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## Presidential Elections - The Right to Vote and Access to the Ballot

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# PRESIDENTIAL ELECTIONS—THE RIGHT TO VOTE AND ACCESS TO THE BALLOT

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<sup>\*</sup> John B. Anderson, of the faculty of Nova Southeastern University's Shepard Broad Law Center, and students Jason Blank and Tom Brogan, examined the subject of ballot access for non-major party candidates in presidential elections in the wake of the recent decision of the Supreme Court of Florida in *Reform Party of Florida v. Black*.

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## SECTION I: CO-AUTHORS' INTRODUCTION

The following article is a tripartite effort by Mitchell Berger and Grace E. Robson, members of the Florida Bar; John B. Anderson, a member of the Nova Southeastern University's Shepard Broad Law Center faculty; and a team of two of the students at that law school, Jason Blank and Tom Brogan, to examine the subject of ballot access for non-major party candidates in presidential elections in the wake of the recent decision of the Supreme Court of Florida in *Reform Party of Florida v. Black*.<sup>1</sup> Mr. Berger has furnished a critical analysis of that decision. Our team of students has catalogued the ballot access laws of the fifty states and the District of Columbia. John B. Anderson has reviewed United States Supreme Court decisions on the subject of ballot access specifically, and then also more generally on the way in which they reflect on the electoral process; a process which for a century and a half has been dominated by our two major parties. His criticism of the resulting duopoly of political power and control should be attributed to him alone and not to the other members of this collaborative effort. However, both Mr. Berger and Mr. Anderson support the idea of a constitutional amendment putting forth an affirmative right to vote as both necessary and desirable as a predicate for any effort to achieve a more uniform approach to ballot access in future presidential contests. We also join in our appreciation for the research assistance of Messrs. Blank and Brogan and their contribution to our joint effort.

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1. 885 So. 2d 303 (Fla. 2004).

**SECTION II: THE SUPREME COURT DECISIONS IN  
ELECTION 2000 LIVE ON: A CRITICAL ANALYSIS OF THE  
SUPREME COURT OF FLORIDA CASE, *REFORM PARTY OF  
FLORIDA v. BLACK***

MITCHELL W. BERGER  
GRACE E. ROBSON

I. INTRODUCTION

Recent elections have raised questions and concerns regarding a person's ability to "get on the ballot." Should there be restrictions? Are the restrictions in place sufficient?

Currently, each state has laws governing the requirements for an individual to get on the general election ballot as a candidate for President of the United States.<sup>2</sup> This article critically analyzes the recent Supreme Court of Florida case pertaining to ballot access for minor party candidates, *Reform Party of Florida v. Black*.<sup>3</sup> More specifically, this article discusses the applicable Florida law and the shortcomings of the majority's decision in interpretation thereof. In addition, this article discusses how to prevent the courts from being confronted with making decisions that fail to apply the law. This solution proposes an amendment to the United States Constitution that would mandate: any eligible registered voter in the United States and the District of Columbia would have the right to vote for an elector in his or her respective place of residence (or directly for the President if the electoral college were abolished); that equal machinery be used to count the votes; and that uniform standards be provided for ballot access with respect to candidates seeking election to the office of President of the United States.

The judiciary's role is to interpret laws.<sup>4</sup> In fulfilling this task, courts routinely use canons of construction to construe statutes, whether they are state, federal, or otherwise. However, on September 17, 2004, when the Supreme Court of Florida decided the case *Reform Party of Florida*, the majority failed to apply basic rules of statutory construction and ignored uncontroverted evidence in ruling that Ralph Nader and Peter Camejo should be listed as presidential and vice-presidential candidates on Florida's general election

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2. See *infra* APPENDIX.

3. See generally *Reform Party of Fla.*, 885 So. 2d at 303-21.

4. See, e.g., *United States v. Morrison*, 529 U.S. 598, 616-17 n.7 (1999).

ballot.<sup>5</sup> Regardless of party affiliation, a review of this case shows that the majority failed to do its job, which in this case, was interpreting a Florida statute.<sup>6</sup>

#### A. *Florida Legislature Modified Ballot Access Law*

In 1999, the Florida Legislature uncoupled the requirement of gathering signatures and affiliating with a national party.<sup>7</sup> The current form of the stat-

5. See *Reform Party of Fla.*, 885 So. 2d at 304.

6. See *id.* at 312.

7. See FLA. STAT. § 103.021(3) (2004). This section provides:

Candidates for President and Vice President with no party affiliation may have their names printed on the general election ballots if a petition is signed by 1 percent of the registered electors of this state, as shown by the compilation by the Department of State for the last preceding general election. A separate petition from each county for which signatures are solicited shall be submitted to the supervisor of elections of the respective county no later than July 15 of each presidential election year. The supervisor shall check the names and, on or before the date of the first primary, shall certify the number shown as registered electors of the county. The supervisor shall be paid by the person requesting the certification the cost of checking the petitions as prescribed in s. 99.097. The supervisor shall then forward the certificate to the Department of State which shall determine whether or not the percentage factor required in this section has been met. When the percentage factor required in this section has been met, the Department of State shall order the names of the candidates for whom the petition was circulated to be included on the ballot and shall permit the required number of persons to be certified as electors in the same manner as party candidates.

*Id.* See also section 103.021(4), *Florida Statutes*, which provides:

(a) A minor party that is affiliated with a national party holding a national convention to nominate candidates for President and Vice President of the United States may have the names of its candidates for President and Vice President of the United States printed on the general election ballot by filing with the Department of State a certificate naming the candidates for President and Vice President and listing the required number of persons to serve as electors. Notification to the Department of State under this subsection shall be made by September 1 of the year in which the election is held. When the Department of State has been so notified, it shall order the names of the candidates nominated by the minor party to be included on the ballot and shall permit the required number of persons to be certified as electors in the same manner as other party candidates.

(b) A minor party that is not affiliated with a national party holding a national convention to nominate candidates for President and Vice President of the United States may have the names of its candidates for President and Vice President printed on the general election ballot if a petition is signed by 1 percent of the registered electors of this state, as shown by the compilation by the Department of State for the preceding general election. A separate petition from each county for which signatures are solicited shall be submitted to the supervisors of elections of the respective county no later than July 15 of each presidential election year. The supervisor shall check the names and, on or before the date of the first primary, shall certify the number shown as registered electors of the county. The supervisor shall be paid by the person requesting the certification the cost of checking the petitions as prescribed in s. 99.097. The supervisor shall then forward the certificate to the Department of State, which shall determine whether or not the percentage factor required in this section has been met. When the percentage factor required in this section has been met, the Department of State shall order the names of the candidates for whom the petition was circulated to be included on the ballot and shall permit the required number of persons to be certified as electors in the same manner as other party candidates.

ute provides that a minor party candidate can get on the general election ballot as a presidential candidate if the candidate either obtains a petition signed by one percent of the Florida registered voters *or* if the minor party is affiliated with a national party holding a national convention to nominate candidates for President and Vice President of the United States.<sup>8</sup>

### B. *Procedural History*

On August 31, 2004, Ralph Nader and Peter Camejo submitted papers to the Secretary of State of Florida pursuant to section 103.021(4)(a) of the *Florida Statutes* in order to be placed as Reform Party candidates for President and Vice-President on the ballot for the general election scheduled for November 2, 2004.<sup>9</sup> Governor Bush certified the Reform Party slate to the Florida Secretary of State who certified “Nader and Camejo be placed on the 2004 Florida presidential ballot.”<sup>10</sup> Complaints were filed against the Secretary of State, Nader, and Camejo alleging that Nader and Camejo were not “‘minor party’ candidates affiliated with a national party” as required by section 103.021(4)(a) of the *Florida Statutes*, but were “independent candidates who use[d] the name ‘Reform Party of Florida’ to claim affiliation with the national Reform Party where no affiliation actually exist[ed].”<sup>11</sup> The Circuit Court for the Second Judicial District, in and for Leon County, issued a preliminary injunction enjoining the Secretary of State of Florida from certifying Nader and Camejo as candidates for the Florida 2004 presidential ballot, finding that: 1) “the Reform Party USA is not a ‘national party[;]’” 2) “Nader and Camejo were not nominated in a ‘national convention’” because they “were endorsed by the party via a conference telephone call,” which “did not follow the Reform Party USA’s own definition of a ‘national convention’” and further, “an April 2002 letter from the Chairman of the Reform Party of Florida shows that the Florida sector [has] disaffiliated from the national party[;]” 3) “the Reform Party of Florida is not affiliated with the Reform Party USA[;]” and 4) “Florida has important interests in enforcing its election laws, ensuring that only qualified candidates appear on its ballot, protecting the integrity of the ballot and election process, and preventing voter confusion during the election.”<sup>12</sup> The preliminary injunction issued by the circuit court was appealed by Nader and Camejo to the First District

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§ 103.021(4).

8. See FLA. STAT. § 103.021(3)-(4) (2004).

9. See *Reform Party of Fla.*, 885 So. 2d at 304.

10. *Id.*

11. *Id.* at 304–05.

12. *Id.* at 305–06.

Court of Appeal, and a stay of the injunction, pending review, was also sought.<sup>13</sup> In addition, the Secretary of State of Florida filed a notice of appeal invoking an automatic stay of the injunction pursuant to rule 9.310(b)(2) of the *Florida Rules of Appellate Procedure* and accordingly directed the supervisors of elections to include Nader and Camejo on the ballot.<sup>14</sup> The First District Court of Appeal certified the appeal of the order to the Supreme Court of Florida as requiring the immediate resolution pursuant to rule 9.125 of the *Florida Rules of Appellate Procedure*.<sup>15</sup> The Supreme Court of Florida agreed to accept jurisdiction while permitting the litigation to continue in circuit court, in order to bring the case to judgment and to determine any motions relating to the automatic stay of the judgment the Secretary of State of Florida was attempting to invoke.<sup>16</sup> While the circuit court was considering motions to vacate the automatic stay, Nader, Camejo, and the Reform Party of Florida filed a petition in the United States District Court to remove the case to federal court, which was met with an emergency motion to remand the matter back to state court.<sup>17</sup> The district court remanded the matter to state court, finding:

all of the counts raised in [Nader and Camejo's] complaint are grounded solidly in state law and thus do not raise a valid federal question sufficient to invoke the district court's jurisdiction; the defendants ha[ve] not met the unanimity requirement as [the Secretary of State of Florida] ha[s] not consented to the removal and she is a necessary and indispensable party to the case; and [Nader, Camejo and the Reform Party of Florida] waived their rights to remove the cause to federal court by invoking the jurisdiction of the Florida appellate courts and by participating in evidentiary hearings on the merits of the case.<sup>18</sup>

The circuit court concluded its final evidentiary hearing and issued a declaratory judgment finding that Nader and Camejo were not qualified under Florida law to appear on the ballot.<sup>19</sup> "The court also permanently enjoined the Secretary of State from certifying Nader and Camejo on Florida's ballots, from instructing the county supervisors of elections to include their

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13. *Id.* at 306.

14. *Reform Party of Fla.*, 885 So. 2d at 306.

15. *Id.*

16. *Id.* at 306–07.

17. *Id.* at 307.

18. *Id.*

19. *Reform Party of Fla.*, 885 So. 2d at 307–08.

names on the ballot, and from mailing any ballots pending further order of the Supreme Court of Florida.<sup>20</sup>

### C. *Right to Regulate Elections by State*

The majority and concurring opinion recognized that “[a]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest.”<sup>21</sup> The majority also recognized that the United States Supreme Court has:

upheld generally applicable and even-handed restrictions that protect the integrity and reliability of the electoral process itself. The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.<sup>22</sup>

However, as further detailed herein, the majority’s decision concludes that the state regulation of election law requires the abdication of the interpretation of these state statutes by the courts when a presidential election is involved.<sup>23</sup>

## II. THE MAJORITY’S DECISION IS OVERSHADOWED BY THE 2000 ELECTION

The issue before the Supreme Court of Florida was whether the Reform Party of Florida and its purported nominees, Nader and Camejo, qualified to be placed on the general election ballot pursuant to section 103.021(4)(a) of the *Florida Statutes*.<sup>24</sup> Although the majority recognized that there was no question that Florida could “impose ‘some burden’ upon the access to the

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20. *Id.* at 308.

21. *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)); *id.* at 314 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted)).

22. *Id.* at 308 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). The butterfly ballots used in Palm Beach County during the 2000 presidential election caused much voter confusion. See, e.g., Rick Weiss, *Canadian Study Calls Butterfly Ballot ‘Confusing,’* WASH. POST, Dec. 1, 2000, at A22; Gary Kane, *But More Marked Ballots for Gore*, PALM BEACH POST, Nov. 12, 2001, at 1AA.

23. See *Reform Party of Fla.*, 885 So. 2d at 308, 314.

24. *Id.* at 311.



ballot,”<sup>25</sup> it found that such burden had to be viewed in light of the United States Constitution.<sup>26</sup>

The majority of the Supreme Court of Florida reversed the declaratory judgment and vacated the injunction.<sup>27</sup> In doing so, it recognized: (i) individuals have a constitutional right to associate and advance political beliefs; (ii) qualified voters have a constitutional right to cast votes effectively; (iii) states have an interest in encouraging compromise and political stability; and (iv) election regulation is required if they are to be fair, honest, and conducive to the maintenance of order.<sup>28</sup>

The most disturbing aspect of the majority’s decision is its intellectual retreat from exercising traditional statutory analysis with respect to section 103.021(4)(a), justifying this retreat by relying on *Bush v. Palm Beach County Canvassing Board*.<sup>29</sup> In *Bush v. Gore*,<sup>30</sup> the United States Supreme Court reminded the litigants that “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”<sup>31</sup> The Court then unanimously vacated the Supreme Court of Florida’s decision which had required the Secretary of State of Florida to allow votes cast in the counties of Volusia, Palm Beach, Miami-Dade, and Broward, to be included in the certified tabulated 2000 election totals.<sup>32</sup>

The Supreme Court of Florida’s decision was based upon Article I, Section 1 of the Florida Constitution,<sup>33</sup> which expressly states in relevant part “all political power is inherent in the people.”<sup>34</sup> The Supreme Court of Florida reasoned that any election law or action by an election official could not impose any “‘unreasonable or unnecessary’ restraints on the right of suffrage.”<sup>35</sup> In vacating the decision, the United States Supreme Court relied upon Article II, Section 1, Clause 2 of the United States Constitution<sup>36</sup> as the

25. *Id.* at 310 (quoting *Burdick*, 504 U.S. at 433).

26. *Id.* at 310–11 (citing *Williams v. Rhodes*, 393 U.S. 23, 28–29 (1968)).

27. *Id.* at 314.

28. *Reform Party of Fla.*, 885 So. 2d at 308 (citations omitted).

29. 531 U.S. 70 (2000) [hereinafter *Bush I*]; *Reform Party of Fla.*, 885 So. 2d at 308–09.

30. 531 U.S. 98 (2000) [hereinafter *Bush II*].

31. *Id.* at 104 (quoting U.S. CONST. art. II, § 1).

32. *Id.* at 101, 111.

33. Article I, Section 1 of the Florida Constitution provides: “All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.” FLA. CONST. art. 1, § 1.

34. *Id.*

35. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1236 (2000).

36. U.S. CONST. art. II, § 1, cl. 2.

authority to support its holding that the Supreme Court of Florida could not construe any Florida Statute in connection with a presidential election which would infringe upon the authority granted to state legislatures to choose the manner of selecting that state's presidential electors.<sup>37</sup> The Supreme Court of Florida refused to undertake traditional statutory analysis for section 103.021(4)(a) because in doing so the majority feared it "could run afoul of Article II, Section 1, Clause 2 of the United States Constitution."<sup>38</sup> As the majority reasoned, "although the judiciary has the power and authority to construe statutes, it cannot construe statutes in a manner that would infringe on the direct grant of authority to the Legislature through the United States Constitution."<sup>39</sup>

The majority per curiam decision in *Bush II* made it unequivocally clear that the case was not to be cited as precedent.<sup>40</sup> Unfortunately, the same language of limitation was not included in *Bush I*.<sup>41</sup> The same political crucible of the nation's closest presidential election which led to the outcome determinative reasoning of *Bush II* also drove the decision in *Bush I*.<sup>42</sup> The case of *Reform Party of Florida* was not the first time the Supreme Court of Florida confronted Article II,<sup>43</sup> since November of 2000. It also confronted that Article in its remand decision from *Bush II*.<sup>44</sup> In that decision, the court noted that "[t]he 'intent of the voter' standard adopted by the Legislature was the standard in place as of November 7, 2000,"<sup>45</sup> and the court would not concede on remand from *Bush II* that to establish standards for the determination of a legal vote in accordance with the then-existing legislation would

37. See *Bush I*, 531 U.S. at 76 (holding that a legislature may take action to disenfranchise a voter or group of voters in the Presidential election which, while unconstitutional under the Florida Constitution, would be constitutional under the Federal Constitution.).

38. *Reform Party of Fla.*, 885 So. 2d at 313.

39. *Id.* at 312; cf. *Fla. Democratic Party v. Hood*, 884 So. 2d 1148, 1149–51 (Fla. 1st Dist. Ct. App. 2004) (considering whether or not Florida's executive branch violated section 120.54(4) of the *Florida Statutes* and Article II, Section 1, Clause 2 of the United States Constitution by issuing an emergency rule restricting recounts of electronic voting machines one business hour prior to the commencement of early voting in the general election); Petitioner's Brief on the Merits at 7, *Fla. Democratic Party v. Hood*, 888 So. 2d 622 (Fla. 2004) (No. SC04-2072). However, the Supreme Court of Florida refused to address this question by declining to consider the petition for review of the emergency rule after "having determined that it should decline to exercise jurisdiction." *Fla. Democratic Party v. Hood*, No. SC04-2072, 2004 Fla. LEXIS 2043, at \*1 (Fla. Nov.10, 2004).

40. See *Bush II*, 531 U.S. at 109. "Our consideration is limited to the present circumstances . . ." *Id.*

41. See *Bush I*, 531 U.S. at 70.

42. *Id.*

43. U.S. CONST. art. II, § 2, cl. 1.

44. See *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000).

45. *Id.* at 526.

have violated Article II of the Federal Constitution.<sup>46</sup> So, why did the Supreme Court of Florida refuse to establish standards for ballot access in the *Reform Party of Florida* case when it had previously expressly reserved its right to interpret state statutes consistent with its responsibility as a court and Article II?<sup>47</sup>

Certainly any review of the history and meaning of Article II prior to *Bush I* would have comforted the Supreme Court of Florida in performing its traditional role as a court in interpreting section 103.021(4)(a) of the *Florida Statutes*.<sup>48</sup> As previously stated in an article co-authored by one of these authors:

The United States Supreme Court's "direct grant of authority" view contemplates that the states relinquished the power to select presidential electors to the federal government at the Constitutional Convention and then, in an act of charitable benevolence, the federal government donated that power to the states. Under such logic, the federal government can "direct[ly] grant" the authority to select electors to a specific entity of the several states, namely the legislature. However, Article II, Section 1, Clause 2, rather than being a "direct grant" of authority, is a reservation of power by the states. The text of the clause itself supports this proposition. The Constitution establishes that "[e]ach State shall appoint" presidential electors, textually recognizing that the power to select presidential electors lies in the several states.

....

The text of title 3, section 5 of the *United States Code* supports this view. Apparently, when creating section 5, Congress believed that the federal constitution contemplates a state legislature delegating issues of enforcement and interpretation to a coordinate branch of government.

....

. . . [U]nlike the federal government, the several states are independent sovereigns with all the inherent powers of common

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46. *Id.* at 526. "[T]he per curiam decision in *Bush v. Gore* acknowledged that the Supreme Court of Florida had the 'power to assure uniformity.'" Mitchell W. Berger & Candice D. Tobin, *Election 2000: The Law of Tied Presidential Elections*, 26 NOVA L. REV. 647, 846 (2002) (citing *Bush II*, 531 U.S. at 109); see also *Gore*, 773 So. 2d at 526.

47. See *Reform Party of Fla. v. Black*, 885 So. 2d 303, 313 (Fla. 2004).

48. FLA. STAT. § 103.021(4)(a) (2004).

law sovereignty, absent those relinquished to the federal government. State constitutions are limitations on the inherent sovereign power of states created by the people of that state.

. . . Those limitations operate when the Florida Legislature selects the manner to appoint electors. Therefore, if a law of the Florida Legislature operates in a manner that violates one of the paramount rights of the people of the State of Florida, then the legislature is subverting the sovereign limitations set forth by the people of Florida. . . .

Essentially, the federal constitution “takes state legislative bodies as it finds them—subject to pre-existing control by the people of each state, the ultimate masters of the state legislatures—and the state constitutional limits that those people create. As a result, the United States Supreme Court’s expression that the Florida Constitution may have “circumscribe[d] the legislative power” provided by Article II, Section 1, Clause 2 rests on the faulty premise that this clause gives the Florida Legislature power that the people of Florida had not granted it.<sup>49</sup>

Instead of performing a traditional statutory analysis and reviewing the record in the *Reform Party of Florida* case, the majority reasoned that “the determination of whether [a] candidate qualifies under section 103.021(4)(a) by claiming to be a ‘minor political party that is affiliated with a national party holding a national convention to nominate candidates for President and Vice President’ involves a legal determination.”<sup>50</sup> This reasoning is unsupported by citation, but appears to stem from the court’s Article II concerns.<sup>51</sup> Against this backdrop, the majority concluded that “we have been unable to ascertain whether the Legislature intended for the statutory terms to have a strict or broad meaning. In the absence of more specific statutory criteria or

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49. Berger & Tobin, *supra* note 46, at 689–92 (citations omitted). Title 3, section 5 of the *United States Code* further provides:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its *final determination of any controversy or contest* concerning the appointment of all or any of the electors of such State, *by judicial or other methods or procedures*, and such determination shall have been . . . made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such a State is concerned.

*Id.* at 690 (quoting 3 U.S.C. § 5 (2000)) (emphasis added).

50. *Reform Party of Fla.*, 885 So. 2d at 311.

51. *See id.* at 312.

guidance from the Legislature we are unable to conclude that a statutory violation occurred.”<sup>52</sup>

#### A. *The Concurrence of Justice Lewis*

While Justice Lewis concurs in the result, he undertakes a traditional statutory analysis performed by appellate courts on appeal.<sup>53</sup> Expressly disagreeing with the majority’s analysis, Justice Lewis held:

I cannot at all agree with the analysis and reasoning of the majority. The right to vote is a fundamental and essential part of our constitutional democracy and is subject to reasonable regulation. The United States Supreme Court made this apparent in *Burdick v. Takushi*, 504 U.S. 428, 433 ... (1992), when it stated:

It is beyond cavil that voting is of the most fundamental significance under our constitutional structure. It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. *The Constitution provides that States may prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives,” Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections.* Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as 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.<sup>54</sup>

Justice Lewis rejected Article II as being a limitation on the state retaining the power, including through its judicial branch “to regulate their own elections.”<sup>55</sup> As Justice Lewis stated:

Although minor political parties most certainly do have a right to be on the ballot, courts have consistently held that this right is not absolute and without restrictions. . . . Our system is legislatively designed so that minor parties affiliated with a national party holding a national convention, *see* § 103.021(4)(a), Fla. Stat. (2003),

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52. *Id.* at 314.

53. *See id.*

54. *Id.* (emphasis added) (citations omitted in original).

55. *Reform Party of Fla.*, 885 So. 2d at 314 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

are treated differently than minor parties that are not affiliated with a national party holding a national convention, *see* § 103.021(4)(b), Fla. Stat. (2003). To construe subsection (4)(a) as the majority does today is nothing less than this Court basically rewriting the statute and using a judicial eraser to strip section (4)(a) of the same dignity this Court has afforded the petition requirement in subsection (4)(b) . . . . [Justice Lewis then declares that] [t]here is no administrative remedy afforded under these circumstances and, therefore, it necessarily falls on the shoulders of the judiciary to determine the rights of the parties in this dispute by interpreting and applying the statute.<sup>56</sup>

Justice Lewis proceeded to analyze the language in the statute through traditional means and concluded that under a traditional statutory analysis employed by courts and reviewing courts, “[i]n my view, the determinations made by the trial court are eminently correct based on the evidence and arguments presented.”<sup>57</sup>

#### B. *Supreme Court of Florida Fails to Construe the Florida Statute*<sup>58</sup>

After considering the evidence presented, the trial court found that Nader and Camejo as candidates of the Reform Party of Florida, were not

56. *Id.* at 315–16 (emphasis added).

57. *Id.* at 317. In concluding that the trial court was correct in finding that the Reform Party was not a national party and that it did not hold a national convention, Justice Lewis refers to the dictionary as required by prior precedent and says: “A simplistic approach by reference to textual material demonstrates that *Black’s Law Dictionary* defines ‘national’ as ‘[o]f or relating to a nation’ and ‘nationwide in scope.’” *Id.* at 318. The majority dismisses definitions set forth in various dictionaries as providing little guidance. *Id.* at 312.

58. Interestingly, the Florida Secretary of State’s position was that her function was “purely ministerial” and therefore she had “no basis to look behind the certificate [submitted by Nader and Camejo] to determine [whether] the party meets the statutory criteria.” *Reform Party of Fla.*, 885 So. 2d at 311. However, if the Secretary’s function is purely ministerial, then how does the Secretary determine whether a petition was signed by one percent of the registered voters of Florida under section 103.021(4)(b) of the *Florida Statutes*? The Secretary’s position would effectively eliminate the need for section 103.021(4)(b), *Florida Statutes*, because all potential presidential candidates would only need to submit a certificate under section 103.021(4)(a). See the dissenting opinion of Justice Anstead approving the trial court’s reasoning that:

in enacting section 103.021(4)(a), Florida Statutes, the Legislature surely did not intend the standards for national party, minor party, and national nominating convention to be meaningless. As the trial court noted, “it doesn’t seem . . . to make any sense that the Legislature would have a provision in the law that says you can get on the ballot as a minor party by getting a . . . great number of signatures, and then have another way that’s basically no requirements.”

*Id.* at 321 (Anstead, J., dissenting).

legally qualified pursuant to section 103.021(4)(a), *Florida Statutes*, to appear on the ballot because: 1) Reform Party USA was not a “national party;” and 2) Nader and Camejo were not nominated in a “national convention.”<sup>59</sup>

The Supreme Court of Florida summarized its position indicating that section 103.021(4)(a) of the *Florida Statutes* did not define the terms “national party” or “national convention,” concluding therefore that “the Reform Party of Florida was not on notice that these terms were to be interpreted in accordance with any specific criteria and certainly not the criteria utilized by the trial court.”<sup>60</sup> Further, “[i]n the absence of more specific statutory criteria or guidance from the Legislature [they were] unable to conclude that a statutory violation occurred.”<sup>61</sup> The majority then stated that it “urge[s] the Legislature to revisit this important issue at its earliest opportunity.”<sup>62</sup>

In making its decision, the majority indicated that it was being mindful of the First Amendment to the United States Constitution providing individuals the right to associate for the advancement of political beliefs as well as the state legislature’s exclusive power to determine how the electors of Florida are chosen, citing to Article II, Section 1, Clause 2 of the United States Constitution.<sup>63</sup> The majority indicated that “although the judiciary has the power and authority to construe statutes, it cannot construe statutes in a manner that would infringe on the *direct grant of authority to the Legislature* through the United States Constitution.”<sup>64</sup> However, as previously noted, this is impossible since the federal government, which was not yet formed in 1789, could not give a direct grant of authority to state legislatures.<sup>65</sup> In 1789, it was the state legislatures at the Constitutional Convention, who reserved the power to appoint state electors.<sup>66</sup> This is critical because if states

59. *Id.* at 305.

60. *Id.* at 314.

61. *Id.*

62. *Reform Party of Fla.*, 885 So. 2d at 314.

63. *Id.* at 311–12. Article II provides, “[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.” U.S. CONST. art. II, § 1, cl. 2.

64. *Reform Party of Fla.*, 885 So. 2d at 312 (emphasis added).

65. *See supra* Part II.

66. *See* THE FEDERALIST NO. 32, at 241 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (stating “the State governments would *clearly retain* all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States”) (emphasis added); *see also* THE FEDERALIST NO. 39, at 285 (James Madison) (Benjamin Fletcher Wright ed., 1961) (“[T]he proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects”); *see also* THE FEDERALIST NO. 40, at 290 (James Madison) (Benjamin Fletcher Wright ed., 1961) (“[T]he

reserved this power, they also generally reserved for the state's statutes to be interpreted in normal course by its courts.

The majority focused on the term "national party" and essentially disregarded the other statutory requirement for the candidates to have been nominated by a national party "holding a national convention."<sup>67</sup> More specifically, the majority indicated that section 103.021(4)(a) of the *Florida Statutes* does not define "national party."<sup>68</sup> It reviewed the dictionary, noting the term was not defined therein,<sup>69</sup> then went on to analyze the term "national party" by comparing the definitions in other states' statutes, concluding that "there is no consensus on what constitutes a national party."<sup>70</sup> The majority went on to discuss an advisory opinion issued by the Federal Election Commission (FEC) which discussed criteria it used in determining whether a political party has "demonstrated sufficient activity on a national level to attain national committee status."<sup>71</sup> Such criteria included: "(1) the party's nomination of candidates for various Federal offices in numerous states; (2) the party's engagement in certain activities on an ongoing basis[;]" and "(3) the party's publicization of issues of importance to the party and its adherents throughout the nation."<sup>72</sup> However, despite evidence that the Reform Party USA "lost its status as a national party because it no longer" had support, "almost eliminated fundraising," and only had candidates for federal office (other than President) in two other states, the court indicated that it could not conclude that the Florida Legislature intended to incorporate the FEC's standards in connection with the term "national party" included in the Florida Statute, because the "FEC's interest relates to the integrity of campaign fundraising access, whereas the state's interest lies in protecting the integrity of the ballot."<sup>73</sup>

The court barely mentioned the dispute as to whether Nader and Camejo were nominated in a "national convention" by their purported na-

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States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction").

67. *Reform Party of Fla.*, 885 So. 2d at 310.

68. *Id.* at 312.

69. *Id.* However, the term "party" has been defined as "a group of persons with common political opinions and purposes organized for gaining political influence and governmental control and for directing government policy." RANDOM HOUSE UNABRIDGED DICTIONARY 1416 (2d ed. 1993). The adjective "national" has been defined as "of, pertaining to, or maintained by a nation as an organized whole or independent political unit." *Id.* at 1279. Although each word is defined separately, the majority did not expend much effort to interpret the words using a common sense approach.

70. *Reform Party of Fla.*, 885 So. 2d at 312-13.

71. *Id.* at 313.

72. *Id.*

73. *Id.*



tional party and noted that “some type of meeting occurred.”<sup>74</sup> As clearly indicated in section 103.021(4) of the *Florida Statutes*, unless a Presidential or Vice-Presidential candidate is part of a minor party affiliated with a national party holding a national convention, such candidate must obtain a petition containing the signatures of one percent of Florida’s registered voters in order to appear on the general election ballot.<sup>75</sup> The majority held that gathering signatures involved a pure question of objectively verifiable fact, yet indicated that the determination of whether a candidate qualifies under section 103.021(4)(a) of the *Florida Statutes* involved a legal determination.<sup>76</sup>

However, it is apparent that party affiliation and whether a “national convention” was held are factual determinations,<sup>77</sup> which is precisely why the trial court considered evidence in making its finding that Nader and Camejo did not qualify under Florida law to appear on the general election ballot.<sup>78</sup> Even if the term “national party” were ambiguous, as aptly stated by Justice Lewis in his concurring opinion, “[t]he Judiciary must . . . give life to the legislative words.”<sup>79</sup>

Our system is legislatively designed so that minor parties affiliated with a national party holding a national convention, *see* § 103.021(4)(a), Fla. Stat. (2003), are treated differently than minor parties that are not affiliated with a national party holding a national convention, *see* § 103.021(4)(b), Fla. Stat. (2003). To construe subsection (4)(a) as the majority does today is nothing less than this Court basically rewriting the statute and using a judicial

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74. *Id.* at 314. The “national convention” was an endorsement of Nader and Camejo via a telephone conference call which did not follow the Reform Party’s own definition of “national convention.” *Reform Party of Fla.*, 885 So. 2d at 305. According to Black’s Law Dictionary, “convention” is defined as “[a]n assembly or meeting of members belonging to an organization or having a common objective,” the term “national” as “[o]f or relating to a nation” or “nationwide in scope” and the term “assembly” as “[a] group of persons organized and united for some common purpose.” BLACK’S LAW DICTIONARY 124, 355 1050 (8th ed. 2004). It is hard to conclude a plain reading of the words “national convention” would be interpreted to include a conference call, let alone a call of the type which the record indicates occurred in this case. *Reform Party of Florida*, 885 So. 2d at 305.

75. FLA. STAT. § 103.021(4) (2004).

76. *Reform Party of Fla.*, 885 So. 2d at 311; *see also* FLA. STAT. § 103.021(4)(a).

77. *See id.* at 319 (Lewis, J., concurring). In his concurrence, Justice Lewis noted that “[n]o matter what definition one may establish as to ‘national’ under this statute, there would be a factual question regarding whether the entity or group satisfies that definition, which the majority summarily rejects.” *Id.* (Lewis, J., concurring).

78. *See id.* at 305.

79. *Id.* at 317–18 (Lewis, J., concurring).

eraser to strip section (4)(a) of the same dignity as this Court has afforded the petition requirement in subsection (4)(b).<sup>80</sup>

In sum, despite the fact that the majority acknowledged that there was a “lengthy evidentiary hearing, that included receipt of documentary evidence and arguments from the parties,”<sup>81</sup> the majority decision failed to give deference to the findings of fact made by the trial court.<sup>82</sup> Justice Lewis, in his concurrence, noted that “[t]he majority, in my view, fails to even consider that there is a factual component as to whether one satisfies the legal criteria of a statute.”<sup>83</sup>

### C. *Other Concerns – Is the Florida Statute Void for Vagueness?*

If the majority of the Supreme Court of Florida and the Secretary of State are correct that the Reform Party of Florida was not on notice of the interpretation of the terms “national party” and “national convention,” is the statute void for vagueness?

The United States Supreme Court has held that with respect to whether a statute is void for vagueness,

generally . . . decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ . . . or, as broadly stated by Mr. Chief Justice White . . . “that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.”<sup>84</sup>

Similarly, under Florida law, a statute “will not be declared vague unless the statute fails to give persons of ordinary intelligence fair notice of what constitutes the forbidden conduct and which, because of imprecision, may invite arbitrary and discriminatory enforcement.”<sup>85</sup> In analyzing

80. *Reform Party of Fla.*, 885 So. 2d at 315 (Lewis, J., concurring).

81. *Id.* at 310.

82. *Id.* at 317 (Lewis, J., concurring).

83. *Id.* (Lewis, J., concurring).

84. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391–92 (1926) (citations omitted).

85. *State v. Delgrasso*, 653 So. 2d 459, 462 (Fla. 2d Dist. Ct. App. 1995); *see also* Gluhareff v. State, 888 So. 2d 733 (Fla. 5th Dist. Ct. App. 2004) (finding statute was “sufficiently

whether a statute is void for vagueness courts first determine whether the statute fairly gives notice to those it seeks to bind of its strictures.<sup>86</sup> Second, courts determine whether the statute is precise enough as to not invite the arbitrary and discriminatory enforcement thereof.<sup>87</sup> If the statute provides both fair notice and is sufficiently precise, it will be upheld.<sup>88</sup> However, if either determination is negative, the statute will be found void for vagueness.<sup>89</sup>

The majority concluded “we are left with a statute that does not have its critical terms defined or standards set for ascertaining compliance with the statute. We thus urge the Legislature to revisit this important issue at its earliest opportunity.”<sup>90</sup> However, Justice Lewis’ concurrence indicates that the statute was capable of interpretation, noting:

[t]he trial court, without the benefit of a specific definition of “national,” probed the parameters of what a “national party” holding a “national convention” really was intended to and actually encompassed.

....

... [T]he trial judge had not only competent and substantial evidence to support his findings but also the only evidence presented supported the conclusion that this is not a “national party” within the purview of the controverted statute.<sup>91</sup>

Justice Lewis further noted:

[n]otwithstanding that there may be various inflections of what a word may mean, an overly technical approach would result in no word ever having an acceptable or legally sufficient definite mean-

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specific to give notice and adequate warning to persons of common intelligence of the conduct that is proscribed” despite the statute’s failure to define the term “under the influence”).

86. See *Delgrasso*, 653 So. 2d at 462–63.

87. See *id.* at 462.

88. See, e.g., *United States v. Powell*, 423 U.S. 87, 92–93 (1975) (upholding a statute prohibiting the mailing of concealable firearms because it established a “reasonably ascertainable standard of conduct” and because it provided notice to the citizens as to what actions are proscribed by the statute).

89. See *id.*

90. *Reform Party of Fla. v. Black*, 885 So. 2d 303, 314 (Fla. 2004).

91. *Id.* at 317 (Lewis, J., concurring).

ing or understanding. A word does not necessarily need to be defined by precise elements to have a common understanding.<sup>92</sup>

Yet Justice Lewis concurred in the result finding that “it may be properly advanced that the appellants were not afforded adequate notice as to what constituted a ‘national party’” under the statute, thereby implicating Nader and Camejo’s due process rights.<sup>93</sup>

If the majority and Justice Lewis found that the Florida Statute was not sufficiently clear to put Nader and Camejo on notice with respect to whether they could qualify to be placed on the ballot, under the standards established by the United States Supreme Court, the statute should have been deemed void under the void for vagueness doctrine as being violative of Nader and Camejo’s due process rights.<sup>94</sup> Such a finding would have produced a similar result—Nader and Camejo would have been placed on the ballot.<sup>95</sup> However, both the majority and the concurrence failed to recognize the statute as void based upon the rationale that the term “national party” was not defined in the statute and therefore did not provide notice to Nader and Camejo on how such term would be interpreted and applied to them.<sup>96</sup> This logic is clearly flawed as the trial court made specific findings on the issue based upon the evidence presented, which the majority failed to recognize and which Justice Lewis inexplicably found to be correct, yet concurred in the result reached by the majority.<sup>97</sup>

### III. CONCLUSION

Unfortunately, the Court failed to adjudicate the rights of the parties through interpretation and application of the appropriate statute. Justice Anstead, in his dissent, echoes Justice Lewis stating:

[a]s the trial court noted, “it doesn’t seem . . . to make any sense that the Legislature would have a provision in the law that says you can get on the ballot as a minor party by getting a . . . great

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92. *Id.* at 319 (Lewis, J., concurring).

93. *Id.*

94. *See Powell*, 423 U.S. at 92.

95. *See id.*

96. *See Reform Party of Fla. v. Black*, 885 So. 2d 303, 314–19 (Fla. 2004) (Lewis, J., concurring).

97. *See id.*

number of signatures, and then have another way that's basically no requirements."<sup>98</sup>

This is precisely the result that the Supreme Court of Florida has created by avoiding its responsibility to act as an appellate court. However, the co-authors of this Section of this article submit that the constitutional amendment proposed by Mr. Anderson in Section III of this article, would prevent the courts from being confronted with making decisions that fail to apply the law.

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98. *Id.* at 321 (Anstead, C.J., dissenting).

### SECTION III: A REVIEW OF FLORIDA'S BALLOT ACCESS LAW IN LIGHT OF *REFORM PARTY OF FLORIDA v. BLACK*

JOHN ANDERSON

In *Reform Party of Florida v. Black*, the Supreme Court of Florida upheld the decision of the Secretary of State, Glenda Hood, to place the names of Ralph Nader and Peter Camejo on the 2004 Florida presidential ballot as candidates of the Reform Party of the United States of America.<sup>99</sup> This action reversed the decision of the Circuit Court for the Second Judicial Circuit of Florida, which had ordered the removal of their names from the ballot.<sup>100</sup> The circuit court ruled in favor of the plaintiffs, who argued that Nader and Camejo were spurious candidates of a "minor party" who were not actually affiliated with a national party.<sup>101</sup> National affiliation of candidates on Florida ballots is required by section 103.021(4)(a) of the *Florida Statutes*.<sup>102</sup> The gravamen of the complaint, which numbered registered Democrats and Republicans, as well as Florida residents, was that the above-cited section of the *Florida Statutes* was inapplicable because the Reform Party of Florida had no actual affiliation with the national party.<sup>103</sup>

In its ruling, the lower court further found that despite its name, the Reform Party USA was not a "national party," and therefore the Reform Party of Florida could not be affiliated with a non-existent entity.<sup>104</sup> Among its other findings was one in which the circuit court concluded that Nader and Camejo were not nominees of a "national convention" because they were nominated via a conference call which violated the Reform Party USA's own prescribed procedures.<sup>105</sup>

In its opinion, the Supreme Court of Florida also cited three United States Supreme Court decisions involving ballot access, one of which, *Storer v. Brown*,<sup>106</sup> refers to "the substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner

99. 885 So. 2d 303, 304 (Fla. 2004).

100. *Id.* at 304–05.

101. *Id.* at 305; see generally FLA. STAT. § 103.021(4)(a) (2004).

102. § 103.021(4)(a).

103. *Reform Party of Fla.*, 885 So. 2d at 305. One of the Florida residents was registered as Independent and one was a registered member of the Reform Party of Florida. *Id.* at 304.

104. See *id.* at 305.

105. *Id.* It should be of more than passing interest that the defendants in this litigation sought to remove the case to federal court because a federal question was involved but were rebuffed by the United States District Court for the Northern District of Florida on the grounds that all of the counts in the plaintiffs' complaint were firmly anchored in state law. *Id.* at 307.

106. 415 U.S. 724 (1974).

will represent a majority of the community and in providing the electorate with an understandable ballot.”<sup>107</sup>

In its per curiam opinion, the Supreme Court of Florida further cites *Storer v. Brown* as holding: “[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.”<sup>108</sup>

The Supreme Court of Florida then stated:

Thus, the United States Supreme Court has “upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself. The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.”<sup>109</sup>

The principal point to be made here, in analyzing the proper role for the judicial branch of state government in deciding questions involving presidential ballot access, is that a unique national interest is involved. After all, the presidential office is completely unlike the thousands of elected state and federal offices that are involved in the electoral process. It is therefore the singular nature of those offices—the President and the Vice-President—that overshadows any effort at the state level to design the ballot and to establish fixed rules that focus on efforts by individuals to gain access to the ballots that are prepared quadrennially to give the American voter the right to choose their top two national leaders.

107. *Id.* at 729 (citing *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)); *Reform Party of Fla.*, 885 So. 2d at 308.

108. *Reform Party of Fla.*, 885 So. 2d at 308 (quoting *Storer*, 415 U.S. at 730).

109. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 n.9 (1983) (citations omitted) [hereinafter *Anderson II*]). It should be noted at this point that *Anderson II* was also cited in another per curiam opinion, *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). This was unquestionably the most bitterly contentious opinion dealing with the electoral process in the entire history of the United States Supreme Court. See generally *Bush v. Gore*, 531 U.S. 98 (2000). Chief Justice Rehnquist, with whom Justices Scalia and Thomas joined in concurring, stated in that case:

Likewise, in *Anderson v. Celebrezze*, we said: “[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.”

*Id.* at 112 (citation omitted).

## I. INTRODUCTORY NOTE

The co-author of this article writes from the perspective of one who formally abandoned our venerable two-party system a quarter of a century ago. I did so by declaring myself an Independent candidate for our nation's highest office. I was immediately confronted with the multiple problems of ballot access, and this resulted in multiple lawsuits in federal and state courts with one, the eponymous *Anderson v. Celebrezze*,<sup>110</sup> reaching the United States Supreme Court.<sup>111</sup> In 1980, the United States District Court for the Southern District of Ohio ruled correctly in allowing me to gain access to the Ohio ballot, and validating my claim that I truly was a national candidate having achieved ballot access in all states.<sup>112</sup> For those interested in a detailed account of my entire adventure I refer you to *Jumping Through 51 Hoops: John Anderson's Struggle for Ballot Access and Its Effect on the Rights of Independent and Third Party Candidates*.<sup>113</sup>

My contribution to this article is not, as should become apparent to the reader, a reprise of that effort. Nevertheless, a quarter of a century after that experience, my deeply held feeling is that despite a plethora of changes in the laws relating to the electoral process, insufficient progress has been made. Progress is essential to right the wrongs of a system so firmly held within the implacable grasp of a two-party duopoly, that it causes independents and minor parties to become victims of a "partisan lockup" (to use the phrase of two prominent critics of many features of our current electoral structure).<sup>114</sup>

At the very outset of my contribution to this commentary on Florida's ballot access law, as it was construed in the case of *Reform Party of Florida v. Black*, I wish to associate myself strongly with the views of the distinguished political scientist, Morris P. Fiorina, in his celebrated article, *The Decline of Collective Responsibility in American Politics*.<sup>115</sup> In the article, Fiorina pays respect to the Framers, who emphasized in the structured ar-

110. 664 F.2d 554 (6th Cir. 1981) [hereinafter *Anderson I*].

111. *Anderson II*, 460 U.S. at 780.

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

113. See Rebbecca Landis, *Jumping Through 51 Hoops: John Anderson's Struggle for Ballot Access and Its Effect on the Rights of Independent and Third Party Candidates* (1985) (unpublished thesis, University of Texas) (on file with author).

114. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); see generally *Reform Party of Fla. v. Black*, 885 So. 2d 303 (Fla. 2004).

115. Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, 109 DAEDALUS 25 (1980).



rangements they conceived and embodied in our Constitution, that government should be workable but not all powerful.<sup>116</sup> This resulted in a federal system that is deeply concerned about the government's power, hemmed in by checks and balances, all based on the Framers' prior experiences.<sup>117</sup> Because of this concern, they were predisposed to a system that would maintain a status quo.<sup>118</sup> But writing almost 200 years later, in 1980, Fiorina felt that it now behooves us to "worry about our ability to make government work for us. The problem is that we are gradually losing that ability, and a principal reason for this loss is the steady erosion of *responsibility* in American politics."<sup>119</sup>

## II. THE TWO PARTY SYSTEM'S EFFECT ON THE ELECTORAL PROCESS

The subsequent repudiation by the United States Supreme Court of the Supreme Court of Florida's assertion of the plenary nature of the right of the individual voter to vote for President and Vice-President of the United States occurred in its per curiam opinion in *Bush I*.<sup>120</sup> The Court vacated the Supreme Court of Florida's order, relying heavily on *McPherson v. Blacker*.<sup>121</sup> In *McPherson*, the Court, more than a century before, stated:

[Art. II, § 1, cl. 2] does not read that the people or the citizens shall appoint, but that "each State shall"; and if the words "in such manner as the legislature thereof may direct," had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.<sup>122</sup>

Thus, the United States Supreme Court, at least as it is presently composed, is firmly in lockstep with a body of precedent dating back more than a century which holds that the state legislature retains the power to determine the election to the Presidency of the United States, not the people.<sup>123</sup> Indeed,

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116. *Id.* at 25.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) [hereinafter *Bush I*].

121. *Id.* at 76, 78 (citing *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)).

122. *McPherson*, 146 U.S. at 25.

123. *See Bush I*, 531 U.S. at 76–78.

the Court in *Bush I* made it abundantly clear that a principal reason for the remand was its dubiety regarding the portion of the Supreme Court of Florida's opinion that stated: "[b]ecause the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution" it should circumscribe any laws governing the electoral process.<sup>124</sup> The Supreme Court of Florida further stated that "election laws are intended to facilitate the right of suffrage"<sup>125</sup> and therefore, laws that regulate the electoral process "are valid only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage."<sup>126</sup> The Supreme Court of Florida then cited *Treiman v. Malmquist*<sup>127</sup> which stated:

the declaration of rights expressly states that "all political power is inherent in the people." The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable disqualifications to run. . . . Unreasonable or unnecessary restraints on the elective process are prohibited.<sup>128</sup>

The Supreme Court of Florida then stated:

[b]ecause election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote:

Generally, the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters and the intention of the voters should prevail when counting ballots. . . . It is the intention of the law to obtain an honest expression of the will or desire of the voter.<sup>129</sup>

Courts must not lose sight of the fundamental purpose of election laws: [t]he laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our represen-

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124. See *id.* at 75–78; *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1239 (Fla. 2000).

125. *Harris*, 772 So. 2d at 1237.

126. *Id.* at 1236.

127. 342 So. 2d 972 (Fla. 1977).

128. *Id.* at 975 (citations omitted).

129. *Harris*, 772 So. 2d at 1237 (quoting *State ex. rel. Carpenter v. Barber*, 198 So. 49 (Fla. 1940)).

tative democracy. Technical statutory requirements must not be exalted over the substance of this right.<sup>130</sup>

The Court's opinion in *Bush I*,<sup>131</sup> asserting the potential federal interest, laid the foundation for *Bush II*,<sup>132</sup> which decided the election of 2000.<sup>133</sup> This was only accomplished by overriding the textual commitment of the Florida State Constitution, which gives primacy to the wish and intent of the individual voter in deciding *any* presidential election contest.<sup>134</sup> The Court accomplished this by an invocation of Article II, Section 1, Clause 2 of the United States Constitution, as well as a failure to comply with title 3, section 5 of the *United States Code*.<sup>135</sup> A further ground, of course, was the Court's reliance on the Equal Protection Clause of the United States Constitution.<sup>136</sup>

*Bush II* is perhaps best remembered for its sweeping assertion that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college,"<sup>137</sup> citing then to the United States Constitution, Article II, Section 1.<sup>138</sup> The Court continued, citing *McPherson v. Blacker*,<sup>139</sup> as its authority for the additional conclusion that "the state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself."<sup>140</sup> Although the Court acknowledged that current practice has seen citizens rather than, as was the practice for many years, state legislatures voting for electors, it is not the constitutional right of voters to do so, and the primacy of the state legislatures' power could be asserted at any time and in any presidential election.<sup>141</sup>

We turn now to the relevance of these judicial precedents arising out of the 2000 presidential election, to the controversy which arose in the 2004 election over ballot access for a candidate for the presidency, Ralph Nader, which led to the decision of the Supreme Court of Florida in *Reform Party of*

130. *Id.* (footnotes omitted).

131. 531 U.S. 70 (2000).

132. 531 U.S. 98 (2000); *see also Bush I*, 531 U.S. 70 (2000).

133. *The Presidential Election Is Finally Done*, WASH. POST, Dec. 14, 2000, at C15, 2000 WL 29921494.

134. *See* FLA. CONST. art VI, § 1.

135. U.S. CONST. art II, § 1, cl. 2; 3 U.S.C. § 5 (2000); *Bush v. Gore*, 531 U.S. 98, 104, 110 (2000).

136. U.S. CONST. art XIV, § 1; *Bush II*, 531 U.S. at 104–05.

137. *Bush II*, 531 U.S. at 104.

138. *Id.*; U.S. CONST. art II, § 1, cl. 3.

139. 146 U.S. 1 (1892).

140. *Bush II*, 531 U.S. at 104 (citing *McPherson*, 146 U.S. at 33).

141. *Id.* (citing *McPherson*, 146 U.S. at 35).

*Florida v. Black*, on September 17, 2004.<sup>142</sup> The court had to interpret a statute allowing a non-major party candidate to gain ballot access by becoming the candidate of a minor party, affiliated with a national party, holding a national convention to nominate candidates for President and Vice President.<sup>143</sup> Some of the 1999 revisions to the Florida ballot access law provided for filing a list of the required number of persons to serve as electors.<sup>144</sup>

The ensuing litigation over the Nader candidacy and its choice of this route to ballot access, rather than use of a petitioning process, yielded a decision in Nader's favor.<sup>145</sup> However, Justice Lewis, concurring in the result only, disagreed sharply with both the "analysis and reasoning of the majority."<sup>146</sup> He specifically lamented at great length the statute's failure to define what constitutes a "national party."<sup>147</sup> And although he does not dwell upon what can legitimately constitute a national nominating convention,<sup>148</sup> especially in the age of the internet, where so much of business and commerce is electronically conducted, it would perhaps be a daunting task to determine whether or not an appropriate definition of a political convention would even be achievable. I mention this because the plaintiffs in the *Reform Party of Florida* made much of the nomination being the product of a telephone call.<sup>149</sup>

Perhaps, as Justice Lewis correctly observed in his concurrence, the question of what constitutes a party was itself difficult enough.<sup>150</sup> However, it is the anterior question, namely, the difficulties that surround the efforts of parties (other than the two major parties) constituting a duopoly of power to gain entrance to the political marketplace, which is the precise task that will be undertaken and explored in this portion of the commentary on the Supreme Court of Florida's decision. This necessarily involves a discussion of the political rights of independent and third party members who would seek to challenge the present hierarchy of the two party system. This requires at least a brief recitation of prior history and how this duopoly has flourished under the United States Constitution over more than the last century and a half.

142. 885 So. 2d 303 (Fla. 2004).

143. *Id.* at 305.

144. FLA. STAT. § 103.021(4)(a) (1999).

145. *Reform Party of Fla.*, 885 So. 2d at 314. The petitioning process is allowable under Florida law. *Id.* at 320 (Anstead, J., dissenting); *see also* FLA. STAT. § 103.021(4)(b) (2004).

146. *Reform Party of Fla.*, 885 So. 2d at 314 (Lewis, J., concurring).

147. *Id.* at 316 (Lewis, J., concurring); *see also* FLA. STAT. § 103.021(4)(a) (2004).

148. *See Reform Party of Fla.*, 885 So. 2d at 319.

149. *Id.* at 305.

150. *See id.* at 316 (Lewis, J., concurring).

I firmly believe that a multi-party system would be beneficial to the health of our democracy in general. Some of the reasons why the health of our democracy can be questioned appeared in an article by Robert A. Pastor who cited the following facts:

**Registration and Identification of Voters.** The United States registers about 55 percent of its eligible voters, as compared with more than 95 percent in Canada and Mexico. To ensure the accuracy of its list, Mexico conducted 36 audits between 1994 and 2000. In contrast, the United States has thousands of separate lists, many of which are wildly inaccurate. Provisional ballots were needed only because the lists are so bad. Under HAVA, all states by 2006 must create computer-based, interactive statewide lists—a major step forward that will work only if everyone agrees not to move out of state. That is why most democracies, including most of Europe, have nationwide lists and ask voters to identify themselves. Oddly, few U.S. states require proof of *citizenship*—which is, after all, what the election is supposed to be about. If ID cards threaten democracy, why does almost every democracy except us require them, and why are their elections conducted better than ours?<sup>151</sup>

Curtis Gans of the Center for the Study of the American Electorate has faithfully followed the rise and fall of participation by the American electorate in presidential years over several decades.<sup>152</sup> Other writers on the subject, like Alexander Keyssar in *The Right to Vote: The Contested History of Democracy in the United States*, amply document the fact that despite the 15th, 19th, 23rd, 24th, and 26th Amendments to the United States Constitution, the Voting Rights Act of 1965 and the 1982 amendments thereto, the National Voter Registration Act of 1993 (often referred to as the “motor voter” law), and last but not far from least, in terms of its implications for electronic voting, the Help America Vote Act of 2002 (HAVA)<sup>153</sup> have not improved voter participation.<sup>154</sup> HAVA is the last major federal legislation to deal with the electoral process and was a response to some, but certainly not all, of the

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151. Robert A. Pastor, *America Observed: Why Foreign Election Observers Would Rate the United States Near the Bottom*, AM. PROSPECT, Jan. 2005, at A2.

152. COUNCIL FOR EXCELLENCE IN GOVERNMENT, A MATTER OF TRUST: AMERICANS AND THEIR GOVERNMENT: 1958-2004 47 (2004), at <http://www.excelgov.org/usermedia/images/uploads/PDFs/AMOT.pdf> (last visited Mar. 30, 2005) [hereinafter A MATTER OF TRUST].

153. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (to be codified at 42 U.S.C. § 15301).

154. See generally ALEXANDER KEYSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

difficulties that arose in the bitter contest over the results of the 2000 election. It should be noted at this point that Piven and Cloward link a decline in voter participation to one of the several so-called realigning elections in our history.<sup>155</sup> In this case, it was the election of McKinley in 1896 which saw not only the defeat of his Democratic opponent, Williams Jennings Bryan, but the emergence of the structured two-party system that has dominated our presidential elections ever since.<sup>156</sup>

The difficulty confronting the Supreme Court of Florida in *Reform Party of Florida* was definitional.<sup>157</sup> What did the Florida Legislature mean by such phrases as “national party” and “national convention?”<sup>158</sup> Justice Lewis, quite properly, did not want to rely on the Federal Election Commission (FEC) (the regulatory body for campaign finance laws affecting presidential campaigns) as the ultimate arbiter of when a party is qualified to put its candidate before the voters.<sup>159</sup> This difficulty was highlighted by Justice Lewis’s comparison of the states of Hawaii and Iowa.<sup>160</sup> In the former, an existing party in one other state entitled a minor party to ballot access in presidential contests.<sup>161</sup> However, in Iowa, the party must be recognized as such “in at least twenty-five other states.”<sup>162</sup> Despite Mr. Nader’s success in winning a place on the Florida ballot in 2004, the concurring opinion warned that the imprecise language of the statute should constitute a clear warning to future candidates that they are in danger of being denied the right to make their case to the voters in a run for the presidency.<sup>163</sup>

Florida’s perceived dilemma about candidates wishing to run outside the two-party system is a national problem, not just a state or local problem. Since at least *Anderson v. Celebrezze*,<sup>164</sup> the Court has made it perfectly clear that presidential elections involve a contest for the one office among thousands of elected offices in our democracy, that involve every American voter.<sup>165</sup> The national implications of that simple, yet profound, fact clearly

155. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON’T VOTE: AND WHY POLITICIANS WANT IT THAT WAY* 65 (2000).

156. *Id.* at 73.

157. *See generally* *Reform Party of Fla. v. Black*, 885 So. 2d 303 (Fla. 2004).

158. *Id.* at 312.

159. *Id.* at 318 (Lewis, J., concurring).

160. *Id.* at 316 (Lewis, J., concurring).

161. *Id.* at 313.

162. *Reform Party of Fla.*, 885 So. 2d at 313 (citing IOWA CODE ANN. § 68A.102(16) (2003)).

163. *Id.* at 319.

164. 460 U.S. 780 (1983) [hereinafter *Anderson II*]; *see also* *Storer v. Brown*, 415 U.S. 724 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968).

165. *Anderson II*, 460 U.S. at 795.

call for a federal statute applicable in all fifty states and the District of Columbia. The present state of our federal election law should not stop at assuring the right of individual voters to cast a vote for president only when the candidate is the nominee of one of the major parties.

Efforts to deal with this problem by enacting a federal statute capable of overriding existing state laws, on the subject of ballot access for non-major party candidates, would not suffice. Conceivably, there could be an effort made under HAVA to condition federal grants for improved state electoral systems on the state's adoption of laws that would specifically grant ballot access to non-major party candidates in a non-discriminatory manner. However, that hit or miss strategy is questionable because it does not really confront the problem. The mythology of this extra-constitutional political system must be pierced, not by bribing states to allow a challenger from outside that system, but by permitting truly unbiased freedom and equality in the electoral arena.

Professor Jamin B. Raskin, in *Overruling Democracy: The Supreme Court vs. The American People*, offers this trenchant observation:

the “two-party system” is neither a historical trend nor a constitutionally driven public institution but a kind of vast political anti-trust conspiracy.

. . . [I]t has successfully reshaped the essential features of our electoral institutions, from ballot-access laws to . . . debate-access laws to presidential campaign public financing laws. This “two-party system” exists indeed, and with a vengeance.<sup>166</sup>

Surely it is difficult to imagine that when the Framers were arguing in the debates that took place during the period of ratification for the creation of a new democratic republic, they believed it would be based on a framework of a two-party system; or, that it would operate to the exclusion of the possibility that a multiparty system could emerge. It certainly was not consciously barred and excluded from future consideration.<sup>167</sup> It is true that Madison in his *Federalist No. 10* inveighed against factions and the peril they could pose for a nascent Republic.<sup>168</sup> It is also well established that the term faction, as used in that context, could be equated with a political party.<sup>169</sup> However, there is scant evidence that Madison took a binary approach, which excluded

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166. JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* 98 (2003).

167. See *THE FEDERALIST NO. 10* (James Madison).

168. See *id.*

169. See *id.*

the possibility that no more than two views could be refined to solve future problems that might beset the new democracy with its republican approach to governance.<sup>170</sup>

Morris P. Fiorina was cited in this article as deploring the decline of “collective responsibility” in solving our problems as a nation.<sup>171</sup> Fiorina alleged that a generation has passed since “parties have provided an ‘adequate’ degree of collective responsibility.”<sup>172</sup> This in turn, he believed, had produced “deleterious consequences.”<sup>173</sup> He also offered the conclusion that “[s]ince 1965 the parties have done little or nothing to earn the loyalties of modern Americans.”<sup>174</sup> This trenchant observation, I believe, cannot be dismissed a quarter of a century later as a remark out of time and out of place.<sup>175</sup> Two of the consequences of political decline resulting from the deficit in the collective responsibility of our existing duopoly are: “the growing importance of single-issue politics and the growing alienation of the American citizenry.”<sup>176</sup> Another profound result of our bipolar domestic politics is what Fiorina describes as immobilism, which specifically refers to critical problems regarding energy, public debt, and the attendant higher costs they will invoke in the future.<sup>177</sup> How prophetic indeed is his observation long ago that:

political inability to take actions that entail short-run costs ordinarily will result in much higher costs in the long-run [for the American people who] ... will not have an opportunity to choose between two or more such long-term plans. Although both parties promise tough, equitable policies, in the present state of our politics, neither can deliver.<sup>178</sup>

These statements may seem morose or Cassandra-like pronouncements from the Academy. However, an array of different sources, including both political scientists and law school academics across America, are writing on

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170. *See id.*

171. Fiorina, *supra* note 115, at 26.

172. *Id.* at 27.

173. *Id.* at 28.

174. *Id.* at 33.

175. *See id.* at 26.

176. Fiorina, *supra* note 115, at 39.

177. *Id.*

178. *Id.* at 40.



this subject and asking whether the most recent decade's elections validate Fiorina's need for greater accountability.<sup>179</sup>

### III. PROBLEMS WITH THE UNITED STATES' BI-PARTISAN ORIENTED BALLOT ACCESS LAWS

In *Williams v. Rhodes*, the United States Supreme Court decided an issue regarding ballot access in an election involving the contest for presidency.<sup>180</sup> *Williams* not only involved the issue of an individual candidate, namely George Wallace, the controversial former Governor of Alabama, but also involved Wallace's newly-formed American Independent Party.<sup>181</sup> Although Wallace's petition to secure a place on the Ohio ballot garnered over 450,000 signatures in six months, far more than Ohio required for a new party, he was not given a place on the ballot because he missed the deadline under Ohio law.<sup>182</sup> The parties who received ten percent of the vote cast for the previous gubernatorial election were automatically granted ballot access.<sup>183</sup> However, the nominees of these parties were not chosen until later at the national general election.<sup>184</sup> Wallace won this lawsuit on the grounds that the Ohio ballot access law violated the Equal Protection Clause of the Constitution by giving preferential treatment to the two major parties: Republican and Democratic.<sup>185</sup> Further, the Court held the associational rights of voters who wished to vote for an Independent candidate were violated under the First Amendment.<sup>186</sup> The Court applied strict scrutiny, which requires the state to show a compelling interest to warrant interference with an individual's right to associate.<sup>187</sup> Ohio had argued that its law should be sustained to further the compromise and stability that inheres in the two-party system.<sup>188</sup>

In reply to that argument, the Court reasoned that the Ohio law did not, as applied, simply support a concept or a construct of a two-party system.<sup>189</sup>

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179. See generally DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* (3d ed. 2004).

180. See *Williams v. Rhodes*, 393 U.S. 23 (1968).

181. *Id.* at 26.

182. *Id.* at 26–27. The number of signatures actually exceeded fifteen percent of the ballots cast in the last election for governor, which was required by Ohio law. *Id.* at 27. Three years later, the Court upheld a Georgia statute requiring five percent for independent candidates. See *Jenness v. Fortson*, 403 U.S. 431 (1971).

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

184. See *id.* at 33.

185. *Id.* at 34.

186. See *id.* at 32.

187. *Id.* at 31.

188. *Williams*, 393 U.S. at 32.

189. *Id.*

It was clearly drawn to advantage the political chances of two specific, identifiable parties: Republican and Democratic.<sup>190</sup> The Court went on to challenge Ohio's right, in essence, to create a permanent political monopoly.<sup>191</sup> Secondly, the Court reasoned that competitive politics is important because it produces new ideas and different programmatic approaches that all require First Amendment protection.<sup>192</sup> Therefore, it is also important to permit freedom of association to advance those new and different approaches.<sup>193</sup> Furthermore, if all new parties are destined to be stillborn because they are not granted time to lay a foundation on which to grow through active participation in the electoral process, they would be robbed of the advantages that both existing major parties enjoy.<sup>194</sup>

Pausing at this point to reflect on the Florida ballot access statute involved in *Reform Party of Florida*, I question both the practicality and constitutionality of the statutory language.<sup>195</sup> The statute grants ballot access only to the nominee of a "national party" which holds a "national convention."<sup>196</sup> Determining what constitutes a national party should not be a judicial function, even with courts having the benefit of expert testimony from political consultants, political scientists, media consultants, or a wide variety of other talents associated with the giant conglomerates that now make up the national party campaigns for the American presidency.

On the other hand, section 103.021(4)(b) of the *Florida Statutes* clearly involves in-state petitioning by a new party candidate for President of the United States as a qualifying procedure for ballot access.<sup>197</sup> It is foreseeable that this legislation will pass constitutional muster under current precedents, going back to *Williams*, and more specifically, *Jenness v. Fortson*.<sup>198</sup> However, other efforts by state legislatures to regulate political party conventions and standing of putative candidates for the presidency should be regarded as highly suspect. Conventions of the established major parties are not decision-making bodies. They are simply showcases where a party merchandises its wares or, at the very least, attempts to do so.

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190. *See id.* In his concurring opinion, Justice Douglas added "Ohio . . . has effectively foreclosed its presidential ballot to all but Republicans and Democrats." *Id.* at 35 (Douglas, J., concurring).

191. *Id.* at 32.

192. *Williams*, 393 U.S. at 32.

193. *Id.*

194. *Id.* at 33.

195. FLA. STAT. § 103.021(4)(a)-(b) (2004).

196. § 103.021(4)(a).

197. § 103.021(4)(b).

198. 403 U.S. 431 (1971) (holding that a state's nominating petition requirement did not violate the First Amendment).

Aside from the officiousness and the emptiness in any meaningful sense of a national convention as a vital cog in the machinery of our democracy, United States Supreme Court cases like *Eu v. San Francisco County Democratic Central Committee*<sup>199</sup> have led me to wonder how hospitable the judicial climate will be to statutorily link the role of national conventions of even major parties directly to the electoral process. Admittedly, *Eu* struck down severe state regulation of party committees' endorsement of political candidates as violating the First and Fourteenth Amendments.<sup>200</sup> Nonetheless, the argument that the overarching right of the American people to choose the President should be conditioned on a party convention nomination is simply indefensible. In *Eu*, California argued that strict scrutiny was not required of the statutory regulation, but Justice Marshall rejected that argument.<sup>201</sup>

I next approach the problem raised by the Florida Ballot Access Law from the broader perspective of the states' laws both generally in this article and in more detail in the appendix explaining the ballot laws in all fifty states.<sup>202</sup> Richard Winger, founder and long-time editor of Ballot Access News in San Francisco, provides an excellent and highly critical historical review of ballot access laws for all fifty states through 2002.<sup>203</sup> Winger points out that it was only in the late 1930s that what he labels "massive petition requirements" began.<sup>204</sup> Then abruptly in 1971 with the Court's decision in *Jenness v. Fortson*, which was only three years after the *Williams* decision discussed above, the Court virtually called a halt to efforts by Independents and minor or third parties to protest the raising of the petition barrier to heights that have made the present duopoly invincible.<sup>205</sup>

An earlier warning, no less alarming in tone, was published in a lengthy article by Bradley A. Smith, entitled *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*.<sup>206</sup> Smith developed a theme similar to Mr. Winger.<sup>207</sup> Together these articles represent a body of opinion with which I wish to publicly associate myself. They are germane to the analysis and discussion of the Supreme Court of Florida's decision on the electoral

199. 489 U.S. 214 (1989).

200. *Id.* at 233.

201. *Id.* at 222. *But see* Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741 (1993).

202. *See infra* Appendix.

203. Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of Jenness v. Fortson*, 1 ELECTION L.J. 235 (2002) [hereinafter Winger I].

204. *Id.* at 236.

205. *Id.* at 235.

206. Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167 (1991).

207. *See id.*; Winger I, *supra* note 203.

process. Also, the two articles cited above furnish an opportunity to go beyond analysis of the decisions themselves and to offer some thoughts on possible guidelines on what the future of ballot access laws should be and to venture some additional thoughts on a uniform, truly national approach to how we elect our President in the twenty-first century.<sup>208</sup> At the same time we fully recognize that ours is a federal system where states both historically and constitutionally have certain responsibilities about how our elections are conducted.

We must necessarily begin with the recognition of the overwhelming power of the two major parties—the past and present duopoly that has already been referred to. I shall leave much of the history of that development to others. However, I must be forgiven if I note that it is not merely a personal predilection, but well documented by these historians that it is third parties as far back as the early nineteenth century that produced both ideas and action on a variety of fronts—from women’s rights, to child labor, to progressive electoral reforms designed to enlarge the role of individual voters and battle against bossism and corruption in the ranks of both capital and labor.<sup>209</sup>

James B. Weaver received eight percent of the popular vote in 1892 as the candidate of the Populist Party.<sup>210</sup> Many of the reforms contained in his platform were taken over by the Democratic Party;<sup>211</sup> some by Theodore Roosevelt in his third party run in 1912 as nominee of the Progressive Party, when he garnered twenty-seven percent of the popular vote.<sup>212</sup> Such developments led to Richard Hofstadters’ famous remark in 1912 that third parties “sting like a bee and then die.”<sup>213</sup>

It has been pointed out that it was the spectacular third party run of the Bull Moose candidate, Theodore Roosevelt, which sparked the passage of new or revised ballot access laws precisely designed to block gains by Independent and third party candidates.<sup>214</sup>

As the state laws across the land are examined, it will be noted that many states are not satisfied to impose the barrier to ballot access in terms of

208. Winger I, *supra* note 203.

209. See V.O. KEY, JR., *POLITICS, PARTIES, & PRESSURE GROUPS* 257–58 (5th ed. 1964); STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA* 8 (2d ed. 1984); Smith, *supra* note 206, at 169.

210. KEY, *supra* note 209, at 257; Smith, *supra* note 206, at 170.

211. KEY, *supra* note 209, at 257–58.

212. *Id.* at 263; see also ROSENSTONE ET AL., *supra* note 209, at 86.

213. Stephen E. Ambrose & Richard D. Lamm, *Why America Needs a New Political Party*, at [http://www.americanreform.org/Lamm/new\\_political\\_party.html](http://www.americanreform.org/Lamm/new_political_party.html) (last visited Mar. 30, 2005).

214. See Smith, *supra* note 206, at 170.

a fixed percentage of the registered voters or the votes cast for governor or state official in a particular prior state election.<sup>215</sup> They include a wide variety of procedural restrictions on who may circulate petitions and may require certain arcane information from the signer, such as a voter affidavit number.<sup>216</sup>

While all the above is going on, it should be reiterated that major party candidates, however, are totally exempt no matter how obscure their identities may have been in their past life.<sup>217</sup> If they are clothed in the major party banner they need not spend their time petitioning to be assured that their names have been placed on the ballot.<sup>218</sup> It is their shield against the demands of time, money, and expenditure of effort to legitimate their placement and right to compete in the public arena of an electoral campaign for public office.<sup>219</sup>

What then are, and should be, the justifications for the tendency of state ballot access laws to be exclusionary and thereby lend official state sanction to the duopoly of political power complained of by Smith, Winger, and the co-author of this article? The most common reasons stated are that this duopolistic system has given us compromise and political stability.<sup>220</sup> Ancillary reasons are that these restrictive laws prevent ballot confusion and assure the orderly administration of the electoral proceed that is necessary if citizens are to be allowed to cast an effective vote.<sup>221</sup>

In *Munro v. Socialist Workers Party*,<sup>222</sup> the United States Supreme Court considered a ballot access requirement, in a so-called blanket primary for a United States Senate seat, to determine whether a candidate should receive placement on the general election ballot if they do not receive at least one percent of the votes cast for that office in the primary.<sup>223</sup> Dean Peoples, a candidate of the Socialist Workers Party, was on the primary ballot with thirty-two other candidates from other parties.<sup>224</sup> However, out of 681,690 votes cast, he received only 596 or .00009 percent of total votes.<sup>225</sup> He was denied placement on the ballot.<sup>226</sup> In the suit that followed, the federal court

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215. *See id.* at 176–77.

216. *Id.* at 176.

217. *Id.*

218. *Id.*

219. *See Smith, supra* note 206, at 176–77.

220. *See id.* at 179.

221. *See id.* at 180.

222. 479 U.S. 189 (1986).

223. *Id.* at 190–91.

224. *Id.* at 192.

225. *Id.* at 192 n.9.

226. *Id.* at 192.

of appeals ruled in his favor, and in answer to the State of Washington's proffered defense that Mr. People's low vote total showed insufficient community support to suffer his candidacy through a general election, it said: "Washington's political history evidences no voter confusion from ballot overcrowding."<sup>227</sup>

In overruling the court of appeals and approving People's exclusion from the ballot, Justice White accepted the truth of that historical fact but nevertheless went on to say: "We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access."<sup>228</sup> He went on to state (astonishingly so, in this writer's opinion) that: "[i]n *Jenness v. Fortson*, [for example] we conducted no inquiry into the sufficiency and quantum of the data supporting the reasons for Georgia's 5% petition-signature requirement."<sup>229</sup> In the *Munro* opinion, the Court referred to its previous decision in *Storer* in which a candidate had been barred from a place on the California ballot by a party disaffiliation provision in the state's electoral code, to renounce the idea that empirical evidence was required in cases challenging a state's ballot access laws.<sup>230</sup> Testing the law's constitutionality does not require proof of a compelling state interest.<sup>231</sup> It was enough for the state to allege that it was seeking to protect the voters, and it was not necessary to justify the means employed or make any effort beyond the assertion itself that the voters were better off with a more limited choice of candidates.<sup>232</sup> It is noteworthy that Justice Marshall, in a dissent, made this telling rejoinder:

The necessity for [a higher standard of review] becomes evident when we consider that major parties, which by definition are ordinarily in control of legislative institutions, may seek to perpetuate themselves at the expense of developing minor parties. The application of strict scrutiny to ballot access restrictions ensures that measures taken to further a State's interest in keeping frivolous candidates off the ballot do not incidentally impose an impermissible bar to minor-party access.<sup>233</sup>

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227. *Munro*, 479 U.S. at 194 (quoting *Socialist Workers Party v. Munro*, 765 F.2d 1417, 1420 (9th Cir. 1985), *rev'd*, 479 U.S. 189 (1986)).

228. *Id.* at 194-95.

229. *Id.* at 195.

230. *Id.*

231. *Id.* at 200-01.

232. *Munro*, 479 U.S. at 194-95.

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

In another commentary, Professor Michael J. Klarman points out the other problem with the Court's decision in *Munro* as it relates to ballot access requirements affecting the formation of, and admission to, our political system of independent or minor party candidates.<sup>234</sup> In *Munro*, which involved the exclusion of a minor-party candidate, Justice White dismissively observed that "[i]t can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election."<sup>235</sup> What Justice White was saying is that for a minor-party candidate, one bite out of the apple should be quite enough to satisfy that party's desire for its voice to be heard.<sup>236</sup> Justice White is implying that regardless of how widely divergent the minor party's message might be, it need not be heard in the general election campaign by the far wider audience of voters who tune in and participate in the decisive contest.<sup>237</sup> This obviously contributes to the entrenchment problem. In other words, one election in the primary phase of our electoral process for minor parties is quite enough.

Another United States Supreme Court case that clearly indicates the trend of the Court's thinking in the area of ballot access is the recent case of *Timmons v. Twin Cities Area New Party*.<sup>238</sup> Today many states ban multi-party or cross-filing for a political office; i.e., they forbid fusion where more than one political party seeks to nominate a candidate for the same office.<sup>239</sup> For example, a Minnesota law banned fusion in 1991.<sup>240</sup> In upholding that law, the Court, per Chief Justice Rehnquist, relied on the argument that: "[s]tates certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."<sup>241</sup> The majority's opinion expressed extreme concern regarding fusion destroying the unity of political parties, while promoting factionalism within the parties and making the ballot "a billboard for political advertising" instead of achieving what should be its only purpose—to choose candidates.<sup>242</sup>

Justice Stevens, joined by Justices Ginsburg and Souter, dissented and stated the majority was wrong in its "conclusion that the ballot serves no

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234. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 522 (1997).

235. *Munro*, 479 U.S. at 199.

236. *See id.*

237. *Id.*

238. 520 U.S. 351 (1997).

239. *Id.* at 355.

240. *Id.*

241. *Id.* at 364.

242. *Id.* at 365.

expressive purpose for the parties who place candidates on the ballot.”<sup>243</sup> Justices Stevens and Ginsburg made an additional important point that “most States have enacted election laws that impose burdens on the *development and growth* of third parties.”<sup>244</sup> They went on to add “[t]he fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality.”<sup>245</sup>

It is almost uniformly accepted by political scientists that the two-party system is already aided immeasurably by our single-member system of both congressional and state legislative districting in maintaining its dominant role in our political system, and has for well over a century and a half.<sup>246</sup> It is further aided by our system of electing plurality winners in single member districts; i.e., our “first past-the-post” system that has come to be known as Duverger’s law, and so inexorable is the resulting two-party system.<sup>247</sup> Therefore, the misbegotten judicial concern for the protection of a two-party system is unwarranted.

Liberalizing access to the ballot for both Independents and third parties for legislative offices still leaves them the enormous difficulties of surmounting that hurdle. For unitary offices such as the President of the United States, or at the state level, that of governor and other state constitutional officers, the first-past-the-post system would have quickly eliminated popular past presidential candidates such as President Theodore Roosevelt in his 1912 third-party new-party bid.<sup>248</sup> The major parties are not an endangered species needing government, or for the purposes of the argument being made here, or judicial protection, or the legislative hurdles posed by ballot access laws conjured up in state legislature either by state legislators seeking their own entrenchment or at the behest of party officials.

Richard Pildes, in his article *Democracy and Disorder*,<sup>249</sup> has effectively summarized and suggested an answer to the questions posed here, which I believe are incorrect assumptions of the courts in general.<sup>250</sup> His assertions are prompted by state legislation targeting the necessity of narrowly limiting

243. *Timmons*, 520 U.S. at 373.

244. *Id.* at 378 (emphasis added).

245. *Id.*

246. See Issacharoff & Pildes, *supra* note 114, at 675 n.121.

247. *Id.* at 675 & n.121 (citations omitted).

248. See Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 583 (1999).

249. Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001).

250. See generally *id.*



ballot access, as well as the United States Supreme Court's misapplication of concerns linking the maintenance of stability and order in our democracy.<sup>251</sup>

Some would argue that American politics today suffers from a bi-polar disorder because there is polarity manifested by a bi-partisan axis. The degree to which ballot access laws have played some role in maintaining this duopoly is open to debate and discussion. However, I believe this issue cannot be dismissed as insignificant.

Bradley Smith, in a historical view of this question, pointed out that ballot access laws did not really draw attention and undergo extensive revision until Theodore Roosevelt's Progressive Party out-poled his Republican opponent, the incumbent President William Howard Taft, in the 1912 election.<sup>252</sup> Although Roosevelt lost the election to Wilson, fourteen Progressive Party members were elected to Congress under his banner.<sup>253</sup> The Australian secret ballot had not begun general adoption in this country until 1888.<sup>254</sup> Until then, ballot access was not really a problem because parties prepared their own ballots.<sup>255</sup> However, the Socialist Party received its largest percentage, with six percent in the 1912 presidential election.<sup>256</sup> As Smith further recounts, the state legislatures then swung into action when Senator Robert LaFollete, "trying to launch a new Progressive Party, faced ballot-access laws that were 'an almost insuperable obstacle to the new party.'"<sup>257</sup> Smith reached the conclusion that "[n]evertheless, strict ballot-access restrictions have helped the two major parties to achieve a vise-grip on American politics never before attainable."<sup>258</sup> The parties' evolution to the present day has been a long story in and of itself.<sup>259</sup> Smith's second chapter began with addressing *Williams v. Rhodes*, which was discussed earlier in this article.<sup>260</sup> Since this article has provided a summary of that evolution, we turn to the issue regarding the proper state-level response to the problem confronting the Supreme Court of Florida in *Reform Party of Florida*.

The difficulties facing the Supreme Court of Florida in interpreting the state's ballot access statute for presidential candidates, along with this article's material regarding the different approaches to ballot access in other jurisdictions, might suggest that statutory reform would be prominent in any

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251. See *id.* at 714–18.

252. Smith, *supra* note 206, at 170.

253. *Id.*

254. *Id.* at 172.

255. *Id.*

256. *Id.* at 170.

257. Smith, *supra* note 206, at 171.

258. *Id.*

259. *Id.*

260. See discussion *supra* Part III; 393 U.S. 23 (1968).

list of changes to the electoral process concerning the presidential election.<sup>261</sup> Following the 2000 presidential election, former Presidents Gerald Rudolph Ford and James Earl Carter, along with many other notables, became the appointed co-chairs of the National Commission on Federal Election Reform, and in due course, the Commission produced an impressive 356-page report, which was reassuringly entitled *To Assure Pride and Confidence in the Electoral Process*.<sup>262</sup> Sadly, the report does not discuss how to reform the states' ballot-access laws.<sup>263</sup> In enacting the Help America Vote Act, Congress also chose not to broach the subject.<sup>264</sup> This article is not intended as a criticism of either the Commission or Congress.

Florida has received the accolade of being listed as one of the “[l]eading major reform states” by Daniel J. Palazzolo and James Ceaser in their recently published book on electoral process reform.<sup>265</sup> In that volume, Susan A. MacManus has headed her contribution on Florida as “Nonstop Reform Since Election 2000.”<sup>266</sup> The most extensive reforms were in the first session of the Florida legislature following the election of 2000, which made Florida the eye of the storm that enveloped the nation in the thirty-five day wait for a final judgment of who had won the presidential election.<sup>267</sup> That enormously controversial and still debated discussion has produced a flood of commentary in both books and articles, but it is not the subject of further discussion here save for mentioning its important role in generating enormous attention to the need for electoral reform both at the national and state level.<sup>268</sup> In Congress, the controversy produced the HAVA, and in Florida legislation was introduced, and has been acted upon in every ensuing session of the state

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261. See also *Reform Party of Fla. v. Black*, 885 So. 2d 303, 312–14 (Fla. 2004).

262. NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, *TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS* 87 (2001), [http://www.reformelections.org/data/reports/99\\_full\\_report.pdf](http://www.reformelections.org/data/reports/99_full_report.pdf) (last visited Mar. 30, 2005).

263. See generally *id.*

264. See Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (to be codified at 42 U.S.C. § 15301).

265. ELECTION REFORM: POLITICS AND POLICY 35 (Daniel J. Palazzolo & James W. Ceaser eds., 2005).

266. Susan A. MacManus, *Goodbye Chads, Butterfly Ballots, Overvotes, and Recount Ruckuses! Election Reform in Florida, 2000 to 2003*, in ELECTION REFORM, *supra* note 265, at 37.

267. *Id.* at 38. The President was only elected by a United States Supreme Court decision. See *Bush v. Gore*, 531 U.S. 98, 101–03 (2000); *The Presidential Election is Finally Done*, WASH. POST, Dec. 14, 2000, at C15, 2000 WL 29921494.

268. See ELECTION REFORM: POLITICS AND POLICY, *supra* note 265, at 35.

legislature, dealing with changes and reforms in the electoral process.<sup>269</sup> However, for the purposes of this article, it should be emphasized that none of the legislation touches on ballot access by independents or third parties.<sup>270</sup> Perhaps this is because the 1999 changes in the law on that subject were so recent that it seemed unnecessary. However, more likely it was true that at both the national and state levels, in the rush to reform, the subject of ballot access was simply not on anyone's radar screen as a critical issue. This seems a strange anomaly because it is almost universally accepted that had Ralph Nader, a third party—then the Green Party candidate—not been on the ballot in Florida, Vice President Gore would have received that state's twenty-five electoral votes and won the presidency.<sup>271</sup> However, across the nation, most states that moved on election reform ignored the subject of ballot access.<sup>272</sup>

I believe that against this background of indifference and inaction, the likelihood of action at the state level—although in this article I confine my attention to Florida, because of its principal focus on the aforementioned decision of *Reform Party of Florida v. Black* and the Supreme Court of Florida's interpretation of minor-party ballot access—is only minimal, if not indeed highly unlikely. This is true despite Justice Lewis' concurring opinion in which he almost plaintively decries the deficiencies of section 103.021 of the *Florida Statutes* for failing to define adequately the terms “national party” and “national convention” in order to provide needed judicial guideposts.<sup>273</sup>

It is equally unrealistic, in my judgment, to think that Congress would provide a remedy. For as the Court famously declared in its per curiam opinion in *Bush II*, there is no affirmative right of the individual citizen to vote for electors of the President in Florida or any other state.<sup>274</sup> That right is the prerogative of state legislatures under Article II, Section 1, Clause 2 of the

269. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (to be codified at 42 U.S.C. § 15301); see also Katherine Harris, *The Facts on Florida: Elections Systems Ready for November*, WASH. TIMES, Oct. 20, 2004, at A19, 2004 WL 64166414.

270. See Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 241–42 (2004); Roberta A. Yard, Comment, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Process to Ensure “One Person, One Vote,”* 42 SANTA CLARA L. REV. 185, 197–98 (2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 58 (2001).

271. Boudreaux, *supra* note 270, at 241–42; Yard, *supra* note 270, at 197–98.

272. See Richard Winger, *Ballot Access News* (Feb. 1, 2001), at <http://www.ballot-access.org/2001/0201.html> (last visited Mar. 30, 2005).

273. *Reform Party of Fla. v. Black*, 885 So. 2d 303, 316 (Fla. 2004) (Lewis, J., concurring).

274. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

United States Constitution<sup>275</sup> Moreover, the Court made it clear more than a century ago in *McPherson v. Blacker* that the right of individuals to choose the electors is a plenary power.<sup>276</sup> Therefore, even though a state's constitution has granted the franchise to the people, "[t]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors."<sup>277</sup> "[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated."<sup>278</sup>

In *Bush II*, the Court hearkened back to its decision more than two decades earlier where, in a 5-4 decision on the ballot access law for independent and minor parties of Ohio, they said: "[i]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only officials who represent all the voters in the Nation."<sup>279</sup>

I believe that a constitutional amendment expunging the language of Article II, Section 2, Clause 2, effectively abolishing the Electoral College, is not the best path to reform the United States Constitution. Nor should state court judges have to grapple with questions of how to define the meaning of a "national party" or a "national convention," when such terms are linked to a statutory scheme for ballot access for a presidential candidate. I empathize with the frustration of the concurring justice in *Reform Party of Florida*.<sup>280</sup> I believe such language should be deleted from the statute. Far more importantly though, the energy for reform should be focused on amending the United States Constitution to declare that it is the right of every voter to cast a vote for President of the United States.

There is an overriding foundational principle that supports our democracy. It was enunciated in one of the most famous cases in our constitutional history, *McCulloch v. Maryland*,<sup>281</sup> in which Chief Justice Marshall stated: "[t]he government of the Union ... is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."<sup>282</sup>

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275. *Id.*

276. 146 U.S. 1, 35 (1892).

277. *Bush II*, 531 U.S. at 104.

278. *McPherson*, 146 U.S. at 35 (quoting S. REP. NO. 395 (1874)).

279. *Bush II*, 531 U.S. at 112 (Rehnquist, C.J., concurring) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983)).

280. See *Reform Party of Fla.*, 885 So. 2d at 315-16 (Lewis, J., concurring).

281. 17 U.S. 316 (1819).

282. *Id.* at 404-05.

To preserve the important principle in the words just quoted, I believe we should now—in view of past judicial precedents that have diminished the peoples’ right to choose unfettered by an entrenched party system—reassert that right in the United States Constitution with a “Right to Vote” amendment. It would do away with more than three decades of minor parties being kept off of state ballots<sup>283</sup> by what one writer calls “America’s Signature Exclusion.”<sup>284</sup> The leading expert on ballot access in the United States and editor for many years of *The Ballot Access News*, a monthly publication, entitled a recent article devoted to the subject: *The Supreme Court and the Burial of Ballot Access: A Critical Review of Jenness v. Fortson*.<sup>285</sup> The article points out that in the last three decades the Supreme Court has cited *Jenness* approvingly in nine opinions.<sup>286</sup> Even more dramatic is that, in lower courts, independent and minor parties have lost on constitutional grounds in 126 cases.<sup>287</sup> Almost half of the state legislatures have followed suit by enacting stricter ballot access laws.<sup>288</sup> The article lays all of this at the door of *Jenness* and suggests the decision has made the states confident that they can successfully bar minority parties and independent candidates.<sup>289</sup> Ralph Nader was on forty-three state ballots in 2000.<sup>290</sup> In the last presidential election, he succeed in gaining ballot access in only thirty-four states.<sup>291</sup> In eighteen states, it was the Democratic Party that undertook legal action to keep him off the ballot.<sup>292</sup>

The people cannot, in the words of Chief Justice John Marshall, demonstrate that “[t]he government of the Union...is, emphatically, and truly a government of the people”<sup>293</sup> because they are restricted by state legislatures which are, in turn, sustained by the judicial branch.<sup>294</sup> The Constitution itself

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283. See *Jenness v. Fortson*, 403 U.S. 431 (1971).

284. RASKIN, *supra* note 166, at 91.

285. Winger I, *supra* note 203, at 235.

286. *Id.*

287. *Id.* at 249–52.

288. See *id.* at 246–49.

289. *Id.* at 248.

290. See *Presidential Vote*, BALLOT ACCESS NEWS, Jan. 1, 2001, at <http://web.archive.org/web/20020203231432/http://www.ballot-access.org/2001/0101.html> (last visited Mar. 30, 2005).

291. Richard Winger, *Did the Democrats Err on Nader?*, BALLOT ACCESS NEWS, Jan. 1, 2005, at <http://www.ballot-access.org/2005/0101.html> (last visited Mar. 12, 2005) [hereinafter Winger II].

292. *Id.*

293. *McCulloch v. Maryland*, 17 U.S. 316, 404–05 (1819).

294. See generally *Reform Party of Fla. v. Black*, 885 So. 2d 303 (Fla. 2004) (Lewis, J., concurring).

must spell out that great truth in the unmistakable language of the proposed “Right to Vote” amendment.

#### IV. CONCLUSION

A vehicle does exist for the enactment of the proposed amendment in House of Representatives Joint Resolution 28, which was introduced in the 108th Congress on March 4, 2003 by Congressman Jesse L. Jackson, Jr. of Illinois.<sup>295</sup> In addition, in order to prevent courts from making decisions like *Reform Party of Florida*, a proposed constitutional amendment should also include provisions that: (i) guarantee every citizen the right to vote for President (or presidential elector to the extent the electoral college continues to exist); (ii) limit the ability of states and the District of Columbia in regulating presidential elections to issues surrounding placement of the ballot and design of the ballot; (iii) provide for equal technology to be used by the states and the District of Columbia in connection with the casting and counting of votes in presidential elections; and (iv) provide for uniform standards with respect to ballot access for the office of the presidency. In his floor speech, Jackson began with the following statement from *Bush II*: “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States.”<sup>296</sup> Jackson also referenced Alexander Keyssar’s magisterial work, *The Right to Vote: The Contested History of Democracy in the United States*.<sup>297</sup> Jackson’s floor statement bore the title, “Our Voting System Needs a New Constitutional Foundation”, and section 1 of his proposed amendment simply stated:

All citizens of the United States who are eighteen years of age or older shall have the right to vote in any public election held in the jurisdiction in which the citizen resides. The right to vote shall not be denied or abridged by the United States, any State, or any other public or private person or entity, except that the United States or any State may establish regulations narrowly tailored to produce efficient and honest elections.<sup>298</sup>

Other significant provisions deal with the power of Congress to establish “election performance standards at least once every four years,” for example, by mandating periodic review on a quadrennial basis.<sup>299</sup> Further, sec-

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295. H.R.J. Res. 28, 108th Cong. (2003).

296. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

297. KEYSSAR, *supra* note 154.

298. H.R.J. Res. 28.

299. *Id.*

tion 4 provides for mandatory same day voter registration, and a provision that state rules for appointing electors for President and Vice President shall ensure that each Elector votes for the candidates chosen by a majority of the voters.<sup>300</sup>

The language quoted above makes it clear that strict scrutiny should be applied in ballot access cases and not produce what Professor Lawrence Tribe described in the treatise *American Constitutional Law*: “*Jenness*, in contrast [to *Williams v. Rhodes*], shunned discussion of the standard of review, contented itself with emphasizing that the laws being reviewed were less suffocating than those in *Williams*, and found the state interests quite sufficient to satisfy whatever standard it did apply.”<sup>301</sup>

Hopefully, what Professor Jamin Raskin has referred to as “America’s Signature Exclusion: How Democracy Is Made Safe for the Two-Party System”<sup>302</sup> can be halted, as the United States Supreme Court would not continue to judge state laws on petitioning for ballot access by its current nebulous standard. Additionally, another critic of the trend of United States Supreme Court decisions in this area of the law, access to the ballot, is Professor Richard L. Hasen of Loyola School of Law.<sup>303</sup> He has addressed what he labels as “Protecting the Core of Political Equality”<sup>304</sup> in his book entitled *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore*.<sup>305</sup> He sums up his chapter on the subject named above in these carefully chosen words:

In sum, cases such as *Jenness*, *Munro*, and *Timmons*, may have been wrongly decided. I say “may have been” rather than “were” because we do not have enough evidence of (1) whether the interests put forward in the case to trump the equality right are adequately supported by the evidence; and (2) if so, how the Court should have engaged in the careful balancing of the rights. Without a doubt, there is good cause for concern that these cases were wrongly decided and have had negative effects on the political equality rights of third parties and independent candidates.<sup>306</sup>

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300. *Id.*

301. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1106 (2d ed. 1988).

302. *See* RASKIN, *supra* note 166, at 91–116.

303. *See* RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003).

304. *Id.* at 73.

305. *Id.* at 73–100.

306. *Id.* at 99 (footnote omitted).

Here, the author cites to Richard Winger's seminal article, *The Supreme Court and The Burial of Ballot Access: A Critical Review of Jenness v. Fortson*.<sup>307</sup> It is clear to me that the aforementioned line of authority would imperil any effort by Congress to enact a national freedom of access to the ballot law. This conclusion is reached based upon the strictures against interfering with state legislatures and circumscribing their power in appointing electors.<sup>308</sup> Additionally, the doctrine interposed to limit congressional authority under Section 5 of the Fourteenth Amendment also plays an integral part.<sup>309</sup> In *City of Boerne v. Flores*,<sup>310</sup> the Court threw down the gauntlet to Congress with respect to what would be regarded as "appropriate legislation," by allowing Congress to enforce the substantive guarantees of the Fourteenth Amendment.<sup>311</sup> In deciding that case, the Court first relied on its own previous interpretations of First Amendment rights and struck down a congressional enactment that would have gone beyond the Court's previous interpretation of those rights.<sup>312</sup> The Court ruled that Congress could not enlarge its powers under the Due Process and Equal Protection Clauses of the Constitution under the guise of implementing the guarantees of the Fourteenth Amendment.<sup>313</sup> It would not only exceed Congress's authority, but it would also infringe upon the prerogatives of the states.<sup>314</sup>

Clearly, the road that any constitutional amendment must travel is both rocky and steep. However, as was suggested in the work by Alexander Keyssar, previously cited, *The Right to Vote: The Contested History of Democracy in the United States*, so eloquently stated:

[t]he history of the right to vote is a record of the slow and fitful progress of the project, progress that was hard won and often subject to reverses. The gains so far reached need to be protected, while the vision of a more democratic society can continue to inspire our hopes and our actions.<sup>315</sup>

It is only too clear, I believe, that a congressional statute seeking to establish federal standards for the conduct of elections and the affirmative right

307. Winger I, *supra* note 203.

308. U.S. CONST. art. II, § 1, cl. 2. This section was interpreted to mean plenary in nature. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).

309. U.S. CONST. amend. XIV, § 5.

310. 521 U.S. 507 (1997).

311. *Id.* at 519, 536.

312. *Id.* at 518-27.

313. *Id.* at 534.

314. *Id.*

315. KEYSSAR, *supra* note 154, at 324.



to vote would be challenged under the doctrine of *City of Boerne v. Flores* as exceeding the authority of Congress under Section 5 of the Fourteenth Amendment.<sup>316</sup> Indeed the present Court, with its dedication to the principles laid down in *McPherson* and heavy reliance on the per curiam opinion in *Bush II*, would undoubtedly resort to a “one-two punch” if an effort was made to proceed by statute, instead of a constitutional amendment.<sup>317</sup>

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316. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

317. *See McPherson*, 146 U.S. at 35; *Bush v. Gore*, 531 U.S. 98, 100 (2000).

## APPENDIX: BALLOT ACCESS LAW OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA

**Alabama:** Candidates may obtain access to the general election ballot for the offices of President or Vice President of the United States through either political party nomination or petition.<sup>318</sup> Political parties that receive 20% of the vote at the last general election qualify to have statewide ballot access.<sup>319</sup> Nomination by petition requires signatures equal or exceeding 3% of electors who cast ballots for the office of Governor in the last general election.<sup>320</sup>

**Alaska:** To have a candidate's name on the general election ballot, the national committees of political parties which are recognized political parties in Alaska select their Presidential and Vice Presidential candidates in a manner prescribed by their party bylaws.<sup>321</sup> Any candidate not associated with one of the aforementioned parties shall be established as a limited political party and must gather signatures in the amount of at least 1% of the number of voters who cast ballots for the office of President in the preceding presidential election.<sup>322</sup>

**Arizona:** Candidates from recognized political parties within Arizona may place their candidates on the primary election ballot.<sup>323</sup> However, any qualified elector who is not a registered member of a recognized political party may be nominated through the means of a nomination petition.<sup>324</sup> A new political party that wishes to be recognized on the primary and general election ballots must submit a petition with the number of signatures of qualified electors totaling no less than 1 1/3 % of the total votes cast for governor or presidential electors at the last preceding general election.<sup>325</sup>

**Arkansas:** In order to have a political party's Presidential and Vice Presidential candidates printed on the ballot, the party must nominate the candidates via the primary election.<sup>326</sup> New political parties are able to nominate by convention if the presidential election is the first general election after

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318. ALA. CODE § 17-19-2(a) (1995).

319. ALA. CODE § 17-16-2 (1995).

320. ALA. CODE § 17-8-2.1(a)(1) (Supp. 2004).

321. ALASKA STAT. § 15.30.020 (Michie 2004).

322. ALASKA STAT. § 15.30.025(a) (Michie 2004).

323. ARIZ. REV. STAT. § 16-301 (1996).

324. ARIZ. REV. STAT. § 16-341(A) (2004).

325. ARIZ. REV. STAT. § 16-801 (2004).

326. ARK. CODE ANN. § 7-8-302(5)(A) (Michie Supp. 2003).

certification as a party by the Secretary of State.<sup>327</sup> Political groups who have failed to obtain 3% of the total votes cast at an election for the office of Governor or nominees for presidential elector wishing to have their nominee placed on the general election ballot may file a petition with the Secretary of State containing a minimum of 1000 signatures of qualified electors of the state.<sup>328</sup>

**California:** If a minor political party wishes to become “qualified,” thereby giving them access to the primary ballot, they are required to gather signatures equaling at least 1% of the entire vote of the state at the last preceding gubernatorial election.<sup>329</sup> A party may also become qualified if the party gathers a number of signatures on a nomination petition equal to or greater than 10% of the entire vote of the state at the last preceding gubernatorial election.<sup>330</sup>

**Colorado:** Any political party may nominate presidential electors by convention.<sup>331</sup> Any candidate not wishing to affiliate with one of the major political parties may gain access to the general election ballot, other than by primary or convention, by either paying a filing fee of \$500 or by filing a nominating petition with at least 5000 signatures of eligible electors.<sup>332</sup>

**Connecticut:** Nominations by minor parties may be made in accordance with the party rules.<sup>333</sup> A party wishing to nominate by petition must have the petition signed by a number of qualified electors in the state equal to the lesser of 1% of the votes cast in the preceding general election or 7500.<sup>334</sup>

**Delaware:** A political party may be listed on the general election ballot only when, twenty one days prior to the date of the primary election, the party has registered a number of voters equal to at least 5/100 of 1% of the total number of voters registered in Delaware as of December 31 of the immediately preceding year.<sup>335</sup> A primary election shall be held for all political parties unless they opt to nominate their candidates otherwise.<sup>336</sup> The nominations

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327. *Id.*

328. See ARK. CODE ANN. §§ 7-7-205, 7-8-302(5)(B) (Michie Supp. 2003).

329. CAL. ELEC. CODE § 5100(b) (West Supp. 2005).

330. CAL. ELEC. CODE § 5100(c) (West 2003).

331. COLO. REV. STAT. § 1-4-302(1) (2004).

332. COLO. REV. STAT. §§ 1-4-303(1), 1-4-802(1)(c)(I) (2004).

333. CONN. GEN. STAT. § 9-451 (West 2002).

334. CONN. GEN. STAT. § 9-453(d)(1)-(2) (West 2002).

335. DEL. CODE ANN. tit. 15, § 3001 (1999).

336. DEL. CODE ANN. tit. 15, § 3181 (1999).

of the candidates for electors of President and Vice President are to be certified to the State Election Commissioner by the presiding officer and secretary of the state convention or committee of each political party eligible to place candidates on the ballot.<sup>337</sup> No candidate may appear on Delaware's general election ballot as an unaffiliated candidate unless they have not been affiliated with any political party for at least three months prior to the filing of a sworn declaration stating such with the State Election Commissioner.<sup>338</sup> Unaffiliated candidates must also have filed a nominating petition signed by at least 1% of the total number of registered voters in the state.<sup>339</sup>

**Florida:** A minor political party that is affiliated with a national political party holding a national convention to nominate candidates for President and Vice President can have the names of its candidates for President and Vice President printed on the general election ballot by filing a certificate with the Department of State that names the candidates and lists the required number of persons to serve as electors.<sup>340</sup> A minor political party that is not affiliated with a national party holding a national convention to nominate candidates for President and Vice President can have the names of its candidates for President and Vice President printed on the general election ballot if a petition is signed by 1% of the registered electors of Florida.<sup>341</sup>

**Georgia:** The two ways in which candidates may qualify for an election are through a nomination in a primary conducted by a political party or by filing a nomination petition as an independent candidate or as a nominee of a political body.<sup>342</sup> Nominations of candidates for public office, other than local office, can be made by nomination petitions signed by electors.<sup>343</sup> A nomination petition for a candidate seeking office must be signed by those registered and eligible to vote in the election in which the candidate is seeking to be elected, and those signing must total at least 1% of the total number of registered voters eligible to vote in the last election for the office in which the candidate is running.<sup>344</sup>

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337. DEL. CODE ANN. tit. 15, § 3301(a) (1999).

338. DEL. CODE ANN. tit. 15, § 3002 (1999).

339. *Id.*

340. FLA. STAT. § 103.021(4)(a) (2004).

341. FLA. STAT. § 103.021(4)(b) (2004).

342. GA. CODE ANN. § 21-2-130 (2003).

343. GA. CODE ANN. § 21-2-170(a) (2003).

344. GA. CODE ANN. § 21-2-170(b) (2003).

**Hawaii:** Candidates of political parties which have been qualified to place candidates on the primary and general election ballots must have the appropriate official from their party file a sworn application with the chief election officer which states, among other things, that the candidates are the duly chosen candidates of both the state and national party.<sup>345</sup> For candidates of non-qualified parties or groups, a petition must be filed with the chief election officer that contains the signatures of currently registered voters equaling at least 1% of the votes cast in Hawaii during the last presidential election.<sup>346</sup>

**Idaho:** A political party nominee for President can be printed on Idaho ballots only if the Secretary of State, in his or her sole discretion, determined that the nominee's candidacy is generally advocated or recognized in national news media throughout the United States, or if a petition for nomination is filed with the Secretary of State by members of a political party to which the candidate belongs.<sup>347</sup> The petition must contain an amount of signatures from qualified electors which equals at least 1% of the number of votes cast in the state for presidential electors at the previous general election in which a President of the United States was elected.<sup>348</sup>

**Illinois:** A presidential candidate may have their name printed on the primary ballot of their political party by filing a petition in the State's Board of Elections office which is signed by not less than 3000 or more than 5000 primary electors who are members of the candidate's political party.<sup>349</sup> Nomination of independent candidates and candidates of newly formed political parties for offices filled by voters of the state may be made by nomination papers signed by 1% of the number of voters who voted in the immediately preceding statewide general election, or 25,000 qualified voters of the state, whichever is less.<sup>350</sup>

**Indiana:** A candidate not wishing to affiliate with a major political party and who wishes to become a candidate of a minor party not qualified to nominate candidates in a primary election or by political party convention, and who wishes to be a candidate for the office of President or Vice President at the general election, must file a written consent to become a candi-

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345. HAW. REV. STAT. § 11-113(c)(1)(C) (1993).

346. HAW. REV. STAT. § 11-113(c)(2)(B) (1993).

347. IDAHO CODE § 34-732(1)-(2) (Michie 2001).

348. IDAHO CODE § 34-732(3)(a) (Michie 2001).

349. 10 ILL. COMP. STAT. 5/7-11 (2003).

350. 10 ILL. COMP. STAT. 5/10-2, 10-3 (2003).

date and a petition of nomination with the Election Division.<sup>351</sup> In order to be placed on the general election ballot, a minor party candidate must obtain signatures of voters equal to 2% of the total votes cast for Secretary of State in the election district the candidate seeks to represent.<sup>352</sup>

**Iowa:** Nominations for candidates for President and Vice President may be made by nomination petitions signed by at least 1500 eligible electors living in at least ten counties in the state.<sup>353</sup> Any convention or caucus of eligible electors representing a political organization which is not a political party may nominate one candidate for each office being voted on during the general election.<sup>354</sup> However, in order for a political organization to have a valid nomination for a state-wide elective office, there must be at least 250 eligible electors and at least one eligible elector from each of the twenty five counties in attendance at the convention or caucus where the nomination is made.<sup>355</sup>

**Kansas:** In order for a political party to become recognized, the party shall file a petition with the signatures of at least 2% of the total vote cast for all candidates for the office of Governor in the last preceding general election.<sup>356</sup> Party nominations for public office candidates can be made only by a delegate, mass convention, primary election, or caucus of qualified voters belonging to one political party with a national or state organization.<sup>357</sup> Party nominations for presidential electors can be made only by a delegate, mass convention, or caucus of qualified electors belonging to a political party with a national or state organization.<sup>358</sup> Nominations other than party nominations must all be independent nominations.<sup>359</sup> Independent nominations for each candidate for any office elected by voters from the entire state can be made by nomination petitions signed by at least 5000 qualified voters.<sup>360</sup>

**Kentucky:** Any political organization not constituting a political party whose candidate received 2% of the vote of the state at the last preceding election for presidential electors may nominate, by a convention or primary election corresponding to the party's constitution and bylaws, candidates for

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351. IND. CODE §§ 3-8-6-12, 3-8-6-14 (2002).

352. IND. CODE § 3-8-6-3 (2002).

353. IOWA CODE § 45.1(1) (1999).

354. IOWA CODE § 44.1 (1999).

355. *Id.*

356. KAN. STAT. ANN. § 25-302a (Supp. 2003).

357. KAN. STAT. ANN. § 25-301 (2000).

358. *Id.*

359. KAN. STAT. ANN. § 25-303(b) (Supp. 2003).

360. *Id.*

offices to be voted for during any regular election.<sup>361</sup> A candidate may be nominated by a petition of electors qualified to vote for the candidate for any office to be voted for during a regular election.<sup>362</sup> “A petition of nomination for a state officer, or any officer for whom all the electors of the state are entitled to vote,” must contain the names of at least 5000 petitioners.<sup>363</sup>

**Louisiana:** Candidates for presidential nominee must qualify in accordance with the procedures established by their political party.<sup>364</sup> Before qualifying as a candidate of a political party for presidential nominee, a person must pay a qualifying fee of \$750 and additional fees imposed by state central committees or obtain a nominating petition with handwritten signatures of at least 1000 registered voters affiliated with the political party from each of the state’s congressional districts.<sup>365</sup>

**Maine:** A political party qualifies to participate in a primary election if the party was listed on the ballot of either of the two preceding general elections and if: 1) the party held municipal caucuses in at least one municipality in each county during the election year in which the designation was listed on the ballot, an interim election year, and the year of the primary election; 2) the political party held a state convention during the election year in which the designation was listed on the ballot and any interim election year; and 3) the party’s candidate for Governor or President received at least 5% of the total vote cast in the state for Governor or President in either of the two preceding general elections.<sup>366</sup> A party which qualifies to participate in a primary election must hold a state convention in the same election year in order to have its candidates’ party name printed on the general election ballot of that year.<sup>367</sup> A party must submit nomination petitions for a slate of candidates for the office of presidential elector that are signed by at least 4000 and no more than 6000 voters.<sup>368</sup>

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361. KY. REV. STAT. ANN. § 118.325(1) (Michie 2004); *see also* KY. REV. STAT. ANN. § 118.015 (defining “political party”).

362. KY. REV. STAT. ANN. § 118.315(1) (Michie 2004).

363. KY. REV. STAT. ANN. § 118.315(2) (Michie 2004).

364. LA. REV. STAT. ANN. § 18:1280.22 (West Supp. 2005).

365. *Id.*; *see also* LA. REV. STAT. ANN. § 18:464(c) (West Supp. 2005) (imposing additional fees by state central committees).

366. ME. REV. STAT. ANN. tit. 21-A, § 301(1) (West Supp. 2004); *see also* ME. REV. STAT. ANN. tit. 21-A, § 311 (West 1993 & Supp. 2004) (prescribing roles for municipal caucuses).

367. ME. REV. STAT. ANN. tit. 21-A, § 301(2) (West 1993); *see also* ME. REV. STAT. ANN. tit. 21-A, § 321 (West 1993) (prescribing rules for state conventions).

368. ME. REV. STAT. ANN. tit. 21-A, § 354(5) (West 1993).

**Maryland:** Nominations for public offices that are filled by elections governed by Maryland's election laws must be made by party primary for candidates of major political parties, or by petition for candidates of political parties that do not conduct nominations by primary, and candidates not affiliated with any political party.<sup>369</sup> A candidate seeking nomination by petition may not have their name placed on the general election ballot unless they file appropriate board petitions signed by at least 1% of the total number of registered voters who are eligible to vote for the office for which the nomination by petition is sought, and at least 250 registered voters who are eligible to vote for the office.<sup>370</sup>

**Massachusetts:** A political party may have its candidates appear on the primary election ballot by: 1) filing nomination papers signed by at least 2500 voters; 2) the state secretary placing candidates on the ballot who have been generally advocated or recognized in the national news media; and 3) the chairperson of each party's state committee designating on written lists the names of its candidates.<sup>371</sup> Nominations of candidates to the general election ballot for presidential electors may be made by nomination papers with no less than 10,000 voters' signatures.<sup>372</sup>

**Michigan:** A political party must make nominations by means of caucuses or conventions if the party's principal candidate "received less than 5% of the total vote cast for all candidates for the office of [S]ecretary of [S]tate in the last preceding state election, either in the state or in any political subdivision affected."<sup>373</sup> Therefore, the party is not allowed to make its nominations using the direct primary method.<sup>374</sup> Political parties may use a qualifying petition to nominate candidates for statewide elective offices as long as the petition is signed by a number of qualified and registered electors equal to at least 1% of the total number of votes cast for all candidates for Governor at the last election in which a Governor was elected.<sup>375</sup> A qualifying petition for the office of President must be signed by at least 100 registered electors in each of at least one half of the congressional districts of the state.<sup>376</sup>

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369. MD. CODE ANN., ELEC. LAW § 5-701 (2003).

370. MD. CODE ANN., ELEC. LAW § 5-703(e)(1) (2003).

371. MASS. GEN. LAWS ch. 53, § 70E (1991).

372. MASS. GEN. LAWS ch. 53, § 6 (2004).

373. MICH. COMP. LAWS § 168.532 (1989).

374. *Id.*

375. MICH. COMP. LAWS § 168.590b(2) (2004).

376. MICH. COMP. LAWS § 168.590b(4) (2004).



**Minnesota:** Candidates for any partisan office who do not seek the nomination of a major political party must be nominated by means of a nominating petition.<sup>377</sup> The number of signatures required on a nominating petition must equal 1% of the total number of individuals voting in Minnesota at the last preceding state general election or 2000 signatures, whichever is less.<sup>378</sup>

**Mississippi:** A petition requesting that a candidate for an independent or special election be placed on the ballot for an office elected by the state at large must be signed by at least 1000 qualified electors.<sup>379</sup> When a political party nominates by national convention, the Secretary of State must certify to the circuit clerks of the several counties the names of all the candidates for President and Vice President of the United States.<sup>380</sup>

**Missouri:** Unless otherwise provided for, all candidates for elective office must be nominated at a primary election in accordance with Missouri's election laws.<sup>381</sup> A group creating a new political party throughout the state must file a petition with the Secretary of State, which contains the signatures of at least 10,000 registered voters of the state.<sup>382</sup>

**Montana:** An individual who wishes to run for President or Vice President as an independent or minor party candidate must file a petition for nomination with the signatures of 5000 electors or signatures of electors equaling 5% or more of the total votes cast for the successful candidate for governor at the last general election, whichever is less.<sup>383</sup>

**Nebraska:** Partisan candidates running for President and Vice President of the United States must be certified by the national nominating convention in order to be listed on the general election ballot.<sup>384</sup> Nonpartisan candidates or candidates from newly established political parties running for President and Vice President may obtain a position on the general election ballot by filing a petition signed by at least 2500 registered voters.<sup>385</sup>

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377. MINN. STAT. § 204B.03 (1992).

378. MINN. STAT. § 204B.08 (2005).

379. MISS. CODE ANN. § 23-15-359(1)(a) (1972 & Supp. 2001).

380. MISS. CODE ANN. § 23-15-785(1) (1972 & Supp. 2001).

381. MO. REV. STAT. § 115.339 (2003).

382. MO. REV. STAT. §§ 115.315(2), (5) (2003).

383. MONT. CODE ANN. § 13-10-504 (2003).

384. NEB. REV. STAT. § 32-620 (1998).

385. *Id.*

**Nevada:** Candidates of a minor political party running for a partisan office must not appear on the ballot for a primary election.<sup>386</sup> Instead, those candidates' names will be placed on the general election ballot if: 1) at the last preceding general election, the minor party received for any of its candidates for partisan office at least 1% of the total number of votes cast for the offices of Representative in Congress; 2) on January 1 preceding a primary election, the minor party has been designated as the political party on the voters' registration applications of at least 1% of the total number of registered voters in Nevada; or 3) no later than the second Friday in August preceding the general election, the minor party files a petition with the Secretary of State which is signed by registered voters equaling at least 1% of the total number of votes cast at the last preceding general election for the offices of Representative in Congress.<sup>387</sup>

**New Hampshire:** A candidate may have their name placed on the ballot for the state general election by submitting the requisite number of nomination papers instead of obtaining a nomination through party primary.<sup>388</sup> The nomination papers must have the names of 3000 registered voters, 1500 of which must be from each United States congressional district in the state, in order to nominate a candidate for President or Vice President of the United States.<sup>389</sup> Each candidate for President who seeks nomination by nomination papers must pay to the Secretary of State a single fee of \$250 for both the presidential and vice-presidential candidates at the time of filing declarations of intent.<sup>390</sup>

**New Jersey:** Candidates, except electors of President and Vice President of the United States nominated by political parties at state conventions, must be nominated directly by petition or at the primary for the general election.<sup>391</sup> A party may nominate by petition its candidate for President and Vice President by filing a petition with at least 800 voters' signatures in the aggregate for each candidate nominated.<sup>392</sup>

**New Mexico:** If the rules of a minor political party require nomination by political convention or by a method other than a political convention, the

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386. NEV. REV. STAT. 293.1715(1) (2003).

387. NEV. REV. STAT. 293.1715(2) (2003).

388. N.H. REV. STAT. ANN. § 655:40-b (1996 & Supp. 2003).

389. N.H. REV. STAT. ANN. § 655:42(I) (1996 & Supp. 2003).

390. N.H. REV. STAT. ANN. § 655:19-a (1996).

391. N.J. STAT. ANN. § 19:13-1 (West 1999).

392. N.J. STAT. ANN. § 19:13-5 (West 1999).

names certified to the Secretary of State must be filed and accompanied by a petition containing a list of signatures and addresses of voters totaling at least 1% of the total number of votes cast at the last preceding general election for the President of the United States.<sup>393</sup>

**New York:** Petitions for any office to be filled by the voters of the entire State of New York must be signed by at least 15,000 or 5%, whichever is less, of the then active enrolled voters of the party in the state.<sup>394</sup> Not less than 100 or 5%, whichever is less, of those enrolled voters must reside in each of one half of the congressional districts of the state.<sup>395</sup> If there are more candidates designated for nomination by a party for an office to be filled by the voters of the entire state than there are vacancies, the nomination(s) of the party must be made at the primary election at which other candidates for public office are nominated and the candidate(s) receiving the most votes will become the nominees of the party.<sup>396</sup>

**North Carolina:** Any person seeking endorsement by the national political party for the office of President can file petitions with the State Board of Elections that are signed by 10,000 persons who are registered and qualified voters in North Carolina and are affiliated with the same political party as the candidate for whom the petitions are filed.<sup>397</sup>

**North Dakota:** The names of all candidates of each political party or principle or no-party designation, who are shown to have been nominated for the several offices in accordance with the certificates of nomination filed in the Secretary of State's office, must be placed by the secretary of state on the official ballot to be voted for at the next general election.<sup>398</sup> Candidates can be nominated by petition; however, each certificate of nomination by petition must meet the specifications set forth in section 16.1-11-16.<sup>399</sup> If the nomination is for the office of President of the United States, there must be at least 4000 signatures on the petition.<sup>400</sup>

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393. N.M. STAT. ANN. §§ 1-8-2(A)-(B), 1-8-3(C) (Michie 1978 & Supp. 2001).

394. N.Y. ELEC. LAW § 6-136(1) (McKinney 1998).

395. *Id.*

396. N.Y. ELECTION LAW § 6-160(1) (McKinney 1998).

397. N.C. GEN. STAT. § 163-213.5 (2003).

398. N.D. CENT. CODE § 16.1-13-04 (2004).

399. N.D. CENT. CODE §§ 16.1-11-16, 16.1-12-02 (2004).

400. N.D. CENT. CODE § 16.1-12-02 (2004).

**Ohio:** One way in which candidates for the offices of President and Vice President may have their names printed on the presidential ballot is by having certified to the Secretary of State for placement on the presidential ballot by authorized officials of an intermediate or minor political party that has held a state or national convention for the purpose of choosing those candidates or simply certified those candidates in accordance with the procedures authorized by its party rules.<sup>401</sup> If the candidacy is to be voted on by electors throughout the entire state, the nominating petition must be signed by no less than 5000 qualified electors, yet contain no more than 15,000 signatures.<sup>402</sup>

**Oklahoma:** The names of candidates for the office of Presidential Elector pledged to the nominee of a political party not recognized under the laws of Oklahoma for President of the United States can only be printed on the ballot by submitting petitions signed by a number of registered voters supporting the candidacy of the nominee equal to at least 3% of the total votes cast in the last general election for President and by filing those petitions with the Secretary of the State Election Board.<sup>403</sup>

**Oregon:** A minor political party can nominate candidates for public office only if it follows procedures set forth in its organizational documents.<sup>404</sup> A nomination certificate made by individual electors must contain signatures of electors in the electoral district equal to at least 1% of the total votes cast in the electoral district for which the nomination is intended to be made, for all candidates for presidential electors at the last general election.<sup>405</sup>

**Pennsylvania:** Where the nomination is for any office to be filled by the electors of the state at large, the number of qualified electors signing the nomination papers must be at least equal to 2% of the largest entire vote cast for any elected candidate in the state at large at the last preceding election for which state-wide candidates were voted.<sup>406</sup>

**Rhode Island:** Every even year, a state convention for each political party must be held no later than October 14 of that year.<sup>407</sup> In presidential election years, these conventions must select the party nominees for presidential elec-

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401. OHIO REV. CODE ANN. § 3505.10(B)(3) (Anderson Supp. 2003).

402. OHIO REV. CODE ANN. § 3513.257(A) (Anderson Supp. 2003).

403. OKLA. STAT. tit. 26, § 10-101.2 (1997).

404. OR. REV. STAT. § 248.009(1) (2003).

405. OR. REV. STAT. § 249.740(1) (2003).

406. PA. STAT. ANN. tit. 25, § 2911(b) (West 1994).

407. R.I. GEN. LAWS § 17-12-13 (2003).

tors and their names will be placed on the ballot for the upcoming election.<sup>408</sup> At the state convention, parties are to adopt a platform and handle any other business that may properly come before the convention.<sup>409</sup> The nomination papers of a candidate for the party nomination or an independent candidate for presidential elector must be signed, in the aggregate, by no less than 1000 voters.<sup>410</sup>

**South Carolina:** Nominations for candidates for the offices to be voted on in a general or special election may be conducted by political party primary, political party convention, or petition.<sup>411</sup> A candidate's nominating petition must contain the signatures of at least 5% of the qualified registered electors of the geographical area of the office for which the candidate runs, as long as no petition candidate is required to furnish the signatures of more than 10,000 qualified registered electors for any office.<sup>412</sup>

**South Dakota:** Any candidate for President or Vice President who is not nominated by a primary election may be nominated by filing a certificate of nomination with the Secretary of State.<sup>413</sup> The number of signatures required must equal to at least 1% of the total combined vote cast for Governor at the last certified gubernatorial election.<sup>414</sup>

**Tennessee:** Political parties may nominate their candidates for any office, other than the offices of Governor, United States Senator, members of the United States House of Representatives, and members of the Tennessee General Assembly, by primary election or any method authorized under the rules of the party.<sup>415</sup> Persons nominated other than by the primary election method for offices filled by voters of more than one county or for statewide offices must be immediately certified to the coordinator of elections by the chair of the nominating body.<sup>416</sup> The coordinator of elections must then certify those nominees to the county election commissions in each county in which the nominees are candidates by the qualifying deadlines.<sup>417</sup> Nominating petitions must be signed by the candidate and twenty-five or more registered

408. *Id.*

409. *Id.*

410. R.I. GEN. LAWS § 17-14-7 (2003).

411. S.C. CODE ANN. § 7-11-10 (Law. Co-op. 1976 & Supp. 2004).

412. S.C. CODE ANN. § 7-11-70 (Law. Co-op. 1976 & Supp. 2004).

413. S.D. CODIFIED LAWS § 12-7-7 (Michie 2004).

414. *Id.*

415. TENN. CODE ANN. § 2-13-203(a) (2003).

416. TENN. CODE ANN. § 2-13-203(c) (2003).

417. *Id.*

voters who are eligible to vote for the office for which the candidate is running.<sup>418</sup> Nominating petitions for independent presidential candidates must be signed by the candidate and twenty-five or more registered voters for each elector.<sup>419</sup> Each independent candidate must note the full number of electors allocated to the state.<sup>420</sup>

**Texas:** In order to have the names of its nominees placed on the general election ballot, a political party required to make nominations by convention must file with the Secretary of State lists of precinct convention participants which must equal at least 1% of the total number of votes received by all candidates for governor in the most recent general election.<sup>421</sup> To be entitled to have its nominees for President and Vice President placed on the general election ballot, a political party must hold a presidential primary election in Texas if: 1) in the presidential election year, the party is required by Texas law to nominate its candidates for state and county offices by primary election; 2) a presidential primary election is authorized under the national party rules; and 3) before January 1 of the presidential election year, the national party has deemed that it will hold a national presidential nominating convention during the presidential election year.<sup>422</sup> To qualify for a position on the general election ballot, an independent candidate running for President must apply for a position on the ballot and submit a petition with signatures equaling at least 1% of the total vote received in the state by all candidates for President in the most recent presidential general election.<sup>423</sup>

**Utah:** Registered political parties and candidates for President who are affiliated with a registered political party are able to participate in the Western States Presidential Primary.<sup>424</sup> When the nomination is for an office to be filled by the voters of the entire state, the candidate must submit the nomination petition to the county clerk for certification when the petition has been completed by at least 1000 registered voters living in the state.<sup>425</sup>

**Vermont:** A minor political party may have its candidate's name printed on the general election ballot for any office for which major political parties

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418. TENN. CODE ANN. § 2-5-101(4)(b)(1) (2003 & Supp. 2004).

419. *Id.*

420. *Id.*

421. TEX. ELEC. CODE ANN. § 181.005(a) (Vernon 2003).

422. TEX. ELEC. CODE ANN. § 191.001 (Vernon 2003).

423. TEX. ELEC. CODE ANN. §§ 192.032(a), (d) (Vernon 2003).

424. UTAH CODE ANN. § 20A-9-802(2) (1953 & Supp. 2003).

425. UTAH CODE ANN. § 20A-9-502(2)(a)(i) (1953 & Supp. 2003).

nominate candidates by primary or for the offices of President and Vice President of the United States.<sup>426</sup> To constitute a valid nomination for Presidential and Vice Presidential offices, a statement of nomination must contain the signatures of at least 1000 voters qualified to vote in an election.<sup>427</sup>

**Virginia:** A group of qualified voters, not constituting a political party under Virginia election law, may have the names of electors selected by the group printed on the official ballot for the election of electors for President and Vice President by filing a petition with the State Board that is signed by at least 10,000 qualified voters and at least 400 qualified voters from each congressional district.<sup>428</sup>

**Washington:** A minor political party may hold more than one convention but may not nominate more than one candidate for any one partisan public office or position.<sup>429</sup> For the purpose of nominating candidates for the offices of President and Vice President, a minor political party or independent candidate holding multiple conventions may add together the number of signatures supporting the candidate from each convention in order to obtain the number required by section 29A.20.141.<sup>430</sup> In order to nominate candidates for the offices of President and Vice President, a nominating convention must obtain and submit to the filing officer the signatures of at least 1000 registered voters from the state.<sup>431</sup>

**West Virginia:** Any political party which polled less than 10% of the total vote cast only for Governor at the immediately preceding general election may nominate candidates by party conventions, as long as the nominations are made and the certificates filed within the time and manner proscribed by section 3-5-23 or section 3-5-24.<sup>432</sup> Groups of citizens not nominating by primary or convention may nominate by petition, and the number of signatures must equal at least 2% of the entire vote cast at the last preceding general election for any statewide, congressional, or presidential candidate, but in no event may the number be less than twenty-five.<sup>433</sup>

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426. VT. STAT. ANN. tit. 17, § 2381(a)(2) (2002).

427. VT. STAT. ANN. tit. 17, § 2402(b)(1) (2002).

428. VA. CODE ANN. § 24.2-543 (Michie 1950 & Supp. 2003); *see also* VA. CODE ANN. § 24.2-101 (Michie 1950 & Supp. 2003) (defining "political party").

429. WASH. REV. CODE § 29A.20.121(4) (Supp. 2005).

430. *Id.*

431. WASH. REV. CODE ANN. § 29A.20.141(2) (Supp. 2005).

432. W. VA. CODE § 3-5-22 (2002); *see also* W. VA. CODE ANN. §§ 3-5-23, 24 (2002).

433. W. VA. CODE § 3-5-23(c) (2002).

**Wisconsin:** In the case of candidates for the offices of President and Vice President, the nomination papers must contain both candidates' names, the office for which each candidate is nominated, each candidate's residence and post-office address, and the party or principles they represent in five words or less.<sup>434</sup> The number of required signatures on nomination papers for independent candidates running for statewide offices must equal at least 2000 but no more than 4000 electors' signatures.<sup>435</sup> For independent presidential electors intending to vote for the same candidates for President and Vice President, the number of required signatures must equal at least 2000 but no more than 4000 electors' signatures.<sup>436</sup>

**Wyoming:** The only method in which minor political parties may nominate candidates to be placed on the general election ballot is by party convention.<sup>437</sup> A minor political party may never nominate by the primary election process.<sup>438</sup> A petition must be signed by those registered electors in the legislative district or other political subdivision in which the petitioner will be a candidate who are able to vote for the candidate.<sup>439</sup> The petition must include signatures equaling at least 2% of the total number of votes cast for representative in Congress in the last general election for the political subdivision or legislative district for which the petition is filed.<sup>440</sup>

**District of Columbia:** A political party which does not qualify under subsection (d) of this section, 1-1001.08, may have its candidates for President and Vice President printed on the general election ballot, so long as a petition nominating the candidates for presidential electors is signed by at least 1% of registered qualified electors of the District of Columbia as of July 1 of the year in which the election is to be and is presented to the Board on or before the third Tuesday in August preceding the day of the presidential election.<sup>441</sup>

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434. WIS. STAT. § 8.20(2)(c) (2004).

435. WIS. STAT. §§ 8.15(6), 8.20(4) (2004).

436. WIS. STAT. § 8.20(4) (2004).

437. WYO. STAT. ANN. § 22-4-303 (Michie 2003).

438. *Id.*

439. WYO. STAT. ANN. § 22-5-304 (Michie 2003).

440. *Id.*

441. D.C. CODE ANN. § 1-1001.08(f) (2001); *see also* D.C. CODE ANN. § 1-1001.08(d) (2001).