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Ballot Access Laws

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BALLOT ACCESS LAWS

INTRODUCTION

The United States Constitution expressly grants to states the authority to conduct and regulate elections for public officials.[1] State election codes may define the time, place, and manner of holding elections, as well as requirements for voting and the selection of candidates.[2] While the Supreme Court has recognized the need for such regulation to effectively implement the democratic process,[3] constitutional tensions arise when such regulations invade the rights of voters. The Supreme Court's review of state election laws, specifically ballot access laws,[4] has received harsh criticism[5] for failing to employ a consistent standard of review.[6] In 1983, however, the Court set out to end the confusion with its decision in *Anderson v. Celebrezze*.[7] In *Anderson*, the Court announced that the proper approach for determining the level of scrutiny in ballot access cases is a balancing of interests test.[8]

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1. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." U.S. CONST. art. I, § 4, cl. 1. *See generally* Todd J. Zywicki, *Federal Judicial Review of State Ballot Access Regulations: Escape from the Political Thicket*, 20 T. MARSHALL L. REV. 87, 90-103 (1994) (providing a thorough discussion of the constitutional framework of election laws).

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

3. *Id.* ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

4. "Ballot access laws" refer to those requirements that a candidate must satisfy in order to have his/her name printed on an election ballot (e.g., a showing of some degree of public support through nominating petitions signed by voters). *See* Jacqueline Ricciani, Burdick v. Takuski: *The* Anderson *Balancing Test to Sustain Prohibitions on Write-in Voting*, 13 PACE L. REV. 949, 950-57 (1994).

5. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 849 (12th ed. 1993) ("[T]hese cases . . . show an especially pervasive degree of uncertainty and instability regarding the appropriate level of scrutiny."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-20, at 1106 (2d ed. 1988) (characterizing the Court's inconsistency as "striking" and "positively delphic"); Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 898-919 (1994) (describing frequent shifts in the Court's focus throughout the cases); Zywicki, *supra* note 1, at 88-89 (lambasting the Supreme Court's opinions so viciously as to imply utter incompetence in this area). *But cf.* Ricciani, *supra* note 4, at 956 ("In deciding the first ballot access cases, the Court formulated an analytical framework that survived for fifteen years.").

6. Burdick v. Takushi, 504 U.S. 428 (1992) (initial balancing test determines level of scrutiny); Munro v. Socialist Workers Party, 479 U.S. 189 (1986) (vague, but resembling rational basis); Anderson v. Celebrezze, 460 U.S. 780 (1983) (balancing of interests); Clements v. Fashing, 457 U.S. 957 (1982) (combination balancing test and rational basis); American Party v. White, 415 U.S. 767 (1974) and Storer v. Brown, 415 U.S. 724 (1974) (purported strict scrutiny, but actually a mix of strict and minimal scrutiny, according to TRIBE, *supra* note 5, at 1107); Lubin v. Panish, 415 U.S. 709 (1974) (strict scrutiny); Bullock v. Carter, 405 U.S. 134 (1972) (strict scrutiny); Jenness v. Fortson, 403 U.S. 431 (1971) (rational basis); Williams v. Rhodes, 393 U.S. 23 (1968) (strict scrutiny).

7. Anderson v. Celebrezze, 460 U.S. 780 (1983). The Court granted certiorari to resolve "conflict among the Circuits on an important question of constitutional law." *Id.* at 786.

8. *Id.* at 789. For a discussion of the balancing test, see *infra* note 49.

The *Anderson* test, as refined in *Burdick v. Takushi*,[9] now stands as the definitive standard for evaluating any constitutional challenge to a state election scheme.[10] The Tenth Circuit has applied the balancing test in cases challenging petition signature requirements,[11] early filing deadlines,[12] and most recently, Oklahoma's ban on write-in voting.[13]

This Survey focuses on the elements and structure of the *Anderson/Burdick* balancing test and then critiques the Tenth Circuit's application of the test in *Coalition for Free and Open Elections v. McElderry*,[14] the only ballot access case decided in the Tenth Circuit during the survey period—September 1994 through September 1995. Part I introduces the constitutional rights at issue in these cases, followed by an overview of the developmental history of the current test. Part II discusses the Tenth Circuit's handling of ballot access cases since *Anderson*, then critically analyzes the *Coalition* decision.

I. BACKGROUND

A. *Rights Implicated by Election Regulations*

While no fundamental right to candidacy exists,[15] the Supreme Court has recognized an overlap between the availability of candidates in an election and the rights of voters to select a candidate of their choice.[16] Ballot access laws, by their very nature, restrict voter choice by screening out those potential candidates who do not satisfy the requirements.[17] Restricting voter choice

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9. 504 U.S. 428 (1992).

10. *Burdick*, 504 U.S. at 438 ("The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson*."); McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1220 (4th Cir. 1995) ("The appropriate standard governing constitutional challenges to specific provisions of state election laws begins with the balancing test that the Supreme Court first set forth in *Anderson v. Celebrezze*."); *see also* David Perney, *The Dimensions of the Right to Vote: The Write-in Vote, Donald Duck, and Voting Booth Speech Written-off*, 58 MO. L. REV. 945, 953-54 (1993) (citing to the method of analysis used in *Anderson*).

11. Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740, 741 (10th Cir. 1988) (upholding requirement that petitions for recognition of a political party bear the signatures of registered voters equal to at least five percent of the total votes cast in the previous general election for governor or president).

12. Hagelin For President Comm. v. Graves, 25 F.3d 956, 957 (10th Cir. 1994) (upholding requirement that independent candidates file their nominating petitions 91 days before the general election).

13. Coalition for Free and Open Elections v. McElderry, 48 F.3d 493 (10th Cir. 1995) (upholding Oklahoma's refusal to honor, or even count, votes for candidates not appearing on the printed ballot).

14. 48 F.3d 493 (10th Cir. 1995).

15. Clements v. Fashing, 457 U.S. 957, 963 (1982); Thournir v. Meyer, 909 F.2d 408, 412 (10th Cir. 1990); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.32(a) (5th ed. 1995).

16. *See e.g.*, Burdick v. Takushi, 504 U.S. 428, 433 (1992) ("Election laws will invariably impose some burden upon individual voters."); Anderson v. Celebrezze, 460 U.S. 780, 786 (1983) ("The impact of candidate eligibility requirements on voters implicates basic constitutional rights."); Bullock v. Carter, 405 U.S. 134, 143 (1972) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."); *see* Ricciani, *supra* note 4, at 955.

17. Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740, 743 (10th Cir. 1988)

encroaches on two fundamental rights implicated by the First Amendment,[18] the right to cast an effective vote, and the right of freedom of political association.[19] In addition, the Equal Protection Clause of the Fourteenth Amendment[20] becomes an issue in these cases when the laws create impermissible classifications as to who may qualify for candidacy.[21]

Since voting rights are deemed fundamental under the United States Constitution,[22] strong arguments exist that laws affecting them should be subjected to strict scrutiny.[23] In fact, the Supreme Court has applied strict scrutiny in many cases to strike down state ballot access laws.[24] The Constitution also gives the states broad authority to regulate elections, however,[25] and resolving the conflict between these competing constitutional privileges has proven to be a thorn in the Court's side for nearly twenty-five years.[26]

B. *The Search for a Standard of Review*

1. Troublesome Beginnings

Prior to 1968, ballot access regulations were considered non-justiciable political questions[27] within the exclusive domain of the states.[28] Indeed, the Supreme Court characterized voting rights issues as a "political thicket"[29] into which it seldom ventured. When it did decide these cases, the Court afforded

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(quoting Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986)) ("State statutes that restrict 'the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively.'").

18. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. The First Amendment was applied to the states through the Fourteenth Amendment. *See, e.g.*, Capitol Square Review and Advisory Bd. v. Pinette, 115 S.Ct. 2440, 2444 (1995).

19. *E.g. Anderson*, 460 U.S. at 782; Williams v. Rhodes, 393 U.S. 23, 30 (1968); NOWAK & ROTUNDA, *supra* note 15, § 14.32(a), at 832.

20. "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

21. NOWAK & ROTUNDA, *supra* note 15, § 14.31(a), at 866-68, § 14.32(a), at 881-82; TRIBE, *supra* note 5, § 13-19, at 1098.

22. Reynolds v. Sims, 377 U.S. 533, 554-56 (1964); Perney, *supra* note 10, at 952-53. *But see* Pope v. Williams, 193 U.S. 621, 632-33 (1904) (declaring that a right to vote is not guaranteed by the federal Constitution, but instead is a privilege conferred and controlled by the state).

23. *E.g., Clements*, 457 U.S. at 977 n.2 (Brennan, J., dissenting); *Bullock*, 405 U.S. at 144. *But cf. Anderson*, 460 U.S. at 788 ("Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates.").

Strict scrutiny refers to the high standard of review imposed by courts in cases involving fundamental rights. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (referring specifically to legislation that restricts political processes). In order to survive strict scrutiny, a law must be narrowly tailored to serve a compelling state interest. *Burdick*, 504 U.S. at 433.

24. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979); Lubin v. Panish, 415 U.S. 709, 715-18 (1974); Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973); *Bullock*, 405 U.S. at 143-44; *Williams*, 393 U.S. at 31-32.

25. *See supra* notes 1-2 and accompanying text.

26. *See* Brownstein, *supra* note 5, at 914-19; Perney, *supra* note 10, at 953; Zywicki, *supra* note 1, at 108. Between *Williams v. Rhodes* in 1968 and *Burdick v. Takushi* in 1992, the Supreme Court applied the gamut of scrutiny levels, including some hybrids. *See supra* note 6.

27. Zywicki, *supra* note 1, at 108-09.

28. *Id.* at 90-107.

29. Colegrove v. Green, 328 U.S. 549, 556 (1946).

great deference to the state legislatures' judgments in addressing various political goals related to elections.[30] In 1968, however, a new era in ballot access jurisprudence began with *Williams v. Rhodes*,[31] and the thorny nature of the Court's plunge into the political thicket emerged almost immediately.[32]

Williams involved a challenge to Ohio's stringent requirements for candidates of new political parties to gain access to a presidential ballot.[33] Specifically at issue was the high number of signatures required. Ohio required that a new party submit a nominating petition containing signatures of qualified electors totaling 15% of the ballots cast in the preceding gubernatorial election.[34] The Court examined this regulation, and the election code as a whole, in terms of impact on Ohio voters' First and Fourteenth Amendment rights, and found the burden so onerous as to be unconstitutional.[35] Since fundamental rights were at stake, the majority subjected the laws to strict scrutiny.[36]

Only three years after the Supreme Court's strict defense of First and Fourteenth Amendment rights in *Williams*, however, the Court dramatically retreated to applying no articulated standard at all.[37] *Jenness v. Fortson*[38] involved a class action suit by voters and prospective candidates attacking the Georgia election code for its signature requirement.[39] The majority, in a relatively short opinion, merely reviewed the *Williams* reasoning,[40] then distinguished Georgia's code from Ohio's laws.[41] The Court concluded that "Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo."[42] On this basis alone—that is, without applying any analysis for rational basis or heightened scrutiny—the Court found Georgia's election scheme acceptable.[43]

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30. Zywicki, *supra* note 1, at 109 ("When the Court reviewed electoral issues, . . . it applied rational basis scrutiny in deferring to the judgements of the states as to the balance of competing political goals.").

31. 393 U.S. 23 (1968).

32. Zywicki, *supra* note 1, at 109-13.

33. *Williams*, 393 U.S. at 24-27. The case involved George Wallace, the American Independent Party's candidate for President in 1968.

34. *Id.* In 1968, this amount equaled 433,100. *Id.* at 24-26. In addition, Ohio required that the petition be filed 90 days before the state primaries. Ohio additionally then imposed impossible conditions upon the primary of a new party. *Id.* at 26 n.1, 35-38 (Douglas, J., concurring), 66 n.7 (Warren, J., dissenting).

35. *Id.* at 25. The Supreme Court determined the impact on candidates and voters by looking at this provision within the context of other Ohio ballot access laws. "The detailed provisions of other Ohio election laws result in the imposition of substantial additional burdens . . . . Together these various restrictive provisions make it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties." *Id.*

36. *Id.* at 31 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)) ("[O]nly a compelling state interest . . . can justify limiting First Amendment freedoms.").

37. TRIBE, *supra* note 5, § 13-20, at 1105 ("In [*Jenness*], the Court dramatically reversed field . . . . Although it did not explicitly indicate what standard of review it employed, it appeared that the Court subjected the Georgia laws to only minimal scrutiny.").

38. 403 U.S. 431 (1971).

39. *Jenness*, 403 U.S. at 432-33. Georgia law provides that an independent candidate may have his name printed on the ballot by filing a nominating petition signed by "a number of electors of not less than five per cent of the total number of electors eligible to vote in the last election for the filling of the office the candidate is seeking." GA. CODE ANN. § 34-1010(b) (1970).

40. *Jenness*, 403 U.S. at 434-37.

41. *Id.* at 438-41.

42. *Id.* at 438.

43. *Id.* at 440 ("We can find in this system nothing that abridges the rights of free speech

2. Settling on a Compromise

With *Williams* and *Jenness* setting the polar extremes of scrutiny for subsequent ballot access cases, the Supreme Court spent the following two and a half decades stumbling between standards of review.[44] In 1983, in *Anderson v. Celebrezze*,[45] the Court began to regain its balance.

John Anderson sought to run for president as an independent candidate in the 1980 November election.[46] He was denied access to the printed ballot in Ohio because he failed to submit his nomination petition by the March 20 deadline.[47] The *Anderson* Court did not talk about "scrutiny" or "levels of review."[48] Instead, the Court announced a balancing of interests test as the appropriate analytical process for ballot access questions. A court must determine the extent of the injury to the plaintiffs' rights and then weigh that injury against the interests proffered by the state as justification for the burden imposed.[49] The court must also consider to what degree the burden is necessary to achieve the state's objectives.[50]

In addition to this careful articulation of the now-preferred approach, the Court also clarified that its main concern in ballot access cases is the First Amendment rights of the voters.[51] The strength of the *Anderson* decision lies in the Court's recognition of the friction between voters' rights and the need for state regulation of elections.[52] The Court's reasoning cut to the heart of

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and association secured by the First and Fourteenth Amendments. The appellants' claim under the Equal Protection Clause of the Fourteenth Amendment fares no better.").

44. For levels of scrutiny in cases during this time period, see *supra* note 6. Even after *Anderson* announced a balancing test, the Court again waffled three years later in Munro v. Socialist Workers Party, 479 U.S. 189 (1986). Instead of weighing the competing interests, the standard put forth in *Anderson*, the majority simply compared the Washington statute to other regulations that had been upheld in previous cases. *Id.* at 196-99. The Court held that, since the effect of the law on constitutional rights was "slight when compared to the restrictions . . . upheld in *Jenness* and *American Party*," there was no constitutional violation. *Id.* at 199. It was not until 1992 that the Court firmly adopted the *Anderson* standard. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

45. 460 U.S. 780 (1983).

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

47. *Id.* at 783. The deadline that year fell 229 days in advance of the general election.

48. *See id.* at 789 (stating that "[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions") (citing Storer v. Brown, 415 U.S. 724, 730 (1974)).

49. The Court outlined the balancing test as follows:

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

Id.

50. *Id.*

51. *Id.* at 782 ("The question presented by this case is whether Ohio's early filing deadline placed an unconstitutional burden on the voting and associational rights of Anderson's supporters."); *id.* at 806 ("We began our inquiry by noting that our primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to [support him].").

52. *See* Greidinger v. Davis, 988 F.2d 1344, 1352 (4th Cir. 1993) ("*Anderson* . . . recognize[s] the precious nature of the individual and state rights at issue and the delicate balancing

the inherent difficulty in election ballot law: constitutional infringement in these cases is a matter of degree.[53] Thus, the Court first determined the extent of the asserted injury,[54] then compared this injury to the legitimacy and strength of each of the state's interests.[55]

3. Refining the *Anderson* Approach

In *Burdick v. Takushi*,[56] the Supreme Court affirmed a Ninth Circuit decision upholding Hawaii's ban on write-in voting.[57] The Court applied and further expanded the *Anderson* test. Whereas the *Anderson* court only evaluated the specific law challenged,[58] the *Burdick* Court examined the entire state ballot access scheme to determine the extent of the hardship on the petitioner-voter's rights.[59] The Court established a standard of review for judging whether a state's interest justifies the burdens it imposes.[60] If the "extent of the burden" portion of the test reveals that the law imposes severe restrictions on voters' rights, then the "regulation must be 'narrowly drawn to advance a state interest of compelling importance.'"[61] However, if the law imposes "reasonable, nondiscriminatory restrictions" on voters' protected rights, the law need only be reasonably related to a legitimate state interest.[62]

After defining the state's burden, the reviewing court must examine the state's asserted justifications for constraining voting rights.[63] The *Burdick* Court takes this second part of the analysis a step further than *Anderson*. If a court finds the state's reasons for the election laws strong enough to survive the scrutiny, meaning the overall ballot access scheme passes constitutional muster, then the challenged law is presumed valid.[64]

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required to achieve electoral harmony."); *see also supra* notes 2-3, 15-19, and accompanying text.

53. "The inquiry is whether the challenged restriction *unfairly or unnecessarily* burdens 'the availability of political opportunity'" and, as such, focuses on "the *degree to which* the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process." *Anderson*, 460 U.S. at 793 (emphasis added) (citations omitted); *see also* Libertarian Party v. Munro, 31 F.3d 759, 761 (9th Cir. 1994) (remarking that according to *Anderson*, "[t]he issue is the severity of the handicap").

54. *Anderson*, 460 U.S. at 790-95 (discussing the impact of Ohio's ballot access laws on independent-minded voters, ultimately depriving everyone of valuable political discourse).

55. *Id.* at 796-805 (examining and rejecting three proffered justifications: voter education; equal treatment of candidates; and political stability).

56. 504 U.S. 428 (1992).

57. *Burdick*, 504 U.S. at 441. Hawaiian election law made no provision for the casting and counting of write-in votes. A voter, not wishing to vote for the one candidate running in his legislative district, filed suit. *Id.* at 430.

58. *Anderson*, 460 U.S. at 790-94 (examining the impact of the early deadline for filing nominating petitions).

59. *Burdick*, 504 U.S. at 434-39 (incorporating the Court's occasional practice of considering ballot access provisions within the larger picture of accompanying election laws).

60. *Id.* at 434 ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.").

61. *Id.* (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

62. *Id.* at 434, 440 (citing *Anderson*).

63. *Id.* at 439.

64. *Id.* at 441 (holding that Hawaii's policy of not tallying write-in votes was constitutional).

C. *Present State of the Law*

In recent years, the Supreme Court has given increased consideration to the legitimacy of states' interests in regulating elections,[65] retreating from the strict scrutiny of earlier cases.[66] The *Anderson* decision appears to represent a settling of the Court's own collective mind concerning the preferred approach for these cases.[67] Even though the voters' rights in *Anderson* were given high regard, the Court applied rational basis scrutiny to the state action.[68]

Write-in voting, the issue in the *Burdick* case,[69] has long been considered an indispensable avenue of political expression.[70] In upholding as constitutional Hawaii's complete ban on write-in voting,[71] the *Burdick* majority seized the opportunity to clarify its position on the relationship between the right to vote and First Amendment rights of political expression.[72] The Court explained that a voter's right to self-expression through the ballot is not absolute.[73] Instead, the Court defined the right to vote as "the right to participate in an electoral process," not as a forum for voicing generalized dissention from it.[74] In other words, the Court considers voting a fundamental right, but not all forms of its exercise merit First Amendment protection.

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65. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428 (1992); Tashjian v. Republican Party, 479 U.S. 208 (1986); Munro v. Socialist Workers Party, 479 U.S. 189 (1986); *see also* Hagelin for President Comm. v. Graves, 25 F.3d 956, 959 (10th Cir. 1994) (citing *Burdick, supra*) ("[T]he states retain the power to regulate elections, and their election laws invariably will impose some burden on voters.").

66. *See, e.g.*, Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Bullock v. Carter, 405 U.S. 134 (1972); Williams v. Rhodes, 393 U.S. 23 (1968). The Tenth Circuit discussed this shift in Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740 (10th Cir. 1988). The Court noted:

> In [*Illinois State Bd. of Elections*], the Court, in evaluating an equal protection challenge to a ballot access restriction, did require the state to establish a compelling interest and to use the least drastic means to achieve its goal. However, other and more recent Supreme Court cases have neither demanded a compelling state interest nor insisted that the state demonstrate it has achieved this end by the least restrictive means available.

Id. at 743 (citations omitted).

67. The four dissenting justices did not object to the analytical process used in the case; rather, their point of disagreement was simply that Ohio's filing deadline was judged too harshly. *Anderson*, 460 U.S. at 812 (Rehnquist, J., dissenting). In fact, the *Anderson* test was applied in *Burdick* with Justice White writing the majority opinion (Justice White having been among the dissenters in *Anderson*). *Burdick*, 504 U.S. at 430; *see also* GUNTHER, *supra* note 5, at 854 n.8.

68. The Court identified the burden to rights as "significant," yet proceeded to strike down Ohio's March filing deadline for independent candidate petitions because the law was not rationally related to the state's asserted interests. *Anderson*, 460 U.S. at 795-806.

69. *Burdick*, 504 U.S. at 430.

70. For discussions about the prominent role of write-in voting in American political history, see Elizabeth E. Deighton, Burdick v. Takushi: *Hawaii's Ban on Write-In Voting Is Constitutional*, 23 GOLDEN GATE U. L. REV. 701, 703-04 (1993); Jeanne M. Kaiser, *Constitutional Law—First Amendment—No Constitutional Right to Vote for Donald Duck: The Supreme Court Upholds the Constitutionality of Write-In Voting Bans in* Burdick v. Takushi, 15 W. NEW ENG. L. REV. 129, 129-31, 147-52 (1993); Michele Logan, *The Right to Write-In: Voting Rights and the First Amendment*, 44 HASTINGS L.J. 727, 732-36 (1993).

71. *Burdick*, 504 U.S. at 430.

72. *Id.* at 433.

73. *Id.*

74. *Id.* at 441.

While *Anderson* set forth the analysis to be used in ballot access/voting rights cases, *Burdick* established the standard of review.[75] It is still possible that a state election law will be subjected to strict scrutiny; whether strict or minimal, however, the Court systematically determines the level of scrutiny in the first part of the balancing test.[76]

D. *Conclusion*

The current trend in Supreme Court ballot access cases departs from the strict defense of First Amendment rights that characterized earlier cases.[77] The *Anderson/Burdick* approach represents the Court's resumption of its appropriate judicial role—respecting both state autonomy and individual liberties.[78] The Court of the current era hesitates to invade the sphere of state control over state affairs.[79] Thus, state election laws are likely to be upheld unless they place severe restrictions on voters and cannot be justified by compelling state interests.[80]

II. TENTH CIRCUIT TREATMENT SINCE *ANDERSON*

A. *Background*

The Tenth Circuit Court of Appeals has handed down a number of decisions following the *Anderson* and *Burdick* methodology.[81] The cases prior to the survey period were well reasoned, adhering strictly to the newly articulated test.[82] Each case opinion described the formula, evaluated the law's burden on protected rights, and then examined the legitimacy and strength of the state's interests furthered by the law.[83] In 1995, however, the Tenth Circuit professed to apply the *Anderson/Burdick* test, yet clearly strayed from that pattern of analysis.

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75. "Despite its explicit endorsement of the *Anderson* approach, the *Burdick* Court also reaffirmed a single modification, that election laws which place 'severe' burdens upon constitutional rights are subject to strict scrutiny . . . ." McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1220 (4th Cir. 1995).

76. *Id.* at 1220-21.

77. For cases demonstrating this progression, see *supra* notes 65-66 and accompanying text.

78. *See* Zywicki, *supra* note 1, at 87-107; *supra* note 52 and accompanying text.

79. *Burdick*, 504 U.S. at 433 (commenting that subjecting every voting regulation to strict scrutiny would essentially "tie the hands of States" in their efforts to run efficient elections); Tashjian v. Republican Party, 479 U.S. 208, 217 (1986) (recognizing that states must retain power to regulate their own elections).

80. *Burdick*, 504 U.S. at 434.

81. Hagelin for President Comm. v. Graves, 25 F.3d 956, 959 (10th Cir. 1994); Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740, 743 (10th Cir. 1988); Populist Party v. Herschler, 746 F.2d 656, 659 (10th Cir. 1984); Blomquist v. Thomson, 739 F.2d 525, 527 (10th Cir. 1984).

82. *See supra* note 81.

83. A summary of the holdings of these cases would not be useful, since each is unique to the specific law challenged and the overall election scheme of the state within which it operates. Each challenge is evaluated on a case-by-case basis depending on many factors. The point is simply that the balancing test was applied consistently by the Tenth Circuit throughout this line of cases.

B. Coalition for Free and Open Elections v. McElderry[84]

1. Facts

A coalition of voters and minor party candidates brought suit against the Oklahoma State Election Board, challenging Oklahoma's total ban on write-in voting in presidential and vice-presidential elections.[85] The coalition framed the issues according to *Burdick*, arguing that the ban violated the First and Fourteenth Amendments when considered in conjunction with the state's other ballot access laws.[86]

2. Decision

The Tenth Circuit, purporting to apply the *Anderson* model, held that Oklahoma's overall ballot access scheme was constitutional and that the ban on write-in voting was, therefore, presumed valid under *Burdick*.[87] The court only feigned adherence to the *Anderson/Burdick* approach, however, because it did not in fact follow the three-part pattern. Instead, the court rearranged the order of tasks and created a new final step.[88]

C. *Analysis*

In the *Coalition* opinion, the Tenth Circuit began with an outline of Oklahoma's ballot access scheme as a whole.[89] This survey took place in the abstract, without consideration of the scheme's impact on voters' rights.[90] Next, the court recited the test and guidelines from the *Anderson* and *Burdick* cases.[91] In briefly summarizing this approach, however, the court reversed the order of the steps.[92] Instead of determining the extent of the laws' burden on voters in order to establish the appropriate standard of review, the court considered the state's interests first, without articulating the standard upon which

84. 48 F.3d 493 (10th Cir. 1995).

85. *Coalition*, 48 F.3d at 495.

86. "Appellants reason that the constitutionality of a ban on write-in voting cannot be judged in a vacuum, and that the more restrictive a State's other means of ballot access are, the more critically such a ban must be viewed." *Id.*; *see* Burdick v. Takushi, 504 U.S. 428, 434-49 (1992). Oklahoma requires that in order for a "nonrecognized party elector" to gain access to the printed ballot in a general election, the candidate must submit a petition of support by July 15, containing signatures equal to at least three percent of the total votes cast in the last presidential election. *Coalition*, 48 F.3d at 496.

87. *Coalition*, 48 F.3d at 499.

88. *Id.* at 496-97; *see infra* note 98 and accompanying text.

89. *Coalition*, 48 F.3d at 495-96 (Ebel, J.).

90. *Id.* The whole reason for examining the state's other election laws is to put the challenged law into context, in order to evaluate the actual and total burden on voters' rights. *Burdick*, 504 U.S. at 436-47 (noting that Hawaii's "system . . . provides for easy access to the ballot," and concluding that "any burden imposed by Hawaii's write-in vote prohibition is a very limited one").

91. *Coalition*, 48 F.3d at 496-97.

92. "Accordingly, a court must first review the State's overall ballot access scheme, weighing the State's interests in ballot access restrictions against the burdens those restrictions impose on voters' interests." *Id.* at 497. This re-prioritizes the state's interests to be considered first, which directly contradicts the order of steps quoted from *Anderson* in the immediately preceding paragraph of the opinion. *Id.* at 496.

it relied.[93] The Tenth Circuit then noted the *Burdick* Court's presumption of validity when an overall scheme passes constitutional muster.[94] The court erroneously perceived this presumption to be the second step in the *Burdick* structure.[95] The court summarized the approach as a two-part test requiring an initial review of the legitimacy of the ballot access laws and then a determination of whether the resulting presumption should be overcome.[96]

In this prefatory summary, the appellate court did not mention any examination of the magnitude of the injury to protected rights, the determination of which *should* define the level of scrutiny for the subsequent state justifications proffered by a state.[97] Instead, the *Coalition* court collapsed the two stages into one and proceeded to invent its own second step.[98]

The court's reasoning began with section I, titled "Oklahoma's Ballot Access Laws."[99] In this section, the court reviewed its earlier holding in *Rainbow Coalition v. Oklahoma State Election Board*[100] and found the requirements of the case at bar less severe than those previously upheld.[101] The court gave no consideration to the extent of the burden imposed by the regulation on voters' rights.[102] Based solely on this comparison to a previous case

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93. *Id.* at 497. When a ballot access law comes under attack, a court must review the law to determine whether it places an unreasonable restriction on the plaintiff's rights. The level of scrutiny that the court will apply to its review of the law depends on the severity of the restriction. *See Burdick*, 504 U.S. at 434. Thus, determining the extent of the burden and the resulting standard of review must necessarily take place first, or else the examination of state justifications will have no basis.

94. *Coalition*, 48 F.3d at 497.

95. *Id.* ("Thus, a court must determine, secondly, if the competing interests are such that this presumption should be overcome.").

96. The *Coalition* court's restatement of the *Anderson/Burdick* balancing test:

> Following this two-step process outlined in *Burdick*, we first review the legitimacy of Oklahoma's ballot access laws for Presidential electors and conclude in Part I that, as in *Burdick*, those laws "pass constitutional muster." In Part II, we then address whether the resulting presumption that Oklahoma's ban on write-in voting is valid should be overcome, and conclude that the presumption prevails in this case.

Id.

97. *Burdick*, 504 U.S. at 434.

98. Part A of the *Burdick* opinion assesses the impact of Hawaii's ballot access laws on the petitioner-voter's rights and finds the burden to be light. Part B then weighs Hawaii's interests asserted to justify the burden imposed. The presumption of validity for the law in question arises because the law is part of a total package that has just been deemed acceptable. There is no Part C in which the *Burdick* Court conducts a second round of balancing to rebut the presumption.

99. *Coalition*, 48 F.3d at 497. Given the actual format of the *Burdick* analysis, perhaps a more appropriate title might have been "The Extent of the Burden Imposed by 'Oklahoma's Ballot Access Laws' on Voters' Rights." *See Burdick*, 504 U.S. at 434-37.

100. 844 F.2d 740 (10th Cir. 1988) (holding that a five percent signature requirement and a May 31 filing deadline for gaining access to the ballot as a recognized party were constitutional).

101. *Coalition*, 48 F.3d at 498. Oklahoma provides four avenues for an elector to gain access to the printed ballot in a presidential election: (1) as an elector for a recognized political party; (2) as an uncommitted elector; (3) as an elector for an independent candidate; or (4) as an elector for an unrecognized political party. *Id.* at 495-96. Even though the *Rainbow* court only addressed the constitutionality of the first alternative, the court in *Coalition* felt that the case was instructional in evaluating the remaining three alternatives. *Id.* at 498.

102. *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (requiring that a court "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").

involving a different challenged provision,[103] the court declared the laws at issue "constitutional."[104] The court omitted the second stage of *Burdick*, apparently forgetting that even light burdens must be justified by legitimate, reasonably related state interests.[105]

Section I of the opinion concludes by stating that the particular ballot access laws at issue "impose only reasonable burdens on Appellants' First and Fourteenth Amendment rights."[106] The positioning of this statement renders it moot, however, since it immediately follows two express findings that the laws were constitutional.[107] Rather than conducting any balancing at all, the court leapt to the conclusion that light burdens indicate constitutionally acceptable regulations.

Section II of the opinion begins with yet a third pronouncement that Oklahoma's ballot access laws are constitutional and then presumes the validity of the ban on write-in voting, citing *Burdick*.[108] The next paragraph in the opinion purported to examine the state interests in by the ban,[109] but in fact merely recited the alleged interests without addressing the issues of legitimacy and reasonableness.

Finally, the Tenth Circuit addressed the appellants' contentions.[110] The court considered their arguments in the rebuttal phase of its modified version of the *Burdick* analysis.[111] All three arguments failed, and the presumption of

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103. *See supra* note 101.

104. "Thus, we find that the July 15 deadline for the signature petitions of nonrecognized party electors, like the May 31 deadline for recognized party electors upheld in *Rainbow*, 'passes constitutional muster'. . . . " *Coalition*, 48 F.3d at 498. "Because the 3% [signature] requirement is less burdensome than the 5% requirement we upheld in *Rainbow*, we find the 3% requirement constitutional as well." *Id.*

105. *Burdick*, 504 U.S. at 439-40.

106. *Coalition*, 48 F.3d at 498-99.

107. *See supra* note 92.

108. *Coalition*, 48 F.3d at 499.

109. The state offered the following interests to justify its ban on write-in voting: (1) "discouraging unrestrained factionalism"; (2) "limiting the general election to recognized parties and to those parties and candidates that are well supported"; (3) "focusing the voters on major issues and candidates"; (4) "conserving state resources" by not having to resort to hand-counting of ballots; and (5) voter education. *Id.* Although the court never expressly declared these interests legitimate, it implicitly did so by finding that they "still outweigh the voters' diminished interest in write-in voting." *Id.* at 501.

110. *Id.* at 499-501. Appellants argued that the *Burdick* presumption should not apply because Oklahoma's ballot access requirements were more onerous than Hawaii's. The court's response to this point demonstrates how truly circular its reasoning was:

> For *Burdick's* presumption not to attach, Appellants would have to show not just that Oklahoma's ballot access laws are more restrictive than Hawaii's, but that Oklahoma's ballot access laws are so restrictive as to burden impermissibly voters' constitutional rights—a proposition that we have already concluded is not the case.

Id. at 500.

111. "To overcome Oklahoma's asserted interests and *Burdick's* rebuttable presumption that Oklahoma's ban on write-in voting is valid, Appellants challenge *Burdick's* applicability on three grounds." *Id.* at 499. In addition to asserting that Oklahoma's laws were more onerous than Hawaii's, appellants also argued two more points: (1) since *Burdick* involved a state election, its presumption should not be applied to the presidential and vice-presidential elections at issue in this case; and (2) a state has less interest in a presidential election than it does in a state or local election and thus should not be allowed to maintain the same stringent ballot access requirements. *Id.*

validity stood.[112] The Tenth Circuit Court of Appeals declared Oklahoma's total ban on write-in voting constitutional.[113]

D. *Other Circuits*

A review of the Second, Fourth, Ninth, and Eleventh Circuits reveals widespread application of the *Anderson/Burdick* balancing approach in ballot access cases.[114] These circuits have not only relied on the test, but have done so with meticulous accuracy as to its structure.[115]

E. *Conclusion*

Despite *Coalition's* analytical shortcomings, its principles align with the Supreme Court's current posture on ballot access and voting rights issues.[116] Elections provide methods for selecting representatives, not platforms for voicing dissention.[117] Under this premise, only those practices contributing to that end are considered defensible.[118] Write-in voting, in particular, is not an effective means of furthering this process.[119] In light of *Coalition* and Tenth Circuit cases cited earlier, the court seems to grasp, in a general sense, the philosophical tenets of the Supreme Court's position. The practitioner, however, should not assume that all the circuit judges will implement the balancing test as it is presented in *Anderson* and *Burdick*.

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112. *Id.* at 499-501.

113. *Id.* at 495.

114. *See* McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1220 (4th Cir. 1995); Schulz v. Williams, 44 F.3d 48, 56 (2d Cir. 1994); Libertarian Party v. Munro, 31 F.3d 759, 761 (9th Cir. 1994); Duke v. Smith, 13 F.3d 388, 394 (11th Cir. 1994); Greidinger v. Davis, 988 F.2d 1344, 1352 (4th Cir. 1993); Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992).

115. The Tenth Circuit in *Coalition* evaluated the case under the subheadings "I. Oklahoma's Ballot Access Laws" and "II. Ban on Write-In Votes," indicating its misunderstanding of the proper analysis. *Coalition*, 48 F.3d at 497, 499. On the other hand, the cases cited *supra* note 114 indicate clear understandings of the method. For instance, the court in *Schulz* divided its opinion as follows: "1. Assessing the burden"; "2. Assessing the state's interest"; and "3. Assessing the means employed." *Schulz*, 44 F.3d at 56-58. *Fulani's* subtitles are even more precise: "A. Character and Magnitude of the Asserted Injury"; "B. The Precise Interests Put Forward by the State"; and "C. Necessity of the Provision to Advancing the State's Interests." *Fulani*, 973 F.2d at 1544-47.

116. The *Coalition* court, quoting from *Burdick*, points out that the purpose of elections 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.'" *Coalition*, 48 F.3d at 501.

117. *Id.*

118. Given the improbability of write-in voting producing a competitive candidate in a national election, demand for the right "amounts to nothing more than the insistence that the State record, count, and publish individual protests against the election system or the choices presented on the ballot." *Burdick*, 504 U.S. at 441. Furthermore, "reasonable regulations advancing the primary function of the election process will be upheld." *Coalition*, 48 F.3d at 501.

119. *Coalition*, 48 F.3d at 501 ("In the context of a Presidential election, the function of actually getting a candidate elected is only nominally advanced by the use of write-in voting . . . .").

CONCLUSION

The trend in ballot access cases suggests that courts should give attention to both individual and state interests but should not intervene unless the state's laws are both onerous and unnecessary.[120] The right to vote in an election no longer qualifies as an exercise of protected speech.[121] Rather, courts perceive voting as the opportunity to participate in one's government and protect the right only on that ground. Write-in voting, as an exercise of political expression, is especially vulnerable since it does not effectively further the objectives of the election process. Thus, claims of injury to First or Fourteenth Amendment rights may, but will not automatically, merit strict scrutiny.[122]

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120. Professor Laurence Tribe summarizes the jurisprudence:

> Whatever its doctrinal roots, there is a principle to be distilled from the Court's approach in the ballot access cases: in order to keep ballots manageable and protect the integrity of the electoral process, states may condition access to the ballot upon the demonstration of a "significant, measurable quantum of community support," but cannot require so large or so early a demonstration of support that minority parties or independent candidates have no real chance of obtaining ballot positions.

TRIBE, *supra* note 5, § 13-20, at 1110-11.

121. Plaintiffs continue to demand strict scrutiny when challenging ballot access and voting restrictions, and the courts consistently chide that heightened scrutiny is not necessarily appropriate. *See, e.g.*, *Burdick*, 504 U.S. at 432 ("Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold."); *Rainbow Coalition*, 844 F.2d at 742 ("Plaintiffs begin their argument on this point by contending that we must apply strict scrutiny to state statutes restricting the ballot access of minority parties. We are unable to agree.").

122. "The Supreme Court has recently made clear that while voting enjoys constitutional protection, every law that imposes a burden on the right to vote need not be subject to strict scrutiny." Schulz v. Williams, 44 F.3d 48, 56 (2d Cir. 1994).