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MAINE ELECTION LAW: DO MAINE'S PETITION SIGNATURE REQUIREMENTS DEPRIVE THIRD-PARTY CANDIDATES OF EQUAL PROTECTION AND FREEDOM OF ASSOCIATION RIGHTS?

INTRODUCTION

Ballot access laws in the United States have drawn scrutiny in recent years.¹ All states in this country draft their own laws regarding ballot access for state and federal office.² Allowing states to write their own ballot rules has become a contentious issue with some believing that discriminatory laws are being used to keep third party candidates from having a legitimate chance at gaining public office.³

The United States maintains a two party, winner-take-all system that serves as a barrier to third party representation.⁴ The election system ensures that representation will be almost exclusively limited to either Republicans or Democrats, with independent candidates garnering seats only occasionally.⁵ Additionally, the laws of some states impose additional obstacles, making elected office a nearly impossible accomplishment for third-party candidates.⁶

One feature of this system is that many people will never vote for a third-party candidate for fear that doing so would take votes from a more viable candidate.⁷ Indeed, claims persist that the 2000 Presidential election would have had a different outcome without third-party candidate Ralph Nader

1. See, e.g., RangeVoting.org, *Ridiculous USA Ballot Access Laws Designed to Discriminate Against Third Parties*, <http://rangevoting.org/BallAccess.html> (last visited Feb. 15, 2010).

2. *Id.*

3. *Id.*; see also Richard Winger, *Ballot Access Developments in 1994: Forward Steps Outweigh Slips*, <http://www.ballot-access.org/winger/fsos94.html> (last visited Feb. 15, 2010) [hereinafter *Ballot Access Developments*].

4. See Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1618 (1999).

5. Richard Winger, *The Importance of Ballot Access*, LONG TERM VIEW (2004) available at <http://www.ballot-access.org/winger/iba/html> [hereinafter *Importance of Ballot Access*]; see RangeVoting.org, *supra* note 1; United States Senate, Senators of the 111th Congress, http://www.senate.gov/general/contact_information/senators_cfm.cfm (listing each United States Senator and his or her political party).

6. *Importance of Ballot Access*, *supra* note 5; RangeVoting.org, *supra* note 1.

7. René Steinhausen, *Giving New Jersey's Minor Political Parties a Chance: Permitting Alternative Voting Systems in Local Elections*, NEW JERSEY LAWYER, THE MAGAZINE, Aug. 2008, at 15-16.

siphoning votes from Democratic candidate Vice President Al Gore.⁸ Be that as it may, the possibility that third-party candidates may detract votes from a major party candidate does not justify imposing separate election requirements.

This Note deals with the issue of restrictive ballot access laws imposed on third party candidates in the State of Maine.⁹ The Maine Supreme Court has dealt with third-party candidates in national elections improperly.¹⁰ Maine has an interest in protecting the viability of its election process, yet cannot justify its requirements that eliminate a candidate's right to ballot access.¹¹ Further, this interest cannot be deemed compelling enough to disenfranchise people who otherwise would have voted for an independent candidate.¹²

This Note argues that Maine's ballot access requirements for third-party candidates violate the candidate's First and Fourteenth Amendment rights. Part I of this Note will discuss ballot access laws in general. The Note then addresses a state's power in managing its own elections, as well as the issue of third-party candidates generally. The common understanding is that the Constitution allows latitude to states in holding elections without outside interference, though certain limitations may still be imposed on states. Part II will then discuss the decision of the Maine Supreme Judicial Court in *Knutson v. Department of Secretary of State & Herbert Hoffman*. Part III will examine the history behind contentious ballot access laws in light of the argument that such laws occasionally violate both the First and Fourteenth Amendments. Part IV will discuss the author's analysis of the constitutionality of Maine ballot access laws in light of the U.S. Supreme Court's past jurisprudence. The Note concludes that Maine's rigid requirements for candidates seeking a position on a federal election ballot violate a third-party candidate's rights under the First and Fourteenth Amendments of the Constitution and that the decision of the *Hoffman* Court was incorrect.

8. See Carmen Mosley-Sims, Note, *Ballot Access Restrictions in Representative Government: An Ode to the Wasted Vote*, 26 U. ARK. LITTLE ROCK L. REV. 703, 703 (2004).

9. ME. REV. STAT. ANN. tit. 21-A, § 354 (2007); Virginia L. Woodell, *Ogunquit's Herb Hoffman: Candidate for U.S.*, THE YORK INDEPENDENT, March 7, 2008, http://www.york-independent.net/news/2008/2008_03_07/080307_FTR_EC_og_senate.cfm.

10. See Emergency Application for a Stay of Enforcement of the Judgment of the Supreme Judicial Court of Maine Pending the Filing and Disposition of a Petition for a Writ of Certiorari at 3, *Herbert J. Hoffman v. John Knutson*, 954 A.2d 1054, 1063 (Me. 2008) (arguing that Hoffman demonstrated "fair prospect (indeed a likelihood) . . . [of] prevail[ing] on the merits [of his claim]") [hereinafter *Knutson I*].

11. See, e.g., ME. REV. STAT. ANN. tit. 21-A, § 354 (2007) (enumerating requirements for nomination petition); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (recognizing that some state regulation is necessary to an orderly election process); *Knutson v. Dep't of Sec'y of State*, 2008 ME 129, ¶¶ 10–11 (same) [hereinafter *Knutson II*].

12. *Anderson*, 460 U.S. at 783, 806; Emergency Application for a Stay, *supra* note 10, at 18–21.

I. BALLOT ACCESS LAWS AND THIRD PARTY CANDIDATES

A. *Ballot Access Laws*

Ballot access laws are written and enforced by individual states, and as such, the laws of the various states differ with respect to independent party candidates' ballot access.¹³ While some states make ballot access for major-party candidates quite easy, this is rarely the case for independent-party candidates.¹⁴ Some have argued that of the world's democracies, the United States has the most unfair laws with respect to ballot access.¹⁵

Ballot laws affect third party congressional candidates differently than they do third-party Presidential candidates.¹⁶ While third-party Presidential candidates occasionally gain ballot spots, it is rare that independent candidates gain ballot spots in congressional races.¹⁷ As a result of stringent American ballot laws, it has been suggested that the United States is violating the Copenhagen Meeting Document, requiring countries to: "Respect the right of individuals to establish, in full freedom, their own political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on the basis of equal treatment before the law and the authorities."¹⁸

Attempts are being made to bridge the inequities existing between major and minor-party candidates.¹⁹ For example, Georgia has introduced legislation that would reduce signature requirements for independent candidates for the

13. Richard Winger, *Ballot Access for Minor Candidates*, BALLOT ACCESS NEWS (Ballot Access News, San Francisco, Cal.), 1992, available at <http://www.hks.harvard.edu/case/3pt/winger.html>.

14. *Id.*; see also RangeVoting.org, *supra* note 1.

15. See, e.g., RangeVoting.org, *supra* note 1. For example, in Florida, "The ballot access laws for third parties and independent candidates have been very severe since 1931. Since then only two third-party candidates for the U.S. House of Representatives and only one for the U.S. Senate have managed to get on the ballot." *Id.* (emphasis removed). In addition, historic laws of various states also show the general direction that ballot access laws have taken over the years. *Id.* In Minnesota in 1961, petitions had to be finished in two weeks. *Id.* In West Virginia, independent party candidates were required by law to inform people signing their petitions that if they signed the petition of a third-party candidate, the voter would not be permitted to vote in a primary. *Id.* To make matters worse, in West Virginia, the third-party candidate themselves would never actually know whether or not they had enough signatures to be placed on a ballot, because if anyone who signed the candidate's petition was later found to have voted in a primary election, the voter's signature would be invalidated. *Id.*

16. *Importance of Ballot Access*, *supra* note 5.

17. *Id.* As a result of this discrepancy between third-party Presidential and congressional candidates, and because independent Presidential candidates more frequently get ballot access, Winger says that the public may not believe that there is a problem for ballot access for independent candidates. *Id.*

18. *Id.* (internal quotation marks omitted).

19. *Id.*

House of Representatives to 5000. The law previously required 14,000.²⁰ Similar attempts have been made in Illinois, where proposed legislation would reduce the number of third-party signatures required by 11,000.²¹

B. *Third-Party Candidates*

A common perception in the United States is that third-party candidates are often unelectable. Perhaps to ameliorate concerns that their ballot laws impose systemic burdens on third-party candidates, a number of states have taken a closer look at their ballot access laws for third party candidates, with some improvements being made since the early 1990s.²² Since the 1930s, third parties in the United States have rarely received enough votes for viable candidacies, despite the fact that many voters now identify themselves as unaffiliated with either of the major political parties.²³ The plurality voting system has certainly played a role in the lack of viable third-party candidates since winning a percentage of the vote does not guarantee legislative representation.²⁴ State ballot laws also reduce the viability of third party candidates by imposing additional restrictions or requirements.²⁵ While it is possible for third party candidates to run successful campaigns, certain states have acknowledged the restrictive nature of their laws and have sought to amend them accordingly.²⁶

Concerns about Maine ballot access laws arose in the past year. During the 2008 United States Senate race in Maine, Herbert Hoffman ran as an independent candidate for the Senate seat held by Senator Susan Collins.²⁷ Despite the fact that Hoffman believed that he had obtained the required number of petition signatures for his candidacy, Hoffman was left off the ballot due to a court ruling that a number of petition signatures were improperly obtained.²⁸

II. THE *HOFFMAN* CASE

Ballot-access laws in Maine for third-party political candidates are designed to protect the integrity of the political process and to ensure that

20. *Id.*

21. *Importance of Ballot Access*, *supra* note 5.

22. *Ballot Access Developments*, *supra* note 3.

23. Steinhagen, *supra* note 7, at 15–16.

24. *See id.* at 15 (noting that people prefer to vote for a candidate whom they perceive as electable).

25. Pildes, *supra* note 4, at 1617.

26. *Id.* at 1617–18 (noting that Jesse Ventura, who won the gubernatorial race in Minnesota, was able to win election as a third-party candidate); *see also* Winger, *supra* note 3 (describing changes to state election laws in 1994).

27. Woodell, *supra* note 9.

28. *Knutson I*, 954 A.2d 1054, 1057–62 (2008).

candidates go through proper measures to obtain ballot access.²⁹ The specific language of Maine Revised Statutes tit. 21-A, § 354(7)(A) states:

The circulator of a nomination petition shall verify by oath or affirmation before a notary public or other person authorized by law to administer oaths or affirmations that all of the signatures to the petition were made in the circulator's presence and that to the best of the circulator's knowledge and belief each signature is the signature of the person whose name it purports to be; each signature authorized under section 153-A was made by the authorized signer in the presence and at the direction of the voter; and each person is a resident of the electoral division named in the petition.³⁰

The plain language of the statute indicates that to validly obtain a petition signature from a voter, the candidate must be in the voter's immediate presence while the petition is signed.³¹

Herbert Hoffman ran for the United States Senate in Maine during the 2008 election.³² The law in Maine required Hoffman, as a non-party candidate, to collect signatures on petitions that were to be presented to the Secretary of State.³³ Hoffman did not obtain all of the signatures alone; about forty people assisted.³⁴ By law, Hoffman—as well as those who were collecting signatures for him—needed to swear oaths as circulators.³⁵ Hoffman's daughter, in addition to other circulators, also helped with obtaining signatures, specifically on election petitions that Hoffman had taken personal care to distribute, with Hoffman failing to observe some of the signatures, as was required by law.³⁶ Despite the fact that Hoffman met the requirements regarding the number of signatures presented to the Secretary of State, the issue litigated in *Hoffman* was whether those signatures were lawfully and properly obtained.³⁷

The main issue concerning the signatures was whether Maine law required that the petitions be signed within the personal view of the petition circulator.³⁸ The Secretary of State determined that the law required the circulator of the petition to attest that the circulator was both physically present and aware of

29. See ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A) (2007); *Knutson I*, 954 A.2d at 1061–62 (holding that absence of fraudulent intent is not a defense to failure to comply with ballot access law).

30. ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A) (2007).

31. See *id.* (imposing duty of knowledge on petition circulator).

32. *Knutson I*, 954 A.2d at 1056–57.

33. *Id.* at 1057; see also ME. REV. STAT. ANN. tit. 21-A, § 354(5)(C) (2007).

34. *Knutson I*, 954 A.2d at 1057.

35. *Id.*

36. *Id.* at 1057–58.

37. *Id.* at 1057 (noting that over 4000 signatures were obtained by Hoffman for presentation to the Secretary).

38. *Id.*; see also ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A).

the signing when the third-party's petition was signed.³⁹ The circulator had to have sufficient physical proximity to witness the actual signing of the petition.⁴⁰

John Knutson, the Chairman of the Maine Democratic Party, contended that because Hoffman did not witness three of the signatures, he violated Maine election law.⁴¹ The issue becomes one of technicalities, because the allegation from Knutson was not that Hoffman was not near the petition when it was signed by a number of voters, but that because Hoffman did not see the signing of the petition, those signatures should be void.⁴² Knutson argued that under Maine law, not only should the three improperly obtained signatures be rendered void, but the entire petition on which the signatures appeared should also have been voided.⁴³

Both the trial court and the Secretary of State disagreed.⁴⁴ The Secretary of State determined that of the 4112 signatures presented by Hoffman, seventy-four ought to be invalidated, leaving Hoffman with enough signatures for a place on the ballot.⁴⁵ Knutson challenged the decision of the Secretary of State, appealing to the Superior Court.⁴⁶ The decision was appealed, as the court noted:

pursuant to M.R. Civ. P. 80B and 21-A M.R.S. § 356(2)(D) (2007), urging the court to conclude that Hoffman's oath was not in compliance with section 354(7)(A) because Hoffman could not accurately aver that the three signatures had been provided in his presence as required by 21-A M.R.S. § 354(7)(A), and, therefore, that each of the three petitions must be declared void.⁴⁷

If the petitions were voided in their entirety, Hoffman would not have enough signatures for a place on the ballot.⁴⁸

Hoffman and the Secretary of State set forth three arguments on appeal.⁴⁹ The first argument by the Secretary of State alleged that to invalidate all of the signatures on the questioned petitions would be unconstitutional.⁵⁰ If all of the

39. *Knutson I*, 954 A.2d at 1059.

40. *Id.*

41. *See id.* at 1056 (presenting the questions raised by Knutson's claims); Emergency Application for a Stay, *supra* note 10, at 2.

42. Emergency Application for a Stay, *supra* note 10, at 2.

43. *Id.*

44. *Id.*

45. *Knutson I*, 954 A.2d at 1057 (noting that with the invalidation of seventy-four signatures, Hoffman would still have been left with 4038 signatures, which would still be enough for a place on the ballot).

46. *Id.* at 1057–58.

47. *Id.*; *see also* ME. REV. STAT. ANN. tit. 21-A § 356(2)(D) (2007).

48. *Knutson I*, 954 A.2d at 1058.

49. *Id.* at 1061–62.

50. *Id.* at 1061.

petition signatures were void, the Secretary claimed, the freedom of association rights of the remaining voters would be infringed.⁵¹

A second challenge, raised both by Hoffman and the Secretary of State, was that the only requirement of § 354(7) is that there be an *honest* oath, and though an oath may not have been accurately taken, as long as it was honestly taken, the oath should be upheld.⁵² The third claim by the Secretary of State was that petitions should only be invalidated in their entirety where the “defect” in the oath of the circulator was so great that it undermined the process of signature gathering.⁵³

The Maine Supreme Judicial Court addressed the three arguments raised by Hoffman and the Secretary of State.⁵⁴ For the first argument, the court reasoned that because Maine jurisprudence allowed for the invalidation of the petitions in their entirety, the result was acceptable.⁵⁵ The court came to this conclusion without any consideration of the constitutional issue that Hoffman raised.⁵⁶ With regard to the second issue, the court rejected Hoffman’s rationale that as long as an honest oath was taken, it should be upheld.⁵⁷ The court reasoned that the language of the statute itself did not allow for this type of interpretation and sought to impose the literal interpretation of the statute to safeguard the validity of the nomination process.⁵⁸ Thus, while Hoffman argued that fraud should be required for the complete invalidation of a petition, and while the court acknowledged that fraud is a means by which a petition will be invalidated, fraud is not a precondition to invalidation.⁵⁹ With regard to Hoffman’s final claim, the court was unmoved by the argument that the defect in the oath had to undermine the process of signature gathering; instead, the court retreated to the plain language of the statute, noting that the legislature could have opted to interpret the statute in a manner consistent with the desired interpretation of the Secretary.⁶⁰ The court reasoned that although the Secretary’s policy rationale was not irrational, the legislature never intended to use such reasoning, and as such, the plain language of the law should be used.⁶¹

When the Maine Supreme Judicial Court began its analysis, it first noted that the standard of review it would use when acting within its “appellate

51. *Id.*

52. See ME. REV. STAT. ANN. tit. 21 § 354(7) (2007); *Knutson I*, 954 A.2d at 1061.

53. *Knutson I*, 954 A.2d at 1062.

54. *Id.* at 1061–62.

55. *Id.* at 1061.

56. *Id.*

57. *Id.* at 1061–62.

58. *Knutson I*, 954 A.2d at 1061.

59. *Id.* at 1061–62.

60. *Id.* at 1062.

61. *Id.*

capacity” was “for findings not supported by the evidence, errors of law, or abuse of discretion.”⁶² The court looked to determine the intent of the legislature at the time that the legislation was written, looking first to the “plain language of the statute.”⁶³ Should the language of the statute be deemed ambiguous, and the decision rendered by the Secretary of State reasonable, the court would defer to the interpretation of the Secretary of State.⁶⁴

The issue in this case was whether the Secretary’s interpretation of what constitutes being in the presence of a circulator of a petition was a reasonable interpretation of the statute.⁶⁵ One of the turning points in the discussion regarded whether general “proximity” to the circulated petitions sufficed to be considered “in the circulator’s presence,” or whether a more direct physical presence was necessary.⁶⁶ The Secretary of State recognized that if the circulator of the petition could not actually witness the signing of the petition, then the requirement that the signature be given in the circulator’s presence could not be met.⁶⁷ Thus, the court recognized that the Secretary correctly determined that being in the circulator’s presence meant being “under direct observation of that circulator.”⁶⁸

The next issue was what remedy ought to be employed with regard to the improperly obtained signatures.⁶⁹ The court reasoned that the oath Hoffman had taken alleging compliance with petitioning requirements was improper because some signatures had been obtained while Hoffman was not present.⁷⁰ While the court noted that three specific signatures had been collected improperly, Hoffman later admitted that:

(1) there were times when he used the assistance of another person to collect the signatures for which he was the circulator; (2) his daughter used a separate clipboard to collect signatures when he was the circulator; (3) he thought that being within ten or fifteen feet of his non-circulator ‘assistant’ was acceptable; (4) another individual gathered a few signatures while he, Hoffman, was engaged in dealing with other responsibilities; and (5) he ‘might have’ left his daughter alone for a brief period to collect signatures while he was otherwise engaged.⁷¹

62. *Id.* at 1058 (citing *Palesky v. Sec’y of State*, 711 A.2d 129, 132 (Me. 1998)).

63. *Knutson I*, 954 A.2d at 1058.

64. *Id.*

65. *Id.* at 1058.

66. *Id.*

67. *Id.* at 1059.

68. *Knutson I*, 954 A.2d at 1059.

69. *Id.* at 1059–60.

70. *Id.*

71. *Id.* at 1059.

As a result, the court concluded that it was not possible for Hoffman to have taken a legitimate oath.⁷² Because only three such instances of improper petition signing could be identified, however, the Secretary of State believed that only those three signatures could be invalidated.⁷³ In prior hearings regarding petition circulation, the Secretary of State believed that the only time that a petition in its entirety ought to be thrown out is when the problem in the petition “undercuts the veracity of the oath as applied to the entire petition.”⁷⁴

But the Maine Supreme Judicial Court also looked at the plain language of the law regarding nominating petitions.⁷⁵ Maine law provides that “[a] nomination petition which does not meet the requirements of this section is void. If a voter or circulator fails to comply with this section in signing or printing the voter’s name and address, that voter’s name may not be counted, but the petition is otherwise valid.”⁷⁶ Further, because the court reasoned that no requirement of fraud was necessary for the invalidation of a petition, it noted that the application of the law was straightforward.⁷⁷ As such, the court held that unless an exception to Me. Rev. Stat. Ann. tit. 21-A § 354(9) applied, the petitions had to be invalidated in their entirety.⁷⁸ Neither of the parties to the action argued that the exceptions to § 354(9) applied under the circumstances.⁷⁹

During subsequent challenges by Hoffman in a Motion for Stay at the Maine Supreme Court, Hoffman argued that those voters who had legitimately signed his petition should not be deprived of their voting rights.⁸⁰ The Maine Supreme Judicial Court concluded that prior holdings of the U.S. Supreme Court show that states have flexibility in ensuring the integrity of their elections.⁸¹ The Maine Supreme Judicial Court also reasoned that the petition

72. *Id.* at 1059–60.

73. *Knutson I*, 954 A.2d at 1060.

74. *Id.* at 1060 (citation omitted).

75. *Id.*

76. ME. REV. STAT. ANN. tit. 21-A § 354(9) (2007); *see also Knutson I*, 954 A.2d at 1060 (explaining that the language of the statute seems straightforward, and that the test is almost black and white in nature; if the requirements of the statute are met, the petition may be used, but if the requirements are not met, the petition must be voided).

77. *Knutson I*, 954 A.2d at 1060.

78. *Id.* at 1060–61.

79. *Id.* at 1061.

80. *Knutson v. Dep’t of Sec’y of State & Herbert Hoffman*, Docket No. Ken-08-375, 2008 WL 3855025, *2 (Me. 2008) [hereinafter *Knutson III*]. Hoffman argued that “his mistake should not affect the voters who signed his petition; specifically, he questions whether the application of section 354(7)(A) and (9), as first explicitly interpreted by ‘any court or agency on July 28, [2008],’ violates the First Amendment rights of Maine voters.” *Id.* (emphasis removed).

81. *Id.* (citing *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 191 (1999)).

requirements applied to all candidates, and that they did not affect any candidates differently than others—a point which is refutable.⁸²

In an Emergency Application for Stay to the U.S. Supreme Court, Hoffman analyzed the decision of the Maine Supreme Judicial Court in determining whether the decision of the court had been in error, and whether an emergency stay should be granted.⁸³ Hoffman argued that the decision of the Maine Supreme Court subjected both voters in the State of Maine, as well as Hoffman himself, to “irreparable injury.”⁸⁴ Hoffman reasoned that as a result of the Maine Supreme Judicial Court’s decision ridding Hoffman of approximately ninety signatures on three petitions, Maine voters would no longer have the opportunity to vote for the candidate of their choice in the general election in November 2008.⁸⁵ Hoffman noted that the work of the Maine Supreme Court, as well as the evidentiary support in its decision, lacked sufficient merit in addressing the issue of First Amendment rights.⁸⁶ Specifically, Hoffman’s rationale was that the Secretary of State (the individual responsible for the enforcement of election law) believed that the invalidation of the petitions in their entirety would impose improper burdens on First Amendment rights,⁸⁷ and that the decision of the Maine Supreme Court runs counter to recent U.S. Supreme Court decisions and other federal circuit decisions that have applied strict scrutiny under circumstances where election rights have been improperly burdened.⁸⁸

While Maine law required that the circulator of a petition have the petition signed in his or her presence, the definition of “presence” is not actually included within the statute itself, subjecting the law to interpretation.⁸⁹ Individuals who signed Hoffman’s petition while outside of his presence acknowledged that they were outside of Hoffman’s presence at the time they signed the petitions.⁹⁰ The issue, however, is ambiguous, as the Maine Superior Court believed that the Secretary of State came to a reasonable conclusion when he determined that the requirements of Me. Rev. Stat. Ann. tit. 21-A § 354(9) showed that a petition did not need to be invalidated in its entirety simply because all signatures on the petition were improper.⁹¹ Of

82. *Id.* at *2–3.

83. Emergency Application for a Stay, *supra* note 10, at 2.

84. *Id.*

85. *Id.* at 2–3.

86. *Id.* at 3 (“It decided the weighty First Amendment issues at stake with a few conclusory sentences, two case citations, and a declaration that it need ‘not address the constitutional concern further.’”). *See id.*

87. *Id.*

88. Emergency Application for a Stay, *supra* note 10, at 3.

89. *Id.* at 6–9; *see* ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A) (2007); *see also* ME. REV. STAT. ANN. tit. 21-A, § 354(9) (2007).

90. Emergency Application for a Stay, *supra* note 10, at 7–8.

91. *Id.* at 9–10; *see also* ME. REV. STAT. ANN. tit. 21-A, § 354(9) (2007).

course, the Maine Supreme Judicial Court did not agree with the decision, and believed that the petitions needed to be completely invalidated if an invalid signature was present.⁹² The Secretary of State asserted to the Maine Supreme Judicial Court that “[a] regulation that significantly burdens First Amendment rights must be justified by a compelling governmental interest and must be narrowly tailored to serve that interest.”⁹³ Further, the Secretary of State reasoned that if the interpretation of the Maine Supreme Court was upheld, there was a serious risk that voters, who had been qualified to sign the petition and had done so, would have their rights seriously infringed.⁹⁴ Specifically, the Secretary of State said:

To require voiding of all of the voters’ signatures on a petition form based on a later finding that the oath was factually incorrect (or based on a misinterpretation of law) with regard to only one signature on that form, would deprive the voters who signed the petition of their rights to associate with, and vote for, the candidate in question. In the absence of any evidence of fraud or misconduct on the part of the candidate or circulator, reading the statute this way *imposes a draconian remedy that is not narrowly tailored to serving an important governmental interest.*⁹⁵

The argument posed by the Secretary of State was that no sufficient government interest was being served, though the rights of voters to have their votes counted was being infringed upon.⁹⁶

Hoffman next asserted that, based on the foregoing arguments, his First Amendment rights would be violated insofar as he would not be allowed to appear on the November 2008 election ballot as a candidate for the Senate.⁹⁷ He argued that merely being able to appear as a write-in candidate would not be sufficient to remedy the violation.⁹⁸ Further, the injury was immediate, and four years would pass before there was another Senate race in Maine.⁹⁹

With regard to voters, past decisions had addressed potential injury similar to that in the present case.¹⁰⁰ Quoting the Supreme Court in *Anderson v. Celebreeze*, Hoffman argued, “The right to vote is ‘heavily burdened’ if that vote may be cast only for major-party candidates at a time when other parties or other candidates are ‘clamoring for a place on the ballot.’”¹⁰¹ Hoffman

92. Emergency Application for a Stay, *supra* note 10, at 10–11.

93. *Id.* at 12.

94. *Id.*

95. *Id.*

96. *Id.* at 12–13.

97. Emergency Application for a Stay, *supra* note 10, at 14; *see also* *Fowler v. Adams*, 400 U.S. 1205, 1206 (1970).

98. Emergency Application for a Stay, *supra* note 10, at 14–15.

99. *Id.* at 15; *see also* *Campbell v. Bennett*, 212 F. Supp. 2d 1339, 1347 (M.D. Ala. 2002).

100. Emergency Application for a Stay, *supra* note 10, at 15.

101. *Id.* (quoting *Anderson v. Celebreeze*, 460 U.S. 780, 787 (1982)).

continued his analysis by making note of the fact that in New England, the chances of having an independent candidate elected to the position of United States Senator are good.¹⁰² Hoffman said that the only realistic way for an independent candidate to be elected in Maine would be to ensure that Hoffman's name was placed on the ballot.¹⁰³ Further, Hoffman rationalized the importance of the right to vote, noting that prior cases have held "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."¹⁰⁴ Any violation of First Amendment rights is unacceptable, and the injury in this case could not be remedied in any manner.¹⁰⁵ "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."¹⁰⁶

The Supreme Court has held that the process of getting signatures for a petition constitutes protected speech.¹⁰⁷ Specifically, the "Court has held that 'the solicitation of signatures for a petition involves protected speech since it 'involves both the expression of a desire for political change and a discussion of the merits of the proposed change.'"¹⁰⁸ The circulation of petitions for elections constitutes political speech because it is an interaction between people looking to formulate "political change."¹⁰⁹ As such, Hoffman concluded that Maine election law, especially in the manner in which it was applied in the *Hoffman* case, constitutes an improper burden on the voters of Maine, as well as third party candidates who are seeking a place on the ballot.¹¹⁰

III. HISTORY

A. *Early Developments in Ballot Access Initiatives*

At the end of the nineteenth century, ballot access laws were not designed to infringe on the rights of potential political candidates.¹¹¹ The general public did not believe that ballot laws were to act as a restrictive wall to a candidate

102. *Id.* at 15–16 (noting that recently, two Senators from New England states have been independents).

103. *Id.*

104. *Id.* at 16 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964)).

105. Emergency Application for a Stay, *supra* note 10, at 16.

106. *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

107. *Id.* at 16–17.

108. *Id.* at 17 (quoting *Meyer v. Grant*, 486 U.S. 414, 421–22 n.5 (1988)).

109. *Id.* (quoting *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999)).

110. Emergency Application for a Stay, *supra* note 10, at 15–18.

111. Bradley A. Smith, Note, *Judicial Protection of Ballot Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 173 (1991).

or his or her party.¹¹² During this era, two signatures on an election petition would have been enough for a potential candidate to have his name placed on a ballot.¹¹³ Today, American voters do not have the choices that prior generations did.¹¹⁴

During the First World War, the laws began to change regarding ballot access.¹¹⁵ During the 1940s, ballot laws continued to take aim at minor-party candidates in light of the Communist scare that was disquieting the American psyche.¹¹⁶ This, in turn, increased the number of signatures required on petitions for nominating third-party candidates.¹¹⁷

B. *How States Restrict Ballot Access*

In the past, states developed a number of measures to restrict minor-party candidates from access to ballots.¹¹⁸ One manner in which candidates have been restricted from ballots is through the use of petition requirements, where a certain number of signatures need to be collected by a potential candidate before his or her name will appear on the ballot.¹¹⁹ All states, with the exception of Mississippi, have at some time or another required some sort of signature collection.¹²⁰ The laws themselves impose requirements on third-party candidates that are not usually imposed on major-party candidates.¹²¹ Major parties often have perpetual places on ballots, which is something that minor-party candidates have not yet been granted.¹²² Only when a party obtains a certain percentage of the vote from a previous election will they be guaranteed a spot on subsequent ballots.¹²³ For example, in 1891, under Ohio law, this meant that independent candidates were required to have their petitions signed by a minimum of one percent of the vote cast for governor during the last gubernatorial election.¹²⁴ While obtaining the percentage is not a difficult task for major-party candidates, for a third-party candidate, this

112. *Id.* at 173 n.3.

113. *Id.*

114. Richard Winger, *What are Ballots For?*, LIBERTARIAN PARTY NEWS, 1988, <http://www.ballot-access.org/winger/wabf.html>.

115. Smith, *supra* note 111, at 173–74.

116. *Id.*

117. *Id.* at 174.

118. *Id.* at 174–75; Richard Winger, *Ballot Format: Must Candidates be Treated Equally?*, 45 CLEV. ST. L. REV. 87, 87, 100 (1997) [hereinafter *Ballot Format*].

119. Smith, *supra* note 111, at 175.

120. *Id.*; see also *Ballot Format*, *supra* note 118, at 88 (noting that Ohio has required petitions for third-party candidates since 1891, though at that time, only 500 signatures were required to get on the election ballot).

121. Smith, *supra* note 111, at 174–76.

122. *Id.* at 175.

123. *Id.*

124. *Ballot Format*, *supra* note 118, at 88.

requirement is not often met.¹²⁵ Though the issue of ballot access laws continues to be contentious, it has not merely developed within the past couple of years.¹²⁶

C. *Supreme Court Jurisprudence on Ballot Access Laws*

The United States Supreme Court has addressed the issue of ballot access laws on many occasions, leading to conclusions that often served to protect the interests of third-party candidates.¹²⁷ One of the foremost cases involving ballot access among third-party candidates was *Williams v. Rhodes*.¹²⁸ In *Williams*, the Supreme Court examined whether the Ohio election statutes made it too difficult for third-party candidates to obtain a place on a general election ballot.¹²⁹ The Socialist Party of Ohio challenged Ohio's laws as unconstitutional.¹³⁰ The Socialist party had been able to maintain a spot on Ohio's election ballots up until 1948, when the party acknowledged that it would not be able to file a petition with the required number of signatures.¹³¹

The panel that examined the case in 1948 noted that the Socialist Party would be allowed to have a write-in candidate on the ballot, though an actual place on the ballot would not be allocated to the party.¹³² By 1968, supporters of George Wallace had formed an independent political party in Ohio, and launched a campaign lasting six months so that the required number of signatures could be collected.¹³³ Eventually, their party was able to collect over 450,000 signatures for its petition, which exceeded the 433,100 required.¹³⁴ There was never an issue that the party failed to obtain the requisite number of signatures for appearance on the ballot.¹³⁵ Rather, the controversy surrounded the time allocated for filing.¹³⁶ The party challenged the validity of such early filing deadlines, alleging that such requirements

125. Smith, *supra* note 111, at 175.

126. *See id.* at 174–78.

127. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 784–86 (1983); *Williams v. Rhodes*, 393 U.S. 23, 34 (1968).

128. 393 U.S. 23 (1968) (examining Ohio election statutes to determine whether the provisions makes it excessively difficult for third-party candidates to obtain a place on a general election ballot).

129. *Id.* at 31.

130. *Id.* at 26.

131. *Id.* at 26–27; *see also* Smith, *supra* note 111, at 178 (discussing the Ohio American Independent Party, the other party in the *Williams* case).

132. *Williams*, 393 U.S. at 28.

133. Smith, *supra* note 111, at 178; *see also Williams*, 393 U.S. at 26–27 (“The Ohio American Independent Party was formed in January 1968 by Ohio partisans of former Governor George C. Wallace of Alabama.”).

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

135. *Id.* at 27.

136. *Id.*; *see also* Smith, *supra* note 111, at 178.

served as a detriment to Ohio voters, and denied independent Ohio voters of equal protection rights.¹³⁷

The Supreme Court noted that Ohio was unable to dictate any compelling reason for imposing such enormous burdens on minor parties with respect to a citizen's "right to vote and . . . to associate."¹³⁸ Ohio claimed that such stringent requirements on third parties promoted stability in the political system.¹³⁹ But the Court believed that what Ohio was doing was promoting complete control of the political system within the Democratic and Republican parties.¹⁴⁰ In addition, because third parties had to file at such an early date to obtain the necessary number of signatures to receive a place on the ballot, there were potential hindrances to a minor party's ability to form quickly enough to meet the requirements that had been established by the state.¹⁴¹ As a result, the Supreme Court held that Ohio's ballot access laws were unconstitutional due to their overly restrictive nature, and the Ohio American Independent Party was allowed to have a spot on the general election ballot.¹⁴²

1. *Jenness v. Fortson*

Three years later, the Court had the opportunity to revisit its holding in *Williams*, responding to a challenge to Georgia's ballot access laws.¹⁴³ The Court's first task was to determine what constituted a political party under Georgia law.¹⁴⁴ Georgia law provided that a political party was "any political organization whose candidate received 20% or more of the vote at the most recent gubernatorial or presidential election."¹⁴⁵ All other political groups were "political bod[ies]," meaning that certain requirements would be imposed on that group if it wanted to have a place on a subsequent election ballot.¹⁴⁶ For political bodies, candidates seeking a spot on a general election ballot for the office of president or governor would be forced to acquire votes from five percent of the voting population that was otherwise "eligible to vote in the last election for the filling of the office he is seeking"¹⁴⁷ Petitions could be

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

138. *Id.* at 31.

139. *Id.* at 31–32.

140. *Id.* at 32; see also Smith, *supra* note 111, at 179.

141. *Williams*, 393 U.S. at 33 (showing that by having such restrictive requirements, Ohio voters were deprived of a choice both regarding who they want to have in office, in addition to being denied the opportunity to have certain issues addressed).

142. Smith, *supra* note 111, at 180.

143. *Jenness v. Fortson*, 403 U.S. 431, 439–41 (1971).

144. *Id.* at 433.

145. *Id.* (noting a distinction between what constitutes a "political party" and what could be referred to as a "political body").

146. *Id.*

147. *Id.* (quoting GA. CODE ANN. § 34-1010(b)); see also Amber J. Juffer, Note, *Living in a Party World: Respecting the Role of Third Party and Independent Candidates in the Equal*

circulated for 180 days, and the timing standards were identical to those provisions for primary candidates associated with political parties.¹⁴⁸

The challengers' first argument with respect to the Georgia law was that a requirement that imposes an obligation on an independent candidate "to secure the signatures of a certain number of voters before his name may be printed on the ballot is to abridge the freedoms of speech and association guaranteed to that candidate and his supporters by the First and Fourteenth Amendments."¹⁴⁹ The second argument set forth by the challengers was that the nomination process for non-party candidates violated the Fourteenth Amendment of the United States Constitution insofar as there were different standards for the major-party candidates and the independent candidates.¹⁵⁰

The Supreme Court considered the case in light of its findings in *Williams v. Rhodes*.¹⁵¹ The Court noted that the statutory procedures present in *Williams* made it nearly impossible for minor political parties to receive a place on a general election ballot.¹⁵² The Court in *Williams* held that Ohio law imposed a large number of requirements on independent party candidates, forcing "extensive organization" that was not also required of major party candidates.¹⁵³ As such, Justice Douglas believed that Ohio had restricted its candidates to Democrats and Republicans.¹⁵⁴ The Court distinguished *Williams* from *Jenness*, noting that under Georgia law, those candidates who were unable to secure a place on the ballot could still launch a write-in campaign.¹⁵⁵ Unlike the Ohio law at issue in *Williams*, Georgia law did not contain confusing and complicated rules for new parties.¹⁵⁶ The Court's decision in *Jenness* ultimately stood on the ground that "Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo."¹⁵⁷

The problems that arose following *Jenness* included the Supreme Court's difficulty in using a single standard of review when examining issues of equal protection among independent political candidates.¹⁵⁸ The Court used multiple standards of review for equal protection, and would sometimes apply strict

Protection Analysis of Ballot Access Cases, 56 DRAKE L. REV. 217, 222–23 (2007) (noting that the petition "had to be signed by five percent of the total number of the previous election's eligible voters").

148. *Jenness*, 403 U.S. at 433–44.

149. *Id.* at 434.

150. *Id.*

151. *Jenness*, 403 U.S. at 434–37 (examining *Williams v. Rhodes*, 393 U.S. 23 (1968)).

152. *Id.* at 438.

153. *Id.* (quoting *Williams*, 393 U.S. at 27).

154. *Id.* at 436.

155. *Id.* at 438 (explaining that independent candidates were allowed to run a campaign, whereas under Ohio law write-in voting for independent candidates was not permitted).

156. *Jenness*, 403 U.S. at 438.

157. *Id.*; see also Juffer, *supra* note 147, at 222–23.

158. Juffer, *supra* note 147, at 222–24.

scrutiny, while other times it would apply intermediate scrutiny to evaluate whether a candidate had been denied equal protection rights.¹⁵⁹ When the Supreme Court finally decided *Anderson v. Celebrezze*, a more objective basis was established for determining whether a state's actions with regard to ballot access had violated the rights of an independent, non-party candidate.¹⁶⁰

2. Balancing Test of *Anderson*

The Supreme Court's analysis of *Anderson v. Celebrezze* established a balancing test to determine whether or not an individual's right to placement on an election ballot had been violated.¹⁶¹ John Anderson initially ran for the office of President as a Republican, but later opted to run as an independent instead, realizing that he would be unlikely to defeat Ronald Reagan in the Republican primary.¹⁶² Anderson announced his candidacy as an independent candidate for President on April 24, 1980, and shortly after, his political supporters began to gather the signatures necessary to place him on the ballot.¹⁶³ If Anderson filed the required number of signatures as well as the appropriate documents stating that he intended to run for President of the United States as a major party candidate, there would have been no problem getting a spot on the November ballot.¹⁶⁴ As an independent candidate, however, Anderson was denied what would have otherwise been a certain spot in the general election.¹⁶⁵ By the time Anderson officially announced his

159. *Id.* at 225–26 (“In *Norman v. Reed*, the Court added that a severe burden on an independent or third-party candidate triggers strict scrutiny. However, the Court has been reluctant to find any burden that is severe enough to justify using strict scrutiny analysis.”).

160. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

161. Donald E. Daybell, *Guarding the Treehouse: Are States “Qualified” to Restrict Ballot Access in Federal Elections?*, 80 B.U. L. REV. 289, 309–10 (2000) (summarizing *Anderson*).

162. *See also Anderson*, 460 U.S. at 782, 788–89 (challenging an Ohio law under which major political party candidates and minor political-party candidates were distinguished when considering the timing of when they were forced to turn in petitions for a position in the general election); Daybell, *supra* note 161, at 308–09.

163. *Anderson*, 460 U.S. at 782 (noting that Anderson was seeking to have his name placed on the general election ballot for every state, in addition to having his name placed on the ballot in Washington, D.C.).

164. *Id.* at 782–83 (“These documents would have entitled Anderson to a place on the ballot if they had been filed before [the deadline]. Respondent refused to accept the petition solely because it had not been filed within the time required by § 3513.25.7 of the Ohio Revised Code.”).

165. *Id.* at 782–83. Section 3513.25.7 of the Ohio Revised Code read:

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

candidacy as an independent, the deadline for filing under Ohio law for independent political candidates had already passed.¹⁶⁶

The District Court determined that there were two grounds for finding the Ohio law improper.¹⁶⁷ First, the early filing deadline for independent party candidates was deemed unconstitutional because “[i]t imposed an impermissible burden on the First Amendment rights of Anderson and his Ohio supporters and diluted the potential value of votes that might be cast for him in other States.”¹⁶⁸ Further, the District Court also noted that the Fourteenth Amendment was violated insofar as Ohio’s election laws mandated action on the part of non-party candidates, while not enforcing similar provisions against members seeking office who belonged to a political party.¹⁶⁹ In addition, the District Court rejected the State of Ohio’s justifications for the law—administrative convenience and “political stability”—because those interests were of “diminished importance in a Presidential campaign,” and because those concerns were adequately addressed by another Ohio statute.¹⁷⁰

The Court of Appeals reversed, holding that the early filing deadline for non-party candidates was important, allowing voters the opportunity to analyze their independent candidate choices.¹⁷¹ But Anderson challenged not only the filing provisions under Ohio law, he also wanted his name placed on the ballot in states like Maryland and Maine, where earlier filing deadlines were also used.¹⁷²

The Supreme Court began its analysis by noting that it was concerned that heavy restrictions on voters’ rights would have an impact on the number of candidates that a prospective voter could choose from.¹⁷³ The Court found that a number of freedoms were potentially infringed by the requirements of Ohio’s early filing date.¹⁷⁴ The first was the general belief of voters that they will

Id. at 783 n.1.

166. *Id.* at 782.

167. *Id.* at 783.

168. *Anderson*, 460 U.S. at 783; *see also* Daybell, *supra* note 161, at 309–11 (summarizing *Anderson*).

169. *Anderson*, 460 U.S. at 783.

170. *Id.* at 783–84.

171. *Id.* at 784–86.

172. *Anderson*, 460 U.S. at 786 (citing *Anderson v. Quinn*, 634 F.2d 616 (1st Cir. 1980); *Anderson v. Morris*, 636 F.2d 55 (4th Cir. 1980), each of which upheld district court decisions ordering Anderson’s name placed on the ballot); *see generally* *Anderson v. Morris*, 500 F.Supp. 1095 (Md. 1980) (noting that the order of the Maryland court was also for affirmance); *see generally* *Anderson v. Quinn*, 495 F.Supp. 730 (Me. 1980) (explaining that the order of affirmance was issued).

173. *Anderson*, 460 U.S. at 786 (explaining that the Court must look at how the voter is impacted by the laws).

174. *Id.* at 786–88.

have a candidate choice representing their own thoughts or values on issues.¹⁷⁵ The Court reasoned that if only major-party candidates made the ballot while third-party candidates were excluded, the rights of the voter would be burdened.¹⁷⁶ Second, denying certain candidates a place on the ballot also has implications for the freedom of association rights of voters, and the Court noted that elections play an important role in allowing people with similar ideals and values to come together in support of a candidate for political office.¹⁷⁷

Generally, states were allowed to enact certain restrictions on political candidates when those restrictions were essential to the operation of elections, or where there were other reasons for imposing those restrictions.¹⁷⁸ The *Anderson* Court stated that “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 process.”¹⁷⁹ In determining whether a state’s actions were legitimate with regard to the restrictions imposed on non-party candidates, the Court established a balancing test.¹⁸⁰ First, the Court needed to “consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.”¹⁸¹ Second, the Court needed to “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.”¹⁸² Finally, the Court had to “consider the extent to which those interests make it necessary to burden the plaintiff’s rights.”¹⁸³ Once the Court considered those three factors, it could determine whether or not the challenged provision violated the constitution.¹⁸⁴

The Supreme Court noted that Ohio election law served as a serious detriment to the political process in Ohio because it required that independent

175. *See id.* at 787; *see also* *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

176. *Anderson*, 460 U.S. at 787–88 (quoting *Lubin*, 415 U.S. at 716) (“The right to vote is ‘heavily burdened’ if that vote may be cast only for major-party candidates at a time when other parties or other candidates are ‘clamoring for a place on the ballot.’”).

177. *See Anderson*, 460 U.S. at 787–88.

178. *Id.* at 788; *Storer v. Brown*, 415 U.S. 724, 730 (1974).

179. *Anderson*, 460 U.S. at 788 (quoting *Storer*, 415 U.S. at 730).

180. *Id.* at 789; *see also* *Daybell*, *supra* note 161, at 310 (summarizing *Anderson*).

181. *Anderson*, 460 U.S. at 789; *see also* *Daybell*, *supra* note 161, at 310 (summarizing *Anderson*).

182. *Anderson*, 460 U.S. at 789; *see also* Ryan Nazzarine, *A Faceless Name in the Crowd: Freedom of Association, Equal Protection, and Discriminatory Ballot Access Laws*, 72 U. CIN. L. REV. 309, 319 (2003) (characterizing the *Anderson* Court’s holding as concluding “that the burden placed upon voters unquestionably outweighed the State’s interests”).

183. *Anderson*, 460 U.S. at 789.

184. *Id.*

candidates file their petition forms at too early a date.¹⁸⁵ While major parties had a long period of time and added flexibility in choosing their presidential nominees, independent candidates were compelled to decide whether they were going to run by March.¹⁸⁶ The Ohio law was also deemed to hinder an independent party candidate's ability to collect the required number of signatures.¹⁸⁷ The Court ultimately held that the early deadline for filing imposed a heavy burden on Ohio's "independent-minded voters."¹⁸⁸ The major question for the Court in determining the constitutionality of such provisions was whether "the availability of political opportunity" was "unfairly or unnecessarily burden[ed]" by the restrictions imposed by the state.¹⁸⁹ The Court held that where a burden falls upon an independent candidate in a manner that is not equal to that of a major party candidate, association rights protected by the First Amendment are infringed.¹⁹⁰

3. The Battle over the Constitutionality of Term Constraints on Ballot Laws

Term constraints have been looked at as an improper ballot restriction as well.¹⁹¹ When a candidate for office has been disqualified, the Court has sought to determine whether the decision can be upheld using the rationale that the candidate was unable to obtain a certain level of public support prior to the election.¹⁹² For instance, Arkansas law prohibited individuals who had already served three terms in the United States House of Representatives from running for that position again.¹⁹³ When the law was challenged in *U.S. Term Limits, Inc. v. Thornton*, the Court identified two issues: first, "whether the Constitution forbids States to add to or alter the qualifications specifically

185. *Id.* at 790–91 (noting that independent candidates were forced to have their petitions filed in March; major party candidates often had not even been nominated by that time, nor would they be for a significant period).

186. *Id.* at 791 n.11 ("Indeed, because it takes time for an independent Presidential candidate and his supporters to gather the requisite 5,000 signatures on nominating petitions, the independent must decide to run well in advance of the March filing deadline. In contrast, Ohio law provides for the automatic inclusion of the Presidential nominees of the major parties on the general election ballot, OHIO REV. CODE ANN. § 3505.10 (Supp. 1982), even if they have never filed a statement of candidacy in Ohio. Their identities are not established until after the major-party conventions in August.").

187. *Anderson*, 460 U.S. at 792 (stating that when the date for filing is imposed on such an early date as it pertains to independent candidates, it makes things more difficult for that candidate in terms of organizing his or her campaign; such difficulties includes finding volunteers, and finding people who are willing to contribute to an independent campaign).

188. *Id.*

189. *Id.* at 793 (quoting *Clements v. Fashing*, 457 U.S. 957, 964 (1982)).

190. *Anderson*, 460 U.S. at 793–94.

191. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995).

192. *Daybell*, *supra* note 161, at 320.

193. *Thornton*, 514 U.S. at 784.

enumerated in the Constitution;”¹⁹⁴ second, “if the Constitution does so forbid, whether the fact that Amendment 73 [the Arkansas law at issue] is formulated as a ballot access restriction rather than as an outright disqualification is of constitutional significance.”¹⁹⁵ The Court noted that, despite the fact that candidates still had a right to pursue their candidacy through a write-in campaign, the State of Arkansas had acted in a manner contrary to the United States Constitution.¹⁹⁶

One issue in *Thornton* was that of public support, and whether a state’s decision to disqualify a candidate for office can stand if the candidate fails to show that he or she has obtained a certain level of public support prior to an election.¹⁹⁷ The Court noted that the petitioners in an earlier case, *Storer*, unsuccessfully argued that the signature requirements placed on independent candidates imposed an additional qualification on running for office, violating the Qualifications Clause.¹⁹⁸ The *Thornton* Court distinguished *Storer* with little explanation, stating only that *Storer* did not apply on the present facts.¹⁹⁹

4. First Amendment Protections

The First Amendment plays an integral role in protecting the political process, and the Supreme Court has acknowledged the fundamental importance of the amendment’s protection in the political sphere.²⁰⁰ Specifically, the First Amendment plays a fundamental role with regard to ballot access laws and ensures that strict scrutiny is used when addressing such issues.²⁰¹ One of the major purposes of the First Amendment is to ensure that free discussion could be maintained among individuals speaking on the topic of “government affairs.”²⁰² Perhaps more importantly, the First Amendment protects an individual’s right to associate politically, as acknowledged in *NAACP v. Alabama*, especially when controversial viewpoints are expressed.²⁰³

194. *Id.* at 787.

195. *Thornton*, 514 U.S. at 787.

196. *Id.* at 829

197. *Id.* at 828–29 (explaining that the signature requirements being imposed on independent candidates became a popular method of determining whether or not a candidate had public support prior to the holding of an election).

198. *Id.* at 828.

199. *Id.*

200. FREE EXPRESSION IN AMERICA: A DOCUMENTARY HISTORY 172–73 (Sheila Suess Kennedy, ed.) (1999); DANIEL A. FARBER, THE FIRST AMENDMENT 233 (2d. ed. Foundation Press 2003).

201. See FARBER, *supra* note 200, at 241.

202. FREE EXPRESSION, *supra* note 200, at 172–73.

203. *Id.* at 173 (noting that when political groups assemble, different vantage points are expressed); see FARBER, *supra* note 200 at 233.

The First Amendment protects a wide range of activity, including the right of groups to organize, though these rights are not unlimited.²⁰⁴ States are often allowed a fair amount of deference concerning ballot laws, despite the acknowledgment that the laws may impede political association.²⁰⁵ It has been argued, however, that freedom of association rights are at their pinnacle when the activity of a group deals with speech that is political in nature.²⁰⁶ A line exists between the right of a state to determine how elections ought to be controlled and the rights reserved to political organizations.²⁰⁷

Courts have generally held that where there is serious infringement on ballot access, the appropriate level of scrutiny to be applied is strict, though reasonable infringements are entitled to a more deferential standard of review.²⁰⁸ Courts in the past, when using strict scrutiny, have overturned state laws that burden a party's right to freely associate and to nominate one of its own candidates for office.²⁰⁹ If the restrictions imposed on the rights of the voter are reasonable, however, courts will often find that the state's interest in regulating the election is a proper reason for the restrictions.²¹⁰ In *Burdick v. Takushi*, the Supreme Court held a Hawaii law not allowing write-in votes for its elections was constitutional.²¹¹ However, Hawaii law allowed for a number of ways in which candidates were able to get on the election ballot, and thus, it was determined that not allowing write-in candidates a spot on the ballot was not a serious enough infringement to be unconstitutional.²¹²

The Supreme Court in *Timmons v. Twin Cities Area New Party* made clear that First Amendment protections for third-party candidates did not guarantee a plethora of rights.²¹³ There, the Court noted that simply because it was more difficult for independent-party candidates to succeed in elections did not mean

204. FARBER, *supra* note 200, at 233. “[T]he First Amendment would lose much of its value if it protected only isolated individuals but left the government a free hand to prevent organized activity.” *Id.* See also Recent Cases, *Constitutional Law—Third Circuit Invalidates Statute Burdening Ballot Access on Equal Protection Grounds—Reform Party of Allegheny County v. Allegheny County Dep’t of Elections*, 174 F.3d 305 (3d. Cir. 1999) (en banc), 113 HARV. L. REV. 1045, 1045 (1999) (noting that courts recognize limits on the right to assembly) [hereinafter Recent Cases].

205. Recent Cases, *supra* note 204, at 1045.

206. FARBER, *supra* note 200, at 233.

207. *Id.* at 239 (“The difficult problem is drawing a line between legitimate state efforts to structure the electoral process and illegitimate intrusion on the rights of the parties.”).

208. See *id.* at 239–41 (collecting cases demonstrating varying degrees of deference to state laws).

209. Recent Cases, *supra* note 204, at 1046 (discussing Reform Party of Allegheny County v. Allegheny County Dep’t of Elections, 174 F.3d 305 (3d. Cir. 1999)); see Reform Party of Allegheny County v. Allegheny County Dep’t of Elections, 174 F.3d 305 (3d. Cir. 1999).

210. FARBER, *supra* note 200, at 241.

211. *Id.*; see generally *Burdick v. Takushi*, 504 U.S. 428 (1992).

212. FARBER, *supra* note 200, at 241.

213. *Id.*; see generally *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

that a state had to allow third-party candidates to enter into coalitions with major-party candidates.²¹⁴ The Court upheld the ban, noting that ensuring voter clarity during the voting process served as sufficient rationale.²¹⁵ Some believe that this ensures a degree of constitutional protections to third-party candidates, while at the same time, assuring that the two-party system remains present in American politics.²¹⁶

5. The Rights of States to Manage Their Elections

States have almost complete authority to engage in election regulation, and courts have allowed states to ensure that certain interests, including the right of voters to be informed about the electoral process as well as political stability, are protected.²¹⁷ Political parties themselves are lightly regulated, allowing parties to engage in most activities short of violating constitutional provisions.²¹⁸ The Constitution allows states a great deal of latitude in holding their own elections with little outside interference, and states are entitled to regulate the “times, places, and manner of holding elections” for Congressional races, with the only check on the state related to Congress’s ability to look over the process.²¹⁹

In *Anderson*, the Court noted that states have a right to ensure that those voters who cast their ballots are informed about the electoral process.²²⁰ In addition, *Anderson* added a number of other interests that the state could consider.²²¹ Aside from having educated voters, further interests included ensuring a stable political environment and requiring “equal treatment for partisan and independent candidates.”²²²

With regard to voter education, the Court in *Anderson* noted that from the times of the Founding Fathers, there was a sentiment the President should not be voted for directly by the American populous.²²³ The Court stated that it was

214. FARBER, *supra* note 200, at 241.

215. *Id.* at 241–42.

216. *See generally id.* at 242.

217. Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2207 (2001); *see Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983).

218. Persily, *supra* note 217, at 2207.

219. *Id.* at 2207–08.

220. *See Anderson*, 460 U.S. at 796.

221. *Id.* at 796–97.

222. *Id.*; *see Daybell*, *supra* note 161, at 300–01 (noting that while the purpose behind the procedural rights given to the states to manage their own elections was so that states could determine how people would vote, this never entailed allowing states such a role in the process as to determine who was going to be elected).

223. *Anderson*, 460 U.S. at 797 n.21 (explaining that there was early apprehension of allowing the American people to directly elect the president, for fear that they were not intelligent enough to perform such a duty).

unclear whether the education of the voter continued to be a justifiable purpose behind the early filing date imposed on independent candidates in Ohio.²²⁴ There were a number of reasons why voter education was no longer considered a justifiable reason for restrictive ballot laws according to the *Anderson* Court.²²⁵ In the first instance, by the time the Supreme Court heard *Anderson*, media had changed the manner in which people were able to receive information about candidates during elections.²²⁶ In addition, literacy was not a skill possessed by all during the 18th century, but this was no longer the case at the time of *Anderson*.²²⁷ Not only were Americans more literate, but the Court also acknowledged that Americans were better informed about their candidate choices for public office.²²⁸ Following the analysis in *Anderson*, the Supreme Court reasoned that pronouncements by a state claiming that its actions were performed in order to better educate its people should be looked upon with scrutiny.²²⁹

The equal treatment of candidates was an additional interest of the Court in *Anderson*, and various steps were taken to ensure the equal treatment of major and minor-party candidates.²³⁰ The justification of Ohio in *Anderson* was that the election statutes of Ohio enabled “equal treatment” between major-party primary candidates and general election independent candidates.²³¹ The Court found a major distinction between candidates competing in party primaries as opposed to candidates who were running in an election as an independent candidate.²³² The *Anderson* Court recognized that regardless of who ended up running under the Democratic or Republican ticket during an election, the fact remained that a Democrat or Republican would still have a place on the ballot—a luxury not afforded to an independent who did not file an election petition in time.²³³ Further, while administrative purposes could be

224. *Id.* at 797.

225. *See id.* (noting that changes in era can also impact the manner in which the population considers their laws).

226. *Id.*

227. *Id.*; *see* Cent. Intelligence Agency, The World Factbook North America: The United States, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (explaining that of all individuals in the United States today age fifteen and above, the literacy rate is approximately ninety-nine percent) (last visited March 24, 2010).

228. *Anderson*, 460 U.S. at 796–97.

229. *Id.* at 798.

230. *Id.* at 799–801.

231. *Id.*

232. *Id.* at 799 (“The consequences of failing to meet the statutory deadline are entirely different for party primary participants and independents.”).

233. *Anderson*, 460 U.S. at 799. It should also be noted that the Court in *Anderson* acknowledged the fact that write-in votes were permitted for independent candidates. *See id.* at 799 n.26. The Court also noted, however, that such action could not serve as a substitute for a candidate actually having their name placed on a ballot. *Id.*

established, requiring a major-party primary candidate to file seventy-five days prior to a primary, the same justification did not hold true for an independent candidate.²³⁴ Ballots needed to be prepared in an adequate amount of time, especially for a presidential race, where the nomination of the party candidate usually comes before the party's convention.²³⁵ Similar justifications could not be made for independent candidates, and there was no compelling administrative purpose justifying why an independent candidate would be forced to submit their petitions at such an early date.²³⁶

6. The State of Elections Today

Legislation is a common approach used to limit the rights of independent candidates in obtaining ballot access.²³⁷ The petitioning system is one of the most popular tools that states use today with regard to allowing third-party candidates to receive a place on a general election ballot.²³⁸ The general rule is that if a political party had a candidate in a previous election who received a pre-set number of votes (or a percentage of the vote), the party would automatically be able to have another candidate put on the ballot in subsequent elections.²³⁹ Because this sort of success is rare among third-party candidates, states have requirements forcing independent candidates to obtain a certain number of signatures to ensure a place on the ballot.²⁴⁰

Regardless of the number of signatures that are actually required of the candidates, some have argued that the fact that independent party candidates need to collect signatures at all is intended only as a mechanism to keep third-party candidates off the ballot. Many states continue to use strict requirements.²⁴¹ As recently as 1994, Colorado maintained what amounted to a residency requirement for third-party candidates.²⁴² In order for a third-party candidate to run for a congressional seat in Colorado, the candidate had to be registered as an independent for a year prior to any petition submitted for a spot on the general election ballot.²⁴³ As of 1994, no third-party candidate in

234. *Id.* at 800.

235. *Id.*

236. *Id.* No administrative purpose could be established regarding the early filing date set forth by Ohio. Ohio did not prove, nor did it even set forth the notion that a March filing date was a necessity for the state to take care of such tasks as counting votes.

237. Smith, *supra* note 111, at 174–75.

238. *Id.* at 175 (noting that all states with the exception of Mississippi have some sort of petitioning system).

239. *Id.*

240. *Id.* at 176. The number of signatures actually required by different states varies drastically, and during the 1990 election, New Jersey required as few as 200 signatures for a spot in the general election, whereas Florida required over 180,000. *See id.*

241. *Id.* at 176; Winger, *supra* note 3.

242. Winger, *supra* note 3.

243. *Id.*

Georgia had been able to make the ballot while running for the United States House of Representatives due to the state's strict petitioning requirements.²⁴⁴ Illinois continues to have both stringent and disproportionate signature requirements as they relate to the major party and independent party candidates.²⁴⁵ For example, in Illinois, major party candidates for governor only need to obtain 5000 signatures for a place on the ballot.²⁴⁶ Independent candidates for governor need 25,000 signatures.²⁴⁷ The issue for this Note becomes whether the various impositions on individuals seeking a spot on an election ballot are too stringent, and whether the laws should be relaxed so that minor-party candidates have a greater chance of being able to run for elected office.²⁴⁸

IV. WHERE MAINE ELECTION LAW FALLS SHORT

A number of Maine's election laws pose an unnecessary burden to a third-party candidate's ability to have his or her name placed on general election ballots, and as such, should be declared a violation of both voter's and candidate's First and Fourteenth Amendment rights.²⁴⁹ While it can be argued that the petition requirements under Maine law may be applied equally to both major-party and independent-party candidates, the law simply does not mandate such equal application.²⁵⁰

The provisions of Maine's election law that precluded Herbert Hoffman from a spot on the ballot violate the Fourteenth Amendment because they impose a burden on third-party candidates, going beyond the protection that courts in the past have recognized as constituting permissible state interests.²⁵¹ Such an argument was raised by the challengers of a Georgia election law in

244. *Id.*

245. Freeandequal.org, *Third Party Activists on Illinois HB 723: "The Protect Incumbents Act,"* <http://www.freeandequal.org/2009/08/third-party-activists-on-illinois-hb-723-the-protect-incumbents-act/> (last visited Feb. 15, 2010).

246. *Id.*; see also Winger, *supra* note 3.

247. *Third Party Activists*, *supra* note 245; Winger, *supra* note 3.

248. See *Williams v. Rhodes*, 393 U.S. 23, 26–27 (1968); see *Knutson v. Dep't of Sec'y of State and Herbert Hoffman*, 954 A.2d 1054, 1057; Winger, *supra* note 3.

249. U.S. CONST. amends. I, XIV; Emergency Application for a Stay, *supra* note 10, at 14–18.

250. ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A) (2007); ME. REV. STAT. ANN. tit. 21-A, § 354(9); *Anderson v. Celebrezze*, 460 U.S. 780, 796–99 (1983) (acknowledging the difference in treatment between major and independent party candidates).

251. ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A); ME. REV. STAT. ANN. tit. 21-A, § 354(9); *Anderson*, 460 U.S. at 788; *Williams*, 393 U.S. at 31; see *Knutson I*, 954 A.2d at 1060–61.

Jenness, where the argument was that the signature requirements imposed an improper burden to freedom of association rights.²⁵²

Independent candidates are placed under constraints that major-party candidates simply do not have to contend with.²⁵³ Such constraints weigh no differently on third-party candidates in Maine than in many other states.²⁵⁴ Maine law draws distinctions between those candidates representing major political parties and those candidates running as independents, requiring a greater effort from third-party candidates for their name to appear on the ballot.²⁵⁵ Not only does the petition signature requirement constitute an infringement on equal protection rights in and of itself by making it difficult for third-party candidates to obtain a place on the ballot; other Maine laws enhance the difficulty by imposing requirements that are overly strict in their application.²⁵⁶

Together with Maine's petition requirement, the signature collection process has infringed the First Amendment rights of both Maine's voters and its third-party candidates.²⁵⁷ The Court in *Williams* noted that the reasons for imposing excessive burdens on independent-party candidates by using early filing dates could not be upheld as promoting any legitimate interest of the state.²⁵⁸ In the *Hoffman* case, a major point of contention was whether the physical presence requirements had been met by Hoffman while he was collecting signatures for his general election run.²⁵⁹ These requirements constitute an undue burden on the abilities of third-party candidates to obtain enough signatures to receive a place on federal election ballots.²⁶⁰ What the Maine statute does is require candidates running for office to acquire a great number of petition signatures simply to be eligible to have their name placed on the ballot.²⁶¹ Not only does the law require the collection of a large number of signatures, but it also requires that the signer of the petition do so while in

252. ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A); ME. REV. STAT. ANN. tit. 21-A, § 354(9); *Anderson*, 460 U.S. at 783; *Williams*, 393 U.S. at 31; *Jenness v. Fortson*, 403 U.S. 431, 434 (1971); *Knutson I*, 954 A.2d at 1060–61.

253. See *Anderson*, 460 U.S. at 796–99.

254. See *id.*; Emergency Application for a Stay, *supra* note 10, at 14–18; Smith, *supra* note 111, at 174–77.

255. Kristin Sullivan, *Requirements for Petitioning Candidates under Public Financing*, available at <http://www.cga.ct.gov/2006/rpt/2006-R-0162.htm>.

256. *Id.*; ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A) (2007); *Williams*, 393 U.S. at 27.

257. Emergency Application for a Stay, *supra* note 10, at 14–18; ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A); *Williams*, 393 U.S. at 31–32.

258. *Williams*, 393 U.S. at 29.

259. Emergency Application for a Stay, *supra* note 10, at 6; ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A).

260. *Id.*; *Williams*, 393 U.S. at 29.

261. ME. REV. STAT. ANN. tit. 21-A, § 354.

the physical presence of the petition circulator.²⁶² Therefore, the task of actually accumulating the required number of signatures becomes more difficult.²⁶³ The major political parties do not have to contend with this situation,²⁶⁴ and thus, a distinction is drawn between major-party candidates and third-party candidates.²⁶⁵

Using the Supreme Court's reasoning in *Anderson*, such a distinction violates the Fourteenth Amendment.²⁶⁶ The Court in that case noted that equal protection is violated where major-party candidates have different requirements than independent-party candidates.²⁶⁷ Under Maine law, however, not only are major candidates freed from having to collect signatures, but they are also free from the overly stringent "physical presence" requirements required under Maine state law.²⁶⁸ This requirement seems to be an additional qualification for independent candidates, which goes against the Court's decision in *Thornton*.²⁶⁹

The *Anderson* Court also reasoned that by not allowing a candidate a place on a ballot, the rights of the voter were also violated.²⁷⁰ The Court took notice of the fact that, by having only major-party candidates on an election ballot, there was a chance that some voters would be unable to select candidates who share their political ideology.²⁷¹ As such, the balancing test of *Anderson* renders the decision of the Maine Supreme Judicial Court overturning the findings of the Secretary of State questionable.²⁷² In considering the "character and magnitude" of the injury to a Maine voter's First Amendment rights, it hardly seems appropriate that the rules requiring the physical presence of the petitioner ought to be upheld.²⁷³ What needs to be considered is whether

262. *Id.*; see also Emergency Application for a Stay, *supra* note 10, at 6.

263. Emergency Application for a Stay, *supra* note 10, at 6, 14–18; ME. REV. STAT. ANN. tit. 21-A, § 354 (2007).

264. Shannon Jones, *Maine: SEP Campaign Faced Arcane Ballot Requirements, Private Property Restrictions*, June 2, 2004, <http://www.wsws.org/articles/2004/jun2004/mne2-j02.shtml> (last visited Mar. 21, 2010).

265. ME. REV. STAT. ANN. tit. 21-A, § 354; *Anderson v. Celebrezze*, 460 U.S. 780, 799–801 (1983); Emergency Application for a Stay, *supra* note 10, at 6, 14–18.

266. *Anderson*, 460 U.S. at 783; see Emergency Application for a Stay, *supra* note 10, at 6, 14–18.

267. *Anderson*, 460 U.S. at 783, 786–88.

268. ME. REV. STAT. ANN. tit. 21-A, § 354; Jones, *supra* note 264.

269. ME. REV. STAT. ANN. tit. 21-A, § 354; Jones, *supra* note 264; see also *Thornton*, 514 U.S. at 837–838.

270. *Anderson*, 460 U.S. at 786–88; see also *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

271. *Anderson*, 460 U.S. at 786–88.

272. *Id.* at 789; *Knutson v. Dep't of Sec'y of State and Herbert Hoffman*, 2008 ME 124, ¶¶ 16–21, 954 A.2d 1054, 1060–61; see also *Daybell*, *supra* note 161, at 310.

273. ME. REV. STAT. ANN. tit. 21-A, § 354(7) (2007); *Anderson*, 460 U.S. at 789.

these provisions of Maine election law serve any justifiable purpose, deserving of the serious burden imposed on voter's rights.²⁷⁴

Because the right to associate politically is of such importance, and because differing or controversial viewpoints are essential to the political process, what Maine law has done is render worthless the opinion of voters whose political views are different than those of the major-party candidates.²⁷⁵ The Court in *Anderson* noted that the First Amendment is violated if independent candidates are burdened to a greater extent or in a manner inconsistent with major political parties regarding the right to properly associate.²⁷⁶ Those voters who legitimately signed Herbert Hoffman's petition during the petition signing process have therefore been deprived of their rights.²⁷⁷ These were people who legally signed the petitions in accordance with the requirements under Maine law, and by depriving them of their rights in having their votes counted, they are effectively deprived of their First Amendment rights under the United States Constitution.²⁷⁸ Even more problematic in *Hoffman* was the fact that the Maine Supreme Judicial Court failed to pay adequate attention to the First Amendment concerns in the first place.²⁷⁹

It was fully acknowledged during the *Hoffman* case hearings that signatures were taken outside of Hoffman's presence as he circulated petitions.²⁸⁰ As an initial matter, the requirement that signatures be gathered in the presence of the circulator creates an undue burden on the candidate.²⁸¹ The requirement creates a situation where a candidate is unable to have people collect signatures on their behalf while the candidate is engaged in other activity, and if the candidate is the individual who is circulating the petition, he or she is responsible for personally witnessing every signature placed on that petition.²⁸²

274. ME. REV. STAT. ANN. tit. 21-A, § 354(7); *Anderson*, 460 U.S. at 789; see also Nazzarine, *supra* note 182, at 319.

275. FREE EXPRESSION IN AMERICA, *supra* note 200, at 172–73; see ME. REV. STAT. ANN. tit. 21-A, § 354(7); see *Knutson v. Dep't of Sec'y of State and Herbert Hoffman (Knutson II)*, 2008 ME 129, ¶ 7, No. Ken-08-375, 2008 WL 3855025 (Me.) at *2 (Sup. Jud. Ct. Me. Aug. 20, 2008).

276. *Anderson*, 460 U.S. at 793–94.

277. See *Knutson II*, 2008 ME 129, ¶ 7, No. Ken-08-375, 2008 WL 3855025 (Me.) at *2 (Sup. Jud. Ct. Me. Aug. 20, 2008).

278. *Id.*; U.S. CONST. amend. I; see also ME. REV. STAT. ANN. tit. 21-A, § 354 (2007).

279. Emergency Application for a Stay, *supra* note 10, at 3.

280. *Id.* at 7–8.

281. ME. REV. STAT. ANN. tit. 21-A, § 354 (2007); *Williams v. Rhodes*, 393 U.S. 23, 27–32 (1968); Emergency Application for a Stay, *supra* note 10, at 6, 14–18.

282. *Williams*, 393 U.S. at 27–32; Emergency Application for a Stay, *supra* note 10, at 6, 14–18; see also ME. REV. STAT. ANN. tit. 21-A, § 354.

This disadvantage became evident when Hoffman was ultimately denied a place on the general election ballot and was forced to attempt to win the Maine United States Senate seat through a write-in campaign.²⁸³ Appearing as a write-in candidate is not sufficient in remedying the violations incurred by Hoffman.²⁸⁴ Voters knew of Hoffman, and therefore voted for him in the general election, while aware that Hoffman had almost no chance of defeating incumbent Susan Collins.²⁸⁵ What people found when they finally looked at the Secretary of State's website for the vote tally, however, was that many of the votes for Hoffman had not been counted.²⁸⁶ Individuals from a number of towns alleged that they had voted for Hoffman by writing his name in under the "other" category, though the end tally for a number of these towns counted zero votes for Hoffman.²⁸⁷ Of specific concern was the fact that no votes for Hoffman were counted in Franklin County, where a university is located.²⁸⁸ It should also be noted that Herbert Hoffman was not the only write-in candidate to appear on the ballot, meaning that municipalities that counted zero votes for candidates in the "other" category did not count votes for any of the other Senate candidates running as write-in contenders.²⁸⁹

What towns like Limerick, Maine contended with was voter disenfranchisement through human error.²⁹⁰ Of the five votes cast for write-in candidates in that town, not one vote actually made it to the final tally.²⁹¹ Could one definitively say that this would not have happened if those candidates (presumably including Herbert Hoffman) had been allowed to have their name printed on the general ballot? It is unlikely that any definitive conclusion can be reached.²⁹² But it is hardly arguable that had Hoffman's name actually appeared on the ballot, such errors would have been less likely to occur, and those voters actually voting for Hoffman would have had a better chance of having their votes counted.²⁹³

One of the problems encountered in the town of Limerick was that the list of pre-notarized and affirmed candidates for the write-in campaign never made it to the town.²⁹⁴ As a result, any vote for a write-in candidate could not be

283. Bill Nemitz, *Write-in Senate Votes Don't Add Up*, PORTLAND PRESS HERALD, Dec. 16, 2008, at B1.

284. Emergency Application for a Stay, *supra* note 10, at 12–13.

285. Bill Nemitz, *Write-in Senate Votes Don't Add Up*, PORTLAND PRESS HERALD, Dec. 16, 2008, at B1.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. Nemitz, *supra* note 285.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

counted in Limerick.²⁹⁵ Despite the fact that Secretary of State Matthew Dunlap has plans for avoiding such results in the future, this fails to remedy the effects of an election where a candidate was unable to garner votes in certain state municipalities.²⁹⁶

CONCLUSION

The Maine Supreme Judicial Court's decision in the *Hoffman* case sets dangerous precedent for election law.²⁹⁷ Should literal statutory interpretations continue to be upheld over the legitimate interests of independent party candidates asserting their constitutional rights, the result will be a two-party system where voters continue to suffer the effects of disenfranchisement.²⁹⁸

Election law in Maine seeks to protect the interests of the state in ensuring that the nomination process is valid.²⁹⁹ While states have a legitimate interest in maintaining control and order over their election process, questions arise when laws hinder the interests of large groups of the voting population.³⁰⁰ In parts of Maine, it was clear that Hoffman's exclusion from the ballot served to disenfranchise a number of people who attempted to vote for him.³⁰¹ Voters who attempted to cast votes for Hoffman were otherwise unable to, as write-in votes in some towns were never actually counted.³⁰²

The question must be posed: Are Maine's election requirements justified under strict scrutiny in light of the fact that they have disenfranchised voters?³⁰³ The Maine Supreme Court failed to address the First Amendment issue, an issue that may have served to complicate the rather straightforward decision that the court seemed to reach.³⁰⁴ By looking at the language of the statute, it appears as though the decision of the court was fair.³⁰⁵ It appears that Hoffman took an improper oath because he was not present to witness

295. Nemitz, *supra* note 285.

296. *Id.*

297. See *Knutson v. Dep't of Sec'y of State and Herbert Hoffman*, 2008 ME 124, ¶¶ 24–25, 954 A.2d 1054, 1061–62 (where the court used the literal interpretation of the statute, justifying it on the grounds that the validity of the nomination process would be upheld).

298. *Id.*; see FARBER, *supra* note 200, at 233; see also *Emergency Application for a Stay*, *supra* note 10, at 2–3.

299. *Knutson I*, 954 A.2d at 1061–62.

300. *Thornton*, 514 U.S. at 798–99; *Anderson v. Celebrezze*, 460 U.S. 780, 783–84 (1983); see *Williams v. Rhodes*, 393 U.S. 23, 27–32 (1968); see *Emergency Application for a Stay*, *supra* note 10, at 2; see also Bill Nemitz, *Write-in Senate Votes Don't Add Up*, PORTLAND PRESS HERALD, Dec. 16, 2008, at B1.

301. Nemitz, *supra* note 285.

302. *Id.*

303. *Id.*; see ME. REV. STAT. ANN. tit. 21-A, § 354 (2007).

304. See *Emergency Application for a Stay*, *supra* note 10, at 3; see also FARBER, *supra* note 200, at 233–39.

305. ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A) (2007); *Knutson I*, 954 A.2d at 1062.

every signature put on his petition.³⁰⁶ But the issue is not about whether or not Hoffman was right or wrong in this case; it is about the state of the law and its potential to improperly deprive voters of their constitutional rights.³⁰⁷ The Maine Supreme Judicial Court looked only at the application of the law as it pertained to the immediate case at hand rather than the larger implications of its decision.³⁰⁸

The Maine legislature must address the issue at hand and should begin to consider the intent of those individuals forced to acquire signatures to support their candidacy when they engage in the petition process.³⁰⁹ If the signature collection process is done in good faith, there seems to be little interest for the state in maintaining overly strict requirements for candidates, especially when considering more serious constitutional concerns.³¹⁰ The law as it stands today serves as a technical barrier to candidates who might in good faith have tried to comply with the requirements of the law but for some reason failed to do so.³¹¹ In light of First and Fourteenth Amendment concerns, technicalities in the Maine statutes cannot reasonably stand in the way of the ability to run for political office.³¹²

POSTSCRIPT

On June 4, 2009, Governor Baldacci of Maine signed into law a bill designed to increase fairness among third-party candidates running for elected office in the State of Maine.³¹³ In addition, the Maine legislature has taken action with respect to some details of its election law in order to clarify whether or not an entire petition should be thrown out for improperly collected

306. ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A) (2007); *see also* *Knutson I*, 954 A.2d at 1057; *see generally* Emergency Application for a Stay, *supra* note 10, at 2.

307. U.S. CONST. amend. I; *see Knutson I*, 954 A.2d at 1061–62; *see also* FARBER, *supra* note 200, at 233–34.

308. ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A) (2007); *see Knutson I*, 954 A.2d at 1062; *see* Nemitz, *supra* note 285; *see also* FARBER, *supra* note 200, at 233–34.

309. ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A); *see Knutson I*, 954 A.2d at 1061–62 (noting that where the intent of the candidate is to commit fraud, the petitions will be invalidated, though fraud is not required for invalidation).

310. U.S. CONST. amend. I; U.S. CONST. amend. XIV; *Jenness v. Fortson*, 403 U.S. 431, 434 (1971); *Knutson I*, 954 A.2d at 1061–62.

311. ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A); *Knutson I*, 954 A.2d at 1061–62 (where the Maine Supreme Court determined that it would use literal interpretations of the statute).

312. U.S. CONST. amend. I; ME. REV. STAT. ANN. tit. 21-A, § 354(7)(A); *see Knutson I*, 954 A.2d at 1061–62; *see also* FARBER, *supra* note 200 at 241; Daybell, *supra* note 161, at 313–14.

313. *Former Independent Candidate Helps Influence Maine Election Laws*, Independent Political Report, June 17, 2009, <http://www.independentpoliticalreport.com/2009/06/former-independent-candidate-helps-influence-maine-election-laws/> (last visited Feb. 15 2010).

signatures on the petition.³¹⁴ The law now states that should a signature on a petition be improperly collected, only those signatures, rather than the petition as a whole, will be eliminated.³¹⁵ While this is certainly a step in the right direction, the law does not change the strict physical presence requirements for candidates.³¹⁶ In fact, the new law simply clarifies what is meant by “physical presence,” and petition circulators are still required to swear an oath that all signatures on a petition were “personally witnessed.”³¹⁷ Therefore, while attempts are being made to ensure a fairer route for the election of third party candidates in Maine, there are still a number of challenges facing independent candidates today, and the Maine legislature should continue its active efforts to ensure that future changes are made to improve Maine’s election laws.

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314. Independent Political Report, *supra* note 313; *see* ME. REV. STAT. ANN. tit. 21-A, § 354(9) (2009); *see* ME. REV. STAT. ANN. tit. 21-A, § 354(9) (2007).

315. ME. REV. STAT. ANN. tit. 21-A, § 354(9); 2009 Me. Laws 792; Independent Political Report, *supra* note 313.

316. ME. REV. STAT. ANN. tit. 21-A § 354(9).

317. 2009 Me. Laws 792.

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