

**DECODING THE “SPHINX-LIKE SILENCE”:  
STATE RESIDENCY, PETITION CIRCULATION,  
AND THE FIRST AMENDMENT**

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*State governments are the primary regulators of elections and ballot access in the United States. State statutes determine who is eligible to be on the ballot in each particular state, as well as who may assist these individuals by gathering petition signatures. Candidates for political office, initiative proponents, and their supporters have challenged some of these restrictions as unconstitutional burdens on political speech. The U.S. Supreme Court has had great difficulty in articulating a coherent standard of review in this area of the law, which shows that the line between a state’s reasonable regulation of the election process and an unconstitutional burden on First Amendment rights is not easy to define.*

*One particular area where this issue has come into focus is state laws requiring petition circulators to be state residents or, alternatively, eligible to vote in the state. The majority of circuits have declared these restrictions unconstitutional burdens on political speech, while one circuit has found them a reasonable regulation of a state’s electoral process. This Note explores the history and context of the Supreme Court’s struggle to establish a consistent standard of review in ballot-access cases before examining the nuances of the constitutionality of both residency and voter eligibility requirements. This Note ultimately argues that the minority view is the more correct reading of Supreme Court precedent and that residency requirements are generally reasonable state regulations of elections, while voter eligibility requirements are unconstitutional violations of the First Amendment.*

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#### INTRODUCTION

In spring 2016, the Libertarian Party of New York nominated Alex Merced as its candidate for U.S. Senate.<sup>1</sup> A marketing executive and longtime libertarian activist and blogger, Merced kicked off his Senate campaign by speaking at the Libertarian Party's national convention in Orlando, Florida, where Gary Johnson accepted the party's nomination for President of the

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1. Complaint para. 17, *Merced v. Spano*, No. 16CV3054 (SJ) (SMG), 2016 WL 3906646, at \*1 (E.D.N.Y. July 14, 2016).

United States.<sup>2</sup> At the time of his speech to the convention, however, Merced and his supporters were unsure whether he would qualify to appear on New York’s ballot for the November general election.<sup>3</sup>

New York’s ballot-access laws have historically been criticized as some of the most stringent and complicated in the country.<sup>4</sup> In addition to requiring candidates in Merced’s position to collect 15,000 signatures of registered New York voters within a period of six weeks, each signature must be witnessed by an individual who is either a “duly qualified voter” in New York, a New York Notary Public, or a New York Commissioner of Deeds.<sup>5</sup> As such, although activists living outside of New York wished to help Merced appear on the ballot, they were forbidden from acting as witnesses in New York’s petitioning process.<sup>6</sup>

On June 13, a little over a week before the beginning of the petitioning period, Merced and other Libertarians filed a lawsuit challenging the constitutionality of New York’s “duly qualified voter” and state-residency requirements for petition witnesses.<sup>7</sup> Seeking a preliminary injunction, Merced alleged that these provisions in New York election law put third parties and independent organizations, such as the Libertarian Party of New York, at a severe disadvantage in accessing the ballot.<sup>8</sup> Furthermore, Merced maintained that the restrictions constituted a “severe burden” on political speech rights under the First Amendment because the requirements made it more difficult for Merced and his supporters to disseminate their political views.<sup>9</sup>

The State of New York contended that the restrictions were necessary to advance its interest in limiting petition witnesses to state residents, which would ensure that all witnesses would be answerable to New York courts.<sup>10</sup> New York further argued the restrictions “serve[] the compelling interest of

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2. *Libertarian Party National Convention, Day 2 Part 1*, C-SPAN (May 29, 2016), <https://www.c-span.org/video/?409917-1/libertarian-party-selects-gary-johnson-2016-nominee> [<https://perma.cc/AM3X-CQ4P>] (statement of Alex Merced at timestamp 2:44:50).

3. Complaint, *supra* note 1, paras. 17–18, 35.

4. See, e.g., Katherine E. Schuelke, Note, *A Call for Reform of New York State’s Ballot Access Laws*, 64 N.Y.U. L. REV. 182, 182 (1989); DeNora Getachew & Andrea Senteno, *Understanding the Labyrinth: New York’s Ballot Access Laws*, GOTHAM GAZETTE (June 29, 2009), <http://www.gothamgazette.com/open-government/252-understanding-the-labyrinth-new-yorks-ballot-access-laws> [<https://perma.cc/4TVC-4TAE>]; Michael Specter, *Once Again, New York’s Arcane Election Laws Shape Race*, N.Y. TIMES (Feb. 28, 1992), <http://www.nytimes.com/1992/02/28/nyregion/once-again-new-york-s-arcane-election-laws-shape-race.html> [<https://perma.cc/H8F7-2AD8>]. But see JERRY GOLDFEDER, GOLDFEDER’S MODERN ELECTION LAW: BALLOT ACCESS IN NEW YORK 1 (2012) (noting that New York’s ballot-access laws “have become more liberalized in the last few years, and are fairly straightforward”).

5. N.Y. ELEC. LAW § 6-140 (McKinney 2017).

6. Complaint, *supra* note 1, paras. 17–18.

7. *Id.* paras. 14–25.

8. *Id.* paras. 25–26, 31–34.

9. *Id.* para. 34.

10. *Merced v. Spano*, No. 16CV3054 (SJ) (SMG), 2016 WL 3906646, at \*2 (E.D.N.Y. July 14, 2016).

preventing those who do not have the right to vote from serving as witnesses” in the election process.<sup>11</sup>

The court, noting that the Libertarian Party had filed petitions in accordance with the law without complaint every two years since 1974, denied Merced’s request for a preliminary injunction in July 2016.<sup>12</sup> The court simultaneously held, however, that Merced was likely to succeed on the merits of his claim, and the suit is currently moving forward.<sup>13</sup>

Like all actions challenging ballot-access restrictions in the United States, Merced’s suit asks the court to weigh two fundamental principles of federal republican government—states’ regulation of their own electoral systems and individual constitutional rights to political speech and assembly. Since the turn of the millennium, similar suits have challenged residency or voter eligibility requirements for petition circulators across the United States.<sup>14</sup>

The issue of whether residency and voter eligibility requirements for petition circulators violate the First Amendment currently divides circuit courts.<sup>15</sup> This Note offers a way forward and weighs the constitutional arguments on both sides and the profound policy implications of this question.

Part I of this Note examines the background, legal context, and history of residency and voter eligibility requirements for petition circulators. Next, Part II discusses the split among circuit courts on whether residency and voter eligibility requirements violate the First Amendment. Part III then argues that the majority view fundamentally misreads Supreme Court precedents and creates the potential for even reasonable restrictions to be held unconstitutional. This Note advocates for a more flexible standard in evaluating restrictions on petition circulation. While each individual state statute presents a unique set of circumstances that must be carefully considered, state-residency requirements for petition circulators should generally be upheld as constitutional, while voter registration and eligibility requirements should not.

#### I. BALLOT-ACCESS, PETITION-CIRCULATION, AND RESIDENCY REQUIREMENTS

Before examining the constitutionality of residency and voter eligibility requirements, it is necessary to place the question in the proper context. Part I.A provides a brief overview of the general framework of election law in the United States. This includes variations in procedures for securing a place on the ballot for both ballot initiatives and candidates for political office. Part I.B discusses the U.S. Supreme Court’s complex and often confusing standards for analyzing ballot-access cases under the First Amendment,

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11. *Id.*

12. *Id.*

13. *Id.*

14. *See* Citizens in Charge, Inc. v. Husted, 810 F.3d 437, 443–44 (6th Cir. 2016) (discussing the holdings of numerous cases challenging similar restrictions).

15. *See id.* at 442–43 (noting the split between the Eighth and Tenth Circuits on the constitutionality of residency requirements).

including relevant precedents that frame the current circuit split over residency and voter eligibility requirements. Part I.C describes the challenges legislatures and courts face as they attempt to administer elections in the twenty-first century.

A. *Election Law in America: The States’ Playground*

The U.S. Constitution grants state legislatures direct control in the first instance over “[t]he Times, Places and Manner of holding Elections.”<sup>16</sup> As such, election law in the United States is an assortment of rules and standards that vary across state lines.<sup>17</sup> State legislatures not only regulate their own state elections but also federal elections within the state, subject to certain constitutional and statutory constraints.<sup>18</sup>

The framers of the Constitution believed that state oversight of elections would be “both more convenient and more satisfactory” than direct federal control.<sup>19</sup> At the time of ratification, opponents of an overbearing federal government feared that direct federal control over elections could lead to undue influence and favoritism for one group of people nationwide, such as “the wealthy and the well-born.”<sup>20</sup> In granting states authority over their own electoral affairs in the Constitution, the framers reasoned that “diversity in . . . the people of the different parts of the Union, [would] occasion a material diversity of disposition in their representatives towards the different ranks and conditions in society.”<sup>21</sup>

The framers recognized the potential for hostile foreign powers to meddle in the young republic’s electoral system.<sup>22</sup> While the framers did not explicitly tie this concern to the decision to have state governments oversee federal elections, concerns about foreign influence permeated the debate on the Constitution.<sup>23</sup>

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16. U.S. CONST. art. I, § IV.

17. See Eli Watkins, *How to Register to Vote in Every US State and Territory*, CNN (Oct. 12, 2016, 11:19 AM), <http://www.cnn.com/2016/08/14/politics/how-to-register-to-vote-in-every-us-state-and-territory/index.html> [<https://perma.cc/QW5W-N9PU>].

18. See U.S. CONST. art. I, § IV (“[T]he Congress may at any time by Law make or alter such [election] Regulations, except as to the Places of chusing Senators.”); see also *infra* Part I.B (describing the Court’s ballot-access jurisprudence).

19. THE FEDERALIST NO. 59, at 150 (Alexander Hamilton) (Michael A. Genovese ed., 2009).

20. THE FEDERALIST NO. 60, at 155 (Alexander Hamilton) (Michael A. Genovese ed., 2009); see also J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 530–31 (1966) (“[James] Madison anticipated the division of the country into conflicting and competing economic and professional interests, and maintained that the chief cause of conflict would be between those with and those without property.”).

21. THE FEDERALIST NO. 60, at 154 (Alexander Hamilton) (Michael A. Genovese ed., 2009).

22. THE FEDERALIST NO. 68, at 190 (Alexander Hamilton) (Michael A. Genovese ed., 2009) (warning of the desire of “deadly adversaries of republican government . . . [and] foreign powers to gain an improper ascendant in our councils”).

23. See, e.g., THE FEDERALIST NOS. 2, 3 (John Jay), NO. 68 (Alexander Hamilton); see also JAMES MADISON, *Notes of Monday, August 13, in THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 384, 384 (Gaillard Hunt & James Brown Scott eds., 1920) (noting Massachusetts delegate

Ultimately, in giving state governments power over federal elections, the framers fundamentally believed that state legislatures were the closest government body to the people. Thus, state legislatures would likely be the easiest to hold accountable should the people feel that the legislature was failing to uphold their interests or attempting to subjugate the people's voice through unfair election laws.<sup>24</sup>

A century after the Constitution's ratification, state-level populist and progressive reformers made such a push to hold state governments accountable. These activists proposed a way for the people to bypass legislatures that had become beholden to special interest groups and refused to pass laws that were favored by a majority of state residents.<sup>25</sup> As a result, many states enacted ballot-initiative laws that allowed voters to directly place legislative propositions on a referendum ballot for approval by popular vote.<sup>26</sup> Drawing influence from Switzerland's constitution, Athenian democracy, and the New England "town meeting," the initiative process aimed to give legislative and political power directly to the electorate, which served as a bulwark against corrosive corruption and intransigence in state legislatures.<sup>27</sup>

The initiative process represented a monumental shift that continues to play a major role in modern politics. Fourteen states allow voters to directly legislate via the ballot initiative, sixteen allow the enactment of constitutional amendments via the initiative, and twenty-four states have a process known as a "popular referendum" whereby voters may affirm or reject a law passed by the legislature.<sup>28</sup>

For an initiative question to be approved by the state's voters, its proponents must first secure it a place on the ballot. States ordinarily require that proponents circulate petitions, a process of collecting a statutorily

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Elbridge Gerry's fear, shared by many influential delegates, that "[f]oreign powers will intermeddle in our affairs, and spare no expence to influence them" and that "[p]ersons having foreign attachments will be sent among us & insinuated into our councils, in order to be made i[n]struments for their purposes"). For a more thorough analysis of the framers' fears of foreign influence in the years preceding and immediately following the Constitution's ratification, see Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 BERKELEY J. INT'L L. 162, 168–70 (2009).

24. See THE FEDERALIST No. 60 (Alexander Hamilton); see also THE FEDERALIST No. 46, at 296 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he prepossessions of the people, on whom both [federal and state governments] will depend, will be more on the side of the State governments, than of the federal government.").

25. See JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAWMAKING* 1–3 (2d ed. 2014).

26. See *id.* at 1.

27. See *id.* at 4.

28. For a chart of which states allow which processes, see *Initiative and Referendum States*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> [https://perma.cc/9WUB-BPFZ] (last visited Mar. 15, 2018). The described methods of initiative and referendum are not mutually exclusive, and several states allow for multiple methods. *Id.* Missouri, for example, allows constitutional amendments and statutory law to be enacted via the initiative, as well as popular referendum of statutes approved by the legislature. See MO. REV. STAT. §§ 116.030–.040 (2014).

mandated number of registered voters’ signatures.<sup>29</sup> Although not used exclusively, states often require petitioning as a prerequisite for ballot access for both ballot initiatives and candidates for political office.<sup>30</sup>

The number of required signatures for any given petition can vary greatly depending on the state, type of petition, and, where applicable, the office sought by a particular candidate.<sup>31</sup> Requirements can also differ depending on whether a candidate seeks the nomination of a political party or plans to run as an independent.<sup>32</sup> These signature requirements theoretically ensure that the candidate or initiative has “some preliminary showing of a significant modicum of support” among the state’s voters before being placed on the ballot.<sup>33</sup> States contend that without these requirements, frivolous candidates and measures with no real popular appeal could clutter the ballot and lead to voter confusion and difficulty in administering the democratic process.<sup>34</sup>

States place many restrictions on the petitioning process, including limits on who is eligible and qualified to physically collect the required signatures, a position commonly known as a “petition circulator.”<sup>35</sup> Restrictions on circulator eligibility can vary in scope and language.<sup>36</sup>

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29. See *Laws Governing Petition Circulators*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/laws-governing-petition-circulators.aspx> [<https://perma.cc/7LQB-9YHQ>] (last visited Mar. 15, 2018).

30. See MICHAEL DIMINO ET AL., *VOTING RIGHTS AND ELECTION LAW* 678 (2d ed. 2015). New Hampshire, for example, gives party candidates for state offices the choice of collecting individual forms to be filled out by registered voters, or paying a modest fee, ranging from \$2 to \$100, depending on the office sought. N.H. REV. STAT. ANN. § 655:19-c (2016).

31. See COSTAS PANAGOPOULOS & AARON C. WEINSCHENK, *A CITIZEN’S GUIDE TO U.S. ELECTIONS: EMPOWERING DEMOCRACY IN AMERICA* 97 (2016).

32. Compare, e.g., N.Y. ELEC. LAW § 6-136(2)(g) (McKinney 2017) (requiring candidates seeking a party nomination for a congressional seat to collect 1250 signatures), with *id.* § 6-142(2)(e) (requiring independent candidates running for the same elected office to collect 3500 signatures).

33. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); see also JAMES A. GARDNER, *WHAT ARE CAMPAIGNS FOR?: THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS* 50 (2009). But see JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VERSUS THE AMERICAN PEOPLE* 110 (2003) (arguing that the petition requirement does not promote the state’s interest in requiring a “modicum of support” because “[i]n every state it is clear that the voter’s signature does *not* express political support for the candidate”).

34. See *Munro v. Socialist Workers Party*, 479 U.S. 189, 194–95 (1986); *Jenness*, 403 U.S. at 442.

35. See *Petition Circulator*, BALLOTPEDIA, [https://ballotpedia.org/Petition\\_circulator](https://ballotpedia.org/Petition_circulator) [<https://perma.cc/99KR-YLK5>] (last visited Mar. 15, 2018). States may also refer to circulators as “witnesses” when the law requires them to submit an affidavit verifying their collected signatures. See, e.g., *Running for Office*, N.Y. ST. BOARD ELECTIONS, <https://www.elections.ny.gov/RunningOffice.html> [<https://perma.cc/EB38-3XRY>] (last visited Mar. 15, 2018).

36. The restrictions this Note analyzes frequently occur alongside other limitations on the petitioning process. For example, scholarship has focused on state restrictions on payments to petition circulators. See, e.g., Jessica A. Levinson, *Taking the Initiative: How to Save Direct Democracy*, 18 LEWIS & CLARK L. REV. 1019, 1022, 1061 (2014) (arguing that states should have the constitutional power to prohibit payments to circulators); Jennifer S. Senior, Comment, *Expanding the Court’s First Amendment Accessibility Framework for Analyzing Ballot Initiative Circulator Regulations*, 2009 U. CHI. LEGAL F. 529, 536–37 (discussing the effects of payment restrictions on different types of interest groups).

Some states have imposed requirements that circulators be “residents” of the state.<sup>37</sup> Other states mandate that circulators be eligible voters or “qualified electors.”<sup>38</sup> This ordinarily means that circulators must be U.S. citizens, legal residents of the state,<sup>39</sup> and must not have some other restriction preventing them from exercising their right to vote, such as a felony conviction in certain states.<sup>40</sup> A voter eligibility requirement usually allows a qualified person to circulate petitions even if they are not registered to vote.<sup>41</sup> In states that do not have requirements outside of residency, age, and U.S. citizenship, however, a voter eligibility requirement can effectively function as a residency requirement.<sup>42</sup>

States have put forward various justifications for these and other similar ballot-access restrictions. The Supreme Court has recognized asserted state interests in protecting election integrity,<sup>43</sup> preventing fraud in the election process,<sup>44</sup> and ensuring that circulators are answerable to the subpoena power of the state’s courts.<sup>45</sup> The Court has also been sympathetic to a state’s interest in protecting political stability.<sup>46</sup> Other justifications include ensuring that candidates and ballot-initiative questions have sufficient grassroots support in the community before being placed on the ballot to avoid a cluttered and confusing ballot that prevents voters from making informed choices.<sup>47</sup> Courts have not always found these interests justified,

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37. *See, e.g.*, ALASKA STAT. § 15.45.105 (2016) (requiring an initiative-petition circulator to be a citizen of the United States, at least eighteen years of age, and “a resident of the state”); IDAHO CODE ANN. § 34-1807 (West 2017) (requiring initiative-petition circulators to be “resident[s] of the state of Idaho and at least eighteen (18) years of age”). Although the Ninth Circuit held Arizona’s residency requirement for candidate-nominating petitions unconstitutional, the application of that holding to these Alaska and Idaho statutes is not yet clear. *See Nader v. Brewer*, 531 F.3d 1028, 1037 (9th Cir. 2008).

38. *See, e.g.*, N.D. CENT. CODE ANN. § 16.1-01-09 (West 2017) (requiring a circulator to certify her status as a “qualified elector”).

39. Not all voter-eligibility requirements require in-state residency. Kansas only requires that candidate-petition circulators satisfy the constitutional requirements for voter eligibility in the United States and not have been convicted of a felony. KAN. STAT. ANN. § 25-3608 (2017).

40. *Felon Voting Rights*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/J8E9-A4T3>] (last visited Mar. 15, 2018).

41. *See, e.g.*, N.D. SEC’Y OF STATE, 2017–2019 INITIATING AND REFERRING LAW IN NORTH DAKOTA 11 (2017), <https://vip.sos.nd.gov/pdfs/portals/initiating.pdf> [<https://perma.cc/F48Q-53SK>]. *But see* GOLDFEDER, *supra* note 4, at 21, 38 (noting that the language of New York’s eligibility requirement, which requires a petition witness to be a “duly enrolled voter,” means that the witness must in fact be registered to vote in New York).

42. *See, e.g.*, N.D. CENT. CODE ANN. § 16.1-01-04 (2017) (stating that to qualify as an elector, an individual must be a U.S. citizen, eighteen years of age or older, and a resident of North Dakota who has resided in the precinct for at least thirty days prior to an election); *see also* Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 615–16 (8th Cir. 2001).

43. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997).

44. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

45. *Buckley v. Am. Constitutional Law Found., Inc.* 525 U.S. 182, 196 (1999).

46. *See, e.g., Timmons*, 520 U.S. at 366–67.

47. *See id.* at 364; *Munro v. Socialist Workers Party*, 479 U.S. 189, 194–96 (1986).



or even legitimate, in instances when the restrictions unduly impose on individual constitutional rights.<sup>48</sup>

*B. Constitutional Restraints on State Election Law:  
Dissecting the Chaos of the Court’s  
Ballot-Access Standard of Review*

While a state’s ability to regulate elections and ballot access is subject to constitutional constraints, courts, practitioners, and scholars have struggled to find consistency in the Supreme Court’s jurisprudence. Part I.B.1 discusses the evolution of the Court’s framework for ballot-access cases and their complex and often conflicting standards of review. Part I.B.2 then outlines *Buckley v. American Constitutional Law Foundation, Inc.*,<sup>49</sup> the landmark decision through which circuit courts have evaluated the constitutionality of residency and voter eligibility requirements.

1. The Supreme Court’s Ballot-Access Framework:  
A Sisyphean Effort to Develop a Consistent Standard of Review

While the cases in the Supreme Court’s ballot-access framework are marked by inconsistent and contradictory standards of review, it is essential to have a firm grasp on the evolution of these precedents before applying them as they are crucial to determining the constitutionality of residency and voter eligibility requirements for petition circulators.<sup>50</sup>

Evaluating the constitutionality of a state ballot-access restriction requires weighing the state’s asserted interest in enacting the restriction against the First Amendment rights to political speech and assembly.<sup>51</sup> Within the confines of these rights, states play an important role in regulating elections. As the Court noted in *Storer v. Brown*,<sup>52</sup> “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”<sup>53</sup>

In weighing these competing state and individual interests, however, the Court has been astonishingly inconsistent in what it considers the appropriate

48. See *infra* notes 177–78, 182–84, 203–12 and accompanying text (analyzing circuit court discussions of whether a state’s interest is compelling in the context of ballot-access restrictions).

49. 525 U.S. 182 (1999).

50. For a more detailed and nuanced examination of the Court’s ballot-access jurisprudence, see Daniel S. Young, Comment, *Buckley v. American Constitutional Law Foundation, Inc.: The Struggle to Establish a Consistent Standard of Review in Ballot Access Cases Continues*, 77 DENV. L. REV. 197 (1999); see also Brian L. Porto, *The Constitution and the Ballot Box: Supreme Court Jurisprudence and Ballot Access for Independent Candidates*, 7 BYU J. PUB. L. 281, 281–308 (1992).

51. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble.”). The First Amendment applies to the states via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

52. 415 U.S. 724 (1974).

53. *Id.* at 730; see also *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

standard of review.<sup>54</sup> Legal scholars and political scientists have written at length about how this inconsistency has led to unpredictability in the Court's jurisprudence over time.<sup>55</sup>

In its earliest ballot-access cases, the Court applied a form of tiered scrutiny derived from equal protection case law.<sup>56</sup> In these cases, the Court often weighed ballot-access restrictions as violations of both First Amendment protections and equal protection rights.<sup>57</sup> The Court's holdings, even in these early decisions, were unpredictable. They waffled between the applicable tiers of scrutiny even when dealing with strikingly similar ballot-access restrictions.<sup>58</sup> Some commentators have suggested that the inconsistent application of three-tiered scrutiny in these early cases might be due to the Justices' desire to reach the right result in their holdings.<sup>59</sup> This

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54. See *infra* notes 58, 67.

55. See, e.g., Terry Smith, *Election Law: Election Laws and First Amendment Freedoms—Confusion and Clarification by the Supreme Court*, 1988 ANN. SURV. AM. L. 597, 610 (describing the Court's standard of review in terms of "confusion and unpredictability"); Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 187 (1991) (labeling the Court's ballot-access jurisprudence as "erratic"). But see Porto, *supra* note 50, at 282, 284 (recognizing that, while the Court has "left in doubt the appropriate standard of review," the "ballot access decisions have been substantially more consistent . . . than political scientists and legal commentators have recognized").

56. The traditional three tiers of scrutiny are "strict scrutiny," where a state must demonstrate that the contested regulation is narrowly tailored to a compelling state interest, "intermediate scrutiny," where the state must demonstrate that the provision is substantially related to an important state interest, and "rational basis," meaning the regulation must be rationally related to a legitimate government interest. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 565–68 (5th ed. 2015).

57. The Equal Protection Clause provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In these cases, the Court would usually hold a restriction to be both a violation of First Amendment freedoms and the Equal Protection Clause but occasionally entertained challenges based on equal protection alone, without mentioning the First Amendment implications. Compare *Jenness v. Fortson*, 403 U.S. 431, 439–440 (1971) (declining to find a violation of either the First Amendment or equal protection), and *Williams v. Rhodes*, 393 U.S. 23, 30–34 (1968) (discussing the challenged restriction in terms of both First Amendment rights and equal protection), with *Bullock v. Carter*, 405 U.S. 134, 149 (1972) (finding an equal protection violation without reference to the First Amendment).

58. See, e.g., *Storer v. Brown*, 415 U.S. 724, 736–37 (1974) (upholding a California statute requiring independent candidates to collect signatures of at least 5 percent of the voters in the previous general election in order to appear on the ballot using the "compelling state interest" language of strict scrutiny review, but making no reference to whether the contested restrictions were narrowly tailored to support that interest); *Bullock*, 405 U.S. at 145–47 (using the language of the rational basis test but seeming to apply a form of intermediate scrutiny to a Texas law requiring candidates to pay a large filing fee); *Jenness*, 403 U.S. at 438–40 (applying rational basis review to a Georgia regulation requiring independent candidates to collect signatures of a minimum of 5 percent of registered voters in order to appear on the ballot); *Williams*, 393 U.S. at 25, 31 (applying strict scrutiny to an Ohio statute requiring third parties "to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election").

59. See Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 169 (2008) ("Perhaps the Court is not seeking to achieve consistency . . . . Perhaps the Justices believe that election law cases simply fall on a continuum that, for whatever reason, forecloses consistency between decisions."); Young, *supra* note 50, at 212

results-oriented approach, however, ultimately came at the expense of a predictable and consistent framework through which to weigh the constitutional implications of ballot-access restrictions.<sup>60</sup>

The Court seemingly tried to remedy this inconsistency in the early 1980s. The Justices began to depart from a rigid application of three-tiered scrutiny and instead applied a more ad hoc “balancing” or “sliding scale” test, best exemplified by *Anderson v. Celebrezze*.<sup>61</sup> This approach arose from the Court’s assertion, beginning in the mid-1970s, that courts could not rigidly apply a one-size-fits-all “litmus-paper” test to decide whether a ballot-access restriction was constitutionally permissible.<sup>62</sup> Instead, the Court needed a more tailored balancing of the conflicting state and individual interests.<sup>63</sup>

The *Anderson* balancing test involves “an analytical process that parallels [the Court’s] work in ordinary litigation” by considering “the character and magnitude” of the burden on the plaintiff’s First and Fourteenth Amendment rights.<sup>64</sup> The Court then weighs this burden against “the precise interests put forward by the State as justifications for the burden imposed by its rule.”<sup>65</sup> A tribunal “must not only determine the legitimacy and strength of each . . . interest[,], it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>66</sup>

From the late 1980s to the present, the Court has appeared to synthesize the *Anderson* balancing approach with the tiered-scrutiny approach but has lacked consistency in its application.<sup>67</sup> In cases where the Court finds that a restriction imposes a severe burden on core political speech, for instance, it will generally apply either the traditional strict scrutiny test<sup>68</sup> or a standard it refers to as “exacting” scrutiny.<sup>69</sup>

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(“In [these] cases, the Court achieved the correct result, yet it did so at the expense of a consistent approach.”).

60. See Young, *supra* note 50, at 212.

61. 460 U.S. 780 (1983).

62. *Storer*, 415 U.S. at 730.

63. See Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 283, 295 (David K. Ryden ed., 2d ed. 2002) (“[*Anderson*] calls for judges to consider all of the factors that bear on a particular problem, giving each due weight under the particular circumstances.”); see also Brian Boyd, Comment, *Stepping over What Towers to the Sky: The Role of Animus Review in Election Law*, 47 U. TOL. L. REV. 495, 504–05 (2016) (discussing the question of the “relative weight of burdens and interests” inherent in *Anderson*).

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

65. *Id.*

66. *Id.*

67. Compare, e.g., *Norman v. Reed*, 502 U.S. 279, 288–89 (1992) (relying heavily on the traditional strict scrutiny language in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), while only briefly mentioning the balancing precedents from *Anderson*), with *Burdick v. Takushi*, 504 U.S. 428, 434, 438 (1992) (relying almost exclusively on the *Anderson* balancing/sliding scale precedents while noting that regulations placing “severe” restrictions on First Amendment rights would need to be “narrowly drawn to advance a state interest of compelling importance” (quoting *Norman*, 502 U.S. at 289)).

68. *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002); see also DIMINO ET AL., *supra* note 30, at 533 (“‘Severe’ restrictions are subjected to strict scrutiny.”).

69. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995); *Meyer v. Grant*, 486 U.S. 414, 420 (1988).

Exacting scrutiny is another ambiguous and confusing term with an imprecise meaning that varies with the circumstances in which it is applied.<sup>70</sup> One view of exacting scrutiny understands it to require a state to demonstrate that the challenged law involves a substantial relationship to an important government interest—arguably a mere synonym for intermediate scrutiny.<sup>71</sup> The Court itself has previously conflated intermediate and exacting scrutiny, most notably in campaign-finance jurisprudence.<sup>72</sup>

In other cases, the Court has defined exacting scrutiny using language more in line with a traditional strict scrutiny test.<sup>73</sup> This has led some courts, and even some Supreme Court Justices, to use the terms “strict” and “exacting” interchangeably.<sup>74</sup>

Professor R. George Wright has attempted to make sense of the apparent disparate uses of exacting scrutiny.<sup>75</sup> He proposes that the Court intentionally uses the phrase as a broader term of art, which allows the Justices more flexibility in balancing state and individual interests.<sup>76</sup> Through this framework, the Justices can avoid tipping the balance to favor one outcome over another, as frequently alleged in cases involving a rigid tiered-scrutiny framework.<sup>77</sup>

Regardless of whether the Court uses “exacting” or “strict” scrutiny terminology, if a state’s restriction creates a “severe” burden on core political

70. See R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKCL. REV. 207, 210 (2016) (“[B]asic confusions and ambiguities regarding exacting scrutiny have already developed.”).

71. See, e.g., *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 137 (2d Cir. 2014) (applying exacting scrutiny to find that a restriction was “substantially related to [a] recognized governmental interest”); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 549 (4th Cir. 2012) (“[A]n intermediate level of scrutiny known as ‘exacting scrutiny’ is the appropriate standard.”).

72. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010); *Buckley v. Valeo*, 424 U.S. 1, 64, 94 (1976) (per curiam).

73. See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) (stating that a regulation will only survive exacting scrutiny if it “promotes a compelling interest and is the least restrictive means to further the articulated interest”); *McIntyre*, 514 U.S. at 347 (“[W]e apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”).

74. See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 215 (1999) (O’Connor, J., concurring in part and dissenting in part) (describing an opinion applying “exacting” scrutiny as applying “strict” scrutiny (citing *Meyer v. Grant*, 486 U.S. 414, 422 (1988))); see also *Nader v. Blackwell*, 545 F.3d 459, 475 (6th Cir. 2008) (using an opinion applying “strict scrutiny” as an example of “exacting scrutiny” (citing *Am. Constitutional Law Found.*, 525 U.S. at 210–11 (Thomas, J., concurring))); *Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997) (referencing “[t]he strict or exacting scrutiny standard”).

75. See generally Wright, *supra* note 70.

76. See *id.* at 214 (“Exacting scrutiny offers the flexibility, in light of the stakes and circumstances, of a broad and genuinely multi-dimensional sliding scale test . . . whose extremes can extend . . . beyond the limits set by both strict scrutiny on one end and typical forms of minimum scrutiny on the other.”).

77. See *id.* at 214 n.45; see also Randy Elf, *The Constitutionality of State Law Triggering Burdens on Political Speech and the Current Circuit Splits*, 29 REGENT U. L. REV. 35, 79 (2016) (noting that “strict scrutiny buttons down the holding more tightly” than exacting scrutiny); Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 419–20 (2012) (“[U]nlike [strict scrutiny and rational basis review], ‘exacting scrutiny’ does not put a thumb on either side of the constitutional scale.”).

speech, the hurdle the state must overcome is “well-nigh insurmountable” because protection of First Amendment rights in this instance is “at its zenith.”<sup>78</sup> Conversely, in cases involving lesser burdens on speech rights, the Court has acknowledged that a less stringent review is merited, which means that the state’s regulatory interest will usually suffice to find the restriction permissible.<sup>79</sup>

The Court used the “exacting” scrutiny language in a foundational case involving petition circulation, the unanimous decision *Meyer v. Grant*.<sup>80</sup> *Grant* was significant in holding that petition circulation constitutes “core political speech” because it comprises “interactive communication concerning political change.”<sup>81</sup> The challenged Colorado law prohibited all forms of payment to ballot-initiative petition circulators.<sup>82</sup> The Court found that the law had the effect of “reducing the total quantum of speech on a public issue” by limiting the number of voices who could convey a political message, and thus limiting the size of the audience those voices could reach with that message.<sup>83</sup> Additionally, the law made it less likely that the initiative proponents could obtain the number of signatures necessary to place their issue on the ballot, thus “limiting their ability to make the matter the focus of statewide discussion.”<sup>84</sup> Because the inability to pay circulators made circulation much more challenging, the Court found that the restriction severely burdened the plaintiffs’ First Amendment rights, which merited “exacting” scrutiny.<sup>85</sup>

The Court did not rely on language from any traditional form of tiered scrutiny in its application of the “exacting” scrutiny standard. Rather, the Court stated that it was not convinced by Colorado’s argument that the restriction was “justified by its interest” in ensuring ballot proposals had “sufficient grass roots support” or by the argument that the law was necessary to ensure the integrity of the local balloting process.<sup>86</sup> Similarly, the Court found that contrary to Colorado’s assertions, there was no evidence that paying petition circulators induced those circulators to commit fraud and that Colorado already had less restrictive ways to address each of these interests.<sup>87</sup>

The Court did not explicitly state how lower courts could replicate this application of “exacting” scrutiny. Rather, the Court asserted that because Colorado had failed to justify the burden on the plaintiffs’ rights, the payment prohibition was a clear violation of the First and Fourteenth Amendments.<sup>88</sup>

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78. *Grant*, 486 U.S. at 425 (quoting *Grant v. Meyer*, 828 F.2d 1446, 1456–57 (10th Cir. 1987), *aff’d*, 486 U.S. 414).

79. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

80. 486 U.S. 414 (1988).

81. *Id.* at 422.

82. *See id.* at 417.

83. *Id.* at 422–23.

84. *Id.*

85. *See id.* at 420, 423–25.

86. *Id.* at 425–26.

87. *Id.* at 426–27.

88. *Id.* at 428.

While the reasoning of *Grant* shrouds its subject in ambiguity, it provides an important foundation for later decisions. While the Court's later attempt to build upon *Grant* obscured the ballot-access standard of review even further, that subsequent case is more important in analyzing the constitutionality of residency and voter eligibility requirements for petition circulators.

2. *Buckley v. American Constitutional Law Foundation, Inc.*

A decade later, the Court returned to the reasoning of the *Grant* decision in *Buckley v. American Constitutional Law Foundation, Inc.* The Court struck down three provisions of a Colorado law restricting the petitioning process for ballot initiatives.<sup>89</sup> That law included a requirement that circulators be registered voters in Colorado.<sup>90</sup> The Court maintained that it was applying the *Grant* framework consistently with earlier jurisprudence.<sup>91</sup> The majority opinion, however, failed to state the standard of review it was applying, although it used language from precedents of cases that used the tiered-scrutiny, balancing, and the combined approaches.<sup>92</sup> The *American Constitutional Law Foundation* Court further complicated this area of the law by explicitly stating that the registration requirement involved a "severe burden on core political speech" but declining to formally define the resulting standard of review.<sup>93</sup>

The Justices who did not join the majority opinion acknowledged this complication.<sup>94</sup> Justice Thomas, who concurred only in the judgment, believed the majority deviated from the previous ballot-access framework as settled in *Grant* and that the Court should have been clear in applying "strict

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89. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186–87 (1999). The Court's opinion, authored by Justice Ginsburg and joined by Justices Kennedy, Scalia, Souter, and Stevens, bridged the Court's typical ideological divisions. *See id.* at 185. Justice Thomas concurred only in the judgment, while Justice O'Connor, joined by Justice Breyer, concurred in the judgment in part and dissented in part. *Id.* Chief Justice Rehnquist issued the lone dissent. *Id.*

90. *Id.* at 197.

91. *See id.* at 186–87.

92. *See id.* at 187, 192 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Storer v. Brown*, 415 U.S. 724 (1974)).

93. *See* DANIEL P. TOKAJI, *ELECTION LAW IN A NUTSHELL* 226 (2013) ("Without specifying the level of scrutiny, the [*American Constitutional Law Foundation*] Court concluded that the registration requirement was not justified . . ."); *see also* Robin E. Perkins, Comment, *A State Guide to Regulating Ballot Initiatives: Reevaluating Constitutional Analysis Eight Years After Buckley v. American Constitutional Law Foundation*, 2007 MICH. ST. L. REV. 723, 740 (noting the "confusion surrounding the Supreme Court's analysis in *Buckley*"); Young, *supra* note 50, at 198 ("[T]he Court's holding . . . further adds to the confusion over the application of the proper standard of review in ballot access cases."). *But see* Michael Carlin, Note, *Buckley v. American Constitutional Law Foundation, Inc.: Emblem of the Struggle Between Citizens' First Amendment Rights and States' Regulatory Interests in Election Issues*, 78 N.C. L. REV. 477, 485 n.51 (2000) (positing that while "the Court did not explicitly state which level of scrutiny it applied[,] . . . the Court clearly purported to apply strict scrutiny, a test that required Colorado's statutes to be 'narrowly tailored to serve a compelling state interest'" (quoting *Am. Constitutional Law Found.*, 525 U.S. at 192 n.12)).

94. *Am. Constitutional Law Found.*, 525 U.S. at 206 (Thomas, J., concurring).

scrutiny.”<sup>95</sup> Justice Thomas noted that the Court’s opinion seemed to agree that the restriction severely limited speech, but he argued that the Court erred in not explicitly requiring Colorado to demonstrate that its registration requirement was narrowly tailored to a compelling state interest.<sup>96</sup> The majority responded to Justice Thomas in a colloquy footnote that the holding was not inconsistent with earlier precedent and stated that it was “entirely in keeping” with what Justice Thomas called the “now-settled approach”—that restrictions severely burdening speech rights “be narrowly tailored to serve a compelling state interest.”<sup>97</sup>

Justice Sandra Day O’Connor, joined by Justice Breyer, also disagreed with the Court’s application of precedent concerning the standard of review.<sup>98</sup> Justice O’Connor reasoned that the plaintiffs had not actually demonstrated a severe burden on their political speech rights and that the registration requirement was merely a “neutral qualification” that did not “directly prohibit otherwise qualified initiative petition circulators from circulating petitions.”<sup>99</sup> Distinguishing this from the ban on payment to petition circulators struck down in *Grant*, she noted that, in that instance, “the statute directly silenced voices that were necessary, and ‘able and willing’ to convey a political message.”<sup>100</sup> Justice O’Connor concluded that the Court’s precedents recommended applying “a less exacting standard of review” to this requirement, one closer to the traditional rational basis test.<sup>101</sup>

While the majority did not clearly state its standard of review regarding the registration requirement, the Court applied language from a number of earlier cases in reaching its decision.<sup>102</sup> It reasoned that Colorado’s registration requirement imposed a severe burden on political speech because it distinguished between registered voters and those “merely voter eligible.”<sup>103</sup> The restriction would “‘limi[t] the number of voices who will convey [the initiative proponents’] message’ and, consequently, cut down ‘the size of the audience [proponents] can reach.’”<sup>104</sup>

The Court held that the requirement “impose[d] a burden on political expression that the State . . . failed to justify.”<sup>105</sup> The state argued that the requirement did not severely limit speech because it was “easy to register to vote,” but the Court was not persuaded because some individuals in the state

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95. *Id.*

96. *Id.*

97. *Id.* at 192 n.12 (majority opinion).

98. *Id.* at 217–18 (O’Connor, J., concurring in part and dissenting in part).

99. *Id.* at 218.

100. *Id.* at 218–19 (quoting *Meyer v. Grant*, 486 U.S. 414, 423 & n.6 (1988)).

101. *Id.* at 215, 220 (stating that precedent “requires that [the provision] advance a legitimate state interest to be a reasonable regulation of the electoral process”).

102. *See id.* at 186–87 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Grant*, 486 U.S. 414; *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Storer v. Brown*, 415 U.S. 724 (1974)).

103. *Id.* at 194–95.

104. *Id.* (alteration in original) (quoting *Grant*, 486 U.S. at 422, 423). The Court reasoned that as many as 964,000 eligible but unregistered voters in Colorado would be barred from circulating petitions. *Id.* at 193 n.15.

105. *Id.* at 195 (quoting *Grant*, 486 U.S. at 428).

declined to register due to political principle.<sup>106</sup> The Court went on to assert that the state's primary interest in "policing lawbreakers among petition circulators" was already achieved through other provisions in the law.<sup>107</sup> As such, the registration requirement was unconstitutional because it imposed a severe burden by "cut[ting] down the number of message carriers in the ballot-access arena without impelling cause."<sup>108</sup>

In striking down the registration requirement, the Court made a point of acknowledging that it was not deciding the constitutionality of residency or "eligible-to-vote" requirements for circulators because the plaintiffs did not challenge that aspect of the Colorado law.<sup>109</sup> The Court observed, however, that "assuming that a residence requirement would be upheld as a needful integrity-policing measure," the unconstitutional registration requirement would not be needed to uphold the state's interest in making circulators answerable to state law.<sup>110</sup>

In the lone dissent, Chief Justice William Rehnquist accused the Court of undermining states' efforts to "prevent fraud in the circulation of candidate petitions" and "ensure that local issues of state law are decided by local voters, rather than by out-of-state interests."<sup>111</sup> He argued that the Court misread the *Grant* framework, upended it, and called into question "any regulation of petition circulation which runs afoul of the highly abstract and mechanical test of diminishing the pool of petition circulators or making a proposal less likely to appear on the ballot."<sup>112</sup>

The Chief Justice also directly addressed the issue of residency requirements. Decrying the Court's "sphinx-like silence as to whether [a state] may even limit circulators to state residents," Chief Justice Rehnquist questioned whether the Court's new default of "voter eligible" individuals would be allowed to circulate petitions under the Court's new test.<sup>113</sup> He also addressed the important distinction between state residents and eligible voters, which are a "subset of [state] residents who have fulfilled the requirements for registration, and have not committed a felony or been otherwise disqualified from the franchise."<sup>114</sup> He believed a new default of those who were "voter eligible" in the wake of the Court's decision was

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106. *Id.* at 195–96.

107. *Id.* at 196 ("The interest in reaching law violators . . . is served by the requirement, upheld below, that each circulator submit an affidavit setting out . . . the 'address at which he or she resides.'" (quoting COLO. REV. STAT. § 1-4-111(2) (1998))).

108. *Id.* at 197.

109. *Id.* (noting that the "[plaintiff] did not challenge Colorado's right to require that all circulators be residents" and that "[no] eligible-to-vote qualification [was] in contest in this lawsuit").

110. *Id.*

111. *Id.* at 226 (Rehnquist, C.J., dissenting); *see also id.* at 231 (noting that states should have the authority to limit circulators to those who can ultimately vote on the initiative and that concern about the rights of those consciously deciding not to register, or of convicted felons, "scarcely passes the 'laugh test'").

112. *Id.* at 227–28.

113. *Id.* at 228, 230.

114. *Id.* at 230–31.



untenable and unnecessarily burdensome on the state.<sup>115</sup> The Chief Justice posited that states would now be required to perform background checks on petition circulators to ensure they were not felons or otherwise barred from voting.<sup>116</sup>

Further, the Chief Justice believed that the Court was not clear on whether the term “voter eligible” meant “eligible to vote in the State” or “eligible to vote in any of the United States or its territories.”<sup>117</sup> If the former, “it necessarily follows . . . that a State may limit . . . circulation to its own residents.”<sup>118</sup> The latter reading would mean that a state would have to run background checks and perform a legal analysis for unregistered circulators to determine whether they were eligible to vote in their place of residence.<sup>119</sup>

The Chief Justice also stated that he would not be opposed to the former reading, although he noted that allowing all state residents to circulate petitions would mean that “political dropouts . . . and convicted drug dealers [would] engage in this electoral activity.”<sup>120</sup>

Rehnquist believed that because the Court did not explicitly address residency requirements, an extension of the Court’s logic would prompt future courts to hold “that being unable to hire out-of-state circulators would ‘limi[t] the number of voices who will convey [the initiative proponents’] message’” to declare residency requirements unconstitutional.<sup>121</sup> He argued that the conclusion of this chain of reasoning would not allow any restriction on the circulation process to survive.<sup>122</sup> He opined, for example, that a prohibition on “children or foreigners from circulating petitions . . . would also limit the number of voices . . . and thus cut down on the size of the audience the initiative proponents could reach.”<sup>123</sup> According to the Chief Justice, this logic would threaten to consume all restrictions not only on ballot-initiative petitions but also candidate-nominating petitions.<sup>124</sup>

The majority responded to the Chief Justice’s concerns in a colloquy footnote. It noted that the new Colorado default of those “eligible to vote” would not include felons, and his fear “that hordes of ‘convicted drug dealers[]’ will swell the ranks of petition circulators, unstoppable by legitimate state regulation, is therefore undue.”<sup>125</sup> The Court similarly rebuked the Chief Justice’s fear of courts applying its logic to include “children and citizens of foreign lands,” admonished his opinion as a “familiar parade of dreadfuls,”<sup>126</sup> and advised him that while “[j]udges and

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115. *Id.*

116. *Id.* at 230.

117. *Id.*

118. *Id.*

119. *Id.* at 230–31.

120. *Id.* at 230.

121. *Id.* at 231 (alterations in original) (quoting *id.* at 194 (majority opinion)).

122. *Id.* at 231–32.

123. *Id.*

124. *Id.* at 232.

125. *Id.* at 194 n.16 (majority opinion) (quoting *id.* at 230 (Rehnquist, C.J., dissenting)).

126. *Id.*

lawyers live on the slippery slope of analogies[,] they are not supposed to ski it to the bottom.”<sup>127</sup>

Ultimately, although *American Constitutional Law Foundation* did not clearly articulate its standard of review regarding the registration requirement and further complicated this area of law, the opinion’s understanding of earlier precedent forms the core backdrop against which circuit courts have analyzed the constitutionality of residency and eligibility requirements.

### C. Election Law Challenges in the Twenty-First Century

In the nineteen years since *American Constitutional Law Foundation*, U.S. elections have been subject to several legal, technological, and cultural developments that pose new challenges for legislatures, courts, and voters. These challenges include cyber threats,<sup>128</sup> “fake news”<sup>129</sup> and “alternative facts,”<sup>130</sup> and targeted partisan redistricting.<sup>131</sup> Such developments, coupled with the Court’s striking down of section 4(b) of the Voting Rights Act,<sup>132</sup> have prompted renewed concerns about voter suppression and the overall integrity of the electoral process.<sup>133</sup>

127. *Id.* (quoting ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 169 (1990)).

128. See Alexa Corse, *Election Officials, Homeland Security Begin to Formalize Cybersecurity Efforts*, WALL ST. J. (July 28, 2017, 3:03 PM), <https://www.wsj.com/articles/election-officials-homeland-security-begin-to-formalize-cybersecurity-efforts-1501268605> [<https://perma.cc/5JZU-F8RK>].

129. See Amit Chowdhry, *Facebook Launches a New Tool That Combats Fake News*, FORBES (Mar. 5, 2017, 5:34 PM), <https://www.forbes.com/sites/amitchowdhry/2017/03/05/facebook-fake-news-tool/#4638354e7ec1> [<https://perma.cc/R67T-RGD5>]; Steve Coll, *Donald Trump’s “Fake News” Tactics*, NEW YORKER (Dec. 11, 2017), <https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics> [<https://perma.cc/A4GH-N6JD>].

130. See Harriet Torry et al., *White House Backs ‘Alternative Facts’*, WALL ST. J. (Jan. 22, 2017, 11:01 PM), <https://www.wsj.com/articles/white-house-backs-alternative-facts-1485144074> [<https://perma.cc/2DVE-4SRM>].

131. See Sara N. Nordstrand, Note, *The “Unwelcome Obligation”: Why Neither State nor Federal Courts Should Draw District Lines*, 86 FORDHAM L. REV. 1997, 2000–06 (2018) (outlining a history of political gerrymandering and relevant Supreme Court decisions); Vann R. Newkirk II, *The Supreme Court Takes on Partisan Gerrymandering*, ATLANTIC (Jun. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/06/supreme-court-gill-whitford-wisconsin-gerrymandering/530769/> [<https://perma.cc/3UBQ-656A>].

132. *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013).

133. See, e.g., Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 GEO. WASH. L. REV. 1928, 1934–35 (2013) (discussing the voting rights implications of *Shelby County*); Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL’Y 57, 59–62 (2017) (describing how fabricated news stories, polarized media, and partisan election laws threaten democratic principles); Ryan P. Haygood, *The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections*, 64 RUTGERS L. REV. 1019, 1020–21 (2012) (outlining partisan efforts to suppress voter turnout in certain communities); Council on Foreign Relations, *Cybersecurity Threats to the Integrity of U.S. Elections*, YOUTUBE (Dec. 6, 2017), <https://www.youtube.com/watch?v=616gyosshOA> [<https://perma.cc/Y4J3-JSBK>] (discussing cyberthreats to election infrastructure and hackers’ efforts to manipulate public opinion).

One particular area of concern is the potential for foreign interference in the democratic process.<sup>134</sup> For example, the FBI and the intelligence community, as well as both houses of Congress, have begun investigating the numerous ways the Russian government sought to influence and undermine the integrity of the 2016 election.<sup>135</sup> These efforts included cyberattacks,<sup>136</sup> advertising and false information campaigns perpetrated on television and social media,<sup>137</sup> and even possible collaboration and collusion with Donald Trump’s campaign.<sup>138</sup> Hillary Clinton, partially blaming her electoral loss on Russian meddling, has raised concerns about the implications of this interference on the integrity of future elections nationwide.<sup>139</sup>

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134. See Philip Bump, *Timeline: What We Know About Trump’s Campaign, Russia and the Investigation of the Two*, WASH. POST (Dec. 8, 2017), [http://wapo.st/2qCIQdj?tid=ss\\_tw&utm\\_term=.db0a0c22ab7b](http://wapo.st/2qCIQdj?tid=ss_tw&utm_term=.db0a0c22ab7b) [<https://perma.cc/S683-K7DT>].

135. See Kyle Kim & Priya Krishnakumar, *A Guide to Every Russia Investigation Happening Right Now*, L.A. TIMES (May 30, 2017), <http://www.latimes.com/projects/la-na-pol-russia-investigation-explainer/> [<https://perma.cc/RB7E-MW5L>]; David E. Sanger, *Putin Ordered ‘Influence Campaign’ Aimed at U.S. Election, Report Says*, N.Y. TIMES (Jan. 6, 2017), <https://www.nytimes.com/2017/01/06/us/politics/russia-hack-report.html> [<https://perma.cc/X8YK-EPN7>]. As of this Note’s writing, Special Counsel Robert Mueller has indicted thirteen Russian nationals in connection with this interference. Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html> [<https://perma.cc/4KQT-RZNB>].

136. See, e.g., Devlin Barrett & Damian Paletta, *FBI Suspects Russia in Hack of John Podesta Emails*, WALL ST. J. (Oct. 12, 2016, 8:24 PM), <https://www.wsj.com/articles/top-russian-officials-shift-away-from-denying-dnc-hack-1476295233> [<https://perma.cc/E98L-N9U2>]; Sari Horwitz et al., *DHS Tells States About Russian Hacking During 2016 Election*, WASH. POST (Sept. 22, 2017), <http://wapo.st/2fGuN3s> [<https://perma.cc/U7HJ-AJEE>].

137. Jim Rutenberg, *RT, Sputnik and Russia’s New Theory of War*, N.Y. TIMES MAG. (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/magazine/rt-sputnik-and-russias-new-theory-of-war.html> [<https://perma.cc/4HKD-VHNQ>] (discussing the influence of Russian state-owned media companies such as RT and Sputnik in Western politics); Scott Shane & Vinu Goel, *Fake Russian Facebook Accounts Bought \$100,000 in Political Ads*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/technology/facebook-russian-political-ads.html> [<https://perma.cc/8DFS-M4MP>].

138. See, e.g., Matt Apuzzo & Maggie Haberman, *‘I Did Not Collude,’ Kushner Says After Meeting Senate Investigators*, N.Y. TIMES (July 24, 2017), <https://www.nytimes.com/2017/07/24/us/politics/jared-kushner-russia-senate.html> [<https://perma.cc/9P9K-CATX>]; Jo Becker et al., *Russian Dirt on Clinton? ‘I Love It,’ Donald Trump Jr. Said*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/us/politics/trump-russia-email-clinton.html> [<https://perma.cc/K97P-L4CP>]; Rosalind S. Helderman & Tom Hamburger, *Top Campaign Officials Knew of Trump Adviser’s Outreach to Russia*, WASH. POST (Oct. 30, 2017), [https://www.washingtonpost.com/politics/trump-campaign-adviser-pleaded-guilty-to-lying-about-russian-contacts/2017/10/30/d525e712-bd7d-11e7-97d9-bdab5a0ab381\\_story.html](https://www.washingtonpost.com/politics/trump-campaign-adviser-pleaded-guilty-to-lying-about-russian-contacts/2017/10/30/d525e712-bd7d-11e7-97d9-bdab5a0ab381_story.html) [<https://perma.cc/67QX-HR36>]; Sharon LaFraniere et al., *How the Russia Inquiry Began: A Campaign Aide, Drinks and Talk of Political Dirt*, N.Y. TIMES (Dec. 30, 2017), <https://www.nytimes.com/2017/12/30/us/politics/how-fbi-russia-investigation-began-george-papadopoulos.html> [<https://perma.cc/J4PN-9ZAY>].

139. HILLARY RODHAM CLINTON, WHAT HAPPENED 325–27 (2017) (“[O]ur democracy was assaulted by a foreign adversary determined to mislead our people, enflame our divisions, and throw an election to its preferred candidate. . . . The only way to heal our democracy and protect it for the future is to understand the threat and defeat it.”).

Additionally, the last decade has brought renewed emphasis on potential “voter fraud.”<sup>140</sup> President Donald Trump has posited, albeit without evidence, that millions of people “voted illegally”<sup>141</sup> for Hillary Clinton in 2016, and in response he created a commission to investigate in-person “voter fraud.”<sup>142</sup> States have used this largely unfounded<sup>143</sup> fear of “voter fraud” to pass scores of new election statutes that include controversial voter-identification requirements.<sup>144</sup> These laws have been criticized as partisan attempts to subvert voting rights of African Americans and Democratic-leaning voters.<sup>145</sup>

The twenty-first century has also seen the rising influence of so-called “dark money” in politics.<sup>146</sup> Billionaires and well-funded interest groups continue to spend more money in election campaigns and are more frequently spending this money to influence increasingly local elections.<sup>147</sup> There is

140. See generally Brian J. Fogarty et al., *News Attention to Voter Fraud in the 2008 and 2012 US Elections*, RES. & POL., Apr.–June 2015, at 1.

141. Donald J. Trump (@realdonaldtrump), TWITTER (Nov. 27, 2016, 3:30 PM), <https://twitter.com/realDonaldTrump/status/8029729445322096644> [<https://perma.cc/U5R6-GZHK>] (“In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally[.]”).

142. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017). President Trump suggested that he would investigate voter fraud allegations by tweeting “I will be asking for a major investigation into VOTER FRAUD, including those registered to vote in two states, those who are illegal and,” Donald J. Trump (@realdonaldtrump), TWITTER (Jan. 25, 2017, 7:10 AM), <https://twitter.com/realDonaldTrump/status/824227824903090176> [<https://perma.cc/YV47-Y92F>], “even, those registered to vote who are dead (and many for a long time). Depending on results, we will strengthen up voting procedures!,” Donald J. Trump (@realdonaldtrump), TWITTER (Jan. 25, 2017, 7:13 AM), <https://twitter.com/realDonaldTrump/status/824228768227217408> [<https://perma.cc/XB5X-JAXJ>]. The commission was disbanded in January 2018. John Wagner, *Trump Abolishes Controversial Commission Studying Alleged Voter Fraud*, WASH. POST (Jan. 4, 2018), [https://www.washingtonpost.com/politics/trump-abolishes-controversial-commission-studying-voter-fraud/2018/01/03/665b1878-f0e2-11e7-b3bf-ab90a706e175\\_story.html](https://www.washingtonpost.com/politics/trump-abolishes-controversial-commission-studying-voter-fraud/2018/01/03/665b1878-f0e2-11e7-b3bf-ab90a706e175_story.html) [<https://perma.cc/LT6X-EWB5>].

143. See Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast> [<https://perma.cc/MXG4-W6MB>].

144. See Wendy Underhill, *Voter Identification Requirements Voter ID Laws*, NAT’L CONF. ST. LEGISLATURES (Jan. 5, 2018), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/2FCP-2PBL>].

145. See Reid Wilson, *Report: Voter ID Laws Reduce Turnout More Among African American and Younger Voters*, WASH. POST (Oct. 9, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/10/09/report-voter-id-laws-reduce-turnout-more-among-african-american-and-younger-voters> [<https://perma.cc/3E9X-QNF3>].

146. See JANE MAYER, *DARK MONEY* 228–29 (2016) (“Rich activists . . . gave what came to be called dark money to nonprofit ‘social welfare’ groups that . . . [could] spend on elections without disclosing their donors. As a result, the American political system became awash in unlimited, untraceable cash.”).

147. See Liz Essley Whyte, *Corporations, Advocacy Groups Spend Big on Ballot Measures*, CTR. FOR PUB. INTEGRITY (Dec. 15, 2014, 11:04 AM), <https://www.publicintegrity.org/2014/10/23/15998/corporations-advocacy-groups-spend-big-ballot-measures> [<https://perma.cc/4TTF-RP46>]; see also Elena Holodny, *The 20 Most Influential Billionaires Behind the Scenes of US Politics*, BUS. INSIDER (Sept. 6, 2014, 11:48 AM), <http://www.businessinsider.com/most-politically-influential-billionaires-2014-9>

concern that candidates and issues supported by these well-funded interests have an enormous advantage in the electoral process.<sup>148</sup>

These issues provide important context for courts deciding the constitutionality of residency and eligibility requirements for petition circulators.<sup>149</sup> Accordingly, the next Part discusses the split among circuit courts on these constitutional questions.

## II. THE SPLIT: DO RESIDENCY AND VOTER ELIGIBILITY REQUIREMENTS VIOLATE THE FIRST AMENDMENT?

In the wake of *American Constitutional Law Foundation*, circuits agree that the holding applies to candidate-nominating petitions as well as ballot-initiative petitions<sup>150</sup> but are ultimately split on the question of whether the holding of *American Constitutional Law Foundation* instructs that residency and eligibility requirements for petition circulators violate the First Amendment.<sup>151</sup>

The Eighth Circuit has held state-residency requirements to be constitutional,<sup>152</sup> and the Second Circuit seemingly has agreed in dicta.<sup>153</sup> Conversely, the majority of circuits, and all circuits that have directly considered the question since 2001, have held these restrictions to be an unconstitutional violation of the First Amendment.<sup>154</sup> Part II.A discusses the minority view, which reasons that these restrictions are constitutional. Part II.B discusses the majority view and the relevant arguments that the restrictions are unconstitutional under the First Amendment.

### A. *The Minority View: Residency and Voter Eligibility Requirements Are Permissible Under the First Amendment*

The Eighth Circuit is the only federal appellate court to explicitly hold that state-residency requirements are constitutional.<sup>155</sup> The Second Circuit, although declining to explicitly rule on the constitutionality of residency

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[<https://perma.cc/TL2J-QV9H>]; Alex Roarty, *Super PACs' Next Target: Local Elections*, ATLANTIC (May 18, 2015), <https://www.theatlantic.com/politics/archive/2015/05/super-pacs-next-target-local-elections/435639/> [<https://perma.cc/594T-NHVY>].

148. See, e.g., LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 158–60 (2011); Russ Feingold, *The Money Crisis: How Citizens United Undermines Our Elections and the Supreme Court*, 64 STAN. L. REV. ONLINE 145, 146 (2012).

149. A thorough examination of these challenges in election administration is beyond the scope of this Note.

150. See, e.g., *Lerman v. Bd. of Elections*, 232 F.3d 135, 148 (2d Cir. 2000) (“There is no basis to conclude that petition circulation on behalf of a candidate involves any less interactive political speech than petition circulation on behalf of a proposed ballot initiative . . .”); *Krislov v. Rednour*, 226 F.3d 851, 861–62 (7th Cir. 2000) (holding that circulating petitions for candidate nominations versus ballot initiatives is “not a particularly relevant distinction”).

151. See *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 443 (6th Cir. 2016) (discussing the “existence of a circuit split”).

152. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615 (8th Cir. 2001).

153. See *Lerman*, 232 F.3d at 150 n.14.

154. See *infra* Part II.B.

155. See *Husted*, 810 F.3d at 443.

requirements, approvingly cited such a restriction in dicta of a related case.<sup>156</sup> While the Second Circuit struck down a more stringent statutory provision, it treated the state-residency requirement as de facto constitutional.<sup>157</sup>

Besides the circumstances of their holdings, the two cases are remarkably different. The Eighth Circuit case, *Initiative & Referendum Institute v. Jaeger*,<sup>158</sup> involved a restriction on ballot-initiative petition circulators, as at issue in *American Constitutional Law Foundation*, while the Second Circuit case, *Lerman v. Board of Elections*,<sup>159</sup> involved circulators for candidate-nominating petitions.<sup>160</sup> Despite the similarity in their outcomes, these two decisions differ greatly in scope, standard of review, and reading of the proper precedent and application of *American Constitutional Law Foundation*.

In discussing statutory requirements that petition circulators be in-state residents, both circuits alluded to their view of *American Constitutional Law Foundation*'s treatment of the issue. The circuits relied on the Court's reference to voter eligibility requirements as a more narrowly tailored—and therefore constitutionally acceptable—approach through which a state could exercise its interest in “ensuring the integrity of the ballot access process.”<sup>161</sup> Although conceding that the *American Constitutional Law Foundation* Court did not explicitly rule on the constitutionality of state-residency or voter eligibility requirements because the issue was not properly raised, both circuits inferred that the Court had all but decided the issue in making this assertion.<sup>162</sup>

Despite this contention, the Eighth Circuit conducted an independent analysis of the constitutionality of the North Dakota state-residency requirement because the plaintiffs facially challenged the restriction.<sup>163</sup> The Second Circuit declined to conduct a similar analysis for the New York state-residency restriction because the circuit considered the issue only in the

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156. See *Lerman*, 232 F.3d at 150 & n.14.

157. See *id.* (declining to explicitly rule on the constitutionality of New York's state-residency voter-eligibility requirement because the plaintiffs did not challenge it, but holding that the state-residency requirement was “more narrowly tailored” than a requirement that circulators reside in the electoral jurisdiction).

158. 241 F.3d 614 (8th Cir. 2001).

159. 232 F.3d 135 (2d Cir. 2000).

160. Compare *Jaeger*, 241 F.3d at 616 (“The appellants are non-profits involved in the initiative process; a for-profit business involved in qualifying proposed initiatives for the ballot; [and] a non-resident who would like to circulate petitions in North Dakota . . .”), with *Lerman*, 232 F.3d at 142 (“Lerman asserts injury in having been deprived of the opportunity to gather signatures in behalf of his candidacy.”).

161. See *Jaeger*, 241 F.3d at 616 (citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 194 (1999)); *Lerman*, 232 F.3d at 150 n.14 (citing *Am. Constitutional Law Found.*, 525 U.S. at 194–97).

162. *Jaeger*, 241 F.3d at 616 (citing *Am. Constitutional Law Found.*, 525 U.S. at 194–97); *Lerman*, 232 F.3d at 150 (citing *Am. Constitutional Law Found.*, 525 U.S. at 194); see also *supra* notes 109–10 and accompanying text.

163. *Jaeger*, 241 F.3d at 616.

context of the more stringent jurisdictional residency requirement being challenged before them.<sup>164</sup>

The Eighth Circuit read *American Constitutional Law Foundation* as applying the balancing/sliding scale test, as opposed to tiered scrutiny.<sup>165</sup> The court understood that a less stringent review was appropriate for the residency requirement, due to its analysis of the burden that the restriction imposed on the plaintiffs.<sup>166</sup>

The Eighth Circuit found that the residency restriction did not impose a severe burden on speech or significantly reduce the number of available messengers, which it saw as the key distinction from the restriction struck down in *American Constitutional Law Foundation*.<sup>167</sup> The residency requirement allowed a pool of over 476,000 North Dakota residents to assist with petitioning.<sup>168</sup> In the court’s view, this stood in contrast with the Colorado registration requirement struck down in *American Constitutional Law Foundation*, where a significant number of state residents would have been prevented from circulating petitions.<sup>169</sup>

Crucially, in analyzing this burden, the Eighth Circuit found no actual evidence of the residency requirement “making it more costly and time consuming to collect signatures.”<sup>170</sup> It noted that since the state had been tracking the success rate of signature campaigns, roughly 70 percent of all initiative campaigns were able to secure their place on the ballot.<sup>171</sup> The court weighed what it saw as a nearly nonexistent burden against the state’s “compelling interest in preventing fraud”<sup>172</sup> and ultimately found the state-residency requirement to be a reasonable regulation to advance the state’s interest.<sup>173</sup>

Conversely, the Second Circuit read *American Constitutional Law Foundation* to imply that strict scrutiny was the applicable standard.<sup>174</sup> In ruling on New York’s *jurisdictional* residency requirement, the court found the burdens imposed on petition circulators’ speech to be severe.<sup>175</sup> While requiring that circulators reside in the political subdivision where the election was taking place was not narrowly tailored to advance the state’s compelling

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164. *Lerman*, 232 F.3d at 150 & n.14 (“Since the plaintiffs do not challenge these [state-residency] provisions, we need not resolve their constitutionality. We conclude only that these requirements are more narrowly tailored to the state’s interest in ensuring the integrity of the ballot access process than the [jurisdictional] witness residence requirement.”).

165. *Jaeger*, 241 F.3d at 616 (“The Supreme Court has developed a sliding standard of review to balance these two interests.”).

166. *Id.* at 616–17 (“Severe burdens on speech trigger an exacting standard . . . whereas lesser burdens receive a lower level of review. . . . [N]o severe burden has been placed on those wishing to circulate petitions.”).

167. *Id.* at 617.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Lerman v. Bd. of Elections*, 232 F.3d 135, 149 (2d Cir. 2000).

175. *Id.*

interest in preventing fraud, the circuit reasoned that a state-residency requirement was a more narrowly tailored option to advance that interest.<sup>176</sup>

After deciding their respective standards of review, both circuits gave great weight to the state's "compelling interest in preventing fraud" and abuse, as well as the state's related interest in "ensuring that circulators answer to the [state] subpoena power."<sup>177</sup> The Second Circuit placed particular emphasis on the statewide subpoena power in holding that a state-residency requirement, as opposed to an individual jurisdictional residency requirement, was narrowly tailored to achieve this compelling state interest.<sup>178</sup>

The Eighth Circuit further reasoned that out-of-state residents who wished to engage in political speech in North Dakota had many alternatives through which to exercise that right.<sup>179</sup> These included speaking to voters about initiatives, training circulators, and even accompanying circulators to collect the requisite number of signatures.<sup>180</sup> The only restriction mandated by the statute, the court concluded, was that nonresidents could not "personally collect and verify signatures," a restriction clearly "justified by the State's interest."<sup>181</sup>

Although the Eighth Circuit did not address the merits of the argument outright, the opinion acknowledged the state's interest in preventing well-funded interest groups located outside the state from hijacking the initiative process, as well as the interest in ensuring that an initiative actually had sufficient grassroots support among the people of North Dakota before being placed on the ballot.<sup>182</sup>

The Second Circuit did not find this state interest in preventing outsiders from influencing the politics of a local jurisdiction to be "legitimate at all."<sup>183</sup> In weighing New York's argument, the court reasoned that "a desire to fence out non-residents' political speech—and to prevent both residents and non-residents from associating for political purposes across district boundaries—simply cannot be reconciled with the First Amendment's purpose of ensuring 'the widest possible dissemination of information from diverse and antagonistic sources.'"<sup>184</sup>

Acknowledging the unclear nature of the standard of review in ballot-access cases,<sup>185</sup> the Eighth Circuit concluded its opinion by noting that even if a court were to apply Justice Thomas's logic and find that strict scrutiny

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176. *Id.* at 150 & n.14.

177. *Jaeger*, 241 F.3d at 616; *Lerman*, 232 F.3d at 149–50.

178. *Lerman*, 232 F.3d at 150.

179. *Jaeger*, 241 F.3d at 617.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Lerman*, 232 F.3d at 152.

184. *Id.* (quoting *Krislov v. Rednour*, 226 F.3d 851, 866 (7th Cir. 2000)). Despite holding in dicta that a state-residency requirement was a more narrowly tailored and acceptable approach to regulate elections, the Second Circuit borrowed this argument from a Seventh Circuit case that invalidated state-residency restrictions. *Id.* (citing *Krislov*, 226 F.3d at 866).

185. *See Jaeger*, 241 F.3d at 616 (citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 208 (1999) (Thomas, J., concurring)).



was the applicable standard for a state-residency requirement, that requirement was sufficiently narrowly tailored to a compelling state interest in preventing fraud to pass constitutional muster.<sup>186</sup>

The Eighth Circuit was confident in the soundness of its logic and its conclusion that the Supreme Court had already all but decided the issue in favor of constitutionality. That circuit, however, remains the only federal court of appeals to explicitly uphold the constitutionality of a state’s residency requirement for petition circulators in its holding. Likewise, the Second Circuit’s statements on state-residency requirements have not yet been overturned, and New York law still requires petition circulators to reside in the state.<sup>187</sup>

*B. The Majority View: Residency and Voter Eligibility Requirements Violate the First Amendment*

*Jaeger* notwithstanding, in the wake of *American Constitutional Law Foundation*, a “consensus . . . emerged [among circuits] that petitioning restrictions . . . are subject to strict scrutiny analysis.”<sup>188</sup> The Fourth,<sup>189</sup> Sixth,<sup>190</sup> Seventh,<sup>191</sup> Ninth,<sup>192</sup> and Tenth Circuits<sup>193</sup> have applied this reading of *American Constitutional Law Foundation* to strike down various

186. *Id.* (citing *Kean v. Clark*, 56 F. Supp. 2d 719, 728–29, 732–34 (S.D. Miss. 1999); *Initiative & Referendum Inst. v. Sec’y of State*, No. Civ 98-104-B-C, 1999 WL 33117172, at \*16 (D. Me. Apr. 23, 1999)).

187. *See* N.Y. ELEC. LAW §§ 6-132, 6-140 (McKinney 2017). New York’s election law requires that witnesses to petition signatures be a “duly qualified voter,” a New York notary public, or a New York Commissioner of Deeds. *Id.* The “duly qualified voter” language has been interpreted to require witnesses to actually be registered to vote, as opposed to merely “eligible” to vote. *See* GOLDFEDER, *supra* note 4, at 20–21. In his lawsuit, Merced challenges both this registration requirement as well as the notion that all witnesses must reside in New York State. *See* Complaint, *supra* note 1, para. 29; *see also* Richard Winger, *Oral Argument Date Set in New York Lawsuit over Out-of-State Circulator Ban*, BALLOT ACCESS NEWS (Aug. 16, 2017), <http://ballot-access.org/2017/08/16/oral-argument-date-set-in-new-york-lawsuit-over-out-of-state-circulator-ban/> [https://perma.cc/FX3F-BCX5].

188. *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316–17 (4th Cir. 2013).

189. *See id.* at 311, 318–19 (finding a Virginia law requiring signatures on nominating petitions to be witnessed either by the candidate personally or by a “resident of the Commonwealth and who is not a minor or a felon whose voting rights have not been restored” to be unconstitutional (quoting VA. CODE ANN. § 24.2-543 (2013))).

190. *Nader v. Blackwell*, 545 F.3d 459, 462 (6th Cir. 2008) (striking down an Ohio law limiting candidate-nomination petition circulators to registered voters in an individual precinct, who were also in-state residents of Ohio, *as applied* to Green Party presidential candidate Ralph Nader).

191. *Krislov v. Rednour*, 226 F.3d 851, 866 (7th Cir. 2000) (finding an Illinois statute requiring candidate-nomination petition circulators to be both registered to vote and residents of the same political subdivision that the candidate was seeking office for, which as applied to one plaintiff functioned as a state-residency requirement, to violate the First Amendment).

192. *Nader v. Brewer*, 531 F.3d 1028, 1031 (9th Cir. 2008) (striking down an Arizona statute that allowed only “persons qualified to register to vote in Arizona” to circulate petitions for political candidates).

193. *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1025–26, 1031 (10th Cir. 2008) (finding an Oklahoma law requiring initiative-petition circulators to issue an affidavit that they were an “elector” of Oklahoma, defined as “all citizens of the United States, over the age of eighteen (18) years, who are bona fide residents of [Oklahoma],” to violate the First Amendment (quoting OKLA. CONST. art. III, § 1)).

state petitioning restrictions, including both residency and voter eligibility requirements, as well as restrictions on both initiative and candidate-nominating petition circulators.

This near-universal application of strict scrutiny largely flowed from the Tenth Circuit, which had issued the decision the Court affirmed in *American Constitutional Law Foundation*.<sup>194</sup> In its opinion, the Tenth Circuit explicitly applied strict scrutiny to the Colorado registration requirement to find it unconstitutional.<sup>195</sup> In subsequent cases, the judges of the Tenth Circuit reasoned that because the *American Constitutional Law Foundation* Court had affirmed their decision, the Court had clearly endorsed strict scrutiny as the applicable standard for ballot-access cases meeting similar criteria.<sup>196</sup> Nearly all circuits weighing similar restrictions on petition circulation in the following years opted to follow the Tenth Circuit's lead.<sup>197</sup>

A common element among the circuits applying strict scrutiny is their frequent citation to Justice Thomas's *American Constitutional Law Foundation* concurrence in the judgment as guiding precedent for future cases.<sup>198</sup> In relying on Justice Thomas's assertions that strict scrutiny is the applicable standard of review, circuits have repeatedly referred to the colloquy in footnote twelve from the majority opinion in *American Constitutional Law Foundation*.<sup>199</sup> These circuits seem to reference this footnote to suggest that the *American Constitutional Law Foundation* majority approved of Justice Thomas's discussion of the *Grant* framework and thus cited to Justice Thomas's concurrence as a clearer distillation of the majority's thoughts on the appropriate standard of review.<sup>200</sup>

Citing language from *American Constitutional Law Foundation* and *Grant*, the majority-view circuits reasoned that state-residency and voter eligibility requirements imposed a severe burden on First Amendment rights by significantly reducing the number of available petition circulators, much like the Colorado registration requirement struck down in *American*

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194. *Am. Constitutional Law Found. v. Meyer, Inc.*, 120 F.3d 1092, 1100 (10th Cir. 1997), *aff'd sub nom. Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999).

195. *See id.*

196. *See Chandler v. City of Arvada*, 292 F.3d 1236, 1241–42 (10th Cir. 2002); *Campbell v. Buckley*, 203 F.3d 738, 744–45 (10th Cir. 2000).

197. *See, e.g., Libertarian Party of Va. v. Judd*, 718 F.3d 308, 317 (4th Cir. 2013); *Nader v. Blackwell*, 545 F.3d 459, 474–75 (6th Cir. 2008); *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008); *Lerman v. Bd. of Elections*, 232 F.3d 135, 150 (2d Cir. 2000); *Krislov v. Rednour*, 226 F.3d 851, 866 (7th Cir. 2000).

198. *See, e.g., Blackwell*, 545 F.3d at 475 (citing *Am. Constitutional Law Found.*, 525 U.S. at 210–11 (Thomas, J., concurring)); *Lerman*, 232 F.3d at 145–46 (citing *Am. Constitutional Law Found.*, 525 U.S. at 206, 210–12 (Thomas, J., concurring)); *Krislov*, 226 F.3d at 860 (citing *Am. Constitutional Law Found.*, 525 U.S. at 206 (Thomas, J., concurring)).

199. *See, e.g., Blackwell*, 545 F.3d at 475 (citing *Am. Constitutional Law Found.*, 525 U.S. at 192 n.12); *Chandler*, 292 F.3d at 1241 (citing *Am. Constitutional Law Found.*, 525 U.S. at 192 n.12); *Lerman*, 232 F.3d at 146 (citing *Am. Constitutional Law Found.*, 525 U.S. at 192 n.12).

200. *See, e.g., Blackwell*, 545 F.3d at 475 (citing *Am. Constitutional Law Found.*, 525 U.S. at 210–11 (Thomas, J., concurring)); *Chandler*, 292 F.3d at 1242 (citing *Am. Constitutional Law Found.*, 525 U.S. at 207 (Thomas, J., concurring)); *Lerman*, 232 F.3d at 146 (citing *Am. Constitutional Law Found.*, 525 U.S. at 210–12 (Thomas, J., concurring)).

*Constitutional Law Foundation*.<sup>201</sup> Using this burden analysis, the circuits reasoned that the holding meant that strict scrutiny was the applicable standard of review.<sup>202</sup>

Next, the circuits weighed whether the statutes were narrowly tailored to serve a compelling state interest.<sup>203</sup> The states in these cases argued several such interests they considered to be compelling.<sup>204</sup> Many of the circuits recognized, and some of the plaintiffs even stipulated, that these interests were compelling, especially the state interests in election integrity and preventing fraud and abuse.<sup>205</sup>

For other interests, however, the circuits were not as accepting. The Tenth Circuit stated that it did not view Oklahoma’s stated interest in “restricting the process of self-government to members of its own political community” to be compelling in the context of restrictions on petition circulation.<sup>206</sup> It reasoned that finding such a compelling interest could have “far reaching consequences,” such as laws prohibiting nonresidents from driving Oklahoma voters to the polls.<sup>207</sup>

The Seventh Circuit recognized a legitimate state interest in “ensur[ing] that only [state] residents have a say in electing their representatives.”<sup>208</sup> The Circuit found, however, that Illinois did not have a similar compelling interest in “preventing citizens of other States from having any influence on [its] elections” whatsoever.<sup>209</sup> It noted that residency requirements for circulators were “harmful to the unity of our Nation” because “[a]llowing citizens of the other forty-nine States to circulate petitions increases the opportunity for the free flow of political ideas.”<sup>210</sup> The Circuit further reasoned that nonresidents could possibly introduce “ideas which are novel to a particular geographic area, or which are unpopular.”<sup>211</sup> “[T]he First

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201. See *Judd*, 718 F.3d at 316 (citing *Meyer v. Grant*, 486 U.S. 414, 422–23 (1988)); *Blackwell*, 545 F.3d at 474–75 (citing *Am. Constitutional Law Found.*, 525 U.S. at 191, 197); *Brewer*, 531 F.3d at 1036 (citing *Am. Constitutional Law Found.*, 525 U.S. at 194–95); *Chandler*, 292 F.3d at 1243 (citing *Am. Constitutional Law Found.*, 525 U.S. at 194–195); *Krislov*, 226 F.3d at 860 (citing *Am. Constitutional Law Found.*, 525 U.S. at 193 n.15; *Grant*, 486 U.S. at 421–22).

202. See *Judd*, 718 F.3d at 317 (“[A]n election regulation that imposes a severe burden is subject to strict scrutiny . . . .” (quoting *Brewer*, 531 F.3d at 1035)); *Blackwell*, 545 F.3d at 475 (noting that the Court applies “strict scrutiny” to such regulations); *Brewer*, 531 F.3d at 1036 (“Because the restriction creates a severe burden on plaintiffs’ First Amendment rights, strict scrutiny applies.”); *Krislov*, 226 F.3d at 863 (stating that “[l]aws which place a substantial burden on First Amendment rights” must be “narrowly tailored to serve a compelling state interest”).

203. See *supra* note 56.

204. See *supra* notes 43–47 and accompanying text.

205. See, e.g., *Judd*, 718 F.3d at 317 (“The plaintiffs do not seriously dispute that the prevention of election fraud is a compelling state interest.”); *Brewer*, 531 F.3d at 1037 (“A state’s interest in ensuring the integrity of the election process and preventing fraud is compelling.”).

206. *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028 n.2 (10th Cir. 2008).

207. *Id.*

208. *Krislov v. Rednour*, 226 F.3d 851, 865 (7th Cir. 2000).

209. *Id.* at 866.

210. *Id.*

211. *Id.*

Amendment,” the court held, “was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people.”<sup>212</sup>

Regardless of whether the circuits found a compelling interest that would possibly justify the restrictions, the circuits universally found the restrictions to be insufficiently narrowly tailored to those interests to survive strict scrutiny review.<sup>213</sup> The Seventh Circuit, for example, noted that the residency requirement was not narrowly tailored to an interest in ensuring that only state residents elected state representatives, as Illinois already had restrictions stating that only registered Illinois voters could sign petitions and vote in its elections.<sup>214</sup> The residency requirement, therefore, was superfluous.<sup>215</sup>

Similarly, the Tenth Circuit, in analyzing Oklahoma’s residency restriction in the context of its stated interest in fraud prevention, found that the state had failed to demonstrate that nonresidents, *as a class*, were more likely to engage in fraudulent activity, or less likely to answer a subpoena, than state-resident circulators.<sup>216</sup>

To further illustrate that the restrictions were not sufficiently narrowly tailored, some circuits cited possible alternatives to advance the states’ interest in preventing fraud that would be less burdensome on First Amendment rights. A common suggestion was for the states to require circulators to file affidavits swearing that they would be answerable to the jurisdiction to address any irregularities or stricken signatures on their petitions.<sup>217</sup> The circuits found that the provisions at issue were not narrowly tailored because the states failed to provide any legitimate reasons why these proposed less-restrictive alternatives were unworkable.<sup>218</sup>

By universally determining that the restrictions failed to be narrowly tailored to a compelling state interest, the majority-view circuits declared the

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212. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam)).

213. *See supra* notes 189–93.

214. *See supra* notes 189–93.

215. *See supra* notes 189–93.

216. *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1031 (10th Cir. 2008) (“Because the record contains insufficient evidence to conclude that non-residents, as a class, threaten the integrity or reliability of the initiative process, Oklahoma has failed to prove that banning all non-resident circulators is a narrowly tailored means of meeting its compelling interest.”); *see also Nader v. Brewer*, 531 F.3d 1028, 1037 (9th Cir. 2008) (noting that the state did not “ever contend that its history of fraud was related to non-resident circulators, a history that might justify regulating non-residents differently from residents”).

217. *See Libertarian Party of Va. v. Judd*, 718 F.3d 308, 318 (4th Cir. 2013); *Savage*, 550 F.3d at 1030; *Brewer*, 531 F.3d at 1037.

218. *Judd*, 718 F.3d at 318 (“[T]he Board has produced no concrete evidence . . . explaining why the plaintiffs’ proposed solution . . . would be unworkable or impracticable.”); *Savage*, 550 F.3d at 1031 (“Oklahoma has . . . failed to prove the ineffectiveness of plausible alternatives to the blanket ban on non-residents.”); *Brewer*, 531 F.3d at 1037 (“The state responds that petition circulators could conceivably be spread throughout the country, and that given the narrow timeframe for petition challenges in Arizona, such a . . . system would be unworkable. The state does not provide any evidence, however, to support this contention . . .”).

restrictions to be unconstitutional violations of the First and Fourteenth Amendments.<sup>219</sup>

### III. RESOLVING THE SPLIT: A WAY FORWARD

Although the split on this issue is admittedly one sided, the Eighth Circuit view should not be so easily cast aside. As recently as 2016, the Sixth Circuit considered the split on the constitutionality of these restrictions to be open ended and unresolved, and it found the Eighth Circuit’s view to be a reasonable interpretation.<sup>220</sup> While circuit courts have unanimously struck down residency and eligibility requirements under the First Amendment since 2001, this issue has far greater significance than these circuit decisions have suggested. Ultimately, although it has been given short shrift by its sister circuits and lacks depth in some aspects, the Eighth Circuit view is ultimately the most reasonable application of *American Constitutional Law Foundation*.

Part III.A discusses the shortcomings of the majority approach to determining the appropriate standard of review and advocates for a return to an ad hoc balancing analysis in ballot-access cases. Part III.B applies this suggested method to draw a constitutional distinction between residency and voter eligibility requirements. It posits that residency requirements are a reasonable state regulation of the electoral process, while voter eligibility requirements present an unconstitutional violation of the First Amendment. Finally, Part III.C discusses the practical and philosophical reasons underlying this approach, as addressed in Chief Justice Rehnquist’s dissent.

#### A. Revisiting the Eighth Circuit View:

##### *A Proper Reading of American Constitutional Law Foundation and a Return to Balancing*

Establishing a consistent ballot-access standard of review is a monumental task that has eluded the Court since it first held that these cases were justiciable.<sup>221</sup> It is crucial that the method for choosing this standard promotes enough flexibility to account for the enormous variations and intricacies between the state and individual interests in ballot-access cases. Part III.A.1 reconciles the holding of *American Constitutional Law Foundation* with a renewed emphasis on the *Anderson* sliding-scale approach. Part III.A.2 argues for a more realistic assessment of the state and individual interests presented in ballot-access litigation.

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219. *Judd*, 718 F.3d at 318–19; *Savage*, 550 F.3d at 1031; *Brewer*, 531 F.3d at 1038.

220. See *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 443 (6th Cir. 2016) (noting that the existence of the circuit split meant that Ohio’s Secretary of State could enforce Ohio’s residency requirement due to a reasonable belief that the statute was constitutional).

221. See Kevin Cofsky, Note, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. PA. L. REV. 353, 366 (1996). See generally Young, *supra* note 50.

### 1. Rejecting Strict Scrutiny: An Individualized Balancing Reading

The circuit courts' emphasis on the proper standard of review has distorted the real question at issue in every one of these ballot-access cases—whether the challenged restriction presents an unconstitutional burden on political speech and whether the asserted state interest justifies that burden. Because each challenged ballot-access restriction presents a unique set of circumstances and factors that speak to the state and individual interests at issue,<sup>222</sup> this area of the law is particularly well suited to a specific and nuanced analysis.

Despite the near-universal finding of residency and eligibility requirements as severe burdens on core political speech mandating strict scrutiny review,<sup>223</sup> this reading of *American Constitutional Law Foundation* fundamentally misreads the Court's precedents. A close reading of the majority-view circuit opinions shows that the use of strict scrutiny does not arise from a detailed understanding of *American Constitutional Law Foundation*, *Grant*, and other earlier case law. Rather, this approach is best explained by the circuit courts' desire to establish a clear and concise framework for deciding the appropriate standard of review in ballot-access cases. While these courts' search for clarity is understandable, the holding of *American Constitutional Law Foundation* is not nearly as simple or clear cut as the majority-view circuits make it out to be.

It is apparent that over the course of the Supreme Court's history, the Court has seemed to favor a more individualized and flexible approach to ballot-access restrictions, even if it has not done so explicitly.<sup>224</sup> The Court has even stated that it would be a mistake to overly rely on strict scrutiny and that a more flexible approach is crucial to properly weigh the competing interests inherent in these cases.<sup>225</sup>

While not explicitly referencing its standard of review, even while finding a "severe burden," the *American Constitutional Law Foundation* majority ultimately appears to favor the "exacting" scrutiny approach from *Grant*.<sup>226</sup> Although the Court does not explicitly state the standard of review, it makes

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222. See, e.g., *Storer v. Brown*, 415 U.S. 724, 730 (1974) (citing *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972)); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (noting that each individual ballot-access decision "consider[s] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification").

223. See *supra* Part II.B.

224. See *supra* Part I.B.1; see also *Wright*, *supra* note 70, at 210 ("Balancing and proportionality plainly inhere in the idea of a sufficiently important government interest, given that the sufficiency of the government interest must be with respect to some corresponding burden imposed upon constitutional rights."); *Cofsky*, *supra* note 221, at 381 (discussing the remarkable span of precedents cited by the Court in developing the *Anderson* balancing test).

225. See *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969)).

226. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 n.12, 199 (1999).

several references to *Grant* and ultimately states its aim to replicate *Grant*'s test.<sup>227</sup>

Many of the majority-view circuits have viewed *Grant*'s “exacting” scrutiny language as interchangeable with traditional strict scrutiny.<sup>228</sup> Justice O'Connor's and Justice Thomas's concurrences in the judgment appear to understand the terms as being interchangeable.<sup>229</sup> Additionally, because the flexible *Grant* “exacting” scrutiny standard has sometimes required that a statute be “narrowly tailored to a compelling state interest,” this has understandably confused many courts and commentators.<sup>230</sup>

The majority-view circuits, as well as several commentators, have cited *American Constitutional Law Foundation*'s footnote twelve as proof that the *American Constitutional Law Foundation* majority applied strict scrutiny to the Colorado registration requirement and that the Court shared Justice Thomas's view of the ballot-access framework.<sup>231</sup> The Court's one-off contention that its “decision is entirely in keeping with the ‘now-settled approach’ that state regulations ‘impos[ing] “severe burdens” on speech . . . [must] be narrowly tailored to serve a compelling state interest,’” however, is not dispositive that this was the test the Court applied.<sup>232</sup> Indeed, apart from this footnote, the traditional strict scrutiny language does not appear at all in the majority opinion.<sup>233</sup>

This colloquy footnote, using quotation marks around “now settled” when referring to Justice Thomas's concurrence in the judgment,<sup>234</sup> serves merely to put Justice Thomas and lower courts at ease. The footnote states that the Court's *American Constitutional Law Foundation* opinion did not overrule decades of earlier precedent—it was not a definitive declaration that strict scrutiny is the applicable standard in cases involving a severe burden on core political speech.<sup>235</sup>

Because of the great weight given to footnote twelve, most of the majority-view circuits have cited to Justice Thomas's concurrence, which explicitly outlines strict scrutiny as the applicable standard.<sup>236</sup> Indeed, if one assumes that “strict scrutiny” and “exacting scrutiny” are interchangeable terms, Justice Thomas's opinion provides a clear, rigid, and concise framework

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227. *See id.* at 186.

228. *See supra* notes 73–74, 194–200 and accompanying text.

229. *See supra* notes 95–101 and accompanying text.

230. *See supra* notes 70–77 and accompanying text.

231. *See supra* notes 198–200 and accompanying text.

232. *Am. Constitutional Law Found.*, 525 U.S. at 192 n.12 (alteration in original) (quoting *id.* at 206 (Thomas, J., concurring)); *see supra* Part I.B.2.

233. *Am. Constitutional Law Found.*, 525 U.S. at 192 n.12 (alteration in original) (quoting *id.* at 206 (Thomas, J., concurring)).

234. *Id.*

235. *See* Kurt Wittenberg, *Anderson v. Celebrezze: Ballot Access and the Due Process Clause—an Alternative to Equal Protection Analysis*, 33 DEPAUL L. REV. 411, 428 (1984) (noting “the Court's apparent unwillingness to overrule prior ballot-access cases and its preference for distinguishing them beyond sense and recognition”).

236. *Am. Constitutional Law Found.*, 525 U.S. at 207 (Thomas, J., concurring); *see supra* note 200.

through which lower courts can analyze similar restrictions to those at issue in *American Constitutional Law Foundation* and *Grant*.

Because of this reading of the opinion, many circuits seem to suggest that footnote twelve somehow transforms Justice Thomas's concurrence into an opinion that more concisely explains the Court's holding. It is important to note, however, that Justice Thomas's view was solely his own, and he explicitly concurred only in the judgment.<sup>237</sup> Attractive as Justice Thomas's summary of the ballot-access framework may be in its simplicity, lower courts' reliance on his opinion is misplaced.

The *American Constitutional Law Foundation* majority peppered its opinion with several references to the precedents of other cases that weighed ballot-access restrictions under multiple standards of review, including the more ad hoc balancing test from *Anderson*.<sup>238</sup> Even if the *American Constitutional Law Foundation* Court stated that "exacting scrutiny" was the appropriate standard of review for the registration requirement, this could have been an indication of favoring a more flexible and evenhanded approach to weighing the restrictions.<sup>239</sup> Justice Ginsburg's majority opinion, although it featured inconsistent precedents from prior cases, spanned the Court's wide ideological gap and gained the support of four other Justices.<sup>240</sup> Because the majority opinion is controlling doctrine, it merits a more careful examination by lower courts than it has received.

Instead, the most logical way for lower courts to apply *American Constitutional Law Foundation* would be to rely on the balancing test from *Anderson* to weigh the "character and magnitude" of the burdens imposed on the plaintiff.<sup>241</sup> Then, depending on the level of the "burden," the courts should apply "exacting" scrutiny in cases involving severe or heavy burdens and "rational basis" review to those with lesser burdens. The definition of "exacting scrutiny" should then involve its own sliding-scale test of sorts by using language from traditional intermediate scrutiny for "severe" burdens and reserving the language from traditional strict scrutiny for the most blatant cases of infringement where the plaintiff has demonstrated a concrete and egregious burden on her rights. The Court does this sort of leveled "sliding scale" already, even though it has not done so explicitly—there are no definitive criteria for finding a "severe burden" on speech.<sup>242</sup> Melding the

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237. See *supra* note 89.

238. *Am. Constitutional Law Found.*, 525 U.S. at 187, 192.

239. See *supra* notes 70–77 and accompanying text. Indeed, the *American Constitutional Law Foundation* majority explicitly outlined "exacting scrutiny" as the appropriate standard of review for another of the contested Colorado restrictions and defined the term using the "substantially related to important governmental interests" language of traditional intermediate scrutiny. See *Am. Constitutional Law Found.*, 525 U.S. at 201–02 (citing *Buckley v. Valeo*, 424 U.S. 1, 66–68, 84 (1976) (per curiam)).

240. See *supra* note 89.

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

242. See Joshua A. Douglas, Note, *A Vote for Clarity: Updating the Supreme Court's Severe Burden Test for State Election Regulations That Adversely Impact an Individual's Right to Vote*, 75 GEO. WASH. L. REV. 372, 373 (2007) (noting that the Court's process of determining whether a burden is severe "is nebulous and unclear, resulting in vague decisions that fail to distinguish between constitutional and unconstitutional state election regulations").



standards together in this way, as in *American Constitutional Law Foundation* and *Grant*, would provide some guidance to lower courts, while allowing the flexibility to achieve the right result for each individual restriction.<sup>243</sup>

While this proposed approach would require further review and testing, it fits within the Court’s earlier framework while recognizing the reality that different regulatory schemes across state lines “make[] it difficult to rely heavily on precedent in evaluating such restrictions.”<sup>244</sup> The proposed approach offers a way to avoid reliance on rigid tiered scrutiny, which is better suited to the Court’s equal protection framework, or on the *Anderson* balancing test, which has been criticized as too loosely defined to offer any meaningful guidance for courts on how to rule.<sup>245</sup> This combined standard would solve the Court’s consistency problem, while focusing the analysis back to the root question of ballot-access cases—whether the regulatory interests of the state sufficiently justify the burden on individual constitutional rights.

## 2. Recalibrating the “Sliding Scale”: A Twenty-First Century Understanding of State Interests and Burdens on Political Speech

In addition to emphasizing flexibility and individualized balancing in the Court’s standard of review, tribunals should also reexamine the precise state and individual interests balanced under this approach. It is crucial for courts not only to renew their efforts to return to the root questions of ballot-access litigation under the First Amendment but also to give both the state and individual interests an appropriate amount of weight in the actual context of twenty-first century elections.

Following the analysis of the *American Constitutional Law Foundation* Court, the majority-view circuits reasoned that residency and voter eligibility restrictions constitute a “severe burden” on core political speech because they drastically reduce the number of individuals able to convey the plaintiffs’ message.<sup>246</sup> This analysis of the burden assumes that these requirements would impact plaintiffs and circulators in similar ways to how the registration requirement impacted state residents of Colorado who were not registered to vote. The majority-view circuits, therefore, fundamentally broaden the scope of *American Constitutional Law Foundation*’s holding by misconstruing the scope of the “denominator” for this test.<sup>247</sup>

A close reading of the *American Constitutional Law Foundation* majority opinion shows that the Court meant the burden test to apply to reducing the

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243. For further analysis of a similar proposed test, see E. Jon A. Gryskiewicz, Note, *Williams v. Rhodes: How One Candidate, One State, One Week, and One Justice Shaped Ballot Access Law*, 28 J.L. & POL. 185, 226–28 (2013).

244. *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004).

245. See, e.g., Young, *supra* note 50, at 213 (“[A] balancing approach, similar to that employed in *Anderson*, would also be difficult for the Supreme Court, and especially lower courts, to effectively employ in subsequent cases with any consistency.”).

246. See *supra* notes 201–02 and accompanying text.

247. See *supra* Part II.B.

number of messengers *in the state*, as opposed to reducing the number of messengers *in the abstract*, as the majority-view circuits contend.<sup>248</sup> Tailoring the burden analysis to state residents focuses on the limits placed on the speech rights of citizens with a demonstrable stake in the outcome of the petitioning process and the electoral politics of their state of residence.

Furthermore, the *Grant* Court, which accepted that a state restriction imposed a severe burden by “limit[ing] the number of voices” able to convey a political message, analyzed the payment ban in the context of state residents.<sup>249</sup> The unanimous *Grant* Court expressed concern that the restriction “limit[ed] [plaintiffs’] ability to make the matter the focus of statewide discussion.”<sup>250</sup> The majority-view circuits’ far broader application of the burden analysis fundamentally misunderstands this notion, seemingly applying the test in an abstract or universal context.

As Justice O’Connor noted in her *American Constitutional Law Foundation* opinion, even though petition circulation is unquestionably political speech, the issue whether a burden is “severe” is by itself an ambiguous question without a clear answer.<sup>251</sup> The Court must develop better criteria for determining whether a restriction in fact imposes a “severe” burden on core political speech, such as a list of determinative factors.<sup>252</sup>

Even if the majority-view circuits properly weighed the burden on the plaintiffs’ core political speech as severe, these circuits also gave insufficient weight to the states’ asserted interests.<sup>253</sup> Given the challenges inherent in administering elections in the twenty-first century,<sup>254</sup> courts should give additional weight to the states’ interest in protecting the integrity of the democratic process. The technological, legal, and cultural changes of the twenty-first century have allowed the framers’ worst fears about corrupting influence and foreign interference in American democracy to take root, which underscores the paramount need for states to uphold their constitutional duty to maintain the integrity of elections.<sup>255</sup>

While undervaluing the state’s interest in protecting the integrity of elections, many courts equate this interest with, and give great weight to, the

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248. *Compare, e.g.,* *Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008) (noting that Arizona’s in-state-residency requirement for circulators “excludes from eligibility all persons who support the candidate but who . . . live outside the state of Arizona. Such a restriction creates a severe burden.”), *with* *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 193–96 & n.15 (1999) (describing the potential impact of Colorado’s registration requirement on individuals who resided in and were eligible to vote in Colorado but were not registered voters).

249. *Meyer v. Grant*, 486 U.S. 414, 422–23 (1988).

250. *Id.* at 423 (emphasis added).

251. *See Am. Constitutional Law Found.*, 525 U.S. at 215–18 (O’Connor, J., concurring in part and dissenting in part).

252. Joshua Douglas, for instance, has proposed that if the challenged restriction affects more than 10,000 voters, or, alternatively, more than 5 percent of the voters in the jurisdiction, the regulation should be considered “per se severe.” Douglas, *supra* note 242, at 386.

253. *See supra* Part II.B.

254. *See supra* Part I.C.

255. *See supra* notes 22–23, 128–39 and accompanying text; *see also* Lily Rothman, *Fear of Foreign Intervention in U.S. Politics Goes Back to the Founding Fathers*, TIME (Dec. 17, 2016), <http://time.com/4604464/foreign-interference-history/> [<https://perma.cc/LLL2-ZP9L>].

state’s interest in preventing “fraud.”<sup>256</sup> Preventing fraud, however, connotes protecting against a more specific, and blatant, corruption of the electoral process than the general interest in election integrity. States have previously used this interest in preventing fraud to justify legislation that has the effect, if not the purpose, of targeting certain groups of voters.<sup>257</sup> If given too much weight, this asserted interest has the potential to allow states to further use their election regulation powers for improper—if not outright discriminatory—purposes. While courts should not disregard this interest, they must perform a more intensive analysis of the state’s claims. For example, they could require a demonstration of actual fraud or abuse prevented by the challenged statute.<sup>258</sup>

Some courts have also given short shrift to a state’s interest in ensuring that voters within the state decide the outcomes of elections.<sup>259</sup> Although some of the majority-view circuits have held that this interest is not legitimate or compelling, this contention overlooks the possibility of well-financed outside groups corrupting a state’s ballot process.<sup>260</sup> While the Seventh and Second Circuits have found this beneficial,<sup>261</sup> the idea of outsiders bringing in novel or originally unpopular ideas is a quaint fantasy and does not reflect the real potential of national interests essentially purchasing the right to have their favored initiative questions and candidates placed on the ballot in any state. There is a real possibility of these groups using their resources to access a state’s ballot in a way that less well-funded, local grassroots interests could not.

Because of this, a state has a strong interest in candidates and initiative proponents demonstrating a “modicum of support” in the community before being allowed access to the ballot.<sup>262</sup> This principle has been integral to elections since the founding of the republic and is embedded in the structure of both state and federal elections.<sup>263</sup> Just as progressive reformers sought to implement the ballot initiative as a way for state residents to reclaim their government from well-funded interest groups, the framers gave states control over elections to avoid favoring the wealthy and privileged in American society.<sup>264</sup>

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256. See, e.g., *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (discussing a need for “integrity [in] our electoral processes” as well as with concerns about “voter fraud”); *Nader v. Brewer*, 531 F.3d 1028, 1037 (9th Cir. 2008) (“A state’s interest in ensuring the integrity of the election process and preventing fraud is compelling.” (citing *Purcell*, 549 U.S. at 4)).

257. See *supra* note 145 and accompanying text.

258. This is distinguished from the related state interest in ensuring that circulators are answerable to that state’s subpoena power, which is properly considered compelling. The ability of states to easily reach individuals working within their electoral systems is more closely in line with the broader interest in electoral integrity. See *supra* note 45 and accompanying text.

259. See *supra* notes 183–84, 207–12 and accompanying text.

260. See Whyte, *supra* note 147.

261. See *supra* notes 183–84, 207–12 and accompanying text.

262. See *supra* note 33.

263. See *supra* Part I.A.

264. See *supra* Part I.A.

Of course, each contested restriction under the *American Constitutional Law Foundation* framework has nuances that require both the interests of the state and burdens on the plaintiffs to be calculated in an individualized manner. While the analysis of these burdens and interests will vary depending on the context in which they are raised, it is important for courts to weigh these factors in a way that reflects both the reality of elections in the twenty-first century and the framers' intent in establishing the constitutional structure of election law.

*B. Practical Applications: The Differing Results for Residency and Voter Eligibility Requirements*

Courts that have weighed the constitutionality of voter eligibility and residency requirements have treated the two types of requirements as indistinguishable from one another for purposes of constitutional analysis.<sup>265</sup> Under the standard proposed in this Note, however, the analysis should be conducted differently, as each presents unique burdens and interests that must be properly considered. Part III.B.1 conducts a constitutional analysis of residency requirements and concludes that they should be upheld as a reasonable exercise of the state's regulatory authority. Part III.B.2 undertakes a similar analysis for voter eligibility requirements and finds them to be an unconstitutional infringement on freedom of speech.

1. Residency Requirements:  
A Logical Place to Draw the Constitutional Line

The *American Constitutional Law Foundation* Court maintained a "sphinx-like silence" on the constitutionality of state-residency requirements.<sup>266</sup> Although the clear majority of circuits that have heard challenges to state-residency requirements for petition circulators have found them to be an unconstitutional infringement on First Amendment rights, this analysis has come from the flawed notion that traditional strict scrutiny is the applicable standard of review.<sup>267</sup>

The Eighth Circuit's understanding of the burdens on the plaintiffs, although sparse on analysis, is the most correct given the challenges of twenty-first century election law. Rather than assuming that limiting petition circulators to state residents is a de facto severe burden by reducing the number of available messengers, courts should conduct their own individualized sliding-scale analysis of each contested restriction to determine the burdens imposed on the plaintiffs. By the Eighth Circuit's understanding, the North Dakota state-residency requirement did not impose a "severe burden" on core political speech because there were hundreds of

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265. Compare, e.g., *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316–17 (4th Cir. 2013) (analyzing the constitutionality of a voter-eligibility requirement), with *Nader v. Brewer*, 531 F.3d 1028, 1037 (9th Cir. 2008) (analyzing the constitutionality of a residency requirement).

266. See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 228 (1999) (Rehnquist, C.J., dissenting).

267. See *supra* Part III.A.1.

thousands, if not millions, of potential circulators available statewide who would be able to assist any plaintiff in circulating petitions.<sup>268</sup>

As noted by the Eighth Circuit, nonresidents who have a political interest in candidates and initiative questions in other states still have many effective ways to assert their views and influence the process.<sup>269</sup> The only limit placed on their speech by these restrictions is that nonresidents cannot physically collect the required signatures.<sup>270</sup> Such a requirement, although certainly burdensome for petition circulators, does not constitute a “severe” restriction meriting strict scrutiny.

Because a residency requirement would not impose a severe restriction on political speech, a lesser form of scrutiny is merited.<sup>271</sup> Under either the “intermediate” form of “exacting” scrutiny or a rational basis review, such a restriction is sustained by the state’s regulatory interest.<sup>272</sup>

As the Eighth Circuit observed in *Jaeger*, a residency requirement is tailored to multiple state interests.<sup>273</sup> And, as mentioned previously, a state-residency requirement is clearly tied to the state’s interest in protecting integrity in the electoral process and ensuring that petition circulators are able to answer to state subpoena power.<sup>274</sup> Even if there are technically other options that are more “narrowly tailored” to that interest, the alternatives posited by the majority-view circuits would be significantly more difficult for the states to administer.

Furthermore, while signing a petition does not necessarily constitute an endorsement of a candidate or initiative question,<sup>275</sup> collecting signatures on behalf of that candidate or initiative certainly does. By requiring circulators—who use their time and energy to secure a place on the ballot for an initiative or candidate—to be residents of the state with an investment in the community, this provision allows a state to effectively ensure that candidates have enthusiasm and support at the state level.

Additionally, residency requirements significantly advance the state’s interest in local administration of its own elections. Allowing outside influences to gather signatures would invariably tip the scales in favor of candidates and ballot issues that are supported by well-funded national interests outside the state.<sup>276</sup> Opening up the petitioning process to all U.S. citizens could allow these interests to ship batches of circulators into states and essentially allow money, rather than the people of a state, to dictate who is on the ballot.

Finally, the Supreme Court indicated in *American Constitutional Law Foundation* that it viewed a residency requirement to be a more tailored (and

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268. See *supra* notes 169–72 and accompanying text.

269. See *supra* notes 179–81 and accompanying text.

270. See *supra* notes 179–81 and accompanying text.

271. See *supra* note 79.

272. See *supra* note 79.

273. See *supra* notes 177, 182 and accompanying text.

274. See *supra* Part III.A.2.

275. See RASKIN, *supra* note 33, at 110.

276. See *supra* Part III.A.2.

thus more constitutionally acceptable) approach for asserting a state interest than the Colorado registration requirement it ultimately struck down.<sup>277</sup> These statements indicate the Court's views on the constitutionality of residency requirements and should provide some direction to lower courts on how to properly frame the issue. While the Eighth and Second Circuits incorporated these statements into their opinions on this question, the majority-view circuits have given these statements little to no weight.<sup>278</sup> These statements should certainly not be the definitive element in analyzing the constitutionality of such restrictions, but lower courts would be remiss to ignore these indications from the Supreme Court.

It is possible that a state-residency requirement could be held unconstitutional in certain contexts even under this individualized balancing approach.<sup>279</sup> Indeed, the aim of this new approach is to allow for an ad hoc determination of a statute's constitutionality based on the individual circumstances and factors at play in a given state. The differences across state lines "make[] it difficult to rely heavily on precedent in evaluating such restrictions, because there is great variance among the states' schemes."<sup>280</sup> As a general rule, however, a mere state-residency requirement for petition circulators does not pose the logistical hurdles and limitations on interactive political speech in the way that even other common restrictions might.

Given the history of states arbitrarily restricting who is eligible to participate in their electoral process and the recent efforts by several states to suppress votes, many advocates will find the argument for allowing states to limit circulators to state residents to be counterintuitive.<sup>281</sup> Limiting circulators to state residents, however, helps states to protect, among other things, important election integrity interests while minimizing the potential harm to First Amendment rights. A state-residency requirement does not constitute a severe burden on core political speech and may also serve as a bulwark against well-moneyed interests further corrupting the electoral process at the state level. From a legal, historical, and policy perspective, the Eighth Circuit's application of *American Constitutional Law Foundation* to state-residency requirements merits a more thorough examination before being cast aside in favor of the more popular view.

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277. See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 211 (1999).

278. Compare *supra* notes 161–62, with *supra* Part II.B.

279. An individualized burden analysis might vary depending on the type and scope of petition being circulated. Cases concerning petitions of national importance, such as for presidential candidates or constitutional amendments, might differ from cases involving petitions solely concerning the people of a specific state. See DIMINO ET AL., *supra* note 30, at 690.

280. *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004).

281. See, e.g., Editorial, *Voter Suppression Is the Civil Rights Issue of This Era*, WASH. POST (Aug. 19, 2017), [https://www.washingtonpost.com/opinions/voter-suppression-is-the-civil-rights-issue-of-this-era/2017/08/19/926c8b58-81f3-11e7-902a-2a9f2d808496\\_story.html](https://www.washingtonpost.com/opinions/voter-suppression-is-the-civil-rights-issue-of-this-era/2017/08/19/926c8b58-81f3-11e7-902a-2a9f2d808496_story.html) [<https://perma.cc/G8PV-9ARR>].

## 2. “Voter Eligibility” Requirements: An Unconstitutional Burden on Political Speech

An individualized balancing approach draws attention to another important distinction that courts have so far overlooked—the difference between residency and voter eligibility requirements.<sup>282</sup> While mostly treated as indistinguishable by the majority-view circuits via the same broad legal analysis, the two types of restrictions present significant differences in the burdens and state interests advanced. Given the long history of states restricting who is “voter eligible” based on race, this distinction should not go unnoticed.<sup>283</sup>

While no longer the overt disqualifications of the Jim Crow era, the legacy of states restricting who is “voter eligible” on the basis of race persists, with many states requiring that individuals with felony convictions lose their status as eligible voters.<sup>284</sup> In the years since *American Constitutional Law Foundation*, both the legal profession and the general public have grown increasingly aware of the racial disparities in American prison populations and the inherent racial bias in the criminal justice system, with some acknowledging the modern American penal system as an extension of slavery.<sup>285</sup>

Concurrently, and perhaps relatedly, societal attitudes about recreational drug use and drug addiction have changed dramatically since 1999.<sup>286</sup> It is not inconceivable, therefore, that a person with a felony drug conviction might wish to circulate petitions for a candidate who pledges to fight the opioid epidemic or for a ballot initiative to legalize recreational marijuana at the state level.<sup>287</sup> In this context, such a person might have standing to challenge a voter eligibility requirement as unconstitutional and could show a severe burden on core political speech that reduces the number of voices

282. See *supra* notes 37–42 and accompanying text.

283. See generally ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2015) (outlining the history of the voting rights movement from the Civil Rights era through the present day).

284. See *supra* note 40; see also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 159 (rev. ed. 2012) (describing felon-disenfranchisement laws as “rules designed to make voting a practical impossibility for a group defined largely by race”); Brent Staples, Opinion, *The Racist Origins of Felon Disenfranchisement*, N.Y. TIMES (Nov. 18, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html> [<https://perma.cc/29CM-VJ69>].

285. See ALEXANDER, *supra* note 284, at 185–220 (describing the disproportionate effects of mass incarceration on communities of color and specifically black men); JOHN F. PFAFF, LOCKED IN 45–50 (2017) (exploring possible causes of racial disparities in state prisons); see also 13TH (Kandoo Films 2016) (examining the interconnected history of race, slavery, and mass incarceration in the United States).

286. See generally PEW RESEARCH CTR., AMERICA’S NEW DRUG POLICY LANDSCAPE (2014), <http://assets.pewresearch.org/wp-content/uploads/sites/5/legacy-pdf/04-02-14%20Drug%20Policy%20Release.pdf> [<https://perma.cc/8NF3-JEGD>].

287. While the debate over whether convicted felons forfeit speech rights has not been settled, it certainly passes the laugh test. See generally Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111 (2013) (analyzing the speech and voting rights of convicted felons through the lens of the First Amendment and equal protection).

eligible to circulate petitions statewide under the *American Constitutional Law Foundation* framework in a way that a mere residency requirement would not.<sup>288</sup>

If an individual could demonstrate such a burden, this type of restriction may actually present a situation that merits strict scrutiny.<sup>289</sup> Throughout the Court's equal protection jurisprudence, strict scrutiny has been applied almost exclusively in cases involving racial discrimination.<sup>290</sup> A state would be unable to demonstrate that a voter eligibility requirement would be sufficiently narrowly tailored to its asserted interests, especially because a residency requirement would achieve the exact same objectives without this discriminatory targeting of former felons. While residency requirements are a justifiable imposition on core political speech in twenty-first century America, it is apparent from examining the context of eligibility requirements that they constitute an undue, and potentially discriminatory, burden on speech against a specific class of potential circulators.

*C. Escaping the Coming Avalanche by "Skiing to the Bottom"  
of the Slippery Slope: Revisiting Chief Justice Rehnquist's  
Fear of the "Sphinx-Like Silence"*

In suggesting this return to a more individualized balancing approach, it is important to mention that Chief Justice Rehnquist predicted many of these issues in his scathing *American Constitutional Law Foundation* dissent.<sup>291</sup> The majority-view circuits' broad application of the *American Constitutional Law Foundation* test, which holds that any restriction reducing the number of messengers constitutes a severe burden on political speech<sup>292</sup> and is thus subject to strict scrutiny, now threatens to consume even the most reasonable restrictions on petition circulation.

To prevent the majority line of circuit cases from completely swallowing the states' ability to pass legitimate ballot-access restrictions, courts should draw a firm distinction between what is constitutionally permissible and what is not. It is apparent that Chief Justice Rehnquist's "slippery slope" prediction is no longer a mere "familiar parade of dreadfuls"<sup>293</sup> but has materialized in the years since *American Constitutional Law Foundation*.<sup>294</sup>

Since 2001, all circuits considering cases on this issue have struck down eligibility and residency requirements.<sup>295</sup> This has resulted from a broad understanding of the *American Constitutional Law Foundation/Grant* view of a "severe burden" and a resulting overuse of strict scrutiny.

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288. The issue and logistics of how a formerly incarcerated individual could bring a claim on such a distinction is beyond the scope of this Note.

289. See *supra* Part III.A.1.

290. See CHEMERINSKY, *supra* note 56, at 567.

291. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 226–33 (1999) (Rehnquist, C.J., dissenting); see also *supra* notes 111–24.

292. See *supra* Part II.B.

293. *Am. Constitutional Law Found.*, 525 U.S. at 194–95 n.16.

294. See *supra* Part II.B.

295. See *supra* Part II.B.



Chief Justice Rehnquist predicted the *American Constitutional Law Foundation* majority’s logic would lead to courts finding restrictions on “children and foreigners” circulating petitions to be unconstitutional.<sup>296</sup> While the *American Constitutional Law Foundation* majority dismissed the Chief Justice’s “unfounded”<sup>297</sup> alarmism and accused him of “skiing to the bottom” of the slippery slope, the majority-view circuits’ broad application of the *American Constitutional Law Foundation* test suggests that this fear is no longer farfetched. The majority-view circuits have found that any restriction that reduces the number of messengers, in the abstract, is subject to strict scrutiny, where the state’s burden is “well-nigh insurmountable.”<sup>298</sup> The next logical step for these courts would be to eliminate “reasonable” restrictions such as age and U.S. citizenship requirements for petition circulators, as both inarguably greatly reduce the number of messengers able to carry petitions under the majority-view circuits’ broad interpretation.<sup>299</sup> Restrictions on age and citizenship are especially ripe to be overturned; foreign nationals and minors have been found to have equal rights to political speech and expression under the First Amendment.<sup>300</sup>

Chief Justice Rehnquist’s *American Constitutional Law Foundation* dissent was also the first to note the important difference between residency and eligibility requirements,<sup>301</sup> although his opinion is certainly in keeping with his reputation of issuing “a somber drumbeat of rejections of the claims of blacks, women, workers and criminal defendants.”<sup>302</sup> Chief Justice Rehnquist argued that eligibility restrictions were the preferable state policy because they would keep felons and drug dealers from circulating petitions in communities.<sup>303</sup> Although framed in the context of his trademark

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296. See *supra* note 123 and accompanying text.

297. *Am. Constitutional Law Found.*, 525 U.S. at 194–95 n.16.

298. See *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

299. This Note discusses restrictions on minors and foreign citizens as examples solely because Chief Justice Rehnquist used them to argue that all restrictions on petition circulation would be consumed by the majority-view circuits’ understanding of *American Constitutional Law Foundation*. This Note does not offer an opinion on whether these types of restrictions on the petitioning process are in fact “reasonable.”

300. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 231–32 (2003) (holding that a prohibition on political contributions by minors violated the First Amendment); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511–13 (1969) (holding that minor students possess a right to engage in political expression); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (“Freedom of speech . . . is accorded aliens residing in this country.”).

301. See *supra* notes 114–19.

302. Adam Cohen, *The Justice Dissents: ‘The Partisan: The Life of William Rehnquist,’* by John A. Jenkins, N.Y. TIMES (Nov. 16, 2012) (book review), <http://www.nytimes.com/2012/11/18/books/review/the-partisan-the-life-of-william-rehnquist-by-john-a-jenkins.html> [https://perma.cc/YDF7-LNR4]; see also JOHN A. JENKINS, *THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST* 71 (2012) (“Rehnquist certainly espoused views and exhibited behavior . . . that [were] racist even by the norms of that place and time.”); David Savage, *The Rehnquist Court: Bill Rehnquist Was Once Considered an Extremist. Now His Views Almost Always Become the Law of the Land.*, L.A. TIMES (Sept. 29, 1991), [http://articles.latimes.com/print/1991-09-29/magazine/tm-4832\\_1\\_rehnquist-court](http://articles.latimes.com/print/1991-09-29/magazine/tm-4832_1_rehnquist-court) [https://perma.cc/7HTX-2QBV] (“In the early 1950s, he did not think the segregation of black school children was unconstitutional. In the 1970s, he did not think discrimination against women violated the Constitution. Now, he insists that any discrimination against white males violates the Constitution.”).

303. See *supra* notes 111, 120 and accompanying text.

contempt for drug dealers and convicted felons,<sup>304</sup> Chief Justice Rehnquist's well-reasoned analysis of the distinction between these two types of circulator restrictions provides twenty-first century courts and scholars with the best place to draw the constitutional line. By heeding the Chief Justice's legal reasoning and predictions, courts can prevent reasonable ballot-access restrictions from being consumed in the avalanche about to overtake the slippery slope.

#### CONCLUSION

The Supreme Court's decision in *American Constitutional Law Foundation* further complicated an inconsistent and confusing area of the law. The majority of circuit courts hearing challenges to residency and voter eligibility requirements under this framework have understandably searched for clarity where none exists, which has resulted in their striking down state-residency and voter eligibility requirements under the First Amendment. The Eighth Circuit, by contrast, has better understood the nuances and individual balancing provisions of *American Constitutional Law Foundation*. The Court's use of the flexible and ambiguous "exacting" scrutiny standard in *Grant*, seemingly affirmed and applied again in *American Constitutional Law Foundation*, indicates that the Court favored greater flexibility in weighing the state's interests against the infringement on individual First Amendment rights. For a number of historical and policy reasons, as well as the potential for the majority-view circuit decisions to consume even the most reasonable ballot-access laws, a state-residency requirement represents the logical constitutional line to draw in balancing these two competing interests.

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304. See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 231 (1999) (Rehnquist, C.J., dissenting) (arguing that concern about the rights of convicted felons "scarcely passes the 'laugh test'"); see also JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 268–69 (2001) (discussing a 1969 memorandum written by the future Chief Justice outlining his "reactionary thinking" on criminal justice issues); Savage, *supra* note 302 ("He had no sympathy for criminal defendants—none. When you talked about the problem of the cities or the poor or blacks, it was clear he had no understanding. It was a universe he didn't comprehend." (quoting law professor and former Supreme Court clerk Donald Trautman)).