BALLOT SPEECH

Derek T. Muller*

A ballot ostensibly has a simple purpose: it is the means by which the state determines the winners and the losers of an election. But the words on the ballot have the power to influence voters. The ballot includes the candidate's name, often the candidate's party preference, and sometimes information about a candidate's incumbency or occupation. These words are usually selected by the candidate to communicate information to the voter in the voting booth, but they are also subject to regulation by the state and potentially require consent from a political party. Ballots, then, include expressive elements, something this Article calls "ballot speech"—content that a candidate or party desires to communicate to voters by means of the ballot.

Judicial opinions and academic commentary typically examine ballot speech not as speech, but principally as the incidental byproduct of election administration, subject to regulation in a balancing of interests. This Article suggests that ballot speech merits a different, more robust defense from the whims of election administrators and the deference of courts. Ballot speech should receive protection as speech under the First Amendment, rather than as merely one element of the free association that candidates and voters share at the ballot box. The ballot more closely resembles a nonpublic forum. And state laws that unreasonably stifle the expression of candidates and voters, that enhance some candidates at the expense of others, or that attempt to put a thumb on the scale of the outcome of an election, cannot stand. It is time to recognize this new definition of ballot speech, and to provide an appropriate legal framework to protect it.

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* Associate Professor of Law, Pepperdine University School of Law. I received valuable support for this research from my colleagues at Pepperdine. Comments I received at the Loyola University of Chicago Constitutional Law Colloquium were particularly helpful, as were comments from Craig Engle, David Han, Michael Helfand, John Inazu, Barry McDonald, and Franita Tolson. Special thanks to Bailey Blaies, Mark Feddes, Sean Olk, and Derek O'Reilly-Jones for their diligent research.

INTRODUCTION

"Barack Obama" appeared on the ballot in recent presidential elections—not "Barack H. Obama," or "Barack Hussein Obama II."[1] And in 2012, so did "Mitt Romney"—not "W. Mitt Romney" or "Willard 'Mitt' Romney."[2] And while "Hillary Rodham Clinton" ran for the United States Senate in 2000 and 2006, "Hillary Clinton" ran for president in 2008 and is running for president in 2016.[3]

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1. *See, e.g.*, BARBOUR CTY., ALA, SAMPLE BALLOT: OFFICIAL BALLOT GENERAL, CONSTITUTIONAL AMENDMENT & SPECIAL ELECTION (2012), http://www.alabamavotes.gov/downloads/election/2012/general/sampleBallots/barbour-2012-sample.pdf; MIAMI-DADE CTY. ELECTIONS DEP'T, FLA., OFFICIAL SAMPLE BALLOT: GENERAL ELECTION (2012), http://www.miamidade.gov/elections/s_ballots/11-6-12_sb.pdf; STATE OF MD., BALT. CITY, OFFICIAL BALLOT: PRESIDENTIAL GENERAL ELECTION (2012), http://www.elections.state.md.us/elections/2012/general_ballot_proofs/03.pdf.

2. *See, e.g.*, BARBOUR CTY., ALA., *supra* note 1; MIAMI-DADE CTY. ELECTIONS DEP'T, FLA., *supra* note 1; STATE OF MD., BALT. CITY, *supra* note 1.

3. *See, e.g.*, Janell Rose, *Hillary Clinton Will No Longer Be Called "Rodham." Here's Her Complicated History with Her Maiden Name*, WASH. POST: THE FIX (Nov. 30, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/11/19/the-fascinating-history-of-when-hillary-clinton-has-chosen-to-use-her-maiden-name/; Callanecc, *Talk: Hillary Rodham Clinton/April 2015 Move Request*, WIKIPEDIA (June 11, 2015, 7:45 AM), https://en.wikipedia.org/wiki/Talk:Hillary_Rodham_Clinton/April_2015_move_request (discussing change of main Wikipedia entry from "Hillary Rodham Clinton" to "Hillary Clinton").

Political parties like the "Working Families Party," the "Conservative Party," and the "Rent Is 2 Damn High Party" have recently appeared on ballots.[4] Ballots often contain notations or designations about the candidates running for office, either candidate-selected terms like "Educator" or "Small Business Owner," or state-required terms like "Incumbent."

A ballot ostensibly has a simple purpose: it is the means by which the state determines the winners and the losers of an election.[5] But the words on the ballot have the power to influence voters.[6] As noted below, the ballot includes the candidate's name, often the candidate's party preference, and sometimes ballot designations about a candidate's incumbency or occupation. These words are usually selected by the candidate to communicate information to the voter in the voting booth, but they are also subject to regulation by the state and may require consent from the candidate's political party. Ballots, then, include an expressive element, something this Article calls "ballot speech"[7]—content that a candidate or party desires to communicate to voters by means of the ballot.

Judicial opinions and academic commentary typically examine ballot speech not as speech but, principally, as the incidental byproduct of election administration. It is usually examined from the perspective of the state's interest in administering the ballot,[8] the voter's interest in associating with a candidate or a political party,[9] or a voter's interest in being informed.[10] These approaches ignore a crucial perspective: the candidate's or party's interests in ballot expression.

This Article creates a practical framework for this new perspective of ballot speech. It opens in Part I with the administrative and legal framework that currently regulates ballot speech. Under these regulations, candidates seeking to use particular versions of their names, and political parties attempting to secure their desired party identities must navigate a series of restrictions before displaying their preferred messages. Ballot notations provide an additional opportunity for

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4. *See infra* Section I.B.

5. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997) ("Ballots serve primarily to elect candidates, not as forums for political expression.").

6. *See, e.g.*, Cook v. Gralike, 531 U.S. 510, 525 (2001) (finding that a set of ballot labels would "handicap candidates for the United States Congress"); Anderson v. Martin, 375 U.S. 399, 402 (1964) (concluding that a Louisiana law requiring the race of candidate to be listed on the ballot encouraged voters to discriminate).

7. *See, e.g.*, Leah Sellers, *We Should Abolish the Franking Privilege, Mass Constituent Communications, and Other Campaign-Related Government Speech but Frankly, It Won't Be Easy*, 42 U. TOL. L. REV. 131, 154 n.162 (2010) (identifying "government ballot speech" in federal cases).

8. *See generally* Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559 (2015) (explaining states' purported interests in ensuring that only constitutionally qualified candidates appear on the ballot).

9. *See infra* Section II.A.

10. Or, perhaps more cynically, the ballot's function is to spread the poor choices of the uninformed voter equally across candidates. *See* James A. Gardner, *Neutralizing the Incompetent Voter: A Comment on* Cook v. Gralike, 1 ELECTION L.J. 49, 59 (2002).

candidates to communicate to voters, and sometimes the state chooses to manipulate the content in those notations. This Article then explores ballot speech in the era before state administration and identifies extensive expressive content that once appeared on ballots—content lost when the states began to regulate ballot content.

In Part II, this Article surveys the First Amendment theory and the patchwork of judicial opinions that implicate ballot speech. It begins with the freedom of association, a right ultimately identified as an element of the First Amendment's right to the freedom of speech. It notes the Supreme Court's application of the freedom of association to ballot access disputes and its conclusion that the right of voters and candidates to associate with one another merits First Amendment protection. It describes the shift toward a balancing test in which the severity of the burden on voters is weighed against the state's interest in election-related law. It relates the application of that standard in subsequent ballot speech cases and concludes that this standard is not helpful in addressing ballot speech.

The Article then turns to other relevant First Amendment issues implicated in ballot speech cases: (1) public forum analysis, the doctrine that ascertains how the government can regulate speech occurring on property it owns or controls; (2) compelled speech, the doctrine that prevents the government from forcing an individual to speak; and (3) government speech, the doctrine that controls how the government can speak when it has control over a message and communicates to the public using its own resources. These First Amendment doctrines are then applied to the candidate's expressive interests on the ballot but none fit perfectly with the nature of ballot speech.

Part III of this Article then offers an alternative theory based on freedom of association. It identifies two principal weaknesses that compel a new approach to ballot speech. First, the associational framework is unable to adequately address the expressive interests at stake in ballot speech. The associational framework is better suited for instances where burdens affecting the right to association are at stake, and ballot speech cannot be adequately examined under this framework. Second, expressive content on the ballot is independently worthy of First Amendment protection, rather than simply being a component of the associational framework.

Finally, in Part IV, this Article suggests the proper legal framework for ballot speech. Instead of viewing regulations of ballot content as some kind of balancing test, the proper framework is to view it through the lens of the candidate's expressive interests under the First Amendment. This lens subjects restrictions on the content of the ballot to a higher level of scrutiny and greater skepticism of the state's purported interests. There are limited areas in which the state may assert an interest, such as avoiding voter confusion, but the instances in which the state may regulate ballot speech are rarer today than in the past. This Article suggests a First Amendment analysis for courts scrutinizing challenges to regulations that implicate ballot speech and identifies administrative or political solutions to better accommodate ballot speech.

This framework neatly applies to several forms of state-compelled speech on the ballot, which have the ostensible purpose of informing voters, but that effectively force candidates to adopt a message or speak on a subject. Use of this framework demonstrates that state-compelled ballot designations regarding incumbency or other state-sponsored messages would likely fail under First Amendment analysis. Moreover, failure is particularly likely when the government adopts a state-compelled ballot designation with an eye toward a particular outcome or to manipulate the political process.

I. EXPRESSIVE CONTENT ON THE BALLOT

The first Australian ballot—a standard, government-administered ballot given to voters at the polls and designed to prevent ballot-box corruption—debuted in the United States in 1888.[11] Prior to that, individuals would typically bring their own ballots to the polling place, often printed by candidates or parties, with clear visual size and color cues that made privacy nearly impossible.[12] The privacy and security that the Australian ballot offered led to its quick adoption across the nation.[13]

The state-administered ballot meant, literally, that the state must administer the ballot.[14] Government officials, acting pursuant to legal instructions, decided what to include and what to exclude from the ballot. The ballot—which once contained information provided by the candidates and the parties, and even by the voters—would now be state regulated, often with quite different means of administration from state to state.[15]

Admittedly, the Australian ballot included a calculated trade-off. Instead of allowing open-ended ballot access where voters placed ballots (either handwritten by themselves or pre-written by parties) into the ballot box, states assumed ballot administration in an effort to minimize fraud and intimidation. No late nineteenth century controversy brewed over the content that appeared on the written ballots; instead, state administration of ballot content was a consequence of the Australian ballot.[16]

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11. LIONEL E. FREDMAN, THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM 2, 31 (1968); *see also* Peter Brent, *The Australian Ballot: Not the Secret Ballot*, 41 AUSTL. J. POL. SCI. 39, 44 (2006).

12. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 115 (2000).

13. *See id.* (noting that the Australian ballot was "rapidly . . . [adopted] . . . almost everywhere in the United States").

14. Brent, *supra* note 11, at 45 ("[T]he most important aspect of the Australian Ballot . . . [t]his was the government-printed ballot slip. This was the distinguishing, revolutionary feature."); *see infra* notes 97–101 and accompanying text.

15. *See, e.g.*, Anthony Johnstone, *The Federalist Safeguards of Politics*, 39 HARV. J.L. & PUB. POL'Y 415, 446–47 (2016) (discussing the various procedures different states use on "election day").

16. Brent, *supra* note 11, at 45. (describing the "distinguishing factor" of the Australian ballot as the "government-printed ballot slip," the trait that "made coercion and/or corruption very difficult").

But what content might today's candidates seek to include on ballots? The communicative scope of the seemingly simple ballot is quite broad. It includes variations of the candidates' names, party preferences, and other notations or designations authorized (indeed, sometimes required) by state law.

How voters *use* that information—and whether public policy suggests it ought to be relevant at all—is a matter of debate. At the very least, courts grant voters broad discretion as to how they choose candidates, even if they decide to choose on the basis of distasteful preferences.[17] And it may be the case that the candidate prefers to communicate something to the voters in light of those voter preferences.[18]

A. Candidate Names

The ballot is capable of displaying to voters many elements of a candidate's identity, even with the relatively simple listing of a candidate's name. States place countless restrictions on candidates' names. When a candidate's expressive preference runs up against existing state rules, the state's rules often win. It is often reserved to election officials' discretion whether the facts surrounding a candidate's preferred name meet the requirements of state law.

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17. *See, e.g.*, Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 94 (1990) ("[T]he electorate votes its subjective preferences."); Muller, *supra* note 8, at 579–80 (describing voters' broad discretion).

18. This is as good a time as any to mention a necessary concession of the scope of this Article. It addresses only ballot content of candidates running for political office. It does not address the ballot speech impact of ballot initiatives or referenda. Direct democracy offers an even greater opportunity to address the curiosities of speaking by means of the ballot. Most states, after all, do not include the full text of a proposed initiative, but instead a title and summary. But that title and summary, left in the hands of proponents, might be deeply misleading. Therefore, the task for reviewing the title and summary often falls to an election administrator. *See, e.g.*, Campbell v. Buckley, 203 F.3d 738, 741 (10th Cir. 2000) (deciding a challenge to a Colorado statute requiring a "title board" of city officials to review ballot initiatives). But that puts the election official in a position to put a thumb on the scale, either for or against the initiative, through supposedly "neutral" changes in language. Further complicating initiatives are notations that may be required to appear on a ballot, such as Oregon's requirement that local initiatives must include a warning that a measure may cause property taxes to increase more than 3%. The Ninth Circuit upheld such a notation under the *Burdick* balancing test, discussed extensively in this Article. *See* Caruso v. Yamhill Cty., 422 F.3d 848, 859–61 (9th Cir. 2005). First Amendment issues concerning ballot initiatives have garnered noteworthy scholarly attention. *See, e.g.*, Chris Chambers Goodman, *(M)Ad Men: Using Persuasion Factors in Media Advertisements to Prevent a "Tyranny of the Majority" on Ballot Propositions*, 32 HASTINGS COMM. & ENT. L.J. 247 (2010); J. Michael Connolly, Note, *Loading the Dice in Direct Democracy: The Constitutionality of Content-and Viewpoint-Based Regulations of Ballot Initiatives*, 64 N.Y.U. ANN. SURV. AM. L. 129 (2008); John Gildersleeve, Note, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437 (2007); Anna Skiba-Crafts, Note, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MICH. L. REV. 1305 (2009). Nevertheless, the ballot speech framework in this Article might apply, in a different way, to the initiative or referendum.

Examples abound, though many escape litigation, as decisions are rendered in unpublished administrative or local court decisions and, unless sufficiently salacious, often escape meaningful media attention.

All states require that candidates' names appear on the ballot; voting for anonymous candidates is not allowed.[19] But a candidate may want to include a *nickname* on the ballot.[20] Few, after all, may recognize the name Cornelius McGillicuddy IV, but Florida voters assuredly would vote for Connie Mack.[21]

Candidates may want to use an *alternative version* of their names—not quite nicknames, but perhaps Americanized versions of foreign-looking names. Some candidates may want to include *versions* of their full names, including or excluding elements of legal names, such as middle initials or generational suffixes. Other candidates may want to include *titles* often associated with their names. Candidates who have legally changed their names may want to use their birth names, such as married women who return to their maiden names,[22] or men with legally changed their names who want to revert to their birth names on the ballot.[23]

Some examples are found fairly readily in case law. States, for instance, often refuse candidates' requests to include prefixes or suffixes,[24] like Dr. Romolo Toigo, Ph.D.,[25] Robert Rainey, M.D.,[26] or Dr. Richard Sooy Jr.[27]

Many disputes involve candidates' preferred versions of their legal names. For example, Louisiana law permits nicknames, but not a "deceptive

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19. *See* Vicki C. Jackson, Cook v. Gralike*: Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299, 326.

20. *See e.g.*, TEX. ELEC. CODE ANN. § 52.031(c) (West 1997) (permitting a nickname to appear on the ballot if "commonly known for at least three years preceding the election," excluding "a slogan" or a nickname that "otherwise indicates a political, economic, social, or religious view or affiliation"); Bryan v. Fawkes, 62 V.I. 19, 23 (Sup. Ct. 2014) (discussing a board of elections decision that authorized twenty-two character names and nicknames to be displayed on the ballot).

21. *See* Rich Abdill, *Why Does Connie Mack Get to Use a Fake Name in Congress?*, BROWARD PALM BEACH NEW TIMES (Apr. 9, 2012, 9:00 AM), http://www.browardpalmbeach.com/news/why-does-connie-mack-get-to-use-a-fake-name-in-congress-6444787.

22. *See* Levey v. Dijols, 990 So. 2d 688, 690 (Fla. Dist. Ct. App. 2008).

23. *See, e.g.*, CAL. ELEC. CODE, § 13104 (West 1994) (prohibiting recent name changes within one year of an election unless the name change occurred because of marriage or a judicial decree); Jovana Lara, *Lawsuit Accuses Candidate of Adding Latino Name to Appeal to Anaheim Voters*, ABC 7 EYEWITNESS NEWS (Aug. 22, 2012, 12:00 AM), http://abc7.com/archive/8783291/ (describing a candidate named Steven Chavez Lodge who sought to use his birth name Steven Chavez on the ballot).

24. *See, e.g.*, CAL. ELEC. CODE § 13106 (2016) (prohibiting titles or degrees from appearing next to a candidate's name on a ballot).

25. Toigo v. Columbia Cty. Bd. of Elections, 273 N.Y.S.2d 781, 783 (Sup. Ct. 1966).

26. State *ex rel.* Rainey v. Crowe, 382 S.W.2d 38, 46 (Mo. Ct. App. 1964).

27. Sooy v. Gill, 774 A.2d 635, 642 (N.J. Super. Ct. App. Div. 2001) (finding the title "Dr." inappropriate but concluding that the suffix "Jr." was permissible when candidates have similar names).

name."[28] Albert Jones wanted to include the nickname "Super Nigger" on the ballot.[29] There, the Attorney General's opinion held that "information contained on the ballot is not protected speech under the First Amendment to the Constitution," and the name, "both inflammatory and deceptive . . . would cause confusion and be both fraudulent and frivolous and serve no useful purpose in identifying the candidate."[30]

Chase "I.Q." Jones and Ron "I.Q." Mazier—the "I.Q." stood for "I quit"—tried to get that particular pair of designations included in their names on the Louisiana ballot. [31] Louisiana law permits nicknames, but forbids any designations. Consequently, a state appellate court rejected "I.Q.," considering it an impermissible designation—one that indicated what the candidates would do if elected—rather than a permissible nickname (that is, an abbreviated version of the candidates' actual names, or names they were known by in the community).[32]

Similar to Louisiana law, Minnesota law has been widely interpreted to permit nicknames on the ballot if a candidate is "commonly or generally known by a particular nickname."[33] One candidate sought to appear on the ballot as Shelvie "Prolife" Rettman.[34] Because "Prolife" was not a true nickname for the candidate, it was prohibited.[35] Minnesota law prohibits candidates' names from appearing on the ballot "in any way that gives the candidate an advantage over his opponent except as otherwise provided by law."[36] The Minnesota Supreme Court found that the Prolife nickname "could give a candidate an unfair advantage" unless the law otherwise expressly permitted it. [37] In another Minnesota case, Dan "Doc" Severson was unable to establish that he was "commonly and generally known in the community" by the nickname "Doc," despite a long military history in which he answered to the nickname and call sign of "Doc."[38]

Al Lewis, an actor who played the role of "Grandpa Munster" in the 1960s television show *The Munsters*, sought to run for governor in New York as the Green Party candidate. He wanted to be identified as "Grandpa Al Lewis" on the ballot.[39] The New York State Board of Elections denied his request. So did a

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28. LA. STAT. ANN. § 18:463(A)(1)(b) (2015).

29. Mr. Wade O'Martin, La. Att'y. Gen. Op. No. 99–326, 1999 WL 800288, at *1 (Sept. 17, 1999).

30. *Id.*

31. Brown v. Jones, 929 So. 2d 169, 170 (La. Ct. App. 2006).

32. *Id.* at 171–72. The candidates' First Amendment claim was rejected on procedural grounds because they failed to raise it in their initial litigation. *See id.*

33. Clifford v. Hoppe, 357 N.W.2d 98, 101 (Minn. 1984).

34. *Id.*

35. *Id.*

36. MINN. STAT. § 204B.35(2) (West 2013).

37. *Clifford*, 357 N.W.2d at 98.

38. Weiler v. Ritchie, 788 N.W.2d 879, 888 (Minn. 2010).

39. Lewis v. N.Y. State Bd. of Elections, 254 A.D.2d 568, 568 (N.Y. App. Div. 1998).

New York court, which concluded that only names, not "descriptive terms," could appear on the ballot.[40]

Mathew Palakunnathu of New York wanted to be listed as "Mathew George," which he allegedly had used since birth.[41] He was of Indian descent and had requested a formal change of his name to "Mathew George Palakunnathu" for his passport. He became a United States citizen, and all legal documents were under the last name "Palakunnathu." He failed to present sufficient evidence that he was known "in the community and professionally as Mathew George."[42] A New York court rejected his preference, noting that state law required adherence to statutory requirements, including listing the legal surname of a candidate.[43]

Fred "Curly" Morrison ran for state senate in Ohio.[44] He tried to add the nickname "Curly" on the ballot, but his nominating petitions included only his birth name, "Fred Morrison." The county board of elections denied his request, and the Ohio Supreme Court, over dissents, concluded that the board of elections' decision was not an abuse of discretion.[45]

When candidates legally change their names, election officials and courts make judgments about the propriety of the new name appearing on the ballot. Even if the name is bizarre, state ballot laws may accommodate the identity. For example, a New Hampshire candidate appeared on the ballot under the simple lower-case word, "human"—a name that had been legally changed and approved by a court order.[46]

After Arizonan Scott Fistler changed his name to "Cesar Chavez," challengers contended that he sought to confuse or deceive voters by adopting the likeness of a labor activist.[47] But critics later believed he did not change his name to fool voters—even though he was kept off the ballot for failure to obtain enough signatures.[48]

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40. *Id.*

41. Palakunnathu v. Ferrara, No. 09/020250, 2009 WL 3713137, at *1 (N.Y. Sup. Ct. Oct. 13, 2009).

42. *Id.* at *4.

43. *Id.*

44. State *ex rel.* Morrison v. Franklin Cty. Bd. of Elections, 410 N.E.2d 764, 765 (Ohio 1980).

45. *Id.* at 766.

46. Jaime Fuller, *New Hampshire Wins the Award for Best-Named Primary Candidate*, WASH. POST: THE FIX (Sept. 8, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/09/08/in-new-hampshire-voters-will-have-the-chance-to-vote-human/ (candidate formerly known as David Montenegro).

47. Rebekah L. Sanders, *Cesar Chavez to Be Removed from Ballot, Plans to Appeal*, AZ CENT: ARIZ. REPUBLIC (June 17, 2014, 9:58 PM), http://www.azcentral.com/story/news/arizona/politics/2014/06/17/cesar-chavez-election-court-ballot/10689571/.

48. *Id.*

Or consider Lauryn Valentine, who in late 1998 asked a court to legally change her name to "Carol Moseley-Braun," in honor of her political hero.[49] Shortly after the name change was approved, she filed to run for Chicago city alderman under her new name.[50] The city election board considered keeping her off the ballot for failing to register to vote under her new name,[51] until a judge withdrew permission for the name change.[52]

Both Mr. Chavez and Ms. Valentine had their short-lived candidacies under new personalities quashed for non-ballot-speech-related concerns. But the questions raised by their attempts are emblematic of concerns that states cite when limiting expressive content on the ballot.

These are just a few of the many incidents that examine the propriety of a candidate's identity through the lens of state law instead of the First Amendment. State laws do concede that a person's name is not as simple as a formal or legally recognized name. Identifying a candidate's name is not a simple mechanical exercise. State laws include concessions regarding nicknames that allow candidates to communicate their identities to voters. In the event that candidates have similar names, state laws permit candidates to distinguish themselves from one another with a middle initial or a descriptive notation. Even so, these laws also leave election administrators as the primary fact finders when determining the legitimacy of the name the candidate seeks to use. State lawmakers understandably worry about candidates including racial epithets on the ballot or deceiving voters through sham name changes. But candidates who are denied a preferred name, who are often left with the sole option of appealing to state courts on state law grounds after election administrators have completed their fact-finding, must either nimbly navigate the rules through the administrative process[53] or succumb to the judgments of these election administrators.

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49. B. Drummond Ayres, Jr., *Political Briefing; What's in a Name? Ask Moseley-Braun*, N.Y. TIMES (Jan. 12, 1999), http://www.nytimes.com/1999/01/12/us/political-briefing-what-s-in-a-name-ask-moseley-braun.html.

50. *Id.*

51. *New Name Hinders Ward Candidate*, CHI. TRIB. (Jan. 16, 1999), http://articles.chicagotribune.com/1999-01-16/news/9901160091_1_carol-moseley-braun-hearing-officer-ruled.

52. *Woman Can't Go By Moseley-Braun Name*, CHI. TRIB. (Apr. 22, 1999), http://articles.chicagotribune.com/1999-04-22/news/9904220452_1_carol-moseley-braun-change-attorney.

53. The administrative process is often informal, but conscientious candidates—and their staff—ensure that their preferred name would be the one listed on the ballot in this process. Consider one anecdote about securing ballot access in South Carolina for the 2016 presidential primary: Sarah Isgur Flores, who worked on Carly Fiorina's 2016 presidential campaign, explained the importance of listing the name "Carly Fiorina," and not her legal name "Cara Carleton Fiorina," on the ballot. "Nobody knows her name is Carleton. Everybody knows her as 'Carly.' When we booked her airline tickets, we'd use her legal name. But on the ballot, it was always going to be 'Carly.'" E-mail from Sara Isgur Flores, Carly for America, to author (Aug. 25, 2016, 4:42 PM) (on file with author).

B. Political Parties

Political parties add another layer to ballot speech. Today, parties usually must be recognized by the state before securing ballot access.[54] The question of "party recognition" is a slightly different question than ballot speech—recognized parties may automatically qualify for certain campaign finance opportunities or state-administered political primaries. For instance, in addition to automatic ballot access for their candidates, recognized parties also receive opportunities to convey their identity to voters on the ballot. And that simple party label communicates a great deal of information to voters.[55]

The identity of the political party can take one of many forms. Party identity may be localized to the state. For instance, the Democratic Party is a national party in the United States, with ballot access and elected officials in all 50 states. But its state-affiliated party in Minnesota is known as the "Democratic-Farmer-Labor Party," a result of a merger of political parties in the 1940s.[56]

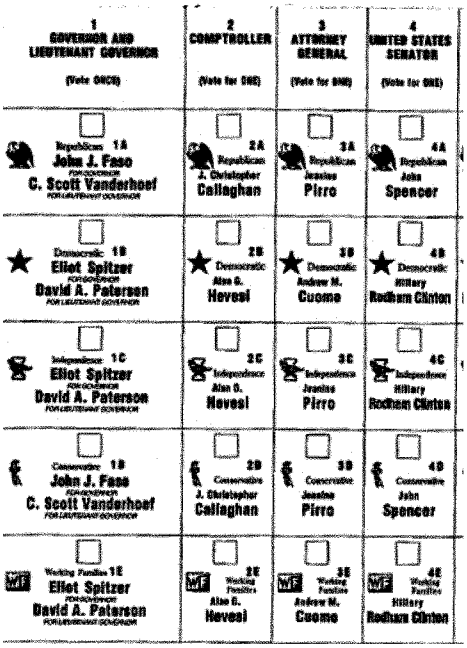

Figure 1

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54. *See, e.g.*, CAL. ELEC. CODE § 5100 (West 2016) (defining requirements for a party to qualify for participation in a primary election).

55. *See, e.g.*, Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 375–78 (2013) (discussing how partisan ties influence voters' choices).

56. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 684, 684 n.151 (1998).

Parties may include an image or logo on the ballot in a handful of states. Utah, for instance, has permitted qualified parties to include a small emblem on the ballot—in 2014, the Democratic Party emblem was a donkey, the Republican Party included an elephant, the Libertarian Party adopted the Statute of Liberty, the Constitution Party used an eagle, and the Independent American Party displayed an American flag.[57] New York permits candidates and parties to include similar logos.[58] But such laws have a cost: logos limit state flexibility in designing the appearance of the ballot. Utah[59] and New York[60] have considered repealing logo laws following Missouri's recent repeal of laws allowing political logos on ballots.[61]

Sometimes even the name of the party is a matter of some contention. In New York and the District of Columbia, for instance, the "Rent Is Too Damn High Party" was required to strike the word "Damn"—in New York because the party name was longer than 15 characters and would not fit on the ballot, and in the District of Columbia because words that might upset voters should not appear on the ballot.[62]

In New York, the parties agreed to use the name "Rent is 2 Damn High" to meet the character limit, but a federal district court found numerous reasons to dismiss party founder Jimmy McMillan's original lawsuit, largely on procedural grounds.[63] In finding the state's abbreviation appropriate, the Federal District Court concluded that there was "no reasonable inference" that voters would have been frustrated at the polls given the option to vote for the "Rent Is Too High" party candidate over the "Rent Is Too Damn High" party candidate.[64] In the District of Columbia, a federal court found that McMillan lacked standing to raise the First Amendment challenge to the board of election's decision to change his party's name to the "Rent Is Too Darn High" Party.[65]

Additional ballot-speech-like issues arise when candidates try to list a party on the ballot that is not recognized by the state. There is a formal channel for state recognition of parties, and if a party fails to gain recognition, then the ballot

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57. *See, e.g.*, Richard Winger, *Utah Legislature Repeals Straight-Ticket Device and Party Logo*, BALLOT ACCESS NEWS (Feb. 25, 2016), http://ballot-access.org/2016/02/25/utah-legislature-repeals-straight-ticket-device-and-party-logo/ (discussing the repeal of the party logo law and its use during the 2014 election).

58. *See supra* Figure 1. NEW YORK, STATE BALLOT (2006) (courtesy of Kelly J. Penziul, Bath, New York).

59. S.B. 25, 2016 Gen. Sess. (Utah 2016) (proposing to remove requirement of party emblem).

60. Assemb. B. A03218, 2015–2016 Reg. Sess. (N.Y. 2015).

61. HB 1036, 96th Gen. Assemb. 2d Reg. Sess. (Mo. 2012).

62. N.Y. ELEC. LAW § 7-104(2) (McKinney 2010); McMillan v. D.C. Bd. of Elections, 75 F. Supp. 3d 348, 350 (D.D.C. 2014), *aff'd*, 2015 WL 5210468 (D.C.C. Aug. 12, 2015).

63. McMillan v. N.Y. State Bd. of Elections, No. 10-cv-2502, 2010 WL 4065434, at *9–10 (E.D.N.Y. Oct. 15, 2010), *aff'd*, 449 F. App'x 79 (2d Cir. 2011).

64. *Id.*

65. *D. C. Bd. of Elections*, 75 F. Supp. 3d at 352–53.

space allocated exclusively to recognized parties remains unused.[66] These are not necessarily "ballot speech" issues, because they turn more on the rules of party recognition, which must survive a separate round of constitutional scrutiny.[67] But courts have addressed the even-handedness of labeling. For example, New York permitted candidates to be listed on the ballot under multiple parties if nominated by multiple parties.[68] If nominated by multiple "independent bodies,"[69] however, the candidates could only be listed by one of them.[70] A candidate challenged this distinction when he sought to be listed by multiple independent bodies, including the Libertarian Party and the Anti-Prohibition Party. A court found little reason to treat independent bodies differently from ordinary political parties and permitted the candidates to be listed with both independent body labels.[71]

Finally, apart from the identity of the party's name, the party may nominate, endorse, or affiliate with candidates. Assuming the candidate accepts the favorable reception from the party, that relationship may be displayed on the ballot. In certain nonpartisan races such as judicial elections, states sometimes decide that partisan affiliations are not appropriate for the ballot and may prohibit the display of such relationships on the ballot. Likewise, problems arise occasionally when multiple parties seek to endorse a single candidate on the ballot,[72] or when a candidate purports to associate with a party but the party disclaims such association.[73] But these examples are better left for later.

C. Designations and Notations

Notations on the ballot have a more interesting history.[74] Many states today include no information on the ballot apart from the candidate's name or party affiliation. But a handful of jurisdictions include additional information. The

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66. *See, e.g.*, Dart v. Brown, 717 F.2d 1491, 1504–10 (5th Cir. 1983) (refusing to list "Libertarian Party" beside a candidate's name when the party had not met the requisites for ballot recognition in 1980); *see also* Chamness v. Bowen, 722 F.3d 1110, 1113 (9th Cir. 2013) (discussing California law that only allows a candidate to list a party preference if the party is a "qualified party"); Soltysik v. Padilla, No. 2:15-cv-7916-AB-GJs, slip op. at 2 (C.D. Cal. Apr. 22, 2016), https://www.unitedstatescourts.org/federal/cacd/630032/61-0.html.

67. *See infra* Section II.A.2 (describing *Burdick* balancing test).

68. *See, e.g.*, N.Y. ELEC. LAW § 7-104(4)(b)–(e).

69. *See* N.Y. ELEC. LAW § 1-104(3), (12) (McKinney 2005) (describing a party as a political organization that has polled 50,000 or more votes for its governor candidate in the preceding election, whereas an independent body is an organization or group of voters who nominates a candidate for office in an election and is not a "party" as defined).

70. *See* Credico v. N.Y. State Bd. of Elections, 751 F. Supp. 2d 417, 418 (E.D.N.Y. 2010).

71. *Id.* at 421.

72. *See infra* Section II.A.3.

73. *See infra* note 245 and accompanying text.

74. *See, e.g.*, Graeme Orr, *Deliberation and Electoral Law*, 12 ELECTION L.J. 421, 429 (2013) ("Historically, British ballots listed candidate occupations. Ostensibly this helped identify the candidate, but it could also be a potent piece of information affecting some voters' deliberation at the last minute.").

New Hampshire presidential primary, for instance, lists each candidate's home city and state,[75] and Massachusetts permits the address of candidates to be printed on the ballot.[76] While no state ballots yet include photographs, candidates' photographs do appear beside their names in places like Australia,[77] Afghanistan[78], Puerto Rico,[79]and Uganda.[80]

Some states include an "incumbent" designation for sitting judges.[81] California permits far more; candidates may include a ballot designation of up to three words describing their principal profession, vocation, or occupation.[82] In the alternative, candidates may include their current elected position title, or the word "Incumbent" or "Appointed Incumbent" where appropriate.[83] The 2014 election in California saw titles like "Supermarket Cashier," "Retired Navy Seal," "Archaeologist/Businesswoman," and "Organic Foods Manager" appear on the ballot.[84] In 2012, a California court permitted Jose Hernandez to list the designation "Astronaut" beside his name—he flew aboard the space shuttle

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75. N.H. REV. STAT. ANN. § 656:31 (2009).

76. MASS. GEN. LAWS ANN. ch. 53, § 34 (West 1988).

77. Orr, *supra* note 74, at 429 n.65.

78. Frud Bezhan, *Will the Next Afghan President Be a Pen, Radio or Bulldozer?*, RADIO FREE EUR./RADIO LIBERTY (Oct. 23, 2013), http://www.rferl.org/content/afghan-voting-symbols/25146119.html ("For each of the 10 candidates expected to be on the ballot for the April 5 vote, there is a symbol. And those symbols will be printed on ballot papers alongside the name and photograph of each candidate to help voters choose their preferred candidate.").

79. Richard Winger, *Republican Presidential Primary in Puerto Rico Shows Pictures of All Candidates*, BALLOT ACCESS NEWS (Feb. 4, 2016), http://ballot-access.org/2016/02/04/republican-presidential-primary-in-puerto-rico-shows-pictures-of-all-candidates/.

80. *EC Unveils Sample Ballot Paper,* UGANDA ELECTION 2016 (Feb. 12, 2016), http://www.elections.co.ug/new-vision/election/1417007/ec-unveils-sample-ballot-paper.

81. *See, e.g.*, MICH. CONST. art. VI, § 24 (requiring the ballot to place the designation of an incumbent's judge's office below their name if he or she is a candidate for re-election to that office); MICH. COMP. LAWS ANN. § 168.467c(2) (West 2012) (officially codifying art. 6, § 24) ; MINN. STAT. ANN. § 204B.36(5) (West 2015) ("If a chief justice, associate justice, or judge is a candidate to succeed again, the word 'incumbent' shall be printed after that judge's name as a candidate."); OR. REV. STAT. ANN. § 254.135(3)(c) (West 2015) (requiring the ballot to designate incumbent judges seeking re-election as "incumbent").

82. CAL. ELEC. CODE § 13107(a)(3) (West 2016); CAL. CODE REGS. tit. 2, § 20711(c)(6)(C) (2009).

83. ELEC. CODE § 13107(a)(3); CODE REGS. tit. 2, §20711(c)(6)(C).

84. *See* John Hrabe, *Campaign 2014: California's Most Interesting Ballot Designations*, CALNEWSROOM.COM (Aug. 29, 2014), http://www.calnewsroom.com/2014/08/29/campaign-2014-californias-most-interesting-ballot-designations/.

Discovery in 2009 and left the National Aeronautics and Space Administration in 2011.[85]

A couple of the more notorious ballot notations—one involving candidate race, and one involving a term limits pledge—are best reserved for a more thorough discussion later.[86] But there are many other historical or proposed ballot notations worth considering.

Prior to the enactment of the Seventeenth Amendment, states experimented with the direct election of senators, despite the formal responsibility of the task residing with the state legislature.[87] Oregon held a preferential primary that would ostensibly guide the state legislature when it elected the state's senators.[88] Oregon then further incentivized legislators to follow the will of the people by permitting candidates for the state legislature to pledge that they would vote for the senate candidate who received the most votes in the preference primary, regardless of their own party affiliation. In the alternative, the candidate could pledge to vote according to his personal preferences: "no doubt to his own political peril."[89] Such a pledge would appear on the ballot in a prominent location, so that the voter could easily observe a candidate's fealty to the will of the people. By 1908, Oregon legislators were required to take the oath supporting the people's preference—an oath that was deeply influential but, in reality, formally unenforceable.[90]

The potential promise of ballot notations has prompted a flurry of innovative ideas and proposed legislation, although few have come close to implementation. The American Legislative Exchange Council floated a short-lived proposal called the "Equal State's Enfranchisement Act."[91] According to this act, if 20% of the members of the state legislature signed a petition nominating a candidate to the United States Senate, that person would be voted upon by the entire legislature. If there were multiple candidates, all would be considered. The

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85. Joe Garofoli, *Judge: Jose Hernandez Can Be 'Astronaut' on Ballot*, SFGATE (Mar. 30, 2012, 4:00 AM), http://www.sfgate.com/politics/joegarofoli/article/Judge-Jose-Hernandez-can-be-astronaut-on-ballot-3446118.php.

86. *See infra* Section II.D.

87. U.S. CONST. art. I, § 3, cl. 1. (amended 1913).

88. *See* ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 76 (1978). Nebraska would enact a similar law. Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 710 (1999).

89. C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 146 (1995).

90. *See* Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717, 724 (2016) (identifying that the Oregon legislature overwhelmingly voted for the preference primary winner as senator in 1913, but that a couple of legislators did not follow the oath in the voting).

91. *See* Vikram David Amar, *Is ALEC's Draft "Equal State's Enfranchisement Act," Concerning U.S. Senate Elections, Constitutional?*, VERDICT: LEGAL ANALYSIS & COMMENT. FROM JUSTIA (Dec. 6, 2013), https://verdict.justia.com/2013/12/06/alecs-draft-equal-states-enfranchisement-act-concerning-u-s-senate-elections-constitutional.

candidates with the most support would be listed on the general election ballot alongside other candidates, but the legislature-preferred candidates would receive the designation "State Legislature Candidate for United States Senate" beside their names.[92] The Act was an attempt to restore some power back to state legislature after the enactment of the Seventeenth Amendment and the direct election of senators.

Scholars have contemplated other practical effects of ballot notations. Professor Elizabeth Garrett has suggested that more robust ballot notations could provide additional information to uninformed voters. Public opinion polls could determine a handful of the most important issues that concern the electorate, and election officials could draft notations and pledges that would appear on the ballot.[93] Professor Garret has conceded that officials may attempt to manipulate the message, and candidate statements may not be particularly informative, but she has posited that the potential benefits of informing voters about candidates' positions may—may—be worth these risks or potential costs.[94]

Professor Ned Foley has also offered a creative idea for future ballot administration: the "speaking ballot."[95] Future electronic ballots might include a brief video message from each candidate. Such messages would provide equal opportunities for candidates to present messages to voters at the ballot box.[96] Likewise, Professor Dmitry Bam has suggested that in judicial elections, ballots should include "neutral, non-partisan assessment of any candidate's judicial performance," as measured by a judicial performance evaluation commission.[97]

D. Pre-Australian Ballot

Candidates and parties must comply with state laws concerning the content that appears on the ballot. The "Australian ballot" gained wide acceptance in late-nineteenth century America after Australian election officials introduced the state-printed and state-administered ballot to improve efficiency and security.[98]

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92. *Id.*

93. Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533, 1581–82 (1999); *see also* Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589, 1590–95 (1999) (critiquing Garrett's model of ballot notations).

94. *See* Garrett, *supra* note 93, at 1585–86.

95. Edward B. Foley, *The Speaking Ballot: A New Way to Foster Equality of Campaign Discourse*, 89 N.Y.U. L. REV. ONLINE SYMP. 52, 52–53 (2014); *see also* Lisa Marshall Manheim, *The Nudging Ballot? A Response to Professor Foley*, 89 N.Y.U. L. REV. ONLINE SYMP. 65, 67–69 (2015).

96. Foley, *supra* note 95; *see also* John Hasnas & Annette Hasnas, *Nudging Voters*, THE HILL: CONGRESS BLOG (Mar. 15, 2016, 6:00 AM), http://thehill.com/blogs/congress-blog/campaign/272909-nudging-voters (proposing to offer candidates the ability to display policy statements at the ballot box and allowing voters to sort candidates by policy statements).

97. Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 589–91 (2014).

98. *See supra* notes 11–16 and accompanying text.

But the present form of the ballot looks little like those used during the first 100 years of voting in the United States, the "pre-Australian ballot" era. At the time of the founding of the United States, voting in England and the United States often took place orally.[99] But the colonies—and soon the states—quickly introduced the written ballot.[100] Ballots, however, were written not by state governments, but by individual voters, and sometimes by the candidates and parties themselves.[101] A party would print a "ticket," which contained a list of all of the party's candidates for each office. The tickets would then be distributed to prospective voters, and voters would cast that ticket indicating support for each candidate on the ticket.[102]

Party-printed tickets were hardly neutral. Consider an 1864 "Union Ticket" for President Abraham Lincoln and Vice-Presidential candidate Andrew Johnson. The top of the ticket included the slogan: "One Flag, One Country, One Government." Below that was an American flag, evocative of the national union, with the slogan: "We vote, as our soldiers and sailors fight, for liberty and the union."[103] The ticket led with a quotation from Ulysses S. Grant: "The end is not far distant, if we are only true to ourselves."[104]

Or consider the 1844 Whig presidential electoral ticket in Virginia, which called for the election of Henry Clay, "The Glory of his Country, and the first Living Statesman," and Theodore Frelinghuysen, "An Upright and Able Statesman, and Honest Man." The ticket went on to describe what these men would do, opening: "These men, if elected, will support American industry against the capital and pauper labor of Europe, which will lead to the creation of a steady and permanent HOME MARKET for the American Farmer."[105]

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99. Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 14 (2011); FREDMAN, *supra* note 11, at 20; KEYSSAR, *supra* note 12, at 28.

100. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 489 (2003).

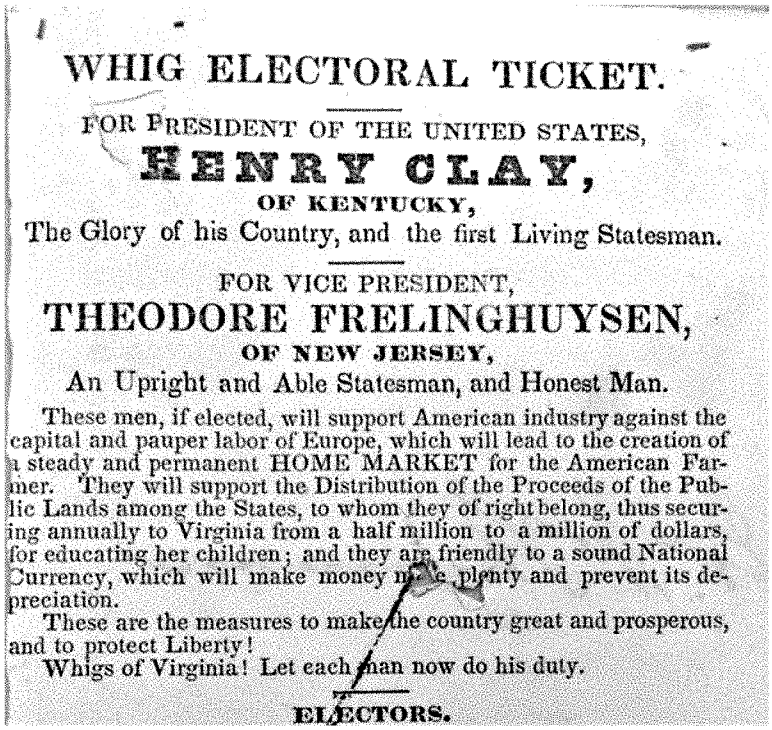
101. *Id.*

102. Burt Neuborne, Buckley*'s Analytical Flaws*, 6 J.L. & POL'Y 111, 118 (1997).

103. NATIONAL UNION TICKET (1864) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F. 28-C-1864).

104. *Id.*

105. *See infra* Figure 2. WHIG ELECTORAL TICKET (1844) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F 29-1844).



WHIG ELECTORAL TICKET.

FOR PRESIDENT OF THE UNITED STATES,

HENRY CLAY,

OF KENTUCKY,

The Glory of his Country, and the first Living Statesman.

FOR VICE PRESIDENT,

THEODORE FRELINGHUYSEN,

OF NEW JERSEY,

An Upright and Able Statesman, and Honest Man.

These men, if elected, will support American industry against the capital and pauper labor of Europe, which will lead to the creation of a steady and permanent HOME MARKET for the American Farmer. They will support the Distribution of the Proceeds of the Public Lands among the States, to whom they of right belong, thus securing annually to Virginia from a half million to a million of dollars, for educating her children; and they are friendly to a sound National Currency, which will make money more plenty and prevent its depreciation.

These are the measures to make the country great and prosperous, and to protect Liberty!

Whigs of Virginia! Let each man now do his duty.

ELECTORS.

Figure 2

Political parties were often not content to include just the party name on the ballot. An 1884 Prohibition Ticket included the description, "Pulverize the Rum Power," and the inspirational quotation, "A Schoolhouse on every Hill top and no Saloon in the Valley."[106]

Prohibition Ticket.

PULVERIZE THE RUM POWER.

"A Schoolhouse on every Hill top and no Saloon in the Valley."

57th Assembly District.

Figure 3

106. *See infra* Figure 3. PROHIBITION TICKET (1884) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F 28-C-1884).

An 1845 "Union Democratic" ticket led with an eagle, an American flag, a star, and a quotation from Andrew Jackson, "The Union—it must be preserved."[107] A detailed series of illustrations depicting men in seven different industries united by chain links topped an 1872 "Labor Reform" ticket.[108]

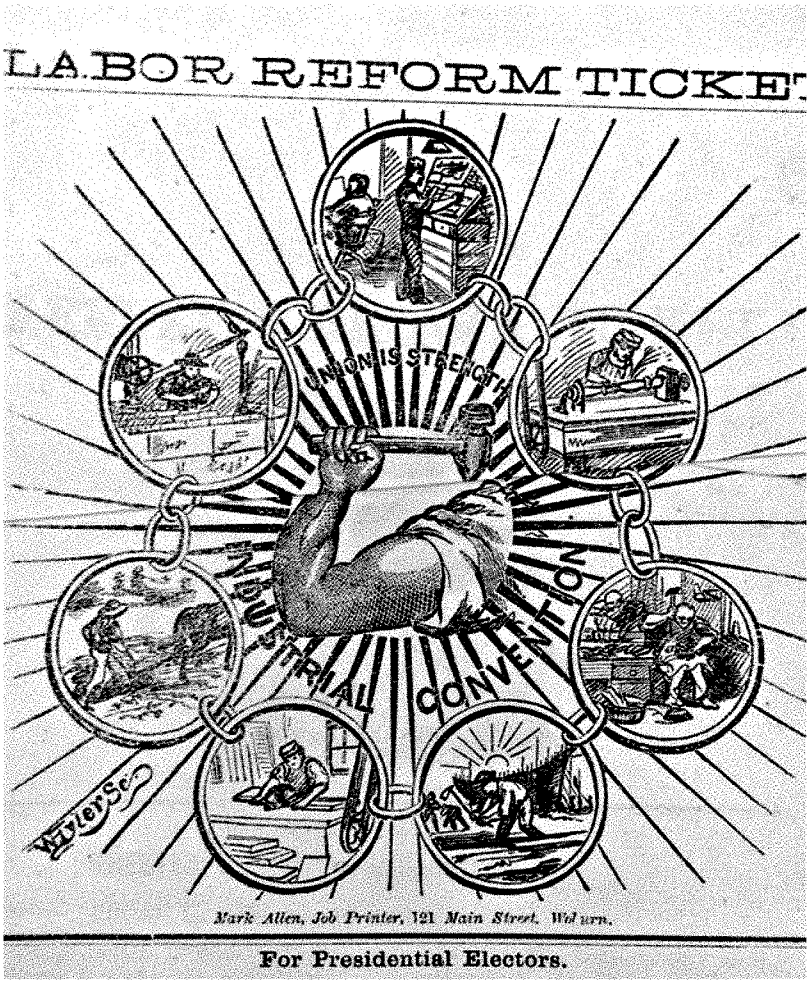


Figure 4

107. *See* UNION DEMOCRATIC TICKET (1845) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F 29-1845).

108. *See infra* Figure 4. LABOR REFORM TICKET (1872) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F 29-1872).

Parties would cross-endorse candidates too. In California's 1859 gubernatorial election, for instance, the "Regular Democratic" ticket and the "Anti-Delinquent Tax Payers'" ticket both called for John Currey to serve as governor, but varied on other down-ticket races.[109]

Ballots provided a visual outlet for parties to display messages and communicate party identities to voters. The 1861 ballots in California demonstrate this point. The "Regular Democratic" state ticket called for "Union and Peace," with a large eagle on the front and a red-colored pattern of stars on the back.[110] The "Union Democratic" state ticket portrayed the American flag on the front, with the same flag held in an eagle's beak among blue-and-white stars on the back.[111] And the "Union Administration" ticket, endorsing Leland Stanford for governor, showed a pillared edifice emblazoned with the word "Constitution" surrounded by cannons defending it.[112] Some included photographs of candidates, such as an 1884 Republican ticket showing portraits of James Blaine and John Logan before listing the electors pledged for them.[113]

Ballots even included more ornate artwork, such as a political cartoon communicating a clear message. The "Workingmen's Party of California" provided one remarkable late-1870s Sonoma County ticket for delegates to the California state constitutional convention. It displayed a boot with the Workingmen's Party of California ("W.P.C.") initials kicking an Asian man across the Pacific Ocean toward China as a woman clutching a baby looked on—reinforcing the "Chinese must go!" slogan featured prominently in the ticket's upper left corner.[114]

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109. *See* ANTI-DELINQUENT TAXPAYERS' TICKET (1859) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F 28-C-1859); REGULAR DEMOCRATIC TICKET (1859) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F 28-C-1859). The Democratic Ticket spelled his name "John Curry."

110. UNION AND PEACE REGULAR DEMOCRATIC STATE TICKET (1861) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F 28-C-1861).

111. UNION DEMOCRATIC STATE TICKET (1861) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F 28-C-1861).

112. UNION ADMINISTRATION TICKET (1861) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F 28-C-1861).

113. REPUBLICAN TICKET (1884) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F 28-C-1884).

114. *See infra* Figure 5. SONOMA CTY., REGULAR WORKINGMEN'S TICKET (1876) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F 28-C-1876).

Figure 5

A ballot for the "Regular Cactus" ticket offered "Protection to American Labor," with an anthropomorphized cactus wielding an American flag and a shield beside a pair of laborers.[115]

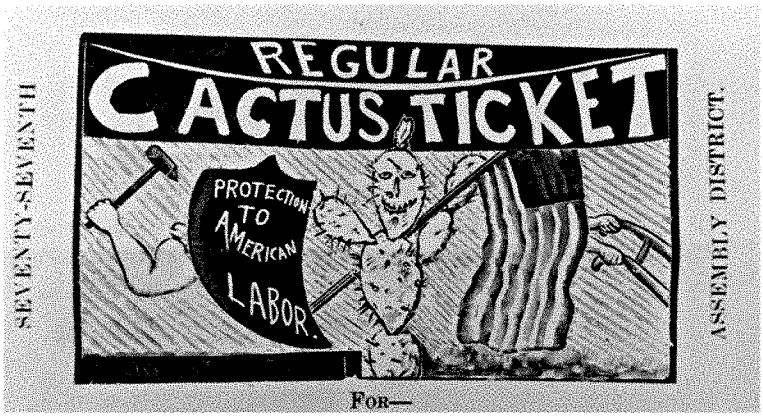

Figure 6

Ballots were not places devoid of politicking or partisan messages; they were integral elements of party and candidate identity in the political process. But when the state took over administration of the ballot, it effectively usurped parties' and candidates' opportunities to include expressive content. Candidates must now

115. *See infra* Figure 6. REGULAR CACTUS TICKET (1888) *on file in* The Ephemera Collection, Huntington Library, San Marino, Cal. (Eph F 28-C-1888).

go through the state to obtain ballot access—and they must also get approval for what appears on the ballot.[116]

States understandably do not allow bespoke or highly customized ballots today. Ballots are principally designed to maximize the opportunity for voters to vote for their preferred candidate, and for election officials to accurately tally votes after the polls close. Secrecy prevents voter intimidation, and state administration helps eliminate the old dangers of ballot box stuffing. Opportunities for expression do remain, but courts have rarely viewed ballot speech as a matter of expression, at least not as expression of the sort that was common in the pre-Australian ballot era. Instead, for purposes of scrutiny under the Federal Constitution, the Supreme Court has largely viewed ballots as merely a means of association.[117]

II. THE FIRST AMENDMENT AND THE BALLOT

The ballot contains a great deal of information lurking within the form of the candidate's name, political party, and any notations or designations that may appear. These displays of information communicate messages to voters about the identity of the candidate or the party. Naturally, despite cases to the contrary, one may think that ballot speech, as a political, expressive communication to voters, merits some protection under the First Amendment. This Part first examines existing First Amendment doctrine in election cases—primarily the freedom of association. This Part then identifies other possible doctrinal frameworks that may be useful for analyzing public speech, such as the public forum doctrine, government speech, and compelled speech.

The role that the First Amendment plays at the ballot box is a complicated one. Starting with the text of the Constitution itself, the First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech."[118] Defining "the freedom of speech" or what constitutes an "abridg[ement]" has not been a simple task.[119] Among the most common theories for the scope of the First

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116. *See supra* Sections I.A–C.

117. *See infra* Section II.A.1.

118. U.S. CONST. amend. I.

119. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25–26 (1971) (arguing that only speech aimed at the discovering and spreading political truth merits First Amendment protection). *Compare* Citizens United v. Fed. Election Comm'n, 588 U.S. 310, 349–56 (2010) (holding protected free speech includes direct election advocacy by unions, non-profits, and corporations and rejecting federal limits on election-related expenditures by such entities), United States v. Eichman, 496 U.S. 310, 315–19 (1990) (holding protected free speech includes expressive conduct and invalidating a federal law prohibiting flag burning), Cohen v. California, 403 U.S. 15, 22–27 (1971) (holding free speech protections extended to plaintiff's vulgar jacket and thus California laws criminalizing uncivil displays are unconstitutional), *and* Tinker v. Des Moines, 393 U.S. 503, 514 (1969) (holding protected free speech includes student symbolic speech as long as it does not threaten "substantial disruption of or material interference with school activities"), *with* Morse v. Frederick, 551 U.S. 393, 408–10 (2007) (holding protected free speech does not include student advocacy of illegal drug use at a school-supervised event), Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–73 (1988)

Amendment's protection of free speech are the promotion of democratic self-governance, the pursuit of truth, and the protection of individual autonomy and self-preservation.[120]

The First Amendment has often been invoked in ballot access or right-to-vote cases, but the reason why is not always clear. Perhaps it is invoked on principle, because the First Amendment actually does have something to say about the association that takes place between candidates and voters on the ballot. Perhaps it is invoked out of necessity, because federal courts feel compelled to weigh in on such a significant issue and lack adequate alternative constitutional tools at their disposal.[121] Perhaps it is invoked for little reason at all.[122] But the

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(holding protected free speech does not include student speech in school newspapers or other forums that bear a school's imprimatur as long as regulations are reasonably related to legitimate pedagogical concerns), Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) (holding sexually vulgar student speech, which threatens to undermine "schools' basic educational mission" does not enjoy constitutional protection), United States v. O'Brien, 391 U.S. 367, 376–82 (1968) (holding protected free speech does not include merely incidentally expressive conduct, specifically burning draft cards, so long as the government maintains a significant non-censorship interest in regulating it), Roth v. United States, 354 U.S. 476, 487–93 (1957) (holding protected free speech does not include expression that "deals with sex in a manner appealing to prurient interest"), Chaplinsky v New Hampshire, 315 U.S. 568, 572 (1942) (holding free speech protections do not extend to "fighting words" which "tend to incite an immediate breach of the peace"), *and* Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that free speech may be abridged if and when it presents a "clear and present danger" that it will create "substantive evils that Congress has a right to prevent"). *See generally* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 595 (1982) (arguing all forms of expression are "equally valuable for constitutional purposes").

120. *See, e.g.*, Jerome Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641, 1648 (1967) (arguing that the market place of ideas theory rests on the assumption that the marketplace is freely accessible, an assumption that no longer applies because mass communication is controlled by private interests); Bork, *supra* note 119, at 29–35 (arguing that only verbal communication aimed at the discovery and spread of political truth should enjoy constitutional protection); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) (discussing the value of free speech as an inviolable individual right); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256–57 (arguing that freedom of speech includes "forms of thought and expression within the range of human communication from which the voter derives knowledge, intelligence, and sensitivity to human values"); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2367–69 (2000) (identifying participation in the political process as a preeminent value in protecting speech). *See generally* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 89–93 (2012) (summarizing major views of the First Amendment).

121. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 69 VAND. L. REV. 89, 95–101 (2014) (discussing the absence of a specifically enumerated right to vote in the U.S. Constitution); Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2188–89 (2001) (analyzing the Supreme Court's treatment of its "manufactured" right to vote in the context of primary ballot access laws).

connection between the First Amendment and the ballot box is at least somewhat tenuous, and it has been exacerbated by the lack of an internally coherent theory of voting rights under the Federal Constitution. Litigants have been forced to think creatively when articulating constitutional causes of action, and the Supreme Court has boxed itself in with undertheorized doctrines cobbled together to achieve democratic results. Further complicating matters are the often confusing, overlapping, and perhaps inconsistent lines of cases flowing from the First Amendment more generally. Loose First Amendment principles have served as one of the most convenient vehicles for ballot access cases, which rely primarily upon the freedom of association. These cases have all occurred in a post-Australian ballot world, as the controlling legal doctrines affect how the state administers the ballot.

A. The Freedom of Association

The First Amendment includes no express guarantee of the "freedom of association." But in 1958, the Court examined an attempt by the Alabama Attorney General to force the National Association for the Advancement of Colored People ("NAACP") to disclose its membership list.[123] The Court concluded that the right asserted by members of the NAACP was a freedom of association: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." By choosing to root the freedom of association in the Due Process Clause and the First Amendment,[124] the Court acknowledged "the close nexus between the freedoms of speech and assembly."[125]

Within the context of the First Amendment, the Court articulated broad protection for the freedom of association: "[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[126] In this case, the disclosure was "likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have a right to advocate."[127] Further, Alabama failed to provide an adequate justification for the disclosure—its purported interests in evaluating the intrastate

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122. *Cf.* Derek T. Muller, Note, *"As Much Upon Tradition As Upon Principle": A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment*, 82 NOTRE DAME L. REV. 481, 483 (2006) (questioning justifications for invocation of the "privilege of necessity" exception to the Fifth Amendment).

123. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 451 (1958)

124. *Id.* at 460.

125. *Id.* This freedom would eventually be identified more clearly by the Supreme Court as a component of the First Amendment. *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 82–96 (2012) (discussing the evolution of the freedom of association after *NAACP*).

126. *NAACP*, 357 U.S at 460–61.

127. *Id.* at 462–63.

business activities of the NAACP did not have "a substantial bearing" on its request for the NAACP's entire membership roster.[128]

The freedom of association as a protected constitutional right has been widely examined: the doctrine has been applied in numerous Supreme Court cases since its introduction.[129] Indeed, the Court wasted no time in introducing the doctrine into election law disputes—in particular, ballot access disputes.

1. Ballot Access as Association

Just ten years after *NAACP v. Alabama*, the Supreme Court found that the state-administered ballot included an associational right.[130] By the 1960s, the Court had already begun to inject itself into traditionally state-administered areas of election law.[131] In 1968, the Court examined a challenge to Ohio's ballot access law. Ohio required presidential candidates nominated by new parties to secure voter-signed petitions totaling at least 15% of the ballots cast in the previous gubernatorial election. Republican and Democratic candidates qualified for ballot space if their parties secured just 10%.[132] In its decision in *Williams v. Rhodes*, the Court identified "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." It rooted the associational right in the First Amendment.[133]

Even if a candidate were not on the ballot, the Court acknowledged that individuals could associate for political purposes in the public sphere. They could organize a political party, they could hold meetings, and they could assemble in public places or private homes—these rights were not contested.[134] But the Court did not limit the guarantee of association to these previously enumerated opportunities to engage in political speech. Instead, it extended the guarantee to

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128. *Id.* at 464–65.

129. For a background on some of the principal discussions in this space, see PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 211–38 (2013); INAZU, *supra* note 125; Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1849–64 (2001); Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 961–62 (2004); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1942–44 (2006).

130. Williams v. Rhodes, 393 U.S. 23, 31 (1968); *see generally* Dan Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763 (2016).

131. *See, e.g.*, Derek T. Muller, *Perpetuating "One Person, One Vote" Errors*, 39 HARV. J.L. & PUB. POL'Y 371, 376–77 (2016) (discussing federal courts' use of the equal protection clause to invalidate state election laws); Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 607–08 (2001) (discussing how the Court has found election disputes to be justiciable).

132. *Rhodes*, 393 U.S. at 24–26.

133. *Id.* at 30 ("We have repeatedly held that freedom of association is protected by the First Amendment.") (citing *NAACP*, 357 U.S. at 460 (other citations omitted)); *see also* INAZU, *supra* note 125.

134. *Rhodes*, 393 U.S. at 24–25.

include a right to associate in a particular forum—namely, the ballot. The Court explained, "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."[135] This right of association is not sufficiently effective unless it applies to the ballot—alternative means of association are not enough.[136] The right to cast an effective or meaningful ballot, then, is also an element of the freedom of association.[137]

Like other rights secured by the Constitution, the right of voters to associate with candidates on the ballot is not absolute. Circumstances may permit the state to regulate the ballot in a way that burdens individuals' right to associate. In *Rhodes*, the Court found that there were "unequal burdens on minority groups where rights of this kind are at stake," which meant that a burden-imposing state must proffer "a compelling state interest."[138] Ohio failed to justify the burden. Its proffered interests in burdening minor parties—promoting the stability of the two-party system, ensuring that winners earned a majority of the vote, and the like—were legitimate interests, but they were not enough. The state's articulated interests failed because it could not "justify the very severe restrictions on voting and associational rights."[139]

Lest one conclude that this case tidily explains the First Amendment doctrine for ballot access cases, the Court tethered its First Amendment analysis to the Equal Protection Clause. It concluded that the ballot regulations disproportionately favored the two major parties and disfavored newer, smaller parties.[140] The restrictive burden on "voting and associational rights" was "an invidious discrimination, in violation of the Equal Protection Clause."[141] Not

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135. *Id.* at 31.

136. *Accord* Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999); Nader v. Blackwell, 545 F.3d 459, 472 (6th Cir. 2008); Moore v. Johnson, No. 14-11903, 2014 WL 4924409, at *4 (E.D. Mich. May 23, 2014). Courts follow this reasoning in other First Amendment contexts:

> That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open more burdensome avenues of communication, does not relieve its burden on First Amendment expression.

Meyer v. Grant, 486 U.S. 414, 424 (1988) (citation omitted).

137. *See* Anderson v. Celebrezze, 460 U.S. 780, 787–88 (1982); *Rhodes*, 393 U.S. at 30–31; Rosen v. Brown, 970 F.2d 169, 176 (6th Cir. 1992).

138. *Rhodes*, 393 U.S. at 31 ("[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.").

139. *Id.* at 32.

140. *Id.* at 30.

141. *Id.* at 34.

everyone on the Court agreed with this jurisprudential move: Justice Harlan emphasized in his concurrence that he found "it unnecessary to draw upon the Equal Protection Clause," and rested his decision solely on the right of political association.[142]

When the Court considered a ballot access law again three years later in *Jenness v. Fortson*, it spoke generically about the "freedoms of speech and association guaranteed to that candidate and his supporters by the First and Fourteenth Amendments."[143] There, a Georgia law permitted ballot access for an independent candidate if the candidate had a petition signed by at least 5% of registered voters.[144] Political parties whose candidates received at least 20% of the vote would automatically qualify for ballot access.

The Court explained that the doctrinal underpinning of *Rhodes* was the Equal Protection Clause, but acknowledged that two concurring justices had emphasized the First Amendment values involved.[145] In *Jenness*, the Court treated the First Amendment and Equal Protection claims distinctly. It found that the system in Georgia did not "[abridge] the rights of free speech and association secured by the First and Fourteenth Amendments."[146] It emphasized the breadth of associational freedom in the Georgia statutes.

So far as the Georgia election laws were concerned, independent candidates and members of small or newly formed political organizations were wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish. They may have chosen to confine themselves to an appeal for write-in votes or sought, over a six-month period, the signatures of 5% of the eligible electorate. If they chose the latter course, the path to ballot access was open to them.[147] The Court concluded that "nothing" in this system "abridges the rights of free speech and association secured by the First and Fourteenth Amendments."[148] Then it went on to reject a claim under the Equal Protection Clause.[149]

Since *Rhodes* and *Jenness*, the Court has sometimes referred to speech rights, associational rights, the First and Fourteenth Amendments, and the Equal Protection Clause in its ballot access cases in rather generic terms.[150] But these

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142. *Id.* at 42 (Harlan, J., concurring).
143. Jenness v. Fortson, 403 U.S. 431, 434 (1971).
144. *Id.* at 432.
145. *Id.* at 437 n.14.
146. *Id.* at 439–40.
147. *Id.* at 438.
148. *Id.* at 440.
149. *Id.* at 440–42.
150. *See, e.g.*, Clements v. Fashing, 457 U.S. 957, 971 (1982) ("As an alternative ground . . . appellees contend that § 19 and § 65 violate the First Amendment. Our analysis of appellees' challenge under the Equal Protection Clause disposes of this argument."); Am. Party of Tex. v. White, 415 U.S. 767, 788 (1974) (examining the signature requirement and concluding that it did not run afoul of "the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment"); Lubin v. Panish, 415 U.S. 709, 710

cases emphasize the *voters'* rights to associate with candidates—rights to associate for political ends or to choose among candidates.[151] And, eventually, as discussed above, the Court rested much more firmly on the rights of voters to associate for political purposes as a First Amendment right.[152]

The rights of *candidates* in ballot access cases are much less clear. Indeed, even calling this line of decisions "ballot access cases" is perhaps a misnomer, because the Court almost entirely ignores the rights of candidate access to the ballot; instead, its examinations turn primarily on rights of voters to cast a ballot for the candidate of their choice, thereby associating with that candidates.[153]

The Court's first turn, then, extended the right of association to the ballot. Voters who wanted to associate with particular candidates had a right to do so,

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(1974) (identifying a dispute over ballot access filing fee as one concerning "the equal protection guaranteed by the Fourteenth Amendment and rights of expression and association guaranteed by the First Amendment," but ultimately only meaningfully addressing the Equal Protection Clause claim); s*ee also* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1796–97 (2004) ("[T]he way in which ballot access opinions migrate to the no-less-but-no-more-plausible First Amendment rather than to these other not implausible routes to the same result suggests that the rhetorical power of the First Amendment exists both within and without the domain of judicial decisionmaking [sic].").

151. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 786 (1983) ("Our primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.'") (citation omitted); Communist Party of Ind. v. Whitcomb, 414 U.S. 441, 449 (1974) (rejecting loyalty oath for political party because it interfered with the party's candidates, and burdened voters' "access to the ballot, rights of association in the political party of one's choice, interest in casting an effective vote and in running for office"); Kusper v. Pontikes, 414 U.S. 51, 51 (1973) (finding that a 23-month prohibition on voting in a primary election of a political party if the voter previously voted in another party's primary "unconstitutionally infringes upon the right of free political association protected by the First and Fourteenth Amendments"); *see also Anderson*, 460 U.S. at 806 ("We began our inquiry by noting that our primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson's candidacy and the views he espoused."). The Equal Protection line of cases, in which the Court examines whether the ballot access rules regarding similarly-situated candidates are available on equal terms, does not put the same emphasis on the voters' rights. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357–58 (1997).

152. *See supra* Section II.A.1.

153. *See, e.g.*, *Anderson*, 460 U.S. at 792 ("It is clear, then, that the March filing deadline places a particular burden on an identifiable segment of Ohio's independent-minded voters."); *Clements*, 457 U.S. at 965 ("The Court has recognized, however, that such requirements may burden First Amendment interests in ensuring freedom of association, as these requirements classify on the basis of a candidate's association with particular political parties. Consequently, the State may not act to maintain the 'status quo' by making it virtually impossible for any but the two major parties to achieve ballot positions for their candidates."); *see also* Rosen v. Brown, 970 F.2d 169, 175 (6th Cir. 1992) ("The primary concern in any ballot access case is not the interests of the candidate but of the voters who support the candidate and the views espoused by the candidate.").

depending on the burden that the state placed upon them. There was no meaningful First Amendment examination of the associational rights of the candidates, much less their speech rights. The Court's next turn would examine *how* it ought to evaluate the burdens that the State placed upon the voters' associational interests.

2. Ballot Access as Balancing Test

The early ballot access disputes ultimately led the Court to develop the balancing test that dominates today. A leading case in the area is *Anderson v. Celebrezze*, which identified some flexibility in these ballot access cases.[154] There, the Court scrutinized an Ohio law that required independent candidates running for president to file a nomination petition and statement of candidacy the March before the November election.[155] The Court determined that the appropriate test required "weighing" a series of factors. These included the "character and magnitude" of the injury to the constitutional rights at issue, the interests of the state in creating the burdens that impact those constitutional rights, and the extent to which the burdens are necessary to achieve the state's interests.[156] It went on to conclude that the March filing deadline did not further the state's proffered interests: educating voters, treating parties equally, and political stability.[157]

In *Burdick v. Takushi*, the Supreme Court examined a challenge to Hawaii's write-in candidate prohibition.[158] It articulated a fuller explanation of the *Anderson* balancing test as follows:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.[159]

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154. *Anderson*, 460 U.S. at 780.
155. *Id.* at 782–83.
156. *Id.* at 789.
157. *See id.* at 793–96.
158. Burdick v. Takushi, 504 U.S. 428, 430 (1992).
159. *Id.* at 434 (citation omitted).

Restated, a court must identify the "character and magnitude" of the injury based on the state's proffered "precise interests" and the "extent" of the "burden" on the plaintiff.[160] In practice, after an examination of the facts, the court tends to make a rather conclusory statement about the nature of the injury.[161] A court's characterization of the character and magnitude of the law—as "severe" or "reasonable [and] nondiscriminatory"—triggers the level of appropriate scrutiny. "Severe" burdens must be "narrowly drawn" to achieve a "compelling interest." But a "reasonable [and] nondiscriminatory" burden generally survives judicial scrutiny pursuant to the state's "important regulatory interests."[162]

A couple of examples illustrate the typical application of this framework. *Burdick*, for instance, involved a challenge to Hawaii's ban on counting write-in votes. The Court concluded that "any" burden imposed was a "very limited" one because candidates had ample opportunities to obtain ballot access.[163] That meant Hawaii's law easily passed constitutional scrutiny.

In *Crawford v. Marion County Election Board*, Indiana's voter-identification law was characterized by the plurality as "a limited burden on voters' rights" [164] and by the concurrence as a "generally applicable, nondiscriminatory voting regulation."[165] Unsurprisingly, then, Indiana's law was justified by at least three "legitimate" interests: modernizing elections, preventing voter fraud, and safeguarding voter confidence.[166]

The "balancing" test often functions as a simple binary formula. If the burden is severe, it must pass strict scrutiny; if the burden is slight, it must pass something like rational basis scrutiny.[167] As a relatively binary formula, it often yields a binary result: if the legislative burden is severe, it is usually deemed a violation of the right to associate; if it is not severe, the regulation is typically upheld.[168]

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160. "'Character' references the type of burden the State places on voters . . . . 'Magnitude' references the severity of the State's burden on voters." Michael J. Gabrail, Misapplication: The Rush to Equal Protection and How the Lower Courts Have Misapplied the "Character and Magnitude" Analysis to Equal Protection Claims Against Election Law 6 (2014) (unpublished manuscript) (on file with author).

161. *See infra* Section III.A.

162. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); *see also* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 137 (2014) (proposing a two-part test where the law restricting the right to vote would be presumptively invalid, and then the state would have to justify the law depending on the burden it places).

163. *Burdick*, 504 U.S. at 435–37.

164. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 202 (2008) (plurality opinion) (quoting *Burdick*, 504 U.S. at 439).

165. *Id.* at 205 (Scalia, J., concurring).

166. *Id.* at 191–97 (plurality opinion).

167. *See id.* at 204–06 (Scalia, J., concurring).

168. *See, e.g.*, Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 207–10 (2015) (discussing courts' rulings on voter identification laws, and the severity of the states' burden).

But there are rare instances where courts reach a contrary conclusion, either striking down a slight burden or upholding a severe burden on the ballot access restriction. In *Cotham v. Garza*, for instance, a federal district court evaluated a Texas law that prevented voters from bringing notes into the voting booth that were not the official sample ballot or the voter's own handwritten notes.[169] The court noted that it posed a "limited, not severe burden on voters' rights to make free choices and to associate politically through the right to vote."[170] After all, the court reasoned, voters had the opportunity to handwrite notes if a third party presented them with material that voters wanted to bring into the voting booth. The court concluded that the state's interest "in aiding the orderly and prompt administration of ballots by minimizing the time voters spend marking their ballots" was "insubstantial," conceding that the state's interest in "preventing voter intimidation and fraud" was "legitimate."[171] But the court concluded that the prohibition on certain written materials in the voting booth was not "necessary" to protect its interests.[172]

On the other end of the spectrum, in *National Right to Life Political Action Committee v. Lamb*, a political-action committee challenged a Missouri law that required it to appoint a Missouri resident as treasurer if it intended to spend more than $1,500 in a state election.[173] A federal district court assumed that the requirements placed a "sufficiently heavy burden" on the political action committee, but it concluded that Missouri had a compelling interest in enforcing campaign finance laws. The regulation protected the integrity of the state's electoral process by ensuring that the treasurer who was accountable for complying with Missouri election law could easily be found and subject to administrative or judicial oversight in the state.[174]

3. Balancing Tests in Ballot Content Disputes

As discussed above, the Court applied the *Burdick* balancing test, originally derived from the right of association cases, to cases involving the law of the election process, like *Crawford*. The Supreme Court further extended the *Burdick* test to disputes concerning the contents of the ballot itself. Plaintiffs filed lawsuits in an attempt to include certain content on the ballot. But courts applying the *Burdick* balancing test have generally rejected these claims.

In *Timmons v. Twin Cities New Area Party*, the Court upheld Minnesota's ban on "fusion" candidacies on the ballot. That is, multiple parties could not endorse a single candidate and have that endorsement appear on the ballot. The Court emphasized that the law "applie[d] to major and minor parties alike."[175] It

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169. 905 F. Supp. 389, 391 (S.D. Tex. 1995).
170. *Id.* at 398.
171. *Id.* at 399.
172. *Id.* at 400.
173. 202 F. Supp. 2d 995, 1017 (W.D. Mo. 2002), *aff'd sub nom.* Nat'l Right to Life Political Action Comm. v. Connor, 323 F.3d 684 (8th Cir. 2003).
174. *Id.* at 1019–20.
175. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 360 (1997).

also made clear that while a party was not "absolutely entitled to have its nominee appear on the ballot," neither was any party's candidate absolutely barred.[176] Instead, parties enjoyed a conditional right to put a candidate on the ballot as long as that candidate was not also associated with another party. The Court explained that the burden Minnesota imposed "also limit[ed], slightly, the party's ability to send a message to the voters and to its preferred candidates." It concluded that "the burdens Minnesota imposes on the party's First and Fourteenth Amendment associational rights—though not trivial—are not severe."[177] Because the burden was not severe, Minnesota's asserted interests "in protecting the integrity, fairness, and efficiency of their ballots and election processes as a means for electing public officials" and the "stability of their political systems" justified the law.[178] The Court also rejected a speech-related claim: "Ballots serve primarily to elect candidates, not as forums for political expression."[179]

In *Washington State Grange v. Washington State Republican Party*, the Court concluded that Washington's top-two blanket primary did not "impose any severe burden" on voters.[180] Candidates would self-designate a "party preference," and the top two candidates with the most votes in each race would face each other in the general election. Washington's basis for a top-two primary, "providing voters with relevant information about the candidates," was "easily sufficient" to sustain the law against political parties' claims that the law severely burdened their associational rights.[181] It was not obvious that a party label with a qualification along the lines of "prefers" before the party name sufficiently burdened those parties' associational rights.

Following the Supreme Court's lead, lower courts have generally avoided speech-based First Amendment challenges in ballot content cases and have used the *Burdick* balancing test rather reflexively. This Article previously identified a handful of legal challenges to names, parties, and notations—but these were primarily resolved administratively or in state courts, usually in non-First Amendment judicial opinions.[182] In the following cases, however, the heart of ballot speech is at issue, and while First Amendment-related concerns arise, they are largely dismissed.

In *Rubin v. Santa Monica*, the Ninth Circuit considered a challenge from a city council candidate who wanted to designate his occupation as "peace activist" on the ballot.[183] California allows candidates to list on the ballot the political office

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176. *Id.* at 359.
177. *Id.* at 363.
178. *Id.* at 369–70.
179. *Id.* at 363; *see also* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 453 n.7 (2008) (quoting *Timmons*, 520 U.S. at 363); Lillian R. BeVier, *Can Freedom of Speech Bear the Twenty-First Century's Weight?*, 36 PEPP. L. REV. 415, 425 (2009).
180. 552 U.S. at 458.
181. *Id.*
182. *See, e.g.*, *supra* Section I.A.
183. 308 F.3d 1008, 1011 (9th Cir. 2002).

the candidate currently holds, the word "incumbent" if it applies, or up to three words designating a principal profession, vocation, or occupation.[184] The court used the *Burdick* balancing test to conclude that prohibiting a designation like "activist" did not severely burden the candidate's First Amendment rights.[185] It emphasized that the regulation was viewpoint neutral, did not infringe on "core political speech," and left ample opportunities to communicate with voters elsewhere.[186] Furthermore, the state's interest in preventing confusion, deception, or frustration was sufficient to justify the regulation.[187] It rejected any kind of "public forum" analysis[188] and did not examine whether a pure speech analysis might have presented a better fit than the ballot access balancing test.[189]

A common ballot notation that has survived recent scrutiny is the "incumbent" designation. A Minnesota Supreme Court decision in 1950 affirmed such a designation rather summarily:

> Petitioner next contends that the act in question is unequal and partial legislation and that it gives the incumbent an undue advantage over other candidates. Indirectly this may be so, but that does not necessarily invalidate the act. Use of the word 'incumbent' following the candidate's name simply informs the voter of the person who presently holds the position.[190]

A subsequent challenge in Minnesota in 2008 scrutinized the designation under the *Burdick* balancing test; the court found the designation was a slight burden to the nonincumbent.[191] Despite the advantage that the label "incumbent" confers on candidates—with no opportunity for other candidates to communicate another message on the ballot—these challenges failed the *Burdick* balancing test.

Ostensibly similar cases are those in which unqualified parties seek to include their political party on the ballot, or candidates seek to fill the space reserved for ballot cues with something other than a qualified party. While the names of qualified parties, which meet some predetermined criteria of signatures or voters earned in the previous election, automatically appear on the ballot beside their candidates' names, unqualified parties do not share this advantage. Courts have generally upheld these cases under the *Burdick* balancing test, so long as the

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184. *Id.* (citing CAL. ELEC. CODE § 13107(a)(1)–(3) (permitting a candidate to use one of these three options)).

185. *Id.* at 1015.

186. *Id.* at 1015–16.

187. *Id.* at 1017.

188. *Id.* at 1014–15; *see infra* Section II.B.

189. *See infra* Section II.D.

190. Gustafson v. Holm, 44 N.W.2d 443, 447 (Minn. 1950); *see also* Peterson v. Stafford, 490 N.W.2d 418, 425 (Minn. 1992) (allowing incumbent designation on judicial election ballot).

191. Clark v. Pawlenty, 755 N.W.2d 293, 313 (Minn. 2008) ("[T]he incumbent-designation imposes at most a de minimis burden on judicial candidates and voters.").

rules for securing ballot access are roughly comparable with the kinds of burdens and justifications articulated in *Anderson* and *Burdick*.[192]

States have also limited what kinds of party labels may appear on ballots. When California moved to a "top-two" primary system, it prohibited candidates unaffiliated with any party from listing the word "independent" beside their names. Instead, they would include the statement "No Party Preference," or the space would remain blank. A federal court in *Chamness v. Bowen* found that the regulation was viewpoint neutral and imposed "only a slight burden on speech."[193]

But that court did concede a "possible difference" between the phrases "independent" and "No Party Preference." It stated:

> The only possible difference between the two phrases that has been suggested is that 'Independent' may evoke a positive view—that the candidate affirmatively rejects the politics of the other parties. 'No Party Preference' might, on the other hand, evoke a neutral or even negative view—that the candidate is apathetic to the views of the other parties; i.e., while he does not identify with them, he does not reject them.[194]

But as the plaintiff "failed to provide any evidence that the two phrases are actually likely to be understood by voters to convey these different meanings, and, if they do, that the distinction would tend to affect the way voters cast their votes," the court rejected his claim.[195]

Another federal case out of California, *Soltysik v. Padilla*, considered a challenge to the state's party-preference notations. Qualified parties would have their party preference listed, while non-qualified parties would have "Party Preference: None" beside their names.[196] The Socialist Party USA, a nonqualified party, argued that the candidates were compelled to list a false assertion of no party preference beside their names. The court rejected the claim because the term "party" was defined in the statute as a qualified party. But the court went on to say that "ballots are not candidate speech," and, citing *Timmons*, noted a lack of "any cases finding that a ballot label reflecting a candidate's party preference is speech by the candidate."[197]

Through the lens of the association cases, these cases are best understood as relying principally on the ability or inability of voters and candidates to

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192. *See, e.g.*, Schrader v. Blackwell, 241 F.3d 783, 785 (6th Cir. 2001) (rejecting "Libertarian Party" label on ballot when party had failed to qualify); *cf.* Dart v. Brown, 717 F.2d 1491, 1504–10 (5th Cir. 1983) (describing Louisiana's party recognition process).

193. 722 F.3d 1110, 1118 (9th Cir. 2013); *see also* Soltysik v. Padilla, No. 2:15-cv-7916, slip op. at 7 (C.D. Cal. Apr. 22, 2016), http://ballot-access.org/wp-content/uploads/2016/04/Soltysik-district-court-decision.pdf.

194. *Chamness*, 722 F.3d at 1117.

195. *Id.* at 1117–18.

196. *Soltysik*, slip op. at 1.

197. *Id.* at 13.

associate with one another, rather than turning on any understanding of the quality of that association. Cases in which the Court developed its associational jurisprudence in ballot access disputes, like *Rhodes* and *Jeness*, largely examined the barriers to candidates who sought access to the ballot. Voters were simply unable to associate with the candidate by means of the ballot if the Court permitted the restriction. In cases like *Timmons*, *Washington State Grange*, *Rubin*, *Chamness*, or *Soltysik*, however, the candidates (and the parties) were wholly capable of associating with voters on the ballot, but the voters and candidates were simply unable to associate with one another in the particular form they desired.[198] Accordingly, burdens appear slight even if candidates and parties are denied their preferred means of expressing their identities.

4. Rejection of Balancing Tests in Non-Process Speech-Related Election Disputes

In some election disputes implicating speech, the Court has rejected reliance upon the *Burdick* test. In *McIntyre v. Ohio Elections Commission*, for instance, the Court considered an Ohio law that prohibited the distribution of anonymous election leaflets.[199] Under this law, Margaret McIntyre was fined for anonymously printing and distributing some leaflets opposing a referendum on a new school tax.[200]

Ohio attempted to defend the law as a slight burden on McIntyre's rights under the *Burdick* test.[201] But the Court rejected the *Burdick* balancing test and found it an inappropriate framework: *Burdick*, the Court concluded, concerned "the voting process itself" and cases involving "ordinary litigation," such as filing deadlines, ballot access restrictions, and the eligibility of independent voters to vote in primary elections.[202] "Ordinary litigation," however, did not apply to the dispute involving McIntyre; instead, the Court emphasized, "It is a regulation of pure speech."[203] Regulations of "pure speech," according to the Court, are actually limitations on political expression "subject to exacting scrutiny."[204]

The *McIntyre* Court cited similarly situated precedents when it rejected *Burdick*. In *Meyer v. Grant*, for instance, the Court applied strict scrutiny when it examined an election law that prohibited paying petition circulators for gathering signatures to put an initiative on the ballot.[205] Under that exacting standard, the Court found the law unconstitutional. And in *Burson v. Freeman*, a majority of the Court used strict scrutiny when considering the constitutionality of a law

198. *See infra* Part III (discussing qualitative and quantitative approaches).
199. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 344–45 (1995).
200. *Id.* at 337.
201. *Id.* at 344.
202. *Id.* at 344–45.
203. *Id.* at 345.
204. *Id.* at 346 (quoting Meyer v. Grant, 486 U.S. 414, 420 (1988)).
205. 486 U.S. at 414.

forbidding campaign-related speech within 100 feet of a polling place.[206] The Court ultimately found the ban on electioneering permissible.[207]

The *Burdick* balancing test, then, is appropriate for challenges concerning "the voting process itself," not matters of "pure speech." And courts have usually found challenges to the form and content of the ballot as "voting process" rather than "pure speech" matters.[208]

Lower courts have not always been able to distinguish between these two challenges. In *Rosen v. Brown*, for instance, the Sixth Circuit considered a challenge to an Ohio law that prohibited candidates from placing the word "independent" beside their names on the ballot.[209] The court considered whether the law abridged plaintiffs' "First Amendment rights to freedom of speech and freedom of association" before using the *Anderson* balancing test[210] and a separate Equal Protection analysis.[211] It went on to conclude that Ohio failed to adequately justify its decision to exclude voter cues for independent candidates.[212]

As this Article shows, the traditional examination of the First Amendment right at the ballot box is largely derived from a freedom of association line of inquiry that predates federal judicial scrutiny of these election disputes. Courts have applied the *Burdick* balancing test in freedom of association cases with both ballot access and ballot content disputes, but have rejected them in "pure speech" cases—despite the fact that ballot content looks much more like speech than association.

B. Public Forum Analysis

In contrast to the framing propounded in the freedom of association cases culminating in the *Burdick* balancing test, this Article argues that the ballot can be thought of as a *forum* for speech. Of course, if the ballot is a speech forum, examination of the ballot demands a different kind of analysis.

When the government owns or controls property, the Supreme Court has developed a "forum based" approach to evaluate the restrictions that the government may place upon First Amendment activity occurring on that property.[213] A "traditional public forum" is a place where, by long tradition, assembly and debate have been permitted, such as streets, sidewalks, and parks.[214] Regulations of speech here must be "narrowly drawn to achieve a compelling state

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206. Burson v. Freeman, 504 U.S. 191, 210–11 (1992).

207. *Id.* at 211.

208. *See supra* Section II.A.3.

209. Rosen v. Brown, 970 F.2d 169, 176 (6th Cir. 1992).

210. The *Rosen* court handed down its decision shortly after *Burdick* but primarily relied upon the formulation of the balancing test articulated in *Anderson*. It also concluded that the holding of *Burdick* was distinguishable. *Rosen*, 970 F.2d at 178 n.2.

211. *Id.* at 177–78.

212. *Id.* at 178.

213. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

214. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

interest"[215] and must be content neutral—that is, the state may not regulate speech differently on the basis of subject matter or viewpoint.[216] A "designated public forum" is a place "that the State has opened for expressive activity by part or all of the public."[217] These places, too, may only be regulated in a content-neutral manner and are subject to strict scrutiny.[218]

Regulation of expressive activity on all other public property "must survive only a much more limited review"—regulations must be reasonable and not be "an effort to suppress the speaker's activity due to disagreement with the speaker's view."[219] The government may limit expression in that forum for specific purposes.[220] A "nonpublic forum," or "limited public forum," then, provides potential speakers far fewer opportunities to speak free from government regulation. Finally, some places are not forums at all—government-owned property that the government uses to speak, like a television channel, is not a forum subject to the "public forum" analysis.[221]

Unsurprisingly, this framework means the bulk of the litigation focuses on whether the court should classify the forum as public or nonpublic. "Traditional public forums" are relatively rare—they often extend only to streets, sidewalks, or parks, the kinds of places that traditionally, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[222] A "designated public forum" includes government property not traditionally regarded as a public forum, but a place that the government has opened for the purpose of creating a place for speech.[223] Such forums may be limited to certain speakers or for the discussion of certain subjects, so long as the restrictions are reasonable and the viewpoints are neutral.[224] But the Supreme Court has been reluctant to find many designated public forums, often finding instead that the forum is nonpublic,[225] deciding that a stipulation controls the forum analysis and refusing to analyze independently whether it is a designated public forum,[226] or concluding that the forum is channeling government speech

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215. *Krishna*, 506 U.S. at 678.

216. *Perry*, 460 U.S. at 59.

217. *Krishna*, 506 U.S. at 678.

218. *Id.*

219. *Id.* at 679.

220. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 815 (1984).

221. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673–75 (1998) (finding televised debates not a traditional forum).

222. Boos v. Barry, 485 U.S. 312, 318 (1988) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

223. Pleasant Grove City v. Summum, 555 U.S. 460, 469–70 (2009).

224. *Id.* at 470.

225. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 805 (1985) (finding the Combined Federal Campaign charitable drive to be a nonpublic forum).

226. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107–12 (2001) (finding school's actions unconstitutional when it discriminated against a Christian viewpoint in extracurricular programming).

rather than private speech.[227] And many fairly public places have been deemed nonpublic forums, like airport terminals[228] or public school property available for after-hours use.[229] The Ninth Circuit has also concluded that voters' pamphlets are "limited public for[ums]" and restrictions on content are subject to a review for reasonableness.[230]

Adopt-a-highway signs are a useful example of nonpublic forums in many courts. They are subject to state control and contain some government speech, but they also include expressions of the name or logo of the organization that has adopted the highway for maintenance.[231] Similarly, the Ninth Circuit recently concluded that advertising programs on public buses constituted a nonpublic forum, given the screening process for advertising and selective access to advertisers.[232] Regulations of the expressions on these signs must be reasonable and viewpoint neutral,[233] as in any nonpublic forum.

The Supreme Court has taken a somewhat circuitous route to conclude that the ballot should not be deemed a public forum. In *Burdick*, a voter claimed the right to express himself on the ballot by writing in a candidate's name. He argued that he was "entitled to cast and Hawaii is required to count a 'protest vote' for Donald Duck."[234] The Court rejected the argument that Hawaii needed to count such votes because "[T]he function of the election process is . . . not to provide a means of giving vent to 'short-range political goals, pique, or personal quarrel[s].'"[235] It rejected a call to embrace voting as a "more generalized expressive function" and affirmed the "channeling [of] expressive activity at the polls."[236] This view limits the voters' interests in expressing themselves as protected First Amendment activity. But it does not necessarily have much to say about the candidates' expressive interests on the ballot as protected First Amendment activity.

The Court drew upon this language in *Timmons* when it flatly held that "ballots serve primarily to elect candidates, not as forums for political

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227. *See Pleasant Grove City*, 555 U.S. at 481.

228. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992).

229. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390–91 (1993).

230. Cogswell v. Seattle, 347 F.3d 809, 811 (9th Cir. 2003).

231. *See, e.g.*, Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075, 1078 (5th Cir. 1995); San Diego Minutemen v. Cal. Bus. Transp. & Hous. Agency's Dep't of Transp., 570 F. Supp. 2d 1229, 1250 (S.D. Cal. 2008); Robb v. Hungerbeeler, 281 F. Supp. 2d 989, 992 (E.D. Mo. 2003), *aff'd on other grounds*, 370 F.3d 735 (8th Cir. 2004).

232. Seattle Mideast Awareness Campaign v. King Cty., 781 F.3d 489, 504 (9th Cir. 2015).

233. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677–78 (1998).

234. Burdick v. Takushi, 504 U.S. 428, 438 (1992).

235. *Id.* (citation omitted).

236. *Id.* ("Accordingly, we have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.").

expression."[237] There, a political party called the "New Party," sought to endorse a candidate already affiliated on the ballot with another political party, Minnesota's "Democratic-Farmer-Labor Party" ("DFL"). As mentioned previously, [238] Minnesota prohibited "fusion" candidates, or multi-party candidacies.[239] Because the Court concluded that the New Party was attempting to "use the ballot itself to send a particularized message," it used the *Burdick* balancing test to find that the New Party was "slightly" limited in its "ability to send a message to the voters and to its preferred candidates," emphasizing the party's associational rights.[240] After all, the New Party could publicly endorse and speak on behalf of the candidate. It simply could not display the party's name on the ballot beside that candidate's name. Alternatively, the candidate could reject the DFL endorsement and appear on the ballot affiliated with the New Party. The Court worried that the New Party's claim would "transform[]" the ballot "from a means of choosing candidates to a billboard for political advertising."[241]

Likewise, in *Washington State Grange*, the Court seized on this language from *Timmons* with greater specificity. In scrutinizing Washington's top-two primary, the Court noted that parties had lost the ability to indicate their nominees on the ballot.[242] But it rejected the First Amendment dimension of this concern, citing *Timmons*: "The First Amendment does not give political parties a right to have their nominees designated as such on the ballot."[243] Candidates had the power to designate a party preference, but parties lacked the ability to designate the preference of candidates. To the Court, this difference did not affect its analysis. Quoting *Timmons*, the Court again repeated that ballots were "not . . . forums for political expression."[244]

Chief Justice Roberts penned a concurrence tied even more specifically to a public forum analysis. If a candidate, for instance, expressed a preference for a party, and a party disapproved of this candidate, the party could control its message by speaking against the candidate publicly, or responding to the candidate's preference in public.[245] But Chief Justice Roberts acknowledged that ballots are different: "What makes these cases different of course is that the State controls the content of the ballot, which we have never considered a public forum. Neither the candidate nor the party dictates the message conveyed by the ballot."[246]

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237. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997) (citing *Burdick*, 504 U.S. at 438). The dissenting opinion also drew upon this language. *See id.* at 445 (Kennedy, J., dissenting)).

238. *See supra* notes 175–79.

239. *Timmons*, 520 U.S. at 358.

240. *Id.* at 363.

241. *Id.* at 365.

242. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 452 (2008).

243. *Id.* at 453 n.7.

244. *Id.*

245. *Id.* at 460–61. (Roberts, C.J., concurring).

246. *Id.*; *see also* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 365 (1997).

The Court's rather casual reference to "forum" in *Burdick* in the context of voter expression quietly transformed into a glib conclusion in *Washington State Grange* that the ballot was not a "forum" for any First Amendment purpose. The speech-related concerns of candidates or parties on the ballot are essentially nonexistent in the Court's eyes—despite politically expressive content being communicated to voters in a forum that was long controlled by private citizens.[247] Although the public forum doctrine may be a useful way of examining ballot speech, the Supreme Court has refused to use that doctrine for this purpose.

C. Compelled Speech and Government Speech

Finally, First Amendment ballot disputes might include compelled speech and government speech issues. As the Supreme Court has explained, "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[248] That means the First Amendment precludes the government from compelling individuals to speak. And while the government may sometimes speak on its own rather than compelling private speech, the First Amendment places limitations on how it may do so.

The compelled speech cases are diverse. The Court has struck down laws requiring students to salute the flag in public schools,[249] compelling newspapers to provide space to political candidates to respond to editorials criticizing them,[250] forcing parade organizers to allow groups to carry signs the organizers prefer to exclude,[251] and compelling drivers to display government slogans on private cars by affixing them to state-issued license plates.[252] In voting, courts have found that requiring voters to vote "yes" or "no" on a recall as a condition upon voting for the replacement gubernatorial candidate also constitutes compelled speech.[253]

Because the government controls the ballot, it necessarily controls the speech that appears on the ballot. Likewise, as a condition of appearing on the ballot—and therefore as a condition of winning elections—it compels candidates to display certain information on the ballot.[254] This is not a terribly controversial proposition. A candidate's name must appear on the ballot, after all; anonymous

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247. *See also* Persily, *supra* note 121, at 2214 n.115 ("[I]f one considers the ballot some kind of public forum, then the decision to allow some names to appear but not others must be justified by compelling state interests.").

248. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796–97 (1988); *see also* Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 634–42 (1943) (discussing the government's ability to compel participation in a salute to the flag).

249. *Va. Bd. of Educ.*, 319 U.S. at 641–42.

250. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

251. Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 581 (1995).

252. Wooley v. Maynard, 430 US. 705, 717 (1997).

253. *See, e.g.*, *In re* Hickenlooper, 312 P.3d 153, 157–59 (Colo. 2013); Partnoy v. Shelley, 277 F. Supp. 2d 1064, 1075 (S.D. Cal. 2003)

254. *Cf.* Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045 (2014) (discussing types of unconstitutional speech conditions).

candidacies are not permitted.[255] A candidate may choose whether to associate with a political party in a partisan race or to associate with no party. If a candidate affiliates with no party, the ballot may have a blank space or "no party preference" beside the candidate's name.[256] And candidates are free to include descriptive terms, as long as the terms are consistent with the content permitted in that notation.[257]

The nature of ballot speech suggests that it does not fit very well within a concept of compelled speech. True, candidates are compelled to include some of these linguistic items on the ballot as a condition of appearing on it. And some concerns about certain notations—such as racial cues or compulsory term limit pledges—may well be driven by a distaste for compelled speech, despite no formal holding that a compelled speech analysis controlled the decisions.[258] But unlike some of the more notorious cases implicating compelled speech, the compulsion is not placed upon the activities of private parties.[259] Instead, it is a display of information on the government-maintained ballot. Further, apart from the candidate's name, the party and most other notations are left to the discretion of the candidate—it is not compulsion at all, but merely an opportunity to display information in this small forum.[260]

Despite the fact that the ballot is maintained by the government, it does not necessarily follow that the government is the speaker. Admittedly, the contours of the government speech are notoriously unclear.[261] But two salient traits stand out in the government speech analysis: clear attribution of the speech to the government, and a history of government control of the venue in which it is speaking.[262]

In *Pleasant Grove City v. Summum*, for instance, the Supreme Court found that monuments on a public park were government speech. Even though many monuments were donated by private speakers, the Court emphasized that

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255. *See supra* note 19 and accompanying text.

256. *See, e.g.*, Chamness v. Bowen, 722 F. 3d 1110, 1117 (9th Cir. 2013).

257. *See supra* Section I.C.

258. *See, e.g.*, Elizabeth Garrett, *supra,* note 93, at 1541.

259. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 558 (1995) (refusing to compel parade group to carry signs); Pac. Gas & Elec. v. Pub. Util. Comm'n, 472 U.S. 1, 15–16 (1986) (refusing to compel billing envelopes to include messages with which the appellant disagreed); Wooley v. Maynard, 430 U.S. 705, 717 (1977) (including a license plate's message on one's private property); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (refusing to compel content in a privately published newspaper).

260. *Accord* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 457 n.10 (2008) ("[I]t simply provides a place on the ballot for candidates to designate their party preferences. Facilitation of speech to which a political party may choose to respond does not amount to forcing the political party to speak.").

261. *See* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 612–13 (2008).

262. *See generally* Abner S. Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833 (2010).

governments have long spoken through monuments, including privately financed monuments, particularly when placed on public land.[263] And in *Walker v. Sons of Confederate Veterans*, the Court found that state-issued license plates have, since their inception, communicated state messages and contained designs closely identified with the state.[264] The state maintained "direct control over the messages" on the license plates and offered final approval authority.[265]

History belies the notion that the ballot traditionally belongs to the government. For many years, ballots were controlled by candidates and parties, and they displayed the messages they desired on them, free from government control.[266] One could argue that the relevant historical question does not concern ballots generally throughout the United States, but the state-administered Australian ballot. In that regard, the ballot looks much closer to government speech. It is a declaration of the list of candidates for office, their party affiliations, and designations or notations—all reviewed by election officials to verify that they are true, or at least not misleading or deceptive. But it is a greater challenge to claim that the state can simply speak freely on the ballot and promote its views—particularly because the ballot has the potential to influence voters at the most crucial stage in the electoral process.[267] It is one thing for states to tell their citizens to vaccinate their children,[268] eat beef,[269] or support the University of Texas.[270] It is something else for it to speak by means of the ballot, to voters, effectively on behalf of candidates and parties who might prefer to express themselves to the voters directly, and possibly in a different way.

Additionally, for speech to qualify as "government speech," courts have usually required an element of governmental control over the message in the speech in such a way that the speech is clearly attributable to the government. For instance, a long-running advertising campaign promoting beef was not a "seeming endorsement" of the message by livestock producers.[271] The government was clearly identifiable as the speaker and proponent of the message, despite the occasional attribution, "Funded by America's Beef Producers."[272] The Court has also found that the public "routinely—and reasonably" views the messages conveyed by state-issued license plates and the monuments in public parks as

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263. Pleasant Grove City v. Summum, 555 U.S. 460, 469–72 (2009).

264. Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248 (2015).

265. *Id.* at 2249.

266. See *supra* Section I.D (discussing the pre-Australian ballot).

267. *See* Cook v. Graylike, 531 U.S. 510, 525 (2001).

268. *Walker*, 135 S. Ct. at 2246 ("How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization?").

269. *See e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 554 (2005) (allowing mandatory contributions for "eat beef" advertising campaign).

270. Transcript of Oral Argument at 36, Walker v. Tex. Div., Sons of Confederate Veterans, 135 S. Ct. 2239 (2015) (No. 14-144).

271. *Johanns*, 544 U.S. at 554.

272. *Id.*

statements made by the issuer and commissioner of such objects—the government.[273]

In contrast, it is challenging to claim that the ballot clearly represents government speech. It does list candidates for office as recognized by the state. But, how the candidates or parties choose to express themselves on the ballot—subject, admittedly, to state regulation—is another matter. Perhaps ballot speech hews closer to cases like adopt-a-highway signs. Perhaps the Eighth Circuit case—which found that such signs involved some government speech, but that such speech "does not eviscerate the expressive elements" of private speech contained on the sign—is more closely analogous.[274]

Further, the most controversial instances concerning speech on the ballot today may well occur when the government attempts to put a thumb on the scale in favor of one candidate over another. The disfavored candidate seeks an opportunity for comparable ballot speech or to have the government-preferred label eliminated.[275] It would strike many as disconcerting to conclude that the government may speak freely on the ballot—a forum primarily for electing candidates and not for speaking. There may be some constitutional constraints on the ability of the government to speak on the ballot: if the government lies about voting matters, for instance, it may violate Due Process or the individual exercise of voting rights.[276] But that does not sufficiently address the concerns of speaking at a crucial stage of the electoral process, in that moment when the vote is cast.[277]

The ballot has not been traditionally subject to government control, even though the government has seized much control recently. And the words on the ballot concerning candidates and parties are not clearly attributable to the government. Instead, ballot speech is better understood as private speech facilitated by a government-managed channel.[278]

D. The Failure to Recognize Ballot Speech

Candidates and parties care about how they appear on the ballot. The ballot contains a linguistic written form—the candidate's name, party, and notation.[279] Candidates and political parties desire to communicate to voters by means of the words used to identify and describe them on the ballot. While

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273. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 471 (2009); *Walker*, 135 S. Ct. at 2249.

274. Robb v. Hungerbeeler, 370 F.3d 735, 745 (8th Cir. 2004); *accord* sources cited *supra* note 231.

275. *See infra* Section II.D.; *supra* Section II.A.3.

276. Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73, 96 (2015).

277. *See infra* Part IV.

278. *See, e.g.*, Bam, *supra* note 97, at 594–95 (describing ballot notations as "purely private speech").

279. *Cf.* Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 338 (1993) ("We can see how voting is akin to speech, it involves linguistic forms to communicate messages . . . .").

candidates and voters could freely do so before the Australian ballot, state control over content and form led to the withdrawal of this expressive element from voters. The role of the First Amendment in relation to ballot speech, however, has been quite limited. In the rare instances the Supreme Court has squarely confronted ballot speech issues, it has avoided any speech-related analysis.[280] In particular, two types of notations have received attention before the Supreme Court: racial notations and term limit notations. Neither received a robust First Amendment inquiry.

A few states in the mid-twentieth century began dabbling with means of influencing elections by including racial information on the ballot. For instance, Oklahoma required that African-American candidates for office include the designation "Negro" beside their names; white candidates, and candidates of any other race, had no such notation. In 1955, the Tenth Circuit found that this rule violated the Equal Protection Clause because it treated black candidates differently than candidates of any other race.[281]

Louisiana offered a different version of this notation. It allowed ballots to include the race of all candidates on the ballot—perhaps, ostensibly, to avoid any equal protection issues of treating races differently.[282] In 1964, the Supreme Court rejected this notation in *Anderson v. Martin*.[283] The Court emphasized that the case had "nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases or to receive all information concerning a candidate which is necessary to a proper exercise of his franchise."[284] Instead, the Court worried that by "placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another."[285] By choosing to direct attention "to the single consideration of race or color," the State suggested that race was "perhaps paramount" in the citizen's choice, which may "decisively influence" the political process.[286] The Court's analysis here turned on the Fourteenth and Fifteenth Amendments, without mention of the First Amendment.[287]

States experimented with a different sort of ballot designation in the 1990s. The Supreme Court had rejected state-created term limits for members of Congress as an impermissible additional qualification for office and concluded that

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280. *See supra* Section II.A.2.
281. McDonald v. Key, 224 F.2d 608 (10th Cir. 1955).
282. Anderson v. Martin, 375 U.S 399 (1964).
283. *Id.*
284. *Id.* at 402.
285. *Id.*
286. *Id.*
287. *See id.* at 401–02. The Court mentioned *NAACP v. Alabama*, 357 U.S. 449, 463 (1958), but merely for the proposition that the "interplay of governmental and private action" was implicated in the case, and not about the associational interests.

the Constitution's enumerated qualifications were exhaustive.[288] Missouri voters amended the state constitution to compel its federal congressional delegation to support a federal constitutional amendment regarding term limits. Members of Congress who failed to take steps in support of such an amendment would see their name accompanied by the words "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" on the ballot.[289] And nonincumbent prospective members of Congress who failed to take a pledge in support of term limits would see the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" beside their names on the ballot.[290]

A majority of the Court rejected the ballot notations as running afoul of the Elections Clause. The Court concluded that the power to regulate the "Times Places and Manner of holding Elections," provided the "exclusive delegation of power" to the states.[291] But that power did not include the power to "dictate electoral outcomes."[292] The Court concluded that the ballot notation was not a "procedural regulation," because it bore "no relation to the 'manner' of elections as we understand it."[293] Instead, it was "plainly designed to favor candidates who [were] willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose[d] term-limits entirely or would prefer a different proposal."[294] Further, the Court agreed that the labels were "pejorative, negative, derogatory, intentionally intimidating, particularly harmful, politically damaging, a serious sanction, a penalty, . . . official denunciation [and] the Scarlet Letter."[295] "Such adverse labels" that "handicap candidates" were "not authorized by the Elections Clause."[296]

Importantly, the Elections Clause extends to regulating only congressional elections. The holding of *Gralike* would not extend to elections for state or local offices.[297] Its impact on the matter of term limits instructions would be particularly limited because many state constitutions had already adopted term limits for state legislators.[298] But it would have no direct impact on ballot labels for noncongressional offices.

There has been a First Amendment light in the darkness of cases like *Anderson v. Martin* and the majority opinion in *Cook v. Gralike*. Chief Justice Rehnquist, joined by Justice O'Connor, concurred in the judgment in *Gralike*. They tethered their analysis to the "First Amendment right of a political candidate, once lawfully on the ballot, to have his name appear unaccompanied by pejorative

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288. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805–06 (1995).
289. Cook v. Gralike, 531 U.S. 510, 514 (2001).
290. *Id.* at 514–15.
291. *Id.* at 522–23.
292. *Id.* at 523 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 833–34).
293. *Id.* at 523–24.
294. *Id.* at 524.
295. *Id.* at 524–25 (citation omitted).
296. *Id.* at 525–26.
297. *Id.* at 526.
298. *See id.* at 514 n.2 (demonstrating the proposed law only applies to federal representatives).

language required by the State."[299] Such a holding would extend to all ballots, implicating candidates for federal, state, and local offices. Chief Justice Rehnquist observed that the notation constituted viewpoint discrimination "because only those candidates who fail to conform to the State's position receive derogatory labels."[300]

However, Chief Justice Rehnquist's concurrence rejected the Eighth Circuit's conclusion that the ballot labels were "compelled speech" violating the First Amendment. The Eighth Circuit had concluded that the labels compelled candidates "to speak about term limits," either "in favor of term limits by threatening them with a ballot label if they fail to do so," or against term limits with a negative label that forces a candidate to note that "he or she failed to follow the voters' wishes."[301] The "potential political damage of the ballot labels" was sufficiently punitive to cause First Amendment damage.[302] Chief Justice Rehnquist rejected this reasoning in part, "I do not believe that a reasonable voter, viewing the ballot labeled as [the Missouri Constitution] requires, would think that the candidate in question chose to characterize himself as having 'disregarded voters' instructions' or as 'having declined to pledge' to support term limits."[303] But Chief Justice Rehnquist expressed no view on the complementary concern raised by the Eighth Circuit—that the failure of a candidate to speak on the state's preferred viewpoint would result in a penalty.[304]

Finally, both the majority opinion and Chief Justice Rehnquist's concurrence emphasized the uniqueness of the timing. The majority recited the concerns of *Anderson v. Martin*: the labels harmed candidates "at the most crucial stage in the election process—the instant before the vote is cast."[305] Chief Justice Rehnquist noted that ballot notations mean that "the State injects itself into the election process at an absolutely critical point—the composition of the ballot, which is the last thing the voter sees before he makes his choice—and does so in a way that is not neutral as to issues or candidates."[306]

Anderson v. Martin and *Cook v. Gralike* do not use the *Burdick* balancing test, nor do they use a First Amendment analysis. Instead, they rely on some idiosyncratic reasoning—*Anderson v. Martin* on an attenuated Equal Protection analysis, *Cook v. Gralike* on a narrow Elections Clause analysis—both bereft of any framework that would be meaningful in subsequent similarly-situated cases regarding ballot speech.

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299. *Id.* at 530–31 (Rehnquist, C.J., concurring).
300. *Id.* at 531–32.
301. Gralike v. Cook, 191 F.3d 911, 917 (8th Cir. 1999).
302. *Id.* at 918.
303. Cook v. Gralike, 531 U.S. 510, 531 n.20 (2001) (Rehnquist, C.J., concurring).
304. *See Gralike,* 191 F.3d at 918–19.
305. *Gralike,* 531 U.S. at 525 (quoting Anderson v. Martin, 375 U.S. 399, 402 (1964)).
306. *Id.* at 532.

In both *Anderson* and *Cook*, a First Amendment speech-based inquiry would have acknowledged that the state was interfering with the candidates' opportunities to communicate with the electorate. State attempts to manipulate the political process through racial designations or to stigmatize opponents of term limits could not survive First Amendment scrutiny. At the most crucial moment in the political process, the state sought to influence the outcome of the election by treading upon the candidates' last opportunities to communicate to voters.[307] But Chief Justice Rehnquist's First Amendment-oriented view of the ballot has earned little attention. Indeed, no court has cited his language on the First Amendment right to ballot speech, and exceedingly few commentaries or briefs have relied upon it.[308]

Prior to these cases, the Massachusetts Supreme Court did in one instance sympathize with a First Amendment speech-related protection of ballot speech. It stated that the ballot is "necessarily short" and "cannot usually permit of discursive statements by candidates."[309] Massachusetts permitted candidates who obtained ballot access via signature to use up to three words to identify their political affiliation. While signature candidates could not use recognized political parties (then, the Democratic and Republican Parties), any other description was permissible—candidates had recently used the "Citizens Party," "Against Politician's Raise," and "The Anderson Coalition." Only one word was impermissible: "Independent." Such candidates would be designated as "Unenrolled."[310]

It was problematic in the court's view that Massachusetts "did admit subject matter to the ballot and then sought to manipulate it."[311] It explained, "Whereas any other candidate was allowed to use a designation on the ballot conforming to the rubric he used during the campaign, the candidate who chose, quite legitimately, to campaign under the label Independent, was singled out and denied that expression on the ballot."[312] By singling out this word, the state sought to manipulate the ballot speech it otherwise permitted.

The court recognized that the expressive interest was related to the associational interest, but that the interests were distinct:

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307. In the ballot initiative or referendum context, the issue, again, is more complicated, and best left for another day. The state may campaign or spend money advocating for or against ballot propositions. *See e.g.*, Goodman *supra* note 18.

308. *See, e.g.*, Vicki C. Jackson, Cook v. Gralike*: Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299, 325–27 (describing the First Amendment right articulated by Chief Justice Rehnquist in *Cook v. Gralike* as "something about elections in particular," at least as much as it is about notions of speech or expression); Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1061 n.218 (2005) ("I tend to agree with the concurring opinion of Chief Justice Rehnquist, which decided the case on First Amendment grounds.").

309. Bachrach v. Sec'y of Commonwealth, 415 N.E.2d 832, 835 (Mass. 1981).

310. *Id.* at 834.

311. *Id.* at 835.

312. *Id.* at 836.

> If freedom of expression was impaired, so also would damage be done to associational rights, and thus to the right to vote. For example: Voters who during the campaign might have been favorably impressed with the candidate as an Independent, would be confronted on the ballot with a candidate who was called Unenrolled. Unenrolled is hardly a rallying cry: the Commonwealth in its brief appears to grant the possibility that that word would have a negative connotation for voters.[313]

The paucity of cases addressing ballot speech with any meaningful analysis does not suggest that ballot speech is unimportant. Indeed, tens of thousands of candidates appear on the ballot each year, with some version of their name displayed; dozens of minor political parties vie for ballot space; and ballot notations remain a constant source of innovation and creativity. The problems that arise, however, tend to occur administratively, and, when litigated, the judicial opinions tend to fall in the rut of the traditional *Burdick* balancing test. A better understanding of "ballot speech" is in order.

III. THE ASSOCIATIONAL ANALYSIS PROBLEM

One could view ballot speech cases as associational rights cases and try to offer a more appropriate application of the *Burdick* balancing test. For instance, displaying the candidate's preferred name on the ballot—perhaps the name she has campaigned under—enables voters to associate more effectively with a candidate by helping voters identify their desired choice more easily. The candidate's party affiliation can help voters associate with that political party, and the notation or designation helps sharpen the voter's preference and enhances the ability of voters to associate with their candidates of choice.

But there are weaknesses intertwined with even this adjusted understanding. First, the associational cases in ballot access disputes generally examine the ability to appear on the ballot, not the effectiveness or value of the ballot's content. And these cases neglect the expressive interests of ballot speech as a distinct right meriting legal protection. This Part discusses each weakness in turn.

A. Deficiencies in Measuring Burdens

In a typical ballot access dispute, there is a great difference between obtaining ballot access, where candidates and voters are able to associate with one another on the ballot, and failing to obtain ballot access, where candidates and voters are incapable of associating with one another. It is usually a binary choice—on the ballot, off the ballot. Then a court examines the barrier to ballot access and evaluates the severity of that burden.[314]

Granted, courts do not always treat this as a purely binary choice. Some ballot access cases emphasize that alternative means, such as write-in votes, are

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313. *Id.*

314. *See supra* Section II.A.2.

inadequate. That is, while a candidate's name may not be printed on the ballot, other means of association exist, such as through the write-in vote. But courts have emphasized that the *effectiveness* of the associational right matters, and alternative means simply may not be as effective—indeed, if alternative means are sufficiently burdensome, the law fails the *Burdick* balancing test.[315] But most disputes, understandably, turn on the more simplistic binary formula of the ability or inability to associate—can this candidate or this political party secure ballot access? If not, how great an obstacle is it to obtain access and what are the state's interests in creating that obstacle?

In ballot speech cases, however, the interests at stake turn exclusively on the *quality* of the associational interest, not the ability or inability to associate. The candidate has already obtained ballot access. The question becomes one of the quality of that association—Are voters more or less likely to vote for a candidate if words like "Hussein" or "Willard" or "Rodham" appear on the ballot? If the party's name is the "Rent is Too Damn High" or "Rent is Too Darn High"? If the word "Independent" or "No Party Preference" appears beside his name? If a candidate has the designation "Incumbent," but the challenger has a blank space?

In these cases, there is a baseline problem. Just how "effective" must the associational interest be for its diminution to equate to a severe burden, to the kind of burden much more likely to result in a constitutional violation? The difference in the "burden" between obtaining signatures equivalent to 1% of registered voters in the state, and 15% of registered voters in the state, seems fairly quantifiable—at least, the Court has found so. But how about the difference between "Hillary Clinton" and "Hillary Rodham Clinton"? Between affiliation with the "Republican Party" and the "Conservative Party" simultaneously, or just the "Republican Party"? These seem much more difficult. Indeed, it is little wonder that the cases closest to addressing ballot speech issues through the *Burdick* balancing test find the burdens slight.[316] After all, how else to quantify the severity of what is essentially a qualitative attribute?

Admittedly, *all* inquiries of the burdens suffer from this same complication when one examines the severity of the burden rather than the binary "on the ballot, off the ballot" approach.[317] There have, however, been attempts to quantify the impact of the ballot itself upon the electoral process. For instance, political scientists have examined the impact on election outcomes of the order candidates appear on the ballot,[318] the design of the ballot itself,[319] or the addition of partisan cues.[320] Ethnic or gender cues may affect voter behavior, too.[321]

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315. *See supra* Section II.A.2.

316. *See supra* Section II.A.3.

317. *Cf.* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 202 (2008) (finding the regulation imposed a limited burden on voters).

318. *See, e.g.*, Daniel E. Ho & Kosuke Imai, *Estimating Causal Effects of Ballot Order from a Randomized Natural Experiment: The California Alphabet Lottery, 1978–2002*, 72 PUB. OP. Q. 216 (2008) (reviewing literature and finding modest effect on outcomes for minor-party candidates); Jonathan GS Koppell & Jennifer A. Steen, *The*

Only a few studies have attempted to scrutinize the impact of ballot speech. One suggests that in a judicial election, information about a political party significantly affected voters' preferences, incumbent status had little if any effect, and the candidates' residence had no effect.[322] The authors posited that it was possible that incumbent status had little effect because the nonincumbents were also judges, suggesting that the cue of "incumbent" would not materially affect voters' preferences.[323] Indeed, another study extending to offices other than judicial candidates concluded that the designation "incumbent," or a label occupationally appropriate for the office, increased the probability of the candidate winning.[324]

If there is a quantifiable difference in the burden between types of ballot speech, then it becomes even more problematic for the government to make *ex ante* determinations about the content of the ballot. Default rules may advantage or disadvantage particular candidates or parties.

And if there is no easily quantifiable difference, the qualitative impact remains. Courts attempting to examine the character and magnitude of the burden in a *Burdick* balancing test are making a judgment that they repeatedly disclaim in speech cases—weighing the value of the speech.[325]

Accordingly, it is not immediately obvious that the candidates' expressive content necessarily redounds to their benefit. That is, would a voter be inherently more likely to vote for a candidate with the nickname "Doc" added to the ballot? Or for a person named "human"? (He lost, anyway.) And it assumes that the

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Effects of Ballot Position on Election Outcomes, 66 J. POL. 267 (2004) (presenting results of study on ballot name positions during the 2008 New York Democratic primary).

319. David C. Kimball & Martha Kropf, *Ballot Design and Unrecorded Votes on Paper-Based Ballots*, 69 PUB. OP. Q. 508 (2005).

320. Jeffrey Conroy-Krutz, Devra C. Moehler, & Rosario Aguilar, *Partisan Cues and Vote Choice in New Multiparty Systems*, 49 COMP. POL. STUD. 3 (2016).

321. Cheryl Boudreau et al., *Racial or Spatial Voting? The Effects of Candidate Ethnicity and Ethnic Group Endorsements in Low-Information Elections* (Working Paper, 2014) [author received permission to cite]; Barry Clayton Edwards, *Race, Ethnicity, and Alphabetically Ordered Ballots*, 13 ELECTION L.J. 394 (2014); Marsha Matson & Terri Susan Fine, *Gender, Ethnicity, and Ballot Information: Ballot Cues in Low-Information Elections*, 6 ST. POL. & POL'Y Q. 49 (2006); Melissa R. Michelson, *Does Ethnicity Trump Party? Competing Vote Cues and Latino Voting Behavior*, 4 J. POL. MARKETING 1 (2005); Devra C. Moehler & Jeffrey Conroy-Krutz, *Eyes on the Ballot: Priming Effects and Ethnic Voting in the Developing World*, 42 ELECTORAL STUD. 99 (2016).

322. David Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POL. RES. Q. 709 (2001).

323. *Id.* at 725.

324. Monika L. McDermott, *Candidate Occupations and Voter Information Shortcuts*, 67 J. POL. 201 (2005).

325. Of course, the Supreme Court has expressly conceded that some speech is "low value" and less worthy of protection. *See* David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 381 (2015). But when selecting *among forms* of political speech communicating a candidate's or a party's identity as the ballot box, the weighing of the value of speech is even less justified.

speech is somehow inappropriate—or less appropriate—if it has the power to influence voters. But words matter. Identities matter. There is little dispute over glib, conclusory statements like these. But they emphasize the unrecognized, yet real, impact that ballot speech may have. Further, it is difficult for the state to claim a novel concern in ensuring that voters take the ballot seriously through state administration, because the ballot was created freely by candidates or parties for an extended period of time.

B. Neglecting the Expressive Interest

Second, viewing these cases exclusively through an associational perspective neglects their expressive element. Indeed, shoehorning these cases into an associational context requires an analysis that runs into the challenges identified previously.

Moreover, there is an expressive interest at stake in how candidates identify themselves and how a party identifies itself. This expressive interest spans several categories of First Amendment theory that merit protection. It extends to democratic self-governance, because candidates and parties assert their preferred identities when presenting themselves in that last crucial moment to voters.[326] It extends to the protection of individual autonomy, as candidates and parties identify themselves—their very names—as they prefer.[327]

To the extent that the Court prefers to weigh the value of the expressive interests, precedent suggests it should be given more weight than it has been given, which, thus far, has been essentially no weight. It is, after all, politically-expressive content that voters and parties care deeply about. Simply appearing on the ballot provides candidates and parties an important opportunity to speak to the public. [328] Consequently, onerous governmental regulation burdening some candidates or parties would seem to run afoul of the First Amendment's guarantee of the freedom of speech.[329] What is more, content was historically controlled by the candidates and parties.

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326. *Cf. supra* notes 305–07.

327. *Cf. supra* Section I.A.

328. Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1307 (2005).

329. For example, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015) the Court noted:

> Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the 'abridg[ement] of speech'—rather than merely the motives of those who enacted them.

See also Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

Understandably, the state-administered ballot relies upon fairly clear *ex ante* rules to evenly permit candidates' access to the ballot and content on the ballot. But once a candidate has obtained ballot access, the inquiry may simply need to look different—something more flexible and more deferential to the candidate to accommodate his expressive interests.

Consider, for instance, how states count write-in votes. States often have statutes that mirror a form of what Professor Rick Hasen calls the "Democracy Canon."[330] States tend to permit imperfect write-in ballots to be counted for the intended candidate if the intent of the voter is clearly expressed, even if only a version or a nontraditional form of the candidate's name is used.[331] States have a strong preference for attempting to count the ballots of voters and granting some flexibility in the decision-making process to maximize the opportunity to count those votes.[332]

True, voters are not engaged in expressive conduct when casting a ballot.[333] But the willingness of a state to accommodate ballots cast for nonstandardized versions of candidates' names suggests that the purity of the state's interest in some standardized form of language appearing on the ballot is not as robust as it initially appears. Perhaps its willingness to recognize these non-conforming write-in ballots is simply a generous accommodation to voters. Even so, it reflects that the candidate's identity extends beyond the state-sanctioned form of the name that appears on the ballot. The candidate's identity can be recognized as having many forms—and candidate-preferred forms should receive greater deference.

Additionally, the state must awkwardly determine the "truth" of the candidate's or party's identity. Courts have been skeptical of excessive judicial supervision of false statements, particularly in the political sphere, as inappropriate

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330. *Cf.* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, passim (2009) (describing a canon of statutory construction that tends to favor voter enfranchisement unless clear language or strong competing policy reasons dictate otherwise).

331. *See, e.g.*, Pendleton v. D.C. Bd. of Elections & Ethics, 449 A.2d 301, 308 (D.C. Ct. App. 1982) (affirming that the board of election's decision was supported by substantial evidence to count a vote cast for "Mr. Long" to candidate "DeLong Harris Jr."); Meyer v. Lamm 846 P.2d 862, 873–74 (Colo. 1993) (en banc) (counting write-in votes when voters included only candidate's surname, whether "Lamm," "Miss Lamm, "Ms. Lamm," or "Mrs. Lamm"); Devine v. Wonderlich, 268 N.W.2d 620, 624–25 (Iowa 1978) (counting write-in votes when voters included the candidate's name twice or only the candidate's surname); Rosenblum v. Tallman Fire Dist., 117 A.D.3d 1064, 1065–66 (N.Y. Ct. App. Div. 2014) (counting write-in votes when voters misspelled or abbreviated a version of candidate's name despite ballot instruction to use candidate's "exact legal name").

332. "Intent of the voter" can of course be far more complicated than simply the identity of the candidate, as *Bush v. Gore* undoubtedly details. *See* 531 U.S. 98, 106–07 (2000) (describing how election officials determined to count punch-card ballots when the "chad" did not fully dislodge).

333. *See* Winkler, *supra* note 280.

content-based restrictions on speech.[334] "Rational discourse," not onerous government regulation, is preferred.[335]

IV. A LEGAL FRAMEWORK FOR BALLOT SPEECH

Candidates and parties care deeply about how they are perceived *on the ballot*. The ballot serves the functional purpose of picking election winners and losers, but that functional purpose cannot be separated from its expressive speech elements.[336] "Ballot speech" does, in fact, exist. How it should be protected under law is another matter.

This Article has established that the Supreme Court's ballot access cases derive from the Court's freedom of association jurisprudence, and that the *Burdick* balancing test is best understood as an associational test, not a one-size-fits-all test for ballot access cases. In ballot speech cases, though, the *Burdick* test is not obviously applicable; indeed, the *Burdick* test has been expressly rejected in "pure speech" election law cases. The Court's public forum and compelled speech cases also provide potential means for understanding ballot speech, albeit means rejected by the Court thus far. And courts have improperly used the *Burdick* test in ballot speech cases, slighting its impact.

To start, there is no inherent right to any *particular* content on the ballot. Candidates have no right to a party affiliation or a notation unless the state creates that opportunity on the ballot. When the state does permit a candidate or party to appear on the ballot, even a simple understanding of equal protection dictates that the opportunities should be available to all on equal terms. But the state may choose to include or exclude *content* as it sees fit—a party emblem printed on the ballot, partisan elections, or the term "incumbent" may come or go. And once the ballot is opened up to candidates or parties, or once elements of the ballot are opened up for expression, speech-related interests come into play. Content-based restrictions on ballot speech are, practically speaking, necessary. While the pre-Australian ballot might have offered unlimited opportunities to candidates, the state-administered ballot requires some concessions to election administrators—including content regulation.

Two widely accepted propositions in these ballot cases are in significant tension with one another, which complicates a First Amendment-based approach to ballot speech.[337] First, the instant before the vote is cast is a crucial stage in the

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334. *See, e.g.*, Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016) (finding Ohio's false statement laws unconstitutional); United States v. Alvarez, 132 S. Ct. 2537 (2012) (striking down the Stolen Valor Act).

335. *See Alvarez*, 132 S. Ct. at 2550.

336. *Cf.* Larry Alexander, *The Misconceived Search for the Meaning of "Speech" in Freedom of Speech*, 5 OPEN J. PHIL. 39, 40 (2015) (proposing that speech should be considered in light of why the government is regulating it, not its value).

337. Strictly speaking, the *Burdick* balancing test is based on the freedom of association within the First Amendment. But this Article will occasionally use "First Amendment" as shorthand for the Amendment's textual guarantee of one thing it protects, the freedom of speech.

electoral process, and, therefore, the ballot—the last thing that the voter is guaranteed to see before making a choice—is paramount.[338] Second, states now have exclusive control over the content and form of the ballot, subject only to a few judicial limitations imposed upon them.[339]

Few seem to appreciate the problem that this pair of propositions creates. The very stage deemed most crucial to our democratic process, the moment that might influence voters the most, is the very moment subject to the heaviest state control and taken most completely out of the hands of the candidates. Indeed, even extremely modest choices regarding the ballot may impact voters. Decisions about ballot design, the order in which candidates appear, or the length of the ballot can impact electoral outcomes, either intentionally or unintentionally.[340] Therefore, in the case of ballot speech—of expressive content that the speaker desires to communicate to voters by means of the ballot—the interests of the candidates and the parties ought to be given much greater weight than they have been afforded thus far under the rather unhelpful *Burdick* balancing test. Even "indirect 'discouragements'" of protected speech, the Court has explained, must survive First Amendment scrutiny.[341] Surely ballot speech merits recognition as something worthy of protection.

Another tension further complicates matters here. The ballot box is supposedly designed to be a place devoid of external influence.[342] But there is also the concession that the content of the ballot itself provides a lasting influence upon the voter at the "most crucial" point in the process, the moment before the vote is cast.[343] There is a concession that the ballot itself influences voters, but that no other influences near the polling place are appropriate. This creates a kind of "donut"[344] surrounding the ballot box—campaign speech outside the polling place is open and free to influence voters; campaign speech within so many feet of a polling place is categorically prohibited; and some limited, but deeply influential, campaign-related content may exist on the ballot itself.

When viewed through this perspective, the expressive interests at stake at the ballot box are distinct in kind from the associational interests that commonly

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338. *See* Anderson v. Martin, 375 U.S 399, 402 (1964).

339. For instance, when the state impermissibly burdens candidates' access to the ballot, exceeds the scope of the Elections Clause in federal elections, or engages in unequal treatment of candidates. *See supra* text accompanying notes 284–94.

340. *See supra* notes 319–22 and accompanying text.

341. Am. Commc'ns Ass'n, C.I.O. v. Douds, 339 U.S. 382, 402 (1950) ("Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.").

342. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992) (upholding prohibitions on electioneering within so many feet of a polling place).

343. Cook v. Gralike, 531 U.S. 510, 525 (2001); Anderson v. Martin, 375 U.S. 399, 402 (1964).

344. Special thanks to Michael Morley for creating this analogy in a conversation on this topic.

govern ballot access disputes. If ballot speech merits protection as free speech under the First Amendment, as this Article has argued, then there are at least three principal solutions. First, as a strong solution, courts could begin to move toward the rejection of the *Burdick* balancing test and toward a more candidate- and party-oriented perspective of speech protected by the First Amendment. Second, as a weak solution, the *Burdick* balancing test, if courts continue to apply it in ballot speech cases, could be modified in recognition of the expressive interests in ballot speech disputes. Third, legislatures or election administrators could introduce additional flexibility in the ballot-administration process to maximize opportunities for candidates to engage in ballot speech.

A. The Strong Solution: A True First Amendment Analysis

Treating the ballot like a nonpublic forum, or limited public forum, accommodates the balance that seems most appropriate for the ballot. The limited public forum analysis recognizes that the ballot is not a "traditional" forum of expression. [345] Ballots did include expressive content long before state administration, but they were tailored toward matters about individual elections and public office. Even before state administration, ballots contained limited content. And even though the Court has glibly concluded before that ballots are not forums,[346] recognition of ballots as a limited forum would be a useful starting point for the appropriate framework governing ballot speech.

Nonpublic forums, after all, are hardly subject to strict scrutiny. [347] Content-based regulations can survive. For example, states could decide whether to list partisan affiliations or open a category of employment-related notations, for example. Regulations must only be "reasonable"—a flexible standard—and not seek to "suppress the speaker's activity due to disagreement with the speaker's view." A nonpublic forum analysis offers a flexibility of reasonableness in the regulation. But it is a different kind of reasonableness inquiry than *Burdick*—the inquiry is whether the regulation is reasonable in light of the expressive interest at stake, and not in light of the associational interest of voters. [348]Regulations might be reasonable in light of one concern, but not the other.

As a pragmatic matter, many of the examples cited earlier would change little.[349] Candidate names, for instance, would continue to be regulated by state laws that sought to approve only names the candidate is known by in the community or during the campaign. To the extent that the name on the ballot is an expression of the candidate's actual identity, some administrative check might remain in place to scrutinize whether the candidate is actually known by that name—preventing deception, for instance, remains a reasonable goal. Attempts to insert a slogan as a nickname would fail; so, too, would spurious racial epithets.

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345. *See supra* Section II.B.

346. *Id.*

347. *Cf.* John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1183 (2015).

348. *See supra* Section II.A.

349. *See supra* Part I.

But such a test would also offer candidates additional opportunities. Nervousness over court-approved name changes like "Cesar Chavez" or "Carol Moseley-Braun" would need to be resolved in the name changing process, not in the election administration context. Silly set-offs of nicknames in quotation marks—"Edward 'Ted' Kennedy" or "Willard 'Mitt' Romney"—might fail reasonableness given the ubiquity of a candidate's name. The same sort of inquiry would occur for party names. The reasonableness inquiry, then, offers the opportunity for administrators to grant more deference to candidates in expressing their identity, rather than obliging candidates and parties to fall back on rules that stifle their preferences.

For labels concerning unrecognized political parties, the reasonableness inquiry offers a greater challenge to election regulators. The party itself may not be recognized or receive the benefits of, say, automatic ballot access, but here a candidate *has* secured ballot access. That candidate wants to make use of the space on the ballot to display a party affiliation. It becomes a challenge for the state to justify preventing that candidate the opportunity to do so—not because it is discriminating on the viewpoint of the unrecognized party, but because it has no meaningful reason to stifle the candidate's expression. The apparent burden, after all, would fall not just on the party, but also on the candidate who loses the opportunity to speak to voters. The candidates would have to establish that their parties were actual political parties and not figments of their imaginations, of course—but assuming they could establish the genuine existence of such parties, they might be permitted to display those names on the ballot.[350] That said, perhaps opening partisan designations only to recognized parties is sufficiently reasonable—and, after all, party ballot access rules must meet the *Burdick* balancing test anyway.

Similar logic would extend to fusion candidacies, but it would likely lead to overturning *Timmons*. After all, once a party has secured ballot access, states could not adequately justify precluding that party from cross-endorsing a candidate who also appears on the ballot. Fusion parties work well in New York with little worries of the parade of horribles that the Court envisioned—a series of sham parties that all managed to survive state laws concerning recognition and that served to communicate messages through party names like the "No New Taxes" party and the "Stop Crime Now" party.[351] Ballot access restrictions on creating new parties pursuant to the *Burdick* balancing test would cure these concerns. But once the party secured ballot access, the expressive element of communicating to voters the relationship between the candidate and the party at the most crucial stage of the process merits more protection than *Timmons* gave it under the *Burdick* balancing test.

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350. In *Chamness v. Bowen*, rejecting the label "Independent" for unaffiliated candidates, the court recognized a risk of confusion in California because the "American Independent Party" already existed and was ballot-qualified. 722 F. 3d 1110, 1118 (9th Cir. 2013).

351. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 365 (1997).

For ballot notations or designations, states could continue to make content-based restrictions, limiting ballot speech to occupational identifications of a few words. But state justifications for selective identification of candidates are troubling. States offering the benefit of the label "incumbent" for some candidates, without a corresponding opportunity for other candidates, would fall on the unreasonable side. States that offered incumbents exclusive opportunities to communicate their occupational identities to voters, like Minnesota and Michigan in judicial elections, would need to provide other candidates with a chance to communicate with voters, as well.[352]

Finally, any attempt by the state to put a thumb on the scale to affect the election, or to prefer one candidate or party to another, would be prohibited. Courts have already recognized that the state cannot actively favor a class of candidates, such as incumbents.[353] And even state regulations with an unintentional negative impact, such as alphabetical ordering, can be problematic.[354] It is with little difficulty, then, that state laws that seek to affect or manipulate voter preference by means of ballot speech are not permitted. Selectively including labels like "incumbent" while precluding other candidates from speaking would fail this test, as impermissible viewpoint-based restrictions on speech. The content in *Anderson*, designed to help white candidates,[355] and *Cook*, designed to help term-limit supporters,[356] would also fail.

A version of the nonpublic forum reasonableness inquiry for ballot speech would be the strongest recognition and yield a few changes. Candidates and parties would have slightly more flexibility in identifying themselves. State-preferred designations like "incumbent" would fall away without a corresponding opportunity for other candidates. And attempts by the state to manipulate the electoral process by means of ballot speech would be forbidden.

B. The Weak Solution: Refining the Burdick Balancing Test

Given courts' comfort with the *Burdick* test and their swift reliance on it for virtually any legal challenge affecting the ballot, perhaps a more sophisticated understanding of *Burdick* could cure problems in ballot speech cases. As discussed earlier, *Burdick* is not optimal for ballot speech cases[357]—but it could be refined to improve how courts currently use it.

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352. This concern is distinct from an equal protection analysis—identifying a suspect class or a fundamental right might make such a claim more challenging.

353. Gould v. Grubb, 536 P.2d 1337, 1344 (Cal. 1975) (in bank) (finding that listing incumbents first on the ballot "substantially dilutes the weight of votes of those supporting non-incumbent candidates" and failed strict scrutiny under the Equal Protection Clause).

354. *Id.* at 1346.

355. *See* Anderson v. Martin, 375 U.S. 399, 403–04 (1964); *see also* Brief for the United States as Amicus Curiae, Anderson v. Martin, 375 U.S. 399 (1964) (No. 51), 1963 WL 106021, at *6–8.

356. *See* Cook v. Gralike, 531 U.S. 510, 516–17 (2001).

357. *See* discussion *supra* Parts III, IV.

Attempting to use the *Burdick* test first requires reorienting the test toward the candidate, not the voter. That is, the principal interest being asserted is really the candidate's interest in expressing herself to the voters, unencumbered by state decisions that alter that expression. It is less about the voter's interest in associating with a particular type of expression communicated by the candidate.

But even making this assertion shows how clumsy it is to apply the *Burdick* test to ballot speech cases. When a candidate or party raises a ballot speech issue, a court must examine the "character and magnitude" of the injury asserted. The "character" is the type—here, some level of expressive political speech—and the "magnitude" is the severity—here, some limitation by the state on a candidate's or party's preferred expression. In areas of self-expression, one would expect courts to be reluctant to weigh the value of the expressive speech, as noted earlier.[358] But at least in applying the *Burdick* test, going forward, courts would need to acknowledge that they are judging a kind of speech—perhaps not "pure" political speech, but something meriting some protection[359]—and proceed with their analysis on that basis, rather than using the less useful associational rubric in other *Burdick* cases.

Placed up against the "precise" interests of the state, a refined *Burdick* test moves toward a more complicated issue. For instance, consider state-compelled notations on the ballot, like the word "incumbent," placed up against another candidate's empty space beside her name. The state might claim it is seeking to provide truthful, nonmisleading information to voters, and that there is simply no need for the nonincumbents to include any such information beside their names. But courts have been unusually skeptical of such state-compelled designations of true, even nonmisleading information, such as a candidate's race or pledged support of term limits, albeit for reasons unrelated to speech.[360] And it might be that a more candidate- or party-oriented examination of the burden would yield greater skepticism about the reasonableness of the state's regulations.

Imperfect as a correction to *Burdick* might be, it would improve judicial analysis in these ballot speech cases through recognition of the expressive interests at stake. That alone might be enough to alter the results in some cases and offer greater opportunities for candidates and parties.

C. The Political Solution: Legislative and Administrative Flexibility

Convincing state legislatures to recognize ballot speech may not be the most attractive option—but it may be the simplest and briefest. Entrenched incumbents and major political parties may find little need to alter the rules to assist others.[361] And it is not a particularly high legislative priority in the

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358. *See supra* Section III.B.

359. *See supra* notes 330–38 and accompanying text.

360. Admittedly, the term-limits pledge at issue in *Cook v. Gralike* may have been misleading. Candidates could support term limits but fail to formally pledge support for purposes of the ballot label, or candidates could support term limits in a different form than the "particular" terms required in Missouri. 531 U.S. 510, 524 (2001).

361. *See supra* Section III.A.

contemporary "voting war," as battles over the Voting Rights Act, redistricting, early voting, and voter identification appear interminable.[362] But legislatures do consider cost-saving measures that affect the ballot, and perhaps reducing administrative oversight would incentivize legislatures to accommodate candidates and parties as they simultaneously consider matters like abolishing party emblems or modernizing ballot layouts.[363]

But administrative solutions are also quite possible, even within existing legal frameworks. Ambiguity in statutes has caused election law officials to draw their own conclusions—often pursuant to attorney general opinions on the subject—concerning what nicknames are appropriate or how the statutes ought to apply when a candidate seeks to use another name.[364] Factual determinations of election officials are rarely overturned.[365]

Given the descriptive aspect of how candidates and parties operate at the ballot box, a legislative or administrative solution hews closer to their interests than the state's purported regulatory interest. Legislative and administrative solutions should use the kinds of First Amendment protections identified in the "strong solution" proposed above to benchmark progress toward protecting ballot speech.

CONCLUSION

Candidates and parties communicate to voters by means of the ballot—whether election officials and courts want to acknowledge it or not. The existing framework for addressing ballot speech fails to adequately appreciate the expressive interests in candidates and parties communicating to voters by means of the ballot. But by recognizing ballot speech as a matter worthy of protection as expressive speech under the First Amendment, election officials and courts can begin to better facilitate the expressive content on the ballot and more transparently address the concerns states have in regulating that content. States may maintain reasonable regulations of ballot speech, but candidates and parties will have more opportunities to communicate by means of the ballot, unencumbered by unnecessary state laws.

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362. *See generally* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012).

363. *See, e.g.*, *supra* Section I.D.

364. *See, e.g.*, *supra* Section II.A.

365. *See, e.g.*, discussion *supra* Section I.A.