

How Ballot Access Laws Affect the U.S. Party System

Richard Winger, *Ballot Access News*

The thesis of this article is that the United States does *not* have lenient ballot access laws for new parties; and that if the United States *did* have lenient ballot access laws, there would be one or two substantial third parties in existence most of the time, if not all the time. By "substantial third party," I mean a party which, although not competitive with the two major parties, is able to win seats in Congress on occasion, commonly wins seats in state legislatures, fields candidates for Congress in a majority of congressional districts, and regularly polls at least two percent or three percent of the presidential vote.

Developed nations with freedom of political expression, equal treatment under the law for all parties, and winner-take-all voting systems (as opposed to proportional representation), generally produce two-party systems. "Two-party system" means a system in which two particular political parties, at any given time, are substantially larger than all other political parties. In such systems, there are only two particular parties that can hope to control the national government. If the nation elects a president by popular vote, then only two parties have a realistic hope of winning that election; if the nation uses a parliamentary system, only two parties have any realistic chance of winning a majority in the national legislature.

Nevertheless, in most two-party systems, there are substantial third parties. In Great Britain, the two major parties are obviously the Conservative and Labor Parties, but the Liberal Democratic Party is a very substantial third party. In Canada, the Liberal and Conservative Parties are still perceived as the only parties with a chance to win a majority in Parliament.¹ But Canada has several very substantial third parties. France, during the last decade, seems to have settled into a two-party system in which the only parties with any chance of winning the presidency are the Socialist Party and the Rally for the Republic Party; but there are also very strong third parties.

Only in the United States is there a two-party system with *no* substantial, long-lived third parties. This article compares U.S. third parties before 1930, when virtually all states had lenient ballot access, to present-day third

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parties. The first section of this article shows that ballot access laws were lenient prior to 1930. The second section shows that there were several substantial nationwide third parties before 1930, even in the period after 1910 when the major parties generally nominated candidates by primary rather than by convention. The third section shows how the ballot access laws have changed since 1930, and demonstrates that they are indeed severe. Section four explains why some of the changes were made. Section five argues that the U.S. Supreme Court ballot access decisions have accelerated the trend toward restrictive ballot access laws. Section six shows that there have been no substantial nationwide third parties since the ballot access laws have become restrictive, and shows how incipient substantial third parties have been damaged by severe access laws.

Ballot Access Laws Prior to 1930

This section of the article demonstrates that ballot access laws for new and small political parties were lenient in the United States, prior to 1930. In fact, there were no ballot access laws in the U.S. before 1888, because there were no government-printed ballots before 1888. Instead, voters were free to make their own ballots, but most voters simply chose a ballot that had been printed and distributed by one of the political parties. Party-printed ballots, not surprisingly, only listed candidates of that one particular party. But a voter was free to obtain a party-printed ballot, line out certain candidates whose names had been printed on that ballot, and write in an alternate candidate.

When governments started printing ballots, it was necessary for the states to pass laws to determine which parties should be on those ballots. Since these laws were written in the 1890s, a decade of vigorous third parties, these original laws were generally lenient; it would have been unthinkable at the time to exclude all parties other than the Democratic and Republican Parties. Every state had at least one third party on the ballot in 1892, 1896, 1904, 1908, 1912 and 1916 (Petersen 1963; State of Nevada 1959).

The New York Times (12 July 1924, 2) carried a story about the ballot access laws in effect at that time. The article described what a new party needed to do in each state, to get on the ballot, or at least to get its presidential candidate on the ballot. The article calculated that a new party presidential candidate needed 50,000 signatures to be on the ballot in all 48 states, and that the petition deadline had not yet passed in any state. No state required more than 12,000 signatures. The *Times* wrote this article because U.S. Senator Robert LaFollette, Sr., had just been nominated for president by his newly-formed Progressive Party. The *Times* reasonably thought its

readers would be interested in knowing what LaFollette had to do, to get on the ballot of all states. The article was not perfectly accurate, but it was substantially accurate.²

In 1924, 50,000 signatures was only one-sixth of 1% of the number of people who voted for president that year. LaFollette ended up on the ballot of all states except Louisiana. He only needed 1,000 signatures in Louisiana, but no one who was registered Democratic or Republican was permitted to sign, and there were so few independent registrants in Louisiana, and it was so difficult to find them, that LaFollette could not qualify in that one state. According to press reports, LaFollette sued Louisiana in early October, 1924, in federal court to overturn his exclusion from the ballot, but lost the case. This is very likely the first constitutional ballot access case ever filed in any federal court. Unfortunately, the decision is not reported.

I have researched the legal history of the ballot access laws of every state back to 1929.³ At that time there were no petition requirements greater than one percent of the last vote cast, to create a new party, except in South Dakota (3%), Nevada (5%), and Oregon (5%). The severity of the Oregon and South Dakota requirements was ameliorated by the fact that it was much easier in those states to qualify independent candidates (third parties in those states commonly qualified their candidates using independent candidate procedures); and the Nevada five percent law, though severe, was not as bad as it sounds, given that in 1930, only 33,622 people voted for Congress in that state, so that 1,682 signatures were required for the 1932 election.

Further evidence that the ballot access laws were lenient, up until 1930, is that in 1928 (a year in which all the third party presidential candidates combined received only 1.0% of the vote), there were only three states in which Herbert Hoover and Alfred E. Smith were the only presidential candidates listed on the ballot. They were Louisiana, Nevada and North Carolina (North Carolina required 10,000 signatures, the second-highest flat number requirement in the nation; problems with the other two states are discussed above). In conclusion, then, the ballot access laws before 1930 were lenient.

Substantial Third Parties Existed When Ballot Access Was Lenient

This section of the article shows that substantial third political parties existed in the United States before 1930. This shows that when ballot access laws were lenient, substantial third parties did function effectively in the United States. Although they had little hope of winning control of the national government, their substance guaranteed that their issues received attention, and they usually had state legislators, if not members of Congress, to give the party a voice.

Socialist Party

The Socialist Party clearly was a substantial third party between 1902 and 1924 as shown in Table 1. The middle column of the table shows that it was on the ballot, in mid-term congressional election years as well as in presidential years, virtually throughout the entire U.S. (for instance, in 1914, a mid-term election year, it was on the ballot for at least one office, in areas containing 98.6% of the voters who cast a ballot that year). In all years 1904 through 1920, it had candidates for the U.S. House of Representatives on the ballot in over half the districts. It elected a Congressman from Wisconsin in 1910, 1918, 1922, 1924 and 1926, and a Congressman from New York in 1914, 1916, 1920 and 1924 (Moore, ed. 1985). It elected 20 state legislators in 1910, and 31 state legislators in 1912 (Gillespie 1993, 183).

The right-hand column shows the percentage of the vote that the party received for its candidate closest to the top of the ballot, in the areas in

**Table 1. Electoral Performance of the Socialist Party, 1900-1932
(in percentages)**

Election Year	On the Ballot in Percent of the U.S.*	Percent of Vote Received
1900	93.0	.74
1902	84.8	2.22
1904	99.8	2.99
1906	95.0	2.54
1908	99.8	2.86
1910	96.2	4.56
1912	100.0	6.00
1914	98.6	4.22
1916	99.8	3.20
1918	83.2	3.69
1920	96.4	3.54
1922	70.0	2.26
1926**	72.0	1.42
1928	95.9	.76
1930	66.2	1.60
1932	96.2	2.31

*Calculated from official state election returns by the author.

**1924 is not included above because the Socialist Party did not have a presidential candidate that year; it endorsed Progressive Party candidate Robert LaFollette.

which it was on the ballot (the office closest to the top of the ballot is president in presidential election years, and generally governor or U.S. Senator in mid-term years).

Prohibition Party

The Prohibition Party was also a substantial third party between 1900 and 1920 as shown in Table 2. It elected a Congressman from California in 1914, 1916 and 1918, and a Congressman from Pennsylvania in 1920. It had candidates for approximately half the U.S. House seats, until after 1916. In 1906 it elected state legislators in Connecticut, Florida, Illinois, Massachusetts, Pennsylvania, and West Virginia (Storms 1972, 29). In 1914 it elected seven legislators in Minnesota and one in California, and it elected at least one state legislator in all years 1902 through 1914. Its nominee for Governor of Florida in 1916, Sidney J. Catts, won the general election, defeating the Democratic, Republican and Socialist nominees.

As with the Socialist Party chart, the right-hand column shows the percentage of the vote that the party received, for its candidate closest to the top of the ballot, in the areas where it was on the ballot.⁴ The middle column shows the proportion of people who voted that year, whose ballot contained at least one of the party's candidates.

**Table 2. Electoral Performance of the Prohibition Party, 1900-1924
(in percentages)**

Election Year	On the Ballot in Percent of the U.S.*	Percent of Vote Received
1900	97.8	1.53
1902	92.4	2.01
1904	97.3	1.95
1906	89.9	2.82
1908	95.5	1.77
1910	85.9	1.71
1912	94.8	1.47
1914	76.5	2.00
1916	96.7	1.23
1918	61.3	1.72
1920	71.5	1.00
1922	32.5	1.83
1924	45.9	.42

*Calculated from official state election returns by the author.

*Progressive ("Bull Moose") Party*⁵

The Progressive Party formed by former President Theodore Roosevelt was a very substantial third party during 1912 and 1914. It placed second in the 1912 presidential election, with 27.4 percent of the vote, ran candidates for the U.S. House in over half the districts, and elected 17 of those candidates. In 1914 its nominee for Governor of California, Hiram Johnson, was elected; he defeated his Republican, Democratic, Socialist and Prohibition opponents. Also in 1914, the party elected or re-elected eight members of Congress. In 1916, it had no presidential candidate and few candidates for other office, but even in 1916 it re-elected one of its members of Congress, Whitmell P. Martin of Louisiana.

During part or all of the period between 1900 and 1924, then, there were three substantial nationwide third parties.

What Happened to the Ballot Access Laws after 1929?

This section of the article shows that U.S. ballot access laws for new and small political parties became much more severe after 1929. Between 1929 and 1960, ten states drastically⁶ increased the number of signatures needed for a new party, or for an old party which had not polled enough votes in the last election, to get on the ballot; three states drastically eased them.⁷ These changes are summarized in Table 3. Between 1961 and 1983, there were 25 instances at which a state drastically increased the requirements, and eight instances of a drastic easing. Note that between 1961 and 1983, the rate of change was much greater than it had been in the previous period: on the average, a drastic change occurred every nine months. Between 1984 and the present, three states drastically increased their requirements, and eight states drastically eased them, for an average rate of change of one per year.⁸

Here are details about the changes, summarized by decade:

The Nineteen-Twenties

Two states made drastic revisions in the number of signatures needed for new political parties, both in 1929: California decreased its requirement for new parties, but Nebraska made its requirements vastly more difficult.

The Nineteen-Thirties

Six states toughened their ballot access laws for new political parties during the nineteen-thirties: Florida, Illinois and West Virginia in 1931,

California in 1937, Massachusetts and South Dakota in 1939. No state eased its requirements.

The Nineteen-Forties

Two states made ballot access substantially more difficult in the 1940s: Georgia in 1943, and Ohio in 1947. Two other states, Florida (1949) and Louisiana (1948), eased ballot access, but only for third party *presidential* candidates; third party candidates for other office were not helped.

The Nineteen-Fifties

During the 1950s, only Missouri drastically stiffened its laws for parties to get on the ballot, and no state eased them.

The Nineteen-Sixties

In the 1960s, eleven states drastically increased their ballot access requirements. Only Nebraska eased them voluntarily. The U.S. Supreme Court struck down restrictions in Ohio and Illinois. The eleven states which increased the requirements were Wyoming in 1961, Tennessee in 1963, Kansas in 1965, Maryland and Texas in 1967, Florida (for president only) in two stages (1967 and 1969) and Arizona, Hawaii, Montana, New Mexico and Virginia in 1969.

The Nineteen-Seventies

In the 1970s, eleven states drastically increased ballot access requirements. Ohio and Florida were the only states which involuntarily and drastically reduced their numerical requirements (as a result of lawsuits won by third parties).⁹ No state voluntarily eased requirements, although the Washington, D.C., City Council voluntarily eased ballot access for third party presidential candidates in the District of Columbia.¹⁰ The eleven states which drastically increased the requirements in the 1970s were: Alabama, Arkansas, Kansas and Pennsylvania in 1971, Colorado in 1973, Oklahoma in 1974, Michigan in 1976, Louisiana in 1976 (for all office except president), Kentucky and Washington state in 1977, and Idaho in 1978.

The Nineteen-Eighties

Five states drastically increased the requirements: Indiana in 1980 (effective in 1983), New Hampshire in 1981, North Carolina in 1983, Colorado in 1989 (for state legislative candidates only), and North Dakota in three steps, culminating in 1989. At the same time, eight states eased their

procedures during the 1980s: Arkansas (for president only) in 1980, Alaska and Michigan in 1982, New Mexico in 1983, South Dakota and Wyoming in 1984, Maryland (for president only) in 1984, and Georgia in 1986 (for statewide office, but not district or county office). The Alaska and Michigan changes came about because of State Supreme Court rulings; the Maryland and Arkansas changes came by state Attorney General rulings; the South Dakota and Wyoming changes were due to federal court rulings; only in Georgia and New Mexico were the changes made voluntarily by legislators.

The Nineteen-Nineties

Only Alabama drastically increased the requirements, in 1995. Five states drastically eased their requirements: Massachusetts in 1990, Missouri, Nevada and Oregon in 1993, and Colorado (for president only) in 1995. The Massachusetts change was made by an initiative and the others were made voluntarily by state legislatures. The signature requirement for ballot access is presented in Table 3, the column "New Requirement" referring to the number of signatures required in the first year the law was in effect. The column "Old Requirement" refers to the number of signatures in the last year the old requirement was in effect. In 1994, a new party which wished to run a complete slate of candidates for all federal and state offices which were being voted on in November, would have needed 3,501,629¹¹ valid signatures to get its candidates on the ballot. This figure does not include additional signatures which would have been needed for county, township or city office.

Why Were the Restrictive Changes Made?

Why this drastic change in the ballot access laws? Most restrictive changes in the 1930s were made to thwart the Communist Party. The Communist Party sued Florida in 1932 in state Court, and sued Illinois in 1936 in federal court. The party lost both lawsuits. Thereafter, the legislators of other states felt free to increase the requirements, any time a particular third party irritated or offended state officials. Few states did so until the 1960s, but as more and more states raised the requirements, the idea of raising the requirements became more and more legitimate.

In almost no instances, did a state increase the requirements because the ballot was too crowded. This section endeavors to explain why some of the changes were made.

The Communist Party in 1930 and 1931 was an extremist party, at least in its rhetoric. Historians of the party say that this was its "ultra-left" period. A typical 1931 editorial cartoon in the paper's newspaper, the *Daily*

**Table 3. The Scope of Ballot Access Requirements after 1929
(in chronological order)**

State and Year of Change	Old Requirement	New Requirement
Nebraska 1929	1,000 signatures	750 people at a meeting*
Florida 1931	1,675 signatures	receive 30,000 write-in votes
Illinois 1931	1,000 signatures	25,000 signatures**
West Virginia 1932	1,000 signatures	7,438 signatures**
California 1937	23,610 signatures	23,610 members or 236,608 sigs.
Massachusetts 1939	1,000 signatures	52,977 signatures**
South Dakota 1939	8,818 signatures	27,685 signatures
Georgia 1943	just hold a meeting	30,000 signatures (estimate)**
Ohio 1947	30,953 signatures	345,570 signatures
Missouri 1953	just hold a meeting	18,710 signatures**
Wyoming 1961	100 signatures	6,717 signatures**
Tennessee 1963	just hold a meeting	52,590 signatures
Kansas 1965	just hold a meeting	2,702 signatures
Maryland 1967	5,000 signatures	45,548 signatures**
Texas 1967	hold meetings, 20 counties	14,259 signatures
Florida 1967 & 1969 (pres. only)	7,500 signatures	27,970 signatures
Arizona 1969	358 signatures	9,680 signatures
Hawaii 1969	just be organized	2,550 signatures
Montana 1969	just hold a meeting	9,033 signatures**
New Mexico 1969	just hold a meeting	15,949 signatures**
Virginia 1969	1,000 signatures	8,685 signatures**
Alabama 1971	just hold a meeting	5,000 signatures
Arkansas 1971	just hold a meeting	42,644 signatures
Kansas 1971	2,560 signatures	22,356 signatures
Pennsylvania 1971	8,601 signatures	35,624 signatures**
Colorado 1973 & 1975	300 signatures	5,000 signatures**
Oklahoma 1974	5,000 signatures	40,243 signatures
Louisiana 1976	1,000 signatures	91,052 registered members
Michigan 1976	17,674 signatures	sigs. and show support in primary
Kentucky 1977	1,000 signatures	5,000 signatures**
Washington 1977	156 signatures	sigs. and show support in primary
Idaho 1978	1,500 signatures	10,323 signatures
Indiana 1980	6,982 signatures	35,040 signatures**
New Hampshire 1981	1,000 signatures	3,000 signatures
North Carolina 1983	5,000 signatures	36,949 signatures
Colorado 1989 (legislative only)	300 signatures	1,000 signatures
North Dakota 1981, 1985 & 1989	300 signatures	7,000 signatures
Alabama 1995	12,157 signatures	35,973 signatures

*In practice, getting 750 Nebraskans to attend a single meeting turned out to be far more difficult than getting 1,000 signatures on a petition. Between 1929 and 1969 (when the requirement was repealed) no party succeeded in getting on the ballot, except in 1932, 1936, and 1968.

**This number only qualifies the party's candidate for statewide offices; additional signatures are needed for district and county office.

Worker, at this time published in Chicago, showed a capitalist as a repulsive spider (wearing a top hat, of course), with a worker poised to smash the spider with his booted foot. Although the Communist Party did not poll many votes, it was very active in elections all across the U.S. It had more candidates on the ballot for Governor and U.S. Senator in 1930, and in 1934, than any other third party, including the Socialist Party. In November 1932 the Communist Party had approximately 1,200 candidates on the ballot. Although none won any partisan elections,¹² a few Communists were elected to non-partisan office. The best showing a Communist Party gubernatorial candidate ever made was in 1930, in North Dakota (3.2%).

Illinois

The Communist Party frightened many state legislators, and it was this fear and dislike which caused the Illinois legislature to drastically change the ballot access laws in 1931. The legislature increase the statewide petition requirement from 1,000 signatures to 25,000 signatures; it also provided that the statewide petition had to include at least 200 signatures from each of at least 50 counties. The legislature knew that the Communist Party was well-organized in Chicago (one of its 1932 legislative candidates, Claude Lightfoot, polled 33,337 votes in the 5th district in 1932), but that it was quite weak in most downstate counties, so the new law was artfully crafted to hurt the party.¹³

Illinois had 102 counties. At the 1928 presidential election, the median county in Illinois only cast 10,500 votes. The 1931 law required the Communist Party, and all third parties, to conduct 50 separate petition drives (one in each of 50 different counties), and if any one failed, the entire statewide petition failed. Even if a petition was only circulated in the 50 most populous counties, some of those counties had fewer than 15,000 voters, and it was no easy task for the Communist Party to obtain 200 signatures in a farm county with a voting population of only 15,000 or so. Furthermore, people who had voted in the primary were not eligible to sign. The Communist Party did comply with the statewide petition in 1932, but it tried and failed in each of the next five statewide elections. It brought a lawsuit in federal court in 1936, but both the U.S. District Court and the 7th Circuit said that nothing in the U.S. Constitution relates to ballot access. The U.S. Supreme Court refused to hear the case (*Blackman v. Stone* (1939)).

The 1931 legislation also raised the petition requirement for district, county and city office to five percent of the last vote cast, which meant that the petition for Chicago Mayor became approximately 50,000 signatures, so

difficult that the Communist Party was never again able to get on the ballot for Mayor of Chicago, nor was any other third party able to do so in the entire 45 years that the law existed.

Florida

But if the 1931 Illinois legislation was harsh, consider Florida. In 1931, the Florida legislature repealed all procedures by which a new party or an independent candidate could get on the ballot; it also defined "political party" as a group which had polled at least 30 percent of the vote for any statewide office in either of the last two presidential elections.

The Florida ballot before 1931 was not crowded with too many third party or independent candidates. There were only two third parties on the ballot in 1928, Communist and Socialist, and none on in 1930. The old petition procedure was 25 signatures in each county in the state, for a state total of 1,675 signatures. What caused Florida to repeal all procedures for new parties to get on the ballot? There is no direct evidence, but it seems very likely that the 1928 election results triggered the change. In 1928, the Communist Party had polled 1.5 percent of the vote for president in Florida (making Florida the best state in the nation for the Communist Party that year), and the Socialist Party had polled 1.6 percent (making Florida the second-best state for the Socialist Party that year). The legislature probably thought that if the two radical parties polled over three percent of the presidential vote in 1928, a year of prosperity and relative contentment, there was danger afoot in 1931 and 1932, with economic depression, joblessness, and deprivation. So, all procedures for third parties and independent candidates were simply repealed.

In 1932 the Communist Party sued (*State ex rel Barnett v. Gray*), but the Florida Supreme Court ruled that the party was free to run a write-in candidate, and that if the party ran a write-in candidate for a statewide office and the candidate polled 30 percent of the vote, the party would again be qualified; therefore the law was reasonable. There were several humorous consequences of the 1931 law: the Republican Party failed to poll 30 percent of the vote for any statewide office in either 1932 or 1936, so it was disqualified and had no realistic means to get back on. Florida was embarrassed to have only one party on the ballot, so in 1937 it retroactively lowered the vote test to 15 percent. In 1939, it again redefined "political party" to mean an organization that had registration membership of at least five percent (the Republican Party met that test); but Florida continued to have no means for new party candidates to get on by petition, nor was there any provision for independent candidates.¹⁴ In 1948 the state was again em-

barrassed because Strom Thurmond, the Dixiecrat candidate for President, qualified in every Southern state except Florida. In September 1948 the legislature met in special session and passed a bill naming Strom Thurmond and Henry Wallace and directing the Secretary of State to place those two named individuals on the ballot. In 1949 the legislature created a petition procedure for third party presidential candidates, but did not extend this to third party candidates for other office, nor could independent candidates get on for any office whatsoever.

West Virginia

The 1931 West Virginia law change was also caused by fear and dislike of the Communist Party. The party qualified for the West Virginia ballot in 1928 under a law which required 1,000 signatures, from people who were willing to abstain from voting in the primary. The primary exclusion made qualification difficult, but the Communist Party was exceedingly active in the coal mining areas of West Virginia and adjoining parts of Kentucky at the time, and the party did qualify. The 1931 session of the legislature raised the petition requirement for statewide third party and independent candidates from 1,000 signatures to one percent of the total vote cast in the last election, a seven-fold increase. In 1934, both the Communist and Socialist Parties tried and failed to qualify in West Virginia, but in 1932 and 1936 they succeeded.

The 1939 session of the legislature again amended the election laws, providing that no one could circulate a petition for third party or independent candidates outside of the petitioner's home magisterial district. A magisterial district was either one-third, one-fifth, or one-seventh of a county. In 1940 the Communist Party gamely tried to qualify again, but its candidate for Governor, Oscar Wheeler, was sentenced to six years in the state penitentiary for misrepresenting the contents of the ballot access petition to voters. His conviction was overturned by the State Supreme Court (*State of W.V. v. Wheeler* (1941)), but the fact that he was even arrested tells us the extent to which there was great hostility towards the party and its attempts to get on the ballot.

California

The 1937 change in California law also seems to have been motivated by a desire to eliminate the Communist Party from the ballot. Prior to 1937, a new party qualified in California either by submitting a petition signed by one percent of the last vote cast, or by persuading that same number of

voters to register as members of the party on voter registration forms. The Communist Party failed to qualify in California until 1934, when it qualified using the one percent petition method. Once on the ballot, the Communist Party was far more active than the other qualified third parties of California; in 1936 the Communist Party in California had 35 candidates for Congress and the state legislature, whereas no other third party had more than 12 candidates for Congress and the legislature.

The 1937 law change increased the petition requirement for new parties from one to 10 percent of the last vote cast. The legislature probably assumed that the Communist Party would fail to poll the needed three percent of the vote for any statewide office in 1938, and that it would then be off the ballot, and unable to get back on. However, the Communist Party did poll over three percent of the vote in 1938, so in 1940 the legislature passed a new restriction that was openly aimed at the Communist Party but no other third party: any party would be disqualified if it had registration of less than 2,500. All the other third parties had double this number, but the Communist Party had fewer than 1,500 registrants. The party unsuccessfully tried to register more members. Lucille Ball, who was very young and not yet famous, registered "Communist" at the request of her grandfather, who was a member of the party; her effort to be helpful came back to haunt her in 1953, when she had to appear before the House Un-American Activities Committee and explain why she had registered "Communist" (*The New York Times* 12 September 1953, 12).

Although few states sharply increased the numerical requirements for third parties in the 1930s, 1940s, and 1950s, the pattern had been set that the courts would let states make this type of election law change. Thereafter, any time some third party irritated state legislators, state legislators were tempted to strike back, by revising the ballot access laws.

Georgia

One of the most drastic de-liberalizations ever made by any state was Georgia's 1943 law. Prior to 1943, any third party could be on the November ballot, simply by holding a nominating convention and certifying the names of its nominees to elections officials. Starting in 1943, parties which polled less than five percent of the vote in the previous election, had to submit a *separate* petition for *each nominee*, signed by five percent of the registered voters. Since Georgia elected approximately fifty statewide partisan officers in mid-term years, and approximately seventy statewide partisan officers in presidential election years, a new party which merely wished to run a full slate of statewide candidates in a presidential election year would

have been required to submit 70 different petitions, each signed by five percent of all the registered voters in the state.¹⁵ If a new party also wished to nominate candidates for U.S. House of Representatives, state legislature and county officers as well, in a presidential election year it would have needed a number of valid signatures that was four times the number of registered voters in the state, although of course voters were free to sign multiple petitions. But can one imagine going out on the street with a clipboard and asking passersby to sign 80 separate petitions?

The 1943 change was made because the legislature was irritated with the Independent Democratic Party, a party which had qualified in 1940. At the time, Georgia permitted parties to jointly run candidates. The Independent Democratic Party ran a slate of the Democratic candidates for statewide office, combined with the Republican Party candidates for presidential elector. The party was thus a device to let Georgia Democrats vote for Wendell Willkie for president without technically voting for the Republican Party.

In 1945, the legislature made the law even more restrictive, by raising the number of votes needed to qualify for "party" status (and thus relief from all petitioning) from five to 20 percent. Since a 20 percent vote standard would have removed the Republican Party from the ballot, the law provided that a party was something that had polled 20 percent of the vote for president in the entire nation; the party's vote for president within Georgia was legally irrelevant.

As in Florida, Georgia's draconian new ballot access law also had humorous unintended consequences. Many Georgians wanted to vote for Strom Thurmond in 1948, but Thurmond did not have the ability to submit a petition signed by five percent of all registered voters, so the legislature met in special session in the summer of 1948 and passed a bill providing that any third party candidate, for president only, could be on the ballot in 1948 only, just by requesting a spot on the ballot. Thurmond, Henry Wallace, and the Prohibition Party presidential nominee took advantage of this temporary law (Schmidt 1960, 149-150).

Ohio

Ohio also toughened ballot access laws during the 1940s. The old law had required a petition signed by one percent of the last gubernatorial vote, to get a statewide third party or independent candidate on the ballot (there was a separate, entirely unused provision of the law, which provided that a new party which desired full party status and its own primary could obtain that status by submitting a petition signed by 15 percent of the last vote cast

for Governor). The Ohio one percent petition had been used by several third parties during the 1920s and 1930s, but it was rigorous and after 1936, no third party was able to meet it. They would try, but elections officials would always find that there were not enough valid signatures. Finally, in 1946, the Socialist Labor Party went to court and proved that its rejected petition—which had twice as many signatures as the required 30,953—really did have enough valid signatures. The Socialist Labor Party thus appeared on the 1946 ballot, but it was the last third party to do so until 1968, since the 1947 session of the legislature changed the one percent petition law to provide that a party label could not be used in connection with the one percent petition. In effect, the one percent petition became a procedure only for independent candidates, and a party could not appear on the ballot unless it did the old, never used 15 percent petition.

In 1948 Henry Wallace (former vice-president of the U.S., and the Progressive Party candidate for president) got on the Ohio ballot as an independent candidate, using the one percent petition. In 1949, the legislature amended the laws again, to provide that presidential candidates could never be placed on the ballot using the independent candidate procedure, and that independent candidate petitions for other office henceforth needed a seven percent petition, not a one percent petition. Thus, in two steps, the petition for third party or independent presidential candidates had gone from a one percent petition, already difficult in practice, to a 15 percent petition. The legislature obviously was not concerned about overly-crowded ballots, because there had been no statewide third party or independent candidates on the ballot for the entire period 1938 through 1944, and only one such party or candidate in 1946 and 1948.

Missouri

The Missouri 1953 law change was motivated by legislative irritation with an entirely different type of political party. In 1952, Gerald L.K. Smith's Christian Nationalist Party had nominated General Douglas MacArthur as its presidential candidate, and placed him on the ballot in seven states. MacArthur was not a candidate for president in the general election, but he would not lift a finger to withdraw either. Since the laws of some states (including Missouri) did not require a party's presidential candidate to submit a declaration of candidacy, there was no means to keep MacArthur's name off the Missouri ballot. The Christian Nationalist Party easily attained ballot status in Missouri because Missouri placed any third party on the ballot with no petition; such parties nominated candidates by convention and certified the names of their candidates to elections officials.

The 1953 session of the Missouri legislature, angered by the party's tactic, provided that in the future, parties which had polled less than two percent of the previous vote, would need a petition signed by one percent of the last gubernatorial vote, with the added proviso that the petition had to contain the signatures of one percent of the voters of each congressional district, or at least two percent of the last vote cast in half the state's congressional districts.

Wyoming

The Wyoming legislature increased the signature requirement from 100 signatures, to five percent of the last vote cast (a 50-fold increase) after the 1958 gubernatorial election, when a third party candidate bearing the label "Economy Party" appeared on the ballot and polled enough votes so that the Democratic nominee for Governor was elected, even though the Democrat only received 49 percent of the vote. It is clear that the legislature was not reacting because Wyoming's general election ballot was over-crowded; the 1958 Economy Party candidate was the first third party candidate who had appeared on the ballot for any state office in Wyoming since 1934. Nor had Wyoming's presidential ballot ever contained more than 4 third party or independent candidates for president.

Maryland

Maryland increased the statewide third party and independent petition requirement from 5,000 signatures to three percent of the number of registered voters (a 10-fold increase) after the 1966 election, when an independent liberal candidate for Governor enabled the Republicans to win the governorship with 49.6 percent of the total vote.

Texas

Texas changed its ballot access laws in 1967, from a system in which no petition was needed (parties merely had to hold a state convention and county conventions in at least 20 counties), to a requirement of a petition signed by one percent of the last vote cast. No one could sign the petition who had voted in the primary, and all the signatures had to be gathered in 55 days. The reason for the change was that the Constitution Party (the only third party on the ballot in Texas during the period 1962 through 1966) irritated the Secretary of State during 1966. Two factions of the Constitution Party each claimed to be the "true" Constitution Party, during the 1966

election season, and the Secretary of State was hard-pressed to judge the competing claims. To avoid such headaches in the future, the Secretary of State persuaded the legislature to revise the ballot access laws. The Constitution Party never again appeared on the Texas ballot.

New Mexico

New Mexico changed its ballot access laws in 1969, from a system in which no petition was needed (parties merely had to hold a state convention and nominate candidates) to a system in which a petition signed by five percent of the last vote cast was needed, not to qualify the party *per se*, but to qualify its candidates, for all office other than president. The impetus for the change was that in 1968, for the first time in the New Mexico history, a party holding itself out as Hispanic was organized and appeared on the ballot. It was called the People's Constitutional Party, and its candidate for president (who appeared on the ballot only in New Mexico), Ventura Chavez, was the first Hispanic ever to appear on the general election ballot as a candidate for president of the United States. The drastic 1969 law change, from no petition, to a petition of over 15,000 signatures, cannot be attributed to concerns about an over-crowded ballot, since no more than four third parties had ever appeared on the New Mexico ballot in any election.

Other States

Oklahoma increased its petition requirement from 5,000 signatures to five percent of the last vote cast in 1974 (an eight-fold increase), even though there had never been any election in Oklahoma with more than three third parties on the ballot. Arkansas changed its law in 1971 from a system in which no petition was needed, to a system in which a new party needed a petition signed by seven percent of the last vote cast, even though there had never been any election in the 20th century in which more than four third parties appeared on the Arkansas ballot. Louisiana changed its requirements in 1976 (for office other than president) from a petition of 1,000 signatures, to a registration requirement of five percent, even though there had never been any election in the 20th century in which more than three third parties appeared on the Louisiana ballot. Idaho increased its petition requirement in 1978 from 1,500 signatures to three percent of the last vote cast for president, even though Idaho had never had more than three third parties on the ballot. North Carolina increased its petition requirement from 5,000 signatures to two percent of the last vote cast (a seven-fold increase) in 1983 even though never in this century had more than four third parties

ever appeared on its ballot. Alabama tripled its requirements in 1995 because the Speaker of the Alabama House was irritated that the Patriot Party had run some candidates in the November 1994 general election who had first run in Democratic primaries. Instead of simply banning "sore losers," the legislature over-reacted and tripled the signature requirements, even though Alabama had been one of only nine states in 1994 without a single statewide third party or independent candidate on the ballot.

The history of these changes demonstrates that the United States has restrictive ballot access laws in many states, not because of common-sense concerns about the ballot being overly crowded, but because state legislators simply did not like certain third parties, and found it too tempting to resist revising the election laws to keep them off future ballots.

There are still some states which have lenient ballot access, and their experience shows that overly-crowded ballots are not much of a problem. Mississippi and Vermont let any party on their ballot which can show that it is organized; no petition is needed. New Jersey still requires 800 signatures for a statewide third party candidate (800 is only two-hundredths of one percent of the number of registered voters). Tennessee has restrictive procedures for third parties, but allows independent candidates on the ballot with a petition of only 25 signatures, and no filing fee. Third party candidates in Tennessee simply use the independent candidate procedures. Even though 25 signatures is an startlingly easy petition hurdle, it suffices to keep the Tennessee ballot from being too crowded, although there were 11 independent presidential candidates on the 1992 ballot, and I believe that many candidates does cause a somewhat-crowded ballot. There are frivolous candidates or would-be candidates in this nation, and the goal of most frivolous candidates is to run for president, so the one office that tends to have too many candidates in the U.S. (when the ballot access laws are extremely easy) is invariably the presidential ballot, whether in a presidential primary or a general election.

Has the Supreme Court Forced the States To Ease Ballot Access?

This section of the article shows that the U.S. Supreme Court has *not* stopped the trend toward more restrictive ballot access laws for new parties. The U.S. Supreme Court struck down Ohio ballot access laws in 1968, in a case called *Williams v. Rhodes*. George Wallace, the American Independent Party candidate for president, had qualified for the ballot of every state except Ohio, but even he could not comply with a requirement of 433,100 signatures, due in February of the election year. The Court heard his lawsuit, as well as another Ohio lawsuit filed by the Socialist Labor Party and

its candidates for President and U.S. Senator, on October 7, 1968, and on October 15, 1968, voted 6-3 that Ohio ballot access laws were too strict and violated the First Amendment. Justices Earl Warren, Byron White and Potter Stewart dissented. *Williams v. Rhodes* reversed *MacDougall v. Green*, the 1948 decision which said that nothing in the U.S. Constitution pertains to ballot access.

The *Williams* decision seemed to be a great victory for third parties. But because the opinion seriously distorted the truth about Ohio's election laws, its usefulness as a precedent was almost nil. One distortion in the opinion was that Ohio had no procedures for independent candidates to get on the ballot. The truth is that Ohio *did* have procedures for independent candidates to get on the ballot, for all office except president. Independent candidates for Congress had appeared on the Ohio ballot in 1950, 1952, 1954, and 1962, and in most years for state legislative elections. But people reading the decision (including judges) believed that Ohio had a complete Democratic-Republican monopoly on all ballots since 1950,¹⁶ and that exaggerated portrait of the state, ruined the decision's effectiveness as a precedent to overturn other restrictive state ballot access laws.

Another major flaw in the decision was its conclusion that even if George Wallace and the American Independent Party had managed to obtain the required 433,100 signatures by February 1968, that the party still could not have functioned. The decision stated that the party would have been forced to hold a primary (which was true), and that it would have been required at that primary to elect hundreds of party officers. In truth, although the election code provided for a state-sponsored primary and gave all political parties the opportunity to elect many party officers, the law did not force a party to fill all those party offices. Nor did Ohio allege that the new party needed to fill those offices, in its briefs or in its communications to the party.

The biggest flaw in *Williams* was that it did not state precisely which aspects of the ballot access laws were unconstitutional. The decision criticized the early (February) petition deadline; it criticized the failure of the state to permit independent presidential candidates; and it criticized the high number of signatures needed to qualify a new party (15% of the last gubernatorial vote). But because it did not specifically state that any of those three aspects were unconstitutional *per se*, many lower courts assumed that the law was only unconstitutional because *all* those characteristics were present. The final flaw in the decision was that it gave no guidelines for a court to determine an unconstitutional ballot access law from a constitutional one.

These weaknesses in the decision were apparent during 1969, the very next year after the decision, when five states drastically *increased* their

ballot access requirements, the single worst year in U.S. history for proponents of lenient ballot access.

In February 1971, the U.S. Supreme Court upheld Georgia ballot access laws in *Jenness v. Fortson*. In many ways, the Georgia ballot access laws (passed in 1943) were more restrictive than the Ohio laws. The Georgia laws had never been used by any statewide third party or independent candidate, except for George Wallace's American Party in 1968 (Wallace was so popular in Georgia that he polled 40.8% of the vote and carried the state). The Supreme Court said that the statewide requirement had been met twice, but it did not say that the other petitioning success (besides Wallace) was achieved by the Republican Party candidate for Governor in 1966,¹⁷ not by a third party or independent candidate. The Court also failed to note that five percent of the number of registered voters (the Georgia law) can sometimes be equivalent to 15 percent of the last vote for Governor (the unconstitutional Ohio law). For instance, in 1978, five percent of the number of registered voters in Georgia was 109,147, but 15 percent of the 1978 Georgia gubernatorial vote was only 99,420; in other words, sometimes five percent of the number of registered voters is a higher number than 15 percent of the last gubernatorial vote. It was therefore nonsense for the Court to say that 15 percent of the last gubernatorial vote is unconstitutional, but that five percent of the number of registered voters is constitutional. Furthermore, there had actually been more independent candidates for Congress on the ballot in Ohio during its most restrictive period (4 candidates) than in Georgia during its longer restrictive period (2 candidates).¹⁸

Jenness v. Fortson gave states permission to raise their petition requirements up to the level of five percent of the number of registered voters, and they took advantage of it. In the ten years after the *Jenness* decision was handed down, 13 states drastically increased their petition requirements, and no state voluntarily lowered its requirement.

The Supreme Court made things even worse for third parties in 1974, in a case called *Storer v. Brown*, its opinion written by Justice Byron White. Although the case concerned ballot access for independent candidates, the lower courts assumed it applies to ballot access laws for new parties as well. The case dealt with whether California could require an independent candidate to collect signatures equal to five percent of the last vote cast, in 24 days, from the ranks of registered voters who had not voted in the primary. The Court could not decide whether the law was constitutional or not, and remanded it back to the lower court for more fact-finding.¹⁹ Deadly was this language:

Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,542 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signatures a day. On its face, the statute would not appear to require an impractical undertaking. *Storer v. Brown*, at 740.

That was theory. These are the facts: with only a single exception, no third party has ever managed to overcome a petition requirement greater than 108,638 signatures.²⁰ The one exception was Henry Wallace's Independent Progressive Party, in California, which successfully complied with a 275,965 signature requirement.²¹ Most people are reluctant to sign a petition for a new party, because they generally feel they do not know enough about it. Few third parties ever have as many as 1,000 activists in a single state willing to collect signatures; petitioning is hard, time-consuming work. In 41 states, shopping centers are legally free to exclude petitioners from the property; the post office is free to exclude petitioners from its sidewalks,²² and petitioners find that there are not many places with heavy pedestrian traffic and which permit petitioning.

The Supreme Court made it still more difficult to win cases against restrictive ballot access lawsuits in 1986 in *Munro v. Socialist Workers Party*.²³ In another decision by Justice Byron White, the court ruled that states, to defend their ballot access laws, need not provide any empirical evidence that those laws are needed! White in *Munro* at 195 wrote:

We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access. In *Jenness v. Fortson*, *supra*, we conducted no inquiry into the sufficiency and quantum of the data supporting the reasons for Georgia's 5% petition-signature requirement. . . . To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate.

White's statement might make sense if every state were just now writing its first ballot access laws. But all the states (except South Carolina, which did not provide for government-printed ballots until 1950) have had 100 years of experience writing ballot access laws.²⁴ When state legislatures increase a petition requirement by seven- or eight-fold, even though the record shows that the ballot was not crowded in the past, why should they be excused from having to justify the increase?

The Court also ruled in 1992 that nothing in the U.S. Constitution requires states to provide write-in space on ballots (*Burdick v. Takushi*). Consequently, when third party candidates are kept off the ballot, supporters of that candidate may be completely disenfranchised.

When third parties do win U.S. Supreme Court decisions, they are invariably useless as precedents almost anywhere else. In 1979 the Court ruled in *Illinois State Board of Elections v. Socialist Workers Party* that it is unconstitutional for a state to require more signatures for a third party or independent candidate to get on the ballot in a smaller-population unit, than are required for a third party or independent candidate to get on the ballot in a larger-population unit. Consequently, Illinois was forbidden to continue to require 45,000 signatures to get on the ballot for Mayor of Chicago, given that it only required 25,000 signatures to get on for statewide office. In 1992, the Supreme Court had to tell Illinois a second time, ruling in *Norman v. Reed* that the state could not require 50,000 signatures to get on the ballot for Cook County Commissioner, when (as before) only 25,000 signatures are needed for statewide office.

Obviously, any state foolish enough to require more signatures for a smaller unit than for a larger unit, can escape having its law struck down, by simply making the signature requirement for the larger unit, higher than it had been. Therefore, the two Illinois decisions have had little impact elsewhere. Only twice has any state other than Illinois been sued under the principles of those two Illinois cases: in 1992 Iowa was forced to stop requiring approximately 2,800 signatures for candidates for U.S. House, since it only required 1,000 for statewide office (*Oviatt v. Baxter*); and in 1994 Colorado was forced to stop requiring 1,000 signatures for candidates for the state legislature, since candidates for the U.S. House only required 500 signatures (*Ptak v. Meyer*). In each case the state then increased the requirement for the larger-population unit, as well as lowering the requirement for the smaller-population unit.

In 1969 the Supreme Court declared in *Moore v. Ogilvie* that statewide petitions could not require a set number of signatures from each county in the state, since counties have different populations and such laws violated "one-man, one-vote" principles. However, states which wished to continue to have distribution requirements for statewide petitions were able to do so,²⁵ by now requiring a set number of signatures from each congressional district, or from each legislative district (the difference between counties and districts is that districts are equal in population). Before the *Moore* decision, there were 6 states with distribution requirements (Illinois, Massachusetts, Michigan, Missouri, New York, Utah); now there are seven (Florida, Montana, Nebraska, New Hampshire, New York, North Carolina, Virginia), so

little real change occurred as a result of the *Moore* decision.²⁶ Congressional district and legislative district distribution requirements are more formidable hurdles than county distribution requirements, since most people know what county they live in, but most people do not know what congressional or legislative district they live in.

In 1972 and 1974 the Supreme Court invalidated mandatory filing fees (*Bullock v. Carter* and *Lubin v. Panish*), but these decisions have had little impact either, since the Court made clear that the states were free to continue mandatory filing fees for non-paupers, and few candidates wish to launch their campaigns with a public admission that they are paupers; furthermore, the states were given the authority to force paupers to submit substantial petitions in lieu of a filing fee.²⁷

In 1983, in *Anderson v. Celebrezze*, the Supreme Court said that Ohio's petition deadline for independent presidential candidates of March, was too early. This decision was 5-4, and as the years since 1983 have passed, lower courts have grown less and less willing to follow it, perhaps noting that only one of the 5-justice majority still sits on the Court, whereas two of the dissenters are still there. In 1986 the 7th circuit upheld an even earlier deadline (December of the year before the election!) for independent candidates for all office other than president (*Stevenson v. State Election Board*). In 1988 the 10th circuit upheld Oklahoma's May petition deadline for new parties (*Rainbow Coalition v. State Election Board*). Also in 1988, the 8th circuit upheld North Dakota's April petition deadline for new parties (*McLain v. Meier II*). In 1989 the 4th circuit upheld West Virginia's May petition deadline for new party and independent candidates (for office other than president) (*Socialist Workers Party v. Hechler*). In 1994, the 9th circuit upheld Washington state's deadline disparity (*Libertarian Party of Washington v. Munro*): all candidates, major party, minor party and independent alike (other than presidential candidates) must run in the September primary, yet minor party and independents must file for that primary 25 days before major party candidates must file for that same primary!

In summary, the Supreme Court decision with the greatest impact has been *Jenness v. Fortson*, which told the states that they were free to raise petition requirements for new parties to five percent of the number of registered voters, and to require separate petitions for each of the third party's candidates. The *Jenness* decision also seemed to uphold a vote retention requirement for new parties of 20 percent of the last vote cast; that part of the *Jenness* decision has been responsible for the fact that no federal court has ever invalidated a state law governing how a party *remains* on the ballot. If the Supreme Court had never heard a ballot access case, or if it had simply ruled that nothing in the U.S. Constitution pertains to ballot

access, third parties would probably be better off than they are now. Such a ruling would have forced State Supreme Courts to examine ballot access laws under State Constitutions, many of which provide that elections must be "free and equal." Unfortunately, since the U.S. Supreme Court has said repeatedly that states have a compelling interest in having severe ballot access restrictions, state courts are inhibited from striking out on their own and finding the contrary. Since *Jenness*, only two State Supreme Courts have ever ruled that ballot access requirements for parties are too severe.²⁸

There Have Been No Nationwide Substantial Third Parties Since the Ballot Access Laws Became Severe

This section of the article shows that there have been no substantial third parties in the U.S. during the last 65 years. The process by which the ballot access laws became severe was a gradual one, starting in 1929 and accelerating in 1969. The thesis of this article is that severe ballot access laws are to blame for the lack of nationwide substantial third parties. Because the change in the ballot access laws was gradual, not instantaneous, it stands to reason that during the transition from leniency to severity, there was one third party that might be termed semi-substantial. That was the Progressive Party of 1948, organized by former vice-president Henry Wallace. It did elect two members of Congress, both in New York in 1948: Leo Isaacson in a special election early in the year, and Vito Marcantonio in November. Since the New York state unit of the Progressive Party was called the American Labor Party, both men were elected under that label. Although New York allows candidates to be the nominee of more than one party, both Isaacson and Marcantonio were on the ballot in 1948 only under the American Labor Party label, and clearly the party deserves to be credited with having won two congressional elections. *No nationally-organized third party since then has ever won a congressional election.* The Conservative Party of New York elected a U.S. Senator in 1970, but the Conservative Party of New York is not part of any nationally-organized third party and never has been; in reality, it functions as a faction of the New York Republican Party. Congressman Bernie Sanders of Vermont is sometimes labelled a "socialist" by the press, but he has never run for public office with that label; his ballot label is "independent."

The Henry Wallace Progressive Party was on the ballot before 93.5 percent of the voters who voted in 1948. It polled 2.64 percent of the vote for its candidates nearest the top of the ticket in the areas where it was on the ballot. By its congressional victories and its presidential vote showing, it meets some of this article's criteria for a substantial nationwide third

party. On the other hand, it only had candidates for the U.S. House in 28 percent of the districts, and it did not elect any state legislators. Furthermore, its vote totals after 1948 were very modest, and it ceased to exist after the 1954 election. The Progressive Party in 1948 had to expend a major share of its resources, just getting on the ballot, engaging in ballot access lawsuits in California, Georgia, Illinois, Ohio, Oklahoma, and having to collect 275,965 signatures in California alone. The party's Illinois lawsuit reached the U.S. Supreme Court, which ruled 6-3 that nothing in the U.S. Constitution protects a party's right to be on the ballot (*MacDougall v. Green*).

In 1967, George Wallace decided to run for president in November 1968 in opposition to both the Democratic and Republican Party nominees. He had no interest in creating a new party, but since twelve states had no procedure for an independent presidential candidate to qualify for the ballot, in order to realize his goal of getting on the ballot in all 50 states, Wallace had to create a new party in some states. Wallace showed his lack of interest in creating a new party by not even choosing a name for the "party." Instead, he let his supporters in each state decide for themselves what label to use. The results were: American Party in 17 states, American Independent in 12, independent in 9, George Wallace Party in 8, and one each for Courage, Independent American, and Conservative. In Alabama, Wallace was the official nominee of the Democratic Party. Another indication that there was no true party, is that no national convention was held.

Wallace preferred that his parties not run any candidates other than himself, but he was powerless to prevent candidacies for other office, and the various state parties across the nation nominated a total of 19 candidates for the U.S. House. Although Wallace polled 13.53 percent of the presidential vote, none of the congressional candidates polled more than 3.5 percent (except for one candidate who was in a two-person race, and even then the Wallace party candidate polled less than 5%).

The Libertarian Party, formed in 1972, would probably be a substantial third party if it were not for the ballot access hurdles. The party has never polled more than one half of a percent for president, except in 1980, when it polled 1.06 percent. The reason it did better in 1980 was that its vice-presidential candidate was a multi-millionaire who contributed \$3,000,000, and the party was able to spend \$2,000,000 on advertising and campaigning. In all other presidential years, the party's and the presidential candidate's budget combined has never exceeded \$1,500,000, and each year the expense of paying petitioners to circulate ballot access petitions consumes two-thirds to three-fourths of the budget. The party elected one state legislator in Alaska in 1978, two in Alaska in 1980, and one in 1984; and it also elected

four in New Hampshire in 1992 and two in 1994. With the exception of a Tennessee State Senator who was elected in 1970 on the American Party ticket, the Libertarian Party is the only nationwide third party which has elected any state legislators since the 1930s, when the Socialist Party last elected some, in Connecticut, Pennsylvania and Wisconsin.

The Green Party, just now in the process of creating a national party structure, might also be an incipient substantial third party, but for ballot access hurdles. It won its first partisan election in 1992 (to county office in Hawaii), and re-elected that candidate in 1994. It has never had a presidential candidate, and had 13 congressional candidates in 1992 and 7 in 1994; its best showing for either house was in 1992, 13.73 percent for U.S. Senate from Hawaii.

Conclusion

In a normal two-party system, there are still significant third parties. In the United States, there were significant third parties before 1930, but there have not been any since then. The reason there are no longer any significant third parties is because the ballot access laws have become severe. U.S. ballot access laws for third parties are considerably more difficult today than they were in the first quarter of the 20th century, and the steepest increase in the requirements occurred in the 1960s and 1970s. The U.S. Supreme Court ballot access decisions, taken together, have probably had the effect of increasing the severity of the laws, rather than ameliorating them. Because of today's strict ballot access laws, there have not been any substantial nationwide third parties in the U.S. in many decades.

APPENDIX

A Note on Sources

Data showing the strength of third parties in the United States is based on exhaustive research over the past thirty years by the paper's author, who compiled official state election returns for all third party candidates for federal office, statewide state office, and in many cases state legislative races and even county and municipal races, for the period 1870 through 1995. In rare instances at which official state election returns no longer exist, old newspapers and other secondary sources were used.

Information about the history of ballot access laws was obtained from state legislative documents, as well as from past issues of newspapers published by many third political parties, including the Socialist Party, the Socialist Labor Party, the Communist Party, the Prohibition Party, and the Socialist Workers Party (all of these parties existed continuously from the 1930s, or earlier, into our day). The newspapers of these parties

generally included news of ballot access law changes when they occurred. Copies of these newspapers exist in the newspaper room of the library of the University of California, either at Berkeley or Los Angeles or both.

NOTES

¹Although the Conservative Party lost virtually all its seats in the last national election, that party's victory in the 1995 Ontario provincial election shows it is capable of making a national comeback.

²The article omitted Oklahoma, which required 5,000 signatures for a new party. The article also listed the petition requirements for statewide independent candidates, rather than the petition requirements for new parties, in several states. But because the petition requirements were greater for independent candidates than for new political parties in some of those states, the errors tend to cancel each other out.

³See Appendix A, giving the number of signatures required in each state, to form a new party, as of 1930.

⁴The party's poor ballot placement after 1916 reflects that many party activists abandoned the party after 1917, when Congress submitted the 18th amendment to the states. The 18th amendment was ratified in 1919.

⁵In 1924, Senator Robert C. LaFollette ran for president under the Progressive label. The 1924 Progressive campaign is not included above because it does not fit into this paper's definition of a "substantial" party, even though LaFollette polled 16.6 percent of the vote. There were Progressive Party candidates for statewide office in 1924 (other than president) only in 9 states. The party only had 24 candidates for the U.S. House and did not elect any candidates for partisan office, other than presidential electors in Wisconsin.

⁶"Drastic increase," for purposes of this article, means that the requirements were at least tripled. Thus, instances at which the requirements were merely doubled are not included in this article. "Drastic decrease" means that the requirement was cut to one-third or less of what it had been.

⁷This article does not deal with ballot access requirements for independent candidates. For purposes of this article, if the election procedure permits a party label to be printed on the ballot, next to the names of a party's candidates, it is considered a ballot access procedure for political parties. If the procedure does not permit a party label on the ballot, it is considered to be an independent candidate procedure, and is not included in this article. Most states make a clear differentiation between independent candidate procedures and procedures for new parties, although a few important states (e.g., New York, Pennsylvania) do not.

⁸If a state drastically changed its procedures but reversed the change within three years, this article omits such short-term acts.

⁹In *American Party v. Jernigan*, 424 F Supp 943 (1977), Arkansas' seven percent petition for new parties were struck down, but the state replaced it with a three percent petition, not enough of a reduction to qualify as a "drastic reduction." More to the point, even the three percent petition has never been used by any political party. All of the signatures must be gathered in a 4-month period during non-election years.

¹⁰In 1976 California, where new parties usually get on the ballot by registering people into the party rather than by collecting signatures on a petition, did not change its law on how a new party gets on the ballot, but it indirectly made the task much easier, by eliminating the need for a voter to visit a public official to change party affiliation.

¹¹See *Ballot Access News* (8 February 1994) for breakdown by office and by state for this figure, with a correction for Florida in a subsequent issue.

¹²The only partisan elections ever won by a Communist Party candidate in the U.S. were for New York city council, under proportional representation, in 1941, 1943 and 1945.

¹³New York also had a county distribution requirement, starting in 1918, of 50 signatures in 61 of the 62 counties. The New York distribution requirement did not have the same severe impact that the Illinois law did because New York had a fairly easy law for a party to remain on the ballot; if it had polled 25,000 votes in the previous gubernatorial election, it was not required to petition (the 25,000 votes was raised to 50,000, effective 1937). Only in 1940 did the Communist Party try and fail to appear on the statewide New York ballot.

¹⁴No third party in any state, since the 1910s decade, has had registration membership as great as five percent of any state's total registration. Therefore, the 1939 change in Florida to a five percent registration standard had no practical effect on third parties; none was able to surmount the new hurdle any more than they could surmount the old 30 percent write-in hurdle.

¹⁵Most of these statewide partisan posts were judicial posts; Georgia elected local judges and solicitors on a statewide partisan basis.

¹⁶For example, see *Socialist Workers Party v. Hechler* (1989), at 1307, "The distinctions between the highly restrictive Ohio scheme and West Virginia's are far-reaching. Ohio ruled out independent candidacies; West Virginia does not." Even the U.S. Supreme Court got it wrong in a later decision, discussing Ohio: "[Ohio] state laws made 'no provision for ballot position for independent candidates as distinguished from political parties'" *Jenness v. Fortson*, (1971), at 435.

¹⁷Even though the Republican Party was a qualified party in Georgia, the law required the party to either hold a primary at its own expense and with its own employees, or submit the five percent petition. Bo Callaway, the first Republican candidate for Governor of Georgia in the history of the ballot access law, chose to complete the petition rather than try to administer a statewide primary.

¹⁸Neither state ever had any third party congressional candidates on the ballot during its restrictive period.

¹⁹The California legislature eased the law before any further court proceedings took place.

²⁰I have calculated the petition requirements for new parties and independent candidates for all states, for all elections 1928 through the present; I have election returns for all federal office and all statewide state office, for all states, 1900-1994, and I have used this material to arrive at this conclusion.

²¹Unlike the independent candidate petition, the California petition to get a new party on the ballot could take as long as the group needed. According to Henry A. Wallace, the party completed the task within six months (Schmidt 1960).

²²See *Longo v. U.S. Postal Service*, 983 F.2d 9 (1992), cert denied, 113 S.Ct. 2994 (1993), which upheld postal regulations forbidding petitioning on post office sidewalks on the absurd grounds that if such petitioning were permitted, the public might think the post office endorsed the party or candidate which was petitioning.

²³Washington state ballot access laws required third party and independent candidates (for office other than president) to poll one percent of the vote in the blanket primary. The evidence was that, since the requirement had been enacted in 1977, no third party candidate for Governor or U.S. Senator had ever managed to surmount this hurdle. As of 1995, it is still true that no third party candidate for Governor or U.S. Senator has managed to qualify under the Washington state barrier. Although the Socialist Workers Party candidate for U.S. Senator was on the November 1986 ballot, this was only because the party won the *Munro* case temporarily (in the 9th circuit), not because the candidate surmounted the hurdle.

²⁴Even Alaska and Hawaii had territorial legislatures starting in the 1900s decade, and those territorial legislatures wrote ballot access laws for legislative elections and for elections for Delegate to the U.S. House.

²⁵See *Libertarian Party of Virginia v. State Election Board* and *Libertarian Party of Missouri v. Bond*, both of which upheld congressional district distribution requirements for statewide petitions.

²⁶The Florida distribution requirements only apply if the new party wishes to run candidates for U.S. House or state legislature.

²⁷See *Fair v. Taylor, sub nom Bush v. Sebesta*, in which a 3-judge court upheld Florida's petition in lieu of filing fee, passed in 1974, which required a pauper to collect the signatures of five percent of the voters eligible to vote for him or her, within 21 days. *Fair* is not reported and was case number 74-316 in the Middle District of Florida, decided June 2, 1975.

²⁸The Alaska Supreme Court invalidated a three percent petition requirement in *Vogler v. Miller* (1982) and the Michigan Supreme Court invalidated a law whereby minor parties had to persuade three tenths of one percent of the voters in the primary election to abstain from voting for any candidates in the primary election and instead to cast a ballot in a portion of the primary ballot which said "I desire the (such-and-such) party to appear on the general election ballot." *Socialist Workers Party v. Secretary of State* (1982). The Michigan law had been upheld earlier in federal court and summarily affirmed by the U.S. Supreme Court, *Hudler v. Austin*.

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