Dimensions of the Right to Vote: The Write-In Vote, Donald Duck, and Voting Booth Speech Written-Off, The

David Perney
Notes

The Dimensions of the Right to Vote: The Write-In Vote, Donald Duck, and Voting Booth Speech Written-Off

Burdick v. Takushi

I. INTRODUCTION

In 1989, Judge Harrison L. Winter of the United States Court of Appeals for the Fourth Circuit announced that "under appropriate circumstances" a write-in vote for Donald Duck would be constitutionally protected as an exercise of a citizen's right to vote. This pronouncement added to the growing but muddled field of jurisprudence concerning the right to vote. In Burdick v. Takushi, the United States Supreme Court eased back the broad parameters of the right to vote that the Fourth Circuit appeared to define. The goal of this Note is to outline the reasoning of the Burdick v. Takushi decision, to define the decision's effect on the write-in vote, and to explore the implications of the decision on the nature and extent of the right to vote.

II. FACTS AND HOLDING

In 1986, only one candidate filed nominating papers for the seat in the Hawaii House of Representatives representing the city and county of Honolulu. Only that candidate's name would have appeared on the election ballot. Alan B. Burdick, a registered voter in the city and county of Honolulu, requested information from the director of elections and the Lieutenant Governor of Hawaii (the State) regarding the State's write-in election laws.

4. Burdick, 112 S. Ct. at 2061.
5. See infra notes 25-53 and accompanying text for a full description of Hawaiian election laws.
7. Burdick v. Takushi, 937 F.2d 415, 416 (9th Cir. 1991), aff'd 112 S. Ct. 2059
voting policy.\(^8\) The State replied that there was no provision for write-in voting in its election laws\(^9\) and that any attempted write-in votes would be ignored.\(^10\) Burdick filed a lawsuit against the State in the United States District Court for the District of Hawaii\(^11\) claiming that he wished to vote in the primary and general elections for someone who had not filed nominating papers and that in the future, he might wish to vote for a candidate who did not appear on the ballot.\(^12\) The failure of the State to provide a method to do so, Burdick claimed, violated his constitutional rights—specifically, his First Amendment right of expression and association.\(^13\) Burdick requested a preliminary injunction ordering the State to provide a method of recording and tallying write-in votes.\(^14\)

The district court granted Burdick's injunction based on his constitutional right to vote.\(^15\) The court of appeals reversed the district court, directing it to abstain from ruling on constitutional issues until Hawaii's courts determined whether write-in voting was prohibited by the State's election laws and constitution.\(^16\) The Hawaii Supreme Court was certified to make this

---

(1992). Under Hawaiian law, the lieutenant governor is the "chief election officer" and is responsible for supervising all state elections. HAW. REV. STAT. § 11-2(a) (1985).

9. *Id.*
12. *Id.* Concerned that this suit would not be resolved in time for an ensuing 1988 election, Burdick filed a second claim centered on the 1988 election. *Id.* at 2062 n.1. This second claim was subsequently consolidated with the first. *Id.*
13. *Id.* at 2062.
14. *Id.*
15. *Id.*
determination. It ruled that write-in voting was indeed prohibited in Hawaii.18

Upon this determination, the district court properly took jurisdiction and granted Burdick injunctive relief.19 However, the district court stayed the judgment pending appeal.20 The court of appeals subsequently reversed the district court,21 expressly declining to follow a Fourth Circuit decision22 regarding write-in voting.23 The Supreme Court granted certiorari to resolve this disagreement.24

Central to the issues presented was the Hawaiian electoral scheme as a whole. The Hawaiian election laws set up a two stage election process. First, a general primary is held to determine which candidates will appear on the ballot in the general election. Second, the general election itself is held to elect an officeholder from the field of candidates determined in the primary. Since the election laws prohibit write-in voting,25 the Hawaiian voter is limited to either voting for a candidate listed on the ballot or leaving the ballot.

17. *Burdick*, 112 S. Ct. at 2062. Three questions were certified:
(1) Does the Constitution of the State of Hawaii require Hawaii’s election officials to permit the casting of write-in votes and require Hawaii’s election officials to count and publish write-in votes?
(2) Do Hawaii’s election laws require Hawaii’s election officials to permit the casting of write-in votes and require Hawaii’s election officials to count and publish write-in votes?
(3) Do Hawaii’s election laws permit, but not require, Hawaii’s election officials to allow voters to cast write-in votes and to count and publish write-in votes?

*Id.* (quoting Application to Petition for Certiorari 56a-57a).

The Hawaii Supreme Court responded "no" to all three questions. *Id.*

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
24. *Id.*
25. Burdick v. Takushi, 776 P.2d 824, 824-26 (Haw. 1989). The Hawaiian Supreme Court did note that the chief election officer may permit write-in voting under Hawaii Revised Statutes section 11-4. *Id.* at 825-26. Section 11-4 empowers the chief election officer to "make, amend, and repeal such rules and regulations governing elections . . . as in the chief election officer’s judgment shall be necessary." HAW. REV. STAT. § 11-4 (1985).
blank. To be elected in Hawaii, the candidate must normally be listed on a primary ballot.

Three methods exist for a candidate to be listed on a primary ballot. First, there is the party petition route. Any group of persons may petition to form a political party by obtaining the signatures of at least one percent of Hawaii’s registered voters and filing for party status at least 150 days before the primary is to be held. During the sixty days prior to the primary, a candidate may file nomination papers indicating that the candidate is seeking to be a representative of the party. The nomination papers must consist of certification that the candidate is qualified under law for the office sought and that the candidate is running as a representative of only one party. Additionally, the nomination papers must include the signatures of registered Hawaiian voters, the number of which is determined by the scope of the office being sought: twenty-five signatures for statewide and federal offices; fifteen for state legislative and county offices. Finally, after the candidate takes an oath, that candidate’s name will be listed on the party’s primary ballot as a candidate for the particular office sought.

The second method of being listed on a primary ballot is the established party route. Essentially the same as the party petition route, Hawaiian law merely exempts "established parties" from the need to petition before each

26. Burdick, 112 S. Ct. at 2069. A "blank" vote does not affect the outcome of an election in any way.

27. "No person shall be a candidate for any general . . . election unless the person has been nominated in the immediately preceding primary . . . ." HAW. REV. STAT. § 12-2 (1985). It is, however, possible for one to be listed on the general election ballot without being on the primary ballot. This may occur when a party’s candidate dies, withdraws, or is disqualified after the primary but prior to the general election. Id. § 11-118(a) (Supp. 1992). The party may fill this vacancy with a replacement candidate who would then be listed on the general election ballot. Id. § 11-118(b), (c).

28. A "political party" is defined as "an association of voters united for the purpose of promoting a common political end or carrying out a particular line of political policy and which maintains a general organization throughout the State." Id. § 11-61(a) (Supp. 1992).


30. Id. § 12-6 (Supp. 1992).

31. Such qualifications include establishing the candidate’s residence, the name of the office being sought, and meeting the constitutional and statutory requirements of that office. See HAW. REV. STAT. § 12-3(a)(1)-(9) (1985) for a complete listing.

32. "Nomination papers shall not be filed on behalf of any person for more than one party." HAW. REV. STAT. § 12-3(c) (1985).


34. Id. § 12-7 (1985).

35. Id. § 12-21 (Supp. 1992).
primary to attain party status. 36 Any party that successfully petitions for political party status, for three consecutive elections qualifies as an "established party" and is thereby exempt from repetitioning for the following ten-year period, 37 so long as it maintains a certain percentage of the vote in each successive election. 38 Anyone choosing to become a candidate for an established party may do so by filing nominating papers meeting the same requirements imposed upon candidates of petitioned parties, including the sixty day filing deadline. 39 If the nominating procedures are followed, the candidate will appear on the established party’s primary ballot for the office sought. 40

The final method of appearing on a primary ballot is for a candidate to file nominating papers as a nonpartisan candidate. The nominating procedure is exactly the same as for candidates seeking party nomination 41 except the nominating papers should designate the candidate as a nonpartisan. 42 If the nominating procedures are followed, the candidate will appear on the nonpartisan primary ballot for the office sought. 43

Hawaii has what is termed an "open" primary system. 44 Each political party, be it an established party or a petitioned party, has its own ballot, which lists the properly nominated candidates attempting to be that party’s representative candidate for each office. 45 Additionally, there is a nonpartisan ballot listing all the properly nominated nonpartisan candidates for each office. 46 Hawaiian law provides that "a voter [is] entitled to select and to vote the ballot of any one party or [the ballot of] nonpartisan[s], regardless of which ballot the voter voted in any preceding primary." 47 A voter is free to choose which ballot to vote, but is limited to voting only one party’s ballot or only on the nonpartisan ballot.

The votes are then tallied. For both the established and petitioned political parties, the candidate receiving the most votes for an office is that

37. Id.
38. Id. See id. § 11-61(b)(1)-(5) (Supp. 1992) for a listing of these required percentages.
39. See supra notes 30-33 and accompanying text.
41. See supra notes 30-33 and accompanying text.
42. HAW. REV. STAT. § 12-3 (1985).
43. Id. §§ 12-9 to -22.
44. Burdick, 112 S. Ct. at 2064.
46. Id.
47. Id. § 21-31 (1985). The voters’ freedom to choose any of the primary ballots is what gives the Hawaiian primary system the moniker "open."

Published by University of Missouri School of Law Scholarship Repository, 1993
party’s candidate for the office in the ensuing general election.\textsuperscript{48} Furthermore, a party candidate running unopposed for an office in the primary automatically becomes the party’s candidate for that office in the general election, even if that candidate fails to receive a single vote in the primary.\textsuperscript{49} These primary winners will have their names (along with the party they represent) listed as candidates for that office on the ballot in the general election.\textsuperscript{50}

The nonpartisan primary candidates need a threshold amount of votes to earn a place on the general election ballot. The nonpartisan primary candidate needs a minimum of either ten percent of all the votes cast for the office or the number of votes equal to the lowest number of votes received by an advancing party candidate.\textsuperscript{51} Any nonpartisan candidate meeting either one of these standards will be listed as a candidate for that office on the general election ballot.\textsuperscript{52}

After the primaries determine the field of candidates, the consequence of Hawaii’s prohibition on write-in voting is that only the votes for the candidates listed on the general election ballot will be tallied in the general election. If only a single candidate’s name appears on the general election ballot, that candidate automatically wins the office.\textsuperscript{53} A vote can affect the election only if cast in the limited field of listed candidates.

It is within this electoral scheme that the litigants in \textit{Burdick} framed their arguments. Burdick claimed that this scheme unconstitutionally burdened his federal rights of political expression and electoral participation.\textsuperscript{54} The First Amendment generally guarantees an individual the right to express political views without undue governmental burdens.\textsuperscript{55} Burdick argued that by distinguishing between listed candidates and write-in candidates, Hawaii’s vote counting method discriminated against political expression based on the content of the expression.\textsuperscript{56} Furthermore, Burdick claimed that Hawaii unconstitutionally conditioned his right to vote upon sacrificing his First Amendment rights of political expression and association.\textsuperscript{57} In order to vote,

\textsuperscript{48} \textit{Id.} \textsection 12-41(a) (1985).
\textsuperscript{49} \textit{Id.} \textsection 12-42 (1985).
\textsuperscript{50} \textit{Id.} \textsection\textsection 11-112(a), 12-41(a), 12-42 (1985).
\textsuperscript{51} \textit{Id.} \textsection 12-41(b) (1985).
\textsuperscript{52} \textit{Id.} \textsection\textsection 12-41(b), 11-112(a).
\textsuperscript{53} \textit{Id.} \textsection 12-42.
\textsuperscript{55} \textit{See} \textsc{Tribe}, supra note 3, \textsection 12-2, at 791 (citing \textit{Cox} v. \textit{New Hampshire}, 312 U.S. 569, 574 (1941).
\textsuperscript{56} \textit{Burdick}, 112 S. Ct. at 2065.
\textsuperscript{57} \textit{Id.}
he had to choose from among the listed candidates. But to do so would have forced him to espouse an ideological position that he did not support. But to do so would have forced him to espouse an ideological position that he did not support. Finally, Burdick contended that Hawaii infringed upon his constitutional right to electoral participation by not enabling him to vote for the candidate of his choice. If the only principled option is not to vote for any of the candidates listed for an office, Hawaii has denied him the opportunity to cast a meaningful vote and has effectively disenfranchised him.

The State countered that its ban on write-in voting was not in violation of the federal constitution. The State contended that the voting booth is not a forum that has been opened by the government for political speech; rather, it is merely a forum for the act of voting to effect a legal change in the government. Therefore, limiting such political speech in the voting booth does not offend notions of free speech embodied in the First Amendment. Additionally, the State believed that the prohibition on write-in voting placed only a minimal burden on a voter’s opportunity to cast a meaningful vote. When the ban is viewed in light of Hawaii’s election system as a whole—specifically, the ease with which a candidate may be listed on a ballot—voters have many opportunities to place the candidates of their choice on the ballot. This minimal burden, the State claimed, was outweighed by the compelling interests Hawaii had in prohibiting write-in voting. The compelling interests served by the prohibition, according to the State, included protecting the process from factionalism and frivolous candidacies, preventing "party raiding," putting a quick end to uncontested races, preventing fraud, enforcing nomination requirements, and encouraging voter education.

58. Id.
59. Id.
61. Burdick, 112 S. Ct. at 2067.
62. Id. at 2066.
63. Id. at 2064.
64. Id. at 2067.
65. Id. at 2066.
66. Id. "Party raiding" occurs when voters of one party write-in a candidate sympathetic to their own causes onto the primary ballot of another party. The possible result is a party being represented by a candidate whose beliefs are incongruent with those of the party.
67. Id.
68. Id. at 2067 n.9.
69. Id.
70. Id.
The United States Supreme Court affirmed the court of appeals and held that Hawaii's electoral scheme, while not providing for write-in voting, placed only a minimal burden on the right to vote and that this minimal burden upon the voter was reasonable in light of the state's interest in conducting fair and efficient elections.\textsuperscript{71}

\section*{III. Legal Background}

No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined.\textsuperscript{72}

The United States Constitution creates a representative governmental system that attempts to embody the concept of a government "for the people, by the people."\textsuperscript{73} At the root of this constitutional endeavor is the principle of democracy. The ability of the United States government to continue being "for the people, by the people" is intimately related to the integrity of our democratic process. The United States Supreme Court has long recognized that some sort of constitutional right of a citizen to vote is necessary to retain this integrity:\textsuperscript{74} "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."\textsuperscript{75}

Although the Court has recognized a constitutional right to vote,\textsuperscript{76} there is no specific language in the Constitution guaranteeing the right to vote.\textsuperscript{77} The constitutional basis for the right to vote is nebulous at best.\textsuperscript{78} The majority of cases concerning the right to vote have arisen under the Equal Protection Clause.\textsuperscript{79} The focus of the Equal Protection analysis has been to

\begin{footnotesize}

\begin{itemize}
  \item \textsuperscript{71} Id. at 2067-68.
  \item \textsuperscript{72} Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (Black, J.).
  \item \textsuperscript{73} Abraham Lincoln, Gettysburg Address, Nov. 19, 1863 ("government of the people, by the people, and for the people").
  \item \textsuperscript{74} See Reynolds v. Sims, 377 U.S. 553, 554-56 (1964) (collecting cases outlining the Court's recognition of a constitutional right to vote).
  \item \textsuperscript{75} Id. at 555.
  \item \textsuperscript{76} Id. at 554 ("[This Court has] repeatedly recognized that all qualified voters have a constitutionally protected right to vote").
  \item \textsuperscript{77} See Robert Batey, Electoral Graffiti: The Right to Write-in, 5 NOVA L.J. 201, 202 (1981). \textit{See generally} U.S. CONST.
  \item \textsuperscript{78} Cf: TRIBE, supra note 3, § 13-1 (claiming that "rights relating to the Franchise stand poised between procedural due process . . . and the first amendment.").
  \item \textsuperscript{79} Id.

\end{itemize}
\end{footnotesize}
assure that all qualified voters are given equal say in elective government.\textsuperscript{80} According to Professor Tribe, the equality of the right to vote among the citizens has historically proven more decisive with the courts than "the fact of [the right’s] availability or absence."\textsuperscript{81} Consequently, apart from the guarantee that all qualified voters are to have an equal vote, little is known about the precise nature or extent of the right to vote.\textsuperscript{82} The United States Supreme Court has indicated that in addition to the Equal Protection Clause, the First and Fourteenth Amendments can be transgressed when the right to vote is offended.\textsuperscript{83} Yet, these boundaries of the right to vote remain relatively unexplored.

\textbf{A. State Regulation—A Source of Tension}

The Constitution provides that "[t]he Times, Places and manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof,"\textsuperscript{84} and that "[e]ach state shall appoint, [its member of the electoral college] in such a manner as the legislature thereof may direct."\textsuperscript{85} These clauses constitutionally empower the states to regulate elections, candidates, and political parties. The United States Supreme Court has enforced such regulation if reasonable.\textsuperscript{86} A state exercising this right of regulation may encroach upon a citizen’s right to vote.\textsuperscript{87} In the milieu of electoral participation, therefore, a tension exists between two competing constitutional rights—the explicit right of states to regulate elections and the implicit right of citizens to vote.

It is in the battles between these two rights that the nature and extent of the right to vote has been defined.\textsuperscript{88} In \textit{Anderson v. Celebrezze},\textsuperscript{89} the Court

\begin{itemize}
\item \textsuperscript{80}See Reynolds v. Sims, 377 U.S. 533, 554-68 (1963).
\item \textsuperscript{81}Tribe, \textit{supra} note 3, § 13-1 (emphasis in original).
\item \textsuperscript{82}See id. Included in the right to vote are:
\begin{quote}
[S]uch distinct concerns as the citizen’s opportunity to cast a vote, the community’s chance to be represented within a larger polity in proportion to its population, the racial group’s ability to prevent the purposeful dilution of its voting power, the candidate’s capacity to gain a place on the ballot, and the constituent’s chance to contribute to a chosen candidate.
\end{quote}
\textit{Id}.
\item \textsuperscript{83}See, e.g., Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
\item \textsuperscript{84}U.S. CONST. art. I, § 4.
\item \textsuperscript{85}U.S. CONST. art. II, § 1.
\item \textsuperscript{87}Arguably, state regulation necessarily encroaches upon the right to vote.
\item \textsuperscript{88}See, e.g., Gray v. Sanders, 372 U.S. 368 (1963) (Georgia’s vote tallying
\end{itemize}
announced a definitive method of analyzing cases and controversies involving electoral participation:90

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.91

This analysis calls for a reviewing court to initially evaluate the burden of a challenged state regulation on the voter's right to vote. However, in order to evaluate this burden the reviewing court must know if the nature or extent of the right to vote is touched by the regulation in question. Because the nature and extent of the right to vote remains vastly unannounced,92 a reviewing court's Anderson analysis is likely to reveal new aspects of the right to vote.

One area of electoral participation whose place in the constitutional right to vote has been uncertain is the write-in vote. The history of write-in voting in United States jurisprudence, coupled with the Burdick Court's Anderson analysis, is illustrative of the uncertainty of the right to vote and the helpfulness of the Anderson analysis in defining this right.

---

regulations gave rise to the pronouncement of the voting right maxim "One person, one vote"). See generally TRIBE, supra note 3, § 13-2 to -7, at 1063-76 (outlining how challenges to a state's power to regulate defined the "one person, one vote" aspect of voters' rights).


90. Id. at 789. Previously, the Court appeared to have used a number of different analytical approaches. See, e.g., Clements, 457 U.S. at 964-66 (determining the extent the law burdens to measure whether heightened Equal Protection scrutiny is warranted or whether a less scrutinizing derivative of Equal Protection is appropriate). Cf. Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972) (applying strict scrutiny to whether the laws are necessary to a compelling governmental interest); Bullock v. Carter, 405 U.S. 134, 144 (1972) (analyzing the law under close scrutiny; requiring the state law to be reasonably necessary to a legitimate governmental interest).


92. See generally, TRIBE, supra note 3, § 13-1.
B. Write-In Voting Facts: Past and Present

The modern concept of the write-in vote did not emerge until the late 1800s.\textsuperscript{93} Prior to this time, ballot "regulations were few and simple."\textsuperscript{94} The Supreme Court of Wisconsin summarized these early years: "Persons went to the voting places . . . and there delivered . . . a paper upon which they signified their choice . . . The ballots might be written, printed, partly written, partly printed, and any sort of combination of persons who were candidates might be printed or written upon a ballot."\textsuperscript{95} In essence, all votes were write-ins since the election officials did not provide preprinted ballots that voters could use to indicate their choice by merely "checking-off" the appropriate candidate.

This early method of voting, however, was open to abuses and fraudulent election practices.\textsuperscript{96} In response to these shortcomings, the Australian ballot—uniform, preprinted, government-provided ballots—was introduced in the United States. In 1888, local elections in Louisville, Kentucky were conducted under the Australian ballot system.\textsuperscript{97} That same year, Massachusetts made the Australian ballot system mandatory statewide.\textsuperscript{98} By 1892, thirty-eight states had some sort of Australian ballot.\textsuperscript{99} And today, of course, the Australian ballot almost exclusively dominates the election systems of the United States.\textsuperscript{100}

With the Australian ballot came the modern concept of the write-in vote. Namely, a write-in vote is when a voter casts a vote for a candidate by literally writing the candidate’s name on the ballot when that candidate’s name fails to appear on the preprinted Australian ballot.

Currently, most state election schemes incorporate the use of write-in voting. This, however, is not universally true. In addition to Hawaii, three other states do not count write-in votes in any of its elections.\textsuperscript{101} Further-
more, a minority of states prohibit write-in voting for certain offices,\textsuperscript{102} for candidates who ran unsuccessfully in primaries,\textsuperscript{103} in run-off elections,\textsuperscript{104} or in primary elections.\textsuperscript{105} And, a slim majority of states condition the tabulation of a candidate’s write-in votes upon the filing of a declaration of candidacy shortly before the election.\textsuperscript{106} A definitive determination concerning the extent to which the write-in vote may be constitutionally restricted could have quite an impact on this vast spectrum of restrictions offered by the states.

\begin{footnotesize}
\begin{enumerate}
\item See N.M. STAT. ANN. § 1-12-19.1(E) (Michie 1991); OHIO REV. CODE ANN. § 3513.04 (Anderson 1988); WASH. REV. CODE ANN. § 29.51.1704 (West 1993).
\item See TEXAS ELEC. CODE ANN. § 146.002 (West 1986). Louisiana has no specific statute but does not allow it.
\item See ARIZ. REV. STAT. ANN. § 16-312 (Supp. 1993); ARK. CODE ANN. § 7-5-205 (Michie 1991); CAL. ELEC. CODE § 7300 (West Supp. 1993); COLO. REV. STAT. § 1-4-1101 (Supp. 1993); CONN. GEN. STAT. ANN. § 9-175 (West 1989); FLA. STAT. ANN. § 99.061(3) (West Supp. 1993); GA. CODE ANN. § 21-2-133 (Harrison 1990); IDAHO CODE § 34-702A (Supp. 1993); 10 ILL. COMPILED STAT. ANN. 5/17-16.1 (Smith-Hurd 1993); IND. CODE ANN. § 3-8-2-2.5 (Burns 1993); KAN. STAT. ANN. § 25-305(c) (Supp. 1992); MD. ANN. CODE art. 33 § 17-5(b) (1957); MASS. GEN. LAWS ANN. ch. 54 § 78A (West 1991); MO. REV. STAT. § 115.453(4) (Supp. 1992); MONT. CODE ANN. § 13-10-211 (1993); NEB. REV. STAT. § 32-428.10(2) (1988); N.M. STAT. ANN. § 1-12-19.1A (Michie 1991); N.Y. ELEC. LAW § 6-153 (McKinney Supp. 1994); N.C. GEN. STAT. § 163-123(a) (1991); N.D. CENT. CODE § 16.1-12-02.2 (Supp. 1993); OHIO REV. CODE ANN. § 3513.041 (Anderson 1988); OR. REV. STAT. § 249.007 (1991); TEX. ELEC. CODE ANN. § 192.036 (West 1986); UTAH CODE ANN. § 20-7-20 (Supp. 1993); WASH. REV. CODE ANN. § 29.04.180 (West 1993); WIS. STAT. ANN. § 8.185(1) (West 1986).
\end{enumerate}
\end{footnotesize}
C. State and Federal Court Treatment of the Write-In Vote

Whether the United States Constitution prohibits restrictions on write-in voting has rarely been presented directly to any court. The few cases considering this issue, directly or indirectly, show that it is not clear whether write-in voting lies within the nature or extent of the right to vote.

The state courts have frequently encountered the issue of whether their respective state constitutions prohibit bans on write-in voting. Five states' highest courts have invalidated statutes prohibiting write-in voting on the grounds of their state constitutions. Other courts have indicated similar conclusions in dicta or have reinterpreted statutes seemingly banning write-in voting to save it from constitutional invalidation. Although these decisions are based upon state constitutions, "few of these cases rely on specific constitutional language regarding the right to write-in; instead the cases consider whether this right derives from the general concept of a right to vote." Therefore, the cases represent "persuasive authority for a similar interpretation of the federally guaranteed right to vote."

Because these state cases rely on "the general concept of the right to vote," they reveal the belief that the write-in vote lies within the parameters of the right to vote. The cases, however, fail to indicate the source of this belief. The language in these opinions is broad and appears to indicate that the write-in vote is in some way fundamental or absolute. For example, in Thompson v. Willson the Georgia Supreme Court stated that "the right to

107. Batey, supra note 77, at 204.
108. See id. at 204-05.
109. See Canaan v. Abdelnour, 710 P.2d 268 (Cal. 1985). Batey, supra note 77, at 204-05 nn.13, 20-23, also cites the following cases: Littlejohn v. People ex rel. Desch, 121 P. 159 (Colo. 1912); State ex rel. Lamar v. Dillon, 14 So. 383 (Fla. 1893); Smith v. Smathers, 372 So.2d 427 (Fla. 1979); Thompson v. Willson, 155 S.E.2d 401 (Ga. 1967); Barr v. Cardell, 155 N.W. 312 (Iowa 1915); Jackson v. Norris, 195 A. 576 (Md. 1937). Id.
111. Batey, supra note 77 at 205 n.24 (citing Mayor v. State ex rel. Howie, 59 So. 873 (Miss. 1912); Park v. Rives, 119 P. 1034 (Utah 1911)).
112. Id. at 204.
113. Id. at 204-05.
114. 155 S.E.2d 401 (Ga. 1967).
write the name of his choice and strike the name presented to him [is guaranteed]."115 The Pennsylvania Supreme Court added:

Unless there was such provision to enable the voter not satisfied to vote any ticket on the ballot, or for any names appearing on it, to make up an entire ticket of his own choice, the election as to him would not be equal, for he would not be able to express his own individual will in his own way.116

The California Supreme Court also strongly suggested that the write-in vote must be a fundamental characteristic of the right to vote:

Under every form of ballot of which we have had any experience the voter has been allowed—and it seems to be agreed that he must be allowed—the privilege of casting his vote for any person for any office by writing his name in the proper place.117

The Georgia Supreme Court in Thompson v. Willson118 and the California Supreme Court in Canaan v. Abdelnour119 considered the federal constitutionality of write-in prohibitions along with their analyses under their state constitutions. Using similarly broad and absolute language, these decisions held that the federal right to vote was as equally offended as the right to vote found in their own state constitutions.120

Other decisions have protected write-in voting, but not in such an absolute or fundamental manner. The United States Supreme Court has noted that "the rights of voters and the rights of candidates do not lend themselves to neat separation."121 The Court has identified a complementary nature between candidate access to the ballot and the availability of the write-in vote.122 Yet, the availability of write-in voting has not always saved candidate access laws from being constitutionally invalidated.123 This relationship with ballot access suggests a smaller role for write-in voting in the

115. Id. at 404.
118. ff155 S.E.2d 401 (Ga. 1967).
119. 701 P.2d 268 (Cal. 1985).
120. Thompson, 155 S.E.2d at 404; Canaan, 710 P.2d at 282.
right to vote. Perhaps the write-in vote is not encompassed in the right to vote at all. It might merely be a method—but not the only method—of securing the right to vote actually guaranteed by the Constitution.

In *Paul v. Indiana Election Board,¹²⁴* a federal district court separated the voter's and candidate's rights and placed "more importance on a voter's right to vote for the candidate of his choice than on a candidate's right to run for office."¹²⁵ In doing so, it joined the federal appellate court of *Dixon v. Maryland State Administrative Board of Election Laws¹²⁶* in viewing the write-in vote as political expression. The United States Supreme Court has said that "an election campaign is a means of disseminating ideas as well as attaining political office,"¹²⁷ and further that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."¹²⁸ By characterizing the write-in vote as political expression, a means of protesting or communicating akin to picketing or distributing leaflets, the *Paul* and *Dixon* decisions mandate strict protection for write-in voting under the First Amendment.¹²⁹ These two decisions identify a facet of the right to vote in the First Amendment and would extend protection of the write-in vote to that typically given to political speech under the First Amendment.

The position of the write-in vote in the right to vote is further muddled by decisions that appear to reject all of the above ideas. The United States Court of Appeals for the Seventh Circuit has declared that the act of voting "is in fact not a vehicle for communicating messages; it is a vehicle only for putting candidates and laws to the electorate to vote up or down."¹³⁰ Furthermore, some state courts have extended no protection to the write-in vote at all,¹³¹ deferring instead "to the legislature's general power to regulate the conduct of elections."¹³² The potential for an absolute ban on write-in voting must be tempered because write-in voting is not always a frivolous act.

---

¹²⁵ Id. at 623.
¹²⁶ 878 F.2d 776 (4th Cir. 1989).
¹³⁰ Georges v. Carney, 691 F.2d 297, 301 (7th Cir. 1982).
¹³¹ Batey, supra note 77, at 206 n.31 (citing Davidson v. Rhea, 256 S.W.2d 744 (Ark. 1953); Pasco v. Heggen, 314 So.2d 1 (Fla. 1975); State ex rel. Mize v. McElroy, 11 So. 133 (La. 1892); McKenzie v. Boykin, 71 So. 382 (Miss. 1916); Mullholand v. Batt, 130 N.E.2d 805 (Ohio 1955); Chamberlain v. Wood 88 N.W. 109 (S.D. 1901)).
¹³² Id. at 206.
Within the past forty years, four national representatives have been elected by write-in votes. Prominent U.S. Senator Strom Thurmond of South Carolina initially captured his Senate position as a write-in candidate. It is with this ambient uncertainty that the Court handed down the Burdick decision dealing with the write-in vote’s place in the Constitution.

IV. THE INSTANT DECISION

A. The Majority Opinion

The majority opinion in Burdick, written by Justice White, begins by noting the extreme importance the right to vote plays in the United States’ constitutional democracy. Justice White, however, warned that, despite the grand importance of the right to vote, restrictions and burdens upon it do not automatically trigger strict scrutiny by a reviewing court. The states’ right to regulate elections—necessary to make the election of governmental representatives as fair and efficient as possible—implicitly requires burdening an individual’s right to vote to some extent. Justice White claimed that applying strict scrutiny to all voting regulations would so greatly "tie the hands" of a state as to hinder or block efforts to achieve fair and efficient elections. The majority, therefore, affirmed that the flexible analysis announced in Anderson is the appropriate one for regulations burdening the right to vote.

133. Recent Development, 104 HARV. L. REV. 657, 661 n.31 (1990) (citing De Young & Garcia, Despite the Odds, 2 ELECTORAL STUD. 241, 241 (1983)).
134. Search of LEXIS, Campaign library, Congressmembers file (November 10, 1993). Senator Thurmond was elected as a write-in candidate in 1954. He has retained his Senate seat up to the date of this publication. Senator Thurmond has previously been president pro tempore of the U.S. Senate (1981-87) and is currently the chairman of the Senate Armed Services Committee and second rank on the Senate Judiciary Committee and Senate Veterans’ Affairs Committee. Id.
135. Burdick, 112 S. Ct. at 2061. Chief Justice Rehnquist, along with Justices O’Connor, Scalia, Souter, and Thomas, joined in Justice White’s opinion. Id.
136. Id. at 2063.
137. Id. at 2062-63.
138. Id. at 2063 (citing U.S. CONST. art. I, § 4, cl. 1; Tashjian v. Republican Party of Conn. 479 U.S. 208, 217 (1986); Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).
139. Id. (citing Storer v. Brown, 415 U.S. 724, 730 (1974)).
140. Id. (citing Anderson v. Celebreeze, 460 U.S. 780, 788 (1983)).
141. Id.
142. See supra notes 89-92 and accompanying text for discussion of the Anderson analysis.
Justice White interpreted the Anderson analysis, which defined the level of scrutiny to be applied to a regulation, as dependent upon the extent of the burden the regulation places upon a voter's First and Fourteenth Amendment rights. Thus, the greater the burden, the more severe the scrutiny that a regulation will receive. However, Justice White noted that if the burden is a "reasonable, nondiscriminatory restriction" then a state's ordinary interest in regulating elections is sufficient to make the regulation constitutional.

Justice White's Anderson analysis began by identifying the burden placed by Hawaiian election law upon the right to vote. The majority steadfastly rejected the proposition that the ban on write-in voting burdened a voter's right to political expression guaranteed by the First and Fourteenth Amendments. Justice White noted that a right to vote is intertwined with a candidate's right to access a ballot and that "the function of the election process is 'to winnow out and finally reject all but the chosen candidates.'" Justice White did not view elections as a soapbox to announce and exchange political ideas. Additionally, he rejected the idea that a ban on write-in voting discriminates based on the content of the ballot or forces a voter to espouse a position with which the voter does not agree. Therefore, the Hawaiian election regulations did not burden a voter's right of political expression.

The majority did perceive a burden on voters' First and Fourteenth Amendment rights to associate with the candidates of their choice and to have those candidates placed on the ballot. Justice White analyzed the Hawaiian election scheme and highlighted the ease with which candidates could access the ballot up to the cut-off date, sixty days before the primary. The burden on a voter's right to associate with a candidate and have that candidate appear on the ballot was minimal up to the cut-off date, according to Justice White, but existed to a certain degree after the cut-off date.

143. Burdick, 112 S. Ct. at 2063.
144. Id. (citing Norman v. Reed, 112 S. Ct. 698, 705 (1992)).
145. Id. at 2063-64 (quoting Anderson, 460 U.S. at 788 n.9).
146. Id. at 2065-66 (citing Bullock v. Carter, 405 U.S. 134, 143 (1972)).
147. Id. at 2066 (quoting Storer, 415 U.S. at 735).
148. Id. (citing Storer, 415 U.S. at 735).
149. Id.
150. Id.
151. Id. at 2064.
152. See supra notes 25-53 and accompanying text for a discussion of the relevant Hawaiian regulations.
153. Burdick, 112 S. Ct. at 2065.
154. Id.
date because of the Hawaiian prohibition on write-in voting. This burden on a voter's freedom of choice and association, the majority declared, falls only upon those voters who have not identified their candidates until after the cut-off date. According to the majority, this burden is of "little weight." Since the burden is of "little weight," the Anderson analysis requires the Hawaiian prohibition on write-in voting to undergo minimal scrutiny, a level of scrutiny far less severe than the need to show compelling state interests with the prohibition narrowly tailored to fit those interests.

The majority found that the interests presented by Hawaii for prohibiting write-in voting were sufficient to overcome the minimal level of scrutiny determined by the Anderson analysis. Avoiding factionalism in the general election, aiding in the "winnowing out" of candidates, keeping attention on contests actually in question, avoiding party raiding, and preventing "sore loser" candidates from disrupting an election were all identified by the majority as interests that assist in satisfying constitutional scrutiny.

The majority therefore concluded that Hawaii's ban on write-in voting placed only a minimal burden on a voter's right to vote that was easily justified by Hawaii's interest in regulating elections to ensure that they were fair and efficient.

**B. The Dissenting Opinion**

The dissenting opinion in Burdick—written by Justice Kennedy—agreed with the majority opinion on a few important points. First of all, the dissent agreed that the ban on write-in voting did not infringe upon a voter's right to political expression. "[T]he purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression." Secondly, the dissent found the Anderson analysis

---

155. Id.
156. Id. (citing Storer, 415 U.S. at 736).
157. Id.
158. Id. at 2067.
159. Id. at 2066-67.
160. Id. at 2067-68.
161. Id. at 2068 (Kennedy, J., dissenting). Justices Blackmun and Stevens joined Justice Kennedy's dissent. Id.
162. Id. at 2069.
163. Id.
appropriate for the present controversy.\textsuperscript{164} It is in the analysis itself that the dissent parted company with the majority.\textsuperscript{165}

The dissenters that believed the majority went astray in its \textit{Anderson} analysis by equating ballot access with the right to vote.\textsuperscript{166} The dissenters noted that the availability of write-in voting is an important factor in determining whether a state's ballot access regulations are constitutional.\textsuperscript{167} They claimed that it was circular reasoning to therefore justify a prohibition on write-in voting upon otherwise constitutional ballot access laws.\textsuperscript{168} Furthermore, even if the ban on the write-in vote was to be measured by the ballot access laws, the dissenters found the ban extremely burdensome because access was not as easy as the majority claimed. The filing deadlines for candidacy were too far from the primary to justify the ban. Also, the dissent pointed out the dominance of the Democratic Party in Hawaii and how the ballot access laws appeared to freeze this status quo rather than encourage participation from opposing views.\textsuperscript{169} The dissent believed that the ban on write-in voting imposed a heavy burden on the right to vote even in light of the ballot access laws.\textsuperscript{170}

The dissent identified other reasons why the burden upon the right to vote under the \textit{Anderson} analysis was greater than the majority put forth. The write-in vote is an important method of freeing the restrictions upon a voter's choice imposed by the Australian ballot system that become particularly stringent when there are late developing issues or information.\textsuperscript{171} The issues

\begin{enumerate}
\item[164.] Id. at 2069-70.
\item[165.] Id. at 2070.
\item[166.] Id. at 2068.
\item[167.] Id. at 2071 (citing Jenness v. Fortson, 403 U.S. 431, 438 (1971)).
\item[168.] Id. at 2070-71.
\item[169.] Id. at 2069. The dissenters noted how the Democratic primary is often decisive of the general election. Therefore, voters could feel pressured to vote on the Democratic ballot to influence the ultimate outcome of the election rather than to choose another ballot and vote according their will. \textit{Id.} It is with respect to this freezing of the status quo that the dissent issued its most scathing attack on the majority:

The majority's approval of Hawaii's ban is ironic at a time when the new democracies in foreign countries strive to emerge from an era of sham elections in which the name of the ruling party candidate was the only one on the ballot. Hawaii does not impose as severe a restriction on the right to vote, but it imposes a restriction that has a haunting similarity in its tendency to exact severe penalties for one who does anything but vote the dominant party ballot.

\textit{Id.}

\item[170.] Id. at 2070-71.
\item[171.] Id. at 2069.
\end{enumerate}
coming to light late in a campaign could be just as influential upon a voter's choice of a candidate as issues known early. Without the write-in vote, the pool of candidates in the Hawaiian election scheme could be frozen prior to such late-breaking information. The electorate may not realize until too late that the candidates do not reflect the views and ideas that the electorate wants. To the dissent, this was a great burden upon the right to vote.\textsuperscript{172} Additionally, the dissent recognized that since the Australian ballot system limits the candidates, a prohibition on writing in other candidates can deprive some voters a meaningful ballot by not allowing them to vote for the candidate of their choice.\textsuperscript{174} If this is the case, the prohibition on the write-in vote would be a severe burden upon the right to vote.\textsuperscript{175} The meaningfulness of a write-in vote is not diminished even though the candidate has virtually no chance of winning, according to the dissent.\textsuperscript{176} Although the dissenters related the write-in vote with the right to cast a meaningful ballot, they did not explain what entailed a meaningful ballot.\textsuperscript{177} They did find the prohibition on the write-in vote to severely burden the right to vote by loss of the voter's meaningfulness.\textsuperscript{178}

By finding the prohibition on the right to vote to be a great burden, the dissent's weighing of Hawaii's interests under the \textit{Anderson} analysis found that the interests failed to meet the scrutiny necessary for the ban to be constitutional.\textsuperscript{179} The dissent identified three proffered state interests for the ban: Preventing sore loser candidacies during the general election, permitting unopposed primary victors to avoid general elections, and Hawaii's interest in encouraging informed selection of candidates.\textsuperscript{180} The dissent found that the absence of a write-in ban was likely to encourage the informed selection of candidates,\textsuperscript{181} and that the automatic ascension of unopposed candidates in general elections made it all the more important to allow write-in votes in the primaries.\textsuperscript{182} Finally, the dissent recognized the importance of avoiding sore loser candidacies, but viewed a ban on write-in voting as too broad and
burdensome to fit this interest. Therefore, the dissent would declare Hawaii’s ban on write-in voting unconstitutional for being overly burdensome to the voter’s right to vote to justify its use for promoting fairness and efficiency.

V. COMMENT

A. Muting Voting Booth Speech

The Burdick decision clearly reverses the recent trend exemplified by Thompson and Dixon of viewing the act of voting as one of political expression. On this point all the Justices in Burdick agreed.

The act of voting is only to determine an office holder, not to contribute to the marketplace of ideas. The expression of dissent voiced by the write-in vote that was so strongly defended in Dixon is now without constitutional protection. Burdick lessens the role the First Amendment plays in the right to vote. Although political speech will clearly continue to be protected, this right has become distinct from the right to vote.

The Court cited its Storer decision as precedent for denying a speech element in voting. This Court, however, dramatically expanded upon the meaning of Storer. Storer noted that elections function to "winnow out" candidates. While this seems obvious, Storer did not say that the winnowing out of candidates was the exclusive function of elections, nor did it count out other functions elections may serve, like expressing dissent. Envisioning the act of voting as having no quantum of speech is solely a creation of the Burdick decision.

This characterization of voting as an act without any speech component underestimates the value of voting to communicate. Although "voting and . . . political speech do bear a number of superficial differences," party goals, views, and policies are shaped by election results. If voting truly were not speech, why even publish election results? The winners could simply be announced, so long as safeguards existed to prevent fraud. As it stands,

183. Id.
184. Id. at 2072.
185. See supra notes 114-29 and accompanying text for a discussion of these cases.
186. Burdick, 112 S. Ct. at 2066, 2069.
188. Burdick, 112 S. Ct. at 2065.
189. Storer, 415 U.S. at 735.
190. See id.
election results provide a wealth of information. Parties crunch and tabulate election results to identify strongholds and weak territories for themselves and their opponents. The views expressed by strong or weak running candidates are examined to plan campaign strategies and tactics and to develop new views and policies. The 1992 independent presidential candidate Ross Perot exemplifies the power of voting booth speech. Although he lost his bid to become president, he had an unusually strong showing. If voting were merely a process of winnowing out candidates, why would Perot have gained so much political clout from his defeat? The political establishment has heard the dissatisfaction of voters through the voice of the voting booth. Viewing the act of voting as only winnowing out candidates is idealistic and naively denies reality.

B. Fundamentally Dead

Another direct consequence of the Burdick decision is the removal of any notion that the write-in vote is absolutely guaranteed by the Constitution. Although the myriad of restrictions imposed on the write-in vote by the states may have foreshadowed this conclusion, the absolute ban on write-in voting still invokes a knee-jerk reaction that it is somehow unconstitutional or un-American. As one court put it, "We have heard of similar methods of holding elections in other so-called democratic countries . . . but this is not the American way." The majority’s upholding of the blanket ban on the write-in vote clearly exorcises the idea that the write-in vote is in communion with the fundamental guarantees of the Constitution. A ban on write-in voting does not necessarily fundamentally burden the right to vote, but may create only a minimal burden that avoids strict scrutiny.

192. Perot "captured one of every five votes, the most by any independent or third-party candidate since Theodore Roosevelt took 30 percent as the 'Bull Moose' candidate in 1912." B. Drummond Ayres, Jr., Despite Losing Election, Perot Gains in Standing, N.Y. TIMES, Mar. 15, 1993, at A10.

193. As Representative William S. Cohen of Maine was quoted as saying, "I walked in here from a meeting with the President, and there were as many people waiting to get in to see [Perot] as there had been waiting to see [the President]. And I said [to Perot], 'Who won the election?' You have a tremendous amount of support out there." Id.

194. Both the Democratic party and the Republican party have initiated research and polls focused on Perot voters following the 1992 Presidential election. See id.; Steve Daley, Voter's Unalloyed Anger is New Part of Political Scene, CHI. TRIB., August 15, 1993, at C1.

195. See supra notes 100-05 and accompanying text.

The dissenters did not expressly say that they believed write-in voting was fundamental to the right to vote. Their opinion, however, did include language that would not rule out the possibility of it being fundamental. They spoke of the write-in as more than a candidate access prophylactic, but also as assuring a voter of a "meaningful vote." The term "meaningful vote" is not defined, but is used synonomously with the right to vote itself. The write-in vote, therefore, assures the right to vote, and perhaps is fundamental to the right to vote. Yet, as a consequence of Burdick, a state may freely extend, modify or prohibit the write-in vote without constitutional consequences so long as it satisfies the Anderson analysis.

C. The Anderson Analysis

The crucial point in the Anderson analysis is in defining the burden on the right to vote. It determines what level of scrutiny a challenged regulation must face. The Burdick court eliminated the potential burden the ban would produce if voting were speech and further found that the write-in vote was not fundamental, i.e., always requiring strict scrutiny (as the dissent implied). The majority identified a burden only upon those voters who identify their candidate late in the election process. The magnitude of the burden was of "little weight" for these people. The determination of such a small burden proved dispositive. This determination, however, either undervalued the burden or indicated a lessening of the significance the Court placed upon the right to vote.

In characterizing the burden as being of "little weight," the Court is assuming that most decisions of whom to vote for are made early in a campaign. In Hawaii, this analysis assumes most voters have decided sixty days before the primaries that their candidates are part of the primary field. This reasoning seems to ignore the significance of late breaking information upon the electorate, as noted by the dissent. In this age of omnipresent media, information is rapidly dispersed and assimilated. As a result, campaign issues have the potential to change daily. A late-breaking issue can become the focus of a campaign even at the eleventh hour. Not allowing a voter's choice to be as flexible as the events that influence that choice is not a burden of "little weight." Even without the late breaking information, it is arbitrary to give more constitutional protection to those voters who decide whom to vote for early in a campaign and not late.

The majority opinion never mentions the dominance of the Democratic Party in Hawaii. The dissent saw the Hawaiian election laws as a means for the Democratic Party to maintain its dominant status. According to the dissent, election laws that maintain the status quo are strong evidence of the unconstitutionality of those laws. The majority indicates either an ambivalence to election laws favoring the status quo, or that this information would be incongruent with its analysis. The Court has previously said that a "[s]tate
may not act to maintain the "status quo" of major parties. The status quo preserving aspect of the Hawaiian law must have been unfavorable to the Court's analysis. If voting is not speech and write-in voting is not fundamental to speech, the majority mischaracterized the burden to the voters as being only upon those who do not choose their candidate until late. If the lack of write-in voting prevents the elected officials from being more reflective of the desires of the constituency, the burden is far greater.

VI. CONCLUSION

The Burdick decision has narrowed the scope of the right to vote. The Court concluded that write-in voting is not political speech under the First Amendment, nor is write-in voting in some other way fundamental under the Constitution. A state may limit or eliminate the write-in vote as an exercise of a state's power to regulate elections. The absence of write-in voting is relevant only if its presence would cure an otherwise constitutionally defective election scheme. The boundaries of the right to vote were explored, and the write-in vote was severed from it.

DAVID PERNEY