Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Voting/Regulating Elections

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Storer v. Brown, 415 U.S. 724 (1974)

Thomas Tone Storer was a politically active attorney who decided in 1972 to run for Congress as an independent. For most of his adult life, Storer had been a registered Democrat. In January, 1972, however, he changed his registration from Democrat to Independent. Under California law, however, Storer's name could not appear on the ballot because he was a registered Democrat during the year before the party primary and did, in fact, vote in the Democratic Party primary on June 6, 1972. In an effort to get on the ballot Storer, with assistance from the American Civil Liberties Union, filed a lawsuit in a federal district court. He claimed that California's restrictions on the ballot were unconstitutional and that federal courts should order the secretary of state in California, Edmund Brown, to place Storer's name on the ballot for the fall election. Gus Hall and Jarvis Tyner, the Communist candidates for president and vice president in 1972, joined the lawsuit. They also sought to run as independents, but had a different objection to California law. California law required that Hall and Tyner, if they wished to run as independents, submit a petition with the number of signatures equal to 5 percent of the vote in the last general election. Hall and Tyner had to acquire those signatures between August 15, 1972, and September 8, 1972. No person who voted in the state primary election that June could sign the ballot. Hall and Tyner claimed that these provisions unconstitutionally burdened their right to run for office. After the federal district court rejected their claims, Storer, Hall, and other potential candidates who had joined the lawsuit appealed to the Supreme Court of the United States.

Storer v. Brown *provides an opportunity to consider the role of political parties in American constitutionalism. Madison in* Federalist 10 *insisted that the capacity to prevent a two-party system was a virtue of the Constitution of 1787. Justice White nevertheless cited* The Federalist *for the proposition that states may pass laws that prevent the major parties from splintering. Can this claim be reconciled with the original hostility to political parties? What interests did Justice White think justify state regulation of the electoral process? Do you agree with this analysis of those interests?*

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JUSTICE WHITE delivered the opinion of the Court.

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. . . [A]s 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. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.

It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of degree,' . . . very much a matter of 'consider(ing) the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are

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disadvantaged by the classification.' *Williams v. Rhodes*. . . . What the result of this process will be in any specific case may be very difficult to predict with great assurance.

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The requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot. It involves no discrimination against independents. . . .

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After long experience, California came to the direct party primary as a desirable way of nominating candidates for public office. It has also carefully determined which public offices will be subject to partisan primaries and those that call for nonpartisan elections. Moreover, after long experience with permitting candidates to run in the primaries of more than one party, California forbade the cross-filing practice in 1959. A candidate in one party primary may not now run in that of another; if he loses in the primary, he may not run as an independent; and he must not have been associated with another political party for a year prior to the primary. The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. If functions to winnow out and finally reject all but the chosen candidates. The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.

Section 6830(d) (Supp.1974) . . . protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidacies prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an 'independent' candidate to capture and bleed off votes in the general election that might well go to another party.

A State need not take the course California has, but California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See *The Federalist, No. 10* (Madison). It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status. . . .

[Justice White then turned to whether California placed unconstitutional restrictions on access to the ballot for persons who were not members of other parties during the previous year.]

We start with the proposition that the requirements for an independent's attaining a place on the general election ballot can be unconstitutionally severe. *Williams v. Rhodes*. . . . We must, therefore, inquire as to the nature, extent, and likely impact of the California requirements.

Beyond the one-year party disaffiliation condition and the rule against voting in the primary, both of which Hall apparently satisfied, it was necessary for an independent candidate to file a petition signed by voters not less in number than 5% of the total votes cast in California at the last general election. This percentage, as such, does not appear to be excessive, but to assess realistically whether the law imposes excessively burdensome requirements upon independent candidates it is necessary to know other critical facts which do not appear from the evidentiary record in this case.

It is necessary in the first instance to know the 'entire vote' in the last general election. Appellees suggest that 5% of that figure, whatever that is, is 325,000. Assuming this to be the correct total signature requirement, we also know that it must be satisfied within a period of 24 days between the primary and

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the general election. But we do not know the number of qualified voters from which the requirement must be satisfied within this period of time. California law disqualifies from signing the independent's petition all registered voters who voted in the primary. In theory, it could be that voting in the primary was so close to 100% of those registered, and new registrations since closing the books before primary day were so low, that eligible signers of an unaffiliated candidate's petition would number less than the total signatures required. This is unlikely, for it is usual that a substantial percentage of those eligible do not vote in the primary, and there were undoubtedly millions of voters qualified to vote in the 1972 primary. But it is not at all unlikely that the available pool of possible signers, after eliminating the total primary vote, will be substantially smaller than the total vote in the last general election and that it will require substantially more than 5% of the eligible pool to produce the necessary 325,000 signatures. This would be in excess, percentagewise, of anything the Court has approved to date as a precondition to an independent's securing a place on the ballot and in excess of the 5% which we said in Jenness was higher than the requirement imposed by most state election codes.

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Because further proceedings are required, we must resolve certain issues that are in dispute in order that the ground rules for the additional fact-finding in the District Court will more clearly appear. First, we have no doubt about the validity of disqualifying from signing an independent candidate's petition all those registered voters who voted a partisan ballot in the primary, although they did not vote for the office sought by the independent. . . . [A] State may confine each voter to one vote in one primary election, and that to maintain the integrity of the nominating process the State is warranted in limiting the voter to participating in but one of the two alternative procedures, the partisan or the nonpartisan, for nominating candidates for the general election ballot.

[O]nce the number of signatures required in the 24-day period is ascertained, along with the total pool from which they may be drawn, there will arise the inevitable question for judgment: in the context of California politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? . . . .

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In *Williams v. Rhodes* (1968), the opportunity for political activity within either of two major political parties was seemingly available to all. But this Court held that to comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot. No discernible state interest justified the burdensome and complicated regulations that in effect made impractical any alternative to the major parties. Similarly, here, we perceive no sufficient state interest in conditioning ballot position for an independent candidate on his forming a new political party as long as the State is free to assure itself that the candidate is a serious contender, truly independent, and with a satisfactory level of community support.

JUSTICE BRENNAN, with whom JUSTICE DOUGLAS and JUSTICE MARSHALL concur, dissenting.

The Court's opinion in these cases . . . hold—correctly in my view—that the test of the validity of state legislation regulating candidate access to the ballot is whether we can conclude that the legislation, strictly scrutinized, is necessary to further compelling state interests. . . .

. . . I dissent . . . from the Court's holding in these cases that although the California party disaffiliation . . . burdens constitutionally protected rights, California's compelling state interests 'cannot be served equally well in significantly less burdensome ways.'

. . . Today, not even the casual observer of American politics can fail to realize that often a wholly unanticipated event will in only a matter of months dramatically alter political fortunes and influence the voters' assessment of vital issues. By requiring potential independent candidates to anticipate, and crystallize their political responses to, these changes and events 17 months prior to the general election, § 6830(d) (Supp.1974) clearly is out of step with 'the potential fluidity of American political life,' . . . operating as it does to discourage independent candidacies and freeze the political status quo.

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The cases of appellants Storer and Frommhagen pointedly illustrate how burdensome California's party disaffiliation rule can be. Both Storer and Frommhagen sought to run in their respective districts as independent candidates for Congress. The term of office for the United States House of Representatives, of course, is two years. Thus, § 6830(d) (Supp.1974) required Storer and Frommhagen to disaffiliate from their parties within seven months after the preceding congressional election. Few incumbent Congressmen, however, declare their intention to seek re-election seven months after election and only four months into their terms. Yet, despite the unavailability of this patently critical piece of information, Storer and Frommhagen were forced by § 6830(d) (Supp.1974) to evaluate their political opportunities and opt in or out of their parties 17 months before the next congressional election.

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Compelling state interests may not be pursued by 'means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' . . . and must be 'tailored' to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means. . . .

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I have searched in vain for even the slightest evidence in the records of these cases of any effort on the part of the State to demonstrate the absence of reasonably less burdensome means of achieving its objectives. This crucial failure cannot be remedied by the Court's conjecture that other means 'might sacrifice the political stability of the system of the State' (emphasis added). When state legislation burdens fundamental constitutional rights, as conceded here, we are not at liberty to speculate that the State might be able to demonstrate the absence of less burdensome means; the burden of affirmatively demonstrating this is upon the State. . . .

Moreover, less drastic means—which would not require the State to give appellants 'instantaneous access to the ballot'—seem plainly available to achieve California's objectives. First, requiring party disaffiliation 12 months before the primary elections is unreasonable on its face. There is no evidence that splintering and factionalism of political parties will result unless disaffiliation is effected that far in advance of the primaries. To the contrary, whatever threat may exist to party stability is more likely to surface only shortly before the primary, when the identities of the potential field of candidates and issues become known. . . . Thus, the State's interests would be adequately served and the rights of the appellants less burdened if the date when disaffiliation must be affected were set significantly closer to the primaries. Second, the requirement of party disaffiliation could be limited to those independent candidates who actually run in a party primary. . . .

I also dissent from the Court's remand, in the case of appellants Hall and Tyner, of the question concerning the constitutionality of the petition requirements imposed upon independent candidates. Under the relevant statutes, Hall and Tyner, candidates for President and Vice President, were required to file signatures equal to 5% of the total vote cast in California's preceding general election. s 6831. However, the pool from which signatures could be drawn excluded all persons who had voted in the primary elections, including voters who had cast nonpartisan ballots. . . . Furthermore, circulation of the petitioners was not permitted until two months after the primaries, and the necessary signatures were required to be obtained during a 24-day period. . . .

. . . Evaluated in light of our decision in *Jenness v. Fortson* (1971), the data leave no room for doubt that California's statutory requirements are unconstitutionally burdensome as applied to Hall and Tyner. Official voting statistics published by the California Secretary of State indicate that 6,633,400 persons voted in the 1970 general election. . . . Appellants were required to secure signatures totaling 5% of that number, i.e., 331,670. The statistics also indicate the size of the total pool from which appellants were permitted to gather signatures. . . . [T]he total pool of registered voters available to appellants was reduced to approximately 3,492,904, of which the required 331,670 signatures was 9.5%.

In my view, a percentage requirement even approaching the range of 9.5% serves no compelling state interest which cannot be served as well by less drastic means. To be sure, in Jenness we . . . upheld the constitutionality of Georgia's election laws requiring potential independent candidates to gather the signatures equal to 5% of the total eligible electorate at the last general election for the office in question.

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However, candidates were given a full six months to circulate petitions and no restrictions were placed upon the pool of registered voters from which signatures could be drawn. In that circumstance, we found that Georgia imposed no unduly burdensome restrictions upon the free circulation of nominating petitions. [A]lthough Georgia's 5% requirement was higher than that required by most States, the Court found it 'balanced by the fact that Georgia . . . imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes.' . . . .

California seeks to justify its election laws by pointing to the same substantial interests we identified in Jenness, of insuring that candidates possess a modicum of support, and that voters are not confused by the length of the ballot. But in sharp contrast to the election laws we upheld in *Jenness*, California's statutory scheme greatly restricted the pool of registered voters from which appellants Hall and Tyner were permitted to draw signatures. The 5% requirement, in reality, forced them to secure the signatures of 9.5% of the voters permitted by law to sign nomination petitions. Moreover, unlike Georgia's six-month period for gathering signatures the California election laws required appellants to meet that State's higher percentage requirement in only 25 days. Thus, even conceding the substantiality of its aims, the State has completely failed to demonstrate why means less drastic than its high percentage requirement and short circulation period—such as the statutory scheme enacted in Georgia—will not achieve its interests.

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