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## Burdick v. Takushi: Hawaii's Ban on Write-In Voting is Constitutional

Elizabeth E. Deighton

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## NOTE

### *BURDICK v. TAKUSHI:* HAWAII'S BAN ON WRITE-IN VOTING IS CONSTITUTIONAL

#### I. INTRODUCTION

In *Burdick v. Takushi*,<sup>1</sup> the Supreme Court held that Hawaii's ban on write-in voting, when taken as part of the State's comprehensive election scheme, does not violate an individual's constitutional rights to freedom of expression or freedom of association as they pertain to voting rights.<sup>2</sup>

This Note gives an overview of the case law as it pertains to voting rights and its relationship to the First Amendment, and analyzes the Supreme Court's application of that law to the specific facts in *Burdick*.

#### II. FACTS

Currently Hawaii's election laws do not provide for the casting of write-in votes in either primary or general elections.<sup>3</sup> Alan Burdick, dissatisfied with the candidates presented on the 1986 ballot, challenged these provisions in the United States District Court for the District of Hawaii.<sup>4</sup> The District Court sustained

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1. 112 S. Ct. 2059 (1992) (per White, J., joined by Rehnquist, C.J., and O'Connor, Scalia, Souter, and Thomas, JJ.; dissent by Kennedy, J., joined by Blackmun and Stevens, JJ.).

2. *Id.* at 2061.

3. *Id.* at 2062. Burdick claimed his constitutional rights to freedom of expression and association were violated, and he attacked Hawaii's election laws on both state and federal constitutional grounds. *Id.*

4. *Id.* at 2061. Three questions were certified to the Hawaii Supreme Court by the district court:

his challenge and held the failure to accommodate write-in voting constituted a violation of Burdick's rights of freedom of expression and association.<sup>5</sup>

The Ninth Circuit reversed, holding that Hawaii's ban on write-in voting did not violate the Constitution.<sup>6</sup> The Supreme Court granted Burdick's petition for a writ of certiorari<sup>7</sup> and affirmed.<sup>8</sup>

### III. BACKGROUND OF VOTING RIGHTS IN THE UNITED STATES

#### A. HISTORICAL CONTEXT

The right to vote is derived from the United States Constitution.<sup>9</sup> The First Amendment<sup>10</sup> has been interpreted as assur-

1. Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
2. Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
3. Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

*Id.* at 2062. The court's answer to all three questions was no. *Id.*

5. *Burdick v. Takushi*, 737 F. Supp. 582, 591 (D. Haw. 1989).

6. *Burdick v. Takushi*, 937 F.2d 415, 417 (9th Cir. 1991). "[The ban on write-in voting does not] impermissibly infringe [upon a voter's rights] in light of the ease of access to Hawaii's ballots, the alternatives available to Burdick for expressing his political beliefs, the State's broad powers to regulate elections, and the specific interests advanced by the State . . ." *Id.* at 420-21.

For an analysis of the Ninth Circuit's decision, see Elizabeth E. Deighton, Summary, *Burdick v. Takushi: Upholding Hawaii's Ban on Write-in Voting*, 22 Golden Gate U. L. Rev. 115 (1991).

7. *Burdick v. Takushi*, 112 S. Ct. 635 (1991).

8. *Burdick v. Takushi*, 112 S. Ct. 2059, 2061 (1992).

9. U.S. CONST. art. I, § 2 provides in part that "the House of Representatives shall be composed of Members chosen every second Year by the People of the several States. . . ." This provision has been interpreted to grant to persons qualified to vote a constitutional right to vote and to have their votes counted. *United States v. Mosley*, 238 U.S. 383, 386 (1915); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The *Wesberry* court also stated that: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Id.*

10. U.S. CONST. amend. I reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

ing citizens' rights to cast a vote effectively and to associate for the advancement of political beliefs;<sup>11</sup> the states may not burden these rights excessively.<sup>12</sup> Under the Fourteenth Amendment no state may deprive any person of any rights of United States citizens without due process of law;<sup>13</sup> this Amendment has been interpreted to incorporate First Amendment rights.<sup>14</sup>

Until the late 1800's, all ballots in the United States were cast as write-in ballots.<sup>15</sup> Voters prepared their own ballots or used pre-printed ones prepared by political parties. Because there were no state-imposed restrictions on whose name could appear on the ballot, individuals could always vote for the candidates of their choice.<sup>16</sup>

The system of state-prepared ballots, known as the Australian ballot system, was introduced in the United States in 1888.<sup>17</sup> State-prepared ballots were considered a progressive reform to reduce fraudulent election practices.<sup>18</sup> However, the new ballot system also operated to constrict voter choice of candidates.<sup>19</sup> In response to this problem, several early state courts recognized a right to cast write-in votes.<sup>20</sup> These early decisions

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speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances."

11. *Burdick*, 937 F.2d at 418. See also *NAACP v. Alabama*, 357 U.S. 449 (1958); *Williams v. Rhodes*, 393 U.S. 23 (1968).

12. *Burdick*, 937 F.2d at 418; *Williams*, 393 U.S. at 30-31. The *Williams* court examined Ohio election laws that made it virtually impossible for new political parties, or old parties with few members, to appear on the ballot for presidential electors. *Id.* at 30. The court held that the election laws resulted in a denial of equal protection and were unconstitutional. *Id.* at 31.

13. U.S. CONST. amend. XIV, § 2 reads, in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

14. See, e.g., *Williams*, 393 U.S. at 30-31.

15. See generally L.E. Fredman, *The Australian Ballot: The Story of an American Reform* (1968).

16. *Id.*; *Burdick*, 112 S. Ct. at 2070 (Kennedy, J., dissenting).

17. *Burdick*, 112 S. Ct. at 2070 (Kennedy, J., dissenting); Fredman, *supra* note 15.

18. For example, the pre-printed ballots offered by political parties had often been in distinctive colors so that the party could determine whether one who had sold his vote had used the right ballot. Fredman, *supra* note 15, at 22.

19. See Fredman, *supra* note 15; *Burdick*, 112 S. Ct. at 2070 (Kennedy, J., dissenting).

20. See, e.g., *Sanner v. Patton*, 40 N.E. 290, 292-93 (Ill. 1895) (if write-in voting is

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emphasized the voters' choice as paramount to administrative convenience; some voters cannot vote for the candidate of their choice without a write-in option.<sup>21</sup>

## B. MODERN DECISIONS

1. *Scope*

In *Williams v. Rhodes*<sup>22</sup> the Supreme Court recognized the interrelationship between the freedom of association and the right to vote.<sup>23</sup> Although the Court did not explicitly define the nature of this interrelationship,<sup>24</sup> it suggested that the freedom of association to form political parties or to advance political beliefs would be meaningless without some outlet at the polls.<sup>25</sup> The freedom of association may also refer directly to the voting process through the specific act of voting, as each citizen "associates" with the party or candidate of his or her choice.<sup>26</sup>

In recent cases, whenever a state election scheme has been challenged on First Amendment grounds, the Court's analysis has consistently focused on the issue of freedom of association.<sup>27</sup>

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prohibited, the voter is deprived of the right of exercising his own choice; where this right is taken away "the boasted free ballot becomes a delusion."); *Patterson v. Hanley*, 68 P. 821, 823 (Cal. 1902) (it seems to be agreed that the voter must be allowed the privilege of casting his vote for any person for any office by writing his name in the proper place.); and *Oughton v. Black*, 61 A. 346, 348 (Pa. 1905) (without a provision for the voter to make up an entire ticket of his or her own choice, the election as to that voter will not be equal, for that voter is unable to express his or her own individual will in his or her own way.).

But see *Lubin v. Panish*, 415 U.S. 709, 716 (1974) where the Court recognized that not every voter can be assured that the candidate of his or her liking will be on the ballot.

21. *Burdick*, 112 S. Ct. at 2070 (Kennedy, J., dissenting).

22. 393 U.S. 23 (1968).

23. *Williams*, 393 U.S. at 30. The Court stated that: "In the present situation the state laws place burdens on two different, although overlapping, kinds of rights — the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes effectively." *Id.*

24. Interestingly, in a dissenting opinion Justice Brennan explicitly stated: "The right to vote derives from the right of association that is the core of the First Amendment." *Storer v. Brown*, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting).

25. *Williams*, 393 U.S. at 31. See also *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-217 (1986) (voters' associational rights might be affected at the ballot box).

26. *Rosario v. Rockefeller*, 410 U.S. 752, 756 (1972). See also *Tashjian*, 479 U.S. at 217 ("[I]mpingement upon the associational rights of the Party and its members occurs at the ballot box . . .").

27. See *Norman v. Reed*, 112 S. Ct. 698 (1992); *Tashjian*, 479 U.S. at 208; *Munro v.*

The Court has also alluded to the corollary First Amendment freedom of expression as a facet of the act of voting.<sup>28</sup> However, until *Burdick* the Court had not decided any ballot-access case<sup>29</sup> or voting rights case<sup>30</sup> on this ground.<sup>31</sup>

In the past the Supreme Court has recognized the existence of write-in voting as an alternative method of ballot access.<sup>32</sup> However, the Court's appraisal of write-in voting as a constitutional remedy in these circumstances has been inconsistent and nebulous.<sup>33</sup>

## 2. *Level of Scrutiny*

Certain processes govern who may run for office<sup>34</sup> and how elections are conducted.<sup>35</sup> The Supreme Court has consistently

Socialist Workers Party, 479 U.S. 189 (1986); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *American Party of Tex. v. White*, 415 U.S. 767 (1974); *Storer*, 415 U.S. at 724; *Lubin*, 415 U.S. at 709; *Rosario*, 410 U.S. at 752; *Jenness v. Fortson*, 403 U.S. 431 (1971); *Williams*, 393 U.S. at 23.

28. See *Norman*, 112 S. Ct. at 705; *Illinois State Bd. of Elections*, 440 U.S. at 184, 186; *Rosario*, 410 U.S. at 764 (Brennan, J., dissenting); *Jenness*, 403 U.S. at 440.

29. See *Norman*, 112 S. Ct. 698; *Illinois State Bd. of Elections*, 440 U.S. at 173; *Jenness*, 403 U.S. at 431.

30. *Rosario*, 410 U.S. at 752.

31. In one case the Court sustained on freedom of speech grounds a first amendment challenge to a California statute that prohibited political parties from formally endorsing candidates before a primary election. However, this election law did not directly relate to the actual process of voting. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989).

32. See *Anderson*, 460 U.S. at 799, 808; *Storer*, 415 U.S. at 736; *Lubin*, 415 U.S. at 719, 722; *Bullock v. Carter*, 405 U.S. 134, 137 (1972); *Jenness*, 403 U.S. at 438; *Williams*, 393 U.S. at 37.

33. In *Anderson*, 460 U.S. at 799, the majority stated "that a write-in provision . . . would constitute 'an acceptable alternative' appears dubious at best." However, Justice Rehnquist's dissent noted that the Court has never squarely held that write-in votes were inadequate. *Id.* at 808. In an earlier concurrence Justice Blackmun regarded the write-in alternative as acceptable. *Lubin*, 415 U.S. at 722. However, in *Williams*, 393 U.S. at 37, Justice Douglas stated in his concurrence that "write-ins are no substitute for a place on the ballot." *Id.*

34. The United States Constitution contains several limitations on candidates for certain offices. See, e.g., U.S. CONST. art. I, § 2 (congressional candidates restricted by a requirement that each be at least 25 years old with a minimum of seven years citizenship); U.S. CONST. art. II, § 1 (presidential candidates restricted to those at least 35 years old who are natural born citizens).

35. Numerous Supreme Court cases have upheld various restrictions placed upon the election process. See, e.g., *Clements v. Fashing*, 457 U.S. 957 (1982) (incumbent Justice of the Peace denied right to seek election to state legislature, and state and county

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recognized that ballot restrictions may burden two distinct and fundamental rights: (1) the right of individuals to associate for the advancement of political beliefs, and (2) the right of qualified voters to cast their votes effectively.<sup>36</sup>

Initially the Court applied strict scrutiny in its evaluation of restrictions on voting.<sup>37</sup> The Court has demonstrated a preference in recent years towards application of a more relaxed rational basis analysis.<sup>38</sup>

In *Anderson v. Celebrezze*<sup>39</sup> the Supreme Court provided a new analytical process for determining the constitutionality of a specific provision in a state's elections laws under the First and Fourteenth Amendments. First the Court considers the character and magnitude of the injury to the plaintiff's asserted First Amendment rights.<sup>40</sup> Second, the Court identifies and evaluates the State's interests that justify the burden its rule imposes.<sup>41</sup> Finally, balancing these conflicting interests enables the Court

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office holders deemed automatically resigned if they run for another elective office); *Storer*, 415 U.S. at 724 (state can require candidate to sever affiliation with political party one year prior to election in order to run as independent candidate); *American Party of Tex. v. White*, 415 U.S. 767 (1974) (state can deny place on ballot to frivolous candidate by requiring candidates to "demonstrate a significant, measurable quantum of community support").

36. *Williams*, 393 U.S. at 30; *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986).

37. *Williams*, 393 U.S. at 31. "When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest." *Illinois State Bd. of Elections*, 440 U.S. at 184; *American Party of Tex.*, 415 U.S. at 780-781; *Storer*, 415 U.S. at 736.

38. *Burdick*, 112 S. Ct. at 2063.

[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest. . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently . . . Accordingly, the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.'

*Id.* See also *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802 (1969).

39. 460 U.S. 780 (1983).

40. *Id.* at 789.

41. *Id.* The legitimacy and strength of those state interests, as well as the extent to which they make it necessary to burden the plaintiff's rights, should be considered. *Id.*

to determine the constitutionality of the challenged provision of the state's election law.<sup>42</sup>

#### IV. THE UNITED STATES SUPREME COURT'S ANALYSIS

##### A. MAJORITY OPINION

##### 1. *Scrutiny Level Applicable*

In *Burdick v. Takushi* the Supreme Court began its analysis by refuting Burdick's contention that strict scrutiny should be applied in evaluating his claim under the First Amendment.<sup>43</sup> The Court observed that election laws "will invariably impose some burden" on First Amendment rights.<sup>44</sup> As a result, applying strict scrutiny in every instance "would tie the hands of States seeking to assure that elections are operated equitably and efficiently."<sup>45</sup> When there are severe restrictions on these rights, the Court may require that the regulation be narrowly drawn to advance a compelling state interest.<sup>46</sup> However, where a regulation imposes merely "reasonable, non-discriminatory restrictions" upon a voter's constitutional rights, the State's "important regulatory interests are generally sufficient to justify" the burden on these rights.<sup>47</sup> Ultimately, the Court reaffirmed and adopted the "more flexible standard" of *Anderson* to ana-

42. *Id.*

43. *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992) ("Our cases do not so hold.")

44. *Id.* at 2063. *See also* *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (any election law provision, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects - at least to some degree - the individual's right to vote and his right to associate with others for political ends.")

45. *Burdick*, 112 S. Ct. at 2063. *See also* *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (just because a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel strict scrutiny"); *Anderson*, 460 U.S. at 788 ("Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates."); *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 806-808 (1969) ("Such an exacting approach is not necessary here . . .").

46. *Burdick*, 112 S. Ct. at 2063. *See also* *Norman v. Reed*, 112 S. Ct. 698, 705 (1992) ("To the degree that a State would thwart this interest [to create new political parties] by limiting the access of new parties to the ballot, . . . we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.")

47. *Burdick*, 112 S. Ct. at 2063-64, *citing* *Anderson*, 460 U.S. at 788-89.



lyze this case.<sup>48</sup>

## 2. *Applying The Anderson Approach*

The Supreme Court examined the overall election scheme in Hawaii and elaborated on the three methods in Hawaii by which a candidate may appear on the primary ballot.<sup>49</sup> The Court found that Hawaii's election laws provide relatively easy access to the ballot without the necessity for write-in voting. The Court stated the Hawaiian election system burdened only "those who fail to identify their candidate of choice until days before the primary."<sup>50</sup> Because the Court gave little weight to this interest in making a late decision in the past,<sup>51</sup> it concluded that any burden that might be imposed by Hawaii's ban on write-in voting would be extremely limited.<sup>52</sup>

However, Burdick characterized his claim as a voting rights case, rather than a ballot-access case, and argued that the ballot-access approach was inapposite.<sup>53</sup> The Court refuted this argument on two grounds.<sup>54</sup> First it noted that voting rights and bal-

48. *Burdick*, 112 S. Ct. at 2063.

49. *Id.* at 2064-65. The three identified methods permitting a candidate to appear on the primary ballot included the filing of a party petition, the established party route, and the designated nonpartisan ballot. The winner of each individual party primary gains a place on the November general election ballot. *Id.* at 2064.

A nonpartisan candidate advances to the general election ballot if he or she receives at least ten percent of the primary vote or the number of votes that was sufficient to nominate a partisan candidate, whichever is lower. See *Hustace v. Doi*, 588 P.2d 915, 920 (Haw. 1978). In the ten years before Burdick filed his action, only eight of 26 nonpartisan candidates qualified for the November general election ballot. *Burdick*, 112 S. Ct. at 2065.

50. *Burdick*, 112 S. Ct. at 2065. The Court observed that "it can hardly be said that the laws at issue here unconstitutionally limit access to the ballot by party or independent candidates or unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot." *Id.*

51. *Id.*

52. *Id.* The Court observed that "[t]o conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot." *Id.*

53. *Id.* Burdick argued that Hawaii's ban on write-in voting "deprive[d] him of the opportunity to cast a meaningful ballot, condition[ed] his electoral participation upon the waiver of his First Amendment right to remain free from espousing positions that he does not support, and discriminate[d] against him based on the content of the message he [sought] to convey through his vote." *Id.*

54. *Burdick*, 112 S.Ct. at 2065-66.

lot-access rights are practically indistinguishable.<sup>55</sup> The Court then observed that the main purpose of elections is to narrow the field of candidates to the chosen ones, not to provide a forum for generalized political expression.<sup>56</sup> In the past the Court has “repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.”<sup>57</sup>

In concluding its examination of the burdens placed on the right to vote by Hawaii’s ban on write-in voting, the Court held that “in light of the adequate ballot access afforded” under Hawaii’s election scheme, “the State’s ban on write-in voting imposes only a limited burden on voters’ rights to make free choices and to associate politically through the vote.”<sup>58</sup>

The Court next addressed the interests asserted by the State of Hawaii in justifying the ban on write-in voting. The State claimed that the prohibition avoids “sore loser” candidacies,<sup>59</sup> and that the prohibition protects the integrity of its election laws.<sup>60</sup> The State also asserted its interest in eliminating “party raiding.”<sup>61</sup> The Court agreed that these interests were

55. *Id.*, citing *Bullock v. Carter*, 405 U.S. 134, 143 (1972). The Court noted that “the rights of voters and the rights of candidates do not lend themselves to neat separation.” *Id.*

56. *Burdick*, 112 S. Ct. at 2066, citing *Storer v. Brown*, 415 U.S. 724, 735 (1974).

57. *Burdick*, 112 S. Ct. at 2066. See, e.g., *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986) (upholding a Washington statute requiring that a minor party candidate receive at least one percent of all votes cast for that office in the State’s primary election in order to gain placement on the general election ballot).

58. *Burdick*, 112 S. Ct. at 2066.

59. *Id.* A “sore loser” candidacy occurs when a nominee loses a primary election and later gathers enough support to beat the primary winner in the general election. See *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.2 (1983); *Storer*, 415 U.S. at 735. The Supreme Court has previously held that preventing such candidacies is a legitimate interest. See *Munro*, 479 U.S. at 196 (states have a compelling interest in ensuring that unrestrained factionalism does not damage the election process).

60. Under Hawaii election law, a candidate who is unopposed in a primary is automatically seated in the general election. See Haw. Rev. Stat. §§ 12-41, 12-42. Allowing write-in votes would nullify the statute because a candidate unopposed in a primary by any candidate running on any other ticket could still be challenged in the general election by a write-in candidate. *Burdick*, 112 S. Ct. at 2067.

61. “Party raiding” (also known as “cross-over voting”) occurs when “voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party’s primary.” *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1972).

*Burdick* argued that “party raiding” was not a legitimate interest in light of Hawaii’s open primary. However, Hawaii requires party candidates to be members of the

legitimate.<sup>62</sup>

In balancing the burdens placed on voting rights against Hawaii's interests in its election scheme, the Court noted that because the burden on voters was slight, the State "need not establish a compelling interest" to justify the ban on write-in voting.<sup>63</sup> The Court determined that the State's ban on write-in voting was a "reasonable way" to protect the State's "legitimate interests" and held that Hawaii's ban on write-in voting was constitutional.<sup>64</sup> However, in upholding Hawaii's voting law the Court went one step further. The Court broadly asserted that "when a State's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights - as do Hawaii's election laws - a prohibition on write-in voting will be presumptively valid."<sup>65</sup>

## B. DISSENT

In dissent Justices Kennedy, Blackmun and Stevens disagreed with two major aspects of the majority opinion. The dissenting justices first disputed the majority's broad presumption that write-in bans are permissible if a state's ballot access laws are otherwise constitutional.<sup>66</sup> The dissent also argued with the specific conclusion reached by the majority as to the constitutionality of Hawaii's ban on write-in voting.<sup>67</sup>

The dissent first reviewed the overall election system in Hawaii and determined that Hawaii's ballot-access system posed a significant impediment to third-party<sup>68</sup> and independent candi-

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political party and does not allow candidates to file nominating papers both as a party candidate and a nonpartisan candidate. Haw. Rev. Stat. §§ 12-3(a)(7), 12-3(c) (1985). Thus, "party raiding" is a realistic possibility that the state may guard against. *Burdick*, 112 S. Ct. at 2067.

62. *Burdick*, 112 S. Ct. at 2066-67.

63. *Id.* at 2067.

64. *Id.*

65. *Id.* The Court was hasty to add, though, that its decision in *Burdick* was "not to be read to discourage such [write-in] provisions." *Id.* at 2067 n.11.

66. *Burdick*, 112 S. Ct. at 2070-71 (Kennedy, J., dissenting).

67. *Id.* at 2072.

68. *Id.* at 2068. The dissent noted that new parties must file their petitions for primary ballot placement five months before the primary, which is "a condition difficult for many small parties to meet" due to organizational constraints. *Id.* See Haw. Rev. Stat. § 11-62(a)(1) (1985 and Supp. 1991).

dates.<sup>69</sup> Strong evidence was presented that in Hawaii many candidates run unopposed,<sup>70</sup> and significant numbers of voters cast blank ballots in those uncontested races rather than vote for the sole candidate on the ballot.<sup>71</sup> From this evidence the dissent concluded that a significant number of Hawaiian voters were unable to participate in Hawaiian elections “in a meaningful manner” due to the write-in voting ban.<sup>72</sup>

Next, the dissent examined the legal principles involved and the appropriate scrutiny level that should be accorded to the Hawaii write-in ban. The dissent found that a test stricter than rational basis scrutiny should have been applied in this case<sup>73</sup> because the injury to voters’ rights was more than slight.<sup>74</sup>

The dissent characterized the Court’s presumption of validity in its examination of Hawaii’s ballot-access system as “circular” because this presumption failed to address the ban on write-in voting as a factor in determining the adequacy of the ballot-access laws.<sup>75</sup> The result is that “the State needs to de-

69. *Burdick*, 112 S. Ct. at 2068-69 (Kennedy, J., dissenting). Between 1982 and 1992 only eight independent candidates succeeded in advancing to the general election. *Id.* at 2069. The dissent noted that getting ballot placement is not as “onerous” for independent candidates, as they must submit 15 to 25 signatures at least 60 days before the primary. *Id.* at 2068. See Haw. Rev. Stat. §§ 12-3 to 12-7 (1985 and Supp. 1991).

The dissent reasoned that voters may vote in only a partisan or nonpartisan (independent) primary, but usually there are not independent candidates for each race. Thus, if a voter felt strongly about an independent candidate in one particular race, that voter would be precluded from having a voice in the other races if he or she chose the nonpartisan primary. When coupled with the fact that the primary election is often dispositive of many races in Hawaii, the dissent found that voters choosing independent candidates would often be precluded from “participating in what will be the dispositive election for many offices.” *Burdick*, 112 S. Ct. at 2068-69 (Kennedy, J., dissenting). See Haw. Rev. Stat. § 12-42 (1985) and *supra* note 60 for discussion of automatic seating of candidates running unopposed in primary elections.

70. *Burdick*, 112 S. Ct. at 2068 (Kennedy, J., dissenting). For example, in the 1986 general election 33 percent of the candidates for state legislative office were unopposed. *Id.*

71. *Id.* at 2068. In 1990, 27 percent of voters who voted in other races did not cast votes in uncontested state Senate races; 29 percent of voters did not cast votes in uncontested state house races. Even in the 1990 contested races, 12 to 13 percent of the voters cast blank ballots. *Id.*

72. *Id.*

73. *Id.* at 2069. The dissent agreed with the Court’s conclusion that the *Anderson* analysis was applicable. *Id.*

74. *Id.* at 2070. “For those who are affected by write-in bans, the infringement on their right to vote for the candidate of their choice is total.” *Id.*

75. *Id.* at 2071. Past decisions have held up other forms of ballot-access restriction

find only its ballot access laws, and not the write-in restriction itself.”<sup>76</sup>

The dissent felt that Hawaii failed to justify its write-in voting ban by not “putting forth the precise interests that are served by the ban.”<sup>77</sup> The dissent dismissed the interests advanced by the State as less important than the majority had determined.<sup>78</sup> Although the dissenting justices conceded that preventing sore loser candidacies was the most legitimate of the State’s interests, they concluded that the write-in voting ban was “very overinclusive.”<sup>79</sup>

The dissent criticized the State’s argument in support of its policy of seating as officeholders the unopposed victors in primary elections as making “no sense.”<sup>80</sup> They also remarked that the State’s asserted interest in preventing party raiding was “ironic” because of the State’s open primary system.<sup>81</sup> Then the dissent blasted as “backward” the state’s interest in promoting an informed electorate, suggesting that voters supporting independent candidates are often more informed because of the per-

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in part because a write-in option was available to voters. *See, e.g.*, *Jenness v. Fortson*, 403 U.S. 431, 438 (1971) (“Unlike Ohio, Georgia freely provides for write-in votes.”); *Storer v. Brown*, 415 U.S. 724, 736 n.7 (1974) (“Moreover, we note that the independent candidate who cannot qualify for the ballot may nevertheless resort to the write-in alternative provided by California law . . .”).

76. *Burdick*, 112 S. Ct. at 2071 (Kennedy, J., dissenting).

77. *Id.*

78. *Id.*

79. *Id.* at 2071 (Kennedy, J., dissenting). The dissent thought a write-in voting ban for just the general election might be justified by the interest in preventing sore loser candidacies, but the ban was unacceptable as applied to both primary and general elections. *Id.*

80. *Id.* The dissent agreed with the petitioner that because Hawaii abolished the general election for those particular races, there is no chance to cast a write-in vote in opposition at either the primary or general election. “If anything, the argument cuts the other way because this provision makes it all the more important to allow write-in voting in the primary elections because primaries are often dispositive.” *Id.*

81. *Id.* at 2072 (Kennedy, J., dissenting). An open primary allows all registered voters to choose which primary to vote in, regardless of what party affiliation is shown on the voter’s registration. *See, e.g.*, Haw. Rev. Stat. § 12-31 (1985), which states:

No person eligible to vote in any primary or special primary election shall be required to state a party preference or non-partisanship as a condition of voting . . . . In any primary or special election . . . a voter shall be entitled to select and to vote the ballot of any one party or nonpartisan, regardless of which ballot the voter voted in any preceding primary or special primary election.

sonal effort required of those voters to learn about candidates who do not conduct "visible campaigns."<sup>82</sup> Finally, the dissent dismissed the State's interest of combatting fraud and enforcing nomination requirements as inapplicable to write-in voting.<sup>83</sup> The dissent concluded that "the State's proffered justifications for the write-in prohibition are not sufficient under any standard to justify the significant impairment of the constitutional rights of voters . . . ."<sup>84</sup>

## V. CRITIQUE

### A. REJECTION OF FOURTH CIRCUIT VIEW

The Supreme Court implicitly recognized that the Ninth Circuit's holding in *Burdick v. Takushi*<sup>85</sup> was inconsistent with the Fourth Circuit's decision in *Dixon v. Maryland State Administrative Board of Election Laws*.<sup>86</sup>

The *Dixon* court held that the casting and counting of write-in votes implicates fundamental rights.<sup>87</sup> The Fourth Circuit considered that a vote is still constitutionally significant even if cast for a long-shot or fictional candidate, because the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable.<sup>88</sup> Consequently, the Fourth Circuit concluded that the expression of this viewpoint, in the form of a write-in vote, is a constitutionally protected right.<sup>89</sup> While the Court acknowledged the existence of the

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82. *Burdick*, 112 S. Ct. at 2072 (Kennedy, J., dissenting).

83. *Id.* The state did not explain how write-in voting presented a risk of fraud in today's elections. Also, the interest of ensuring that elected candidates are qualified for office would be much better served by requiring a declaration of candidacy and verification of qualifications be filed a few days before the election as done in many other states. *Id.*

84. *Id.*

85. 937 F.2d 415 (9th Cir. 1991).

86. 878 F.2d 776 (4th Cir. 1989).

87. *Dixon*, 878 F.2d at 782. The challenged election law in *Dixon* required candidates for certain city offices to pay a \$150 filing fee in order to qualify as an "official" write-in candidate. Only official write-in candidates could have the votes cast for them publicly reported and attain office. *Id.*

88. *Id.* The *Dixon* court further reasoned that write-in votes are used in the hope, however slim, that the votes will be successful in propagating the voter's views to increase his or her influence. *Id.*

89. *Id.* There was no petition for a writ of certiorari filed with the Supreme Court in the *Dixon* case.

*Dixon* decision,<sup>90</sup> it failed to discuss the *Dixon* holding or suggest what, if anything, remained valid in the *Dixon* holding.

## B. PRESUMPTIVE VALIDITY OF WRITE-IN VOTING BANS

More disturbing than the Court's avoidance of *Dixon* is the Court's broad assertion that a State's ban on write-in voting will be presumptively valid when the State's ballot-access laws pass "constitutional muster."<sup>91</sup> Moreover, the dissent was correct in its statement that this presumption is "circular."<sup>92</sup> The Court's presumption of validity rests on the fact that the overall ballot-access scheme is constitutional.<sup>93</sup> Yet a ballot-access scheme must be examined in its entirety, which necessarily includes the availability of write-in voting.<sup>94</sup> As the dissent clearly points out, the majority fails to acknowledge this fault in its reasoning.<sup>95</sup>

## VI. CONCLUSION

In *Burdick v. Takushi*<sup>96</sup> the Supreme Court held that Hawaii's ban on write-in voting is not an infringement of a voter's constitutional rights to freedom of political speech and association.<sup>97</sup> The Court did not directly address whether there is a fundamental right to cast a write-in vote. However, by implication it appears there is no such fundamental right as was suggested in *Dixon*.

By not following the Fourth Circuit's holding in *Dixon*, the Supreme Court avoided the opportunity to define specifically how our fundamental rights of free political speech and association are related to our right to vote. Additionally, the Court's trend appears to whittle away at voting rights.<sup>98</sup> The Ninth Circuit's holding, affirmed by the Supreme Court, has already been

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90. *Burdick*, 112 S. Ct. at 2062.

91. *Burdick*, 112 S. Ct. at 2067.

92. *Id.* at 2071 (Kennedy, J., dissenting).

93. *Id.* at 2063.

94. *Id.* at 2071 (Kennedy, J., dissenting).

95. *Id.*

96. 112 S. Ct. 2059 (1992).

97. *Id.* at 2061.

98. See *supra* notes 34 through 42 and accompanying text regarding the more relaxed standard of scrutiny applied in recent voting rights cases.

followed by at least one federal court.<sup>99</sup> Furthermore, at least 25 states currently ban or restrict write-in voting.<sup>100</sup> Hopefully those states still permitting write-in voting will maintain their present electoral schemes. However, the Court's assertion that it "does not disapprove" of such write-in voting schemes in general<sup>101</sup> does not sound encouraging.

*Elizabeth E. Deighton\**

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99. See *New Progressive Party v. Colon*, 779 F. Supp. 646, 659 n.14 (D.P.R. 1991): "Concerning plaintiffs' allegation that Act 85 precludes a write-in vote, the Court finds [*Burdick*] dispositive. 'Although the voter has a protected right to voice his opinion and attempt to influence others, he has no guarantee that he can voice any particular opinion through the ballot box.'"

100. Statutory prohibitions on write-in voting exist in three states. See Nev. Rev. Stat. § 24-293.270(2) (1987); Okla. Stat. tit. 26, § 7-127(1) (Supp. 1989); S.D. Codified Laws Ann. § 12-16-1 (1982 and Supp. 1990).

For statutory write-in voting bans in primary elections see Alaska Stat. § 15.25.070 (1988); Fla. Stat. § 101.011(6) (1989); Ga. Code Ann. § 34A-1124 (Harrison Supp. 1988); Md. Ann. Code, art. 33, § 5-3(f) (1986); Minn. Stat. § 204B.36(2) (1988); N.C. Gen. Stat. § 163-151(6)(e) (1987); Tex. Elec. Code Ann. § 172.112 (Vernon 1986); Wis. Stat. § 8.17(3)(a) (1987-88).

Preregistration by potential write-in candidates is mandated in at least sixteen states. See Ariz. Rev. Stat. Ann. § 16-312 (1984 and Supp. 1989; Ark. Stat. Ann. § 7-5-205 (Supp. 1989); Cal. Elec. Code § 7300 (West 1977 and Supp. 1990); Colo. Rev. Stat. § 1-4-1001 (1980 and Supp. 1989); Conn. Gen. Stat. § 9-373(a) (1989); Ga. Code Ann. § 34A-915 (Harrison Supp. 1988); Idaho Code § 34-702A (Supp. 1989); Mo. Rev. Stat. § 115.453(4) (1986); Mont. Code Ann. § 13-10-211 (1989); N.M. Stat. Ann. § 1-12-19.1 (1985); N.Y. Elec. Law § 6-164 (McKinney 1978 and Supp. 1990); Ohio Rev. Code Ann. § 3513.041 (Anderson 1988); Or. Rev. Stat. § 249.007 (1989); Utah Code Ann. § 20-7-20 (1984 and Supp. 1990); Wash. Rev. Code Ann. § 29.51.170 (1965 and Supp. 1990); Wis. Stat. § 8.16(2) (1987-88).

See generally *Recent Development: First Amendment — Voters' Speech Rights — Federal District Courts Mandate Availability of Write-In Votes*, 104 HARV. L. REV. 657 (1990).

101. *Burdick*, 112 S. Ct. at 2067 n.11.

\* Golden Gate University School of Law, Class of 1993.