

State Restrictions On Candidate Access to the Ballot In Presidential Elections: *Anderson v. Celebrezze*¹ — Article II of the United States Constitution gives the states broad authority to regulate presidential elections. It provides that "[e]ach State shall appoint in such Manner as the Legislature thereof may direct, a Number of Electors, Equal to the Whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . ."² Since the Supreme Court's landmark decision in *Williams v. Rhodes*,³ the Court has consistently held that the discretion article II gives to states to establish the rules governing national elections is limited by the first and fourteenth amendments.⁴ These amendments, in the Court's view, guarantee the right to associate for the advancement of one's political beliefs and the right to vote for a candidate of one's own political persuasion.⁵ The Court has had difficulty, however, in defining the limits that the first and fourteenth amendments place on article II's grant of authority to the states to regulate access to the presidential ballot. The Court's difficulty is apparent in the contradictory standards of review it has applied to state-imposed presidential ballot access restrictions. In one line of decisions, the Court subjected ballot access legislation to strict scrutiny by demanding that states demonstrate that the ballot access limitations at issue were the least restrictive means of serving vital state concerns.⁶ In another line of rulings, the Court required merely that the states show that the ballot access restrictions reasonably advanced legitimate state purposes.⁷

In the recent decision of *Anderson v. Celebrezze*,⁸ the Supreme Court attempted to reconcile its contradictory holdings and to clarify the standard of review it will apply to ballot access restrictions on presidential candidates.⁹ In *Anderson*, the Court held that an early filing deadline for independent candidates is unconstitutional.¹⁰ The Ohio law that the Supreme Court struck down had required independent candidates to file nominating petitions with the Ohio Secretary of State seven and one-half months before the presidential election.¹¹ Reasoning that the requirement interfered with the first amendment rights of voters to coalesce around candidates of their choice and to cast their votes effectively,¹² the Court held that the early deadline impermissibly burdened independent-minded voters' rights.¹³ In striking down the Ohio statute, the Court indicated that any significant ballot access limitation by a state must be the least restrictive means available to serve an important state interest.¹⁴ The Court asserted that the mere existence of an important

¹ *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

² U.S. CONST. art. II, § 1, cl. 2.

³ 393 U.S. 23 (1968) (ballot access laws which place significantly unequal burdens on independent and third party candidates violated the first amendment rights of voters to associate to advance their political views and to vote for candidates of their own political persuasion). See *infra* notes 43-69 and accompanying text.

⁴ See, e.g., *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 186 (1979).

⁵ *Id.*

⁶ See, e.g., *Socialist Workers Party*, 440 U.S. at 186-87 (see *infra* notes 112-15 and accompanying text); *Williams v. Rhodes* 393 U.S. 23, 31 (1968) (see *infra* notes 43-69 and accompanying text).

⁷ See, e.g., *Clements v. Fashing*, 457 U.S. 957, 970 (1982) (Rehnquist, J., plurality opinion). See *infra* notes 117-33 and accompanying text; *American Party of Texas v. White*, 415 U.S. 767, 780 (1973) (discussed *infra* notes 93-106 and accompanying text).

⁸ 460 U.S. 780 (1983).

⁹ *Id.* at 806.

¹⁰ *Id.*

¹¹ *Id.* at 782-83.

¹² *Id.* at 790-91.

¹³ *Id.* at 806.

¹⁴ *Id.* at 794-95, 806.

state concern in a presidential election does not justify legislation to protect it.¹⁵ Rather, the state interest must be so vital that it requires protection even though the state restricts the voting rights of a national, and not merely a statewide or local, group of electors.¹⁶

John Anderson, the plaintiff in *Anderson*, formally announced his candidacy for President on June 8, 1979.¹⁷ At that time, he sought the Republican party's nomination.¹⁸ On April 24, 1980, after competing in nine primaries, Anderson declared he would campaign as an independent rather than as a Republican candidate.¹⁹ Anderson requested those states in which he was still scheduled to compete in a Republican primary, including Ohio, to remove his name from the primary ballot.²⁰ At the same time, he sought to comply with the requirements for gaining a place on the ballot as an independent in each of those states.²¹

On May 16, 1980, Anderson filed the nominating petition required by Ohio law.²² The petition was rejected by the Ohio Secretary of State because it was not filed by March 20, 1980, as required by section 3513.25.7 of the Ohio Revised Code.²³ Three days later, Anderson and voters registered in Ohio brought suit against the Secretary of State of Ohio in the United States District Court for the Southern District of Ohio challenging the constitutionality of the early filing deadline for independent candidates.²⁴ The district court granted the petitioners' motion for summary judgment and ordered the respondent to place Anderson's name on the general election ballot.²⁵ Ohio promptly appealed the decision and unsuccessfully sought expedited review by the Sixth Circuit Court of Appeals and the Supreme Court.²⁶ The presidential election was held while the appeal was pending.²⁷

In other litigation, Anderson challenged early deadlines in Maine and Maryland.²⁸ The United States Courts of Appeals for the First and Fourth Circuits struck down as unconstitutional state statutes with early filing deadlines similar to the Ohio requirement.²⁹ The Sixth Circuit, however, upheld the Ohio early filing deadline.³⁰ To resolve

¹⁵ *Id.* at 796.

¹⁶ *Id.*

¹⁷ *Anderson v. Celebrezze*, 664 F.2d 554, 555 (6th Cir. 1981).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Anderson*, 460 U.S. at 782.

²³ *Id.* at 782-83. The Ohio statute provided in pertinent part:

Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election . . . shall file no later than four p.m. of the seventy-fifth day before the day of the primary election immediately preceding the general election at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petition as provided in section 3513.261 [3513.26.1] of the Revised Code. . . .

OHIO REV. CODE ANN. § 3513.25.7 (Supp. 1982).

²⁴ *Id.* at 783.

²⁵ *Anderson v. Celebrezze*, 499 F. Supp. 121, 124 (S.D. Ohio 1980), *rev'd*, 664 F.2d 554 (6th Cir. 1981), *rev'd*, 460 U.S. 780 (1983).

²⁶ *Anderson*, 460 U.S. at 784.

²⁷ *Id.*

²⁸ *Id.* at 786.

²⁹ See *Anderson v. Morris*, 636 F.2d 55 (4th Cir. 1980); *Anderson v. Quinn*, 634 F.2d 616 (1st Cir. 1980).

³⁰ *Anderson v. Celebrezze*, 664 F.2d 554 (6th Cir. 1981), *rev'd*, 460 U.S. 780 (1983).

the conflict among the circuits caused by the *Anderson* cases the Supreme Court granted certiorari.³¹

The Supreme Court's decision in *Anderson* is significant because it puts forward the proposition that a state has far less an interest in a nationwide election than it has in a statewide or local election.³² The *Anderson* Court viewed state requirements for access to the presidential ballot as state legislation which had principally an extraterritorial effect.³³ Such legislation, according to the *Anderson* Court, did more than burden the associational and voting rights of a single state's citizens,³⁴ rather it placed a significant state-imposed restriction on a nationwide election process.³⁵ The Court indicated that such state legislation is subject to a more heightened level of constitutional scrutiny than ballot access restrictions for purely intrastate elections.³⁶ This new distinction between ballot access barriers affecting a national election and those affecting a statewide election that the *Anderson* Court has drawn raises significant questions that may prove extremely difficult for the Court to resolve.³⁷

This casenote will examine the *Anderson* decision and its implications. The first section will examine the ballot access decisions that preceded *Anderson*.³⁸ The casenote will demonstrate that in these decisions, the Court was inconsistent in the standard of review it applied.³⁹ In addition, the casenote will show that the Court drew no distinction in these decisions between ballot access conditions which could be applied validly to national elections and those which could only be applied to state and local elections.⁴⁰ The second section of the casenote will examine the *Anderson* decision, the new standard of review in presidential elections that the *Anderson* Court created and the Court's rationale for applying that standard.⁴¹ Finally, in the third section of the casenote, it will be suggested that although the Court's prior decisions on access to the ballot in presidential and other elections were inconsistent and in need of clarification, that clarification has not been sufficiently provided by the *Anderson* decision.⁴²

I. THE EMERGENCE OF BALLOT ACCESS STANDARDS: *WILLIAMS V. RHODES* AND ITS PROGENY

Although the Supreme Court has repeatedly held that states cannot unnecessarily restrict access to the ballot, the Court has not clearly delineated what the limits are to the state's power to regulate elections.⁴³ In 1968, in *Williams v. Rhodes*,⁴⁴ the Supreme Court held unconstitutional for the first time a state law limiting access of independent and third

³¹ 456 U.S. 960 (1982).

³² 460 U.S. at 795.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *infra* notes 287-308 and accompanying text.

³⁸ See *infra* notes 44-133 and accompanying text.

³⁹ See *infra* notes 74-133 and accompanying text.

⁴⁰ See *infra* notes 136-40 and accompanying text.

⁴¹ See *infra* notes 141-210 and accompanying text.

⁴² See *infra* notes 237-308 and accompanying text.

⁴³ See, e.g., *Clements v. Fashing*, 457 U.S. 957 (1982) (Rehnquist, J., plurality opinion); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Williams v. Rhodes*, 393 U.S. 23 (1968).

⁴⁴ 393 U.S. 23 (1968).

party candidates to the general election ballot.⁴⁵ The statute at issue in *Williams* regulated ballot access for presidential candidates.⁴⁶ Although the holding was therefore limited to presidential elections, the language of the decision indicated that the Court would apply the standards it enunciated in its decision to other elections as well. Indeed, subsequent Court rulings have used *Williams* as authority for the proposition that a state's ability to restrict ballot access for any elective public office is limited by the equal protection clause of the fourteenth amendment.⁴⁷ The Ohio law challenged in *Williams* required new and small political parties, as well as the two major parties, to hold primary elections for presidential electors on a statewide basis.⁴⁸ This statute mandated an elaborate party election apparatus to organize the primary⁴⁹ and also required candidates in the primaries to file nominating petitions signed by "qualified electors."⁵⁰ The law defined a qualified elector as one who voted for a majority of that party's candidates in the last election or had never voted in any election before.⁵¹ In examining the state law, the Court determined that Ohio's numerous and burdensome requirements made it "virtually impossible" for a new political party, or an old political party with a very small number of members, to be placed on the presidential ballot.⁵² The Court also noted that the Ohio law made no provision whatsoever for ballot positions for independent candidates.⁵³

Reasoning that the authority article II grants to the states to control the selection of presidential electors may not be exercised in violation of other constitutional provisions,⁵⁴ the Court rejected Ohio's contention that the state had absolute power to establish any barriers it chose to the presidential ballot.⁵⁵ One limitation on the states' authority to control the choice of presidential electors, the Court held, is the equal protection clause.⁵⁶ The Court asserted that the equal protection clause⁵⁷ does not forbid minor differences in the treatment of candidates.⁵⁸ According to the Court, the equal protection clause does, however, prohibit state laws which impose unequal burdens on candidates, unless justified by a compelling state interest.⁵⁹

In finding that the Ohio statute violated the equal protection clause, the Court asserted that Ohio's ballot access law burdened the first amendment rights of voters to associate and to vote which are shielded from unequal restriction by the states through the equal protection clause.⁶⁰ According to the *Williams* Court, the conditions on ballot access that the Ohio law placed on minor party candidates and independents were significantly

⁴⁵ *Id.* at 31. See Note, *A New Dimension to Equal Protection and Access to the Ballot: American Party v. White and Storer v. Brown*, 24 AMER. U.L. REV. 1293, 1302-03 (1975) [hereinafter cited as Note, *A New Dimension*].

⁴⁶ 393 U.S. 23, 28 (1968).

⁴⁷ See, e.g., *Storer*, 415 U.S. at 730; *Bullock v. Carter*, 405 U.S. at 141; *Jenness v. Fortson*, 403 U.S. at 441.

⁴⁸ *Williams v. Rhodes*, 393 U.S. at 28.

⁴⁹ *Id.* at 25.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 26.

⁵⁴ *Id.* at 29. See text accompanying note 2 for the text of the relevant portion of article II.

⁵⁵ *Id.* at 28-29.

⁵⁶ *Id.*

⁵⁷ U.S. CONST. amend. XIV, § 1.

⁵⁸ *Williams*, 393 U.S. at 30.

⁵⁹ *Id.* at 31.

⁶⁰ *Id.* at 34.

greater than the conditions the law placed on Republican and Democratic candidates.⁶¹ The Court ruled that such requirements burdened the first amendment rights of supporters of minor party and independent candidates and could only be justified by a compelling state interest.⁶² Ohio, the Court found, advanced no interest sufficiently important to justify the requirements.⁶³

In holding that state access to ballot laws are subject to strict scrutiny, the *Williams* decision reversed a line of Supreme Court decisions holding that state laws on access to the ballot had only to pass the rational relationship test.⁶⁴ Under the rational relationship test, the Court would not look at the effects of the challenged legislation but only at whether the state's purpose in passing the law was discriminatory.⁶⁵ By subjecting ballot access legislation to stringent review,⁶⁶ the *Williams* Court required the states to demonstrate that a law significantly limiting access to the ballot is justified by a compelling state interest and that the state law is the least burdensome alternative for promoting that interest.⁶⁷ The *Williams* Court did not, however, specify what kinds of state ballot access laws would withstand constitutional scrutiny. It merely stated that the equal protection clause forbids states to provide positions only for Democrats and Republicans while other candidates "are clamoring for a place on the ballot."⁶⁸ Indeed, in his dissent to the *Williams* decision, Chief Justice Warren's principal criticism was that the Court provided no concrete guidelines to the states specifying which ballot access laws could pass the Court's scrutiny.⁶⁹

Supreme Court decisions subsequent to *Williams* have also failed to provide guidelines to the states on the limitations of their power to regulate access to the ballot. The Court has stated that it can not provide a "litmus paper test" to separate valid from invalid ballot access laws⁷⁰ and has emphasized that decisions in this context must be "very much a matter of degree."⁷¹ In general, the decisions are limited to assessing whether the precise law in question imposes unequal burdens on voters.⁷² The Court has carefully avoided making rulings which could lend themselves to generalization.⁷³

The Court's lack of clarity in deciding state access to ballot cases is evident from its contradictory rulings on the central question of what standard of review to apply in such

⁶¹ *Id.* at 32.

⁶² *Id.* at 31.

⁶³ *Id.*

⁶⁴ See, e.g., *MacDougall v. Green*, 335 U.S. 281, 283-84 (1948) (per curiam); *Snowden v. Hughes*, 321 U.S. 1, 7-10 (1943).

⁶⁵ See, e.g., *Snowden v. Hughes*, 321 U.S. 1, 7-10 (1943).

⁶⁶ See *supra* notes 45-63 and accompanying text.

⁶⁷ *Williams*, 393 U.S. at 32. See also *Socialist Workers Party*, 440 U.S. at 185.

⁶⁸ *Williams*, 393 U.S. at 31.

⁶⁹ *Id.* at 69-70 (Warren, C.J., dissenting).

⁷⁰ See, e.g., *Clements v. Fashing*, 457 U.S. at 963; *Storer*, 415 U.S. at 730.

⁷¹ "Decision in this context, as in others, is very much 'a matter of degree' . . . very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification.'" *Storer*, 415 U.S. at 730 (citations omitted).

⁷² See *Clements v. Fashing*, 457 U.S. 957 (1982) (Rehnquist, J., plurality opinion). See *infra* notes 117-33 and accompanying text; *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). See *infra* notes 112-15 and accompanying text; *American Party of Texas v. White*, 415 U.S. 767 (1974). See *infra* notes 93-106 and accompanying text; *Storer v. Brown*, 415 U.S. 724 (1974). See *infra* notes 107-11 and accompanying text; *Bullock v. Carter*, 405 U.S. 134 (1972). See *infra* notes 81-92 and accompanying text; *Jenness v. Fortson*, 403 U.S. 431 (1971). See *infra* notes 77-80 and accompanying text.

⁷³ See *infra* notes 50-72 and accompanying text.

cases. In some cases, the Court has indicated that states have substantial discretion in regulating the election process.⁷⁴ In others, the Court has held that a state may restrict access to the ballot only to protect a vital interest, using the least restrictive means which will serve that interest.⁷⁵ For example, in the two ballot access cases decided immediately after *Williams*, the Supreme Court seemed to retreat from its insistence in *Williams* that courts must apply a rigorous standard of review to ballot access legislation.⁷⁶ In *Jenness v. Fortson*, the Court upheld a Georgia statute requiring demonstration of support for candidates for elective office.⁷⁷ The Court reasoned that the legislation furthered the important state interest of "avoiding confusion of the democratic process. . . ."⁷⁸ The Court, however, did not characterize the interest Georgia sought to protect as "compelling" or "vital" as it normally does when applying strict scrutiny.⁷⁹ Furthermore, the Court did not discuss whether Georgia had used the least restrictive alternative available for promoting its interest.

The *Jenness* Court did not specify its standard of scrutiny. It does not appear, however, that the Court could have used the heightened review that the *Williams* Court applied. To be consistent with *Williams*, the *Jenness* Court should have ruled that the state had shown that its demonstration of support requirement was the least restrictive means available to further an urgent state concern. The decision gives no evidence that Georgia was required to show that its law advanced an urgent state interest. On the contrary, the Court's observation that some states had established lower demonstration of support requirements than Georgia had enacted indicates that the *Jenness* Court used a standard which fell short of strict scrutiny.⁸⁰

*Bullock v. Carter*⁸¹ is another Supreme Court decision that appears to be inconsistent with the *Williams* decision. In *Bullock*, the Court struck down a Texas law requiring payment of a substantial filing fee as an absolute prerequisite to securing a line on the ballot.⁸² The Court noted that Texas had a legitimate interest in limiting ballot access to avoid clogging the election machinery.⁸³ In holding that the challenged legislation did not serve that interest,⁸⁴ the Court rejected the state's argument that a high filing fee limited the ballot to serious candidates and was therefore a rational means of forwarding the state's concern.⁸⁵ The Court reasoned that no logical connection existed between the ability of a candidate and his supporters to pay a substantial fee and the seriousness of his candidacy.⁸⁶ In the Court's view, the Texas statute impermissibly restricted voters' first

⁷⁴ See, e.g., *Clements v. Fashing*, 457 U.S. at 970 (Rehnquist, J., plurality opinion); *American Party of Texas*, 415 U.S. at 780.

⁷⁵ See, e.g., *Socialist Workers Party*, 440 U.S. at 185.

⁷⁶ *Bullock v. Carter*, 405 U.S. 134 (1972); *Jenness v. Fortson*, 403 U.S. 431 (1971).

⁷⁷ 403 U.S. 431, 442 (1971) (in order to have a ballot position, under a Georgia law, nominees of small political parties and independent candidates were required to have nominating petitions signed by 5 percent of those eligible to vote in the last election for the office sought).

⁷⁸ *Id.* at 442.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 405 U.S. 134 (1972).

⁸² *Id.* at 145.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 145-46.

amendment rights to associate and to vote by limiting the range of candidates on the ballot from which voters might choose by a wholly arbitrary means.⁸⁷

In *Bullock*, the Court stated that it closely scrutinized the challenged statute.⁸⁸ But, in striking down the statute, the Court did not state that it rejected the measure because it was not the least burdensome alternative. The Court indicated merely that the provision failed because it was unreasonable.⁸⁹ The level of review that the Court used in *Bullock* seems to be comparable, therefore, to the level of review that the Court used in *Jenness*. In *Jenness*, the Court appears to have applied something less than strict scrutiny by ruling that the challenged statute was valid because it furthered an important state interest without finding that the interest advanced was "vital," "urgent," or "compelling" as the Court normally does to signal that it has strictly scrutinized a statute.⁹⁰ Further, the *Jenness* Court does not seem to have required that the means chosen by the state be the least restrictive alternative.⁹¹ Similarly, in *Bullock*, the Court indicated that the interest that the state intended to advance by its ballot access law could be merely legitimate and that the means that the state has used must be reasonable.⁹²

In the companion cases of *American Party of Texas v. White*⁹³ and *Storer v. Brown*,⁹⁴ the Supreme Court seems to have recognized that *Williams*, *Jenness*, and *Bullock* were contradictory and attempted to reconcile them by establishing a mixed standard of review.⁹⁵ The Court suggested, in both *American Party* and *Storer*, that a state must show that the legislation in question protects a vital state interest.⁹⁶ The Court did not, however, demand that the state use the least restrictive alternative to protect the interest.⁹⁷

In *American Party*, the Court upheld a complex Texas statute which provided four methods for nominating candidates to the general election ballot.⁹⁸ Two small parties challenged the provision of the statute requiring candidates of parties of small size to qualify for ballot position either through nominating conventions or by securing the required number of signatures on nominating petitions.⁹⁹ In addition, independent candidates challenged the nominating petition requirement which applied to them.¹⁰⁰ The Court held that the validity of the challenged qualifications depended on whether they were necessary to advance compelling state interests.¹⁰¹ The Court found that the legislation was enacted to serve vital state concerns, that is, preserving the integrity of the ballot process and regulating the number of candidates on the ballot to avoid voter

⁸⁷ *Id.* at 149.

⁸⁸ *Id.* at 143-44.

⁸⁹ *Id.* at 146-47. See also Note, *A New Dimension*, *supra* note 45, at 1307-10 (neither *Jenness* nor *Bullock* used stringent review).

⁹⁰ 403 U.S. 431, 442 (1971).

⁹¹ See *supra* note 80 and accompanying text.

⁹² 405 U.S. 134, 146-47 (1972).

⁹³ 415 U.S. 767 (1974).

⁹⁴ 415 U.S. 724 (1974).

⁹⁵ "*Storer v. Brown* and *American Party v. White* attempted the synthesis. . . . The standard of review actually applied . . . seems to have been a mix of strict and minimal scrutiny." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 782-83 (1978) [hereinafter cited as L. TRIBE].

⁹⁶ *American Party of Texas v. White*, 415 U.S. at 780; *Storer v. Brown*, 415 U.S. at 736.

⁹⁷ 415 U.S. at 780; 415 U.S. at 736.

⁹⁸ *American Party of Texas v. White*, 415 U.S. at 772.

⁹⁹ *Id.* at 776.

¹⁰⁰ *Id.* at 788.

¹⁰¹ *Id.* at 780.

confusion.¹⁰² In addition, the Court found that the state's objectives could not have been met by significantly less burdensome measures.¹⁰³ This finding was, however, a bald, unsubstantiated assertion by the Court.¹⁰⁴ Justice Douglas, in his dissent, maintained that some of the statute's provisions were unnecessarily limiting, such as the requirements that independent candidates had merely a thirty day period in which to gather signatures on their nominating petitions and that voters could sign the petition of only one candidate.¹⁰⁵ The majority did not address Justice Douglas' observations.¹⁰⁶

In *Storer v. Brown*, the Court upheld the constitutionality of a state law requiring candidates desiring positions on the ballot as independents to disaffiliate themselves from all parties one year before the election.¹⁰⁷ The Court stated that the requirement was essential to protect California's compelling interest in avoiding intraparty feuding in election years.¹⁰⁸ The Court does not seem to have inquired into the possibility of a less restrictive alternative.¹⁰⁹ Neither *Storer* nor *American Party*, therefore, appear to apply the strict scrutiny test of *Williams*. In both cases the Court required the presence of a vital state interest to justify state imposed ballot access legislation.¹¹⁰ Neither case seems to have required the states to demonstrate that the challenged statutes were the least burdensome means to protect the asserted interest.¹¹¹

In its next major ballot access decision, *Illinois State Board of Election v. Socialist Workers Party*,¹¹² the Court again seemed to have changed its standard of review. The challenged Illinois statute contained a provision requiring candidates seeking ballot positions for office in Chicago to secure more signatures on nominating petitions than candidates for statewide office.¹¹³ The Supreme Court held that the Illinois law was unconstitutional because it was not the least burdensome means to achieve the state's objective of providing ballot positions only for candidates who had a reasonable degree of support.¹¹⁴ In this decision, the Court grounded its ruling on the existence of less restrictive alternatives.¹¹⁵ In *American Party* and *Storer*, in contrast, the Court made no inquiry into the possible existence of less restrictive means of serving the interests asserted by the states.¹¹⁶

In *Clements v. Fashing*,¹¹⁷ the last major Supreme Court decision on ballot access prior to *Anderson*, the Court appeared to have abandoned the position it had just taken in *Illinois Board of Elections*.¹¹⁸ In *Clements*, the Court upheld a Texas law barring state, federal, and foreign office holders from campaigning for a seat in the Texas legislature if the terms of their present offices overlapped the legislative term for which they sought election.¹¹⁹ The

¹⁰² *Id.*

¹⁰³ *Id.* at 781.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 797-98 (Douglas, J. dissenting).

¹⁰⁶ *Id.* at 781.

¹⁰⁷ 415 U.S. 724, 736 (1974).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 761 (Brennan, J., dissenting).

¹¹⁰ See *supra* note 96 and accompanying text.

¹¹¹ See *supra* note 97 and accompanying text.

¹¹² 440 U.S. 173 (1979).

¹¹³ *Id.* at 186.

¹¹⁴ *Id.* at 186-87.

¹¹⁵ *Id.*

¹¹⁶ See *supra* notes 96-97 and accompanying text.

¹¹⁷ 457 U.S. 957 (1982) (Rehnquist, J., plurality opinion).

¹¹⁸ See *supra* note 114 and accompanying text.

¹¹⁹ 457 U.S. 957, 972 (1982) (Rehnquist, J., plurality opinion).

Court split evenly on the appropriate level of scrutiny. The plurality asserted that the equal protection clause generally does not require heightened scrutiny of ballot access legislation or any other restriction on the right to candidacy.¹²⁰ It argued that close scrutiny is required only when the law discriminates on the basis of wealth or a suspect classification, or substantially disadvantaged third party and independent candidacies.¹²¹ Because the Texas law involved neither suspect classifications nor allegedly unequal burdens on minor party or independent candidates, the plurality claimed that close scrutiny was not applicable and that the rational relationship test provided the appropriate level of review.¹²² According to the plurality, because the only complainants were Texas Justices of the Peace, the sole issues in the case were whether Texas had a legitimate interest in prohibiting candidates for the legislature from holding a paid state office during their campaigns and whether the "resign to run" provision reasonably served that interest.¹²³ The plurality held that Texas' interest in preventing state officeholders from neglecting their duties while they sought other state positions was valid and that the law was rationally related to that concern.¹²⁴

The dissent in *Clements* argued that *Williams v. Rhodes* and its progeny had established that the Court must apply strict scrutiny to ballot access legislation and to any other significant restriction on the right to candidacy.¹²⁵ Prior decisions such as *Storer v. Brown* and *Bullock v. Carter*, the dissent asserted, did not use strict scrutiny merely when, as the plurality claimed, challenged ballot access legislation discriminated on the basis of suspect categories or imposed burdens on new or small political parties or on independent candidates.¹²⁶ Rather, the dissent maintained, "strict scrutiny was required in those [ballot access] cases because of their impact on the First Amendment rights of candidates and voters."¹²⁷ According to the dissent, the Texas "resign to run" statute had the same effect of reducing the field of candidates as did overly restrictive ballot access legislation.¹²⁸ It was subject therefore, the dissent maintained, to the same stringent level of review as ballot access statutes that discriminated against minority voters, candidates or parties.¹²⁹ The dissent concluded that the Texas law could not survive strict scrutiny¹³⁰ because Texas could not possibly have a vital interest in demanding that officeholders resign from federal or foreign offices before running for the Texas legislature.¹³¹ Further, the dissent maintained that the law was not sufficiently tailored to its goal.¹³² In the dissent's view, the statute was so overly broad in its application to officeholders outside the state of Texas that it did not pass the rational relationship test, much less the strict scrutiny that the *Williams* line of cases required the Court to apply to any state legislation designed to keep a significant number of candidates from running for office or from appearing on the ballot.¹³³

¹²⁰ *Id.* at 965-66.

¹²¹ *Id.* at 964-65.

¹²² *Id.* at 966-70.

¹²³ *Id.* at 966-68.

¹²⁴ *Id.* at 968-69.

¹²⁵ *Id.* at 977 n.2 (Brennan, J., dissenting).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 980-84 (Brennan, J., dissenting).

¹³¹ *Id.* at 978-79 (Brennan, J., dissenting).

¹³² *Id.* at 978-80 (Brennan, J., dissenting).

¹³³ 460 U.S. 780 (1983).

Anderson v. Celebrezze is the Court's latest attempt to clarify the states' authority to limit access to the ballot, at least as regards presidential elections.¹³⁴ In *Anderson*, the Court attempted to specify what states can and cannot do to regulate ballot access in national campaigns.¹³⁵ As prior decisions generally asserted, this decision specifies that states must have a strong interest and must design a precisely drawn statute to have a valid ballot access law.¹³⁶ In contrast to prior decisions, however, the *Anderson* Court held for the first time that close review must be applied with particular rigor to statutes limiting ballot access for presidential candidates because states do not have as strong an interest in regulating national elections as they do in regulating intrastate elections.¹³⁷ Several years earlier, in *Cousins v. Wigoda*,¹³⁸ the Court held that a state's interest in a party's presidential nominating convention was too slight to allow the state to establish rules for the seating of delegates.¹³⁹ The *Anderson* decision extends the holding in *Cousins* to presidential elections.¹⁴⁰

II. *ANDERSON V. CELEBREZZE*

A. *The Majority Opinion*

Justice Stevens, writing for the majority in *Anderson*, began the analysis of the case with a general discussion of the states' power to legislate conditions for ballot positions.¹⁴¹ The Court observed first that its primary concern in assessing the constitutionality of ballot access laws was examining the impact such laws have on voters because of a tendency to limit the field from which voters might choose.¹⁴² The Court pointed out that ballot position requirements restricted two basic constitutional rights of voters — the right to associate for the advancement of one's political beliefs and the right to vote for a candidate of one's own political persuasion.¹⁴³ Both rights, the Court stated, "rank among our most precious freedoms."¹⁴⁴ Recognizing that, as a practical matter, the states must have substantial authority to regulate elections so that they can impose order on them,¹⁴⁵ the Court stated that the constitutionality of those regulations depended on the interests the state put forward as justification and the burden those interests imposed on voters' constitutionally protected liberties.¹⁴⁶

The Court explained further that the validity of ballot access legislation could be measured by the extent to which the statute placed unequal burdens on voters' first amendment rights.¹⁴⁷ This approach, the Court noted, was used in earlier ballot access

¹³⁴ See *infra* notes 141-210 and accompanying text.

¹³⁵ 460 U.S. 780, 789 (1983).

¹³⁶ *Id.* at 794-95.

¹³⁷ *Id.* at 795.

¹³⁸ 419 U.S. 477 (1975).

¹³⁹ *Id.* at 478-79, 489-90.

¹⁴⁰ *Anderson*, 460 U.S. at 794-95.

¹⁴¹ *Id.* at 786. The opinion was joined by Chief Justice Burger and Justices Brennan, Marshall and Blackmun. Justice Rehnquist wrote the dissenting opinion and was joined by Justices White, Powell and O'Connor.

¹⁴² *Id.*

¹⁴³ *Id.* at 787 (quoting *Williams*, 393 U.S. at 30-31).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 788 (quoting *Storer v. Brown*, 415 U.S. at 730).

¹⁴⁶ *Id.* at 789.

¹⁴⁷ *Id.* at 786-87 n.7.

rulings.¹⁴⁸ The Court maintained, however, that the constitutionality of a ballot access restriction could be gauged simply by ascertaining the degree to which the statute limited voters' first amendment rights without reference to equal protection requirements.¹⁴⁹ The Court stated that it would follow the latter course in reviewing the *Anderson* case.¹⁵⁰

In addressing the impact of early filing deadlines on voters and candidates, the Court pointed out that state-imposed early deadlines for independent candidates placed significant burdens on voters' first amendment rights.¹⁵¹ The Court observed that the impact was particularly strong when, as in the present case, early deadlines were applied to elections for national office.¹⁵² In national elections, the Court stated, candidates rapidly rise and fall in popularity and new issues emerge as a result of national and international developments.¹⁵³ These changes, the Court reasoned, affect declared candidates' strategies and create opportunities for new candidates.¹⁵⁴ The Court noted that Ohio's filing deadline prevented persons wishing to be independent candidates from entering the presidential contest in the Ohio arena after the middle of March.¹⁵⁵ At that time, the Court stressed, developments in the campaigns for major party nominations had hardly begun.¹⁵⁶ The Court emphasized that the Republican and Democratic choices of candidates and platforms still lay five months in the future.¹⁵⁷ Under the Ohio law, the Court noted, an independent had the significant problem of deciding whether to challenge the major political parties before he could possibly know what their candidates or platforms would be.¹⁵⁸ Furthermore, according to the Court, newly emergent independent candidates traditionally served as focal points for voters who become disaffected with the major party choices.¹⁵⁹ Independents could not play this important role, the Court asserted, if they could not secure places on the ballot.¹⁶⁰ The Court reasoned that, as a practical matter, late-emerging candidates would be barred from running effectively in Ohio however important their candidacies might prove to voters in other states.¹⁶¹ Moreover, the Court stated, not only would a deadline as early as Ohio's exclude from the election process an independent candidate who decided to run after the middle of March, but also it would burden even those independents who decided to run in time to meet the deadline because it would hinder their ability to garner the requisite number of signatures on their nominating petitions.¹⁶² When the Republican and Democratic primaries are so far in the future, the Court found, volunteers are difficult to recruit, media coverage is hard to

¹⁴⁸ *Id.* The Court cited *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972); *Williams v. Rhodes*, 393 U.S. 23 (1968).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 790.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 790-91.

¹⁵⁷ *Id.* at 791.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 791-92.

¹⁶⁰ *Id.* at 787, 799 n.26.

¹⁶¹ *Id.* at 792.

¹⁶² *Id.*

come by, and, therefore, voters are generally unaware of candidates and issues and are extremely reluctant to support independents.¹⁶³

The Court stated that the constitutionality of a state-imposed early deadline must depend on the urgency of the state interest that the deadline was enacted to protect.¹⁶⁴ Because Ohio's legislation substantially limited the constitutionally protected liberties of candidates and voters, the Court continued, the benefits that Ohio claimed it derived from the law were subject to careful scrutiny.¹⁶⁵ The Court emphasized that because Ohio's law was directed at aspirants for the presidency,¹⁶⁶ the state-imposed restrictions implicated a "uniquely important national interest" in the election.¹⁶⁷ This national interest, according to the Court, far outweighed the state's own interest.¹⁶⁸ Thus, the Court analyzed the constitutionality of Ohio's deadline in light of the relatively slight interest Ohio had in a presidential campaign.¹⁶⁹ To support this conclusion the Court pointed out that in *Cousins v. Wigoda*¹⁷⁰ it had struck down a state law regulating the selection of delegates to a presidential nominating convention because the national interest in the selection of party candidates for national office was greater than the interest of any individual state.¹⁷¹ In *Anderson*, the Court stressed that the national interest in presidential elections similarly dwarfed the interest of the state.¹⁷² The Court reasoned that the president and vice president are the sole office holders chosen by voters in all states and that the votes for presidential and vice-presidential candidates cast in each state affect the votes cast in other states.¹⁷³ According to the Court, stringent state ballot access requirements which exclude a presidential candidate from a state's ballot dilute the value of votes cast for that candidate beyond that state's borders.¹⁷⁴

Based on this analysis, the Court concluded that Ohio's early deadline burdened the rights of candidates and voters in states other than Ohio and significantly restricted the national election process.¹⁷⁵ The state of Ohio, the Court pointed out, had identified three vital interests it sought to serve by its early filing deadline: voter education, equal treatment for partisan and independent candidates, and political stability.¹⁷⁶ To determine whether the three interests identified by the state of Ohio justified the significant burdens the Ohio ballot access restrictions imposed on the presidential election process, the Court next examined each of these interests in detail.¹⁷⁷

In addressing Ohio's interest in voter education, the Court observed that the state unquestionably had a legitimate interest in insuring the existence of an informed electorate.¹⁷⁸ The Court was not persuaded, however, that such an interest justified a March

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 789.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 794.

¹⁶⁷ *Id.* at 794-95.

¹⁶⁸ *Id.* at 795.

¹⁶⁹ *Id.* at 794-95.

¹⁷⁰ 419 U.S. 477 (1975).

¹⁷¹ 460 U.S. 780, 795 (1983).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 796.

¹⁷⁷ *Id.* at 795.

¹⁷⁸ *Id.* at 796.

filing deadline for independent candidates in a presidential election¹⁷⁹ and rejected Ohio's assertions that an early filing requirement assured the electorate adequate time to observe candidates and to inform itself about them.¹⁸⁰ Because the media in modern times could communicate information about candidates instantaneously, the Court reasoned that the length of time a candidate was exposed to the state electorate could no longer be a very significant factor in voter education.¹⁸¹ The Court determined that rapid dissemination of information on candidates' positions and backgrounds was especially true in a presidential election due to the intense publicity presidential candidates receive.¹⁸² Limiting the number of ballot positions by an early deadline, the Court maintained, reduced the field of candidates in an election because it deprived some candidates of their incentive to run.¹⁸³ Early deadlines, in the Court's view, quite possibly restricted rather than increased the flow of information about political aspirants and issues in an election.¹⁸⁴ Thus, the Court was not persuaded that Ohio's early filing requirement advanced the state's interest in voter education to any significant degree.¹⁸⁵

Second, the Court found no merit in Ohio's claim that an early deadline served the state's interest in treating all candidates alike.¹⁸⁶ According to the Court, although the deadline applied to all candidates, its effect was not the same for all.¹⁸⁷ The consequences of not meeting the deadline were entirely different for Republican and Democratic primary participants, for example, than for independent candidates.¹⁸⁸ Major party candidates, the Court pointed out, could have their names entered on the Ohio ballot even if they did not decide, prior to the deadline, to run in Ohio.¹⁸⁹ An independent, however, was denied a position on the Ohio ballot if he did not declare his candidacy before March 20.¹⁹⁰ Furthermore, the Court reasoned that a national party candidate had something to gain if he chose to file before the deadline in Ohio.¹⁹¹ Early filing gave such a candidate the opportunity to run in the Ohio primary and win delegates to his party's convention.¹⁹² The deadline, however, could not benefit the independent because he did not participate in a structured intraparty contest.¹⁹³ A common March deadline was, therefore, according to the Court, not equal treatment of independent and partisan candidates.¹⁹⁴ The deadline did not burden party candidates and independents equally.¹⁹⁵

Lastly, the Court analyzed Ohio's claim that it had a substantial interest in protecting the two major political parties from damaging "intraparty feuding."¹⁹⁶ According to the Court, Ohio claimed that a candidate's decision to abandon his efforts to secure a major party's nomination shortly before an election and to run instead as an independent, could

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 796-97.

¹⁸¹ *Id.* at 797.

¹⁸² *Id.* at 798.

¹⁸³ *Id.* at 787, 788 n.8.

¹⁸⁴ *Id.* at 798.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 799.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 800.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 800-01.

¹⁹⁵ *Id.* at 801.

¹⁹⁶ *Id.*

draw an excessive amount of support away from the principal parties,¹⁹⁷ thereby threatening the state's political party structure.¹⁹⁸ The Court reasoned that Ohio's assertion amounted to a desire to protect the Republicans and Democrats from the competition of former members for volunteers and other campaign resources.¹⁹⁹

Recognizing that it had determined that preventing intraparty feuding could indeed be a legitimate state interest in *Storer v. Brown*,²⁰⁰ the Court distinguished the statute in that decision from the Ohio statute in question. The statute involved in *Storer*, the Court observed, was a statute that governed an intrastate election, whereas the statute challenged in *Anderson* affected national elections.²⁰¹ In *Storer*, the Court stated, it had upheld a California law which required an independent candidate to disaffiliate himself from all political parties one year before the election in which he sought state office.²⁰² According to the *Anderson* Court, Ohio's early deadline for independents did not serve the same function as the California law.²⁰³ The Court maintained that Ohio had a separate measure designed to discourage independent candidacies by disappointed aspirants for a party's nomination.²⁰⁴ The Court noted Ohio's deadline applied to all independents regardless of whether they had sought a party's nomination for the same election.²⁰⁵ The Ohio deadline, the Court determined, was not a disaffiliation requirement as was California's law.²⁰⁶ In addition, the Court stated, Ohio did not have as much interest in regulating a national election as it would in regulating a state election.²⁰⁷ Consequently, any reduction in intraparty feuding that the deadline might produce in Ohio was outweighed by its burdens on a national electorate.²⁰⁸

After examining each of the state interests, the Court found that the Ohio statute did not significantly serve those interests.²⁰⁹ To the extent the statute had any positive effect at all, the Court concluded, it furthered state interests which were minimal, given the nationwide scope of the election.²¹⁰

B. *The Dissenting Opinion*

Justice Rehnquist, in a dissenting opinion, took issue with the majority's use of strict scrutiny as the standard of review for a state imposed ballot access law.²¹¹ He argued that article II of the Constitution expressly granted the states plenary power to choose presidential electors.²¹² According to Justice Rehnquist, the only limits on the state's

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ "In *Storer* we recognized the legitimacy of the State's interest in preventing 'splintering parties and unrestrained factionalism.'" *Id.* at 803 (quoting *Storer*, 415 U.S. at 736).

²⁰¹ *Id.* at 804.

²⁰² *Id.* at 803.

²⁰³ *Id.* at 804.

²⁰⁴ *Id.* at 804 n.7.

²⁰⁵ *Id.* at 805.

²⁰⁶ *Id.* at 804.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 805-06.

²⁰⁹ *Id.* at 806.

²¹⁰ *Id.*

²¹¹ *Id.* at 806-23 (Rehnquist, J., dissenting). The dissent was joined by Justices White, Powell and O'Connor.

²¹² *Id.* at 806 (Rehnquist, J., dissenting).

power to restrict ballot access concerned rules denying the vote to citizens on arbitrary and discriminatory grounds and laws making it virtually impossible for third party and independent candidates to secure places on the ballot.²¹³ Within these parameters, Justice Rehnquist argued, the Court has allowed the states to enact any legislation "tied to a particularized legitimate purpose."²¹⁴

The majority, Justice Rehnquist maintained, misinterpreted the holdings of previous ballot access cases like *Storer v. Brown*.²¹⁵ These decisions, Rehnquist maintained, "never required the states to meet some kind of narrowly tailored standard in order to pass constitutional muster."²¹⁶ Justice Rehnquist implied that the federal judiciary was not empowered to subject a state's interest to stringent examination, as the *Anderson* majority did.²¹⁷ He also implied that precedent did not require that a state's legislation regarding elections use the least restrictive alternative for serving a vital state interest.²¹⁸

Justice Rehnquist maintained that the law challenged in *Anderson* met all relevant criteria for the rational relationship test that he argued the Court should apply.²¹⁹ First, he stated that Ohio clearly had a legitimate interest in voter education in presidential elections.²²⁰ Second, unlike the majority, Justice Rehnquist found that Ohio's early deadline significantly furthered this interest.²²¹ He asserted that the rapid methods of communication in contemporary life had not obviated the importance of the length of time a candidate is before the voters in a state.²²²

Justice Rehnquist conceded that the majority was correct in pointing out that Ohio's law made it almost impossible for *Anderson* to test the waters adequately as a party hopeful and then secure a line on the ballot as an independent when it was clear he would lose in a primary.²²³ He argued, however, that nothing in prior ballot access decisions on

²¹³ *Id.* at 808, 812 (Rehnquist, J., dissenting).

²¹⁴ *Id.* at 812 (Rehnquist, J., dissenting). Justice Rehnquist's rationale in *Anderson* was somewhat unclear. He apparently saw *Anderson* as primarily an equal protection case and attempted to make the same points in his dissent that he made in his plurality opinion in *Clements v. Fashing*, 457 U.S. 957 (1982). In *Clements*, Justice Rehnquist argued that under the normal level of equal protection review a statute's "distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate end." *Id.* at 962-63. In *Clements*, Justice Rehnquist asserted that the Court had abandoned the rational relationship test for close scrutiny review in ballot access cases when the challenged laws involved classifications based on wealth or imposed burdens on new or small parties or independent candidates. *Id.* at 964-65. Justice Rehnquist implied that this standard of review was consistent with the Court's application of equal protection analysis to other statutes. *Id.* at 962-63. The Court, Justice Rehnquist claimed, had departed from traditional equal protection principles only when the challenged statute placed burdens on "suspect" classifications or "fundamental" rights. *Id.*

²¹⁵ 415 U.S. 724, 730 (1974). See *Anderson*, 460 U.S. at 817 (Rehnquist, J., dissenting).

²¹⁶ 406 U.S. at 817 (Rehnquist, J., dissenting).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 818 (Rehnquist, J., dissenting).

²²⁰ *Id.* at 818-19 (Rehnquist, J., dissenting).

²²¹ *Id.*

²²² *Id.* According to Justice Rehnquist, Ohio's assertion that an early deadline gave voters as much time as possible to gather information about candidates and to examine how well they withstood the rigors of a campaign was reasonable. In Justice Rehnquist's view the Court should have deferred to the Ohio legislature in this matter. *Id.*

²²³ "Quite clearly rather than prohibiting him from seeking the Presidency, the filing deadline only prevented him from having two shots at it in the same election year." *Id.* at 811-12 (Rehnquist, J., dissenting).

presidential or other elections forbade that kind of limitation on candidates.²²⁴ Indeed, in Rehnquist's view, precisely the same kind of law, in an intrastate context, had been upheld in *Storer v. Brown*.²²⁵ The dissent interpreted the holding in *Storer* to be that reasonable disaffiliation statutes are within a state's discretion.²²⁶ Justice Rehnquist maintained that the majority did not convincingly distinguish *Anderson* from *Storer*,²²⁷ arguing that Ohio did not have a less substantial interest in avoiding party fragmentation in national than in intrastate elections as the majority claimed.²²⁸ Thus, based on *Storer* and other precedent Justice Rehnquist and the other dissenters would have upheld Ohio's early deadline for independents.²²⁹

The dissent stands in sharp contrast to the view of the *Anderson* majority. The dissenting Justices argued that, based on article II of the Constitution and on Supreme Court precedents, state ballot access laws must normally meet the rational relationship test rather than the strict scrutiny test.²³⁰ Strict scrutiny, according to the dissent, is applicable only if the challenged statute denies the vote to citizens on arbitrary and discriminatory grounds or severely restricts the ability of independent and third party candidates to secure ballot positions.²³¹ Ohio's early deadline, the dissent maintained, met none of the criteria necessary to trigger the Court's use of strict scrutiny.²³² The *Anderson* majority, however, found that the Court must apply strict scrutiny to any law significantly limiting candidate access to the ballot.²³³ Reasoning that states have less of an interest in regulating ballot access in national elections than in intrastate elections, the majority also ruled that state laws regulating ballot access for presidential and vice-presidential candidates must meet a more stringent level of strict scrutiny than laws restricting ballot access for other offices.²³⁴ In the majority's view, Ohio did not assert a sufficiently compelling interest to justify its early filing deadline for independent presidential candidates to meet the requirements of the heightened strict scrutiny the Court was obliged to apply.²³⁵ The next section of the casenote will explore the importance of the *Anderson* decision and the questions that the Court's new position on ballot access laws raise.

III. THE *ANDERSON* DECISION IN PERSPECTIVE

The *Anderson* decision is significant because it establishes that ballot access legislation is subject to strict review by the judiciary and because the Court declared that states do not have as significant an interest in regulating national elections as they have in controlling state elections.²³⁶ This section of the casenote will demonstrate that *Anderson* indicates the presence of a stable majority for the use of heightened review of ballot access legisla-

²²⁴ "This is precisely the same behavior that California sought to prevent by the disaffiliation statute this Court upheld in *Storer*." *Id.* at 814 (Rehnquist, J., dissenting).

²²⁵ *Id.* at 812-14 (Rehnquist, J., dissenting).

²²⁶ *Id.* at 814 (Rehnquist, J., dissenting).

²²⁷ *Id.*

²²⁸ *Id.* at 815 (Rehnquist, J., dissenting).

²²⁹ *Id.* at 817 (Rehnquist, J., dissenting).

²³⁰ *Id.* at 818 (Rehnquist, J., dissenting).

²³¹ *Id.* at 812 (Rehnquist, J., dissenting).

²³² *Id.* at 818 (Rehnquist, J., dissenting).

²³³ *Id.* at 786-87, 806.

²³⁴ *Id.* at 789, 795.

²³⁵ *Id.* at 806.

²³⁶ *Id.* at 789, 795.

tion.²³⁷ Additionally, this section will suggest that *Anderson* simplifies challenges to ballot access laws by establishing that suit can be brought solely on the basis of a statute's limitation of first amendment rights.²³⁸ Equal protection analysis no longer seems to be necessary.²³⁹ This section will then point out that *Anderson* was essentially consistent with the policy goals of most of the Court's earlier ballot access decisions.²⁴⁰ It is suggested that the dissent's approach to ballot access analysis was far less consistent with precedent.²⁴¹ The casenote will argue, however, that the dissent was correct in asserting that the majority's use of a particularly strict standard of scrutiny for ballot access limitations on national candidates was a departure from past practice.²⁴² Finally, this casenote will propose that the distinction *Anderson* made between national and intrastate elections will not make it easier for courts to gauge the constitutionality of ballot access laws.²⁴³ Indeed, it seems to make ballot access analysis even more difficult.

A. The Significance of *Anderson*

Supreme Court decisions have not been consistent in addressing the states' power to regulate access to the ballot.²⁴⁴ Some decisions have subjected ballot access legislation to strict scrutiny, asserting that states must have a vital state interest to protect and must use the least burdensome alternative for furthering that interest to have a valid ballot access law.²⁴⁵ Other rulings have applied a mixed standard of review, demanding that the state demonstrate that its statute protects a compelling state interest, but not demanding that the state use the least restrictive means to promote that interest.²⁴⁶ One decision held that ballot access legislation must merely be rationally related to a legitimate state purpose unless the law discriminates against suspect categories or limits access to the ballot by independent or third party candidates.²⁴⁷

The *Anderson* decision specified that strict scrutiny was the appropriate level of review of state imposed ballot access limitations.²⁴⁸ By calling for stringent review in ballot access decisions, the *Anderson* case seems to settle the debate on the applicable level of scrutiny.²⁴⁹ Significantly, the *Anderson* majority was composed of Justice Stevens and the four dissenting justices in *Clements v. Fashing*, who had argued that significant ballot access legislation must always receive close scrutiny by the courts.²⁵⁰ The plurality in *Clements* had maintained that ballot access statutes are subject to strict scrutiny only if the laws discriminate on the basis of a suspect category or substantially disadvantage independent and third party candidates.²⁵¹ Justice Stevens, in *Clements*, voted with the plurality but rejected both

²³⁷ See *infra* notes 248-53 and accompanying text.

²³⁸ See *infra* notes 254-60 and accompanying text.

²³⁹ *Id.*

²⁴⁰ See *infra* notes 261-70 and accompanying text.

²⁴¹ See *infra* notes 271-78 and accompanying text.

²⁴² See *infra* notes 279-86 and accompanying text.

²⁴³ See *infra* notes 289-308 and accompanying text.

²⁴⁴ See *supra* notes 44-133 and accompanying text.

²⁴⁵ See, e.g., *Socialist Workers Party*, 440 U.S. at 185; *Williams*, 393 U.S. at 31-33.

²⁴⁶ See, e.g., *American Party of Texas v. White*, 415 U.S. at 781; *Storer v. Brown*, 415 U.S. at 736.

See also *L. TRIBE*, *supra* note 95, at 782-83.

²⁴⁷ *Clements v. Fashing*, 457 U.S. at 962-65 (Rehnquist, J., plurality opinion).

²⁴⁸ 460 U.S. 780, 786-87, 806 (1983).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 781. See also *Clements v. Fashing*, 457 U.S. at 976 (Rehnquist, J., plurality opinion).

²⁵¹ *Clements v. Fashing*, 457 U.S. at 976 (Rehnquist, J., plurality opinion).

the plurality's and dissent's interpretations of the appropriate level of review.²⁵² In *Anderson*, Justice Stevens fully adopted the strict scrutiny views of the *Clements* dissenters.²⁵³ It would seem that, for the present time at least, the Court has reached a stable majority on the issue of the level of scrutiny ballot access laws must receive.

In addition to settling the level of scrutiny to be accorded ballot access legislation, the *Anderson* decision has facilitated challenges to ballot access laws by the supporters of independent and third party candidates.²⁵⁴ The Court in *Anderson* did not rely on equal protection analysis,²⁵⁵ even though it recognized that equal protection analysis was used in its prior decisions.²⁵⁶ The *Anderson* Court based its argument solely on the first and fourteenth amendments,²⁵⁷ viewing Ohio's March filing deadline for independents only as a restriction on *Anderson*'s supporters' rights to vote and to associate.²⁵⁸ It appears that the new majority, by specifically ruling that challenges to ballot access restrictions can be based solely on first amendment rights, has attempted to ease the burden of proof on voters seeking invalidation of ballot access statutes. Plaintiffs, after *Anderson* it seems, need no longer argue that they were denied equal protection because a state's ballot access legislation placed greater restrictions on them than on supporters of major party candidates.²⁵⁹ As a result of the decision in *Anderson*, voters bringing suit need only prove that their voting rights have been unnecessarily restricted by a condition for ballot positions.²⁶⁰

Anderson not only settled the question of when close scrutiny must apply to ballot access legislation and provided a new rationale for the use of strict review, but also it is consistent in several respects with the Court's earlier rulings. First, the Court has required vigorous scrutiny in a number of other contexts in which state legislation has limited the right to vote. The Court has, for example, used strict scrutiny as the test of the constitutionality of laws restricting eligibility to vote in primaries in *Kusper v. Pontikes*,²⁶¹ laws establishing requirements for voting in *Dunn v. Blumstein*²⁶² and *Carrington v. Rash*,²⁶³ and laws restricting ballot access to interested voters in *Kramer v. Union School Free District*.²⁶⁴ Because these laws impinge on the same fundamental rights of voting and association as do ballot access statutes, it was consistent for the Court to extend vigorous review to ballot access legislation as well. Second, *Anderson* held that a major purpose of its invalidation of Ohio's ballot access law was to assure the free flow of political ideas in the state by protecting the rights of supporters of third party and independent candidates to or-

²⁵² *Id.* at 973 (Stevens, J., concurring).

²⁵³ *Anderson*, 460 U.S. at 787.

²⁵⁴ *Id.*

²⁵⁵ "In this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in separate Equal Protection Clause analysis." *Id.* at 786-87, n.7.

²⁵⁶ *Id.* The *Anderson* majority did not specifically state whether equal protection suits could continue to be brought to challenge ballot access laws. Apparently, however, the Court did intend to permit such suits. Footnote 7 stated: "we rely . . . on the analysis of a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment."

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 786-87.

²⁵⁹ See, e.g., *Williams*, 393 U.S. at 29 (the Constitutional violation by Ohio was burdening the first amendment rights of supporters of third party and independent candidates more than those of supporters of Democratic and Republican candidates).

²⁶⁰ See *supra* notes 254-58 and accompanying text.

²⁶¹ 414 U.S. 51, 57-60 (1973).

²⁶² 405 U.S. 330, 349-60 (1972).

²⁶³ 380 U.S. 89, 95-96 (1965).

²⁶⁴ 395 U.S. 621, 626-28 (1969).

ganize.²⁶⁵ The Court has taken the same approach in previous ballot access rulings.²⁶⁶ It noted in its earlier decision in *Williams v. Rhodes* that competition in ideas was a major element in election campaigns.²⁶⁷ Indeed, the Court has observed that an election is as much a means of disseminating ideas as it is a way of achieving office.²⁶⁸ The Court has also held that overbroad ballot access restrictions deprive voters not supporting major party candidates of their incentive to organize and to express their political views.²⁶⁹ *Anderson* maintained that excessively restricting conditions for ballot access can have a chilling effect on small political groups and can injure the vitality of American political life.²⁷⁰ Thus, *Anderson* was decided in accordance with the basic policy considerations the Court expressed in its earlier decisions including *Williams* and its progeny.

The position taken by the dissent in *Anderson* is inconsistent with the trend toward using a strict standard. Justice Rehnquist's argument that the standard used in ballot access legislation generally has been minimum scrutiny²⁷¹ is not supported by precedent. At the very least, the Court in each decision has claimed it was applying some higher level of scrutiny.²⁷² Most often, as in *American Party of Texas v. White*²⁷³ and *Storer v. Brown*,²⁷⁴ the Court used a mixed standard of review by inquiring into whether the state legislation protected a compelling interest, but not into whether the state used the least restrictive alternative.²⁷⁵ Moreover, the dissent identified the central issue in *Anderson* as the right to candidacy, a right the Court has never recognized as fundamental.²⁷⁶ Justice Rehnquist's focus on the state's power to regulate candidates rather than on the limitations on the state's ability to restrict voters' rights has been used in only one other ruling — the plurality opinion in *Clements v. Fashing*²⁷⁷ which Justice Rehnquist wrote. This approach contradicts the stated purpose of most of the Court's ballot access decisions — maximization of the voter's right to find a candidate of his own political persuasion on the ballot.²⁷⁸

Despite the inaccuracy of the *Anderson* dissent's assertion that precedent indicates that the rational relationship test is ordinarily the appropriate level of review of ballot access laws, the dissent is correct in its argument that the majority's view that states have a minimal interest in a national election is a novel proposition.²⁷⁹ The majority cited only one case to support its assertion — *Cousins v. Wigoda*.²⁸⁰ *Cousins*, the majority claimed, stood for the proposition that the national interest in the selection of candidates for national office far outweighs the interest of any individual state.²⁸¹ The *Cousins* Court, however, did not make that precise ruling. Rather, in *Cousins*, the Court held that a state

²⁶⁵ *Anderson*, 460 U.S. at 793-94, 798.

²⁶⁶ See, e.g., *Socialist Workers Party*, 440 U.S. at 186; *Williams*, 393 U.S. at 32.

²⁶⁷ *Williams*, 393 U.S. at 32.

²⁶⁸ *Socialist Workers Party*, 440 U.S. at 186.

²⁶⁹ *Williams*, 393 U.S. at 41 (Harlan, J., concurring).

²⁷⁰ *Anderson*, 460 U.S. at 788 n.8.

²⁷¹ *Id.* at 817 (Rehnquist, J., dissenting).

²⁷² See *supra* notes 44-133 and accompanying text.

²⁷³ 415 U.S. 767, 781 (1974).

²⁷⁴ 415 U.S. 724, 736 (1974).

²⁷⁵ See also L. TRIBE, *supra* note 95, at 782-83.

²⁷⁶ See *Anderson*, 460 U.S. at 807 (Rehnquist, J., dissenting); *Clements v. Fashing*, 457 U.S. at 963 (Rehnquist, J., plurality opinion).

²⁷⁷ 457 U.S. 957, 963 (1982) (Rehnquist, J., plurality opinion).

²⁷⁸ See *supra* notes 267-69 and accompanying text.

²⁷⁹ 460 U.S. 780, 815 (1983) (Rehnquist, J., dissenting).

²⁸⁰ 419 U.S. 477 (1974).

²⁸¹ *Anderson*, 460 U.S. at 795.

does not have a sufficient interest in the outcome of a national party convention to demand that the convention seat delegates according to the state's, rather than the party's, election rules.²⁸² The Court noted in *Cousins* that if every state could establish qualifications for national delegates without regard to party policy, states could destroy the effectiveness of a national party convention as a concerted enterprise in the vital process of choosing presidential and vice-presidential candidates.²⁸³ It observed further that the states themselves had no constitutionally mandated role in the task of selecting those candidates.²⁸⁴ The Court did not, however, extend its ruling to hold that in elections, and not merely in conventions, two levels of state interest were present: the state's interest in intrastate elections and the state's interest in national elections. Nor did the *Cousins* Court hold that a state's power to condition candidates' access to the ballot is measured in part by the interest the state has in the election in question. Nevertheless, the *Anderson* Court claimed that its holding — that in setting restrictions on access to the presidential ballot, states enter an area in which the national interest is far greater than the interest of any individual state — was grounded on *Cousins*.²⁸⁵ The *Anderson* ruling has no direct support either from *Cousins*, which ruled merely that each state cannot establish its own rules for election of delegates to a national party's convention, or from the Court's decisions on the issue of ballot access.²⁸⁶

B. The Questions Remaining

The *Anderson* Court established two types of strict scrutiny for ballot access legislation. The Court held that the state must demonstrate that its statute is the least restrictive means available to serve a compelling state interest to justify a state imposed limitation on access to the ballot in any election.²⁸⁷ In addition, the Court specified that when the election is for president or vice president, the state has the additional burden of showing that the interest that the legislation serves is not merely vital to the state, but is so urgent that it justifies weakening a national campaign effort and therefore limiting the right of voters in other states to cast their votes effectively.²⁸⁸

Anderson's creation of two levels of strict scrutiny, one for state laws limiting access to the ballot for intrastate offices and a higher level for legislation limiting access to the ballot for national offices,²⁸⁹ presents new problems in ballot access analysis. The *Anderson* decision emphasizes that a state must have a vital interest to advance by its restriction on access to the ballot in a presidential election.²⁹⁰ According to the Court, however, a state's interest in voter education which might be compelling in an intrastate or local contest, was

²⁸² 419 U.S. 477, 489 (1974).

²⁸³ *Id.* at 490.

²⁸⁴ *Id.* at 489-90.

²⁸⁵ See *supra* notes 168-72 and accompanying text.

²⁸⁶ See, e.g., *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (local election); *American Party of Texas v. White*, 415 U.S. 767 (1974) (gubernatorial election); *Storer v. Brown*, 415 U.S. 724 (1974) (congressional election); *Williams v. Rhodes*, 393 U.S. 23 (1968) (presidential election). The scope of the elections was not mentioned by the Court in any of these cases as a factor in its analyses of whether the statutes the candidates challenged could pass equal protection scrutiny.

²⁸⁷ *Anderson*, 460 U.S. 780, 789 (1983).

²⁸⁸ *Id.* at 795.

²⁸⁹ See *supra* notes 165-77 and accompanying text.

²⁹⁰ *Id.*

not a compelling interest in a presidential election.²⁹¹ In addition, the *Anderson* Court ruled that the state interest in preventing unbridled intraparty feuding, which the Court found a vital state concern in congressional elections in *Storer*, was not an urgent state interest in presidential elections.²⁹² The Court gave no hint of what state needs it would find sufficiently vital to justify conditions to ballot access in a national campaign.

In *Anderson*, the Court affirmed earlier rulings holding that the means a state chooses to serve its interests must not be unnecessarily restrictive of voters first amendment rights.²⁹³ The Court also held, however, that in a presidential election, the restrictiveness of the state's ballot access limitation should be judged by its impact on voters at a national level, not merely by its impact on voters at a statewide or local level.²⁹⁴ This latter holding seems to require that burdens on presidential candidates be even less restrictive than burdens on other candidates. The Court, however, did not refine this concept or give any example of what a sufficiently narrowly tailored ballot access device might be in the context of a presidential election.

Although the Court has never laid down guidelines for the states on what ballot access legislation is permissible, its earlier decisions did provide some direction. For example, the Court found that avoiding clogging of the election machinery²⁹⁵ and preventing voter confusion²⁹⁶ through limiting the number of candidates on ballots were vital state concerns. In addition, it ruled that preventing the division of the vote among so many candidates that none could win a majority was a compelling state interest in light of the public costs involved in run-off elections.²⁹⁷ Further, the Court determined that the avoidance of intraparty strife was a vital state concern because cohesive, well-functioning parties were important components of a stable democracy.²⁹⁸ Some devices which the Court approved include modest minimum support requirements²⁹⁹ and reasonable disaffiliation statutes.³⁰⁰ The Court determined that these means can forward important state concerns and only minimally restrict voters' rights.³⁰¹ *Anderson* did not indicate, however, whether any of the interests or devices the Court upheld in its prior decisions could survive the new heightened strict scrutiny applicable to ballot access limitations on presidential candidates. Its earlier rulings on the concerns and the means that pass strict scrutiny therefore can have current validity only for state and local elections. The Court might not uphold any of them as appropriate to a presidential election.

Further, it would seem that *Anderson's* creation of two levels of strict scrutiny of ballot access legislation would involve the Court in extremely difficult analytic problems. Interests held to be compelling and regulations found to be precisely drawn in the context of state and local elections need not be so in the context of a presidential election. A minimum number of signatures, for example, which a state can require for a ballot position for a gubernatorial candidate might arguably be too high for a presidential candidate. The state's interest in the outcome of a presidential election would be less,

²⁹¹ 460 U.S. 780, 796 (1983).

²⁹² *Id.* at 804.

²⁹³ *Id.* at 789.

²⁹⁴ *Id.* at 794-95.

²⁹⁵ *Bullock v. Carter*, 405 U.S. at 145.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Storer v. Brown*, 415 U.S. 724, 735 (1974).

²⁹⁹ *Socialist Workers Party*, 440 U.S. at 185-86.

³⁰⁰ *Storer v. Brown*, 415 U.S. at 736.

³⁰¹ See *supra* notes 299-300.

under *Anderson*, than its interest in the outcome of a state election and the barrier to ballot access that the state establishes would be a hindrance to a nationwide and not merely a statewide election effort. Presumably, therefore, the signature requirement for ballot access should be lower under *Anderson* in a presidential election than in a state election. To say the least, it would be difficult to discover exactly what that lower requirement should be. The same analytic problems would be involved in ruling on the validity of disaffiliation statutes and every other device a state might use to limit ballot access in a presidential election. Therefore, although *Anderson* clarifies that legislation limiting access to the ballot in intrastate elections is subject to strict scrutiny, *Anderson*'s requirement of a heightened strict scrutiny of ballot access restrictions for presidential and vice-presidential candidates creates new confusion. States appear to have less guidance than before *Anderson* on what state interests the Court would find sufficiently vital to justify ballot access limitations on candidates for national office and what means the Court would find sufficiently narrowly tailored to advance those interests.

CONCLUSION

The *Anderson* decision attempted to clarify the baffling series of Supreme Court opinions on the validity of state ballot access legislation.³⁰² The Court's rulings from *Williams v. Rhodes* to *Clements v. Fashing* employed three different levels of review of state ballot access statutes.³⁰³ Although Justice Stevens, writing for the *Anderson* majority, never identified his standard of review by the traditional terms associated with strict scrutiny, he subjected Ohio's law to a rigorous review.³⁰⁴ The decision therefore reinforces the interpretation that ballot access laws which impose significant burdens on voters' first amendment rights must receive vigorous scrutiny by the courts. Also significant is that the decision made clear equal protection analysis is not necessary in ballot access cases.³⁰⁵ The *Anderson* Court held that the constitutionality of ballot access laws can be measured solely by the extent to which they unnecessarily restrict voters' first amendment rights.³⁰⁶ In addition, however, the *Anderson* Court has drawn a distinction between the states' power to regulate access to the ballot in intrastate elections in contrast to national elections.³⁰⁷ This distinction complicates ballot access analysis by suggesting that legislation which may pass strict scrutiny as applied to state elections might not be valid for presidential elections.³⁰⁸ In sum, after *Anderson*, states have somewhat more guidance than they had before on what ballot position qualifications they can enact for intrastate elections. As regards national elections, however, they may have less guidance because the Court did not give any indication of what state interests would be sufficiently compelling to condition ballot access for presidential candidates or what devices the Court would find sufficiently narrowly tailored in furthering such an interest.

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³⁰² See *supra* notes 134-210 and accompanying text.

³⁰³ See *supra* notes 43-133 and accompanying text.

³⁰⁴ See *supra* notes 141-210 and accompanying text.

³⁰⁵ See *supra* notes 147-50 and accompanying text.

³⁰⁶ *Id.*

³⁰⁷ See *supra* notes 166-77 and accompanying text.

³⁰⁸ See *supra* notes 289-301 and accompanying text.