enrolled members of the candidate's political party, and their signatures must be witnessed or notarized.[435] In addition, the completed designating petition must be filed nine weeks prior to the primary election[436] and signatures cannot be obtained more than thirty-seven days prior to filing the petition.[437]

For independent candidates seeking ballot status at a general election, nominating petitions must contain signatures totalling the lesser of five per cent of the votes cast for governor by voters of that assembly district at the preceding election or 1500.[438] In addition, all signatures on the nominating petition must be witnessed or notarized.[439] A voter who signs this peti-

433. N.Y. ELEC. LAW § 6-118 (McKinney 1978).
434. *Id.* § 6-136(2)(i) (McKinney Supp. 1993).
435. *Id.* § 6-132 (McKinney 1978 & Supp. 1993).
436. *Id.* § 6-158(1) (McKinney Supp. 1993).
437. *Id.* § 6-134(6).
438. *Id.* § 6-142(2)(g).
439. *Id.* § 6-140 (McKinney 1978 & Supp. 1993).

tion cannot vote in the primary election for that office, or sign the nominating petition of any other candidate running for the same office.[440] Nominating petitions for independent candidates must be filed between eleven and twelve weeks prior to the general election[441] and signatures cannot have been obtained more that six weeks prior to filing.[442]

Under New York's ballot access laws, petition requirements for political party candidates differ from those for independent candidates. The most stringent requirement imposed on candidates for New York State Assembly is the number of signatures that must be obtained on a designating or a nominating petition within a specified time frame. Political party candidates must gather 500 signatures within a thirty-seven day time period prior to filing. Simple division reveals that an average of fourteen signatures per day must be obtained on a political party candidate's nominating petition to satisfy the signature requirements. An independent candidate, however, must obtain 1500 signatures in a forty-two day period prior to filing. Therefore, an independent candidate seeking the same office must obtain an average of thirty-six signatures per day to satisfy the signature requirement.

The restrictions on the qualifications of voters who can sign each type of petition also impacts on the signature gathering process. Political party candidates can solicit any member of their party to sign a designating petition, whereas independent candidates can only obtain valid signatures from voters who will not vote in a primary election. These requirements result in an independent candidate having a dramatically limited pool of potential voters from which to obtain signatures. Since signatures on a nominating petition must be obtained over a month prior to a primary election, it is likely that enrolled members of a political party would refrain from signing the nominating petition for an independent candidate in the expectation that they would participate in their party's primary election. Moreover, if an independent candidate is from a district with a high percentage of voters who are enrolled in a political party, the pool of potential signers would be further limited.

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440. *Id.* § 6-138(1) (McKinney 1978).
441. *Id.* § 6-158(9) (McKinney Supp. 1993).
442. *Id.* § 6-138(4) (McKinney 1978).

An additional factor is the filing time frame for an independent candidate to obtain ballot status at a general election. The time frames make it likely that a nominating petition for an independent candidate would be filed a month prior to the primary election.[443] Under these circumstances, an independent candidate may be in a position of gathering supporters before the issues have been solidified or the strongest political party candidates have emerged.[444]

In *Burdick*, only fifteen signatures were required on a nominating petition for a state legislative race, and there were no restrictions on the voters who could sign the petition.[445] There, a voter could easily file a petition to place the candidate of his choice on the ballot and thereby further his ability to vote for that candidate. The *Burdick* Court concluded that the lack of write-in voting did impinge on a voter's rights, yet the ease of ballot access reduced the significance of that burden.[446] In New York, a voter must obtain 500 or 1500 signatures to have his candidate of choice placed on the ballot. Similar to *Burdick*, a ban on write-in voting would infringe on a New Yorker's ability to select the candidate of his choice. The more stringent signature requirements, however, as well as the limitations on voters who could sign a petition, suggest that the burden in New York would be more than slight.[447]

Under the second part of the *Anderson* balancing test, the interests advanced by the state to justify the ballot access laws are examined. New York has asserted three interests to justify its ballot access laws. The first interest is "requiring candidates to demonstrate a significant level of public support . . . ."[448] The Supreme Court has held that requiring candidates to show a "significant modicum of public support" is a compelling state interest.[449] The other asserted interests are ensuring that elec-

443. For example, if the primary election is held on September 14, the designating petition for a party candidate must be filed between July 12 and 15 and if the general election is held on November 4, the nominating petition for an independent candidate must be filed between August 12 and 19.

444. *See* Anderson v. Celebrezze, 460 U.S. 780, 790-92 (1983).

445. Burdick v. Takushi, 112 S. Ct. 2059, 2064 (1992).

446. *Id.* at 2066.

447. *See Anderson*, 460 U.S. at 792-93.

448. Katherine E. Schuelke, Note, *A Call for Reform of New York State's Ballot Access Laws*, 64 N.Y.U. L. REV. 182, 215 (1989).

449. *See supra* note 60.

tions are conducted fairly and honestly, and maintaining the efficiency of the electoral process.[450] These interests are implicated under the more general interest of protecting the integrity of the electoral process. The Court has found this to be an important and legitimate state interest.[451] Since the interests advanced by New York are legitimate or compelling, the third part of the *Anderson* balancing test is applied whereby the extent to which the state's interests make it necessary to burden the voter's right is considered.

Presumably, the interests advanced by the state to justify the ballot access laws apply equally to party and independent candidates, yet the petition requirements for independent candidates are more demanding. Because political party candidates are not required to obtain more than 500 signatures to sufficiently meet the state's interests, it appears unreasonable to require that an independent candidate obtain 1500 signatures to achieve the same interests. Therefore, the stringent petition requirements for independent candidates are not necessary to achieve the state's interests and fail under the third part of the *Anderson* balancing test. This analysis demonstrates that a challenge to a prohibition on write-in voting in New York would find the prohibition unconstitutional in light of the stringent petition requirements in the ballot access laws and resulting burden on the right to vote.

VI. Conclusion

Challenges to write-in voting, like challenges to any law that regulates ballot access, are evaluated using the *Anderson* balancing test. *Burdick v. Takushi* stands for the proposition that the constitutionality of a particular provision of a state's ballot access law will be evaluated in the context of the total ballot access scheme. Under this reasoning, states can justify a prohibition on write-in voting that poses a slight infringement on the exercise of the right to vote, within the context of the larger ballot access scheme, by merely advancing a legitimate interest.

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450. *See* Schuelke, *supra* note 448, at 215.
451. *See supra* note 57.