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Fairness in the Election Arena: Congressional Regulation of Federal Ballot Access

FAIRNESS IN THE ELECTION ARENA: CONGRESSIONAL REGULATION OF FEDERAL BALLOT ACCESS

INTRODUCTION

Traditionally, the issue of ballot access[1] for independent candidates and political parties, other than the Democratic and Republican parties, has been relegated to the special area of constitutional litigation reserved for religious sects and other non-conformists. Until now, the fundamental nature of the two-party system has been axiomatic; society and the courts have questioned only how to give political "outsiders" their due under the first and fourteenth amendment guarantees of free speech, freedom of association and equal protection of the laws.

Events of the 1980's, however, are bringing the ballot access issue into the legal and political mainstream. In the Illinois Democratic primary in March of 1986, followers of right wing "extremist" Lyndon LaRouche won the Democratic Party nomination for the offices of Secretary of State and Lieutenant Governor.[2] Adlai Stevenson, III, the Democratic Party gubernatorial nominee, was faced with the choice of running on the same ticket as the LaRouchites (something he announced he would not do), or seeking a ballot line as an independent candidate of the "True Democratic Party" or some such new entity.[3] Other Illinois Democrats have faced the same dilemma. In the 1985 Democratic primary in New York City, the only non-white mayoral candidate was almost thrown off the ballot for failure to comply with the state's onerous and hypertechnical petitioning requirements.[4] Both the Democrats and the Republicans face possible defection by large elements of their base in the 1988 Presidential election and beyond because the centrism which has long characterized the nominating process within these parties is leaving more and more of their constituents

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1. Ballot access requirements are set forth in state statutes regulating the procedure for placing an individual or party name on the ballot in an election. They vary greatly from state to state and include requirements such as: the number of signatures necessary to file; witness requirements for the signatures; how long a period is allowed for collecting the signatures; what, if any, geographical distribution requirements there are in the collection of signatures, and the deadline for filing of designating or nominating petitions.

2. N.Y. Times, Mar. 20, 1986, at A1, col. 1.

3. *Id.* Mr. Stevenson later refused the Democratic Party nomination and ran for governor as the candidate of the Illinois Solidarity Party. He lost the general election to incumbent Republican Governor James R. Thompson. N.Y. Times, Nov. 5, 1986, at A27, col. 3.

4. N.Y. Times, Aug. 20, 1985, at A1, col. 4.

dissatisfied. A poll conducted by sociologists at the University of Michigan's Institute for Social Research in 1985 revealed that fifty-seven percent of Black registered Democrats would have voted for Jesse Jackson had he run as an independent in the 1984 Presidential election.[5] The right wing has learned to use the Conservative and Right-to-Life Parties to influence the selection of candidates and platforms in the Republican Party. In 1980, liberal Republican John Anderson chose to run as an independent presidential candidate rather than support the nomination of Ronald Reagan. His effort generated a host of ballot access litigation, including one Supreme Court case, *Anderson v. Celebrezze.*[6] In 1988, progressive Lenora B. Fulani chose to run as an independent presidential candidate rather than support the nomination of Governor Michael Dukakis.[7] Her efforts have also generated a host of ballot access litigation and have resulted in her being the first black woman to be on the ballot in all fifty states and the District of Columbia, and the first black woman to qualify for federal primary matching funds.[8]

Proponents of ballot access, however, are no longer satisfied with piecemeal litigation to defend their rights and advance their causes. As a result of their efforts, Representative John Conyers of Michigan has introduced legislation setting ballot-access standards for all federal elections which are far less restrictive than those currently in effect in most states.[9] The bill's supporters argue that leaving matters to the states with occasional judicial intervention has resulted in a lack of fairness, uniformity, and predictability.[10] Opponents of the legislation have questioned its wisdom and constitutionality, arguing that traditionally, rules for ballot access have been left to the authority of the states. In the opposition's view, challenges to this authority are appropriate only when a particular state has imposed requirements which are so onerous as to violate the rights of candidates and voters to express themselves in the electoral arena and, even then, the proper remedy lies in litigation rather than legislation.[11]

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5. Liebesman, *Afro-Americans Favor an Independent Jesse,* The National Alliance, Aug. 2, 1985, at 1, col. 2.

6. Anderson v. Celebrezze, 460 U.S. 780 (1983). For a discussion of *Anderson,* see *infra* notes 119-40 and accompanying text.

7. Cook, *Third Party Impact is small, but it could be Felt this Fall,* 46 Cong. Q. 2485 (1988).

8. *See* Fulani v. League of Women Voters Educ. Fund, 684 F. Supp. 1185, 1187 (S.D.N.Y. 1988).

9. For the text of the legislation, see *infra* Appendix A.

10. Telephone interview with Nancy Ross, Director, Rainbow Lobby, Washington, D.C. (February 10, 1986).

11. Letter from Representative Al Swift, Chairman of the Subcommittee on Elections of the House Administration Committee to Francine Miller (November 3, 1985) (discussing objections to holding hearing on H.R. 1582).

This Note will address these issues by examining some of the existing ballot-access restrictions,[12] tracing the development of the Supreme Court's decisions in the leading ballot-access cases,[13] and concentrating on the Court's consideration of congressional regulation of federal elections.[14] It will conclude that congressional regulation of federal ballot access is necessary and constitutionally justifiable.

I. STATE BALLOT-ACCESS STATUTES: A GENERAL OVERVIEW

Each state has enacted a complex code of ballot-access requirements that candidates must fulfill to obtain a place on the ballot. These requirements may include the submitting of a petition signed by the statutory number of qualified voters. Petition signature requirements for independent and third-party presidential candidates range from a low of 188 in Washington,[15] to 20,000 in New York,[16] to a high of 128,840 in California.[17] Some states require a certain percentage of registered voters. California, for example, requires one percent;[18] Washington requires one-tenth of one percent.[19] Other states, among them New York, require a flat number of signatures.[20] Certain states require that petition signatures for independent candidates be obtained within a very limited period of time. For example, Arizona requires that signatures be collected in a ten-day period.[21] Other states,

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12. *See infra* text accompanying notes 15-38.

13. *See infra* text accompanying notes 39-158.

14. *See infra* text accompanying notes 159-229.

15. WASH. REV. CODE § 29.24.030 (Supp. 1988). This statute sets forth requirements for valid minor party nominating conventions to be held for the purpose of designating candidates for public office. Under another statute, the convention participants sign a certificate of nomination, an instrument which is similar to a designating or nominating petition. WASH. REV. CODE § 29.24.040(5) (Supp. 1988). For statistical data reflecting the number of signatures necessary for an independent candidate to achieve ballot access, see *infra* Appendix B.

16. N.Y. ELEC. LAW § 6-142 (McKinney 1978). For statistical data reflecting the number of signatures necessary for an independent candidate to achieve ballot access, see *infra* Appendix B.

17. CAL. ELEC. CODE § 6831 (West 1977). For statistical data reflecting the number of signatures necessary for an independent candidate to achieve ballot access, see *infra* Appendix B.

18. CAL. ELEC. CODE § 6831 (West 1977).

19. WASH. REV. CODE § 29.24.030 (Supp. 1987) (provision specifically calls for one for each ten-thousand voters who voted in preceding presidential election or 25 registered voters—whichever is greater).

20. For example, candidates who are to be "voted for by all the voters of the state" must file independent nominating petitions which are signed by a least 20,000 voters. N.Y. ELEC. LAW § 6-142.1 (McKinney 1978). Candidates for offices to be voted for by "all the voters of any congressional district" must collect the signatures of 3500 voters on such petitions. *Id.* at § 6-142.2(e).

21. ARIZ. REV. STAT. ANN. § 16-341(C). Nomination petitions "are required to be filed

including New York, New Hampshire, Michigan, and Virginia, impose geographical distribution requirements under which a certain number of signatures must be obtained in every congressional district or county.[22] In Kansas, the petition circulator for an independent candidate must live in the same precinct as the petition signer, even when the petition is for a candidate for statewide or federal office.[23] In New York, the petition circulator must write *every* signer's election district and assembly district next to the signer's name on the petition.[24]

These types of requirements greatly exceed those for major party candidates. In Florida, for example, an independent candidate for President would have to obtain 48,657 signatures, totalling one percent of the registered voters in 1982.[25] Conversely, a major party candidate

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no later than 5:00 p.m. on the tenth day after the primary election." *Id.*

22. *See* N.Y. ELEC. LAW § 6-142.1 (McKinney 1984) (candidates must obtain signatures of at least 20,000 voters, "of whom at least one hundred must reside in each of one-half of the congressional districts of the State"); N.H. REV. STAT. ANN. § 655:42(I) (1986) (candidate for president, vice-president, United States senator or governor requires names of 3000 legal voters, 1500 from each United States congressional district in the state); MICH. COMP. LAWS ANN. § 6.1685(1) (West 1983) ("petitions shall be signed by at least 100 residents in each of at least 9 congressional districts of the state and not more than 35% of the minimum required number of signatures may be resident electors of any 1 congressional district"); VA. CODE ANN. § 24.1-159 (1985) (qualified voters equaling at least one-half of one percent of the number of voters "registered in the Commonwealth as of January 1 of that year and including at least 200 qualified voters from each congressional district in the Commonwealth" may select names of electors, "including 1 elector residing in each congressional district and 2 from the Commonwealth at large . . . ."); *see also* MO. REV. STAT. § 115.315.4 (1986) (petition must be signed either by the number of registered voters in each congressional district equal to at least one percent of the total votes cast in the district for governor in the last gubernatorial election, or by the number of registered voters in each of one-half of the congressional districts equal to at least two percent of all votes cast in the district at the last gubernatorial election); NEB. REV. STAT. § 32-526(1) (1984) (petitions must contain signatures of at least one percent of all votes cast in the most recent general election for governor. Signatures of qualified registered electors must total "at least one percent of votes cast for Governor in the most recent gubernatorial election in each of at least one-fifth of the counties in this state.").

23. KAN. STAT. ANN. § 25-303 (1986).

24. Texas had a similar law which required the petition circulator to write each signer's voter identification number next to their name on the petition, even though Texas law provides that a random sampling of one percent of the total signatures gathered is used to determine the number of valid signatures obtained. TEXAS ELEC. CODE ANN. § 181.005(a) (Vernon 1986) (political parties required to nominate by convention must file lists of precinct convention participants equaling at least one percent of all votes cast for governor in the most recent gubernatorial general election, and the "lists must include each participant's residence address and voter registration number"). This law was struck down when the Court of Appeals for the Fifth Circuit affirmed a lower court ruling that it was unconstitutional for Texas to require such information. Pilcher v. Rains, Civ. No. 88-1245.

25. FLA. STAT. § 103.021(3) (1985) (petitions must be signed by one percent of registered electors of state, indicated by the preceding general election). For statistical data

only needs to be "advocated by the media" to get on the primary ballot.[26]

In 1984, a major party candidate had to obtain approximately 25,500 valid petition signatures to run in all twenty-nine Democratic Party primaries.[27] An independent candidate had to obtain more than twenty-eight times that, or approximately 725,000 signatures.[28] In California, Democrats and Republicans need to obtain a mere sixty-five signatures to appear on the primary ballot,[29] while independent candidates must produce signatures of one percent of the state's registered voters for statewide offices and signatures of three percent of an area's registered voters for local or county offices.[30] State laws also present difficult obstacles for third parties attempting to obtain ballot status—the right of automatic access to the ballot—something the major parties have possessed since ballot access laws were enacted.[31]

Independent candidates and third parties have challenged, with some success, the constitutional validity of many state ballot-access laws.[32] States themselves rarely reform their own ballot-access laws, since those empowered to do so are generally Democrats and Republicans who benefit from the restrictions on independent candidates. This situation is analogous to that surrounding the passage of the Voting Rights Act of 1969,[33] which was designed to protect minorities' fif-

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reflecting the number of signatures necessary for an independent candidate to achieve ballot access in Florida, see *infra* Appendix B.

26. *See* Yorty v. Stone, 259 So. 2d 146 (1972) (upholding the constitutionality of a Florida statute that placed on the ballot "presidential candidates who are generally advocated or recognized in news media throughout the United States or in the state."); *see also infra* Appendix B.

27. *See infra* Appendix B.

28. *See generally* 133 CONG. REC. E1494 (daily ed. Apr. 22, 1987) (general comments of Rep. Conyers regarding the Fair Elections Act).

29. CAL. ELEC. CODE § 6495(a) (West 1977) (regarding state office or U.S. Senate).

30. *See generally* 133 CAL. ELEC. CODE § 6801 (West 1977). No independent candidate has ever obtained more than 125,000 signatures. Telephone interview with Rich Winger, ballot access expert and consultant, in San Francisco, Ca. (Jan. 30, 1986).

31. *Id.*

32. *See, e.g.*, William v. Rhodes, 393 U.S. 23 (1968) (states must have procedures for new parties and independent candidates to get on the ballot); Moore v. Ogilvie, 394 U.S. 814 (1969) (laws which require third parties or independent candidates to collect a certain number of signatures in each county in a state are unconstitutional as violative of the "one man, one vote" principles established in the reapportionment cases); Bullock v. Carter, 405 U.S. 134 (1972) (states with filing fee requirements as a prerequisite to a candidate's participation in a primary violated the equal protection clause of the fourteenth amendment); Lubin v. Panish, 415 U.S. 709 (1974) (states with filing fee must provide alternatives for indigent candidates not able to afford the fees); Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) (laws which ban political parties from the ballot because they are "subversive" or which require candidates to sign a loyalty oath violate the first and fourteenth amendments).

33. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as

teenth amendment right to vote. Congress adopted the Voting Rights Act after finding that the states themselves still effectively were denying Blacks the right to vote.[34] Congressional hearings surrounding the Voting Rights Act reflected that "the system breeds on itself" because local governments remain in power by denying Blacks the right to vote, which "can be undone only by strong measures from without."[35]

Similarly, the majority of the state legislatures are composed of Democrats and Republicans, who stand to benefit from maintaining the status quo since it restricts independent and third party candidates attempting to challenge the established two parties. With little incentive to change those laws voluntarily, state legislatures have either ignored the results of successful challenges, or amended their laws cosmetically, to distinguish them from those invalidated by the United States Supreme Court.[36] Further, although the Supreme Court may invalidate a law in one state, other states will not necessarily change their laws, even if those laws would probably be deemed unconstitutional under the Court's analysis. An independent or minor party candidate must, therefore, bring suit in each state, in order to ensure compliance with Supreme Court guidelines.[37] Challenging each state law,

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amended at 42 U.S.C. §§ 1971-1973p (1983)).

34. *See* H.R. Doc. No. 439, 89th Cong., 1st Sess. 2, *reprinted in* 1965 U.S. Code Cong. & Admin. News 2437, 2483 (comments of Rep. Lindsay).

35. *Id.*

36. In North Carolina, for example, the legislature amended the ballot-access laws to require that an independent party's petition include a warning, in bold letters, explaining to signees that by signing the petition they were registering into that party. North Carolina Socialist Workers Party v. North Carolina State Board of Elections, 538 F. Supp. 864, 868 (E.D.N.C. 1982). Further, the new law required that new parties seeking ballot access obtain 10,000 signatures, an increase of 5000. *Id.* at 865. The Socialist Workers Party sought to restrain these provisions, and the court granted this injunction. *Id.* at 868. The legislature later revised the signature requirement, demanding that new political party organizers obtain "two percent . . . of the total number of voters who voted in the most recent general election for Governor." N.C. Gen. Stat. § 163-96 (a)(2) (1987).

Another example of legislatures skirting a court decision involved Ohio. The Socialist Labor Party sued after the Ohio legislature had reformed the electoral code provisions which had been found unconstitutional in Williams v. Rhodes, 393 U.S. 23 (1968) (discussed *infra*, text accompanying notes 46-61). Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972). The district court had invalidated all the challenged provisions, except one that required the party executive to swear under oath that the party did not seek the forceful overthrow of the government. Socialist Labor Party v. Rhodes, 318 F. Supp. 1262, 1271 (S.D. Ohio 1970), *appeal dismissed*, 406 U.S. 583 (1972). The Supreme Court dismissed the appeal when the Ohio legislature extensively revised the code. *Id.*

37. *See* Serrette v. Connolly, No. Civ. 68172 (Sup. Ct. Mass. filed June 19, 1985) (action to compel Massachusetts to accept plaintiff's petition signatures for his independent presidential candidacy after the May filing deadline, which was held unconstitutional); Libertarian Party of Pa. v. Davis, No. Civ. 84-0262 (M.D. Pa. June 14, 1984) (consent decree, agreeing to accept plaintiffs' nomination papers filed on or before Au-

however, is an expensive and time consuming process.[38]

Few independent candidates or minor parties have the necessary resources to accomplish this task. Though financial considerations hamper challengers of any law, those who challenge ballot-access laws must be afforded special status, for they seek to vindicate fundamental rights in the face of obstacles designed to thwart their efforts. Independent candidates and third parties seek to protect access to the political process, in much the same way that Blacks struggled to become equal participants in the electoral process. Just as Congress, in enacting the Voting Rights Act, offered Blacks essential aid in securing access to the vote, Congress must act again to ensure fair ballot-access laws.

II. Supreme Court Approach to Ballot-Access Cases

An analysis of the leading ballot-access cases demonstrates that the Court considers several competing state interests and federal rights in deciding whether a state statute violates the rights of independent candidates, third parties and voters. The federal rights involved—those of independent candidates and minor parties and their supporters—include the right to associate for the advancement of political beliefs and the right to cast an effective vote. These rights are derived from the first amendment guarantee of freedom of association[39] and are protected against state action by the fourteenth amendment.[40] Challengers of state laws also assert their right to equal protection of the laws under the fourteenth amendment.[41] In defense of ballot-access laws, on the other hand, the states assert their concerns for maintaining political stability,[42] avoiding voter confusion,[43] and ensuring a man-

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gust 1, 1984).

38. For example, in *Serrette,* an action to declare a Massachusetts filing deadline unconstitutional, the attorney worked fifteen hours, or billable time of $1500. In addition, volunteers conducted research and other legal work. The costs of this case, which was not litigated, did not include printing costs, costs of pre-trial discovery, costs of trial, or other costs normally involved in a lawsuit. *Id.* A litigated case, especially one which is appealed, involves higher costs, particularly when the lawsuits are brought in different states. *Id.* Telephone interview with Gary Sinawski, Esq., former attorney for Dennis Serrette, an independent presidential candidate in 1984 appearing on the ballot in 33 states (Feb. 8, 1986).

39. "Congress shall make no law respecting . . . the right of the people peaceably to assemble . . . " U.S. Const. amend. I.

40. Freedom of association is guaranteed by the first amendment and made applicable to the states by the fourteenth amendment. New York Times Co. v. Sullivan, 376 U.S. 254, 276-77 (1964). "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . . " U.S. Const. amend. XIV, § 1.

41. "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

42. *See* Williams v. Rhodes, 393 U.S. 23, 32 (1968); Storer v. Brown, 415 U.S. 724,

ageable ballot and discouraging frivolous candidates.[44] Their claimed objective is to regulate fair and honest elections.[45]

The issue of how to balance the interests and rights involved raises the question of what standard of review the Court should employ in determining whether a state ballot-access statute violates constitutional rights. In *Williams v. Rhodes,*[46] the first ballot-access case to be decided by the Supreme Court,[47] the Court used an equal protection clause analysis to adjudicate plaintiff's claims. Of course, to determine whether a statute violates equal protection, the Court uses various standards of review. Where neither a suspect class nor fundamental rights are involved, the Court applies the "mere" rationality standard.[48] The more rigorous standard, strict scrutiny, is applied when the challenged statute is directed toward a "discrete and insular minority."[49]

In *Williams,* the Court employed strict scrutiny to strike down an Ohio election law requiring a new political party to obtain a number of petition signatures equal to fifteen percent of the vote cast in the preceding gubernatorial election.[50] The Ohio law allowed the Republican and Democratic parties to retain ballot status by obtaining ten percent of the vote cast in the last election for governor, and did not require any petition signatures for their candidates to appear on the ballot.[51] Ohio had sharply contrasting provisions for independent parties;[52] in

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736 (1974); American Party of Texas v. White, 415 U.S. 767, 782 n.14 (1974); Anderson v. Celebrezze, 460 U.S. 780, 801 (1983).

43. *See Williams,* 393 U.S. at 33; Jenness v. Fortson, 403 U.S. 431, 442 (1971); *Storer,* 415 U.S. at 743; *White,* 415 U.S. at 782; *Anderson,* 460 U.S. at 796.

44. *See Jenness,* 403 U.S. at 442; *Storer,* 415 U.S. at 736; *White,* 415 U.S. at 782.

45. *Anderson,* 460 U.S. at 788. The Court stated that "[t]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Id.* (quoting *Storer,* 415 U.S. at 730).

46. 393 U.S. 23 (1968).

47. In *Williams,* the Supreme Court ruled, for the first time, that cases involving restrictive ballot-access requirements could not be determined as non-justiciable controversy under the political question doctrine because the Court had squarely rejected that formulation in both Baker v. Carr, 369 U.S. 186, 208-37 (1962), and Wesberry v. Sanders, 376 U.S. 1, 5-7 (1964). *Id.* at 28.

48. Clements v. Fashing, 457 U.S. 957, 962-63 (1982). The Court noted that classifications based on reasons which were unrelated to the pursuit of state goals, and not justified by any conceivable grounds, would be set aside. *Id.*

49. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (heightened scrutiny may be required when a law has an impact on rights guaranteed by the first ten amendments, and where "prejudice against discrete and insular minorities may be a special condition.").

50. *Williams,* 393 U.S. at 24-25 (citing OHIO REV. CODE § 3517.01 (1960)).

51. *Id.* at 25-26.

52. *Id.* For a discussion of another state's recent regulatory treatment of independent candidates' access to the ballot, see *infra* note 152.

order for a new party to appear on the state ballot, its candidates had to produce petitions signed by qualified electors totalling at least fifteen percent of the votes cast in the last gubernatorial election.[53] Arguing that it had the right to put any burdens it chose on the selection of candidates for the ballot, Ohio cited article II, section 1, clause 2 of the Constitution, which states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . . "[54] The Court responded by noting that, although article II, section 1, clause 2 grants the states extensive power to regulate how electors are selected, that power cannot be used to undermine rights secured by the equal protection clause of the fourteenth amendment.[55] The Court, examining the impact of the statute on the federal rights involved—the right to associate for the advancement of political beliefs and the right to cast an effective vote[56]—required the state to demonstrate both a compelling interest in regulating access to the ballot, and its use of the least restrictive means in doing so.[57] The Court determined that Ohio had important but not compelling interests[58] in maintaining political stability[59] and avoiding voter confusion.[60] Concomitantly, these interests could not "justify the very severe restrictions on voting and associational rights which Ohio [had] imposed."[61]

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53. *Id.* at 24-25.

54. *Id.* at 28-29 (quoting U.S. CONST. art. II, § 1, cl. 2).

55. *Id.* at 29.

56. *Id.* at 31. The Court stated:

> No extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal oportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

Id.

57. *Id.*

58. *Id.*

59. *Id.* at 31-32.

60. *Id.* at 33.

61. *Id.* at 32. Although the Court ultimately found the state's interests to be important, it questioned the legislature's motives in enacting the legislation by particularly noting that Ohio had enacted the 15% requirement between 1948 and 1952, after Henry Wallace, an independent, received 30,000 votes. *Id.* at 47 n.9. Before 1952 the requirement was 1%. *Id.* This has occurred across the country; in 1930 the median state requirement for a new party to get on the ballot was a petition signed by 1/10th of 1% of the number of registered voters; for 1986, the median is 8/10th of 1%. R. Winger, *supra* note 30.

The *Williams* Court found that because ballot-access regulations directly affect a fundamental right, a state cannot enact measures that are more burdensome on that right than is necessary to meet its interests. Since *Williams,* however, the standard has evolved to a more intermediate level of scrutiny, requiring an important state interest and a regulation reasonably related to that interest.[62] To determine whether the regulation is reasonable under this intermediate standard, the Court has examined the burden placed on the rights to vote and associate, adopting a presumption that the state has valid and important interests in ballot-access regulation.[63] In doing so, the Court has held that states can enact provisions to promote these interests as long as they do not fundamentally restrict the right to candidacy and the right to vote. In each case, the Court must weigh the state's interest to determine whether it justifies the burdens placed on the federal rights involved.

For example, in *Jenness v. Fortson,*[64] the Court considered a challenge to a Georgia election law that required independent candidates to file petitions with signatures equal to five percent of the number of registered voters at the time of the last general election for the office in question.[65] Plaintiffs[66] claimed the law violated their right to freedom of speech and association, guaranteed against state action by the fourteenth amendment's due process clause,[67] and violated their right to equal protection of the laws.[68] In finding no violation of plaintiffs' first and fourteenth amendment rights, the Court evaluated the signature requirement in the context of the ballot-access scheme as a whole. It emphasized the fact that the candidate had 180 days to petition, that the candidate had until mid-June to file those peitions, and that the state did not place any restrictions on the gathering and filing of petitions.[69] The Georgia system allowed independent candidates and their

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62. Gender is an example of a classification that has warranted the middle level of scrutiny. *See* Craig v. Boren, 429 U.S. 190 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.").

63. Jenness v. Fortson, 403 U.S. 431, 442 (1971).

64. 403 U.S. 431 (1971).

65. *Id.* at 432 (*citing* GA. CODE ANN. § 34-1010 (1970)).

66. Plaintiffs were nominees of the Georgia Socialist Workers Party for Governor, two nominees of that organization for the House of Representatives, and two registered voters, representing themselves and all others who wanted to be able to vote for people other than nominees of the Democrats and Republicans. *Id.* at 432 n.3.

67. *Id.* at 434. For the relevant text of the first and fourteenth amendments, see *supra* notes 39-41.

68. *Id.* at 434. The fourteenth amendment provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

69. Jenness v. Fortson, 403 U.S. 431, 433-34, 438 (1971). The Court noted that a voter

supporters to associate, to speak, to write; there were no "suffocating restrictions."[70] The Court also held there was no violation of the equal protection clause because the Georgia ballot-access requirement for an independent candidate was no more burdensome than the requirement that a major party candidate win by a majority in a party primary.[71] Georgia had not denied plaintiffs equal protection of the laws; the state had merely recognized the clear differences between the needs and potentials of a major political party and those of a new or small political organization; and, therefore, provided an alternative route to the ballot for independent candidates.[72]

The fundamental rights analysis that the *Williams* Court had employed is conspicuously absent from the *Jenness* Court's discussion; the fundamental rights to vote and associate were allegedly being violated in *Jenness;* and, therefore, the strict scrutiny approach used in *Williams* would have been appropriate. The Court did say that Georgia had "an important state interest in requiring some preliminary showing of a significant modicum of support . . . [to] avoid confusion, deception and even frustration of the democratic process at the general election."[73] Although the five-percent requirement here was higher than that enacted by most states, the Court found the requirement constitutional because there were no unduly restrictive eligibility requirements on registered voters signing the petitions.[74] Thus, without explicitly saying so, the Court seemed to be applying an intermediate level of scrutiny.

Three years after *Jenness, Storer v. Brown*[75] furthered the development of a standard of review for these cases. In *Storer,* plaintiffs challenged a number of provisions of the California election code. The

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in Georgia could sign a petition of a non-party candidate and then vote in the party primary; voters could sign more than one petition; the signer did not have to intend to vote for the candidate; and the petitions did not need to be notarized. *Id.* at 438-39.

70. *Id.* at 438.

71. *Id.* at 440. As an example, the Court looked at the most recent election year, when 12 candidates sought the nomination for the office of governor in the two party primaries, and naturally only two had their names printed on the ballot after winning their respective primaries. *Id.* The Court stated that the 10 individuals who lost could raise the argument that their equal protection rights were denied when compared with the candidate who achieved ballot access after complying with the five-percent filing requirement. *Id.*

72. *Id.* at 440-41. The Court determined that alternative routes were available for a Georgia candidate who desired access to the ballot. *Id.* at 440. He could enter the primary of a political party, or circulate nominating petitions either as an independent candidate, or under the sponsorship of a political organization. *Id.*

73. *Id.* at 442.

74. *Id.* The Court concluded that the Georgia requirement "ha[d] insulated not a single potential voter from the appeal of new political voices within its borders." *Id.*

75. 415 U.S. 724 (1974).

California ballot-access regulations included a disaffiliation provision forbidding an independent candidate to seek a position on the ballot if he or she had been affiliated with a qualified political party for one year prior to the preceding primary election.[76] Additionally, California law required an independent candidate to file petitions signed by a number of registered voters equal to five percent of the total votes cast in the preceding general election for the office sought.[77] The law also required these signatures to be gathered in twenty-four days.[78] Plaintiffs claimed that these regulations placed substantial burdens on their rights to vote and to associate for the advancement of political beliefs. Therefore, the plaintiffs argued, the laws were invalid under the first and fourteenth amendments, and under the equal protection clause, unless the state demonstrated that the regulations were essential to meet a compelling interest.[79] The Supreme Court disagreed. A majority upheld the disaffiliation provisions as constitutional, and remanded the case for further fact-finding to determine the extent of the burdens imposed on plaintiffs by the other aspects of the California law.[80]

In analyzing the disaffiliation provisions, the Court examined the state interests involved—maintaining the integrity of alternative routes to the ballot,[81] preventing intraparty feuding,[82] and furthering political stability[83]—and found that these interests outweighed any interest a candidate or his/her supporters had in the candidate's late decision to run as an independent. Seemingly applying the strict scrutiny standard of review, the Court stated: "Nor do we have reason for concluding that the device California chose . . . was not an essential part of its overall mechanism to achieve its acceptable goals."[84] Because the Court's strict scrutiny analysis in *Storer* was sparse, the Court's conclusion that the state had used the least restrictive means possible to effectuate its goals must be inferred.

Justice Brennan's dissent strongly criticized the majority's analysis. The disaffiliation provisions placed a great burden on candidacy, he argued, and therefore on the candidate's supporters; a candidate had

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76. *Id.* at 726 (citing CAL. ELEC. CODE § 6830(d) (West Supp. 1974)).

77. *Id.* at 726-27 (citing CAL. ELEC. CODE § 6831 (West 1961)).

78. *Id.* (citing CAL. ELEC. CODE § 6833 (West Supp. 1974)).

79. *Id.* at 729.

80. *Id.* at 740.

81. *Id.* at 733.

82. *Id.* at 735. The Court stated that the "general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds." *Id.*

83. *Id.* at 736. The Court stated that the one-year disaffiliation section was consistent with California's view that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government." *Id.* (citation omitted).

84. *Id.*

to decide on affiliation seventeen months prior to a general election.[85] The question for the Court was not whether the regulation *could* be essential to the state's interest, but rather whether it *was* essential. The state had the burden of proving the absence of less drastic means to achieve its objectives, and in this case, Justice Brennan argued, it had failed.[86]

Justice Brennan also disagreed with the majority on its decision to remand the question of the constitutionality of the signature requirement and the twenty-four-day gathering period.[87] The majority began its analysis by noting that the nature, extent, and likely impact of California requirements had to be examined in their totality to decide whether the laws were excessively burdensome on independent candidates and their supporters.[88] The California law disqualified those who had voted in a party primary from signing an independent nominating petition. Therefore, the Court found it was possible that, in actuality, substantially more than five percent of the eligible pool of voters would be required to produce the signatures necessary for filing because the number of potential signers were far fewer than the total number of registered voters.[89] The Court remanded the case to the district court to determine whether the signature requirement, in the context of the other provisions of the election code, imposed too great a burden on independent candidates.[90]

Justice Brennan argued that the majority was temporizing—the Court already had the data it was directing the district court to obtain on remand.[91] As with the disaffiliation provision, California had not shown that the high-signature requirement and short petition gather-

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85. *Id.* at 758 (Brennan, J., dissenting).

86. *Id.* at 760-61. Justice Brennan emphasized that the failure of the state to prove the absence of a less drastic means of achieving its objectives "cannot be remedied by the Court's conjecture that other means '*might* sacrifice the political stability of the system of the State. . . .' " *Id.* at 760 (emphasis added by the Court).

87. *Id.* at 762. Brennan's objection to remanding this question was based on his conclusion that the data available to the Court was sufficient to find the California statutory requirements to be unconstitutionally burdensome. *Id.* at 762-63.

88. *Id.* at 738.

89. *Id.* at 739.

90. *Id.* at 740. Although the Court noted that "gathering 325,000 signatures in 24 days would not appear to be an impossible burden," and that "[o]n its face, the statute would not appear to require an impractical undertaking for one who desires to be a candidate for President," the majority conceded that those requirements were substantial. *Id.* Further, the Court reasoned that, "if the additional likelihood is, as it seems to us to be, that the total signatures required will amount to a substantially higher percentage of the available pool that the 5% stipulated in the statute," then the constitutional claim would have some merit. *Id.*

91. *Id.* at 763 (Brennan, J., dissenting). Justice Brennan pointed to the majority's opinion, wherein the Court cited to reports from the Secretary of State which explicitly provided the necessary data. *Id.* (citing 415 U.S. at 742 n.12, and 744 n.14).

ing period were necessary and essential to achieve its important interests.[92] Justice Brennan, again, applied the strict scrutiny standard of review and found the statute did not meet the requirements. He also criticized the majority for not using this test. As Justice Brennan observed, the majority's language implied that it was using a different test, more akin to intermediate scrutiny: instead of the burden of proof falling on the state to demonstrate the necessity for the regulation, plaintiffs had to prove either that there were less drastic means available for the state to use or that the burden placed on their rights by the restrictions was too great.[93]

The Court continued its search for an appropriate standard in *American Party of Texas v. White*,[94] decided the same day as *Storer*. The plaintiffs in *White* challenged several provisions of the Texas election code. They claimed that the Texas laws violated their first and fourteenth amendment rights to freedom of association for the advancement of political beliefs, and the equal protection clause of the fourteenth amendment by invidiously discriminating against new and minority political parties and independent candidates.[95] The challenged laws included a prohibition of pre-primary day petition circulation,[96] a disqualification of persons who voted in the primary from signing petitions,[97] a requirement that each signature be notarized, and a fifty-five day limit for gathering signatures.[98] The plaintiffs also challenged the requirements that candidates from minor political parties be nominated through a series of precinct, county and state conventions, and that minor parties get petition signatures of registered voters equal to at least one percent of the total vote cast for governor in the last general election.[99]

In evaluating the Texas election regulation scheme, the Court noted that whether the laws were seen as placing burdens on the right to associate or as denying equal protection, they must be necessary to

92. *Id.* at 765-66. Brennan concluded that "even conceding the substantiality of its aims, the State [of California] has completely failed to demonstrate why means less drastic than its high percentage requirement and short circulation period—such as the statutory scheme enacted in Georgia—will not achieve its interests." *Id.* at 766.

93. *Id.* at 760-61 (Brennan, J., dissenting).

94. 415 U.S. 767 (1974).

95. *Id.* at 780.

96. *Id.* at 774-75 n.6 (citing TEX. ELEC. CODE ANN. Art. 13.45 (2) (Supp. 1973)). The statute provided that "[t]he petition may not be circulated for signatures until after the date set by . . . this code for the general primary election." *Id.* (quoting TEX. ELEC. CODE ANN. Art. 13.45 (2) (Supp. 1973)).

97. *Id.* (quoting TEX. ELEC. CODE ANN. Art. 13.45 (2) (Supp. 1973)) (The statute provided that "[a]ny signatures obtained on or before that date [of the general election] are void.").

98. *Id.* at 778-79.

99. *Id.* at 776-77.

further compelling state interests to be valid.[100] Although the Court cited *Williams*,[101] the difference in analysis between the two cases is substantial. In *Williams*, the Court applied strict scrutiny after concluding that the regulations at issue infringed fundamental constitutional rights.[102] In contrast, the Court analyzed the restrictions at issue in *White* to determine whether they were invidiously discriminatory.[103] The Court, in *White*, focused on the rights of the candidates, comparing the exigencies of ballot access for minor party candidates with those of Democratic and Republican candidates.[104] The Court did not focus on the impact of the regulations on the *voters'* fundamental rights as it had in *Williams*, and thus effectively shifted the burden of proof of unconstitutionality to the minor party.[105] Because the Supreme Court has never explicitly decided whether minor parties are a suspect classification, warranting the application of strict scrutiny; the *White* majority, instead, chose an intermediate level of scrutiny to analyze the statute.

The Court found that the plaintiffs had failed to meet their burden to show differences between procedures for third parties and those for the two major parties substantial enough to deny equal protection.[106] The Court then looked to the reasonableness of the regulations, and the importance of the state interests involved. The majority found that Texas, in order to avoid voter confusion, had vital interests in maintaining the integrity of the electoral process and regulating the number of candidates. The state could pursue these interests by requiring independent candidates and minor parties to show a significant amount of community support,[107] as long as the restrictions were not "impossible or impractical," and did not "impose[ ] insurmountable obstacles" to obtaining a place on the ballot.[108]

The *White* Court determined that the Texas law prohibiting any person who had voted in a primary from signing a ballot-access petition was tantamount to not allowing people to vote more than once.[109]

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100. *Id.* at 780 (citing Storer v. Brown, 415 U.S. 724, 729-33 (1974)).

101. *Id.* at 780 n.11. The Court cited *Williams* for the proposition that a "compelling state interest" must exist. *Id.* (citations omitted).

102. For a discussion of *Williams*, see *supra* text accompanying notes 46-62.

103. American Party of Texas v. White, 415 U.S. 767, 781-82 (1974).

104. *Id.* at 788-91.

105. *Id.* at 781.

106. *Id.* The Court stated that "[s]tatutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." *Id.* (quoting Ferguson v. Skrupa, 372 U.S. 726, 732 (1963)).

107. *Id.* at 782-83.

108. *Id.* at 783-84.

109. *Id.* at 786. The Court noted that it was within Texas' discretion to confine "voters to supporting one party and its candidates in the course of the same nominating process." *Id.*

The majority also stated that the fifty-five-day limit for collecting signatures was not unduly restrictive, particularly when the party could begin collecting signatures at its nominating convention, and two of the original party plaintiffs had complied with the requirement.[110] As for the requirement that each signature be notarized, the Court found plaintiffs had not met their burden of showing this to be impractical, and the Court stated it was "in no position to disagree" with the district court that this restriction was a valid way for a state to enforce the law prohibiting voters from voting in a primary and then signing a nominating petition.[111] In applying a middle level of scrutiny to the Texas provisions, the majority in *White* concluded that "[w]hat is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot."[112]

In *Jenness*,[113] *Storer*,[114] and *White*,[115] cases decided after *Williams* but prior to *Anderson v. Celebrezze*,[116] the Court applied an intermediate level of scrutiny to determine whether state ballot-access regulations were constitutional.[117] Those cases considered alleged violations of first amendment and fourteenth amendment rights under the equal protection clause.[118] In *Anderson*, however, the Court explicitly shifted from this analysis to one directly based on the first and fourteenth amendments, without an equal protection clause analysis.[119]

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110. *Id.* at 786-87. The Court buttressed its conclusion by noting that a candidate needed only to gather 400 signatures per day over that 55-day period. *Id.*

111. *Id.* at 787.

112. *Id.* at 783.

113. For a discussion of *Jenness*, see *supra* text accompanying notes 63-74.

114. For a discussion of *Storer*, see *supra* text accompanying notes 75-93.

115. For a discussion of *White*, see *supra* text accompanying notes 94-112.

116. 460 U.S. 780 (1983). For a further discussion of *Anderson*, see *infra* text accompanying notes 119-140.

117. Jenness v. Fortson, 403 U.S. 431, 442 (1971) ("There is surely an important state interest . . . in avoiding confusion, deception, and even frustration of the democratic process at the general election."); Storer v. Brown, 415 U.S. 724, 741 (1974) ("it would be difficult to ascertain any rational ground, let alone a compelling interest . . . "); American Party of Texas v. White, 415 U.S. 767, 782 (1974) ("[T]he State's admittedly vital interests are sufficiently implicated. . . ").

118. *See Jenness*, 403 U.S. at 434; *Storer*, 415 U.S. at 729; *White*, 415 U.S. at 779-80.

119. The Court stated the method of analysis adopted in this case:

> [W]e base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the "fundamental rights" strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State's restrictions further legitimate State interests.

460 U.S. at 786 n.7 (citations omitted).

This shift may indicate that the Court is reluctant to apply an intermediate level of scrutiny to adjudicate equal protection claims, except in limited circumstances such as sex discrimination.[120] Perhaps the Court's explicit choice to base its decision in *Anderson* on the first and fourteenth amendments—and not on the equal protection clause—was intended to resolve the uncertainty and instability surrounding a pervasive issue in these ballot-access cases: the appropriate standard of review.[121]

In *Anderson,* the Court invalidated an Ohio provision requiring independent candidates to file nominating petitions and a statement of candidacy in March in order to appear on the general election ballot in November.[122] The Court stated that, although the direct impact of this early deadline fell on candidates, laws that affect candidates usually have some effect on voters.[123]

The Ohio restriction was to limit voters' choices by excluding candidates, thereby burdening the right to freedom of association.[124] The Court recognized that although first amendment rights are fundamental, the "[s]tate's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[125] To fully consider Ohio's interest and the interests of its voters, the Court used a balancing test to determine whether the election law provision uncon-

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120. *See supra* note 62; *see also* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 589-91 (11th ed. 1985).

121. G. GUNTHER, *supra* note 120, at 930.

122. Anderson v. Celebrezze, 460 U.S. 780, 806 (1983).

123. *Id.* at 786. As the Court stated, "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." *Id.* (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972)). *But see* Clements v. Fashing, 457 U.S. 957 (1982). *Clements* involved a challenge to two Texas statutes limiting certain public officials' ability to become candidates for offices other than those they already occupied. *Id.* at 960. Justice Rehnquist, in the plurality opinion upholding the statutes as constitutional, stated that "[f]ar from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" *Id.* at 963 (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972)). The *Anderson* Court distinguished *Clements* from other ballot-access cases by stating that the restrictions on candidate eligibility upheld in *Clements* were unrelated to first amendment values. *Anderson,* 460 U.S. at 788 n.9. Unlike *Anderson,* the provisions involved in *Clements* were restrictions imposed solely on candidates who were already elected officials; therefore, the state's intrusion on the officials' first amendment interests in candidacy for higher office was de minimus. *Clements,* 457 U.S. at 971-72.

124. *Anderson,* 460 U.S. at 787-88. The Court reiterated that the constitutional interests protected in *Anderson* were the voter's interests instead of the candidate's: "our primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson's candidacy and the views he espoused." *Id.* at 806.

125. *Id.* at 788.

stitutionally burdened first and fourteenth amendment rights.[126] The Court would consider the magnitude of the injury plaintiff sought to redress, and then identify the legitimacy of the interests advanced by the state to determine if they justified the burdens imposed.[127]

Applying this test, the Court determined that the burden imposed by the early filing deadline on the candidates, and most importantly, on the voters, restricted the availability of political opportunity for a particular group, and therefore discriminated against independent-minded voters.[128]

In examining the burdens imposed by the early filing requirement, the Court emphasized the dynamic character of a presidential election as November approaches.[129] The March filing deadline prevented candidates who wanted to run as independents from doing so, as well as making it impossible for would-be independent voters to express their preferences.[130] In addition, the early filing deadline also burdened the signature-gathering requirement because volunteers, media coverage, campaign contributions, and voters interested in a campaign are more difficult to secure so early in the election year.[131] Finally, the Court pronounced the early filing deadline a "significant state-imposed restriction on a nationwide electoral process" because, in a national election, the impact of the requirement was not confined to Ohio's borders: the votes cast in one state affected votes cast in other states.[132]

The *Anderson* Court then examined the strength of the state interests asserted to determine whether they justified the burdens placed on voters. The Court found that voter education was a legitimate and important goal, but did not justify the restriction at bar; it was unrealistic for Ohio to suggest that more than seven months were necessary for voters to learn about a candidate solely because he or she did not represent one of the major parties.[133] Nor did the state's interest in political stability justify the burdens imposed. The *Anderson* Court noted that *Williams v. Rhodes* had firmly rejected this as a legitimate interest if it served, in effect, to protect the existing political parties

126. *Id.* at 789.

127. *Id.*

128. *Id.* at 792-94. The Court noted that independent-minded voters were "those voters whose political preferences lie outside the existing political parties." *Id.* at 794.

129. *Id.* at 790-92.

130. *Id.* at 792.

131. *Id.*

132. *Id.* at 795. In a presidential election, the electoral vote is implicated as well as the popular vote. *Id.* at 795 n.19. If Anderson was not on the ballot in Ohio, he would have been unable to compete for 25 electors. *Id.* Ohio has the sixth-largest slate of electors in the country. *Id.*

133. *Id.* at 797.

from competition.[134] First amendment values outweigh any state interest in protecting the Democrats and Republicans. Furthermore, the state's interest in political stability was not as strong when the regulation affected a national election: "No State could singlehandedly assure 'political stability' in the Presidential context."[135] After considering the actual political and social circumstances and effects of the challenged provision on both the candidates and the voters, the *Anderson* majority concluded that the burdens exacted by the Ohio statute were unjustifiable.

In his sharply worded dissent,[136] Justice Rehnquist argued that the majority's conclusion was not supported by the record,[137] and that the standard to be applied was the mere rationality test. Accordingly, if the provision challenged did not freeze the status quo, it should have been upheld as long as it was the means for accomplishing a legitimate purpose, and neither invidious nor arbitrary.[138] Here, Justice Rehnquist found that the law did not freeze the status quo—five independent candidates had qualified for the ballot in 1980.[139] Furthermore, the state had legitimate interests in maintaining political stability and increasing voter awareness and education and constitutionally could, therefore, require independents to file in March.[140]

This series of cases, culminating in *Anderson,* indicates that while the Court consistently has rejected any kind of mathematical standards,[141] its approach to constitutional scrutiny of state regulations is unsettled. In *Williams,* the first ballot-access case, the Court used an equal protection analysis, and the strict scrutiny standard to find the ballot-access regulation challenged unconstitutional.[142] Since then, however, the Court has developed a balancing test to determine whether a regulation is constitutional. The interests the Court must weigh are evident; the standard used to balance them is, however, problematic because it fosters unpredictability.[143] The ramifications of

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134. *Id.* at 802.

135. *Id.* at 804.

136. *Id.* at 806 (Rehnquist, J., dissenting). Justice Rehnquist was joined by Justices White, Powell, and O'Connor. *Id.*

137. *Id.* at 809.

138. *Id.* at 817 (citing Rosario v. Rockefeller, 410 U.S. 752, 762 (1973)).

139. *Id.* at 809.

140. *Id.* at 818.

141. Although the Court questioned the constitutionality of a five-percent petition signature requirement in *Storer,* it was upheld in *Jenness.*

142. *See supra* text accompanying notes 46-61.

143. The Court, in *Storer v. Brown,* acknowledged such results, noting that:

> Decision in this context, as in others, is very much a "matter of degree," very much a matter of "consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." What the result of this process will be

this problem directly affect the right to vote. As the Court has noted, " '[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.' "[144]

The unpredictability and instability generated by the Court's inconsistent approach and the lack of any legislative action by Congress, have allowed state legislators to draft restrictive statutes that are distinguishable on the facts from the Court's pronouncements.[145] In some cases, legislators have explicitly ignored judicial precedent. The New Jersey 1985 legislature changed the deadline for all independent candidates to file petition signatures from late April to early April,[146] even though the late April deadline for independent presidential candidates was specifically declared unconstitutional in 1984.[147] In 1977, the Arkansas independent candidate deadline of April was held unconstitutional and the legislature changed the deadline to June.[148] In 1981, however, the legislature changed the deadline back to March.[149] The Court in *Williams v. Rhodes* declared that state election laws cannot present unduly burdensome obstacles to independent candidates.[150] Yet, Michigan still does not have procedures for independent candidates,[151] so that any independent who desires to be on the ballot must file a lawsuit. Such lawsuits have been filed, one in 1976, three in 1980, one in 1982, and five in 1984.[152]

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in any specific case may be very difficult to predict with great assurance. 415 U.S. 724, 730 (1974) (citations omitted).

144. Williams v. Rhodes, 393 U.S. 23, 31 (1968) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (footnote omitted).

145. For example, the Supreme Court, in *Anderson,* declared Ohio's early-filing deadline for independent candidates unconstitutional; yet, in 1985, the Maine legislature moved their independent presidential candidate filing deadline back from July 1 to the second Tuesday in June. *See* ME. REV. STAT. ANN. tit. 21A, § 354 (8-A) (Supp. 1987).

146. N.J. STAT. ANN. § 19:13-9 (West 1964 & Supp. 1986).

147. *See* LaRouche v. Burgio, 594 F. Supp. 614, 615-16 (D.N.J. 1984) (New Jersey statute setting filing deadline for petition signatures for independent candidates for president and vice-president at 40 days prior to the primary; held unconstitutional).

148. American Party v. Jernigan, 424 F. Supp. 943, 951 (E.D. Ark. 1977).

149. ARK. STAT. ANN. § 7-7-103,-203 (1987).

150. Williams v. Rhodes, 393 U.S. 23 (1968). For a further discussion of *Williams,* see *supra* text accompanying notes 46-62.

151. MICH. COMP. LAWS ANN. § 6.1001-6.2117 (West 1983 & Supp. 1986).

152. While each lawsuit was successful, it took Michigan's legislature until May 1988 to finally pass HB 4099, a law setting requirements for independent candidate's access to the ballot. MICH. COMP. LAWS APP. § 168.590 (West 1988). *See* Goldman-Frankie v. Austin, 727 F.2d 603 (6th Cir. 1984) (independent candidate must be afforded a reasonable opportunity to obtain a ballot position; Michigan's condition precedent, requiring the membership in or formation of a political party, held unconstitutional). *Accord* Johnson v. Austin, 595 F. Supp. 1073 (E.D. Mich. 1984); Hall v. Austin, 495 F. Supp. 782 (E.D.

State legislators have also ignored precedent in the area of filing fee requirements. In the early 70's, the Supreme Court held that states with filing fees had to provide alternatives for indigent candidates.[153] Today, however, Florida requires a ten-cent fee per signature to check the ballot access petitions of third parties and independent candidates.[154] Since Florida requires 167,000 signatures to get a new party on the ballot,[155] a minimum of $16,700[156] would be charged the new party in fees. In 1983, the Eleventh Circuit upheld this law as constitutional.[157]

Without national regulation of this aspect of voting rights, the voting process and access to the ballot are vulnerable to unconstitutional state restriction. State legislatures, composed of Democrats and Republicans, often do not respond to Supreme Court, federal and state court mandates requiring open access to the ballot for independent and third party candidates, thus violating basic freedoms necessary to our democratic society. An analogy between the rationale for federal enforcement of ballot access and the impetus for the Voting Rights Act is apt. Legislation is particularly appropriate where, as here, "there is little basis for supposing that the States and subdivisions affected will themselves remedy the present situation."[158]

III. CONGRESSIONAL REGULATION OF VOTING

The Constitution provides that Congress may make or alter regulations pertaining to the place and manner of congressional elections

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Mich. 1980); McCarthy v. Austin, 423 F. Supp. 990 (W.D. Mich. 1976).

153. Lubin v. Parrish, 415 U.S. 709, 718 (1974).

154. FLA. STAT. ANN. § 99.097(4) (West 1985); *see also* N.C. GEN. STAT. § 163-96(b) (1982 & Supp. 1985) (imposing a five-cent charge per petition signature, and providing no procedure for indigents).

155. *See infra* Appendix B.

156. This cost is not absolute. Florida allows the use of random sampling techniques to reduce the number of signatures checked, thus lowering the cost. FLA. STAT. ANN. § 99.097(1)(b) (West 1985).

157. Libertarian Party v. Florida, 710 F.2d 790 (11th Cir. 1983), *cert. denied*, 469 U.S. 831 (1984). In *Libertarian Party*, the court upheld as constitutional both the ten-cent-per-signature charge, *id.* at 794, and the three-percent petitioning requirement, *id.* at 795. As for the former requirement, the court felt that the minor expenses third parties would incur did not constitute a violation of equal protection. *Id.* (citing American Party of Texas v. White, 415 U.S. 767, 793-94 (1974)). As for the latter, the court determined that the signature requirement was a valid exercise of Florida's goal to assure that minor parties are truly " 'statewide, ongoing organization[s] with distinctive political character.' " *Id.* (citing Storer v. Brown, 415 U.S. 724, 745 (1974)). The court noted that the requirement helped guard against unauthorized use of the party's name and political platform by independent candidates seeking to capitalize on the party's success. *Id.*

158. H.R. DOC. No. 439, 89th Cong., 1st Sess. 19, *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2437, 2450.

except as to the places for choosing senators.[159] Based on this general supervisory power, Congress has enacted a number of laws dividing states into districts for the purposes of elections,[160] fixing the day on which elections are held,[161] and outlawing private interference with the right to vote in federal elections.[162] The Supreme Court has interpreted congressional power over the federal election process broadly.[163] In *United States v. Classic*,[164] for example, the Court declared that for constitutional purposes, a primary is similar to an election, and therefore is subject to congressional regulation.[165] Furthermore, in *Colegrove v. Green*,[166] the Supreme Court held that the Constitution vests Congress with exclusive authority to legislate on the subject of fair districting.[167] The Court reasoned that apportionment is an area best left to

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159. U.S. CONST. art. I section 4. ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except in places of choosing Senators.").

160. *Ex Parte* Yarbrough, 110 U.S. 651, 660 (1883).

161. *Id.* at 661.

162. *Id.* at 655. In *Yarbrough*, a statute making it illegal for two or more private individuals to interfere with a private citizen's right to vote in a federal election was upheld as constitutional. *Id.* at 662. The majority held that Congress has power under article I, section 4 of the U.S. Constitution to make laws protecting and guaranteeing the free and safe exercise of the vote. *Id.*

163. *See* Smiley v. Holm, 285 U.S. 355, 366 (1932). In *Smiley* the Court noted that:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Id.

164. 313 U.S. 299 (1941).

165. *Id.* at 319-20. This decision upheld the constitutionality of sections 19 and 20 of the Criminal Code, 18 U.S.C. §§ 55, 52, as applied to primary elections, which made it illegal for anyone to interfere with the rights of voters to cast their votes and have them count. *Id.* at 324-28. The Court said there was no question that one's right to vote, and to have that vote count, were secured by the Constitution and that Congress had the legislative power to secure that right. *Id.* at 315. The Court determined that the laws passed by Louisiana regulating primaries were an integral part of the general election process, and therefore, were subject to congressional regulation; though states had power to pass laws regarding elections, this power was subject to the legislative power of Congress. *Id.* at 311.

166. 328 U.S. 549 (1946). This case involved a challenge to the boundaries of congressional districts in Illinois. The Supreme Court dismissed the complaint. *Id.* at 556.

167. *Id.* at 554 (citing U.S. CONST. art. I, § 4). In *Baker v. Carr*, however, the Court found this issue justiciable. 369 U.S. 186, 209-11 (1962). Later cases struck down state districting plans on the one person, one vote rationale; that in effect, the districting plans violated each person's right to an effective vote. *See, e.g.*, Gray v. Sanders, 372 U.S. 368 (1963) (the use of a Georgia county-unit election system found to violate the equal pro-

Congress because Congress has the power to secure the right to vote and to ensure that each vote counts in federal elections.[168]

In *Oregon v. Mitchell*,[169] a challenge to the passage of the Voting Rights Act Amendments of 1970, the Court upheld a provision changing the minimum voting age in federal elections from twenty-one to eighteen. Justice Black announced the judgment of the Court,[170] stating that the Constitution granted Congress ultimate supervisory power over the states with regard to federal elections.[171] "In short," the Court declared that, "the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them."[172] According to Justice Black, article 1, section 4 of the Constitution represented a compromise between those who wanted the states to have ultimate authority over all elections, and those who wanted Congress to have sole power to legislate regarding federal elections.[173] Finally, in upholding a provision of the Voting Rights Act Amendments that established uniform national rules for absentee voting in federal elections, Justice Black found that under its broad authority to create and maintain the federal government, "Congress unquestionably has power under the Constitution to regulate federal elections."[174]

The policy reasons enunciated in these precedents support recognizing Congressional power to regulate ballot-access laws. In *Classic*, the Court held that Congress could regulate primary elections when necessary to secure the effectiveness of the right to vote for representatives to Congress. A primary is the route a major party candidate must take to get on the ballot. The Court concluded that it is "an integral

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tection clause of the fourteenth amendment); Reynolds v. Sims, 377 U.S. 533 (1964) (Alabama apportionment scheme held invalid under the equal protection clause since neither legislative house was apportioned on a population basis).

168. *Colegrove*, 328 U.S. at 554. Similarly, federal ballot-access regulation is an area best left to Congress to regulate.

169. 400 U.S. 112 (1970). For a further discussion of *Mitchell*, see *infra* notes 219-26 and accompanying text.

170. *Id.* at 117.

171. *Id.* at 123. The congressional power to regulate states with regard to federal elections is found in article I, section 4 of the U.S. Constitution. *Id.* at 122-23 (citing Smiley v. Holm, 285 U.S. 355, 366-67 (1932)).

172. *Id.* at 123.

173. *Id.* at 119 n.2 (citing 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 280-92 (1st ed. 1833)). Justice Black cited *Ex Parte* Yarbrough, 110 U.S. 651 (1884) and United States v. Classic, 313 U.S. 299 (1941) to reinforce the proposition that Congress had final authority over national elections. *Id.* at 124 n.6. For a discussion of *Yarbrough*, see *supra* note 162 and accompanying text; for a discussion of *Classic*, see *supra* text accompanying notes 164-65.

174. Mitchell v. Oregon, 400 U.S. 112, 134 (1970). Justice Black used this rationale to uphold both the provision for uniform national absentee voting rules and the provision lowering the voting age in national elections.

part of the procedure of choice . . . ," and "an integral part of the election machinery . . . . "[175] Similarly, the regulations for ballot access play a central role in the election process. Petition signatures and other ballot-access requirements are the routes that minor party and independent candidates take to get on the ballot and run for office. These candidates are "nominated" through the ballot-access process. This process effectively determines which independents and third-party candidates will get on the ballot and, therefore, the field from which voters can choose alternatives to the two major party candidates.[176] Ballot access, therefore, affects the fundamental right to vote which the Court has held is within Congress' legislative purview.

The authority to pass comprehensive federal ballot-access legislation of this type also may be based in powers granted to Congress by the fourteenth amendment, which provides that no state shall deny to any person due process of the laws nor equal protection of the laws,[177] and which grants Congress broad legislative power to enforce the amendment.[178] Historically, such congressional enforcement has been remedial; Congress has passed laws designed to implement specific judicially declared rights.[179] For example, 18 U.S.C. § 242 and 42 U.S.C. § 1983 provide civil and criminal remedies for the deprivation of rights protected by the Constitution as interpreted by the Court.[180] The enactment of the Voting Rights Act[181] was the first congressional legislation passed pursuant to the enabling clauses of the Civil War Amendments[182] to go beyond a clearly remedial focus.[183] One of the provisions

175. *Classic*, 313 U.S. at 318.

176. Only 52% of registered voters participated in the 1984 presidential election. FED. ELEC. COMM'N., POST ELECTION REPORT 76 (Jan. 1985). Nearly half of all eligible voters do not vote at all. One suggested reason for this is the limited choice of candidates. Reiter, *Why is Turnout Down?*, 43 PUB. OPINION Q. 297 (1979). Many states have enacted extremely restrictive ballot-access requirements limiting the ability of independent candidates to get their names on the ballot. Representative Conyers and endorsers of H.R. 2320 argue that voters' rights to choose, to vote, and to vote effectively are thereby denied. Telephone interview with Nancy Ross, *supra* note 10.

177. U.S. CONST. amend. XIV, § 1. For the language of this section, see *supra* note 41.

178. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

179. G. GUNTHER, *supra* note 120 at 930.

180. *Id.*

181. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (current version at 42 U.S.C. §§ 1971-1973p. (1982)). The Voting Rights Act was passed pursuant to section two of the fifteenth amendment to the Constitution. G. GUNTHER, *supra* note 120, at 930.

182. The Civil War Amendments—the thirteenth, fourteenth, and fifteenth amendments—were enacted soon after the war to address the problems of slavery and emancipation. G. GUNTHER, *supra* note 120, at 408. Each of the amendments ends with a section giving Congress the authority to enact legislation to enforce its provisions. *Id.* at 409.

183. *Id.* at 930. Congress exercises remedial power when it "provide[s] sanctions

of the Act suspended the use of literacy tests[184] in order to eradicate racial discrimination in voting.[185] The suspension included practices that the Court had already determined were not unconstitutionally discriminatory.[186] A few years before passage of the Act, in *Lassiter v. Northampton Election Board,*[187] a literacy test in North Carolina had been upheld by the Supreme Court. The Court did not find any evidence that the test was being used to perpetuate discrimination.[188] Congress, however, made a determination in passing the Voting Rights Act that states could not use literacy tests to determine whether someone could vote because, in fact, they were being used as part of a plan to deprive Blacks of their right to vote.[189]

In *South Carolina v. Katzenbach,*[190] the state of South Carolina argued that these measures went beyond the bounds of congressional authority.[191] Since the Court had sustained a similar literacy test in *Lassiter,* it was argued the Court should strike down this provision in the Voting Rights Act.[192] The Court held, however, that Congress did

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against practices independently held unconstitutional under Court-announced doctrine." *Id.* Congress goes beyond its remedial power when it determines a state practice to be illegal even though the Court has not found it to be unconstitutional. *Id.*

184. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (1965) (current version at 42 U.S.C. § 1971 (a)(2)(C) (1982)).

185. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). Chief Justice Warren described the discriminatory impact of literacy tests in seven states:

> [I]n each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write. At the same time, alternate tests were prescribed in all of the named States to assure that white illiterates would not be deprived of the franchise. These included grandfather clauses, property qualifications, "good character" tests, and the requirement that registrants "understand" or "interpret" certain matter.

Id. at 311 (footnote omitted). For a further discussion of *Katzenbach,* see *infra* text accompanying notes 190-97; *see also* H.R. Doc. No. 439, 89th Cong., 1st sess. 2, *reprinted in* 1965 U.S. Code Cong. & Admin. News 2437, 2450 (examining the difficulty of enforcement by the Attorney General of the Civil Rights Acts of 1957, 1960 and 1965, and concluding that more effective measures were clearly necessary to enforce the fifteenth amendment).

186. *See* 42 U.S.C. § 1973b(e) (1976) (prohibiting English language tests to voters who were educated in American flag schools in which the predominant language was not English). The Court had found this provision constitutional in Katzenbach v. Morgan, 384 U.S. 641 (1966). For a discussion of *Morgan,* see *infra* text accompanying notes 199-215.

187. 360 U.S. 45 (1959).

188. *Id.* at 53. The Court found that North Carolina's literacy requirement for voters was not unconstitutional on its face, as it was related to the lawful "desire of North Carolina to raise the standard for people of all races who cast the ballot." *Id.* at 54.

189. *See* H.R. Doc. No. 439, *supra* note 185, at 2443-44.

190. 383 U.S. 301 (1966).

191. *Id.* at 325.

192. *Id.* at 333.

not overstep its authority, but rather, that, pursuant to section 2 of the fifteenth amendment, Congress had merely fulfilled its primary responsibility to enforce the rights guaranteed by the Civil War Amendments.[193] Given the difficulties of case-by-case litigation,[194] the Court found that prior judicial adjudication was not a constitutional prerequisite to congressional remedies for voting discrimination. Congressional fact-finding had uncovered an effort in most of the states covered by the Act to effect racial discrimination through literacy tests, thus violating the fifteenth amendment.[195] Even though the Court had upheld the literacy test in *Lassiter,* it found that the passage of this provision of the Voting Rights Act was a legitimate Congressional response to the problem.[196]

The *Katzenbach* Court found that Congress could determine that a state practice fostered racial discrimination and thereby violated the fifteenth amendment.[197] It established that Congress could require states to discontinue certain activities, even if those activities previously had not been held unconstitutional by the Court.[198] This paved the way for the majority opinion in *Katzenbach v. Morgan.*[199]

Morgan involved a challenge to the constitutionality of a provision of the Voting Rights Act of 1965.[200] The provision provided that no one who had completed sixth grade in American-flag schools[201] could be

193. *Id.* at 325-26. The Court reiterated the rule of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), that Congress may use all means which are appropriate in exercising its power toward a legitimate end. The only times in the past when the Court had found Congress to unconstitutionally exercise its powers regarding the fifteenth amendment were when, in the Court's opinion, the legislation did not remedy an evil covered by that amendment. *Id.* at 326.

194. *Id.* at 328. The Court examined the voluminous legislative discussion and fact-finding that went along with passage of the Act. Congress had passed the Civil Rights Acts of 1957 and 1960, and Title I of the Civil Rights Act of 1964 with the objective of facilitating case-by-case litigation to remedy racial discrimination in voting. *Id.* at 313. This process, however, was very slow. Cases took a great deal of time to prepare, and even when favorable decisions were handed down, state officials would make minor changes in the law which sidestepped the federal decisions or ignored them completely. *Id.* at 314. Thus, Congress, based on its power to enforce the fifteenth amendment by appropriate legislation, passed the Voting Rights Act, providing new strict remedies for discrimination. *Id.* at 337.

195. *Id.* at 309, 327-28.

196. *Id.* at 334.

197. *Id.* at 327-28.

198. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments,* 59 NOTRE DAME L. REV. 337, 345-49 (1984).

199. 384 U.S. 641 (1966).

200. *Id.* at 643 (citing Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439, codified at 42 U.S.C. § 1973b(e) (1964 ed., Supp. 1).

201. *Id.* at 652. American-flag schools are American schools in which the predominant language is not English. *Id.* This case involved Puerto Rican citizens schooled in

denied the right to vote because of the inability to read or write English.[202] A New York City law provided that the ability to read and write English was a pre-condition to voter registration.[203] The Attorney General of New York argued that this section of the Voting Rights Act could have been constitutional only if there had been a prior judicial determination that such state regulations were unconstitutional.[204] The Court rejected this reasoning because the Attorney General's argument belittled both congressional resourcefulness and responsibility for enforcing the fourteenth amendment.[205] The majority emphasized that adjudication by the Court was not a prerequisite to congressional legislation. In defining Congress' powers to enforce fourteenth amendment rights, the Court spoke broadly, stating that the Constitution positively grants Congress legislative power to use its discretion to determine whether, and what, legislation is needed.[206] The enactment by Congress of section 4(e) of the Act enforced appropriately the equal protection clause; it was "plainly adapted to that end," and was consistent with "the letter and spirit of the Constitution."[207] Speaking to the conflict between the constitutional right to vote and New York's English literacy requirement, the Court noted: "It is enough that we be

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Spanish in American schools in Puerto Rico. *Id.*

202. *Id.* at 643.

203. *Id.* at 644 (citing N.Y. ELECT. LAW § 150 (McKinney 1949), N.Y. CONST. art. II, section 1 (providing that no one could vote unless they could read and write English)).

204. *Id.* at 648. The Attorney General of New York argued that without the judiciary deciding that the English literacy requirement was unconstitutional, Congress had no power to pass the legislation. *Id.*

205. *Id.* The Court quoted Senator Howard, who described section 5 of the proposed fourteenth amendment as "a direct delegation of power to Congress, . . . It enables Congress, in case the States shall enact laws in conflict with the principles of the Amendment, to correct that legislation by a formal congressional enactment." *Id.* at 648-49 n.8 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2766, 2768 (1866)).

206. *Id.* at 651. This was consistent with the Court's reasoning in *Katzenbach* that Congress had the power to enact the Voting Rights Act pursuant to section 2 of the fifteenth amendment to the Constitution. South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966). The *Katzenbach* Court's only decision was whether the legislation was an appropriate way to remedy an evil that the fifteenth amendment was designed to eliminate. *Id.* at 327-28.

207. Katzenbach v. Morgan, 384 U.S. 641, 651-52 (1966). The Court cited to an earlier decision that had addressed Congress' power under section 5:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 650 (quoting *Ex Parte* Virginia, 100 U.S. 339, 345-46 (1879)). The Court compared the scope of section 5 of the fourteenth amendment with the broad powers in article 1 section 8, clause 18, and said that section 5 was enacted to give Congress those same broad powers. *Id.* at 650.

able to perceive a basis upon which the Congress might resolve the conflict as it did."[208] Congress could decide that the New York law violated the equal protection clause, and pass legislation aimed at striking it down.[209]

Commentators have suggested two possible interpretations of *Morgan*.[210] The Court's decision could be interpreted merely as reaffirming congressional power to pass remedial legislation to enforce the fourteenth amendment. This power enables Congress to select whatever means it finds appropriate to combat judicially defined discrimination against a particular ethnic or minority group.[211] The decision could also be interpreted to mean that Congress can determine that a state practice, which either has not been subject to judicial review or has been subject to such review and held constitutional, violates the equal protection clause, and can legislate to make it illegal.[212]

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208. *Id.* at 653.

209. *Id.* at 656. In his dissent, Justice Harlan, joined by Justice Stewart, proposed that the Court had confused the issues in the case, and thereby wrongfully concluded that the matter was one for congressional determination and not for judicial decision-making. *Id.* at 667. Harlan noted that:

> The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command, that is, whether a particular state practice or, as here, a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch . . . .

Id.

Harlan concluded that the rightful role of Congress was to not limit the effect of *Lassiter* by means of section 4(e), and thus, the majority had erred in finding Congress could do so. *Id.* at 668.

210. *See generally* Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299 (1982); Cox, *The Role of Congress in Constitutional Determination*, 40 U. CIN. L. REV. 199 (1971); Gordon, *The Nature and Uses of Congressional Power Under § 5 of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U.L. REV. 656 (1977); Burt, *Miranda and Title II: A Morganatic Marriage*, (1969) SUP. CT. REV. 81.

211. Choper, *supra* note 210, at 302. The Court described section 4(e) of the Act as "a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by the government." *Morgan*, 384 U.S. at 652. The New York statute made unenforceable by the enactment of section 4(e) was aimed primarily at the Puerto Rican community of New York, depriving them of the right to vote and, in effect, of political power. *Id.* The Court found that without a voice in government, which the statute prevented, Puerto Ricans could not be guaranteed nondiscriminatory treatment in governmental services such as schools, housing and police protection. *Id.*

212. *See generally* Choper, *supra* note 210, at 305; Pilchen, *supra* note 198, at 349; Gordon, *supra* note 210, at 676. Further, the *Morgan* Court acknowledged that "[s]ection 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); *see also* Cox, *supra* note 210, at 228. Cox argues that the *Morgan* Court essentially said that even

Such was the effect of the Voting Rights Act. In *Morgan*, the Supreme Court deferred to Congress' decision to legislate against the state practice, even though the Justices might have sustained that same law.[213]

By either interpretation, *Morgan* is significant not only as an example of judicial deference to a legislative determination of fact,[214] but also as an example of the Court's preference for congressional fact-finding over fact-finding by the states. New York had made findings of

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though Congress' decision regarding the discriminatory effect of the English literacy provision might be different than the Court's own, it would defer to Congress, given the legislature's greater capacity to find facts. *Id.*

213. *Morgan*, 384 U.S. at 657-58; *see also* Gordon, *supra* note 210, at 662; Cardona v. Power, 384 U.S. 672 (1966). In *Cardona*, a companion case to *Morgan*, the Court reviewed a New York Court of Appeals judgment, which had affirmed a trial court's decision holding constitutional a New York statute requiring citizens to satisfy an English literacy requirement as a condition precedent to the right to vote. *Id.* at 673-74. The Court refused to find that the New York law violated equal protection, and remanded the case for further consideration in light of *Morgan*. *Id.* at 674. The dissent contended that the statute had violated it, and would have reversed the court of appeals. *Id.* at 675 (Douglas, J., dissenting).

214. As the *Morgan* Court stated:

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school.

Morgan, 384 U.S. at 653. Some commentators view the *Morgan* decision as a rational approach. The legislature is definitely a better fact-finder than the Court. The legislature commands wider knowledge and keener appreciation of current social and economic conditions than will the typical court, because of a greater number of members and varied backgrounds and experience. Cox, *supra* note 210, at 209. Congress may have a greater capacity to gather and evaluate facts. *Id.* at 228. In *Morgan*, the Court could have decided that Congress could better evaluate whether the New York legislature had an invidious motive in adopting the election law challenged, and whether a less restrictive means could have been used if there was a legitimate state purpose. Burt, *supra* note 210, at 105.

Other commentators offer a somewhat different analysis. Choper argues that *Morgan* stands for the proposition that once the Court has found a state law to be subject to strict scrutiny because it involves either a suspect classification or a fundamental right, Congress can investigate the facts surrounding state action of this type and prohibit the practice if, in Congress' judgment, it lacks the compelling basis which the Court demands to uphold it. Choper, *supra* note 210, at 307-08. Similarly, Gordon argues that with the enactment of section 4(e) of the Voting Rights Act, the provision challenged in *Morgan*, Congress had reappraised the reasonableness of New York's law. Congress examined the state's interests involved and the effect the law had on denying the right to vote to Puerto Rican citizens, and decided that the state's interests were not substantial enough. Thus, Congress enacted section 4(e). According to Gordon, this is a valid exercise of congressional power. Gordon, *supra* note 210, at 676.

fact when enacting the law prohibiting non-English speaking people from voting,[215] and therefore, the Court was forced to choose between the conflicting findings of fact of Congress and the New York legislature. Guided by the supremacy clause, which mandates that federal law preempt state law,[216] the Court was compelled to defer to Congress. "When Congress and a state legislature reach different conclusions, the supremacy clause makes the federal determination paramount,"[217] as long as Congress is within its delegated powers, "one of which is indisputably to enforce the fourteenth amendment."[218]

The Court next addressed the scope of congressional power under the fourteenth amendment in *Oregon v. Mitchell.*[219] *Mitchell* involved a challenge to the constitutionality of several provisions of the 1970 Amendments to the Voting Rights Act.[220] The Court upheld legislation banning literacy tests for five years, establishing nationwide rules for absentee voting, lowering the voting age from twenty-one to eighteen for federal elections, and prohibiting states from applying durational residency requirements for presidential and vice-presidential elections.[221] The decision struck down that part of the amendment that lowered the voting age in state elections.[222] Five separate opinions were

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215. *Morgan,* 384 U.S. at 654.

216. "This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI.

217. Cox, *supra* note 210, at 229.

218. *Id.* at 234; *see also* Oregon v. Mitchell, 400 U.S. 112, 231 (1970), discussed *infra,* notes 219-26 and accompanying text; Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). *Bitzer* involved a challenge to the constitutionality of the 1972 amendments to Title VII of the Civil Rights Act of 1964, authorizing federal courts to award money damages against state governments in employment discrimination suits. The state argued this violated the eleventh amendment. *Bitzer,* 427 U.S. at 451. *Bitzer* had been interpreted as standing for "the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overriden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion into state sovereignty." City of Rome v. United States, 446 U.S. 156, 179 (1980) (constitutionality of Voting Rights Act upheld as applied to Rome, Georgia).

219. 400 U.S. 112.

220. *Id.* at 117. Three provisions were challenged. One lowered the voting age from 21 to 18 in federal and state elections. *Id.* A second provision imposed a complete ban on literacy tests throughout the country. *Id.* The third set uniform national rules for absentee voting and prohibited the states from applying their durational residency requirements for presidential and vice presidential elections. *Id.*

221. *Id.* at 118-19. Durational residency requirements are restrictions imposed by the state requiring a citizen to have resided in the state for a particular amount of time before voting in an election. *Id.* at 285 (Stewart, J., dissenting in part and concurring in part).

222. *Id.* at 118.

filed in the case. Four justices relied on Congress' powers under section 5 of the fourteenth amendment, and one justice relied on article 1, section 4 of the Constitution for Congress' authority to change the voting age in federal elections.[223] Four justices relied on the states' power to regulate state elections under article 1, section 2 to strike down the provision lowering the voting age in state elections.[224]

In *Mitchell*, Justice Brennan reaffirmed *Morgan* as standing for the proposition that Congress could determine that state legislative discrimination exists and pass legislation to bar that discrimination.[225] Four out of the nine justices agreed with this position in *Mitchell* to justify the provision lowering the voting age in both national and state elections.[226]

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223. Justices Brennan, White, and Marshall, and in a separate opinion, Justice Douglas, stated that Congress could determine that it needed to lower the voting age in order to guarantee equal protection of the laws, based on its powers under section 5 of the fourteenth amendment. *Id.* at 144 (Douglas, J., dissenting in part); *id.* 231 (Brennan, White, and Marshall, JJ., dissenting in part and concurring in part). Justice Black relied on Congress' supervisory role over federal elections. *Id.* at 124 (Black, J., announcing the judgment of the Court in an opinion expressing his own views).

224. Justice Harlan maintained that Congress had no power to set voter qualifications under any provision of the Constitution. *Id.* at 154 (Harlan, J., concurring in part and dissenting in part). Justice Stewart, joined by Chief Justice Burger and Justice Blackmun and, in a separate opinion, Justice Black, found that article 1, section 2 precluded Congress from regulating state elections. *Id.* at 125 (Black, J.); *id.* 287-88 (Stewart, J., concurring in part and dissenting in part).

225. *Id.* at 248 (Brennan, White, and Marshall, JJ., dissenting in part and concurring in part). This is a broad reading of Congress' power under section 5 of the fourteenth amendment. Some commentators have suggested that where the Supreme Court has subjected a state law to strict scrutiny, and has upheld it on the grounds that it is necessary to promote a state's compelling interests, Congress can reevaluate the interest the Court found sufficient and if it disagrees with the Court's conclusion, it can enact legislation directed at prohibiting the enforcement of the state law. *See* Choper, *supra* note 210, at 323-24; Gordon, *supra* note 210, at 676. For a discussion of congressional power to enforce the fourteenth amendment with reference to New York's English literacy requirement, see *supra* notes 203-18 and accompanying text.

226. Mitchell v. Oregon, 400 U.S. 112, 135 (1970) (Douglas, J., dissenting in part and concurring in part); *id.* at 240 (Brennan, White, and Marshall, JJ., dissenting in part and concurring in part). Justice Harlan, after a long analysis of the legislative history of the fourteenth amendment, found, as he had in his dissent in Katzenbach v. Morgan, 384 U.S. 641, 665 (1966), that Congress had no power to set any voter qualifications. *Id.* at 154 (Harlan, J., concurring in part and dissenting in part). Chief Justice Burger and Justices Stewart and Blackmun found that to base lowering the voting age on powers under section 5 would be an enormous expansion of Congress' powers as announced in *Morgan*, and therefore, dissented from that part of the opinion. *Id.* at 296 (Stewart, J., concurring in part and dissenting in part).

The provision setting forth uniform rules for absentee voting and banning durational residence requirements for presidential and vice-presidential elections was upheld eight to one. Each of the concurring opinions relied on different sections of the Constitution. Justice Black relied on article 1, section 4 and the broad powers of national government to regulate federal elections, *id.* at 134; Justice Douglas upheld the provision based

This line of cases suggests that if Congress determines that state regulation of federal ballot-access violates candidates' and voters' first and fourteenth amendment rights, Congress can pass remedial legislation, setting standards for state regulation in this area. In a recent dissent,[227] Chief Justice Burger characterized the line of cases interpreting section 5[228] as delineating Congress' power "to enact legislation that prohibits conduct not in itself [judicially declared] unconstitutional because it considered the prohibition necessary to guard against encroachment of guaranteed rights or to rectify past discrimination."[229]

CONCLUSION

This Note has established both Congress' constitutional authority under section 5 of the fourteenth amendment and article 1, section 4 of the Constitution to regulate federal ballot-access, and the need for that regulation. Congress must perform extensive fact-finding to determine whether, and to what extent, states are violating the rights of candidates and voters. Congress is equipped best to determine whether state election regulations on federal ballot-access are necessary to accomplish the legitimate state interests involved. It must legislate to preserve the fundamental right to vote, the right to political association, the right to have one's vote count, and the right of independent-minded voters to reject the alternative offered by the two major parties and vote for the candidate of their choice.

H.R. 1582 establishes consistent standards for state regulation of federal ballot-access requirements, leaving the states with discretion to regulate within federally prescribed guidelines.[230] The legislation

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on Congress' powers under section 5 of the fourteenth amendment to enforce that amendment, specifically with regard to the privilege and immunities clause, *id.* at 150 (Douglas, J., concurring in part and dissenting in part); Justices Brennan, White, and Marshall stated that section 5 of the fourteenth amendment gave Congress the constitutional basis for eliminating a burden on the right to travel, *id.* at 237-39 (Brennan, White, and Marshall, JJ., dissenting in part and concurring in part); Justices Stewart, Burger, and Blackmun relied on the necessary and proper clause, article 1, section 8, to find that Congress has the power to protect the exercise of one of the privileges of United States citizenship, the right to travel, *id.* at 286 (Stewart, J., dissenting in part and concurring in part).

227. Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226 (1983) (Burger, C.J., dissenting).

228. *See* City of Rome v. United States, 446 U.S. 156 (1980); *Mitchell,* 400 U.S. 112 (1970); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); South Carolina v. Katzenbach, 383 U.S. 301 (1966); *Morgan,* 384 U.S. 641 (1966). For further discussion of *Mitchell, Katzenbach,* and *Morgan,* see *supra* text accompanying notes 219-26, 190-99, and 200-18.

229. *Equal Employment Opportunity Comm'n.,* 460 U.S. at 261 (Burger, C.J., dissenting).

230. *See infra* Appendix A.

merely sets floors and ceilings on the number of petition signatures required and prohibits onerous ballot-access requirements. It substitutes consistent national standards for the inconsistency that now exists, and it fosters third-party and independent candidates' contributions to our political process, contributions that clearly have been recognized by the Supreme Court as not only valid, but essential to our democratic system as a whole.[231]

The issues raised by the prospect of federal legislation are extremely timely. Upcoming presidential elections will bring, once again, the issue of third-party ballot-access to the federal forum. In addition, the electorate has suffered a crisis of confidence in our two-party system. Voter apathy is a major problem, only one-third of all those eligible to vote are registered,[232] and only half of those registered actually vote. With Ronald Reagan moving out of the presidential offices and with several independent parties poised on the horizon,[233] Congressional regulation of federal ballot-access would address the rights of millions of voters who currently do not vote.

It is Congress' responsibility to loosen what have become palpable restraints on our democratic system. The electoral process must be liberalized to allow for a truly participatory democracy. As the Supreme Court has noted, "[t]he 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."[234]

Francine Miller

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231. As the *Anderson* Court stated:

> By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream.

Anderson v. Celebrezze, 460 U.S. 780, 794 (1983) (citations omitted).

232. For a discussion of citizens' lack of participation in the electoral arena, see *supra* note 176.

233. Some independent parties include the following: New Alliance Party, Communist Party, Socialist Workers Party, Workers League, Spartacist League, Green Party, Citizens Party, Workers World, Libertarian Party, National Unity Party, Populist Party, U.S. Labor Party, American Independent Party, and the United Sovereign Citizens Party. There is also pressure on Rev. Jesse Jackson to form an independent party with the Rainbow Coalition. Telephone interview with Nancy Ross, *supra* note 8.

234. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

APPENDIX A

This bill, H.R. 1582, 99 Cong., 2nd Sess. (1985), was introduced by Representative Conyers and is now in the Sub-Committee on Elections of the House Administration Committee pending a determination of whether hearings will be held. The text of the bill is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Ballot Access Rights.

A State shall not use any device to abridge or deny the right of an individual to be placed as a candidate on, or to have such individual's political party, body, or group affiliation in connection with such candidacy placed on, a ballot or similar voting materials to be used in a Federal election.

Section 2. Definition of Device.

For the purposes of this Act, the term "device" means any requirement, condition, or prerequisite to being placed on, or having individual's political party, body, or group affiliation placed on, a ballot or similar voting materials, other than a requirement, condition or prerequisite described in section 3.

Section 3. Allowed Requirements for Ballot Access.

(a) Petition—A State may impose any or all of the following requirements, conditions or prerequisites:

(1) That an individual seeking to exercise rights protected by this Act present a petition stating in substance that the signatories desire such individual's name and political party, body, or group affiliation to be placed on the ballot or other similar voting materials to be used in the Federal election with respect to which such rights are to be exercised.

(2) That the political party, body, or group affiliation, if any, of such individual be shown on such petition.

(3) That such petition, to be effective, must have not more than the greater of—

(A) 1000 signatures; or

(B) a number of signatures equal to 1 tenth of 1 percent of the number of registered voters on the date of the most recent previous Federal election, if any, for the office for which such individual is a candidate who voted in such election for such office.

(4) That such petition may be signed only by persons residing anywhere in the bounds of the geographic area from which an individual is to be elected to such office.

(5) That such petition may be circulated only during a period—

(A) beginning not later than the 270th day before the date of the election with respect to which such rights are to be exercised;

(B) ending not earlier than the 60th day before the date of such election.

(b) Party Vote. A State may impose the requirement, condition, or prerequisite that, in order to have an individual's political party, body, or grouping affiliation placed on a ballot or similar voting materials to be used in the Federal election with respect to which rights protected by this Act are to be exercised, without having to satisfy any requirement relating to a petition under section 3(a), that or another individual, as a candidate of that political party, body, or group, must have received whichever is the lesser of—

(1) 20,000 votes; or

(2) 1 percent of the votes cast in the most recent general Federal election for President or Senator in that State.

Section 4. Rulemaking.

The Attorney General may make rules to carry out this Act.

Section 5. General Definitions.

As used in this Act—

(1) the term "Federal election" means a primary, general, special, or runoff election for the office of—

(A) President or Vice President;

(B) Senator;

(C) Representative in, or Delegate or Resident Commissioner to, the Congress; and

(2) the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

APPENDIX B

Number of signatures needed by a Democratic candidate for his party's presidential nomination (assuming he is advocated by the media)

1984

1	Alabama	500
2	California	none
3	Connecticut	none
4	Dist of Columbia	1,000
5	Florida	none
6	Georgia	none
7	Idaho	none
8	Illinois	3,000
9	Indiana	5,000
10	Louisiana	none
11	Maryland	none
12	Massachusetts	none
13	Montana	2,000
14	Nebraska	none
15	New Hampshire	none
16	New Jersey	1,000
17	New Mexico	none
18	New York	10,000
19	North Carolina	none
20	North Dakota	none
21	Ohio	1,000
22	Oregon	none
23	Pennsylvania	1,000
24	Rhode Island	none
25	South Dakota	none
26	Tennessee	none
27	Vermont	1,000
28	West Virginia	none
29	Wisconsin	none

total for the entire nation (i.e., all those states holding Democratic presidential primaries): 25,500 signatures.

In other words, in order to run in every single Democratic pres. primary in 1984, a candidate like Mondale, Hart, or Jackson, only needed 25,500 valid signatures. Texas requires more than this national total for a third party to get on the ballot.