"NO RIGHT IS MORE PRECIOUS": COMMON GOOD SOLUTIONS TO BALLOT ACCESS JURISPRUDENCE

Andrew J. Koehler[†]

INTRODUCTION

The year 2020 was a significant one in many ways, and unfortunately for many of the wrong reasons. For example, the world was met with "seven days of roiling uncertainty" about whether war would break out between the United States and Iran,[1] President Trump faced and was acquitted on two articles of impeachment that were brought against him,[2] the world experienced record-breaking natural disasters,[3] and the murder of George Floyd mobilized millions of citizens into months of demonstration and debate about racial relations and the use of force by police officers.[4]

[†] Andrew Koehler is a J.D. candidate, May 2022, at Ave Maria School of Law. He would like to thank his Note advisors, Professor Patrick Gillen and Katarina Chavez; and all of the editors for their work on this Note. Most importantly, he would like to thank his wife, Rebekah, without whom this Note—or law school, more generally—would not be possible. This Note was written with love for our wonderful country.

1. Peter Baker et al., *Seven Days in January: How Trump Pushed U.S. and Iran to the Brink of War*, N.Y. TIMES (Apr. 27, 2021), https://www.nytimes.com/2020/01/11/us/politics/iran-trump.html. *See, e.g.*, Michael Hirsh, *U.S. Strike Kills One of Iran's Most Powerful Military Leaders*, FOREIGN POL'Y (Jan. 2, 2020, 10:14 PM), https://foreignpolicy.com/2020/01/02/u-s-strike-kills-one-of-irans-most-powerful-military-leaders; Edward Chang, *Whether You Like It or Not, the United States Is at War with Iran*, THE FEDERALIST (Jan. 7, 2020), https://thefederalist.com/2020/01/07/whether-you-like-it-or-not-the-united-states-is-at-war-with-iran.

2. Philip Ewing, *'Not Guilty': Trump Acquitted on 2 Articles of Impeachment as Historic Trial Closes*, NPR (Feb. 5, 2020, 5:43 PM), https://www.npr.org/2020/02/05/801429948/not-guilty-trump-acquitted-on-2-articles-of-impeachment-as-historic-trial-closes.

3. Andrea Thompson, *A Running List of Record-Breaking Natural Disasters in 2020*, SCI. AM. (Dec. 22, 2020), https://www.scientificamerican.com/article/a-running-list-of-record-breaking-natural-disasters-in-2020.

4. Nicholas Pfosi & Jonathan Allen, *Derek Chauvin Sentenced to 22-1/2 Years in Murder of George Floyd*, REUTERS (June 26, 2021, 5:18 AM), https://www.reuters.com/world/us/ex-policeman-derek-chauvin-be-sentenced-george-floyds-murder-2021-06-25; Eliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning That Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html.

As significant as these and other events were in making 2020 "the most difficult year of our lives,"[5] perhaps the two most influential factors to weigh on the lives of Americans were the spread of the novel coronavirus, COVID-19,[6] and the presidential election race between President Donald Trump and then-former Vice-President Joe Biden.[7] These two realities came crashing together to boost "fundraising and campaigning to the digital realm" and encourage voting by mail at an unprecedented level.[8] Crucially, the entrenched political division over deeply personal issues also brought to light a relatively-unknown but, nevertheless, important topic of election law: minor and third party candidate access to the presidential ballot.[9] For example, some states voluntarily eased ballot access requirements for third parties due to the difficulties brought on by campaigning and collecting signatures in the midst of the coronavirus pandemic,[10] such as restrictions on non-essential travel.[11]

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5. Barton Goldsmith, *Getting Through 2020, the Most Difficult Year of Our Lives*, PSYCH. TODAY (Oct. 1, 2020), https://www.psychologytoday.com/us/blog/emotional-fitness/202010/getting-through-2020-the-most-difficult-year-our-lives. Or, as expressed by a recent Time Magazine cover without fear of overstatement, "The Worst Year Ever." Stephanie Zacharek, *The Worst Year Ever*, TIME, Dec. 14, 2020, at 1.

6. *See, e.g.*, *COVID-19 Forecasts: Deaths*, CTRS. DISEASE CONTROL & PREVENTION (June 28, 2021), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us.html; Rachel Treisman, *How Is Each State Responding to COVID-19?*, NPR (Dec. 4, 2020), https://www.npr.org/2020/03/12/815200313/what-governors-are-doing-to-tackle-spreading-coronavirus; Laura Oliver, *It Could Take Three Years for the US Economy to Recover from COVID-19*, WORLD ECON. F. (Mar. 30, 2020), https://www.weforum.org/agenda/2020/03/economic-impact-covid-19.

7. *See* Stephen Ohlemacher & Will Weissert, *Biden Formally Clinches Democratic Presidential Nomination*, ASSOCIATED PRESS (June 6, 2020), https://apnews.com/article/bb261be1a4ca285b9422b2f6b93d8d75.

8. Molly Ball, *How COVID-19 Changed Everything About the 2020 Election*, TIME (Aug. 6, 2020, 6:54 AM), https://time.com/5876599/election-2020-coronavirus.

9. *See, e.g.*, *Changes to Election Dates, Procedures, and Administration in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEDIA, https://ballotpedia.org/Changes_to_election_dates,_procedures,_and_administration_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020#Candidate_filing_modifications (last visited Nov. 11, 2020).

10. *See id.*; Richard Winger, *Fourth Circuit Upholds North Carolina's March 3 Independent Presidential Petition*, BALLOT ACCESS NEWS (Ballot Access News, San Francisco, Cal.), Aug. 30, 2020, https://ballot-access.org/2020/08/30/august-2020-ballot-access-news-print-edition (noting that New York Governor, Andrew Cuomo, eased ballot access restrictions for state races).

11. *See* U.S. Dep't of State, *COVID-19 Travel Restrictions and Exceptions*, TRAVEL.STATE.GOV (June 24, 2021), https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/covid-19-travel-restrictions-and-exceptions.html [https://web.archive.org/web/20211105084402/https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/covid-19-travel-restrictions-and-exceptions.html]; Megan Marples & Forrest Brown, *Covid-19 Travel Restrictions State by State*, CNN (May 22, 2021), https://www.cnn.com/travel/article/us-state-travel-restrictions-covid-19/index.html.

However, in many states, the process has not been so simple.[12] In some cases, ballot access restrictions on minor and independent candidates were eased only after bringing the matter to court.[13] Still, this was not the case in all states, as courts in Pennsylvania[14] and North Carolina,[15] among others, refused to grant such relief. Indeed, the entire topic of ballot access laws is littered with Supreme Court contradiction, such that one can hardly be surprised when constitutional challenges often end in wildly different results.[16] Ballot access jurisprudence has become the very "entangl[ed] web of election laws" that the Court wanted to avoid.[17]

Ballot access laws are the basic rules and procedures which regulate the conditions under which candidates for public office may qualify for presentation to the electorate on the voting ballot.[18] Depending on the criteria met, a candidate may typically be presented to voters in one of three ways: nomination by a political party that has been recognized by the state, as an independent candidate free from affiliation with any political party, or as a write-in candidate who is eligible to receive votes.[19] The authority to promulgate these laws is constitutionally vested within the several states,[20]

12. *See, e.g.*, Winger, *Eight Courts Ease Ballot Access*, BALLOT ACCESS NEWS (Ballot Access News, San Francisco, Cal.), Aug. 30, 2020, https://ballot-access.org/2020/08/30/august-2020-ballot-access-news-print-edition (identifying California, Georgia, Idaho, Maryland, Michigan, Oregon, Rhode Island, and Virginia as states where litigation was necessary to ease ballot access).

13. *Id.*

14. Libertarian Party v. Governor of Pa., 813 F. App'x 834, 834 (3d Cir. 2020); Megan Swift, *Third-party Candidates' Pennsylvania Ballot Requirements Weren't Changed Despite Pandemic*, DAILY COLLEGIAN (Aug. 28, 2020), https://www.collegian.psu.edu/news/state/article_48311174-e8c7-11ea-9007-d353969bcf30.html.

15. Buscemi v. Bell, 964 F.3d 252, 266 (4th Cir. 2020), *cert. denied sub nom.*, Kopitke v. Bell, 141 S. Ct. 1388, 1388 (2021) (mem.).

16. E. Jon A. Gryskiewicz, Note, *Williams v. Rhodes: How One Candidate, One State, One Week, and One Justice Shaped Ballot Access Law*, 28 J.L. & POL. 185, 223–24 (2013).

17. Williams v. Rhodes, 393 U.S. 23, 35–36 (1968).

18. Daniel Baracskay, *Ballot Access*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://mtsu.edu/first-amendment/article/980/ballot-access; *Ballot Access*, BALLOTPEDIA, https://ballotpedia.org/Ballot_access [https://web.archive.org/web/20201108014312/https://ballotpedia.org/Ballot_access] (last visited Nov. 8, 2020).

19. *Ballot Access for Major and Minor Party Candidates*, BALLOTPEDIA, https://ballotpedia.org/Ballot_access_for_major_and_minor_party_candidates [https://web.archive.org/web/20201108013706/https://ballotpedia.org/Ballot_access_for_major_and_minor_party_candidates] (last visited Nov. 8, 2020).

20. U.S. CONST. art. I, § 4. *See also* Baracskay, *supra* note 18 ("The U.S. Constitution decentralizes the election process to the states.").

which, consequentially, sets before each presidential candidate more than fifty unique hurdles to clear.[21]

Although constitutional amendments prohibit states from imposing discriminatory limits to the ballot on the bases of race,[22] sex,[23] payment of poll tax,[24] and age,[25] the states are largely free otherwise to advance their own policy considerations as they relate to ballot access and voting.[26] The mechanisms by which the states control access to the ballot are varied.[27] Most states require that a candidate submit a minimum number of petitions (signatures of prospective voters pledging their support), calculated according to a percentage of registered voters, a percentage of voters from the previous election, or simply a hard and fast limit.[28] States also impose filing fees, justified on the basis of covering the various costs associated with the ballot process.[29] Naturally, these measures must be enforced by deadlines which, depending on how early they appear in the election cycle, present yet another obstacle to the ballot for candidates.[30]

In what amounts to a political positive feedback loop, because of their strong performance in the previous elections, candidates from the Republican and Democratic parties generally qualify automatically for the ballot and thereby bypass the need to meet the traditional criteria of a state.[31] Then,

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21. *See generally* Baracskay, *supra* note 18 ("This deferral of election procedures to state governments, which has remained in place over time, has allowed each state to consider its own unique circumstances and conditions when designing the criteria for access.").

22. U.S. CONST. amend. XV, § 1.

23. U.S. CONST. amend. XIX, § 1.

24. U.S. CONST. amend. XXIV, § 1.

25. U.S. CONST. amend. XXVI, § 1.

26. *See generally* Baracskay, *supra* note 18 (describing constitutional position of deference to the states to better address their individual circumstances and situations concerning ballot access).

27. John P. Avlon, *How Ballot Access Laws Hurt Voters*, CNN (Dec. 30, 2011, 9:41 AM), https://www.cnn.com/2011/12/29/opinion/avlon-ballot-access/index.html ("The United States is the only nation in the world, save Switzerland, that does not have uniform federal ballot access laws, according to Ballot Access News, a website run by Richard Winger that is dedicated to the issue. This may reflect the country's closely held federalism, but it can create chaos in a presidential year.").

28. *See* Baracskay, *supra* note 18.

29. *Id.*

30. Anderson v. Celebrezze, 460 U.S. 780, 806 (1983) (holding that the early filing requirement of March 20th imposed too great a hardship upon the independent presidential candidate tasked with collecting 5,000 signatures).

31. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 25–26 (1968). *See generally* Kevin Cofsky, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. PA. L. REV. 353, 360–61 (1996) ("Most states grant automatic access to the ballot box for majority or existing parties. This status is reevaluated and legitimized on a regular basis, typically by securing a requisite percentage of the vote in a prior general election.").

because the legislators who consider the ballot access laws almost always belong to a major party, they naturally only tend to pass measures which avoid putting their own parties' political aspirations at risk.[32] Thus, the bulk of the ballot access laws work almost exclusively against minor parties and independent candidates.[33]

On July 6th, 2020, the Fourth Circuit Court of Appeals decided the case brought by independent presidential candidate, Kyle Kopitke, against the State of North Carolina for its early filing requirement.[34] The decision ultimately upheld North Carolina's March 3rd independent presidential petition filing deadline as well as the 70,666 petition requirement.[35] The decision, however, seemed to directly contradict the reasoning and overall holding of the precedentially binding case, *Anderson v. Celebrezze*,[36] perhaps due to the self-contradictory and generally confusing nature of Supreme Court decisions on the topic.[37]

This Note focuses primarily on ballot access issues for presidential candidates and is divided into three parts. Part I provides a background of the origins of ballot access laws in the United States and tracks the historical development of the topic through a discussion of the pertinent case law. Part II consists of a discussion of the resulting modern confusion in the wake of conflicting Supreme Court case law as well as an illustration of these concerns through further development of the *Buscemi v. Bell* case.[38] Part III considers proposed resolutions and offers a potential solution in light of a recent resurgence in common good-based discussions of jurisprudence in the academic sphere. A brief conclusion stresses the importance of resolving these issues in a light favorable to robust political dialogue and American notions of liberty.

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32. Cofsky, *supra* note 31, at 360–62.

33. *Id.*

34. Buscemi v. Bell, 964 F.3d 252, 252 (4th Cir. 2020), *cert. denied sub nom.*, Kopitke v. Bell, 141 S. Ct. 1388, 1388 (2021) (mem.).

35. *Id.* at 266.

36. Winger, *supra* note 10.

37. Gryskiewicz, *supra* note 16, at 185, 223–24 (asserting that the Supreme Court has used "the Equal Protection Clause and the First Amendment, strict, intermediate, and rational basis scrutiny; a balancing test; and a system incorporating all of this accumulated flotsam less the Equal Protection Clause."). *See also* Jennifer R. Abrams, *The Supreme Court's Disenfranchisement of the American Electorate: Advocating the Application of Strict Scrutiny When Reviewing State Ballot Access Laws and Political Gerrymandering*, 12 ST. JOHN'S J.L. COMM. 145, 149 (1996) ("The Supreme Court has not provided meaningful guidance for reviewing state ballot access laws.").

38. *Buscemi*, 964 F.3d at 252.

I. LEGAL BACKGROUND

A. *Historical Development of State Ballot Access Control*

It is useful to place any analysis of current challenges to the integrity of our balloting processing in proper historical context. Elections immediately after the birth of the United States followed European *viva voce* tradition[39] and were therefore "conducted orally or by a showing of hands."[40] However, within twenty years, voter intimidation and bribery drove the majority of states to require written votes in the interest of privacy.[41] These first paper ballots were not regulated by the state, which meant that it was up to individual voters to merely write the name of their preferred candidate on a piece of paper.[42] Although these efforts were initially successful in addressing the fraud and coercion that birthed them, voter privacy was again violated when, looking for political advantage, parties began to print and distribute their own paper ballots on brightly-colored paper with unique designs.[43] This led to "an epidemic of vote buying" and harassment emerged as voters could be identified by the colored ballot of their favored candidate.[44] Additionally, because parties and candidates eventually had to cover the costs of printing and distributing their own ballots, many candidates were excluded due to their financial status.[45] By any measure, "these early elections 'were not a very pleasant spectacle for those who believed in democratic government.'"[46]

The United States was not the only country to suffer from such severe intimidation and voter fraud throughout most of the 1800s.[47] Several countries worked to improve election integrity, but it was the Australian system which introduced many of the measures modern voters likely take for granted, such as the erection of private voting booths.[48] Perhaps the most influential change introduced by the Australian system, however, was state sponsorship of an

39. Burson v. Freeman, 504 U.S. 191, 200 (1992).

40. Oliver Hall, *Death by a Thousand Signatures: The Rise of Restrictive Ballot Access Laws and the Decline of Electoral Competition in the United States*, 29 SEATTLE U. L. REV. 406, 416 (2005).

41. *Id.* at 417.

42. *Id.*

43. *Id.*

44. *Id.*

45. Cofsky, *supra* note 31, at 359.

46. Burson v. Freeman, 504 U.S. 191, 202 (1992) (quoting ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 10 (1917)).

47. *Id.*

48. *Id.*

official ballot which, among other things, required the printing of all candidates on the same ticket.[49]

It was hoped that this added secrecy in the election process would, in fact, work to open up the election to more competition from minor candidates by putting them on more equal footing with the larger and more established parties.[50] State regulation of the ballot was thus born of a need to ensure the integrity of the voting results and a desire to sustain healthy political competition.[51] Consequentially, the question of which candidates have access was naturally begged: "[i]t is only when the State undertakes to prepare the ballot and make its use alone mandatory, that official recognition of political groups or parties becomes necessary. In some way now the names which are to appear upon the ballot must be suggested . . . ."[52]

England and Belgium adopted the Australian system in the 1870s and early-adopting states in America followed suit in the late 1880s.[53] States assumed authority as the regulators of both local and federal elections after failing to find authority otherwise allocated in the Constitution.[54] However, in the interest of preserving its own authority, the federal government reserved the power to supersede state election laws.[55] Early ballot access laws eschewed substantive regulation, preferring instead to allow politics and popularity to set the number of candidates.[56]

Moreover, these decisions were grounded in voters' rights—an idea which, even then, cut both ways.[57] For example, Justice Oliver Wendel

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49. *Id.*

50. Gryskiewicz, *supra* note 16, at 191 n.32 (quoting Bradley Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 172–73 (1991) ("The Australian ballot was praised as a device that would open up the two-party system to challenge by third parties. It was hoped that the secrecy of the ballot would not only prevent bribery and outright intimidation, but also the subtler sanctions of ridicule, dislike, and social or commercial injury. As a result, the Australian ballot would break political machines and allow new political competitors to compete on more equal terms with established parties.")).

51. Floyd R. Mechem, *Constitutional Limitations on Primary Election Legislation*, 3 MICH. L. REV. 364, 369–71 (1905).

52. *Id.*

53. *Burson*, 504 U.S. at 202–03.

54. Gryskiewicz, *supra* note 16, at 192.

55. Benjamin D. Black, Note, *Developments in the State Regulation of Major and Minor Political Parties*, 82 CORNELL L. REV. 109, 112–13 (1996).

56. *Id.* at 192.

57. *See id.* (asserting that voters' rights were said to be represented by an interest in voting for their preferred candidate, but also by an interest in being presented with a straightforward and representative ballot).

Holmes stressed a reasonability standard when it came to state regulation,[58] and courts sought to limit discrimination against minor parties.[59] Legislators themselves at this time recognized their precarious footing, as stated by House Representative-turned Circuit Court Judge, George W. McCrary:

> It is within the province of the Legislature to prescribe reasonable rules and regulations for the conduct of elections . . . But it is manifest that under color of regulating the mode of exercising the elective franchise, it is quite possible to subvert or injuriously restrain the right itself; and a statute that clearly does either of these things must, of course, be held invalid . . . .[60]

Therefore, state requirements were minimal and focused more on the efficiency of the electoral process, and, in most states, early candidates needed only to collect a mere 500 or 1,000 signatures.[61] On the other hand, "voter choice" was used to justify limiting a ballot that was feared to become "the size of a blanket" if every nomination were added to the list of candidates.[62] "Write-in" options were introduced as a method of combatting this seemingly necessary regulation,[63] although today some argue that they are used more as a sword than as a concession.[64]

This era of relatively mild state regulation of the ballot, even if unanticipated by the Founding Fathers,[65] led to some third-party success on election day as over 150 third-party Congressmen were elected between 1888 and 1944 (despite the fact that this included a period of time in which some states still had not adopted the Australian system).[66] Successes for those without party affiliation, on the other hand, were more muted.[67] However, even these moderate successes for minor and independent candidates proved

58. Commonwealth v. Rogers, 63 N.E. 421, 423 (Mass. 1902).

59. Gryskiewicz, *supra* note 16, at 192.

60. Black, *supra* note 55, at 109 (alterations in original) (quoting GEORGE W. MCCRARY, AMERICAN LAW OF ELECTIONS 126 (Henry L. McCune ed., Chicago, Callaghan & Co. 4th ed. 1897)).

61. Hall, *supra* note 40, at 417.

62. De Walt v. Bartley, 146 Pa. 529, 543 (1892).

63. Mechem, *supra* note 51, at 372.

64. *See* Gryskiewicz, *supra* note 16, at 193 (explaining that although the ability to write in candidates for office was originally intended to protect the constitutional right to vote in the face of limitations on ballot size, it is now used as a tool to maintain major party dominance by affording minor and independent candidates *some* way to garner votes while keeping the names on the ballot strictly those belonging to a major party).

65. Black, *supra* note 55, at 113.

66. Gryskiewicz, *supra* note 16, at 193–94.

67. *Id.*

to be too much for major party legislators and "political exile from the ballot" proved to be forthcoming.[68]

B. *Supreme Court Intervention and Conflicting Jurisprudence in* Williams *and* Anderson

During the period sketched above, courts generally matched the legislatures' lax approaches to ballot access with highly deferential rational basis review when they could not dismiss the controversies as political questions.[69] However, more significantly restrictive ballot access laws came about after World War I in response to widespread national aversion to communism known as the "Red Scare."[70] For example, some states used their regulatory authority to entirely ban the Communist Party.[71] But even after fears of rising communism began to subside, the restrictive laws and governmental overreach left in their wake remained behind as a yoke upon the backs of non-major party political candidates.[72]

1. Williams v. Rhodes*: A Fateful "First Foray"*[73]

The ballot restrictions in the state of Ohio during the mid-twentieth century were admittedly extreme, even in comparison to other states.[74] But they followed a pattern of development that was common around the country,[75] they demonstrated the overtly political nature of ballot access restrictions at the time,[76] and they set the stage for the first modern Supreme Court opinion on the topic, *Williams v. Rhodes*.[77]

Throughout the 1940s and 1950s Ohio's newly enacted measures most notably included a ban on independent candidates running for President and

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68. *Id.* at 194.

69. Darla Shaffer, Survey, *Tenth Circuit Survey: Ballot Access Laws*, 73 DENV. U. L. REV. 657, 659–60 (1996).

70. Hall, *supra* note 40, at 418. *See also* Marcie K. Cowley, *Red Scare*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://mtsu.edu/first-amendment/article/1063/red-scare (last visited July 5, 2021) (supporting characterization of "Red Scare").

71. Hall, *supra* note 40, at 418.

72. *Id.*

73. Gryskiewicz, *supra* note 16, at 189.

74. *Id.* at 194–95.

75. *Id.* at 194.

76. *Id.* at 195.

77. *See generally id.* at 189.

Vice President.[78] These statutes included other restrictive measures as well, such as moving the petition filing deadline from sixty days before the general election to ninety days before the primary,[79] eliminating write-in voting,[80] and instituting a complex structure of state and national conventions to restrict third-party organization.[81] These measures were so successful that, after 1948 and for a period of twenty years, no third party candidate received a single vote.[82] In fact, when the Supreme Court considered these "substantial . . . burdens" in 1968, it made no qualms about their efficacy:

> The State of Ohio in a series of election laws has made it virtually impossible for a new political party, even though it has hundreds of thousands of members, or an old party, which has a very small number of members, to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States. . . . [T]hese various restrictive provisions make it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties.[83]

Much like 2020, "1968 was a year of turmoil in America. Racial tension, the Vietnam War and President Johnson's withdrawal therefrom, and the assassinations of Senator and presidential candidate Robert Kennedy and Dr. Martin Luther King, Jr. exploded America's collective conscience and any vestigial veneer of political stability."[84] Thus was the socio-political environment in January, 1968, when former Governor George Wallace of Alabama formed the Ohio American Independent Party (AIP) with which he would run for President in the upcoming general election.[85] Over the following six months his campaign collected more than 450,000 signatures to comply with a state rule requiring filings to include petitions in excess of 15% of the ballots cast in the immediately preceding gubernatorial election.[86] Despite its demand for new parties to garner 5% more support than the minimum required of major parties, the incredibly high petition requirement was not at issue in the forthcoming litigation and neither side doubted AIP's

78. Statement as to Jurisdiction at 14, Williams v. Rhodes, 393 U.S. 23 (1968) (No. 543), 1968 WL 129460, at *14.

79. *Id.* at 10–11.

80. Gryskiewicz, *supra* note 16, at 195.

81. *Id.*

82. Statement as to Jurisdiction, *supra* note 78, at 25.

83. *Williams*, 393 U.S. at 24–25.

84. Gryskiewicz, *supra* note 16, at 186.

85. *Williams*, 393 U.S. at 26.

86. *Id.* at 24–26.

compliance.[87] Rather, Wallace took issue with a confluence of rules which required petitions to be submitted by February 7th, 1968, about nine months before the general election, a requirement he claimed to be overly burdensome.[88] AIP eventually missed the filing deadline after allegedly mistaking it to be ninety days before the general election rather than the primary.[89]

The District Court for the Southern District of Ohio granted partial relief by ruling that Ohio's prohibition against write-in ballots denied voters equal protection, but refused to add Wallace to the ballot, finding the claim to be barred by the doctrine of laches.[90] Nevertheless, on appeal, Justice Stewart, perhaps anticipating a sympathetic bench and wishing to avoid problems of practical inefficiency,[91] stayed this ruling with an injunction conditioned upon successful challenge at the Supreme Court.[92] A similar claim for injunctive relief by another minor party, the Socialist Labor Party (SLP), was denied "for failure to move quickly to obtain relief," but was considered along with AIP's claim in oral argument.[93] Thus, the stage was set for the Court's "first foray into a traditional state sphere" on October 7th, 1968—less than one month before the national general election.[94]

Facing an issue of first impression,[95] according to conference notes, many of the Justices appeared at first inclined to decide the case on First Amendment grounds.[96] Justice Douglas, in particular, urged the Court to employ a strict First Amendment analysis, seemingly with the hope of writing the opinion himself.[97] However, Justice Black instead assigned the opinion to himself as

87. *Id.* at 25–27.

88. *Id.*

89. Statement as to Jurisdiction, *supra* note 78, at 6.

90. Socialist Lab. Party v. Rhodes, 290 F. Supp. 983, 987, 990 (S.D. Ohio 1968); *Williams*, 393 U.S. at 27 (1968).

91. Williams v. Rhodes, 89 S. Ct. 1, 1–2 (1968) (order granting preliminary injunction) ("[I]n the absence of a temporary order by me at this time, difficult if not insurmountable practical problems in the preparation of ballots would result, should the judgment of the United States District Court be reversed by this Court.").

92. *Williams*, 393 U.S. at 27.

93. *Id.* at 28.

94. Gryskiewicz, *supra* note 16, at 189.

95. *See Williams*, 393 U.S. at 42 (Harlan, J., concurring); *id*. at 69 (Warren, C.J., dissenting).

96. Gryskiewicz, *supra* note 16, at 201 ("The notes show that although the Justices approached the case differently, they largely agreed that the First Amendment was most applicable to the case, with only Black discussing the Equal Protection Clause.").

97. *Id.* at 201–03 ("On October 8—the day after oral argument and conference— [Justice Douglas] circulated an opinion. The accompanying memorandum stated: 'I have taken the liberty of circulating this

Senior Associate Justice and, with a majority concurring in result and only four concurring in rationale, instead invalidated Ohio's burdensome election laws on equal protection grounds.[98]

In the majority opinion, Justice Black wasted no time in dismissing the State's claims as to justiciability under the political question doctrine as well as absolute power stemming from Article II of the Constitution,[99] at least in so far as it would violate any other constitutionally-based rights.[100] Justice Black found two different and overlapping violations of the First Amendment as applied to the States via the Fourteenth Amendment: "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[101] These, he affirmed, "rank among our most precious freedoms."[102] He recognized these as consonant with the right to vote more generally, noting that, "[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."[103]

Black dismissed each of the State's arguments as sufficiently compelling to justify the restraint on Ohio voters' constitutional rights.[104] Specifically, the State argued that it had an interest in promoting "compromise and political stability" through enforcing a two-party system.[105] Although true, Justice

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rough draft opinion with the thought that it might possibly be helpful in expediting our disposition of the cases.' . . . Douglas' motive may have been to persuade his colleagues of his views. But his conference notes and use of concluding language suggest he hoped to co-opt the opinion. Indeed, he concluded each draft as if he were speaking for the Court, only replacing the plural 'we' with the singular 'I' on October 10. . . . This evidence suggests Douglas had an eye on writing the Court's opinion. A note he wrote to his clerk further supports this interpretation. In his handwritten note, Douglas wrote: 'I have circulated the Ohio opinion with the view that it may be useful in drafting (by someone) of an opinion to come down this week. So, check it over carefully as if I were filing the opinion.' Given that his conference notes indicate that Justices Harlan, Brennan, Fortas, and Marshall agreed with his emphasis of the First Amendment over the Equal Protection Clause, Douglas' pursuit of the opinion makes sense. His colleagues' agreement provides motive and Douglas' opinion drafts and his handwritten memo instill intent in his actions. Yet, no other justice joined him, leaving the unanswerable question, why?").

98. *Id.* at 205–06.

99. U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").

100. Williams v. Rhodes, 393 U.S. 23, 28–29 (1968).

101. *Id.* at 30.

102. *Id.*

103. *Id.* at 31 (quoting the recently decided Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

104. *Id.* ("The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate.").

105. *Id.* at 31–32.

Black argued, this interest evaporates when the two parties are specifically and exclusively Republicans and Democrats.[106] Additionally, Justice Black did not consider the State's interest in ensuring the winner of the election is the one with majority support rather than a mere plurality compelling enough to warrant the steps taken to ensure the outcome.[107] Finally, he dismissed as "no more than theoretically imaginable," the State's claim that loosening ballot restrictions would result in an influx of qualified parties which would render the ballot confusing and unrepresentative of the will of the people.[108] The result under a strict scrutiny analysis was an "invidious discrimination, in violation of the Equal Protection Clause."[109]

Justice Douglas's concurrence took a sharply different stance as to the jurisprudential analysis.[110] Justice Douglas used the words of Justice Black against him, stating:

> Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote. The totality of Ohio's requirements has those effects. It is unnecessary to decide whether Ohio has an interest, "compelling" or not, in abridging those rights, because "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."[111]

Thus, he would have found that such a facial violation by Ohio of the First Amendment right to vote would have made a strict scrutiny analysis inappropriate.[112] Douglas would have also granted declaratory relief for SLP on the merits, for the same reasons as AIP, despite the differences in the size of the parties and the timing of the claims they brought.[113] Justice Harlan concurred, but would have decided the case with a strict scrutiny analysis under the Due Process clause rather than the Equal Protection clause.[114]

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106. *Id.* at 32.

107. *Id.*

108. *Id.* at 33 (internal quotes omitted).

109. *Id.* at 34.

110. *Id.* at 35–41 (Douglas, J., concurring).

111. *Id.* at 39–40 (Douglas, J., concurring) (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 61 (1961) (Black, J., dissenting)).

112. *See id.* at 39 (Douglas, J., concurring) ("I would think that a State has precious little leeway in making it difficult or impossible for citizens to vote for whomsoever they please and to organize campaigns for any school of thought they may choose, whatever part of the spectrum it reflects.").

113. *Id.* at 40–41 (Douglas, J., concurring).

114. *Id.* at 41 (Harlan, J., concurring).

Two dissents were particularly noteworthy. Justice Stewart argued that the states had very broad powers to regulate the ballot, even for political reasons.[115] Although he conceded that some forms of discrimination would be constitutionally unjust (such as racial or sexual discrimination), he would have used rational basis review to decide this case in favor of the state.[116] Justice Stewart's position is significant because he would later author the Court's opinion in the next big ballot access case, *Jenness v. Fortson*.[117]

Chief Justice Warren's dissent seemed driven in part by the need to make such an important decision on so limited time.[118] He also stressed federalism concerns, cautious to tread upon the sovereignty of state power.[119] Notably, however, Chief Justice Warren highlighted several important shortcomings of the *Williams* opinion that would come to plague the courts in the coming years.[120] For example, where the majority opinion only distinguished between the AIP and SLP claims on the basis of laches and available remedy for prudential concerns, Chief Justice Warren saw no reason to distinguish between the cases despite the differences in size of voter support for each party.[121] Perhaps most importantly, the Chief Justice was disturbed by the lack of guidance provided by the opinion noting that "both the opinion of [the Supreme] Court and that of the District Court leave unresolved what restrictions, if any, a State can impose," leaving future courts rudderless to determine the validity of specific ballot restrictions.[122]

Legal scholars correctly predicted that the competing Black and Douglas frameworks, the decision to consider and then sever all Ohio ballot restrictions without analysis of any individual provisions, as well as the failure to identify

115. *Id.* at 49–50 (Stewart, J., dissenting).

116. *Id.* at 50–51 (Stewart, J., dissenting).

117. Jenness v. Fortson, 403 U.S. 431, 432 (1971).

118. *Williams*, 393 U.S. at 63 (Warren, C.J., dissenting) ("We have had but seven days to consider the important constitutional questions presented by these cases. The rationale of the opinion of the Court, based both on the Equal Protection Clause and the First Amendment guarantee of freedom of association, will apply to all elections, national, state, and local. Already, litigants from Alabama, California, Illinois, and Virginia have requested similar relief virtually on the eve of the 1968 presidential election. I think it fair to say that the ramifications of our decision today may be comparable to those of *Baker v. Carr*, 369 U.S. 186 (1962), a case we deliberated for nearly a year. Appellants' belated requests for extraordinary relief have compelled all members of this Court to decide cases of this magnitude without the unhurried deliberation which is essential to the formulation of sound constitutional principles.").

119. *Id.* at 66–69 (Warren, C.J., dissenting).

120. *See* Gryskiewicz, *supra* note 16, at 210–11.

121. *Williams*, 393 U.S. at 64 (Warren, C.J., dissenting).

122. *Id.* at 69.

the jurisprudential distinction based on party size, would lead to confusion and ridiculous results in the near future.[123]

2. Anderson*'s "Political Thicket":*[124] *Attempting to Navigate Post-*Williams

Despite the haste with which it was decided, *Williams* ushered in a new era of ballot access jurisprudence.[125] Unfortunately, this new era was marked with confusion and contradiction, and received, to put it politely, "harsh criticism."[126] This was at least in part because of the Supreme Court's self-contradiction in employing rational basis review in *Jenness v. Fortson*.[127] *Jenness* involved a class action lawsuit brought by voters and prospective political candidates who challenged Georgia's filing fee (equal to 5% of the salary of the office sought after) and petition requirement (5% of registered voters).[128] Although the opinion gave a detailed account of the *Williams* case, it essentially went no further than differentiating *Williams* from the facts of the case at bar.[129] As for its analysis, the Court's opinion, written by Justice Stewart, considered the state-imposed restrictions, but not in their totality as it did in *Williams*, and failed to utilize any language indicating strict scrutiny.[130] Rather, it found "an important state interest" in ensuring that the candidates' names on the ballot are backed by a "modicum of support."[131] In this way, it did not employ strict scrutiny, but applied a somewhat lesser degree of review more akin to rational basis—if it balanced the interests involved at all.[132]

Jenness was merely the first of many examples of Supreme Court waffling on whether to consider restrictions individually or collectively, and which level of scrutiny to apply in constitutional challenges to ballot access laws in

123. Gryskiewicz, *supra* note 16, at 212 n.169.

124. Shaffer, *supra* note 69, at 660.

125. *Id.*

126. *See id.* at 657 n.5 (providing sources which assert that the opinion offered "an especially pervasive degree of uncertainty and instability regarding the appropriate level of scrutiny," which describe the Court's inconsistencies as "striking" and "positively delphic," and which "lambast[e] the Supreme Court's opinions so viciously as to imply utter incompetence in this area." (citations omitted)).

127. *Id.*

128. Jenness v. Fortson, 403 U.S. 431, 432 (1971).

129. *Id.* at 441–42.

130. *Id.* at 442.

131. *Id.* Some have argued that this looser stance was in response to ballot access abuse in *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 986, 997 (S.D.N.Y. 1970), *aff'd*, 400 U.S. 806 (1970). *See* Gryskiewicz, *supra* note 16, at 214 n.197.

132. Shaffer, *supra* note 69, at 660.

the years immediately following *Williams*.[133] After *Williams*' strict scrutiny standard was established in 1968,[134] and then ignored in 1971 in *Jenness*,[135] the Supreme Court again applied strict scrutiny in *Bullock v. Carter* (1972)[136] and in *Lubin v. Panish* (1974).[137] However, it then applied a mixture of strict and minimal scrutiny in two more 1974 cases, *Storer v. Brown*[138] and *American Party v. White*.[139] One of the most telling (and famous) signs of judicial confusion was apparent in Justice Blackmun's concurrence in *Illinois State Board of Elections v. Social Workers Party* which purported to use strict scrutiny in 1979:[140]

> Although I join the Court's opinion and its strict-scrutiny approach for election cases, I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as "compelling [state] interest" and "least drastic [or restrictive] means." I have never been able fully to appreciate just what a "compelling state interest" is. If it means "convincingly controlling," or "incapable of being overcome" upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, "least drastic means" is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down. . . .
>
> I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and I must endeavor to disassociate myself from them. Apart from

133. *See id.* at 657 n.6.

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

135. *Jenness*, 403 U.S. at 442.

136. Bullock v. Carter, 405 U.S. 134, 144 (1972). As further evidence of the Court's struggles in fashioning a remedy and confusion as to precedent, Justice Burger openly asked in deliberation, "How far do we go?" Gryskiewicz, *supra* note 16, at 216.

137. Lubin v. Panish, 415 U.S. 709 (1974).

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

139. *See* Am. Party v. White, 415 U.S. 767, 780–81 (1974).

140. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188 (1979) (Blackmun J., concurring).

> their use, however, the result the Court reaches here is the correct one. It is with these reservations that I join the Court's opinion.[141]

Clements v. Fashing, on the other hand, used a combination between a balancing test and rational basis review in 1982.[142] In none of these cases did the Court explicitly overrule *Williams*.[143] The Supreme Court finally decided to take up *Anderson v. Celebrezze* in 1982 with the intention of clarifying the matter,[144] an effort which history would ultimately find unsuccessful.[145]

In *Anderson*, the Court heard the case of another Ohio petitioner, John Anderson, who sought to have his name added to the presidential ballot as an independent candidate.[146] He announced his campaign on April 24th, 1980, and complied with all substantive requirements set by the state (signature, required documents, and filing fees) by May, 1980.[147] However, Ohio's deadline for submission of the required signatures was March 20th.[148] Therefore, Anderson's application for candidacy was rejected as the deadline was passed even before Anderson announced his candidacy.[149] Anderson and two voters filed suit in federal district court which "granted [their] motion for summary judgment and ordered [the state] to place Anderson's name on the general election ballot."[150] The District Court for the Southern District of Ohio found the restrictions unconstitutionally burdened the First Amendment and equal protection rights of the plaintiffs.[151] Similar suits filed by Anderson in other states were treated in like manner.[152] However, the Sixth Circuit Court of Appeals reversed and found for the state.[153]

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141. *Id.* at 188–89.

142. Clements v. Fashing, 457 U.S. 957, 965–66 (1982).

143. *See generally* Black, *supra* note 55, at 122–23 (stating that in the cases following *Williams*, the Court failed to explain the level of scrutiny to apply).

144. Anderson v. Celebrezze, 460 U.S. 780, 786 (1983).

145. *See* Jacqueline Ricciani, Note, Burdick v. Takushi*: The* Anderson *Balancing Test to Sustain Prohibitions on Write-In Voting*, 13 PACE L. REV. 949, 970 (1994).

146. *Anderson*, 460 U.S. at 782.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 783.

151. Anderson v. Celebrezze, 499 F. Supp. 121, 139 (S.D. Ohio 1980); *Anderson*, 460 U.S. at 783–84.

152. *Anderson*, 460 U.S. at 786.

153. Anderson v. Celebrezze, 664 F.2d 554, 567 (6th Cir. 1981). As it happened, the State did not request a stay in their appeal of the District Court's ruling and Anderson was therefore left on the ballot where he received 5.9% of the vote in Ohio and 6.6% of the vote nationally. *Anderson*, 460 U.S. at 784–85.

Justice Stevens' majority opinion began with an affirmation of the right to vote as constitutionally protected at a basic level and necessarily at odds with ballot access restrictions and went so far as to call the resulting tension "our primary concern."[154] After a brief discussion of the jurisprudential concerns illuminated in its ballot access case law,[155] the Court set forth a balancing test to be used to determine the constitutionality of a restriction:

> [The Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[156]

The Court proceeded to apply this test to the case at hand.[157] It first considered the burden upon the right to vote based upon the ballot access scheme as a whole, particularly upon Anderson's supporters who could not vote for their candidate.[158] The Court found that those subject to the early filing deadline were disproportionately disadvantaged by limited flexibility in choosing their candidate and responsiveness to political issues that might come up later in the election season in comparison to supporters of major political parties which were not subject to the same restrictions.[159]

In its treatment of the second part of the new balancing test, the Court considered each interest asserted by the state.[160] For example, the state asserted an interest in encouraging an "informed" and "educated" electorate.[161] While legitimate, this interest did not necessitate a deadline as early as seven months before the general election.[162] The Court also disagreed that the state's purported interest in equal treatment of all candidates was met by requiring all

154. *Anderson*, 460 U.S. at 786.
155. *Id.* at 786–88.
156. *Id.* at 789.
157. *Id.* at 789–806.
158. *Id.* at 790–92.
159. *Id.*
160. *Id.* at 796.
161. *Id.*
162. *Id.* at 796–97.

to file a statement of candidacy in March.[163] Finally, the state asserted that the restrictions promoted political stability by eliminating self-defeating infighting between the two major parties.[164] The Court saw through this cleverly deceptive framing and concluded that this interest amounted to "a desire to protect existing political parties from competition."[165] The Court affirmed its holding in *Williams* that protection of major political parties "cannot justify the virtual exclusion of other political aspirants from the political arena."[166]

The Supreme Court ultimately reversed the ruling of the Court of Appeals and ruled in Anderson's favor, considering the state interest in an early filing deadline to be "minimal."[167] *Anderson* seemed to indicate the Court was shifting the basis for its decisions to a First Amendment rationale, even as it admitted its reliance on cases that had rested on equal protection grounds.[168] More importantly, the Court made its use of a balancing test to be clear.[169] What remained unclear, however, was the extent to which it utilized strict scrutiny, or if it didn't, what level of scrutiny should be applied in future cases.[170] In considering the state's interests in advancing the totality of the ballot access restrictions (rather than the restrictions individually), the Court failed to require a showing of narrowly tailored means to advance a compelling state interest.[171] Conference notes from the case seem to indicate that the Justices meant to abandon strict scrutiny,[172] but, crucially, the Court failed to indicate that it was overruling *Williams*, leaving commentators and future courts still confused as to which standards to apply.[173]

C. *Establishing the Modern Test:* Burdick v. Takushi

Despite its noted shortcomings, *Anderson* at least provided a more flexible test that could be readily applied across a variety of circumstances; however,

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163. *Id.* at 801.
164. *Id.*
165. *Id.*
166. *Id.* at 802.
167. *Id.* at 806.
168. *See* Ricciani, *supra* note 145, at 965–66.
169. *Id.* at 969–70.
170. *Id.*
171. *Id.*
172. *See* Gryskiewicz, *supra* note 16, at 221 (Justice Rehnquist seemed to echo Justice Blackmun's *Illinois State Bd. of Elections v. Socialist Workers Party* concurrence stating that "strict scrutiny is judicial puppetry").
173. *See* Ricciani, *supra* note 145, at 970.

in the first ballot-access case to come before the Supreme Court after *Anderson*, the *Anderson* balancing test was nowhere to be found.[174] In *Munro v. Socialist Workers Party*, a challenge to a 1% petition requirement, the Court mentioned strict scrutiny but, in *ad hoc* fashion, resolved the case by simply finding the restrictions less burdensome upon First Amendment freedoms than those in previously decided cases.[175] Justice Marshall's dissent likewise failed to mention the *Anderson* balancing test but argued for application of strict scrutiny.[176] To make matters worse, the very same day that *Munro* was decided, the Court *did* seem to apply the *Anderson* balancing factors in *Tashjian v. Republican Party*, a case wherein the Court struck down a state requirement that primary voters be registered members of the respective party to vote.[177] Later, in *Norman v. Reed*, the Court seemed to utilize strict scrutiny—and not *Anderson*'s balancing test—in a challenge to a petition requirement.[178] As confusing as it was, some commentators tried to see through the fog to argue that the Court was really laying the foundation for a broader analytic framework that included both strict scrutiny and *Anderson*'s balancing test.[179] Thus, despite the Court's efforts to set the record straight in *Anderson*, more clarification was needed.[180]

In *Burdick v. Takushi*, the Court attempted to answer these questions as it considered Burdick's challenge to Hawaii's total ban on write-in voting for the general election.[181] Specifically, Burdick believed that Hawaii's ban on write-in voting unconstitutionally prohibited him from writing in "Donald Duck" in protest of what he considered to be a politically foreclosed election system.[182] The Court again recognized that any regulation of the ballot would burden voters' rights, but then went on to reject a flat application of strict scrutiny as too burdensome upon legislators' needs to regulate the ballot for a fair election.[183] Ultimately, the Court confirmed the use of a multi-level

174. *Id.* at 972–73.

175. Munro v. Socialist Workers Party, 479 U.S. 189, 199 (1986).

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

177. Tashjian v. Republican Party, 479 U.S. 208, 214 (1986). *But see* Ricciani, *supra* note 145, at 975 (suggesting that when reading *Tashjian* in context with a later case, *Eu v. San Francisco Cnty. Democratic Cent. Comm*, 489 U.S. 214 (1989), it appears that "the Court apparently believed that it had applied strict scrutiny in *Tashjian*, even though it was not readily apparent from that opinion").

178. Norman v. Reed, 502 U.S. 279, 293–94 (1992).

179. *See* Ricciani, *supra* note 145, at 979.

180. *See* Todd J. Zywicki, *Federal Judicial Review of State Ballot Access Regulations: Escape from the Political Thicket*, 20 T. MARSHALL L. REV. 87, 116 (1994).

181. Burdick v. Takushi, 504 U.S. 428, 433 (1992).

182. *Id.* at 438.

183. *Id.* at 434.

scheme whereby *Anderson*'s balancing test is used to determine the "character and magnitude" of the burden imposed, and then, if severe restrictions are found, strict scrutiny is applied according to *Norman*.[184] If severe restrictions are not found, however, the rest of the *Anderson* test is to be applied.[185] Eventually, the Court held that Hawaii's total ban on write-in voting constituted only a minor burden upon voters' rights because, among other things, it was predicated upon the state's permissive access to the primary ballot.[186]

The implications of *Burdick* were significant. *Burdick* seemed to prove that a larger framework was indeed intended, although a wide difference of opinion exists as to whether *Burdick* clarified, built upon, or simply applied *Anderson*'s test.[187] Additionally, *Burdick* established that these ballot access inquiries could not be subjected to any kind of a "litmus-test," but would instead be subjected to case-by-case consideration[188] (despite judicial conference notes suggesting concerns over the *ad hoc* nature of the area jurisprudence[189]). Finally, *Burdick* established "that the constitutionality of a specific provision" in question (such as a total ban on write-in voting) would be evaluated in the context of the state's ballot-access scheme in its entirety.[190] If one thing is clear, it is that the Supreme Court's meandering case law demonstrates the Court's desire to move away from its knee-jerk application of strict scrutiny in *Williams*, and towards a more restriction (and, by implication, major-party) friendly *Anderson-Burdick* test that requires a "severe burden" to have any teeth.[191]

II. CONTINUED CONFUSION AND MODERN APPLICATION

A. *Remaining Uncertainty After* Burdick

Concerns that the Court failed to adequately clarify the matter remained after *Burdick*.[192] For example, the *Anderson-Burdick* test failed to specify the scrutiny to apply to a non-severe burden, stating only that in such cases "the

184. *Id.*
185. *Id.*
186. *Id.* at 441.
187. *See* Gryskiewicz, *supra* note 16, at 223.
188. Zywicki, *supra* note 180, at 116.
189. Gryskiewicz, *supra* note 16, at 223.
190. *See* Ricciani, *supra* note 145, at 999.
191. Black, *supra* note 55, at 126–27; Shaffer, *supra* note 69, at 663.
192. Zywicki, *supra* note 180, at 117.

State's important regulatory interests are generally sufficient to justify the restrictions."[193] This has led some courts to apply rational basis review to such minor restrictions.[194] However, others have interpreted a three-tier approach "whereby severely burdensome restrictions receive strict scrutiny, less problematic laws serving legitimate state objectives are balanced against the party's or voter's interests, and rational basis review is used for other more benign regulations."[195] Finally, at least one court has utilized a sliding scale approach, holding that the level of scrutiny to apply is directly proportional to the burden imposed upon the rights in question.[196] Some modern commentators have agreed with this interpretation.[197] Thus, the adequate level of review remains elusive.[198]

Additionally, the Court provided few signposts for lower courts to determine how restrictive a regulation is for purposes of review.[199] Even the Supreme Court in *Storer v. Brown* had so much trouble with this question that it remanded for further factual inquiry.[200] Part of this confusion may stem from the Court's failure to distinguish between which constitutional rights trigger the analysis to begin with: although free expression was walked back in write-in cases by *Burdick*,[201] it, along with associational and due process rights are all implicated to some level without much distinction or direction from the case law.[202] This has led to criticism of the approach as "largely results-based, with legal doctrine following as post hoc rationalizations for decisions already reached. [For w]hen the Court applies heightened scrutiny, it seemingly does so only after determining that the regulations in question are especially draconian."[203]

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193. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

194. *See, e.g.*, Libertarian Party v. Munro, 31 F.3d 759, 761 (9th Cir. 1994); Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992); New All. Party v. N.Y. State Bd. of Elections, 861 F. Supp. 282, 294 (S.D.N.Y. 1994).

195. Black, *supra* note 55, at 126.

196. Patriot Party v. Mitchell, 826 F. Supp. 926, 934 (E.D. Pa. 1993) ("This formulation makes the severity of the access law directly proportional to the degree of scrutiny it will receive by a court.").

197. MICHAEL DIMINO ET AL., VOTING RIGHTS AND ELECTION LAW 1081 (1st ed. 2010).

198. *See* Zywicki, *supra* note 180, at 116.

199. *Id.*

200. Storer v. Brown, 415 U.S. 724, 738–46 (1974).

201. Black, *supra* note 55, at 144; Shaffer, *supra* note 69, at 663.

202. Leonard P. Stark, *You Gotta Be on It to Be in It: State Ballot Access Laws and Presidential Primaries*, 5 GEO. MASON L. REV. 137, 147–51 (1997) (also noting that, despite its relevance, *Burdick* failed to address exactly how it would apply to presidential primary cases).

203. Zywicki, *supra* note 180, at 108.

Even more concerning, because the Court has continued to reach back to prior cases in the development of its case law on the matter without ever overruling itself, evidence suggests that there remains confusion on even what tests to apply.[204] Thus, courts are left feeling the need to choose between the various tests utilized by the Supreme Court.[205] And, in one case, *Perry v. Judd*, the judge found it best to simply apply all levels of judicial scrutiny[206]—an effort hardly in the interest of judicial efficiency and predictability.

B. *Modern (Mis)application*

Recently, *Buscemi v. Bell*[207] took yet another route in finding for the State—not applying *Anderson* at all.[208] In *Buscemi*, three plaintiffs brought suit challenging North Carolina's ballot-access scheme as violative of their First and Fourteenth Amendment rights.[209] All of the claims were dismissed by the United States District Court for the Eastern District of North Carolina.[210] Subsequently, although it dismissed two of the claims for lack of standing,[211] the Fourth Circuit considered the merits of Kyle Kopitke's grievance with the state's petitioning requirements for independent presidential candidates.[212] In North Carolina, independent presidential candidates were required to "collect the signatures of at least 1.5% of those who voted in the last gubernatorial election."[213] The state required that these

204. Cofsky, *supra* note 31, at 401–03; Gryskiewicz, *supra* note 16, at 223–24.

205. Gryskiewicz, *supra* note 16, at 225–26.

206. Perry v. Judd, 840 F. Supp. 2d. 945 (E.D. Va. 2012).

207. Buscemi v. Bell, 964 F.3d 252 (4th Cir. 2020), *cert. denied sub nom.*, Kopitke v. Bell, 141 S. Ct. 1388, 1388 (2021) (mem.).

208. *See* Winger, *supra* note 10.

209. *Buscemi*, 964 F.3d at 256.

210. *Id.* at 256–57; Buscemi v. Bell, No. 7:19-cv-00164-BO (Nov. 22, 2019) (PACER).

211. Kyle Kopitke, a Michigan native and independent candidate for president, challenged the state's law which prohibits ballot-access to someone who is not a registered voter. *Buscemi*, 964 F.3d at 259. Kopitke claimed that the state's regulation would keep him from the ballot in North Carolina because he is registered to vote in Michigan. *Id.* However, the State contended that the registered voter requirement merely required that a candidate be registered to vote *somewhere*, rather than not at all, and furthermore that Kopitke could not prove a "credible threat of enforcement." *Id.* at 260 (quoting Abbott v. Pastides, 900 F.3d 160, 176 (4th Cir. 2018)). William Clark, a North Carolina voter, argued, similarly to Burdick, that the state's petitioning requirement for write-in candidates unconstitutionally prevented him from voting for any write-in candidate of his choosing. *Id*. The Court thought that, based upon his pleading and upon the scheme's dissimilarity to that of *Burdick*, "Clark's generalized allegation of harm is too speculative to constitute an 'actual or imminent' injury necessary to confer Article III standing." *Id.* at 261 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

212. *Id.* at 261.

213. *Id.* at 257.

signatures, amounting to 70,666,[214] be submitted no later than the date of the state's primary, which fell on March 3rd, 2020.[215] Notably, despite claiming the petition requirement was too high and the deadline was too early, Kopitke conceded that he would not be able to meet any reduced requirement or delayed deadline.[216]

The court first considered Kopitke's challenge to the timing of the signature deadline.[217] Although it did state the *Anderson-Burdick* test, in its application, the opinion relied heavily upon the Fourth Circuit's 2014 opinion, *Pisano v. Strach*.[218] In *Pisano*, the court considered challenges to the state's restrictions on the formation of a political party (not ballot access) and upheld a filing deadline of mid-May, one week after the state's primary election.[219] The court found it appropriate to compare *Buscemi* to *Pisano* because in each case the deadline was near the date of the state's primary election.[220] It further afforded "little weight" to an independent candidate's burden of contending with an early deadline rather than a late one.[221] Therefore, it found only a "modest burden" upon Kopitke's asserted rights.[222]

On this issue, the Fourth Circuit seemed woefully ignorant of the most on-point binding precedent that it had available: *Anderson v. Celebrezze*.[223] Because it also considered an independent candidate's challenge to a March filling deadline,[224] the Supreme Court's *Anderson* opinion would have made far better analogy than *Pisano,* which considered a much later filing deadline for a new political party application as opposed to Kopitke's ballot access question.[225] Ironically, later in its opinion, the court chastised Kopitke for making a very similar "apples to oranges" comparison to *Pisano*.[226] In *Anderson*, the Court stated that an early filing deadline could have a

214. *See* Winger, *supra* note 10.

215. *Buscemi*, 964 F.3d at 257.

216. *Id.* at 262 (notably demonstrating a breaking point from analogous facts of *Anderson* and calling into question whether it may affect the outcome of a contrary ruling).

217. *Id.* at 263.

218. *Id.* (citing Pisano v. Strach, 743 F.3d 927 (4th Cir. 2014)).

219. *Pisano*, 743 F.3d at 935–36.

220. *Buscemi*, 964 F.3d at 263.

221. *Id.*

222. *Id.*

223. *See* Winger, *supra* note 10.

224. Anderson v. Celebrezze, 460 U.S. 780, 782–83 (1983).

225. Pisano v. Strach, 743 F.3d 927, 935–36 (4th Cir. 2014).

226. *See Buscemi*, 964 F.3d at 264–65 (finding the comparison "unavailing" when Kopitke attempted to argue that the 1.5% petition requirement was unduly burdensome in light of the considerably smaller 0.25% petition requirement placed upon those wishing to incorporate a new political party).

"substantial impact" upon the rights of the parties.[227] The Court recognized that because the political atmosphere in an election year is subject to constant change, developments later in the year create new opportunities for independent candidates that they would not otherwise be able to take advantage of were they subject to an early filing deadline (which it identified as mid-March).[228] The Court stated:

> If the State's filing deadline were later in the year, a newly emergent independent candidate could serve as the focal point for a grouping of [state] voters who decide, after mid-March, that they are dissatisfied with the choices within the two major parties. As we recognized in *Williams v. Rhodes*, 393 U.S., at 33, "[s]ince the principal policies of the major parties change to some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected 'group' will rarely if ever be a cohesive or identifiable group until a few months before the election." . . . Not only does the challenged [state] statute totally exclude any candidate who makes the decision to run for President as an independent after the March deadline, it also burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline. When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.[229]

Not only did the Fourth Circuit stray from the Supreme Court's precedent on this point, it also gave great deference to its *Pisano* conclusion that a petition deadline near a primary election is *de facto* reasonable—a finding entirely absent from any Supreme Court case law, including *Anderson*.[230] The Fourth Circuit would be in no better company with lower court decisions which have never found the date of a state's primary to have been important,[231] and have never found a filing deadline for an independent candidate

227. *Anderson*, 460 U.S. at 790.

228. *Id.* at 790–91.

229. *Id.*

230. *See* Winger, *supra* note 10 ("The decision says that petition deadlines are only unconstitutional if they are earlier than that state's primary. That statement is untrue for presidential independent deadlines, and there is no other precedent, relative to presidential petitions, that agrees with *Buscemi*. Nothing in *Anderson v. Celebrezze* says that the date of a primary relates is relevant.").

231. *See id*. In fact, some courts have found an independent candidate's filing deadline to be too early even if it was after the state's primary election, *id. See, e.g.*, Nader 2000 Primary Comm., Inc. v. Hazeltine, 110 F. Supp. 2d 1201 (D.S.D. 2000).

constitutional before mid-May.[232] Ironically, the Fourth Circuit itself *did* consider John Anderson's challenge (of *Anderson v. Celebrezze*[233]) to a March 3rd filing deadline, finding it to be impermissibly early and of no relation at all to the primary election.[234]

The court then considered Kopitke's challenge to the number of signatures required for access to the ballot.[235] The court started by (contrary to the first step of the *Anderson-Burdick* test) mentioning the state's "important" interest in imposing petition requirements.[236] It then concluded that because the 1.5% requirement was below the 3% and 5% thresholds not considered facially unconstitutional in previous Supreme Court decisions, the requirement imposed upon Kopitke must be only modestly burdensome as a result.[237] Despite the *non sequitur*, this line of reasoning also considered the petitioning threshold in a vacuum—without analyzing it in relation to the oppressiveness of the scheme as a whole as required by *Burdick*.[238] Had it done so, it might have noticed that North Carolina's scheme instituted an earlier filing deadline than *Anderson*, and required more than fourteen times as many signatures.[239] It might have also taken into account that, except for in 1992, no candidate for statewide office has ever met the filing threshold required by North Carolina.[240]

In finding that the regulatory scheme imposed only a "modest burden" upon the rights of the plaintiffs, the court then searched for a rational basis for the restrictions, admittedly not a "high bar" to meet.[241] It thought that this

232. *See* Winger, *supra* note 10 (noting only one case finding a constitutional filing deadline before mid-June for independent presidential candidates, and no such existing requirement earlier than May in any state).

233. *Anderson*, 460 U.S. at 786.

234. Anderson v. Morris, 636 F.2d 55, 58–59 (4th Cir. 1980).

235. Buscemi v. Bell, 964 F.3d 252, 263–64 (4th Cir. 2020), *cert. denied sub nom.*, Kopitke v. Bell, 141 S. Ct. 1388, 1388 (2021) (mem.).

236. *Id.* at 264.

237. *Id.*

238. *See* Ricciani, *supra* note 145, at 999.

239. *Compare Buscemi*, 964 F.3d at 257 (a March 3rd deadline and 1.5% petition requirement), *and* Winger, *supra* note 10 (1.5% petition requirement amounting to 70,666 signatures), *with* Anderson v. Celebrezze, 460 U.S. 780, 782–83 (1983) (a March 20th deadline and 5,000 signature requirement).

240. Winger, *supra* note 10. Incidentally, that one candidate was Ross Perot, arguably the most successful non-major party candidate of the last hundred years—a candidacy which never would have come to fruition in 2020 because it would have begun *after* North Carolina's filing date of March 3rd. Brief for Jessica Belcher et al. as Amici Curie Supporting Petitioners, Kopitke v. Bell, 141 S. Ct. 1388 (2021) (No. 20-897), https://www.supremecourt.gov/DocketPDF/20/20-897/168445/20210208155922575_Brief%20of%20Amici%20Curiae.pdf.

241. *Buscemi*, 964 F.3d at 265.

hurdle was cleared by the state's asserted interest in avoiding voter confusion and a crowded ballot,[242] despite evidence in the case showing that states which require at least five thousand signatures never have a crowded ballot.[243]

The Fourth Circuit affirmed the dismissal of Kopitke's case for failure to state a claim.[244] It then denied rehearing *en banc*.[245] Kopitke filed a petition for writ of *certiorari* which was denied by the Supreme Court on February 22nd, 2021.[246]

III. TOWARDS A POTENTIAL RESOLUTION

A. *Previously Proposed Solutions*

Scholarly commentary exists on a wide variety of potential resolutions,[247] although a clearly correct answer is difficult to ascertain. Some authors have argued for a total application of strict scrutiny, maintaining that the Court's current jurisprudence is "logically inconsistent and intuitively imprudent" by its treatment of "two of our 'most precious freedoms'" with such little concern.[248] At least one author has advocated for a return of the issue to the states to handle as they would like.[249] Finally, another commentator would rather the Court disaffirm any previous use of heightened scrutiny in its ballot access case law and rely entirely on a balancing system which he trusts to properly weigh all of the competing interests.[250] Nearly all of the opinions seem to agree that, whatever route the Court takes, consistency is key.[251]

B. *A Common Good-Based Theory*

Perhaps more important than the individual tests and rules prescribed by the judiciary are the underlying jurisprudential theories that give rise to the Court's application of those tools in the first place. While many were dealing

242. *Id.* at 265–66.

243. Winger, *supra* note 10 (assuming "crowded" means more than eight candidates for office).

244. *Buscemi*, 964 F.3d at 266.

245. Buscemi v. Bell, No. 19-2355, 2020 U.S. App. LEXIS 24426, at *1 (4th Cir. Aug. 3, 2020).

246. Kopitke v. Bell, 141 S. Ct. 1388, 1388 (2021).

247. *See, e.g.*, Ronald Mirvis, *Political Candidate Access to The Ballot: A Selective Bibliography*, 52 THE RECORD 649 (1997).

248. Cofsky, *supra* note 31, at 401–02 (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968)). *See also* Abrams, *supra* note 37, at 148–49.

249. Zywicki, *supra* note 180, at 133.

250. *See* Gryskiewicz, *supra* note 16, at 227–28.

251. Cofsky, *supra* note 31, at 403–05.

with the "work from home" effects of the 2020 coronavirus pandemic, Harvard Law School professor of constitutional law, Adrian Vermeule, "ignit[ed] a firestorm of controversy within the internet world of legal and political theory"[252] with his article *Beyond Originalism*.[253] In "provocative" style, Vermeule's "Common Good Constitutionalism" renewed, for the first time in a generation, political discourse on common good-focused jurisprudence.[254] For example, Josh Hammer disagreed with Vermeule's aggressive approach,[255] but argued for application of the substantive conservative law principles found in the Constitution's Preamble.[256] Despite the shortcomings of Common Good Constitutionalism, the novel application of the common good theory and similarly elucidated principles provide a fresh framework for consideration of ballot access law problems.

A common good approach "should be based on the principles that government helps direct persons, associations, and society generally toward the common good, and that strong rule in the interest of attaining the common good is entirely legitimate."[257] Furthermore, Vermule laid out principles that could be "read into the majestic generalities and ambiguities of the written Constitution":

> These principles include respect for the authority of rule and of rulers; respect for the hierarchies needed for society to function; solidarity within and among families, social groups, and workers' unions, trade associations, and professions; appropriate subsidiarity, or respect for the legitimate roles of public bodies and associations at all levels of government and society; and a candid willingness to "legislate morality"—indeed, a recognition that all legislation is necessarily founded on some substantive conception of morality, and that the promotion of morality is a core and legitimate function

252. Jonathan Culbreath, *In Defense of 'Common Good Constitutionalism'*, CRISIS MAG. (Apr. 13, 2020), www.crisismagazine.com/2020/in-defense-of-common-good-constitutionalism.

253. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037.

254. Josh Hammer, *Common Good Originalism*, THE AM. MIND (May 6, 2020), www.americanmind.org/features/waiting-for-charlemagne/common-good-originalism.

255. *Id.*

256. Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. PUB. POL'Y 918, 926–32 (2021).

257. Vermeule, *supra* note 253. For an example of an early Supreme Court opinion relying upon common good and natural law principles, see, e.g., *Chicago, Burlington, & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 236–38 (1897).

> of authority. Such principles promote the common good and make for a just and well-ordered society.[258]

Vermeule's approach emphasizes the strong hand of government, particularly in the protection of the "most important" principles of solidarity and subsidiarity.[259] Thus, "[u]nions, guilds and crafts, cities and localities, and other solidaristic associations will benefit from the presumptive favor of law . . . [as] in virtue of subsidiarity, the aim of rule will be not to displace these associations, but to help them function well."[260] Finally, a common-good approach would prioritize substantive justice[261] in agreement with the Founding Fathers that "[t]he aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society . . . ."[262]

C. *Theory in Application*

Vermeule further clarified the application of his argument as exemplified in Justice Harlan's dissenting opinion in *Lochner v. New York*.[263] In *Lochner*, the Supreme Court held that a New York state law restricting bakers to working no more than sixty hours per week violated the rights of those bakers to contract with their employers.[264] Justice Harlan, who would have found for the state,[265] outlined the elements of a common-good framework stating: "(1) the public authority may act for the common good, (2) by making reasonable determinations about the means to promote its stated public purposes; and (3) when it does, judges must defer."[266] Justice Harlan's dissent (and the crux of Vermeule's position) focused on this third element, the "heavily deferential

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258. Vermeule, *supra* note 253. For further discussion of the role of moral values, or "normative values" in governance, see Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899 (2009).

259. Vermeule, *supra* note 253.

260. *Id.*

261. Hammer, *supra* note 254.

262. THE FEDERALIST NO. 57 (James Madison or Alexander Hamilton).

263. Adrian Vermeule, *Common-Good Constitutionalism: A Model Opinion*, IUS & IUSTITIUM (June 17, 2020) (citing Lochner v. New York, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting)), www.iusetiustitium.com/common-good-constitutionalism-a-model-opinion.

264. *Lochner*, 198 U.S. at 45–46, 64.

265. *See id.* at 68 (Harlan, J., dissenting).

266. Vermeule, *supra* note 263. *See also Lochner*, 198 U.S. at 68 (Harlan, J., dissenting).

standard of review" apparent in the case law within the context of common good principles.[267]

However, Vermeule states that "the coherence and integrity of law include arguments from political morality for deference to nonjudicial decisionmakers, *within reasonable boundaries*."[268] In application of this common good framework to ballot access law, just what level of restriction falls within these reasonable boundaries brings the inquiry within the first of Justice Harlan's elements.[269] Common good principles state that the basis of public authority is the charge to act in promotion of the common good.[270] The fundamental inquiry, then, even before consideration of deference, ought to be whether, for a proper exercise of authority, that duty of adherence to the common good has reasonably been discharged.

St. Thomas Aquinas, one of the earliest and most influential theorists of the common good based in natural law,[271] believed the authority of human law was based upon its derivation from the natural law as either a conclusion, derived from the deeply held principles of the natural law, or a specification, derived from the natural law by way of details which are left open by the dictates of natural law principle.[272] While he posits that a human law may not justly violate a conclusion of the natural law, Aquinas would, like Vermeule and Harlan, give deference to the determinations of justly elected law makers.[273] However, Aquinas limits this deference to "the judgement of expert and prudent men."[274] Thus, experience and prudence act as limits on judicial deference in addition to the reasonability standard described above. Aquinas later gives credence to other traditional principles in application of the common good including that law must be made in good faith, for the common rather than private benefit, and fitting for the place and time in correspondence with the circumstances of the time.[275]

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267. Vermeule, *supra* note 263 ("In contrast, then, to both Peckham's tendentious majority and Holmes' morally skeptical dissent, Harlan's dissent kept the faith, applying the common-good framework with real integrity—with a fair-minded appreciation of the point and justification of the preceding caselaw, and with appreciation for the limits of the judicial role in an overall institutional system of common-good constitutionalism.").

268. *Id.* (emphasis added).

269. *See Lochner*, 198 U.S. at 68 (Harlan, J., dissenting).

270. Vermeule, *supra* note 263.

271. MARK TEBBIT, PHILOSOPHY OF LAW: AN INTRODUCTION 15–18 (3d ed. 2017).

272. J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS'S TREATISE ON LAW 317–19 (2014).

273. *Id.* at 317–19, 321.

274. *Id.* at 321.

275. *Id.* at 329 (discussing the principles of the legal philosopher, Isidore).

Courts have done well to recognize that ballot access laws "inexorably" implicate and even infringe upon the right to vote.[276] Indeed, the right to cast one's vote effectively is considered one of "our most precious freedoms" because it marks one of the most fundamental methods of engagement with and control over elected officials.[277] Therefore, to rob citizens of this right, would be to invite the same kind of non-representative governmental tyranny that America's Founding Fathers fought to eliminate.[278] The Founders thought that the right to participate in government in this way "was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our Constitution."[279] Thus, the right to participate effectively within one's government ought to be considered among Aquinas' conclusions of the law,[280] and to the extent which that right is violated, courts ought to apply the strictest scrutiny. Although courts have very frequently found in favor of voters' rights when that issue has been considered, it has not frequently been considered.[281] Given the extent to which infringement upon the right to vote violates the common good conclusion of government participation, courts ought to more readily consider its occurrence and the weight it truly holds.

In their relation to common good principles, ballot access restrictions which do not directly implicate the right to vote might more rightly be considered "specifications," and deference be given to legislators subject to reason, experience, and prudence. In evaluation of these limits, Vermeule's

276. Black, *supra* note 55, at 115.

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

278. *See* U.S. Term Limits v. Thornton, 514 U.S. 779, 793–95 (1995). Note also the fears of the Founding Fathers regarding limited representation under two expansive political parties (which makes a conservative originalist defense of a heavily restricted ballot particularly difficult): "Any interpretation of the Elections Clause should also recognize a simple historical fact: when this provision was drafted, political parties were generally unknown and positively feared. To the Founders, the entire structure of our government - the separation of powers - was predicated on a fear that factions, operating through parties, would impose their will on the country. John Taylor, a Founding Father and libertarian from Virginia, lamented: 'The situation of the public good, in the hands of the two parties nearly poised as to numbers, must be extremely perilous.' John Adams feared the specter of the 'division of the republic into two great parties, each arranged under its leader, and concerting measures in opposition to one another.'" Black, *supra* note 55, at 113 (internal citations omitted).

279. Powell v. McCormack, 395 U.S. 486, 534 n.65 (1969) (quoting 16 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND 589 (T. C. Hansard, 1813)).

280. For Catholics, this should hardly be a controversial claim, as Catholics believe it to be a moral obligation to participate in the political sphere to promote the common good. U.S. CONF. OF CATH. BISHOPS, FORMING CONSCIENCES FOR FAITHFUL CITIZENSHIP: A CALL TO POLITICAL RESPONSIBILITY FROM THE CATHOLIC BISHOPS OF THE UNITED STATES 17 (Digital ed. 2020), https://www.usccb.org/ issues-and-action/faithful-citizenship/upload/forming-consciences-for-faithful-citizenship.pdf.

281. *See* Ricciani, *supra* note 145, at 963.

principles as laid out above may serve as effective touchstones.[282] For example, minor political parties and independent candidates for office, as those recognized by the case law with associational rights, would fit within the categories of those protected by the principles of subsidiarity. To the extent that ballot access restrictions directly restrain the search for virtuous leaders according to the Founders' vision of substantive justice,[283] state interests in a heavily restricted ballot ought to be given less weight. Finally, courts ought to be willing to take into account the extremities of modern political polarization when considering whether ballot access restrictions were truly enacted with good faith rather than with both eyes towards political gain.

D. *Common Good Application in* Kopitke v. Bell

Had the Supreme Court granted Kopitke's petition for *certiorari*,[284] it would have had the opportunity to bring about much needed reformation to the field of ballot access law. As Justice Clarence Thomas dissented in response to the Court's refusal to hear a different election law case:

> One wonders what this Court waits for. . . . [W]e again fail to provide clear rules for future elections. The decision to leave election law hidden beneath a shroud of doubt is baffling. By doing nothing, we invite further confusion and erosion of voter confidence. Our fellow citizens deserve better and expect more of us.[285]

Kopitke would have provided the Court with the opportunity to make common sense adjustments and clarifications in attainment of that ever-elusive virtue of consistency.[286] For example, ought the Court consider the restrictive ballot-access effects individually or within the context of their overall scheme?[287] Or, ought the Court consider asserted Fourteenth Amendment rights violations according to equal protection or due process grounds?[288]

The Court would have been able to make more substantive assertions about the field of ballot access law as well. Serving the common good prudential principle of considering laws in light of modern circumstances, for

282. Vermeule, *supra* note 253.
283. THE FEDERALIST NO. 57 (James Madison or Alexander Hamilton).
284. Kopitke v. Bell, 141 S. Ct. 1388, 1388 (2021).
285. Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 738 (2021) (Thomas, J., dissenting).
286. Cofsky, *supra* note 31, at 405.
287. *See* Ricciani, *supra* note 145, at 996–97.
288. Cofsky, *supra* note 31, at 403–04.

example, the Court could hearken back to its *Anderson* reasoning as directly applicable to *Kopitke*. In *Anderson*, the Court thought that increases in modern technology would alleviate the state's concern for an educated and informed electorate regarding its choice of candidate.[289] As a result, a filing deadline seven months before the election was thought to be unduly burdensome.[290] The Court might have taken the opportunity to recognize that, nearly forty years after *Anderson*, the advanced state of technological development and social media only further diminishes state interest in early filing deadlines for educational reasons, making a deadline even earlier than *Anderson*'s that much more prejudicial.[291] Similarly, the Court could have cleared up existing confusion on exactly how to weigh individual rights and state interests[292] by asserting common good principles and clearly refuting previously asserted considerations.

Most importantly though, the Court would have had the opportunity to put the right to vote in proper perspective according to common good principles. In both *Williams* and *Anderson*, the Court was confronted with the interests of candidates who had amassed a considerable amount of support for minor candidates.[293] In its treatment of AIP, the *Williams* Court failed to make clear whether the amount of support for a candidate weighed anything in the balancing of individual and state interests.[294] Kyle Kopitke, because he received little support overall,[295] would have provided the Court with the opportunity to assert the importance of the right to vote for everyone, not just for those who would favor a major party candidate or a popular minor candidate. This is critical because, given the increasingly polarized nature of the modern political process,[296] dissent via vote has only become more

289. Anderson v. Celebrezze, 460 U.S. 780, 797 (1983).

290. *Id.* at 797, 806.

291. *Compare* Buscemi v. Bell, 964 F.3d 252, 252 (4th Cir. 2020), *cert. denied sub nom.*, Kopitke v. Bell, 141 S. Ct. 1388, 1388 (2021) (mem.) (a March 3rd deadline and 1.5% petition requirement), *and* Winger, *supra* note 10 (1.5% petition requirement amounting to 70,666 signatures), *with Anderson*, 460 U.S. 782–83 (a March 20th deadline and 5,000 signature requirement).

292. *See* Gryskiewicz, *supra* note 16, at 223–24 (describing the current state of the law as a "doctrinal quagmire").

293. *See* Williams v. Rhodes, 393 U.S. 23, 24–27 (1968); *Anderson*, 460 U.S. at 784.

294. *Williams*, 393 U.S. at 64 (the SLP had very little support relative to Williams' AIP).

295. *Kyle Kenley Kopitke*, BALLOTPEDIA, https://ballotpedia.org/Kyle_Kenley_Kopitke (last visited Feb. 27, 2020) (Kopitke received only 815 votes nationally).

296. Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411, 413 (2014) (research indicating that Congressional polarization is at its highest level since the Civil War with no signs of slowing down).

important over time. Having passed on this opportunity, the Court may find itself searching for another *Kopitke v. Bell* in the future.

CONCLUSION: WHY DOES IT MATTER?

The fields of ballot access law specifically, and election law more generally, are confusing, buoyed by the influence of major political parties and legislative schemes that vary state-by-state. Supreme Court decisions too have been conflicting, repeatedly "fail[ing] to provide clear rules for future elections" and "leav[ing] election law beneath a shroud of doubt."[297] The weight of this burden lies disproportionately on the backs of independent and minor candidates, who, with less resources, must contend with more restrictive measures to achieve the same opportunities as their major party counterparts.

Ballot access for independent and minor candidates is about more than an opportunity to win an election. These candidates (perhaps primarily) seek to contribute to healthy "diversity and competition in the marketplace of ideas" through an expansion of political debate.[298] Access to the ballot for candidates also affects their ability to be appointed to public office,[299] to be included in meaningful debates,[300] to appear on voter registration forms,[301] and to accept campaign finance contributions.[302] Most importantly, the Court's failure to strike down overly restrictive ballot access measures directly implicates the

297. Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 738 (2021) (Thomas, J., dissenting).

298. Munro v. Socialist Workers Party, 479 U.S. 189, 202–03 (1986) (Marshall, J., dissenting) ("The Court's conclusion stems from a fundamental misconception of the role minor parties play in our constitutional scheme. To conclude that access to a primary ballot is adequate ballot access presumes that minor-party candidates seek only to get elected. But, as discussed earlier, minor-party participation in electoral politics serves to expand and affect political debate. Minor parties thus seek 'influence, if not always electoral success.' [. . .] Their contribution to 'diversity and competition in the marketplace of ideas,' does not inevitably implicate their ability to win elections. That contribution cannot be realized if they are unable to participate meaningfully in the phase of the electoral process in which policy choices are most seriously considered. A statutory scheme that excludes minor parties entirely from this phase places an excessive burden on the constitutionally protected associational rights of those parties and their adherents." (citations omitted)).

299. Rodney Smolla, *Carney v. Adams Threatens Delaware's Balanced Judiciary*, LAW360 (Oct. 7, 2020, 6:10 PM), https://www.law360.com/articles/1316944/carney-v-adams-threatens-delaware-s-balanced-judiciary.

300. Andrew Koehler, *Not Up for Debate: The Subjective Exclusion of Minor Presidential Candidates from the Biggest Night of the Year*, 13 GAVEL 7, 7 (2021) (citing *The Commission on Presidential Debates: An Overview*, THE COMM'N ON PRESIDENTIAL DEBATES (last accessed Feb. 27, 2021), www.debates.org/about-cpd/overview).

301. Marina Villenueve, *Progressive Party Says NY Making It Harder to Stay on Ballot*, AP NEWS (Sep. 2, 2020), https://apnews.com/article/election-2020-ny-state-wire-nyc-wire-e274dd4521dd3df9aa256124d6e9d1ce.

302. *Id.*

fundamental right to partake in a representative government through the right to vote.[303] Overall, the inclusion of minor-party and independent political candidates within the political process is valuable to the nation at large:[304]

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.[305]

The truths of these assertions are born out in the development of ballot access as a vehicle to healthy political competition.[306]

The Supreme Court attempted to address ballot access issues against the backdrop of the volatile socio-political environment of the 1968 presidential election.[307] And now, for the last thirty years, the Supreme Court has denied every certiorari petition filed by a minor or independent candidate.[308] The Court has not just the authority but an emphatic duty to say what the law is.[309]

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303. Black, *supra* note 55, at 115.

304. *See, e.g.*, Ann Ravel, *Third Parties Deserve Shot at Debate Stage*, REALCLEAR POL. (Feb. 21, 2020), https://www.realclearpolitics.com/articles/2020/02/21/third_parties_deserve_shot_at_debate_stage.html (stating that when polled in 2000 and in 2016, more than half of likely voters stated that they wished to see a third candidate at the debate, and further stating, "When alternative candidates are denied the opportunity to promote forward-thinking policies at the most widely viewed political event of election season, the entire country suffers."); Koehler, *supra* note 300, at 7 ("As a matter of policy consideration, including a third candidate in the debate provides several benefits. It would elevate the quality of the debate: with only two candidates, each candidate may strategize to sway viewers to his or her side by merely attacking the other candidate. With a third-party present, however, mere attacks are too risky as the viewer could be persuaded to the party on the sidelines. Therefore, each candidate would have to sway the viewer on the merits of his or her own argument. Additionally, without a third-party present, the two parties can avoid topics on which they agree, do not have a way to resolve, or of which they are unaware.").

305. Sweezy v. New Hampshire, 354 U.S. 234, 250–51 (1957).

306. Mechem, *supra* note 51, at 369–71.

307. Gryskiewicz, *supra* note 16, at 185–86; Williams v. Rhodes, 393 U.S. 23, 26 (1968).

308. Richard Winger, *U.S. Supreme Court Refuses to Hear North Carolina Independent Deadline Case*, BALLOT ACCESS NEWS (Ballot Access News, San Francisco, Cal.), Mar. 28, 2021, https://ballot-access.org/2021/03/28/march-2021-ballot-access-news-print-edition. But note that "[t]he U.S. Supreme Court *does* take cases when minor parties or independent candidates win election law cases in the court below, and the state appeals." *Id.* (emphasis in original). And further, "[i]n none of the cases in which the minor party or independent candidate had won in the court below, and the U.S. Supreme Court then reversed, was there a circuit split (except in [a] Minnesota fusion case). So the theory that the Court is especially inclined to hear cases when there is a circuit split does not apply to minor party and independent candidate election law cases." *Id.*

309. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Our modern socio-political climate of confusion and division demonstrates that it is time that the Supreme Court went back to the table to again say what the law is. This time, it ought to do so with common good principles, in favor of independent and minor party candidates for public office.