ARTICLES

A SECOND LOOK AT THIRD PARTIES: CORRECTING THE SUPREME COURT'S UNDERSTANDING OF ELECTIONS

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This Article presents a comprehensive overview of the Supreme Court's ballot-access jurisprudence as it relates to minor political parties, and challenges the conventional "structuralist" view that ascribes shortcomings in the Court's approach to the doctrinal constraints of an individual-rights-based analysis. Structuralist critics correctly observe that the Supreme Court's ballot-access rulings almost always disfavor minor parties and protect the two dominant parties. Because these decisions appear to rely on an unduly narrow understanding of the expressive value of voting and on a misunderstanding of the role played by minor political parties within the context of a predominantly two-party system, scholars have proposed a number of alternative frameworks

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to guide the Court's inquiry. However, if the problem is indeed one of the Justices' faulty background assumptions about the political process, it is unlikely to be solved by the wording of any particular test, structuralist or otherwise. This Article attempts to demonstrate that a willing court could easily apply the conventional balancing test in Anderson v. Celebrezze *in a manner that would encompass most of the inquiries necessary for a more accurate weighing of the interests at stake. The difficult task suggested, though barely attempted, here is to persuade judges to re-examine their assumptions to the extent that they conflict with contemporary scholarly understandings of the electoral process.*

INTRODUCTION

In the United States today, minor political parties face unrelenting hostility from the media, which decries them as "spoilers;" from federal and state legislatures, which promulgate an electoral framework heavily tilted toward protecting the two major parties; and from the Supreme Court, which has upheld substantial legal burdens on the ability of third parties to run candidates for public office. Although the Court has addressed the rights of minor political parties and independent candidates in a number of contexts, including access to televised debates[1] and campaign finance,[2] the main body of relevant caselaw relates to state-level rules determining which parties' candidates may appear on the general election ballot. These rules seldom receive national attention, but they are a major impediment to the participation of non-major-party candidates in our elections.[3] Indeed, despite the notoriety of recent third-party Presidential candidates such as Ross Perot and Ralph Nader, in many states few, if any, minor parties succeed in placing their candidates on the ballot, and, when they do, these candidates spend most of their limited resources on complying with the applicable hurdles.[4]

Ballot-access restrictions affect core expressive and associational activity

[1] *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 683 (1998) (finding that a state-owned broadcaster's decision to exclude an independent candidate with little popular support from televised debates was constitutional as a reasonable viewpoint-neutral restriction in a limited public forum).

[2] *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 96 (2003) (upholding federal regulation of "soft money" contributions against the challenge that such regulation stifles minor parties' speech and associational rights).

[3] Richard Winger, *How Ballot Access Laws Affect the U.S. Party System*, 16 AM. REV. POL. 321, 346 (1995).

[4] *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 687 (1998) (describing the large financial burden faced by minor-party candidates seeking to challenge ballot access restrictions); *see also* Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of* Jenness v. Fortson, 1 ELECTION L.J. 235, 235 (2002) (showing that it costs hundreds of thousands to millions of dollars for a minor-party candidate to appear on all states' ballots).

protected by the First Amendment[5] and raise serious discrimination concerns under the Equal Protection Clause,[6] yet the Supreme Court has repeatedly denied minor-party challenges to these laws using a wide variety of justifications.[7] At the same time, the Court has been very protective of the interests of major political parties and has not hesitated to strike down laws that, in its opinion, infringed on these organizations' associational freedoms.[8]

In recent years, numerous legal scholars have focused their attention on the Supreme Court's election-law jurisprudence, including ballot-access caselaw, and have advocated changes in the judiciary's approach to the claims of political parties. Many believe – as do I – that judicial intervention is necessary to prevent incumbents from insulating themselves against would-be challengers,[9] while others suggest that the Court might do better to leave all parties to fend for themselves in the political arena.[10] However, all sides in the ongoing debate sometimes make the questionable assertion that problems with the Court's current approach can be traced to doctrinal constraints.[11] For

[5] *See, e.g.*, Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986) (stating that ballot access restrictions implicate the rights of individuals to associate, but that such rights are not absolute and are subject to qualification).

[6] *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 34 (1968) (holding that ballot access laws that invidiously discriminate violate the Equal Protection Clause).

[7] *See, e.g.*, Am. Party v. White, 415 U.S. 767, 780-81 (1974) (holding that ballot access restrictions are constitutional if the resulting burden on the right to associate is outweighed by compelling state interests that could not be served in a less burdensome manner); Storer v. Brown, 415 U.S. 724, 736 (1974) (holding that states have a compelling and overriding interest in political stability).

[8] *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567, 581-82 (2000) (striking down the requirement of a blanket primary); Eu v. S.F. Democratic Cent. Comm., 489 U.S. 214, 231-33 (1989) (invalidating a state ban on party leadership's endorsements of primary candidates); Tashjian v. Republican Party of Conn., 479 U.S. 208, 225 (1986) (striking down a state law mandating closed primaries).

[9] *See generally* Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331 (1997); Issacharoff & Pildes, *supra* note 4; Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).

[10] *See, e.g.*, Nathaniel Persily, *The Search for Comprehensive Descriptions and Prescriptions in Election Law*, 35 CONN. L. REV. 1509, 1516-17 (2003) (advocating minimal judicial oversight of politics to prevent the Supreme Court's messy entanglement in the "political thicket").

[11] *But see* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 333 (2003) ("[T]he law crafted by the Supreme Court, especially – but not only – when the Court is interpreting vague provisions of the Constitution, is not stabilized by text or precedent or the other tools of formalist judging."); Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 696 (2001) ("[I]t might be useful to assume that the formal sources of legal judgment are sufficiently open-textured as not to compel directly a uniquely determinate conclusion.").

instance, Professor Jamin Raskin believes that the Court's "democratically indefensible decisions follow logically from the citizen's lack of affirmative political rights."[12] Professor Nathaniel Persily similarly asserts that "[t]he Court's jurisprudence in 'democracy' cases often flows logically from or fits comfortably within larger constitutional doctrines."[13] Indeed, the foundational article in the *Stanford Law Review* by Professors Samuel Issacharoff and Richard Pildes, which urged courts to adopt a structuralist process-based approach to political competition cases, was premised on the "failures of current doctrinal frameworks."[14]

In my view, the Court's ballot-access doctrinal framework is not the problem. Indeed, the Court's decisions in this area rarely appear to be constrained by the tests the Court itself has articulated. To find the driving force behind the Court's rulings we must look beyond the surface of doctrine to the Justices' conceptions of the electoral process.[15] A close examination of the language in ballot-access cases demonstrates that the Court has consistently watered down the relevant constitutional inquiries when addressing claims by minor political parties because it sees these groups as a threat to orderly elections and to the stability of the major parties. The Court also underestimates the value of third parties because it tends to view elections as horse races in which it only matters who wins, and which otherwise serve no expressive function either for the individual voter[16] or for the political parties involved.[17]

Several scholars have made similar observations and have rightfully criticized the Court's approach as inconsistent with contemporary understandings of the role played by minor political parties in our electoral system. However, these commentators have failed to draw a logical corollary: if the Court's jurisprudence is a function of certain flawed assumptions, then it matters little what doctrinal test the Court applies so long as the assumptions remain unchanged.[18] In fact, the Court has been unsympathetic to minor-party

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[12] Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 572 (2004).

[13] Persily, *supra* note 10, at 1515.

[14] Issacharoff & Pildes, *supra* note 4, at 646 (analogizing the political process to a competitive market where the goals of democratic politics are realized by preventing anticompetitive practices).

[15] *Cf.* Pildes, *supra* note 11, at 696-97 (observing that, in split decisions of the Court, a Justice's individual assumptions of democracy have great influence).

[16] *See* Burdick v. Takushi, 504 U.S. 428, 438 (1992).

[17] *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 369 (1997).

[18] To be fair, both Professor Raskin and Professor Persily at times acknowledge that political assumptions play a critical role in judicial decision-making. *See* JAMIN B. RASKIN, OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE 8 (2003) ("The impulse that . . . unifies the Court's treatment of American politics[] is fear of popular democracy and the 'philistine' attitudes of the public."); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100

claims under both the First Amendment[19] and the Equal Protection Clause,[20] and even when allegedly applying strict scrutiny,[21] to say nothing of more deferential standards of review. It is therefore unlikely that *any* test, functional or otherwise, that scholars could propose would lead the Court to a different result. To see a real change in ballot-access jurisprudence, the faulty background assumptions underlying the Court's decisions must first be challenged and corrected.

On the other hand, once this admittedly difficult task is done, it would be relatively easy to infuse a new vitality into judicial review of ballot-access challenges using the conventional framework employed in such cases. This Article demonstrates that the modern test for ballot-access restrictions, articulated in *Anderson v. Celebrezze*,[22] is well-suited to accommodate a more stringent review than the Court has chosen to undertake thus far. The *Anderson* test, which calls for a balancing of the burden on minor-party rights against the state interests justifying the law, can take into consideration most of the insights suggested by modern electoral scholars. Courts could be more cognizant of the expressive rights of minor political parties, more scrupulous in the evaluation of self-entrenching legislative motives, and less protective of powerful major-party organizations, all while claiming a closer adherence to the text of *Anderson* and other constitutional precedent than a number of recent Supreme Court decisions in the field could do.

The approach of this Article is thus at once more and less radical than what other critics have suggested. It is more radical because of its emphasis on lifting the veil of the Court's doctrinal reasoning and rhetoric in order to expose the assumptions necessarily underlying the many seemingly inconsistent decisions in this field. It is less radical because it denies that corrective action requires – or would be usefully served by – an overhaul of the Court's doctrinal approach to ballot access and political parties. All that is missing, in my opinion, is a more accurate understanding of the existing political environment, and a firm commitment by the Court to engage in evenhanded balancing of the competing considerations as part of the *Anderson* analysis.

Part I of this Article provides a brief introduction to the diverse and often arcane set of rules governing minor-party access to the general election ballot.

COLUM. L. REV. 775, 777 (2000) ("We think [the inconsistencies in caselaw have] to do with the worldview that judges and lawyers bring to these cases and particularly their differing philosophies as to the function political parties play in American democracy.").

[19] *See, e.g.*, *Timmons*, 520 U.S. at 369-70 (rejecting a minor party's First Amendment challenge to a ban on consensual cross-nomination of another party's candidates).

[20] *See, e.g.*, Jenness v. Fortson, 403 U.S. 431, 440 (1971) (rejecting an equal protection challenge to Georgia's ballot-access laws).

[21] *See, e.g.*, Am. Party v. White, 415 U.S. 767, 780-81 (1974) (upholding a ballot-access restriction under a strict-scrutiny standard of review).

[22] 460 U.S. 780 (1983).

It shows, among other things, that these rules are often made burdensome with the express intention of preventing minor-party candidates from appearing on the ballot. Part II presents an overview and evaluation of the Supreme Court's treatment of ballot-access challenges by minor parties. In particular, it points out that the cases are difficult to reconcile with one another and with parallel First Amendment and equal protection cases unless we understand the Justices' assumptions regarding the role of various actors in the electoral process. Part III shows that the Court's view of minor parties as meddlesome and irrelevant outsiders, though not unusual, is inconsistent with modern scholarly understandings of the function of these groups in our democracy. Greater judicial protection of these parties would not undermine orderly elections or create a multi-party polity. Instead, it would merely acknowledge the fact that much more is at stake in our elections than who wins any given race, and that both expressive and competitive values justify greater access to the ballot for third parties. Finally, Part IV suggests how, given a better understanding of the electoral process, courts could utilize existing doctrinal tools within the framework of the *Anderson* test to subject restrictions on minor parties to more effective review.

I. THE ORIGINS OF BALLOT ACCESS LAWS

The United States Constitution offers virtually no direct guidance on the conduct of federal elections, delegating the power to prescribe the "Times, Places, and Manner of holding Elections" to the states, subject to congressional oversight.[23] Because Congress has rarely exercised its power to promulgate national election laws, at least outside the area of campaign finance,[24] state legislatures are the effective source of most laws regulating elections at all levels of government.[25] In the absence of any widely accepted model code,[26] each state has developed its own statutory framework to structure

[23] U.S. CONST. art I, § 4, cl. 1. As the Supreme Court has recently pointed out, presidential elections are even more firmly within the domain of state legislatures, since states have no obligation to conduct them at all. Bush v. Gore, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.").

[24] *See, e.g.*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 18, 28, 36, and 47 U.S.C.). *But see* Persily, *supra* note 10, at 1511 (listing other federal election laws such as the Voting Rights Act and the Federal Election Campaign Act).

[25] *See* DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 144 (2002) ("From the early days of the Republic, the states have enjoyed remarkably wide authority over the electoral process.").

[26] Although efforts have been made to create a series of model provisions, they remain purely aspirational. *See generally* Appleseed Center for Electoral Reform & Harvard Legislative Research Bureau, *A Model Act for the Democratization of Ballot Access*, 36 HARV. J. ON LEGIS. 451 (1999).

representative democracy's most vital rite. As a result, today each state maintains a unique, often Byzantine, set of rules governing access to the ballot by party-supported and independent candidates.[27] To understand the nature and function of these rules, a short historical overview of their evolution is instructive.

For almost half of this nation's existence, states did not regulate ballot access for the simple reason that the government did not provide printed ballots.[28] Instead, each political party was eager to supply voters with ballots listing their own candidates for each office.[29] Voters simply chose the ballot of the party that most appealed to them, and could mark changes on it if they did not want to vote a straight-party ticket.[30] In the late 1880s, however, as part of Progressive-era reforms designed to combat vote-buying and the influence of party political machines, states adopted the so-called Australian, or government-printed, ballot.[31]

At the time, like today, the Republicans and the Democrats were the two dominant parties.[32] However, a number of other political parties flourished, electing their own candidates to public office and forming coalitions with major parties to cross-nominate each other's candidates – a practice known as "fusion."[33] In 1896, for instance, the People's Party claimed twenty-two seats in the U.S. House of Representatives and had an additional five in the Senate.[34] Other significant parties of the period included the Union Labor Party, the Socialist Labor Party, and the Prohibition Party.[35] All of these parties participated actively in public debate and championed a number of political and social reforms that were later adopted by the major parties, including women's suffrage, child labor laws, the direct election of senators, and public

[27] *See, e.g.*, E. JOSHUA ROSENKRANZ, VOTER CHOICE '96: A 50-STATE REPORT CARD ON THE PRESIDENTIAL ELECTIONS 11 (1996); *see also id.* at 89-191 (containing a dated but illustrative summary each state's laws).

[28] STEVEN J. ROSENSTONE ET AL., THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE 19 (1984).

[29] *Id.*

[30] *Id.* at 19-20.

[31] *Id.* at 20.

[32] *Cf.* LISA JANE DISCH, THE TYRANNY OF THE TWO-PARTY SYSTEM 35-37 (2002) (observing that, even after the advent of the two-party system in the late 1830s or early 1840s, third parties continued to participate meaningfully in elections, even displacing the Democrats in several states in 1890).

[33] *See generally* Peter H. Argersinger, *A Place on the Ballot: Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287 (1980).

[34] KENNETH C. MARTIS, THE HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS 1789-1989, at 46 (1989) (commenting that "[t]hese twenty-two [House] seats are the single largest number carried by a third party in any post-Civil War election") (emphasis omitted).

[35] *See* ROSENSTONE ET AL., *supra* note 28, at 67, 75, 88-89 (tracing the development of those parties).

works programs similar to those of the New Deal.[36] Although none of the era's third parties ultimately succeeded in becoming a major party, they were serious contenders in the political arena and resembled the major parties of the era more than they resemble the minor parties of today.[37]

Ironically, many of these third parties initially supported increased government regulation of the electoral process, including the new Australian ballot, which eventually contributed to their near-extinction.[38] The first ballot-access laws were relatively innocuous, usually requiring 500 to 1,000 signatures to obtain a line on the ballot.[39] Soon, however, state legislatures began to discover that their new power to regulate the ballot could be used to reduce or eliminate potential third-party competition.[40] One by one, many states increased the number of signatures required for a minor party to obtain a spot on the ballot, and minor parties were able to appear on the ballots of fewer and fewer states.[41] As a result, third parties suffered a dramatic decline in the subsequent decades and have never recovered the stature they once possessed.[42]

Historians point out numerous instances during the last century when state legislatures apparently adopted stringent ballot-access restrictions not only out of a general desire for self-entrenchment, but specifically in response to a perceived third-party threat. Thus in 1931, the Illinois legislature, fearful of the Communist Party, increased the petition signature requirement from 1,000 to 25,000,[43] which, combined with other restrictions, prevented the Communists from qualifying for the ballot for the next five elections – even in Chicago, where they had a significant base of support.[44] Ballot-access expert Richard Winger traces the origins of many more recent ballot-access restrictions to similar motivations.[45] In North Carolina, the Socialist Workers

[36] BLAKE ESKIN, THE BOOK OF POLITICAL LISTS 235 (1998).

[37] *See* ROSENSTONE ET AL., *supra* note 28, at 81 (describing nineteenth-century third parties as continuous, unlike successful twentieth-century third parties that often disappeared after a single election).

[38] *See* THOMPSON, *supra* note 25, at 69 ("Ballot access [restriction laws] came out of the turn-of-the-century reforms, championed by progressives and populists who had no intention of entrenching a two-party system.").

[39] Winger, *supra* note 4, at 236.

[40] *See* DISCH, *supra* note 32, at 45 (describing how the major parties, in control of the state legislatures, "joined forces to shut third parties out of the electoral arena").

[41] *See* Winger, *supra* note 4, at 236 (detailing the increasingly restrictive ballot-access laws which, by 1968, included massive petition requirements in seven states).

[42] *See id.*

[43] Richard Winger, *Drastic Increases in Petition Requirements in the Past (table)*, BALLOT ACCESS NEWS (Ballot Access News, San Francisco, Cal.), Aug. 24, 1995 (identifying 1931 as the date of the change from 1,000 to 25,000 signatures), *available at* http://www.ballot-access.org/1995/0824.html#08.

[44] ROSENKRANZ, *supra* note 27, at 14.

[45] Winger, *supra* note 4, at 237.

Party qualified for the ballot in 1980 by collecting the requisite 10,000 signatures.[46] To ensure that this would not happen again, the legislature more than quadrupled the number of required petition signatures.[47] Similarly, Alabama tripled petition signature requirements in 1995, reportedly in anger over the Patriot Party's nomination of a candidate for county office who had earlier lost in the Democratic primary.[48]

As a general rule, signature requirements for access to the general election ballot do not apply to the major political parties, because most states prescribe different routes to the ballot for these organizations.[49] Many explicitly define a major political party in terms of past electoral success, for instance by specifying the vote percentage that the party's candidate for statewide or national office must have received in the preceding election to qualify for an automatic spot on the ballot.[50] Thus, for a major-party candidate, access to the general election ballot is generally not an issue, as long as the candidate prevails over intra-party competitors during the primary phase. Access to the primary election ballot is sometimes difficult for challengers within the major parties, but it is governed by a different set of rules that typically have no bearing on minor parties because the latter usually (though not always) nominate candidates by means of an internal party caucus.[51]

Independent candidates and parties that do not qualify for automatic ballot status must qualify for the general election by means of a petition, although a few states permit other methods, such as payment of a filing fee or registration of a certain percentage of voters as members of that party.[52] State law typically regulates, among other things, when signatures for the petition must be collected, how many signatures are required, who may circulate the petition, who may sign the petition, and what information signatories must provide.[53]

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[46] *Id.* at 247.

[47] *Id.*

[48] *Id.* (detailing how the state legislature increased the petition requirement from 1% of the last gubernatorial vote to 5%, which the governor then reduced to 3%).

[49] *See* ROSENSTONE ET AL., *supra* note 28, at 19 (describing the process by which major-party candidates automatically appear on the ballot, while third parties must petition state election officials to be listed).

[50] The electoral scheme described in *Jenness v. Fortson* is a typical example of such a system. 403 U.S. 431, 433 (1971) (explaining Georgia's system, under which a party that received 20% of the vote in the prior gubernatorial election was exempted from petitioning requirements). *See also* Richard Winger, *History of U.S. Ballot Access Law for New and Minor Parties*, *in* 1 THE ENCYCLOPEDIA OF THIRD PARTIES IN AMERICA 72, 72-95 (Immanuel Ness & James Ciment eds., 2000) (presenting a comprehensive treatment of the subject).

[51] *See, e.g.*, ROSENKRANZ, *supra* note 27, at 23; *see also id.* at 19 (explaining the differences between primaries and caucuses).

[52] Richard Winger, *2006 Petitioning for Statewide Office*, BALLOT ACCESS NEWS (Ballot Access News, San Francisco, Cal.), Mar. 5, 2005, *available at* http://www.ballot-access.org/2005/0305.html#12 [hereinafter *2006 Petitioning*].

[53] *See* ROSENSTONE ET AL., *supra* note 28, at 20-22.

For a new party candidate for statewide office, most states require signatures in the thousands or tens of thousands, with Oklahoma requiring as many as 73,188.[54] In addition, states often make the gathering of petitions dramatically more burdensome through related regulatory provisions such as filing deadlines early in the electoral cycle, and cumbersome signature verification requirements.[55] Occasionally, the procedure to qualify as a minor-party candidate is substantially more burdensome than the procedure to qualify as an independent candidate, forcing some party candidates to run as independents and to forego potential benefits of ballot status for the party.[56]

Complying with all the requirements is often a Sisyphean task that must be repeated anew every election cycle,[57] except when a state permits a minor party to qualify for automatic ballot status based on past electoral performance.[58] Some parties rely on volunteers to gather the necessary signatures, while others employ paid petition circulators, but the drain on party resources is immense in any event, unless the party's candidate is wealthy enough to fund his or her own petition drive.[59] In 1996, Ross Perot spent $12 million of his personal fortune in order to appear on the ballot in every state,[60] yet his Reform Party lost ballot status in fifteen states only two years later.[61] In 2000, the party's Presidential candidate, Patrick Buchanan, had to spend $200,000 to appear on the ballot in North Carolina alone.[62]

To be sure, several states today permit relatively easy ballot access. Washington and New Jersey require fewer than 2,000 signatures, while

[54] *2006 Petitioning*, *supra* note 52, at 12.

[55] *See* ROSENKRANZ, *supra* note 27, at 34-44 (describing the factors making signature requirements more burdensome).

[56] Ohio, for example requires a staggering 56,280 signatures for a new party and only 5,000 for an independent candidate to run for statewide office in 2006. *2006 Petitioning*, *supra* note 52, at 12; *see also* Richard Winger, *Ballot Format: Must Candidates Be Treated Equally?*, 45 CLEV. ST. L. REV. 87, 94, 96-98 (1997) (explaining the conundrum that Ohio's laws create for minor parties).

[57] *See, e.g.*, ROSENKRANZ, *supra* note 27, at 11.

[58] *See, e.g.*, *id.* at 57-58.

[59] *See* RALPH NADER, CRASHING THE PARTY 74 (2002) (stating that it cost Pat Buchanan's 2000 Presidential campaign $200,000 to get on the ballot in North Carolina alone); E. JOSHUA ROSENKRANZ, VOTER CHOICE 2000: A 50-STATE REPORT CARD ON THE PRESIDENTIAL ELECTIONS 3-4 (2000) (lamenting "the enormous cost of qualifying for the ballot[, which] forces minor parties to focus on money rather than ideas when choosing their nominees").

[60] ROSENKRANZ, *supra* note 59, at 3-4.

[61] MICAH L. SIFRY, SPOILING FOR A FIGHT: THIRD-PARTY POLITICS IN AMERICA 110 (2002).

[62] NADER, *supra* note 59, at 74.

Colorado and Louisiana do not have a petition requirement at all.[63] Unsurprisingly, these states have somewhat longer ballots, with the historically average number of candidates for President, the office attracting by far the most minor-party contenders, between 5.6 (Louisiana) and 8.7 (New Jersey).[64] Still, given the prevailing emphasis on national politics,[65] the difficulties in achieving ballot status and organizing in some states generally cripple minor-party efforts to compete effectively with major parties across the board.

In sum, there is ample evidence that restrictive ballot-access laws of many states were designed to, and have the effect of, removing minor-party candidates from competition for elective offices.[66] In those states today, the office of President is the only office for which third-party candidates appear on the ballot with any frequency, partly because some states make ballot access for presidential elections relatively easy,[67] and partly because minor parties often choose to focus their energies on the Presidency.[68]

II. MINOR PARTIES, MAJOR PARTIES, AND THE COURT

With a few exceptions, the Supreme Court's jurisprudence has been consistent in its hostility to election-law challenges by minor political parties.[69] Rather than treating third parties as groups that require an especially high degree of constitutional protection, the Court has repeatedly used the doctrinal and rhetorical tools at its disposal to limit the constitutional claims of non-mainstream political parties. As this Part seeks to demonstrate, the Court's biased approach has come at the price of doctrinal consistency, because the Court has never squarely acknowledged that alternative political parties are

[63] Richard Winger, *How to Compare Presidential Access?*, BALLOT ACCESS NEWS (Ballot Access News, San Francisco, Cal.), Mar. 5, 2005, *available at* http://www.ballot-access.org/2005/0305.html#08.

[64] *Id.*

[65] *See, e.g.*, DISCH, *supra* note 32, at 37 (commenting on the modern "predilection for all things national").

[66] *See* Winger, *supra* note 4, at 236-37 (indicating that the effect of early petition requirements "was to exhaust minor parties that couldn't poll enough votes to win exemption from the mandatory petitions").

[67] For instance, according to Mr. Winger, in 2004 Alabama required 5,000 signatures for an independent candidate for President, but 41,012 signatures (3% of the votes cast in the last gubernatorial election) for minor-party and independent candidates for other offices. Richard Winger, *Alabama Increases Petition Requirement to 3%*, BALLOT ACCESS NEWS (Ballot Access News, San Francisco, Cal.), Aug. 24, 1995 (reporting on the adoption of this two-track system), *available at* http://ballot-access.org/1995/0824.html#01.

[68] *See* DISCH, *supra* note 32, at 140 (criticizing third parties for focusing exclusively on the Presidency).

[69] *See* Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 187 (1991) (discussing the history of Supreme Court election law jurisprudence since Jenness v. Fortson, 403 U.S. 431 (1971)).

disfavored per se.[70] Instead, the Court has used porous language, manipulable tests, and ad hoc reasoning to deny third parties' equal protection and First Amendment claims.

A. Williams *and* Jenness*: The Pillars of Ballot Access Caselaw*

The Court's first major foray into the field of ballot-access was also the high-water mark of protection afforded third-party challengers. In 1968 the Supreme Court decided *Williams v. Rhodes*,[71] a case in which the Ohio American Independent Party (supporters of George Wallace) and the Socialist Labor Party challenged Ohio's early filing deadline for petitions as well as other provisions of the Ohio election code.[72] The Court, in an opinion by Justice Black, struck down Ohio's electoral scheme in its totality as a violation of the Equal Protection Clause.[73] The Court found that the Ohio laws placed a "substantially unequal burden" on the "precious" rights to vote and associate, and that the state failed to demonstrate a "compelling interest" in the regulations.[74]

Justice Black's majority opinion considered and rejected the state's asserted interests in promoting the two-party system,[75] in assuring the election of the majority's preferred candidate,[76] and in preventing voter confusion.[77] It stressed the essential quality of electoral competition and argued that the Ohio laws effectively granted the major parties a "complete monopoly."[78] Justice Douglas's concurrence was even stronger in its support for third parties, asserting that

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[70] As discussed below, the Court has come quite close to doing so in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). *See infra* Part II.D.

[71] 393 U.S. 23 (1968).

[72] *Id.* at 26-28. Ohio did not permit independent or write-in candidacies for President, and it required new parties to obtain 433,100 petition signatures by February 7th of the election year. *Id.* at 26-27, 35-36.

[73] *Id.* at 31.

[74] *Id.* It is noteworthy, especially in light of later developments, that the majority opinion, unlike Justice Douglas's concurrence, never used the term "fundamental right." *Compare id.* at 31 ("No right is more precious [than the right to vote] . . . .") *with id.* at 38 (Douglas, J., concurring) ("[T]he right to vote [is] a fundamental political right . . . .") (internal quotation marks omitted).

[75] *Id.* at 32 ("[T]he Ohio system does not merely favor a 'two-party' system; it favors two particular parties – the Republicans and the Democrats – and in effect tends to give them a complete monopoly.").

[76] *Id.* (conceding the legitimacy of the interest but concluding that it did not justify stifling the growth of all new parties).

[77] *Id.* at 33 ("[T]he experience of many States, including that of Ohio prior to 1948, demonstrates that no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required.").

[78] *Id.* at 32.

> [i]n our political life, third parties are often important channels through which political dissent is aired: "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, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society."[79]

Williams was truly a momentous case, indicating not only that third parties had a right against discrimination, but also that a violation of this right would, at least in some circumstances, trigger strict scrutiny.[80] Nevertheless, the case turned out to be a relatively weak precedent, partly because its characterization of Ohio's electoral scheme was so disparaging that it allowed future courts to distinguish the case on the facts.[81] Moreover, the choice of remedy in *Williams* – namely, broad invalidation of the state's entire ballot-access scheme – made it unlikely that courts more cautious than the Warren Court would willingly follow it.

These weaknesses of *Williams* proved critical only three years later in *Jenness v. Fortson*.[82] Justice Stewart, the most vigorous dissenter in *Williams*,[83] wrote the sole opinion in that case, upholding Georgia's two-tiered ballot-access scheme that required minor parties to file a nominating petition signed by 5% of registered voters, but directed major parties to nominate by primary election.[84] The opinion rejected First Amendment as well as equal protection challenges to the law, asserting that "Georgia's election laws, unlike

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[79] *Id.* at 39 (Douglas, J., concurring).

[80] *Id.* at 30-31 (evaluating Ohio's system under the Equal Protection Clause and finding that the state did not assert the "compelling interest" required to maintain such a restrictive system). Chief Justice Warren dissented, in part, on the ground that the case was so important that it warranted longer deliberation. *Id.* at 67-68 (Warren, C.J., dissenting) ("I think it is fair to say that the ramifications of our decision today may be comparable to those of *Baker v. Carr*, a case we deliberated for nearly a year.") (citation omitted).

[81] *See, e.g.*, *id.* at 24 ("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 . . . ."); *id.* at 35-36 (Douglas, J., concurring) ("Ohio, through an entangling web of election laws has effectively foreclosed its presidential ballot to all but Republicans and Democrats."); *see also* Jenness v. Fortson, 403 U.S. 431, 438 (1971) ("But the *Williams* case, it is clear, presented a statutory scheme vastly different from the one before us here.").

[82] 403 U.S. 431 (1971).

[83] In *Williams*, Justice Stewart argued for "rational basis" scrutiny in ballot access cases. 393 U.S. at 51-52 ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (quoting McGowan v. Maryland, 366 U.S. 420, 425-26 (1961))).

[84] *Jenness*, 403 U.S. at 433-34. Justices Black and Harlan, who were about to depart from the Court, concurred in the result without an opinion. *Id.* at 442.

Ohio's, [did not] freeze the political status quo."[85] Thus, Justice Stewart implied that unless an electoral scheme, viewed as a whole, entirely shut out alternative voices, it would be upheld.[86]

In the span of a few short pages, the *Jenness* opinion effectively turned much of the *Williams* language on its head. While ignoring the precedent's strict scrutiny framework, the Court turned the "complete monopoly" description from *Williams* into a benchmark that justified all restrictions short of freezing the status quo.[87] Furthermore, *Jenness* employed the *Williams* "totality of the circumstances" approach to justify specific restrictive provisions by pointing to other available means of ballot access for the candidate.[88] This device allowed the *Jenness* Court to claim that the restrictions placed no burden whatsoever on First Amendment rights of minor parties.[89] As a result, the Court avoided almost completely any discussion of the burdened rights and countervailing state interests. Finally, in rejecting the equal protection claim, Justice Stewart suggested that, since *Williams* found a primary requirement burdensome when *imposed* on a minor party, states are free to *prohibit* primaries for minor parties.[90]

B. Rosario *to* American Party*: Third Parties Lose*

In *Rosario v. Rockefeller*,[91] several New York voters challenged the state's requirement that voters desiring to participate in a party primary register as

[85] *Id.* at 438.

[86] *Id.* at 439-40 ("In a word, Georgia in no way freezes the status quo . . . . We can find in this system nothing that abridges the rights of free speech and association secured by the First and Fourteenth Amendments."). *See generally* Winger, *supra* note 4 (describing the severity of the restrictions upheld in *Jenness*).

[87] *Id.* at 434-38.

[88] *See id.* at 437-38 (distinguishing *Williams*, where "the totality of the Ohio restrictive laws taken as a whole" constituted "an invidious discrimination," from Georgia's scheme, which "freely provides for write-in votes"). The Court did not inquire whether the alternative means of access were adequate substitutes for the political expression. *Cf.* City of Renton v. Playtime Theatres, 475 U.S. 41, 50 (1986) ("The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication."). However, it is arguable that a candidate's ability to run as a write-in or major-party candidate is not an adequate alternative means of expression for the *minor party* or its members.

[89] *Id.* at 439-40 ("Georgia[']s election scheme overall] in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life. . . . We can find in this system nothing that abridges the rights of free speech and association . . . .").

[90] *Id.* at 441. Justice Stewart's conclusion is ironic in light of his dissent in *Williams*, which indicated that a state should be free to require primaries of all political parties. Williams v. Rhodes, 393 U.S. 23, 55 n.9 (1968) (Stewart, J., dissenting) ("Ohio's requirement that all political parties hold primary elections . . . seems to me[] well within the State's power to enact.").

[91] 410 U.S. 752 (1973).

members of that party eight to eleven months prior to the election.[92] The majority, once more led by Justice Stewart, held that the prohibition did not violate the right to vote, and was supported by the state rationale in avoiding party raiding, the practice of voting strategically in an opposing party's primary in order to skew the primary results in one's favor.[93] Four Justices dissented on the ground that the majority appeared to apply rational-basis review and that strict scrutiny – appropriate here in light of prior cases – would dictate that the regulation be struck down.[94]

Although *Rosario* did not directly involve third parties, it prefigured at least two developments affecting their rights. First, the case indicated a willingness on the part of the Court to protect the integrity of major-party organizations against outsiders.[95] In the eyes of the Court, these organizations appeared so fragile that a mere possibility of strategic party-switching justified a state law that would prevent both "raiders" and legitimate new party members from voting.[96] Second, the case departed from strict scrutiny as the standard applicable to a burden on the right to vote, and, in fact, failed altogether to articulate a standard of scrutiny.[97] This confusion about the proper constitutional test persisted in the Court's opinions in ballot-access cases for at least ten years.

In 1974, one year after *Rosario*, the Court handed down two decisions, *Storer v. Brown*[98] and *American Party v. White*,[99] creating more doctrinal confusion. In *Storer*, the Court upheld a California statute that disqualified independent candidates who had voted in the immediately preceding primary election of any party, and that required candidates to gather all nominating signatures during a twenty-four-day window following the major-party primaries.[100] In *American Party*, the Court dismissed a challenge to several provisions in the California election code that required a minor party to obtain

[92] *Id.* at 755.

[93] *Id.* at 760-61 (acknowledging that "the period between the enrollment date and the . . . primary [elections] is lengthy," but is linked to an "important state goal").

[94] *Id.* at 767-68 (Powell, J., dissenting) ("[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." (quoting Reynolds v. Sims, 377 U.S. 533, 561-62 (1964))).

[95] *Id.* at 760.

[96] *Id.* (finding that inhibiting party "raiding" was an important state goal). The holding of *Rosario* was soon limited in *Kusper v. Pontikes*, 414 U.S. 51 (1973), which invalidated a twenty-three-month waiting period for party-switching, but the Court remained firm in recognizing the legitimacy of the state interest at stake. *Id.* at 59-60 ("[T]he Court recognized in *Rosario* that a State may have a legitimate interest in seeking to curtail "raiding," as that practice may affect the integrity of the electoral process.").

[97] *Rosario*, 410 U.S at 767 (Powell, J., dissenting) ("The majority does not identify the standard of scrutiny it applies to the New York statute.").

[98] 415 U.S. 724 (1974).

[99] 415 U.S. 767 (1974).

[100] *Storer*, 415 U.S. at 726-27, 746.

the support of 1% of the state's voters, excluding those who had voted in another party's primary.[101] Justice White, the other remaining dissenter from *Williams*, wrote for a solid majority in both cases. Disclaiming any "litmus-paper test" for invalid electoral restrictions, the Court purported to employ a flexible balancing approach in *Storer*.[102] On the state interest side of the scales, the opinion presented a long list of justifications for limiting ballot access: preventing inter-party raiding, avoiding overcrowded ballots, requiring a preliminary showing of support, and generally preserving the stability of the political system.[103] In contrast, the decision presented the petitioner's interest as the interest in "making a late rather than an early decision to seek independent ballot status," and so had little trouble upholding the law at issue.[104]

In *American Party*, Justice White paid lip-service to the strict-scrutiny standard and asserted that the challenged law must be "necessary to further compelling state interests . . . that cannot be served equally well in significantly less burdensome ways."[105] Nevertheless, the rest of the decision resembled *Storer* in its ready and uncritical acceptance of the state's proffered interests. For instance, having decided that "preservation of the integrity of the electoral process" was a compelling state interest,[106] the Court neglected to consider whether this extremely general interest was necessarily implicated and whether it could be served through less drastic means.[107] By elevating boilerplate justifications for ballot restrictions to the level of compelling state interests, the Court's "strict scrutiny" analysis in *American Party* effectively struck another blow to the rights of minor parties. Third parties, it seemed, would lose under any test.

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[101] *American Party*, 415 U.S. at 779-80.

[102] *Storer*, 415 U.S. at 730 ("Decision[s] in this context . . . [are] very much a matter of consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.") (citation omitted) (internal quotation marks omitted). The Court cited the strict-scrutiny standard at the outset of its discussion, but never returned to it. *Id.* at 729 ("[T]he [*Williams*] Court . . . ruled that the discriminations against new parties and their candidates had to be justified by compelling state interests.").

[103] *Id.* at 731-34.

[104] *Id*. at 736. The Court did remand a portion of the case relating to California's petition-signature requirements for further fact-finding. *Id.* at 738.

[105] *American Party*, 415 U.S. at 780.

[106] *Id.* at 782 n.14.

[107] *Compare id. with Williams*, 393 U.S. at 54 n.8 (suggesting that Ohio could have used the less drastic means of a runoff election rather than restricting ballot access in order to promote its interest in producing a majority-supported winner).

C. Anderson *to* Burdick*: Articulating a (Double) Standard*

In 1983, in *Anderson v. Celebrezze*,[108] the Supreme Court set out to clarify the constitutional test for ballot-access cases. Writing for the majority, Justice Stevens stated that a court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the interests asserted by the State to justify the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights.[109]

This balancing approach appeared to impose an intermediate form of scrutiny on ballot-access restrictions. Applying the test to the case at hand, the Court found that the March petition-filing deadline at issue was invalid because the state's "minimal interests" in the deadline did not justify the burden on the candidate and his supporters.[110] To reach this assessment, Justice Stevens carefully analyzed the state's asserted interests in voter education, equal treatment of candidates, and political stability, and concluded that none of these interests required the early deadline.[111]

Yet, despite its holding and strong language supporting the rights of third parties, *Anderson* did not signal a shift in the Court's jurisprudence. In fact, the *Anderson* test was all but ignored when the Court decided the next pair of election law cases, *Munro v. Socialist Workers Party*,[112] and *Tashjian v. Republican Party of Connecticut*.[113] In *Munro*, Justice White proceeded in the same manner as in *Storer* and *American Party* – accepting improbable state rationales[114] and characterizing the burdens on plaintiffs as "slight"[115] – to

[108] 460 U.S. 780 (1983).

[109] *Id.* at 789.

[110] *Id.* at 806.

[111] *Id.* at 796-806.

[112] 479 U.S. 189 (1986).

[113] 479 U.S. 208 (1986).

[114] For instance, in support of Washington's argument that its law was designed to prevent voter confusion and ballot overcrowding, Justice White held that the state need not present any evidence to support its claim. *Munro*, 479 U.S. at 194-95 ("We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access."). Moreover, the opinion never confronted the fact that the challenged statute resulted in over thirty-two candidates being listed on the primary election ballot, ostensibly exacerbating the very problem the state purported to solve. *Id.* at 203-04 (Marshall, J., dissenting).

[115] *Id.* at 199. When the plaintiffs demonstrated that the new regulation effectively reduced the number of qualified third parties from twelve to one, the Court stated that this "prove[s] very little . . . other than the fact that [the statute] does not provide an insuperable

reject the Socialist Workers Party's argument that the state of Washington improperly conditioned access to the general election ballot on the party's performance in the state's blanket primary. In reaching its holding, the Court departed from *Williams* in finding that the requirement of a direct primary may be imposed on a minor party.[116]

In *Tashjian*, on the other hand, the Court struck down a statute requiring the major parties to have closed primaries on the grounds that it was not narrowly tailored to further a compelling state interest.[117] Thus, while *Munro* applied a standard more lax than the one articulated in *Anderson*, *Tashjian* applied a much stricter one. Later cases, including *Eu v. San Francisco County Democratic Central Committee*, [118] have continued the trend of applying strict scrutiny to statutes impinging on the associational rights of major parties.[119]

Beginning in the 1990s, however, the Court resurrected the *Anderson* balancing test as part of a two-tier framework for analyzing ballot-access restrictions on minor parties. In *Norman v. Reed*,[120] the Court explained that "severe" restrictions on minor-party rights would trigger strict scrutiny,[121] while lesser restrictions could be justified merely by a correspondingly weighty state interest in accordance with *Anderson*.[122] Aside from *Norman* itself, however, the Court has been extremely reluctant to classify burdens on minor-party or independent candidates as "severe," so the *Anderson* balancing approach has remained the effective test.[123]

In *Burdick v. Takushi*,[124] the Court considered a Hawaii statute that forbade write-in votes, even in uncontested elections.[125] Although the restriction on write-ins was absolute, the majority opinion, once again written by Justice White, found that it constituted only a "slight" burden on the right to vote because the system "provide[d] for easy access to the ballot" in other ways.[126] In upholding the restriction under *Anderson*, the Court employed a number of

barrier to minor-party ballot access." *Id.* at 196-97.

[116] *See* Williams v. Rhodes, 393 U.S. 23, 32-33 (1968) (concluding that Ohio's "requirement of a party structure and an organized primary . . . . operate[s] to prevent [minor parties] from ever getting on the ballot").

[117] *Tashjian*, 479 U.S. at 225.

[118] 489 U.S. 214 (1989).

[119] *See id.* at 222 (holding that a California election law prohibiting political parties from endorsing primary candidates was not narrowly tailored to the advancement of a compelling state interest).

[120] 502 U.S. 279 (1992).

[121] *Id.* at 288-89 (citing Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184, 186 (1979)).

[122] *Id*. (citing Anderson v. Celebrezze, 460 U.S. 780, 789, 793-94 (1983)).

[123] *See* RASKIN, *supra* note 18, at 115 (identifying *Anderson* as the modern standard).

[124] 504 U.S. 428 (1992).

[125] *Id.* at 430.

[126] *Id.* at 436, 439.

already-familiar tactics. First, it focused on the electoral scheme as a whole, arguing that less burdensome restrictions offset the impact of the challenged provision.[127] Second, it accepted broad state justifications without any showing that they could not be served equally well in less restrictive ways.[128] Finally, and most dramatically, the Court minimized the plaintiff's interests by denying that elections carried an expressive function.[129] Quoting *Storer*, the Court explained that the function of elections was to "to winnow out and finally reject all but the chosen candidates."[130] According to the Court, "[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently."[131]

D. Timmons *and* CDP*: Protecting the Major Parties*

In *Timmons v. Twin Cities Area New Party*,[132] the Court went further than ever before in making its disfavor of minor parties explicit. In sustaining Minnesota's ban on cross-nomination of the same candidate by multiple parties, the Court held that the state interest in preserving the two-party system trumped the New Party's right to select a candidate who had already been nominated by the Democratic Farmer-Labor Party.[133] "The Constitution," argued Chief Justice Rehnquist, "permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system."[134] In accepting this rationale, the Court effectively held that a restrictive ballot-access law might be justified because of – rather than despite – its detrimental impact on third parties. After all, any law that burdens only third parties and their supporters necessarily promotes the two major parties. Thus, the Court, having already established different standards for evaluating challenges by major and minor parties,[135] eviscerated the protection afforded minor parties to the point that they appeared to lose almost by definition.

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[127] *Id.* at 436 (discussing the other avenues to the ballot, such as obtaining the signatures of 1% of the state's registered voters, qualifying as an established party, and participating in the designated nonpartisan ballot process).

[128] *See id.* at 439-40 (accepting Hawaii's asserted interest in avoiding factionalism at the polls and guarding against "party raiding").

[129] *Id.* at 438 ("[T]he function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrels. Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.") (citation and internal quotation marks omitted).

[130] *Id.*

[131] *Id.*

[132] 520 U.S. 351 (1997).

[133] *Id.* at 369-70. It is important to point out that both the candidate and the Democratic Farmer-Labor Party had agreed to the cross-nomination.

[134] *Id.* at 367.

[135] *See supra* Part II.C.

Admittedly, the Court was careful to limit its holding to "reasonable regulations" that favor the two-party system "in practice."[136] But this requirement of reasonableness is probably no more than a reference to the *Anderson* balancing test, which the Court purported to apply. The "in practice" limitation could be read in one of two ways. It could mean that a legislature may not favor the two-party system *intentionally*, but is free to do so incidentally, as a practical consequence of pursuing other goals. Although this reading is plausible at first glance, it must be rejected in light of the Court's assertion that "[t]he Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system."[137] In other words, not only is the intentional favoring of the two-party system permissible, it actually tips the scales in favor of upholding the law.[138]

The remaining explanation of the "in practice" language is that it is meant to exclude restrictions that, on their face, display favoritism to the major parties. After all, *Timmons* implicitly classified the anti-fusion ban as facially neutral when it quoted *Burdick* and *Anderson* for the proposition that important state interests would justify "reasonable, *nondiscriminatory* restrictions."[139] Even though, in practice, the Minnesota statute clearly disadvantaged minor parties,[140] it formally applied to both major and minor parties alike, and was therefore at least facially neutral.[141]

But deciding whether a statute facially discriminates against minor parties may be complicated. In one sense, most ballot-access restrictions are discriminatory, because, as explained earlier, they typically do not apply to the major parties.[142] Nevertheless, the Court has explicitly endorsed a two-track scheme of this type in *Jenness*.[143] In doing so, the Court noted that "[s]ometimes the grossest discrimination can lie in treating things that are

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[136] *Timmons*, 520 U.S. at 367.

[137] *Id.*

[138] *See id.* at 378 (Stevens, J., dissenting) ("The fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality.").

[139] *Id.* at 358 (emphasis added).

[140] Fusion helps a minor party by allowing voters to vote for their candidate without fear of "wasting their vote" on a candidate who stands no chance of winning. Then, if the fusion candidate is elected by the combined efforts of a major and a minor party, he or she is likely to act in a way that is responsive to both constituencies. *See generally* Argersinger, *supra* note 33. *See also infra* Part III.A (discussing the flawed reasoning behind the "wasted vote" argument).

[141] The Court has recognized in other contexts, however, that "equal application" of a statute does not bar a finding of discrimination. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 7-9 (1967) (rejecting an argument that because anti-miscegenation laws punish both whites and blacks equally, they are not discriminatory).

[142] *See* ROSENKRANZ, *supra* note 27, at 57-58.

[143] *See* Jenness v. Fortson, 403 U.S. 431, 441-42 (1971).

different as though they were exactly alike . . . ."[144] The Court also pointed out that major parties are regulated in some ways in which minor parties are not, so that neither "can be assumed to be inherently more burden[ed] than the other . . . ."[145] Together, *Jenness* and *Timmons* suggest a *Catch-22* situation: classification schemes that single out minor parties for separate treatment are upheld as effectively fair, while restrictions having the effect of promoting the two major parties are defended as facially neutral. Seen in this context, *Timmons* contains no meaningful limitation on the states' abilities to promote the major parties.[146]

The contrast in the Court's treatment of major and minor parties becomes evident in comparing *Timmons* with *California Democratic Party v. Jones* ("*CDP*"),[147] decided three years later. At issue in *CDP* was California's blanket primary law, which provided that the primary ballots for all parties would be combined into one, allowing California voters to vote for any combination of the listed candidates; the top vote-getter in each party would then be placed on the general election ballot.[148] Major and minor parties sued, arguing that the law violated their right to have their membership select the candidate who would represent them in the general election[149] – essentially the same right that the Court found insufficiently important in *Timmons* only three years earlier.[150] Nevertheless, the Court, without the slightest effort to distinguish *Timmons* – or, for that matter, *Munro*, which implicitly upheld Washington's blanket primary requirement for minor parties – applied strict scrutiny and invalidated the California law.[151]

The apparent conflict with *Timmons* becomes even more puzzling when we notice that, with the exception of Justice Souter, the same Justices were in the majority and the dissent in both cases.[152] Incredibly, the majority in *CDP*

[144] *Id.* at 442.

[145] *Id.* at 441.

[146] The caveat that the major parties may not *completely* insulate themselves from competition, *see* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997), is not a significant protection. A court could theoretically find any restriction short of outlawing alternative parties constitutional under this standard. *See also* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 40 (2003) ("*Timmons* appears to overrule *Williams v. Rhodes* in allowing the government to favor the two major political parties over third parties and independent candidates.").

[147] 530 U.S. 567 (2000).

[148] *Id.* at 570-71.

[149] *Id.* at 571.

[150] *Timmons*, 520 U.S. at 359 (clarifying that the party's right to select a "standard-bearer" is limited by the state's right to impose qualifications for candidates).

[151] *See CDP*, 530 U.S. at 586 (finding that the California statute was not narrowly tailored to compelling state interests).

[152] The primary reason Justice Souter dissented in *Timmons* was because he did not think it proper for the Court to raise the "preservation of the two-party system" rationale sua

repeatedly cited Justice Stevens's dissent in *Timmons* to support the key proposition that the party's right to select its nominee is constitutionally protected,[153] and Justice Stevens's dissent in *CDP* cited the *Timmons* majority for the proposition that this right is not absolute.[154] However, neither side discussed *Timmons* at any length, either intentionally ignoring the inconsistency, or genuinely believing that the two cases were not in conflict. In either event, we are left to search for clues implicit in the language of the opinions if we are to understand the different outcomes.

Although the facts of the two cases differ, it is unclear that the differences are of constitutional significance. On the surface, *Timmons* involved a restriction at the general election level, while the California law applied to party primaries, arguably making it more invasive.[155] However, this variation merely reflects the different routes that major and minor parties generally follow to obtain a spot on the general election ballot. As explained earlier, minor-party candidates in most states must petition to appear on the ballot, but generally do not need to participate in an intra-party primary, while major parties have an automatic place on the ballot, but must go through a primary to select their chosen candidates for the general election.[156] This difference aside, the laws in both cases imposed a burden on the same act, namely the selection of the party's standard-bearer for the general election. If anything, the minor parties' associational rights in this context deserve more protection, because one of the main justifications for requiring major-party nomination by direct primary, as opposed to by internal party caucus, is the quasi-public role played by the major political parties.[157]

Another attempt to justify the different outcomes in *Timmons* and *CDP* could focus on the weight of the state interests asserted in the two cases. One would have to argue that the justification of "preserving the two-party system"

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sponte. *Timmons*, 520 U.S. at 383-84 (Souter, J., dissenting). His opinion went on to suggest, however, that he might be one of the most likely to support such a rationale in principle. *Id.* at 384 ("If it could be shown that the disappearance of the two-party system would undermine [the state's] interest, and that permitting fusion candidacies poses a substantial threat to the two-party scheme, there might well be a sufficient predicate for recognizing the constitutionality of the state action presented by this case.").

[153] *E.g.*, *CDP*, 530 U.S. at 575 (citing Justice Stevens's dissent to support the proposition that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee").

[154] *Id.* at 593-94 (stating that "the associational rights of political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations").

[155] *See id.* at 572-73 (stressing the protected status of a party's internal affairs).

[156] *See* Jenness v. Fortson, 403 U.S. 431, 441-42 (1997) (upholding this practice).

[157] *See* Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753, 769-70 (2000) (describing the historical origins of the direct primary); *cf.* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 580 (1995) (observing that a parade large enough to confer social benefits on its private organizers would generally justify a mandated-access provision).

in *Timmons* was more important than the state interest in promoting "moderate problem-solvers" and increasing voter participation in *CDP*. In addition to the dubious quality of this claim, it utterly fails to explain why the Court applied strict scrutiny in *CDP* but not in *Timmons*. After all, it is generally the nature of the burden – not the state's justification for it – that determines the constitutionally applicable standard of review.[158]

Still another, and perhaps more insightful, attempt to explain the disparate reasoning in *Timmons* and *CDP* is suggested by Professor Pildes in an essay written in the aftermath of *Bush v. Gore*.[159] Instead of approaching the Court's cases doctrinally, Professor Pildes implies that the outcomes are consistent with the Justices' belief in the fragility of the electoral process and their desire for political stability.[160] To explain how *CDP* fits into this framework, he points out that the challenged law was the product of a voter initiative process and, at least in the Justices' view, threatened "democratic politics and political organizations."[161]

While Professor Pildes's analysis is interesting and, it seems to me, correct as a general matter, it does not explain why the Court sided with the political organization against the state law in *CDP*, while rejecting the political organization's claim in *Timmons*. Only if "political organization" is a code word for "major political party," does the Court's solicitude appear consistent with prior cases. In fact, it seems that one way to reconcile *Timmons* and *CDP* is to notice that both decisions protect the major political parties, one from third parties, and the other from non-member voters.

To that end, the opinions invoked wholly different rhetoric depending on whether the political party at issue was a major or minor one. In *CDP*, the Court stated, "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself."[162] Meanwhile, the *Timmons* majority quoted *Storer* for the proposition that a state is entitled to "believe[] with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government."[163] Given that the Founders evinced

[158] *See, e.g.*, Norman v. Reed, 502 U.S. 279, 288-89 (1992) (stating that severe burdens on a protected right trigger strict scrutiny, while lesser burdens may be justified by less compelling state interests).

[159] Pildes, *supra* note 11, at 702-09 (emphasizing the Court's apparent concern that political organizations are unstable entities in need of judicial protection).

[160] *See id.* at 696-98 (considering whether certain Justices consistently gravitate toward a particular outcome in ballot-access cases).

[161] *Id.* at 704.

[162] Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000).

[163] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 368 (1997).

distaste for all parties and factions alike,[164] this selective invocation of their attitude against third parties is either a historical error or a rhetorical ploy to support the desired result. John Adams, for instance, was hostile to the idea of a "division of the republic into two great parties, each arranged under its leader, and concerting measures in opposition to each other."[165] Arguments based on the Founders' intent are therefore extremely problematic, and are made no less so by the fact that many of the Founders soon became party leaders themselves.[166]

E. Clingman v. Beaver*: Consistently Inconsistent*

The difference between the Supreme Court's approach to the rights of major and minor political parties may also explain the somewhat awkward result in the high court's most recent election-law case, *Clingman v. Beaver*.[167] At issue in *Clingman* was an Oklahoma statute that forbade a party from opening its primary elections to registered members of other parties but allowed parties to conduct semi-closed primaries, in which independents could vote.[168] Previously, the Court had struck down both mandatory blanket primaries in *CDP* and mandatory closed primaries in *Tashjian* as a violation of a political party's associational rights.[169] Given the high degree of protection afforded by these cases to a party's choice of primary election scheme, Oklahoma's requirement of a semi-closed primary also seemed destined for defeat. However, *Clingman*, unlike the prior cases, involved a challenge by a minor political party (the Libertarian Party of Oklahoma), and came out, once again, on the side of the state.[170]

To arrive at the conclusion that a party could be prevented from conducting open primaries, the Court had to negotiate several doctrinal hurdles. As an initial matter, *Tashjian*, the closest available precedent, applied strict scrutiny without articulating a rationale for doing so that would permit an easy distinction with *Clingman*.[171] Although *Tashjian* noted that a party seeking to

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[164] *See* A. JAMES REICHLEY, THE LIFE OF THE PARTIES: A HISTORY OF AMERICAN POLITICAL PARTIES 17 (1992) (addressing the historical origins of the Founders' distrust of political parties).

[165] *Id.*

[166] *Id.* ("The other principal Founders fully shared [George] Washington's distrust of parties – at least until they began running parties themselves.").

[167] 125 S. Ct. 2029 (2005).

[168] *Id.* at 2034.

[169] Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000); Tashjian v. Republican Party of Conn., 479 U.S. 208, 225 (1986).

[170] *Clingman*, 125 S. Ct. at 2042.

[171] In fact, *Tashjian* appeared to apply strict scrutiny on the basis of the fact that the statute burdened a fundamental right, namely the right to vote. *See Tashjian*, 479 U.S. at 217 ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgement of fundamental rights, such as the right to vote or, as here,

open its primaries to all voters "would raise a different combination of considerations," it did not suggest that such a question would trigger a completely different level of constitutional review.[172] However, Justice Thomas's majority opinion in *Clingman* explained that more recent cases applied strict scrutiny only when the burden on protected rights was "severe."[173] To avoid the implication that *Tashjian* was wrongly decided – or at least employed the wrong level of review – the opinion took pains to demonstrate that the burden on the Libertarian Party was less than the burden on the Republican Party in *Tashjian*.[174]

The argument that forcing a closed primary is more burdensome than forcing a semi-closed primary has some logical force, but the two burdens are still quite closely related: both prevent a party from extending the right to vote in its primary to non-members. The fact that the Court chose to draw the distinction only underscores its reluctance to apply strict scrutiny to concerns raised by a minor political party plaintiff.[175] Here, the result of this reluctance is a rather odd framework under which challenges by parties to both open and closed primaries are judged under a strict scrutiny standard, while challenges to a semi-closed system engender only intermediate-level review.

It is noteworthy that Justice Thomas's characterization of the burden on minor-party rights as slight failed to convince a majority of the Court, and that Justices O'Connor and Breyer wrote a separate concurrence in which they affirmed the importance of the associational rights at stake.[176] However, the concurring Justices agreed that the burden was not severe enough to trigger strict scrutiny.[177] According to the majority, individuals who wanted to vote in the Libertarian Party primary faced "only" the burden of de-registering from one of the other parties.[178] But, as Justice O'Connor's concurrence acknowledged, such a statement would be unimaginable in the context of other expressive activity.[179] Indeed, a statute barring campaign contributions by registered Republicans to the Libertarian Party would almost certainly trigger strict scrutiny and be found unconstitutional because it would force

the freedom of political association.") (citation omitted).

[172] *Id.* at 224 n.13.

[173] *Clingman*, 125 S. Ct. at 2038.

[174] *Id.* (finding that, whereas in *Tashjian* "Connecticut's closed primary limited citizens' freedom of political association," this case involved "voters who have *already* affiliated publicly with one of Oklahoma's political parties").

[175] It is notable that the Court of Appeals decision in *Clingman* applied strict scrutiny and found that the challenged statute at issue was not narrowly tailored to a compelling state interest. *Id.* at 2034.

[176] *Id.* at 2042-44 (O'Connor, J., concurring).

[177] *Id.* at 2045 (O'Connor, J., concurring).

[178] *Id.* at 2038.

[179] *Id.* at 2043 (O'Connor, J., concurring) ("We surely would not say, for instance, that a registered Republican or Democrat has no protected interest in associating with the Libertarian Party by attending meetings or making political contributions.").

Republicans to give up one constitutional right (the right to affiliate with a group of one's choosing) to obtain another.[180] Ironically then, *Clingman* effectively treated the expressive value of casting a ballot as less worthy of protection than other forms of expressive activity, even though five Justices expressly disavowed the logic behind doing so.[181]

In addition to diminishing plaintiffs' First Amendment interests, the decision in *Clingman* also elevates the state interest in promoting the integrity of political parties to a concern that trumps the parties' own preferences. According to the Court, Oklahoma's interest in maintaining the Libertarian Party's identity is so strong that it overrides the Libertarian Party's desire to "surrender" that identity.[182] As the dissent notes, however, the Court's real concern about party integrity relates to the integrity of the major political parties.[183] It is the cohesion of the Democratic and Republican parties that the Court's ruling effectively protects: the registered membership of minor political parties is typically tiny, even in proportion to their share of voters.[184]

III. THE COURT'S MISTAKEN ASSUMPTIONS

The summary above demonstrates that we must look beyond doctrine to the underlying political assumptions of the Court if we wish to make sense of its jurisprudence in the ballot-access arena. In this Part, I intend to identify and challenge the most problematic of these biases, namely, the unduly narrow understanding of elections and of the role of third parties, and the inappropriately deferential attitude toward self-entrenching state legislatures and major-party organizations. Although some of these preconceptions are not uncommon among the general public, most have been soundly discredited in scholarly literature.

Today's scholars of democratic politics may be roughly classified as either "aggregative" or "deliberative" theorists, with the former emphasizing the rational self-interest of voters, organized groups and politicians, and the latter focusing on the more normative task of improving the quality of public decision-making.[185] Although the two approaches are often in tension with

[180] Even in the context of government-conferred privileges, as opposed to rights, the Supreme Court has held that the state may not impose conditions that infringe on an individual's First Amendment freedoms. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 359 n.13 (1976) (finding that employment conditioned on political partisanship violates the First Amendment).

[181] *Clingman*, 125 S. Ct. at 2043 (O'Connor, J., concurring); *id.* at 2047-48 (Stevens, J., dissenting).

[182] *Id.* at 2039.

[183] *Id.* at 2052 (Stevens, J., dissenting).

[184] *See id.* at 2039 (commenting that there were only 300 registered Libertarians in Oklahoma and that at least 95% of voters in LPO's 1996 primary were independents, not Libertarians).

[185] Richard H. Pildes, *Competitive, Deliberative and Rights-Oriented Democracy*, 3

one another, each offers a convincing rationale for greater protection of minor political parties.[186] To understand why this is so, this Part examines the contemporary understandings of why individuals vote, why minor political parties form, and why elected representatives legislate the way they do. Even a cursory investigation of incentives behind each of these actions will demonstrate that voters do not "waste" their vote on third parties in any meaningful sense; that third parties have valid reasons for appearing on the ballot; and that state legislatures, if unchecked by the judiciary, do not act in the public interest when they promulgate onerous ballot-access restrictions.

A. *The Ballot and Expressive Voting*

The Court's belief that elections do not serve an expressive function is particularly problematic because it causes the Court to ignore important interests of voters and minor-party candidates. Doctrinally, the Court reached its current position through a gradual narrowing of its definition of the function of an election. In *Storer*, the Court stated that "[t]he general election ballot is reserved for major struggles," and is not a place for factional politics.[187] Justice White reasoned that because the election process "functions to winnow out and finally reject all but the chosen candidates," exclusion of third parties at the general election stage was permissible.[188] Later, in *Burdick*, the Court held that a voter's act of marking a ballot was not an expressive activity protected under the First Amendment and, therefore, voters had no right to a tally of write-in votes.[189] Incredibly, even the dissenting Justices agreed that "[p]etitioner's right to freedom of expression is not implicated. . . . As the majority points out, the purpose of casting, counting and recording votes is to elect public officials, not to serve as a general forum for political expression."[190] Finally, in *Timmons*, the Court seized on the language in *Burdick* to hold that a third party's expressive interest in having its name on the ballot was insubstantial, because "the function of elections is to elect

ELECTION L.J. 685, 685 (2004) (explaining that the aggregative view focuses on interaction between politicians and organized groups, while the deliberative view seeks to promote citizen participation in public policy and debate).

[186] *Compare*, *e.g.*, POSNER, *supra* note 11, at 170, 237, 239, 245-47 (adopting an antitrust rationale for protecting third parties) *with* THOMPSON, *supra* note 25, at 69 (arguing that third parties promote the value of free choice). *See also* Pildes, *supra* note 185, at 691 (framing this convergence of prescriptions).

[187] Storer v. Brown, 415 U.S. 724, 735 (1974).

[188] *Id.* The Court reiterated this argument in *Munro*. Munro v. Socialist Workers Party, 479 U.S. 189, 196 (1986) (concluding that states are entitled to "raise the ante" for ballot access at the general election phase).

[189] Burdick v. Takushi, 504 U.S. 428, 438 (1992) (arguing that "attributing a more generalized expressive function to elections would undermine the ability of States to operate elections fairly and efficiently").

[190] *Id.* at 445 (Kennedy, J., dissenting).

candidates."[191] As Justice Stevens pointed out in dissent, *Timmons* represented a major expansion of *Burdick*, because that case held that a *voter's* private act in the voting booth was not expressive, while *Timmons* suggested that the public display of a *party's* name on the ballot was not protected.[192]

The Court's limited view of the purpose of voting is, at best, oversimplified and out of touch with contemporary understandings of the act of voting. Around the middle of the twentieth century, social science theorists began to apply a "rational choice" model to the behavior of actors in the political sphere in an attempt to utilize the tools of economic analysis to explain the workings of our system of government.[193] According to this model, elected officials act in the interests of their constituents primarily in order to maximize their chances for re-election, and voters choose to vote for the candidates who are likely to promote policies that are personally beneficial to them.[194] Some scholars in this mold emphasize the role of the electorate and focus on the pluralist aspects of democracy, while others emphasize the crucial role of well-organized elite interests, but all share in the analogy of politics as a competitive market.[195] The basic model posits the existence of atomized actors making rationally self-interested decisions about politics within a given set of electoral rules, just as the traditional economic model suggests consumers of goods and services make decisions about economic matters.[196]

This vision of politics should be contrasted with the so-called "civic republican" theory prevailing during the early days of the nation's existence, which expected both voters and politicians to act in a public-spirited fashion,[197]

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[191] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 369 (1997) (citing *Burdick*, 504 U.S. at 437-38).

[192] *Id.* at 373 (Stevens, J., dissenting) (rejecting the conclusion that, because the ballot does not serve as a principal forum for voter expression, it therefore serves no expressive purpose for parties who place candidates on the ballot).

[193] *See generally* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957). *See also* Issacharoff & Pildes, *supra* note 4, at 708 (emphasizing the foundational nature of Downs's work).

[194] DOWNS, *supra* note 193, at 28.

[195] *See* JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 12-13 (1995) (explaining that some rational choice theorists focus on political elites whose singular goal is to seek and hold public office, while other theorists focus on the electorate's ability to choose from among the many parties' goods and services).

[196] *Id.* at 13 (observing that the "genius of democracy" for a rational choice theorist is much like the genius of the invisible hand that Adam Smith found in the free market).

[197] *See* Samuel Issacharoff, *Law and Political Parties: Introduction: The Structures of Democratic Politics*, 100 COLUM. L. REV. 593, 594 (2000) ("[T]he generation of the Framers viewed the emergence of stable intermediary organizations as factions, deeply anathema to the strong civic republican conception of virtue." (quoting Richard Hofstadter, a contributor to the article, who claims that the Founders deliberately attempted to create a "Constitution against parties")).

implementing what Rousseau famously termed the "general will," as distinguished from the aggregate wills of self-interested individuals.[198] The country's Founders subscribed to this vision of politics, and opposed the formation of factions and political parties, largely because they thought the self-interested motivations of such groups to be illegitimate.[199] However, as perhaps most eloquently demonstrated by the Founders' own partisan activities,[200] the "civic republican" theory sometimes diverges from actual practice.[201]

Still, the conventional market approach has raised far more questions about the mechanics of democratic politics than it has been able to resolve in a convincing manner. In particular, it has no convincing explanation for why individuals bother to vote at all.[202] If the act of voting is solely a tool for selecting among competing packages of benefits offered by each candidate, as some early theorists have assumed[203] – along with today's Supreme Court,[204] the transaction costs associated with voting appear to outweigh any potential benefits of casting a vote.[205] In mathematical terms, to assess the expected utility of voting ("R") we would multiply the likely benefit of having one's preferred candidate win ("B") by the likelihood of the vote making a difference ("P") and subtract the time and effort it takes for someone to vote ("C").[206] Thus,

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[198] *See* Jean-Jacques Rousseau, *The Social Contract or Principles of Political Right* in THE SOCIAL CONTRACT AND DISCOURSES 203 (G.D.H. Cole trans., 1993) ("There is often a great deal of difference between the will of all and the general will; the latter considers only the common interest, while the former takes private interest into account, and is no more than a sum of particular wills . . . .").

[199] *See, e.g.*, JOHN F. BIBBY & L. SANDY MAISEL, TWO PARTIES – OR MORE? 21 (2d ed. 2003) (quoting George Washington, who claimed that parties serve "always to distract the Public Councils and enfeeble the Public administration"). Today's "deliberative," i.e., civic republican, theorists are still often hostile to political parties. *See, e.g.*, DISCH, *supra* note 32, at 108 (citing Hannah Arendt and Benjamin Barber as two notable examples).

[200] REICHLEY, *supra* note 164, at 17.

[201] *See* POSNER, *supra* note 11, at 130-43 (presenting a critique of the more idealized civic-republican vision, which he calls "concept 1 democracy").

[202] *See id.* at 198 (suggesting that rational choice theorists methodically leave voters out of their equations and focus instead on interest groups); THOMPSON, *supra* note 25, at 22 (asserting that the most plausible explanations for why people vote have to do with personal feelings of social participation and civic involvement).

[203] Anthony Downs is perhaps the best-known proponent of this assumption. DISCH, *supra* note 32, at 77 (quoting DOWNS, *supra* note 193, at 48).

[204] *See supr*a notes 187-193 and accompanying text.

[205] *See* ALDRICH, *supra* note 195, at 47 (explaining that, because the probability that one's vote will decide the outcome of the election is very nearly zero, one's utility of voting is maximized only if the rewards felt from the act of voting itself outweigh the costs associated with voting).

[206] *Id.* at 46-47.

$$R = B * P - C.$$

Under this formula, "R" would almost always be negative, because "P" is infinitesimal in any sizeable voting district, even in an extremely close election.[207] This is because an individual vote is outcome-determinative in a precise sense only if it actually swings the election to a particular candidate, which virtually never happens.[208] This relatively simple insight has eluded some scholars, who not only accepted the formula as a starting point of their analysis, but even used it to argue that a vote for a third-party candidate is "wasted" or irrational in a two-party system because the probability of such a candidate being elected is minimal most of the time.[209] In effect, the argument erroneously assumes that the probability of electing any candidate, from an individual voter's perspective, is appreciably greater than zero.

To explain why individuals do, in fact, vote, some political scientists have suggested adding a value "D" to the equation to represent the positive rewards from the act of voting itself.[210] Others have resisted, possibly because this factor is difficult to quantify and undermines the narrow definition of rational self-interest accepted in the field.[211] However, there are a host of reasons why people may vote that do not depend on the likelihood of affecting the outcome, and this behavior is irrational only if, as the Supreme Court appears to believe, the function of elections is limited to selecting the "winner."[212] The fact that a significant percentage of the electorate votes – and votes predominantly in state-level and national-level elections, in which individuals have the smallest chance of affecting the outcome – implies that it is the Court's understanding of elections that is illogical.

In fact, as theorists who have focused on the deliberative aspects of democracy suggest, individuals may vote for a variety of reasons.[213] Some

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[207] *See id.*

[208] POSNER, *supra* note 11, at 191 (hypothesizing that voter turnout is higher in close elections because candidates spend more on advertising and other promotional activities, not because voters irrationally think that their single vote will swing the election).

[209] *See, e.g.*, DOWNS, *supra* note 193, at 48 (arguing that a vote for an unpopular candidate is always wasted because votes "should be expended as part of a selection process").

[210] *See* ALDRICH, *supra* note 195, at 46 (reworking the voting calculus as R = B * P - C + D, and concluding that utility is maximized only when "D" outweighs "C").

[211] *See id.* at 47 (mentioning that some scientists argue that the "D" variable does not belong in the equation); *see also* Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2138-46 (1996) (explaining that the rational choice model becomes meaningless once "D" is added).

[212] *See supr*a notes 187-193 and accompanying text.

[213] *See, e.g.*, THOMPSON, *supra* note 25, at 22 (listing several reasons why people might vote, including a desire to participate in society, a sense of civic duty, a fulfillment of their identities as citizens, and as a form of political and personal expression); *see also* Pildes,

may vote from a sense of civic responsibility.[214] Others may vote as an expression of support for a particular candidate, or as a statement of protest against an incumbent.[215] Because each legitimate vote is counted and contributes to a candidate's total, this number serves as a convenient measure of popular support for the candidate and his or her party, and carries political consequences well beyond the election itself.[216]

On the other hand, strategic, i.e., outcome-focused, voting for one of two most popular candidates is a curious and far-from-inevitable phenomenon.[217] Some strategic voters may indeed believe – almost always erroneously – that they have a real chance of affecting the outcome of an election with their single vote, and therefore vote not for a third-party candidate they would otherwise prefer, but for the most palatable major-party candidate because only a major-party candidate typically has a realistic chance of winning.[218] Others may simply relish the feeling of having backed the winner, and major-party supporters clearly experience this feeling much more often than minor-party voters. However, it should be clear from the analysis above that it is impossible to distinguish between legitimate and illegitimate reasons for voting for any particular candidate. All voting expresses the personal and political values of the voter, and that expressive function is far broader than candidate-selection.[219]

Although some aspects of voting are private, it would be a fallacy to argue that secret balloting removes the communicative aspect of voting or of running for office. For candidates and parties, appearing on the ballot is undoubtedly an important means of publicizing their views, even if they have little chance of winning.[220] For voters, the fact that their votes will contribute to a public

supra note 185, at 691 (summarizing the approach of deliberative theorists and pointing out Professor Thompson as one of its proponents).

[214] *See, e.g.*, THOMPSON, *supra* note 25, at 22.

[215] *See* ROSENSTONE, *supra* note 28, at 162 (presenting empirical research on voter motivations and suggesting that third-party voting is driven largely by dissatisfaction with the major parties).

[216] For instance, a candidate's vote totals often determine whether his party will be entitled to any public financing for the subsequent election. *See, e.g.*, Trevor Potter & Marianne H. Viray, *Barriers to Participation*, 36 U. MICH. J.L. REFORM 547, 568-70 (2003) (explaining that minor-party candidates must receive at least 5% of the popular vote in a general election in order to receive federal matching funds for the next election).

[217] Empirical research suggests that strategic voting of this type does, in fact, occur on a significant scale. *See, e.g.*, BIBBY & MAISEL, *supra* note 199, at 75 (presenting evidence that a significant percentage of voters in the 1968, 1980, and 1992 elections voted for a major-party candidate even though their first choice was a third-party or independent candidate).

[218] *See* DISCH, *supra* note 32, at 77 (summarizing the "wasted vote" argument).

[219] *See* THOMPSON, *supra* note 25, at 24 ("Elections are not only instruments for choosing governments; they are also media for sending messages about the democratic process.").

[220] *See* SIFRY, *supra* note 61, at 13 ("Third parties succeed when . . . the party's candidate gets enough votes to affect the larger political debate and change people's political

vote count could be an important statement of political values, even if any individual ballot does not determine the outcome.[221] A jurisprudence that takes the expressive aspects of voting into account would be quite different from the Supreme Court's current approach. Today, the Justices may believe that third parties contribute little more than confusion to elections. This view makes sense if the only purpose of elections is the selection of office-holders, since third-party candidates are usually not electable. However, if voting is reconceptualized as a broader political statement of support for or rejection of a particular candidate or agenda, then the ballot becomes inseparable from the larger arena of democratic politics, in which dissenting minority voices are integral to healthy debate.[222]

When the two major parties agree on a particular issue, public discourse about it may be virtually eliminated in the absence of a strong third voice.[223] Even when the two parties disagree, they may collude to avoid topics that each of them finds politically damaging.[224] Third parties thus liven public debate by broadening the range of topics and positions to which the electorate is exposed.[225] In a sense, they are in a unique position to do so because they have less to lose by taking a firm stand on issues that incumbents would rather avoid.[226] As Justice Stevens observed in *Anderson*, "Historically political figures outside the two major parties have been a fertile source of new ideas and new programs . . . ."[227] Even the more conservative members of the Court recognize that minor political parties have legitimate expressive rights despite the fact that they do not expect to win elections. For instance, in *McConnell v. FEC*,[228] in arguing against campaign finance limitations imposed on political parties by the Bipartisan Campaign Reform Act, Chief Justice Rehnquist

awareness.").

[221] Although the importance of every vote being counted is especially prominent in close elections, few would argue that it is otherwise unimportant.

[222] *See* Williams v. Rhodes, 393 U.S. 23, 39 (1968) (Douglas, J., concurring) (stressing that minor political parties have often "been the vanguard of democratic thought"); *see also* SIFRY, *supra* note 61, at 7 ("Historically, third parties have led the way in opening up discussion of new issues.").

[223] *See, e.g.*, Keith Darren Eisner, *Non-Major-Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 980 (1993) (commenting on the ability of major parties to manipulate the issues in the absence of a third voice in the context of Presidential debates).

[224] *See* POSNER, *supra* note 11, at 190 ("Duopolists often collude rather than compete vigorously with each other.").

[225] *See* DANIEL A. MAZMANIAN, THIRD PARTIES IN PRESIDENTIAL ELECTIONS 67-68 (1974) (remarking that third parties repeatedly force controversies into the open and compel major parties to respond).

[226] *Id.* at 67 (stating that third parties need not seek the middle of the road, and therefore "dramatize and help crystallize minority positions on issues").

[227] Anderson v. Celebrezze, 460 U.S. 780, 794 (1983).

[228] 540 U.S. 93 (2003).

emphasized that "some national political parties exist primarily for the purpose of expressing ideas and generating debate."[229]

The campaign finance decisions demonstrate the Court's willingness to recognize expressive interests in elections, at least outside the ballot-access context. For instance, the Court has found "serious . . . concerns under the First Amendment" with limitations on campaign contributions, which serve a similar, though less direct, candidate-supporting function than marking a vote on the ballot.[230] The Court has been even more unyielding in its protection of campaign expenditures by candidates, under the rationale that they have an expressive purpose, even though the ostensible goal of such spending, i.e., election to public office, is identical to a candidate's reason for appearing on the ballot.[231] In the campaign finance context, it would sound absurd to argue that expenditures by or contributions to non-major-party candidates should be less protected because they have little chance of affecting the election's outcome.

However, until now, the Court has carved out an exception to the expressive and associational rights of minor parties in the context of ballot access by imagining the general election ballot as solely a tool for the selection of candidates.[232] Ballot-access restrictions typically do not affect either interest groups (which do not compete in elections)[233] or the major parties (which appear on the general election ballot automatically), so the detrimental effect of the Court's approach has been largely confined to minor parties and independent candidates. However, once the ballot is properly understood as an important public forum for expressive activity, the Court would no longer be able to deny that minor political parties have a vital expressive interest in appearing on the ballot and that voters have a corresponding interest in being able to vote for them.

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[229] *Id.* at 352 (Rehnquist, C.J., dissenting).

[230] *See id.* at 120 (citing Buckley v. Valeo, 424 U.S. 1, 14-23 (1976)).

[231] *See id.* (declaring limitations on candidate and individual expenditures a direct restraint on speech).

[232] *See* Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 767 (2001) ("Despite the robust protection it has accorded major-party claims of expressive association, even the Supreme Court, as its consideration of associational claims of minor parties reveals, recognizes the difference between a political party and a normal association. The duplicity in the caselaw is all the more surprising, given that minor parties can present a much more persuasive argument that they are not state actors and behave more like purely expressive associations.").

[233] *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 373 (1997) (Stevens, J., dissenting) ("[T]he right to be on the election ballot is precisely what separates a political party from any other interest group."); Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. PENN. L. REV. 793, 802 (2001) (explaining that interest groups do not officially nominate candidates under their name).

B. *The Two-Party System and Political Stability*

Another driving force behind the Court's willingness to uphold ballot-access restrictions has been its perception of third parties as a threat to political stability. In the eyes of most Justices, minor parties, when left unchecked, raise the specter of "unrestrained factionalism" and electoral chaos, undermining the foundations of orderly democratic processes.[234] A solid majority of the Court shares the belief that third parties, if allowed easy access to the ballot, may destabilize the political system.[235] Even Justice Stevens, the author of *Anderson*, appears to agree that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government."[236]

In contrast, the Court views major political parties as the basis of stable politics. Recent cases are replete with praise for the stabilizing function of the major parties and the two-party system.[237] Chief Justice Rehnquist observed in *Timmons* that laws promoting the two major parties "temper the destabilizing effects of party-splintering and excessive factionalism,"[238] and cited Justice Powell's argument that "[b]road-based political parties supply an essential coherence and flexibility to the American political scene."[239] Justice O'Connor, a firm believer in the two-party system, has asserted that it "has contributed enormously to sound and effective government,"[240] and Justice Scalia has remarked that "[t]he stabilizing effects [of a two-party system] are obvious."[241]

To understand why the current Court is so favorable to major-party organizations, we must look to its understanding of the role of these organizations in the democratic process. Upon examination, it becomes clear that the Court envisions the major parties as "critical buffers between the individual and . . . the State," but in quite a different sense than Justice Brennan meant when he used the phrase in *Roberts v. United States Jaycees*.[242]

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[234] *Timmons*, 520 U.S. at 366-67.

[235] *Id.*

[236] Anderson v. Celebrezze, 460 U.S. 780, 803 (1983) (quoting Storer v. Brown, 415 U.S. 724, 736 (1974)).

[237] *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself.").

[238] *Timmons*, 520 U.S. at 367.

[239] Branti v. Finkel, 445 U.S. 507, 532 (1980).

[240] Davis v. Bandemer, 478 U.S. 109, 144-45 (1986).

[241] Rutan v. Republican Party of Ill., 497 U.S. 62, 107 (1990) (Scalia, J., dissenting).

[242] Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984) (explaining that the Bill of Rights must allow for the "formation and preservation" of certain personal relationships as a sanctuary from state interference); s*ee* Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101

Instead of focusing on a party's role as the protector of individual liberties against a potentially oppressive state, the Court stresses that parties perform the reverse function: they protect the smooth functioning of government against the discord of pluralist and populist politics.[243] Thus, the Court values major parties primarily as the guardians of political stability.

Ironically, however, the Court also believes that the major parties are so fragile that they need judicial protection in order to survive.[244] In *CDP*, for instance, the Court argued that "a single election in which the party nominee is selected by nonparty members could be enough to destroy [a] party."[245] To make its point, the Court rhetorically asked what would have happened to the Republican Party had it not been able to choose Abraham Lincoln as its candidate in 1860.[246] Although the Republican Party is undeniably more robust today than in 1860 when it was a third party itself, the opinion failed to acknowledge this obvious difference. In fact, Justice Souter has voiced a concern, perhaps shared by other members of the Court, that the major parties in the United States may be suffering a decline, and may therefore require protection especially today.[247]

Unfortunately, the Court improperly fails to distinguish between those aspects of the major parties that may require protection from those that do not. To understand whom the Court is protecting in cases such as *Tashjian*, *CDP*, and *Clingman*, it is helpful to employ an established conceptual framework first proposed by political theorist V.O. Key.[248] Key argued that a "political party" consists of at least three distinguishable groups.[249] First is the party-in-the-electorate, which represents the party's grassroots supporters, who may or may not be registered members of the party.[250] Second is the party as a private organization, which consists of the core members and committees that direct the party's affairs.[251] Third is the party-in-government, which includes party

COLUM. L. REV. 274, 294 (2001) (comparing family relationships, which clearly warrant the strongest protection against state interference, and political relationships, which require closer scrutiny and some level of state involvement).

[243] *See* RASKIN, *supra* note 18, at 8 ("The impulse that . . . unifies the Court's treatment of American politics[] is fear of popular democracy and the 'philistine' attitudes of the public.").

[244] *See, e.g.*, DISCH, *supra* note 32, at 30 (highlighting the Court's inconsistent reasoning that ballot-access restrictions only present minor inconveniences to third parties, while easy ballot access severely threatens the stability of the two-party system); Pildes, *supra* note 11, at 704 (criticizing the Court's view that major political parties need judicial protection).

[245] Cal. Democratic Party v. Jones, 530 U.S. 567, 579 (2000).

[246] *Id.*

[247] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 383-84 (1997) (Souter, J., dissenting).

[248] *See generally* V.O. KEY, POLITICS, PARTIES, AND PRESSURE GROUPS (5th ed. 1964).

[249] Hasen, *supra* note 9, at 351.

[250] *Id.*

[251] *Id.*

members who have gained public office.[252]

In *Tashjian*, the Connecticut state legislature, dominated by one major party, passed a statute that forbade any political party from opening its primaries to independent voters not registered as members of that party.[253] The party-in-government of one party thus removed an option that would have otherwise been at the disposal of the opposing party's organization.[254] The Court, without much hesitation, concluded that the associational interests of the party organization were paramount.[255] It is by no means clear, however, that major parties need such judicial protection from legislative action. After all, in Connecticut, as in most states, both parties are well represented in the legislature and therefore should be able to protect themselves through the political process better than almost any other group. In the context of partisan gerrymandering, for example, the Court has left the major parties to settle their differences in the political arena.[256] But the Court's belief in the ability of the major parties to protect themselves seems to disappear when a function of the party organization, as opposed to the party-in-government, is under threat.

While *Tashjian* could be seen as a conflict between distinct elements of opposing parties, *CDP* presented a more clear-cut conflict between the party organization and the party-in-the-electorate.[257] The law at issue was adopted by a popular initiative that was supported by members of both major parties,[258] and therefore involved an exercise of power by the electorate rather than by the party-in-government of either party. The Court once again sided with the party organizations, believing that they must be protected from a law that interfered with their candidate-selection power.[259] In *CDP*, however, the Court was not simply protecting a private association from outsiders, as it has done in other contexts;[260] it was, in reality, favoring one group within an association against

[252] *Id.*

[253] Tashjian v. Republican Party of Conn., 479 U.S. 208, 210 (1986).

[254] *See id.* at 237 (stating that the Democratic Party controlled the Connecticut legislature at the time the statute was passed).

[255] *Id.* at 225.

[256] *See* Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) (plurality opinion) (finding claims of partisan gerrymandering non-justiciable).

[257] *See* Pildes, *supra* note 11, at 704 (suggesting a similar tension without explicitly using Key's categories).

[258] *Id.* at 702; Persily, *supra* note 232, at 780.

[259] The Court found it troublesome that the blanket primary law was designed to promote "the election of more representative 'problem solvers' who [would have been] *less beholden to party officials*." Cal. Democratic Party v. Jones, 530 U.S. 567, 581 (2000). In the Court's view, this could undermine "orderly internal party governance," apparently a more important value than representativeness. *Id.*

[260] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (holding that the First Amendment prohibits states from imposing membership upon a private association such as the Boy Scouts); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 581 (1995) (holding that street parade organizers may exclude members of a gay, lesbian, and

another.[261] Yet, the favored group, namely the party leadership, already has tremendous power with respect to the rank-and-file voters.[262] To protect party leaders against a popular initiative may simply aggravate an existing power imbalance.

Clingman, although on its face a decision that limited the autonomy of political parties,[263] also effectively increased the power of major-party organizations at the expense of the common voter. Some of the plaintiffs in that case were registered Republicans and Democrats, and the statute upheld by the Court prevented these individuals from voting in any primary but the one held by their party.[264] Instead of allowing party members to define the extent of their affiliation with the party, the Court stepped in to enforce the values typically touted by party bosses: common identity, group cohesion, party loyalty, and stability.[265] This elitist stability-focused bias in the Court's approach to party politics comes into play in many election-law cases,[266] but is hardly ever acknowledged or defended on a policy level.

In fact, Justice Souter's concern over the possible decline of major parties is unfounded if it refers to major-party organizations. Although there is considerable debate in the scholarly literature on the question of whether political parties are getting stronger or weaker,[267] scholars such as John Aldrich have pointed out that the disagreement tends to disappear when Key's three aspects of a political party are considered separately.[268] For instance, it is commonly believed that the party-in-the-electorate has been on the decline for many decades.[269] In other words, parties enjoy less grassroots support than before, as evidenced by the steadily increasing percentage of voters who call themselves "independents."[270] Indeed, scholars have shown that modern parties are much more distant from the common voter than the mass-based

bisexual group).

[261] *See* Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 829-30 (2001) (distinguishing the context of political primary elections from that of the Court's forced association cases).

[262] *See generally* Ortiz, *supra* note 157 (discussing the gatekeeping power of party leadership).

[263] Clingman v. Beaver, 125 S. Ct. 2029, 2034 (2005) (denying the Libertarian Party's challenge to the state's semi-closed primary requirement).

[264] *See id.*

[265] *See id.* at 2039-41 (emphasizing the state's interest in party cohesion).

[266] *See, e.g.*, Pildes, *supra* note 11, at 696-98.

[267] Hasen, *supra* note 9, at 350-51 (commenting on scholarly debate regarding the strengthening or weakening of the party system).

[268] ALDRICH, *supra* note 195, at 15-17.

[269] *See, e.g.*, Hasen, *supra* note 9, at 351-54 (describing the transition from mass-based political parties to parties without grassroots).

[270] *See, e.g.*, GORDON S. BLACK & BENJAMIN D. BLACK, THE POLITICS OF AMERICAN DISCONTENT: HOW A NEW PARTY CAN MAKE DEMOCRACY WORK AGAIN 150-55 (1994) (citing pertinent statistics).

political parties that existed a century ago.[271]

With respect to the current strength of the party-in-government, the evidence is mixed. Even though the vast majority of public officials continue to belong to one of the two major parties, many of them do not feel bound to their party's program and act more as individuals than as agents of the political party.[272] Weak party discipline has traditionally been a feature of the American political system, however, so the decline, if any, of the party-in-government should not be overstated.[273]

The major party as a private organization, in contrast, is stronger now than it ever has been.[274] Both major parties have powerful national and state organizations that exert tremendous influence over the electoral process, partly through their role in nominating and endorsing candidates.[275] These party organizations are better organized, better funded, and more professional than in the past.[276] Given the parallel rise in the costs of campaigns[277] and the decline of volunteer-based campaigning,[278] control of the purse strings has placed party committees at the state and national levels in a powerful position indeed. This powerful position ensures that the major-party organizations will continue to play a dominant role in electoral politics even without the level of judicial protection they receive today.

Just as the Court exaggerates the fragility of the major parties, it also exaggerates the danger that alternative political parties present to political

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[271] At the turn of the twentieth century, political parties relied primarily on the volunteer work of their grassroots memberships, while today's parties often engage paid professionals to perform the same services. On the other hand, the party patronage system that flourished a hundred years ago allowed the parties to dole out favors to many of their supporters, thereby strengthening the party-electorate bond in a way that many today would find objectionable. *See* DAVID REYNOLDS, DEMOCRACY UNBOUND: PROGRESSIVE CHALLENGES TO THE TWO PARTY SYSTEM 94-96 (1997).

[272] *See, e.g.*, Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1246 (1989) (indicating the dissipation of the dictatorial power of congressional party leaders).

[273] *See, e.g.*, WILLIAM GOODMAN, THE TWO-PARTY SYSTEM IN THE UNITED STATES 24-25 (1956) (contrasting the American party system with the more disciplined British party system).

[274] ALDRICH, *supra* note 195, at 15.

[275] *See* BLACK & BLACK, *supra* note 270, at 141 ("The national party organizations . . . have expanded enormously, to the point where they are a major source of funding, expertise, and support for candidates.").

[276] ALDRICH, *supra* note 195, at 15.

[277] *See, e.g.*, Press Release, The Center for Responsive Politics, '04 Elections Expected to Cost Nearly $4 Billion (Oct. 21, 2004), http://www.opensecrets.org/pressreleases/2004/04spending.asp.

[278] *See* Hasen, *supra* note 9, at 352-53 (tracing the decline of party patronage and the rise of mass-market campaigning).

stability.[279] In fact, modern third parties hardly pose a significant threat to the two-party system at all.[280] Even in the absence of ballot-access restrictions, it is almost inconceivable that a third party could, in the near future, seriously challenge the major parties. No third party has succeeded in displacing a major party since the Republicans replaced the Whigs as the chief competitors to the Democrats in the 1850s,[281] and the possibility of such displacement was far greater a hundred years ago, when a number of vibrant third parties were present on the political scene.

Political scientists and legal scholars have identified several fundamental features of the American political framework that, in combination, strongly favor a two-party state. For instance, most public officials are elected by a plurality of votes in single-member districts.[282] Under this winner-take-all system, the candidate who wins a plurality of votes in a district becomes the sole representative of the district; all other candidates receive nothing, even if their combined votes exceed the winner's total votes.[283] Although a number of schemes allowing more proportional representation exist and are widely practiced abroad,[284] federal and state legislatures have resisted moving in this direction, and the Court has not required them to do so.[285]

Political theorist Maurice Duverger popularized an explanation of why countries with winner-take-all elections tend to have only two major parties, and this hypothesis has become known as Duverger's Law.[286] The hypothesis states that winner-take-all elections force parties to fight over the political center, because each needs a plurality in order to win.[287] Parties that cannot receive a plurality of votes win no seats at all and may even throw the election to the major party it most opposes.[288] Any new political party in this system must not only resign itself to virtually no payoff for competing in elections, it

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[279] *See* Hasen, *supra* note 261, at 826 (making a similar assessment).

[280] Based on historical analysis, some scholars have even claimed that third parties help promote the two-party system. *See, e.g.*, WILLIAM B. HELLSELTINE, THIRD-PARTY MOVEMENTS IN THE UNITED STATES 14 (1962) ("Third Parties played a significant part . . . in the maintenance of the traditional 'two-party' system.").

[281] Hasen, *supra* note 9, at 367.

[282] ROSENSTONE, *supra* note 28, at 16.

[283] *Id.*

[284] *See, e.g.*, SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 720-22 (1998) (discussing the prevalence of proportional representation systems in other countries).

[285] *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 79 (1980) ("[T]he Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation . . . .").

[286] *See, e.g.*, Hasen, *supra* note 9, at 367-68 (discussing Duverger's Law).

[287] *See* DOWNS, *supra* note 193, at 114-17 (explaining this phenomenon using a market analogy).

[288] *See* Hasen, *supra* note 9, at 367-70 (citing this result to support the conclusion that third-party votes are wasted).

must also be prepared to survive the vehement opposition of its closest allies.[289] The latter irony would not exist if the United States adopted runoff elections or one of the available instant-runoff techniques, such as preference voting,[290] but the political establishment appears unlikely to support this type of electoral reform in the near future.[291]

Admittedly, Duverger's so-called "law" is far from universal.[292] It would not, for instance, prevent a third party with a geographically concentrated base of support from electing candidates to public office, if the concentration were sufficient to obtain a plurality in some districts.[293] Moreover, recent history appears to disprove the law, since both Canada and Great Britain, which have election systems similar to ours, currently have more than two major parties.[294] However, the hypothesis is probably correct if restated in a weaker form: plurality-based elections are likely to produce a small number of relatively large parties, as compared with alternative electoral systems. In other words, it is highly improbable that the American polity will fracture into a large number of factional political parties so long as the winner-take-all plurality-based method of electing public officials remains the standard.

Another force contributing to the dominance of the major parties is the direct primary method of selecting representatives for the general election.[295] The primaries, unlike insider-dominated party caucuses, allow broader participation in intra-party politics and may sometimes, though not always, permit dissenting voices to compete within, rather than outside, the major parties.[296] As a result, these parties tend to absorb protest movements that might otherwise have led to the establishment of oppositional parties.[297] Although it is possible to take this claim too far and argue that third parties are

[289] For instance, Ralph Nader's Presidential bid in the 2000 election evoked extreme hostility from many Democrats. *See, e.g.*, *No Sympathy for Spoiler Nader*, ORLANDO SENTINEL, Feb. 5, 2001, at A13 (commenting that Nader "has become a political pariah to congressional Democratic officials" in the aftermath of the election).

[290] *See* ISSACHAROFF ET AL., *supra* note 284, at 748-49 (describing preference voting).

[291] *Cf.* BIBBY & MAISEL, *supra* note 199, at 77 ("The cultural and institutional environments in America are not conducive to developing and sustaining a thriving multiparty system.").

[292] *See, e.g.*, DISCH, *supra* note 32, at 3-5, 74-78 (pointing to recent examples of third-party-candidate success and explaining the limitations of Duverger's Law).

[293] At the Presidential level, the Electoral College also exacerbates the value of geographic concentration, since most states' votes are allocated on an all-or-nothing basis. Yet, while Ross Perot failed to win a single state despite polling 18.9% for President in 1992, Strom Thurmond, running as a candidate of the States' Rights Party in 1948, managed to carry four states with only 2.4% of the national vote due to his strength in the South. BIBBY & MAISEL, *supra* note 199, at 23, 37.

[294] *See id.* at 72 (commenting on Britain's three-party system).

[295] *Id.* at 62-63.

[296] *See id.* at 63.

[297] *Id.* at 62-63.

unnecessary in such a system, the fact that direct primaries contribute to the continued vitality of the major parties is undeniable.

The list of election rules and practices that favor the two-party system does not end there. The public funding of major-party primaries and general-election campaigns, the incumbent-favoring stream of political contributions, and the bipartisan system of televised Presidential debates ensure the dominance of major parties in the mass media.[298] Without sufficient finances and media access, minor parties are unlikely to threaten the existing major parties' hold on power.

All these legal and political factors combine to make the Supreme Court's concern about political instability in the ballot-access context seem rather far-fetched. Ballot-access laws are not the sole guardians of the two-party system, and are, in fact, completely unnecessary to its survival. The major-party organizations are not suffering a decline, and rarely need to be protected from the electorate or from minor parties. It is ironic, then, that the Court has time after time stepped in to protect major-party organizations, which have recently been at the height of their power relative to other political actors. It is also unfortunate, since, as the Court noted in *Anderson*, an advantage to the major parties "is a correlative disadvantage [to non-major-party candidates] because of the competitive nature of the electoral process."[299]

Undoubtedly, political stability and healthy electoral competition are both important, though occasionally opposing, values.[300] The current Court, with the possible exception of Justices Stevens and Ginsburg,[301] views political stability as the paramount concern in ballot-access cases. However, as this Article, among others, has suggested, there is little empirical or theoretical basis for the concern in this context, while the dangers of reduced competition are quite real.[302] Thus, even if the Court persists in valuing political stability above other democratic virtues, it must recognize that the current power imbalance between major and minor parties is so great that minor parties do not pose a credible threat to the two-party system.

Minor parties also typically do not threaten orderly elections by overcrowding the ballot, in spite of the Supreme Court's fears to the contrary. Admittedly, the most orderly elections are those with the fewest candidates. Soviet-style elections with only one candidate running for each office are

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[298] *See id.* at 64-70.

[299] Anderson v. Celebrezze, 460 U.S. 780, 791 (1983) (referring to the difference in filing deadlines for independent and major-party candidates).

[300] *See* Pildes, *supra* note 11, at 714 (asserting the need for both political competition and stability).

[301] *See id.* at 713-14 (pointing out that Justices Stevens and Ginsburg consistently dissent in recent cases defining election law).

[302] *See, e.g.*, Hasen, *supra* note 9, at 343-44 (listing the inefficiencies of a two-party system, such as agency problems, loss of information problems, and duopoly competition problems).

probably the most orderly – and meaningless – elections imaginable. When the Supreme Court upheld the ban on write-in voting in Hawaii, where Democratic candidates often run unopposed,[303] it effectively demonstrated that its concern about orderly elections could lead it to endorse even non-competitive elections. But there is ample empirical evidence, both domestically and abroad, that orderly elections can occur with large numbers of candidates. In the much-touted democratic elections in Iraq earlier this year, the ballot listed a stunning 111 political parties and candidates.[304] In the United States itself, primary elections with a dozen or more candidates are not uncommon,[305] yet there are no studies of which I am aware that suggest the prevalence of voter confusion in primaries. To be sure, there were reports of confusion in 2000 over the "butterfly ballot" in Florida's Palm Beach County, which listed ten candidates for President.[306] However, as others have observed, these problems were due to poor ballot design, and did not affect counties and states with different ballots but similarly large numbers of Presidential candidates.[307]

Arguably, Palm Beach County's ballot design issues were caused by state officials' inexperience with moderate-sized lists of candidates. Just prior to the 2000 election, as a result of a voter initiative, the state of Florida replaced one of the most restrictive ballot-access laws in the nation with a scheme essentially allowing any organized group access to the ballot.[308] Officials in Palm Beach county, wanting to fit all Presidential candidates on a single page in a typeface legible to the county's elderly voter base, chose an admittedly confusing and misguided design, with two columns of candidates and a single column in between on which the voters were supposed to mark their preference.[309] Some might suggest that these problems validate the Court's concern with overcrowded ballots.[310] Admittedly, more competitive elections require better administrative planning than less competitive contests, yet no one would suggest, for instance, that competitive elections in South Africa after the fall of apartheid were inferior to preceding elections because of the

[303] Burdick v. Takushi, 504 U.S. 428, 442 (1992) (Kennedy, J., dissenting).

[304] Richard Winger, *Iraq Election*, BALLOT ACCESS NEWS (Ballot Access News, San Francisco, Cal.), Feb. 1, 2005, *available at* http://www.ballot-access.org/2005/0205.html#06.

[305] *See, e.g.*, *supra* note 114.

[306] *See* POSNER, *supra* note 11, at 238 ("One of the things that made the 'butterfly' ballot . . . so confusing was that ten Presidential candidates were listed.").

[307] Winger, *supra* note 4, at 244.

[308] Richard Winger, *Florida Voters Wipe Out Mandatory Petitions*, BALLOT ACCESS NEWS (Ballot Access News, San Francisco, Cal.), Nov. 8, 1998, *available at* http://ballot-access.org/1998/1108.html#01.

[309] *See* POSNER, *supra* note 11, at 238.

[310] *See id.* ("[T]he task of weighing the entry-retarding against the confusion-reducing effects of ballot access is inescapable.").

long hours voters had to endure standing in line in order to vote. The administrative issues associated with multi-party elections are not a sound reason to forego them, and certainly do not justify most of the onerous ballot-access rules upheld by the Court.

C. *Real and Imagined Legislative Rationales*

Despite serious doubts over the validity of state interests in many ballot-access restrictions, the Court has accorded extreme deference to legislatures in evaluating these laws.[311] This deference is due, in part, to the belief that state legislatures are well suited to the task of crafting electoral rules. For instance, the opinion in *Storer* refers to California's "long experience" and "careful[] determin[ations]" in making election decisions.[312] The Court's deference has manifested itself in its failure to apply many of the doctrinal tools at its disposal to scrutinize the validity of the restrictions. For example, it has refused to ask whether the law was needed to achieve its stated goal.[313] In *Storer*, the Court swept aside with a single phrase the notion that the state law was unnecessary: "[W]e have [no] reason for concluding that the [challenged statute] was not an essential part of [the state's] overall mechanism to achieve its acceptable goals."[314]

Furthermore, the Court has taken the state's post-hoc rationales for the challenged laws at face value, without inquiring into *actual* motives or even into the laws' legislative histories. Although the reluctance to look behind proffered justifications also occurs in other areas of First Amendment jurisprudence,[315] the Court does consider true motivations under some forms of intermediate scrutiny. For instance, in the gender discrimination context, the Court has stated that a scheme's "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."[316]

Finally, the Court has expressly stated that even the most implausible and general state justifications need not be supported empirically. As the Court proclaimed in *Munro*,

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[311] *See, e.g.*, HASEN, *supra* note 146, at 94-95 (commenting on the Court's deference to states' asserted interests in various cases).

[312] Storer v. Brown, 415 U.S. 724, 734 (1974).

[313] *See* HASEN, *supra* note 146, at 97 ("The Court is wrong in failing to require evidence of some causal connection between the restriction on ballot access and the government's asserted interest.") (emphasis omitted).

[314] *Storer*, 415 U.S. at 736.

[315] *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 694 (1991) ("[D]irect inquiry into motive is blocked by the Court's consistent refusal in the free speech context to examine the types of evidence (such as legislative history and common sense) that would allow one to determine actual motive.").

[316] United States v. Virginia, 518 U.S. 515, 533 (1996); *cf.* Cook v. Gralike, 531 U.S. 510, 526 (2001) (invalidating a set of pejorative ballot labels because their intended effect was to disfavor certain candidates).

> "We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies . . . . To require States to prove [the existence of these effects] would invariably lead to endless court battles over the sufficiency of the 'evidence' . . . ."[317]

Of course, courts, as a general matter, are largely in the business of weighing the sufficiency of evidence, so swallowing this line of reasoning is somewhat difficult. Nevertheless, under the Court's current approach, any state justification effectively enjoys a presumption of validity. In fact, as the *Timmons* opinion demonstrated, the Court will go so far as to adopt a rationale, such as protection of the two-party system, which the state itself disclaims as a valid justification in defending the law.[318]

Unfortunately, the Court's deference to legislative determinations fails to take into account the reality that restrictive ballot-access laws are often adopted for illegitimate anti-competitive reasons.[319] The standard rationale for judicial deference to legislatures in the political context is often phrased in terms of relative expertise and accountability.[320] Legislators, it is said, are more experienced than courts in the intricacies of the legislation's subject matter.[321] In addition, legislators are thought to be more likely to act in the public interest because they are more directly accountable to the voters than the federal judiciary.[322] This general argument about the trustworthiness of legislatures, however, is weaker in the ballot-access field than in almost any other.

According to standard public choice theory, legislators will support legislation that maximizes their chances of re-election.[323] In most cases, this preference for re-election will cause legislators to vote for legislation that is popular with the constituencies and interest groups whose support they need in order to win.[324] Theorists of the competitive school generally consider such

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[317] Munro v. Socialist Workers Party, 479 U.S. 189, 194-95 (1986).

[318] *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 377-78 (1997) (Stevens, J., dissenting) (arguing that it is impermissible to consider a rationale that did not appear in the brief and was rejected during oral arguments).

[319] *See* Klarman, *supra* note 9, at 521-22 (commenting that incumbents from both major parties stand to gain from implementing and maintaining ballot-access restrictions).

[320] *See* Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 699-708 (2000) (analyzing theories that promote judicial deference).

[321] *Id.* at 699.

[322] *Id.* at 701-02.

[323] *See, e.g.*, DOWNS, *supra* note 193, at 28 ("[P]arties formulate policies in order to win elections, rather than win elections in order to formulate policies."); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 891 (1987) (explaining that economists have replaced the assumption that legislators act for the public good with the assumption that legislators act for their own interests).

[324] *See* Klarman, *supra* note 9, at 502-03 ("Securing reelection . . . generally requires some measure of responsiveness to the will of one's constituents."); *see also* JOHN HART

self-interested responsiveness a vital feature of representative democracy.[325] Legislation pertaining to elections, however, affords legislators another avenue of securing re-election: by stacking the odds in favor of incumbents, some election laws make legislators' tenure more secure, and, consequently, less accountable.[326] Moreover, because legislation protecting incumbents is in the self-interest of the entire legislative body, it is far more likely to be enacted than constituency-driven legislation, which presents different costs and benefits to each legislator.

There are, of course, multiple reasons why a self-interested legislature may not always follow an entrenchment strategy. First, clear pro-incumbent measures may offend the constituents' notions of fair play and cause a backlash in subsequent elections. Voter initiatives designed to punish legislators who failed to vote for term limits are one example of this phenomenon.[327] Second, a legislator's political party may rationally oppose pro-incumbent measures, either because it hopes to defeat another party's incumbents, or because there is substantial competition within the party for the incumbent seats.[328] As a result, the party may exercise pressure on its members in government to reject incumbent-favoring legislation.

None of these countervailing forces, however, are likely to apply to ballot-access restrictions on third parties, the subset of pro-incumbent legislation at issue in this Article. Most ballot-access rules are fairly obscure statutory provisions that are unlikely to draw attention from the electorate, so legislatures do not risk a backlash in adopting them. Even though a majority of the population favors the creation of a strong third party to challenge the two dominant parties,[329] it is not usually well informed of the plight of existing minor parties.

Furthermore, because ballot-access restrictions are generally in the joint interest of both major parties, which together control virtually every state legislature in the country, it is likely to be an issue on which they do not disagree. As Professor Richard Hasen, among others, has observed, "[D]emocrats and Republicans . . . have a common interest in maintaining high barriers to entry by other parties."[330] Politicians sometimes acknowledge this

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ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 78 (1980) (positing that legislators only need to be responsive to the will of the majority in order to enhance the likelihood of re-election).

[325] ALDRICH, *supra* note 195, at 13 ("The genius of democracy, in this view, is rather like the genius Adam Smith found in the free market.").

[326] *See* Klarman, *supra* note 9, at 502-03 (calling this phenomenon "the agency problem of representative government").

[327] *See, e.g.*, Cook v. Gralike, 531 U.S. 510, 526 (2001) (invalidating one such attempt as violative of the Elections Clause).

[328] *Cf.* Issacharoff & Pildes, *supra* note 4, at 712 (observing that the self-interest of individual legislators and their parties sometimes diverges in the electoral context).

[329] *See, e.g.*, BIBBY & MAISEL, *supra* note 199, at 57 (citing opinion poll data).

[330] Hasen, *supra* note 261, at 838-39; *see also* Klarman, *supra* note 9, at 521 (making the

common-sense proposition. In the words of a Texas Republican Party official, "The one thing Democrats and Republicans agree on – they don't want more parties . . . . [T]hey would rather continue to fight with one another."[331] And, as Ralph Nader, Green Party Presidential candidate in 2000, recalls, when he lobbied to reform Georgia's onerous signature requirements, the Democratic leaders in that state openly asked him why they should pass a law that would encourage their own competition.[332] In sum, when the Court imagines that state legislatures regulate ballot access in the public interest, it does so in the face of overwhelming theoretical and historical evidence to the contrary.[333]

IV. BETTER BALANCING: A FRESH LOOK AT *ANDERSON*

As the preceding account has sought to demonstrate, the Court's electoral assumptions in ballot-access cases are fatally flawed and require significant adjustments to reflect the insights of current scholarship. Although I believe the impact of these adjustments on the outcomes of future ballot-access cases would be significant, the changes could be made within the bounds of the current doctrinal structure for the analysis for such cases, namely the *Anderson* test. Admittedly, the Court itself has applied *Anderson* in a perfunctory manner, without giving sufficient weight to the literal wording of the test.[334] I suggest, however, that courts willing to take into consideration the political realities outlined in this Article could rediscover in the *Anderson* test a framework suitable to a more searching review of the restrictions placed on non-mainstream parties and candidates.

A. *Identification of Protected Rights*

The first part of the *Anderson* inquiry requires courts to "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."[335] The most important observation here is that the source of protected rights considered under the test is broad: it could include associational or expressive rights under the First Amendment as well as equal protection rights under the Fourteenth Amendment.

Stated differently, the *Anderson* test does not give the Court license to exclude otherwise constitutionally protected rights as irrelevant to the inquiry.

same point).

[331] ROSENKRANZ, *supra* note 27, at 12; *see also id.* at 74 ("While legislators may tussle over rules that advantage one major party over another, they can readily agree on rules that award both major parties significant advantages over upstarts.").

[332] NADER, *supra* note 59, at 75.

[333] *See* HASEN, *supra* note 146, at 4 (suggesting that the anti-entrenchment theory has reached the status of orthodoxy among election-law scholars).

[334] *See* Hall v. Simcox, 766 F.2d 1171, 1174-75 (7th Cir. 1985) (Posner, J.) (suggesting that the Court does not practice what it preaches in this context).

[335] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

If, as this Article has argued, both voters and political parties have important expressive interests at stake in the ballot, courts should recognize them as within the scope of "protected rights" in the *Anderson* inquiry, rather than sweep them aside as irrelevant to the purpose of elections. Indeed, the Court has consistently given weight to similar expressive interests in other electoral contexts, such as campaign finance.[336] Under my proposal, courts need not treat the expressive rights in the ballot context as dispositive, but they must, at a minimum, be considered an important factor in the balancing under *Anderson*.

In addition, ballot-access cases often implicate the rights of candidates and parties to equal protection under the Fourteenth Amendment. Interestingly, the *Anderson* inquiry appears to collapse the equal protection and First Amendment inquiries into one, perhaps because the equal protection claims in this context invariably relate to the exercise of First Amendment rights, and the burden on these rights is almost always enhanced by the discriminatory aspects of the restriction. Early Supreme Court decisions in the ballot-access field tend to rely on the Equal Protection Clause, while later decisions focus primarily on the First Amendment, but the Court has cited to cases based on the two clauses interchangeably.[337]

In some cases, a greater focus on equal protection rights could assist in identifying the precise nature of the burden associated with a particular restriction.[338] Even if the *Anderson* test does not imagine a full-fledged analysis under the Equal Protection Clause, it clearly incorporates equal protection concerns.[339] For instance, even a restriction that imposes a mild burden on expressive and associational rights may be found unconstitutional when it contains an explicitly discriminatory aspect. In one example of this approach, the Third Circuit, shortly after the decision in *Timmons*, invalidated on equal protection grounds a ban on fusion that expressly applied only to minor political parties.[340] It is also difficult to imagine that *Timmons* itself would have relied so heavily on the state's interest in promoting the two-party

[336] *See supra* Part III.A.

[337] *Compare*, *e.g.*, Williams v. Rhodes, 393 U.S. 23, 26 (1968) (applying the Equal Protection Clause) *with* Norman v. Reed, 502 U.S. 279, 288 n.8 (1992) (declining to engage in a separate equal protection analysis).

[338] I have discussed this possibility in more detail in a previous work. *See generally Recent Cases: Constitutional Law – Third Circuit Invalidates Statute Burdening Ballot Access on Equal Protection Grounds*, 113 HARV. L. REV. 1045 (2000); *see also* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience* 117 HARV. L. REV. 1765, 1796 (2004) (suggesting greater reliance on the Equal Protection Clause in ballot-access cases).

[339] *See Anderson*, 460 U.S. at 793 n.16 (explaining that more careful judicial scrutiny may be needed because minor parties and independent candidates are not well represented in state legislatures).

[340] Reform Party of Allegheny County v. Allegheny County Dep't of Elections, 174 F.3d 305, 318 (3d Cir. 1999).

system if the Court had understood the basic claim in that case to be one of discrimination.

B. *Identification of Valid State Interests*

The second part of the *Anderson* test instructs courts to "identify and evaluate the precise interests put forward by the state as justifications for the burden."[341] The first thing to note is that a plain reading requires, at a minimum, that an interest be *put forward* by the state. Thus, consideration of an interest actively disclaimed by the state, such as the one adopted in *Timmons*, is inappropriate on its face. Second, the focus must be on the *precise* interests at issue. In other words, it is arguable that generalized boilerplate justifications for ballot access are insufficient, because they are not sufficiently precise. For instance, frequently advanced justifications such as voter confusion, ballot integrity, and orderly elections may be insufficient if advanced in the abstract, without a specific explanation of how they apply in the particular circumstances.

So far, the Court has considered these justifications to be not only valid but prima facie "compelling" when invoked against minor parties.[342] In evaluating restrictions that affect major parties, however, the Court has acknowledged that the issue of whether a justification is compelling must be determined with reference to the specific circumstances under which it applies.[343] The language of *Anderson* appears to support this common-sense approach, and would require at least that the state come forward with a credible explanation of how each asserted interest would be served in the particular context of the case. Given the likely irrelevance of often-asserted rationales, such as political stability, courts serious about applying *Anderson* may well rule many of them out of bounds.

Anderson goes on to specify that as a court proceeds to the balancing phase of its inquiry, it must "determine the legitimacy and strength of each of [the asserted] interests."[344] Thus, even logically supportable rationales must pass the additional benchmarks of seriousness and legitimacy. Courts could question the legitimacy of asserted interests on a number of doctrinal and public policy grounds. For instance, they could recognize that protection of the two-party system is an illegitimate justification for a burden on the rights of minor political parties. Enhancing the expressive power of one political group at the expense of another in this manner is inimical to free-speech values. In the context of campaign expenditures, the Court has proclaimed that silencing the voices of some to give more power to the voices of others is "wholly

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[341] *Anderson*, 460 U.S. at 789.

[342] *See, e.g.*, Munro v. Socialist Workers Party, 479 U.S. 189, 194 (1986) (finding that preserving the integrity of the electoral process and regulating the number of candidates on the ballot are compelling state interests).

[343] Cal. Democratic Party v. Jones, 530 U.S. 567, 584 (2000).

[344] *Anderson*, 460 U.S. at 789.

foreign to the First Amendment."[345] The rationale of promoting the two-party system is, of course, utterly incoherent from an equal protection perspective as well, since it constitutes the very embodiment of a discriminatory intent to disadvantage a minority group.[346] Importantly, *Anderson* already states that an advantage for one political group is a correlative disadvantage to a competing group,[347] so there is no need to uproot the Court's entire ballot-access jurisprudence to give weight to this concern.

Moreover, courts with a realistic understanding of the political game would recognize that legislatures often act with an illegitimate self-entrenching motive in the ballot-access context.[348] This recognition might cause them to refuse to accept a state's rationales for ballot-access restrictions as legitimate without inquiring into the *actual* motives behind the challenged ballot-access provisions. Legislative history and the timing of particular laws might be used to shed light on the legislature's motivations.[349] It is quite plausible that such inquiries would lead a court to conclude that the legislature's dominant purpose was to thwart a real or perceived threat to major-party dominance. As the history presented in Part I indicates, many ballot-access laws would be vulnerable under such an analysis. To be sure, *Anderson* does not plainly require an inquiry into actual motives, but its concern over the legitimacy of a state's rationale opens the door to such an inquiry. Arguably, in cases in which the discriminatory intent of the legislature is evident, there is no reason to allow the state to hide behind after-the-fact rationalizations.[350]

In addition to being legitimate, the state interest under *Anderson* must be serious.[351] Determining that an interest is serious should not be automatic as it has often been under the Court's current approach. Courts can and should require some evidence that the state's concerns are justified, and the state should carry the evidentiary burden of demonstrating some need for the restriction it imposes.[352] Requiring that the state produce real-world evidence

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[345] Buckley v. Valeo, 424 U.S. 1, 48-49 (1975).

[346] HASEN, *supra* note 146, at 98 (stating that the Court in *Timmons* endorsed a rationale that is improper by definition).

[347] *Anderson*, 460 U.S. at 791.

[348] *See supra* Part III.C.

[349] *See* Klarman, *supra* note 9, at 536 (recommending that the Court examine the timing of the restriction's enactment and the stringency of the requirement to reveal the legislature's motives).

[350] *Cf.* United States v. Virginia, 518 U.S. 515, 533 (1996) (clarifying that a state's justification for gender-based classification must be genuine, not invented solely as a response to litigation).

[351] *Anderson*, 460 U.S. at 789.

[352] *See* HASEN, *supra* note 146, at 97 ("[The] Court is wrong in failing to require *evidence* of some causal connection between the restriction on ballot access and the government's asserted interest."); *cf.* Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-37 (1972) (advocating similar changes in the equal protection context).

of some sort to substantiate its arguments would allow judges to base their decisions on facts, rather than on vague notions of how the electoral process functions.[353] For instance, if the state excludes some would-be candidates or parties because of an asserted interest in preventing voter confusion, it should provide evidence to support this claim.[354] Long ballots are not always confusing,[355] so if the state chooses to argue the point, it should bear the burden of supporting it. Furthermore, even if the state demonstrates the theoretical possibility of voter confusion from extremely long lists of candidates, it would still need to show that repeal of the challenged statute would be likely to produce a ballot of such proportions. The task of establishing a serious risk of ballot overcrowding is by no means superfluous, given the fact that even states with lenient ballot-access laws generally have fewer minor-party and independent candidates running for office.[356]

Cases such as *American Party* illustrate how decisive evidentiary determinations could be in the ballot-access context. In that case, Justice White's majority opinion resolved factual doubts as to the effect of the law in favor of the defendants,[357] while Justice Douglas dissented, arguing that the law should be held unconstitutional because the state failed "to dispel the doubts" with respect to its potential harmful effects.[358] Justice Douglas claimed that the challenged law imposed a "prima facie . . . invidious discrimination on the unorthodox political group," thereby shifting the burden of proof to the defendants seeking to justify the law.[359] Given the lack of empirical evidence in the case, the Justices thus relied on their background presumptions about the nature of state legislatures to reach their respective outcomes. Justice Douglas, suspicious of legislatures and sensitive to First Amendment interests,[360] imagined a state that could not be trusted to protect

[353] *See* POSNER, *supra* note 11, at 76 ("[H]ow to make judges better informed is a great challenge to the American judiciary.").

[354] Contrary to Justice White's assertion that the state would have to sustain some damage to its electoral system before it could produce empirical evidence, *see* Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986), the state would be free to use the experiences of other states, as well as its own history, to establish the point.

[355] *See supra* Part III.B.

[356] *See* Williams v. Rhodes, 393 U.S. 23, 33 (1983) (pointing out that there were few minor-party candidates in Ohio even before the restrictive law at issue went into effect); *see also id.* at 47 (Harlan, J., concurring) ("[T]he presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion.").

[357] Am. Party v. White, 415 U.S. 767, 789-90 (1974) (dismissing plaintiffs' hardship argument because "nothing in the record before us indicates . . . what the size of the pool of eligible signers might be").

[358] *Id.* at 797 (Douglas, J., dissenting).

[359] *Id.* at 796-97 (Douglas, J., dissenting).

[360] One of many famous quotes by Justice Douglas is the following: "Restriction of free thought and free speech is the most dangerous of all subversions." Speech by William O. Douglas to the Authors Guild Council in New York (Dec. 3, 1951), *available at*

the rights of a minor party. Justice White, in contrast, imagined a group of benevolent public-minded officials who had carefully weighed the costs and benefits of the law before adopting it. Because trusting the public spirit of legislators is unrealistic in this context,[361] Justice Douglas's approach to the burden of proof appears preferable.

Requiring that the state come forward with evidence supporting its claims is fully consistent with the *Anderson* balancing test, which requires courts to "*evaluate* the precise interests put forward by the State" and "*determine* the legitimacy and strength of each of those interests."[362] The test contains no elements of deference to legislative assertions and judgment, and, instead, suggests a careful review of the interests proffered.[363] In a footnote, the Court even cites the anti-entrenchment rationale for doing so: "[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny."[364] Thus, relying on *Anderson*, courts might sensibly demand specific evidence and thereby make the state's burden of proof higher without resorting to the trappings of a strict scrutiny approach advocated by some scholars.[365]

C. *Necessity of Burdening Plaintiffs' Rights*

The final requirement imposed by the *Anderson* test is that courts must consider "the extent to which [the state's proffered] interests make it necessary to burden the plaintiff's rights."[366] This language evokes the strict-scrutiny standard under which the state must establish that the restriction is the "least drastic means" available of achieving the state's goals. Indeed, *Anderson* cites *Kusper v. Pontikes* for the proposition that "[i]f the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."[367] However, aside from *Anderson*, the Court has been reluctant to inquire whether the asserted state interests could be achieved in a less restrictive manner where

http://www.ala.org/ala/oif/foryoungpeople/theoneunamerican/oneunamerican.htm.

[361] *See supra* Part III.C.

[362] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (emphasis added).

[363] *Id.* (instructing courts to "consider the extent to which [the state's proffered] interests made it necessary to burden the plaintiff's rights").

[364] *Id.* at 793 n.16 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) and ELY, *supra* note 326, at 73-88).

[365] S*ee, e.g.*, Kevin Cofsky, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. PENN. L. REV. 353, 401 (1996) (arguing in favor of the strict scrutiny standard).

[366] *Anderson*, 460 U.S. at 789.

[367] *Id.* at 806 (quoting Kusper v. Pontikes, 414 U.S. 51, 59 (1973)).

the ballot-access restrictions affected minor-party rights.[368] For example in *Burdick*, the Court stated only that the state's means were a "reasonable way of accomplishing [its] goal."[369]

As this Article suggests, inquiring into the necessity of many ballot restrictions may well lead an informed Court to conclude that they are not needed to preserve political stability, orderly elections, or the two-party system. Less restrictive ballot-access laws are highly unlikely to confuse voters or seriously threaten the dominance of the two major parties. Third parties face so many challenges in the United States, and the major parties are so entrenched, that the two-party system is rarely, if ever, under threat from liberal ballot-access laws. Moreover, even if such laws result in longer ballots, the threat to orderly elections, under most circumstances, would likely be minimal.

But although I make these predictions, I agree with the Court that there is no substitute for the difficult judgments to be made.[370] The key to accurate and effective balancing of the competing interests lies in a careful and objective investigation of the factual circumstances and likely consequences of a particular law. The *Anderson* test already contains, or can be understood to contain, most of the inquiries necessary for such a thorough and detailed analysis. Unfortunately, the Court has so far been unwilling to inquire deeply enough to modify their existing assumptions about the electoral process. Still, the tools for a more rigorous analysis of ballot-access restrictions are clearly available; the question is only whether courts will choose to make use of them.

D. *The* Anderson *Approach Defended*

While some may object that the *Anderson* balancing test allows too much judicial discretion to deny the rights of minor political parties, there is no evidence that a more rigid rule-bound approach would prove more constraining.[371] Moreover, the complexity and variety of ballot-access schemes defies easy classification, and the diversity of interests at stake in elections makes a one-size-fits-all approach to ballot-access cases impossible, as the Court has properly recognized.[372] On the other hand, functional

[368] The Court has routinely rejected challenges to ballot-access restrictions on major parties where it concluded that the restriction was not necessary to achieve the stated goal. *See, e.g.*, Bullock v. Carter, 405 U.S. 134, 146 (1972) (invalidating a large filing fee for the party primary ballot as ill-fitted to the goal of weeding out frivolous candidates).

[369] Burdick v. Takushi, 504 U.S. 428, 440 (1992).

[370] *See Anderson*, 460 U.S. at 789 (rejecting any "litmuspaper test" to distinguish valid from invalid restrictions).

[371] *See* POSNER, *supra* note 11, at 375 (arguing that when a rule replaces a standard, often no change occurs because the standard's considerations secretly become the rule's factors in determining the rule's scope and exceptions).

[372] Storer v. Brown, 415 U.S. 724, 730 (1974) (stating there is no "litmus-paper" test for ballot-access restrictions).

approaches focused on creating a level playing field may lack a framework that would be sufficiently detailed to guide judicial inquiry in difficult cases,[373] and may leave out important interests on both sides from consideration.[374]

Unsurprisingly, the latest scholarly proposals advocating greater protection for minor parties have been rediscovering the benefits of comprehensive balancing. For instance, Judge Richard Posner proposes a quasi-utilitarian balancing approach to election law, believing that judges should self-consciously base their decisions on the case-specific and social consequences of reaching particular conclusions.[375] Professor Hasen's recent book on election law also proposes a balancing test for most ballot-access cases, albeit one phrased in terms of equality rights versus legitimate state interests.[376] Professor Hasen's broader scheme, which is much more structured than Judge Posner's, calls for a preliminary analysis of whether an asserted right is a core or contested right, and whether the state advances countervailing interests or simply denies the applicability of that right.[377]

Although the approaches of these scholars are insightful, they are unlikely to be adopted, at least explicitly, by the courts. Their tests, unlike *Anderson*, are relatively unorthodox and may lack the textual grounding generally sought by all but the most unabashedly activist judges.[378] On the contrary, the balancing approach proposed in this Article uses the currently prevailing legal standard as its base, and fits comfortably within the Court's First Amendment and equal protection jurisprudence. It does not require the Court to apply new tests or articulate a comprehensive theory of democracy. Instead, it merely suggests that the Court has assigned improper weight to some factors in the balancing process and has erroneously treated some inquiries under it as superfluous.

To be sure, a revitalized *Anderson* test, if adopted, might lead the Court to limit or even overrule its holdings in *Jenness*, *Storer*, *Burdick*, *Timmons*, *Clingman*, and possibly other cases. However, the Court has reversed itself so frequently in election-law cases that the difficulty of doing so should not be overstated. For instance, in the seminal case of *Baker v. Carr* the Court dramatically lowered the bar to justiciability of political questions,[379] and later proceeded to invalidate numerous state electoral practices, including the ballot-

[373] *See* HASEN, *supra* note 146, at 5-6 (pointing to deficiencies that may make the inquiry inconclusive).

[374] *See* THOMPSON, *supra* note 25, at 7-8 (criticizing the anti-competitive approach as incomplete).

[375] *See* POSNER, *supra* note 11, at 59-60 (summarizing the principles of such "pragmatic" adjudication); *see also id.* at 238-39 (suggesting policy reasons for why the Supreme Court should allow greater ballot access for third parties).

[376] HASEN, *supra* note 146, at 97-99.

[377] *Id.* at 92-94, 95.

[378] *See, e.g.*, Klarman, *supra* note 9, at 499 ("One might well question the *constitutional* basis for this anti-entrenchment theory of judicial review.").

[379] Baker v. Carr, 369 U.S. 186, 207-08 (1962).

access scheme at issue in *Williams*.[380] Only three years after *Williams*, however, a unanimous Court in *Jenness* retreated no less dramatically from its commitment to protect minor parties.[381] Similarly, as this Article has sought to demonstrate, *CDP* is doctrinally inconsistent with both *Munro* and *Timmons*, and the latter appears to overrule the part of *Williams* that eschewed a duopoly-protecting rationale for ballot restrictions.[382] More recently, the Court has backtracked on the justiciability of partisan gerrymandering in *Vieth v. Jubelirer*,[383] and famously limited its holding in *Bush v. Gore* to the facts by treating the case as *sui generis*.[384] Overall, the Court's jurisprudence in the election-law context has never been dogmatic or precedent-bound in the strictest sense.[385]

CONCLUSION

Ultimately, courts will apply election-law doctrine in ways that are consistent with their preconceptions and assumptions about the parties involved and the contexts in which they operate. Making such assumptions in deciding cases is unavoidable and often not improper. However, when a particular field lies outside of their area of expertise, courts must be open to modifying their assumptions in light of data that contradicts them.[386] This is precisely the issue with the Supreme Court's understanding of the role of minor parties, major parties, and state legislatures in the election context.[387] When the Court imagines third parties as troublesome but irrelevant meddlers on Election Day, it fails to recognize the expressive contribution of these groups to our elections. When it treats major parties as the fragile guardians of democracy, it misjudges the political tenacity of these organizations. Finally, when the Court trusts state legislatures to make ballot-access laws in the public interest, it underestimates the powerful incentive for self-entrenchment.

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[380] Williams v. Rhodes, 393 U.S. 23, 34 (1968).

[381] *See supra* Part II.A.

[382] *See supra* Part II.D.

[383] Vieth v Jubelirer, 541 U.S. 267, 305 (2004).

[384] Bush v. Gore, 531 U.S. 98, 107, 109 (2000).

[385] *See* POSNER, *supra* note 11, at 333, 348 (contending that the Court often avoids formalism and adopts a pragmatic approach, particularly when approaching ambiguous statutes or provisions).

[386] *Cf. id.* at 76 ("How to make judges better informed is a great challenge to the American judiciary.").

[387] Although scholars of politics often disagree on a wide range of matters, there is little disagreement about facts such as the self-entrenching tendencies of legislatures, the current strength of the two major parties, or the disadvantaged status of minor parties in our electoral framework. *See* Hasen, *supra* note 261, at 826 ("States should not be allowed to discriminate against minor parties to favor the two-party system unless they can put forward more evidence of the system's benefits than the last generation of political scientists has been able to do.").

If judges were willing to recognize these political realities, they would find a number of doctrinal tools within the framework imposed by *Anderson* that would allow them to give proper weight to the interests of minor political parties. A critical examination of the state's non-discriminatory interests in a ballot-access law could ensure that the legislature is not merely acting to insulate itself from competition. Recognition of a strong expressive function for elections would allow the Court to see how the restriction burdens the central interests of a minor party. Finally, a focus on whether the restrictions are truly necessary to achieve stability, the Court's paramount concern, could serve as an opportunity to recognize the existing power imbalance between major parties and outsiders.

Thus, the *Anderson* test, in the interpretation suggested in this Article, provides a framework for inquiry that is detailed yet flexible enough to accommodate both case-specific evidence and theoretical insights. The pertinent language is familiar to judges and consistent with tests applied in other areas of constitutional law. All that is missing, in my view, is willingness on behalf of the Court to refresh and update its assumptions about the democratic process. Yet, for a court as involved in the "political thicket" as today's Supreme Court,[388] this willingness may be essential to rendering socially constructive judgments in the cases it confronts.

[388] *See* HASEN, *supra* note 146, at 1 ("Supreme Court intervention in the political process has become a regular feature of the American political landscape.").