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Opening Ballot Access to Political Outsiders: How Third Parties Could Use Cook v. Gralike to Challenge the Dominance of America's Two-Party System

Matthew M. Mannix
Roger Williams University School of Law

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Opening Ballot Access to Political Outsiders: How Third Parties Could Use *Cook v. Gralike* to Challenge the Dominance of America's Two-Party System

[The major parties have resisted a modification of the current two-party system with every means at their disposal. One of the most effective means of preserving their dominance of American politics is their control, via major party-dominated legislatures, over the electoral process. Under the Elections Clause of the United States Constitution, state legislatures are empowered to regulate the time, place and manner of elections held in their states. As an exercise of this power, every state in the nation restricts the candidates that may appear on its ballot.]

I. INTRODUCTION

The two major political parties in the United States are committed to their self-preservation and have the power to act on that commitment. Individuals who wish to form a new political party, or simply run for political office as independent candidates, face an entrenched two-party system that has erected numerous obstacles in their paths. Third party candidates perennially face prohibitive ballot access laws, passed by Democrats and Republicans, in various state legislatures across the nation. As a

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result, despite voters' decreasing affiliation and identification with the two major parties,\(^3\) those two parties have maintained their dominance of American elections into the twenty-first century.

This Comment addresses how these obstacles affect federal elections against the backdrop of the Supreme Court's interpretation of the Elections Clause of the U.S. Constitution. The Elections Clause states that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."\(^4\) Since the Elections Clause refers to states' powers to conduct federal – specifically congressional, senatorial and, to a lesser extent, presidential – elections, this Comment focuses on federal elections and the states' regulations of federal elections. Historically, the Court has relied heavily on constitutional provisions other than the Elections Clause to assess the constitutionality of states' regulations of federal elections.\(^5\) In the last decade, however, the Court has placed greater reliance on the Elections Clause, as U.S. Term Limits, Inc. v. Thornton\(^6\) and Cook v. Gralike\(^7\) illustrate. With these two decisions, the Court distinguished procedural regulations, which it found constitutionally permissible under the Elections Clause, and substantive regulations, which it found impermissibly outside the scope of the states' powers under the Elections Clause.

Thornton rejected the argument that the Elections Clause provided broad authority to the states to regulate elections.\(^8\) Instead, the Thornton Court stated that the Founding Fathers "intended the Elections Clause to grant states authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office."\(^9\) The regulation at issue in Thornton would have prevented incumbent United States Senators from Arkansas who had served two terms from

\(^4\) U.S. CONST. art. I, § 4, cl. 1.
\(^5\) See infra Part III.
\(^7\) 531 U.S. 510 (2001).
\(^8\) 514 U.S. at 832.
\(^9\) Id. at 832-33 (emphasis added).
being placed on the election ballot. Similarly, it would have prevented incumbent United States Congressmen who had served three terms from being placed on the election ballot. The Thornton Court relied on the arguments made by James Madison during the ratification debates, and by Alexander Hamilton in The Federalist Papers, to support the view of the Elections Clause as a narrow grant of power to the states. On one hand, the Thornton Court viewed the "times, places and manner" language of the Elections Clause as referring to "how...electors shall elect." This language governs the procedures associated with conducting an election and the Thornton Court found such procedures within the purview of the states' power. On the other hand, regulations that would "dictate electoral outcomes, to favor or disfavor a class of candidates, or...evade important constitutional restraints" were not permitted under the Elections Clause. These non-procedural regulations were substantive in nature, as the Thornton Court made clear in its distinction between procedural and substantive regulations:

The provisions at issue in...our...Elections Clause cases were...constitutional because they regulated election procedures and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position.

Thus, forbidding incumbents from placing their names on the ballot was unconstitutional and imposed a "substantive" restriction because it disfavored a class of candidates - incumbents - and dictated the outcome of the election by removing that class of candidates from the ballot.

Whether one agrees with the Thornton Court's interpretation of the Elections Clause, it did create a clear and usable test for

10. Id. at 783, 784.
11. Id.
12. Id. at 833-34.
13. Id. at 833 (emphasis in original) (citing THE FEDERALIST NO. 60 at 371).
14. Id.
15. Id. at 834.
16. Id. at 833-34.
17. Id. at 835.
18. Id.
analyzing election regulations. Under *Thornton*, a regulation that governs how an election is to be conducted would be categorized as procedural and therefore constitutional. A regulation that prevents a certain group of candidates from getting on the ballot would be categorized as substantive and therefore unconstitutional. What mattered in *Thornton* was that incumbents were disqualified outright, regardless of whether they had met all applicable procedural regulations to get on the ballot.

The distinction between impermissible substantive exclusions and allowable procedural regulations changed in *Cook*. In *Cook*, the Court found a Missouri initiative requiring the instruction, "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS," be placed next to the name of Missouri's incumbent congressmen who did not oppose term limits and the instruction, "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS," be placed next to the name of non-incumbent candidates for Congress who refused to support term limits, unconstitutional. Instead of focusing on how the regulation at issue dictated electoral outcomes, as had the Court in *Thornton*, the *Cook* Court focused on how the regulation placed its "targets at a political disadvantage" and found the regulation unconstitutional for attempting to dictate electoral outcomes. With this language, the *Cook* Court broadened *Thornton*'s definition of substantive regulations, thus opening the door for challenges to election regulations by third parties and independent candidates. Third parties and independent candidates can now seize this opportunity to challenge the constitutionality of long-accepted election regulations. This new definition of "substantive" may give the judiciary more authority to strike down election regulations once viewed as constitutional and categorized by the *Thornton* Court as procedural and somewhat benign. By seizing this opportunity, new parties and independent candidates could alter the political landscape by making access to the ballot easier for individuals and groups.

19. *Id.*
20. *Id.*
21. *Id.*
23. *Id.* at 514-15, 523-24.
24. *Id.* at 525-26.
outside of the dominant two-party structure. By using the substantive/procedural distinction in *Cook*, courts may be able to re-categorize some seemingly neutral regulations, previously categorized as procedural, as substantive regulations that influence electoral outcomes and place certain candidates at a political disadvantage. In doing so, these courts could remove some of the obstacles faced by political outsiders in modern-day U.S. elections.

This Comment opens with a discussion of the obstacles to candidates outside the traditional two-party system. Part II addresses those obstacles, as well as the difficulties political outsiders face, by describing the entrenchment of the two-party system, especially its unresponsiveness to new issues. Part III discusses how the Court's treatment of federal election regulations has touched on many parts of the Constitution: the First Amendment, the Equal Protection Clause, Substantive Due Process, the Qualifications Clause and the Elections Clause. Part IV discusses Thornton's attempt to sort out some of the Court's past election regulation jurisprudence by placing greater emphasis on the Elections Clause than past courts and articulating the distinction between substantive and procedural election regulations. Part V discusses how the Court expanded the definition of substantive regulations in *Cook v. Gralike* and explains how this new definition has opened the door to legal challenges from third parties and independent candidates. Part V explores how the judiciary could embrace the new and broader definition of substantive regulations in *Cook* and use that new definition to recognize that some existing regulations traditionally thought to be procedural (and constitutional) are more properly viewed as substantive (and therefore unconstitutional) regulations. This approach would fundamentally alter how federal elections are conducted because many existing election regulations could be categorized as substantive. To illustrate this point, this Comment addresses several widely accepted regulations and discusses how they may violate the broader *Cook* definition of substantive regulations.

Finally, this Comment concludes by showing how the Court

25. *See infra* Part III.
could use the Cook definition of substantive election regulations to open up ballot access to third (and perhaps fourth and fifth) parties as well as independent candidates, many of whom have struggled to gain access to the ballot in the past. By using this broader definition of substantive qualifications, the Court could help break up the dominance of the two-party system, open up the electoral system to disparate groups and individuals who challenge the status quo and enhance the spirit of democracy.

II. THE TWO-PARTY STRANGLEHOLD

The Founding Fathers expressed major concerns over the divisiveness of factions in the new republic.27 In The Federalist Papers, James Madison defined a “faction” as a “number of citizens... united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”28 Such factions existed at the time of the nation’s founding and exist today, in the form of interest groups, lobbyists and political action committees. The existence of these modern factions would not be a surprise to the Founding Fathers because they saw factions as inevitable.29 They simply devised tools to control such factions.30

Chief among these tools is the concept of representative, as opposed to pure, democracy.31 According to this concept, citizens elect individuals to represent their interests and those representatives become responsible for discerning the country’s “true interest.”32 In a representative democracy, federal officeholders are responsible for controlling factions.33 In their roles as elected representatives, they come together and work out the differences between various local interests by creating policies

27. See, e.g., THE FEDERALIST NO. 10, at 150 (James Madison), in THE AMERICAN CONSTITUTION: FOR AND AGAINST (J.R. Pole ed., 1987) (“Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”).
28. Id. at 151.
29. Id. (“The... causes of faction are... sown in the nature of man.”).
30. Id. at 154.
31. Id.
32. Id.
33. Id.
that strengthen the *national* interest. 34

Other mechanisms created by the Founding Fathers also contribute to controlling factions. These mechanisms include federalism and the separation of powers, both of which Madison described as necessary to control factions and protect the citizenry:

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself. 35

The "two distinct governments" are the federal and state governments, a *vertical* separation of power crucial to Madison's concept of federalism. 36 The "distinct and separate departments" are the legislative, executive and judicial branches — *horizontal* separations that exist at both the federal and state level. 37 These three distinct power bases prevent any single "department" or individual from gaining too much power. Together, these tools also prevent any single faction from gaining too much power because that faction would need to gain control over all those governmental layers to dominate the nation's political agenda.

In addition to these tools, another has emerged: the two-party system. While the Founding Fathers did not create the two-party system, it has played a significant role in controlling factions because it channels political conflict through two distinct pillars — the Democrats and the Republicans. 38 These two major parties have been firmly in place since the Civil War and, despite several challenges to their dominance, 39 they remain the nation's two

34. *Id.*
37. *Id.*
39. Since the emergence of the Republican Party during the Civil War,
major political parties. In presidential elections since the Civil War, serious third party challengers have failed to form movements or parties with any significant staying power.40 The U.S. Senate currently contains only one independent – Vermont's Jim Jeffords – and he ran as a Republican before defecting from the party after winning his re-election.41 The U.S. House of Representatives likewise has only one independent member, Vermont's Bernard Sanders.42 While the formation of a new national party does not necessarily depend on the presence of minor party representatives in Congress, the relative absence of such individuals certainly does not bode well for the formation of a new party in the near future.

Throughout American history, the two-party system has often forced different factions or interest groups to focus their energy on influencing the agendas of either one or both of the major parties. These factions often work within the two-party system to force change. The 1896 presidential candidacy of William Jennings Bryan is illustrative.43 His Populist takeover of the Democratic party that year came after he had embarked on a series of lecture tours throughout the country denouncing the administration of the strongest showing by a third-party presidential candidate came in 1912, when former president Theodore Roosevelt ran under the Bull Moose Party label and finished second in both the popular vote and the Electoral College (Woodrow Wilson won the 1912 election). T. HARRY WILLIAMS ET. AL., A HISTORY OF THE UNITED STATES (SINCE 1865) 337 (Alfred A. Knopf, 1964). H. Ross Perot's 1992 presidential candidacy, in which he finished third, garnered nineteen percent of the popular vote and received zero Electoral College votes, represents the second-strongest showing by a third-party presidential candidate. See PresidentElect.org, http://presidentelect.org/e1992.html.

40. Theodore Roosevelt's Bull Moose Party presidential candidacy in 1912 illustrates this point. A committed progressive, he left the Republican Party and ran on the Bull Moose ticket in 1912. SUNDQUIST, supra note 38, at 177-80. However, his Bull Moose party had no staying power because it "was a personal party, a party permeated with intense moral flavor." See V.O. KEY, JR., POLITICS, PARTIES & PRESSURE GROUPS 179 (5th ed. 1964). Roosevelt's supporters "were no committed ideological bloc whose political course was dictated by what was necessary to advance a program; they merely followed a leader where he led." SUNDQUIST, supra note 38 at 180.

43. See, e.g., SUNDQUIST, supra note 38, at 149-54.
President Grover Cleveland and advocating for free silver. At other times, the major parties absorb new ideas. During the Progressive Era of the early twentieth century, the major parties both made efforts to absorb the Progressives' ideas and agenda, thus blunting the Progressives' ability to form a new party. As a result of this two-party hegemony, one of the two major parties is almost always sure to attain a legislative majority, whether at the state or the federal level. This dominance is evident throughout U.S. history and the failure of any third party to coexist for a significant period of time with the two major parties demonstrates that dominance.

Despite its endurance and stability, the two-party system has its flaws. It can encourage polarization, rather than consensus and compromise. Two former U.S. Senators saw this polarization emerging a decade ago when they bemoaned the "vanishing bipartisan center in Congress." Sam Nunn, a Georgia Democrat, described the voices of common sense in Washington as being "drowned out by the extremes in both parties, who are usually wrong but never in doubt." Bill Cohen, a Maine Republican, similarly lamented his increased marginalization within his own party, seeing a "limit to what... [he] could achieve" as a moderate in an increasingly conservative GOP.

A second and perhaps more significant flaw of the two-party system is the major parties' unresponsiveness to new issues. They often ignore such issues until they almost rupture the political system, or even the nation. As former Chief Justice Warren

44. Id. at 150-154.
45. Id. at 170.
50. In the pre-Civil War political system, the Whig and Democratic Parties ignored the slavery issue for so long that it ruptured not only the political system, but the nation. After both the Whigs and Democrats failed to incorporate the abolitionist or anti-slavery ideas of the Liberty and Free Soil Parties, the Republican Party was created as a vehicle for the anti-slavery movement voice. The creation of the Republican Party forced the
noted:

History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society.51

Throughout the nation's history, third parties and independent candidates have often been responsible for major reforms, ranging from abolition to Progressive Era legislation.52 A more recent example is H. Ross Perot's 1992 third-party presidential candidacy, which focused attention on issues such as the national deficit that had received relatively little attention from the major parties.53 Political forces and figures, like Perot, who are historically "outside the two major parties have [often] been fertile sources of new ideas and new programs. . . . [and] many of their challenges to the status quo have in time made their way into the political mainstream."54 Perot, the Progressives, the abolitionists and other political "outsiders" illustrate how, in American political life, "third parties are often important channels through which political dissent is aired."55

Unfortunately, the current electoral system does not protect
these "important channels." Instead, the two-party system "unquestionably favors Democrats and Republicans at the expense of minor parties and independents, simply because the Democrats and Republicans came into existence first and were...the ones who wrote the rules." These rules include ballot access restrictions and other election regulations, created mostly by state legislatures dominated by the two major parties. These election regulations represent the products of a system designed to perpetuate itself. While the Court has "squarely held that protecting the Republican and Democratic Parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena," it sometimes has contributed - whether wittingly or unwittingly - to that very exclusion.

Many Americans are also increasingly skeptical of the major parties, as their support for a viable third party demonstrates. In the mid-1990s, advocates for congressional term limits attempted to break up this two-party stranglehold by trying to reduce the number of terms a Congressman or Senator could serve in Washington. These advocates ran into a brick wall when the Supreme Court, in a 5-4 decision, ruled that individual states could not impose term limits on federal officeholders. However, the concerns brought up by term limits advocates and other outsiders to the two-party system have not disappeared. Voters and candidates who neither agree with nor identify with either of the major parties continue their struggle.

56. Daybell, supra note 1, at 326.
57. See generally id.
58. Anderson, 460 U.S. at 802.
63. See, e.g., Cook v. Gralike, 531 U.S. 510 (2001). While the State of Missouri was not directly advocating for term limits, it was trying to force its representatives in Congress to advocate for term limits with the ballot labels its voters had approved.
III. THE MUDDLED HISTORY OF ELECTION REGULATIONS
JURISPRUDENCE BEFORE THORNTON

Prior to Thornton's distinction between substantive and procedural election regulations, the Court did not use a consistent approach to analyze federal election regulations. Before the 1980s, the court's jurisprudence in the area of election regulations could be described as a grab-bag of constitutional catchphrases, ranging from Due Process and Equal Protection to Free Speech and Free Association. For example, in Anderson v. Martin, the Court found a Louisiana statute requiring the designation of a candidate's race on the ballot as an Equal Protection violation. At other times — often within the same cases — the court emphasized the right to vote. Within these cases, other justices cited even more options for analyzing election regulations. These various rationales — free association, Equal Protection, the right to vote and Due Process — demonstrate the lack of a cohesive approach to analyzing the constitutionality of election regulations during the 1960s and 1970s.

In the early 1980s, the court attempted to merge some of these approaches in Anderson v. Celebrezze. In Anderson, the Court created a balancing test, weighing the First Amendment (freedom of association) and Fourteenth Amendment (Equal
Protection) against the states’ interests in regulating elections:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.71

In Anderson, the Court stated that an election contest is not a static event.72 Rather, an election is fluid where new and emerging issues “create [potential] opportunities for new candidacies.”73 In Anderson, the Court specifically found that the state’s interests in voter education, political stability and equal treatment for major party and independent candidates were insufficient to justify a March filing deadline for independent and third party candidates in the presidential election, which took place eight months later, in November.74 The Court ruled that such regulations unfairly burdened the independent candidate’s political opportunity.75

Under this rationale, states need to be mindful of ensuring that potential candidates have the opportunity to give voice to new issues. The 2004 presidential election provides a modern-day example. While neither major party candidate took a strong stance against American involvement in Iraq, Howard Dean’s candidacy, as well as numerous opinion polls, demonstrated that a sizeable portion of voters were against American involvement there.76 However, Ralph Nader’s struggles to gain the necessary

72. Id. at 790.
73. Id.
74. Id. at 796, 800.
75. Id. at 805-06.
76. Exit polls on Election Day 2004 indicated that forty-five percent of those polled disapproved of the decision to go to war with Iraq and that forty-six percent believed that the war with Iraq has improved the United States'
signatures to get on all fifty states’ ballots\textsuperscript{77} illustrated how the two-party system hampered his political opportunity to express this alternative point of view.

IV. THE BIRTH OF THE PROCEDURAL/SUBSTANTIVE DISTINCTION UNDER THE ELECTIONS CLAUSE

The Anderson test drew heavily from the election regulation cases that preceded it, because it focused primarily on the First Amendment and the Equal Protection Clause to assess the constitutionality of those regulations.\textsuperscript{78} However, over a decade later with Thornton, the Court made a clear shift in its jurisprudence by relying on the Elections Clause to strike down term limits imposed by Arkansas voters on congressional representatives and U.S. Senators.\textsuperscript{79} The Elections Clause provides that the “Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof.”\textsuperscript{80} The Court described the Elections Clause as a grant of “broad power” to the states to prescribe \textit{procedural} regulations for holding elections for federal offices.\textsuperscript{81} In Cook, the Court relied on a seventy-year-old definition of procedural regulations as “safeguards which experience shows are necessary in order to enforce the fundamental right [to vote].”\textsuperscript{82} Such safeguards are justified by the practical need to ensure that elections are fair and honest and accompanied by order rather than chaos.\textsuperscript{83} These concerns demonstrate how the court has given states a certain measure of discretion to ensure that federal elections run fairly and in a manner that minimizes confusion to long-term security. See Katharine Q. Seelye, \textit{Moral Values Cited as a Defining Issue of the Election}, N.Y. Times, Nov. 4, 2004, at P4.


78. Anderson, 460 U.S. at 783.

79. Thornton, 514 U.S. at 832-38.

80. U.S. Const. art I, § 4


82. \textit{Id.} at 524 (citing Smiley v. Holm, 285 U.S. 355, 366 (1932)).

voters.

That discretion has its limits. While the Court recognizes that procedural regulations for conducting elections are within the purview of the states' constitutional powers, it has simultaneously carved out a category of substantive regulations that states are forbidden to impose on federal elections: "...the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."84 In short, if a state's proposed regulation would decide the outcome of federal elections, then it should not pass constitutional muster.85

A. Defining Procedural Regulations

Procedural regulations are constitutional because they govern how an election is conducted. At the procedural end of the spectrum, the Court has described allowable state regulations as "notices, registration, supervision of voting... counting of votes, duties of inspectors and canvassers, and making and publication of election returns."86 The Court has described such regulations as neutral, "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself."87

In Thornton, the Court reviewed its prior election regulation cases and explained that the provisions at issue in those cases were constitutional "because they regulated election procedures and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position."88 Several cases, which Thornton cited, provide examples of procedural regulations that the Court has found constitutional. In Storer v. Brown, the Court upheld the following provisions of the California Election Code: (1) denial of ballot access to an independent candidate who registered his affiliation with a qualified political party within one year prior to the preceding

84. Cook, 531 U.S. at 523 (citing Thornton, 514 U.S. at 833-34 (emphasis added)).
88. Thornton, 514 U.S. at 835.
primary election (known as a non-partisan requirement for independent candidates), (2) a requirement that all such signatures be obtained during a twenty four-day-period following the primary election (known as a time limit for signature-gathering) and (3) a corresponding requirement that none of the signatures be those of voters who voted in the primary (known as a guarantee of demonstrated support). The Court upheld these restrictions because the state has an "interest...to protect the integrity of its political processes from frivolous or fraudulent candidacies" and to prevent intra-party feuding from spilling into general election contests. Similarly, in Jenness v. Forston, the court upheld the following provisions of the Georgia Election Code: (1) a requirement that a political party obtain twenty-percent of the vote in the most recent gubernatorial or presidential election to gain a place on the ballot in the subsequent election (known as automatic ballot access for the major parties), (2) a requirement that non-party candidates receive the signatures of five percent of the voters eligible to vote in the last election to gain ballot access (known as signature requirements) and (3) a time limit requirement for signature-gathering (180 days). The Thornton Court suggested that these regulations would be categorized as permissible "procedural" regulations.

B. Defining Substantive Regulations

Defining substantive election regulation is elusive. In Thornton, the Court helped crystallize the procedural/substantive distinction when it struck down an amendment to the Arkansas Constitution that would have made it unlawful for incumbent Congressmen and Senators to have their names placed on the ballot. Decided in the mid-1990's, Thornton represented a landmark decision that sounded the death knell for states' ability to impose term limits on federal officeholders. Term limits had

89. Storer, 415 U.S. at 726-27.
90. Id. at 733, 735.
92. Thornton, 514 U.S. at 834-35.
93. The Arkansas regulation, which was the result of a statewide voter initiative, would have restricted an individual Senator to two six-year terms and an individual Congressman to three two-year terms. Id. at 784.
94. Terence M. Fitzpatrick, The Speech or Debate Clause: Has the Eighth
been a major element of the Republican Party’s platform during its sweeping electoral victories in the 1994 midterm elections.\textsuperscript{95} Despite strong public support for term limits, however, the Court struck them down.\textsuperscript{96} It stated that the Arkansas regulation did not fall within the scope of the state’s power under the Elections Clause because the clause did not provide states “with license to exclude classes of candidates from federal office.”\textsuperscript{97} Thus, the Court made a clear statement that patent exclusion of certain candidates from the ballot could never be interpreted as a procedural regulation. Rather, it represented a substantive regulation designed to dictate the outcome of the election.

The Thornton Court did not, however, ground its entire analysis in the Elections Clause. It placed perhaps even greater emphasis on how the regulation violated the Constitution’s Qualifications Clauses and on how the regulation disrupted the somewhat delicate constitutional balance between federal and state power.\textsuperscript{98} The Court stated that the “Framers decided that the qualifications for service in the Congress of the United States be fixed in the Constitution and be uniform throughout the nation.”\textsuperscript{99} States accordingly did not have the power to add to, or delete from, those qualifications. Permeating the Thornton Court’s discussion of the Qualifications Clauses were the premises that universal qualifications for federal officeholders are a necessary element of the constitutional framework and that allowing states to change those qualifications would “erode the structure envisioned by the Framers.”\textsuperscript{100} While these sentiments

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95. \textit{Id.} at 771.
96. \textit{Id.} at 772.
97. \textit{Thornton,} 514 U.S. at 832-33.
98. See generally \textit{id.}
99. \textit{Id.} at 837.
100. \textit{Id.} at 838. While this Comment does not focus on the Qualifications Clause, it is necessary to mention its important role in the development of the court’s jurisprudence in the area of state control of federal elections. Many of the same concerns and arguments over federalism and the proper balance between state and federal power that have influenced the court’s interpretation of the Qualifications Clauses have also influenced its interpretation of the Elections Clause. The two clauses can be discussed separately, but some overlap occurs in the case law and in commentators’ critiques. \textit{See Daybell, supra} note 1, at 316, 317. Much of the reasoning used to strike down or uphold a particular ballot access requirement could be used
also underlie the Court's Elections Clause analysis in Thornton, further discussion of the procedural/substantive distinction came six years later in Cook.

V. Cook's Broadened Definition of Substantive Regulations

In Cook, the Court moved the boundary between substantive and procedural regulations when it struck down a Missouri initiative that (1) instructed each member of Missouri's congressional delegation to vote to pass a Congressional Term Limits Amendment to the U.S. Constitution, (2) required that the statement "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed next to the name of Missouri's incumbent congressmen who did not follow the voters' instructions and (3) required the statement "DECLINED TO PLEDGE TO SUPPORT LIMITS" be printed next to the name of non-incumbents who refused to take a pledge to vote for a Congressional Term Limits Amendment.\(^1\) The lower courts both had relied on Thornton to find the Missouri initiative unconstitutional.\(^2\) In fact, the Supreme Court clearly stated that "although the Court of Appeals' decision is consistent with the views of other courts that have passed on similar voter initiatives, the importance of the case prompted our grant of certiorari."\(^3\) The Court could easily have allowed the lower court decisions to settle the matter, but appeared to have other reasons for granting certiorari on an issue of "importance."\(^4\) In taking the case, the Court broadened its definition of substantive election regulations, but supported its new definition with reasoning that could be used to subsume many existing procedural regulations within the substantive category.

Thornton had stated that it was impermissible for a state to

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2. See Gralike v. Cook, 996 F. Supp. 917, 920 (W.D. Mo. 1998) (describing the Missouri ballot label as having the "likely effect of handicapping a class of candidates for Congress"); see also Gralike v. Cook, 191 F.3d 911, 924 (8th Cir. 1999) (describing the Missouri ballot label as seeking to "impose an additional qualification for candidacy in Congress and...[doing] so in a manner which is likely to handicap term limit opponents.").
3. Cook, 531 U.S. at 518.
4. Id.
deny ballot access to an incumbent congressional candidate because it absolutely excluded a class of candidates from consideration and thus dictated "electoral outcomes." The *Thornton* decision had defined substantive regulations as those that dictated electoral outcomes by excluding a class of candidates from the ballot – and therefore excluding those candidates from the election – versus a procedural regulation that governed the time, place and manner of casting ballots. Under *Thornton*, a procedural regulation may exclude a candidate from the ballot, but a substantive regulation will always do so. Thus, even if one of Arkansas' incumbent congressmen or Senators followed every procedural regulation imaginable, no matter how burdensome, to get on the ballot, the problem with the Arkansas term limit regulation was that it excluded the candidate from the ballot anyway. Such exclusion of particular candidates' (namely incumbent congressmen's) names from the ballot would dictate the electoral outcome because voters would never get the opportunity to vote for incumbents after they had served a designated number of terms. The *Thornton* Court found that dictating electoral outcomes in this way was unconstitutional.

Unlike the incumbent congressmen in *Thornton*, the candidates opposed to term limits in *Cook* were not being excluded from the ballot. However, *Cook* applied a broader version of the *Thornton* dictation-of-electoral-outcomes test to the labels Missouri wished to place next to candidates' names: "While the precise damage the labels may exact on candidates is disputed between the parties, the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office." Such labels were substantive, not procedural, regulations and thus violated the Elections Clause. The labels, which the courts below had described as "pejorative," "negative," "derogatory," "intimidating" and akin to a "Scarlet Letter," were struck down because they "handicap candidates 'at the most crucial stage in the election process – the instant before the vote is

106. *Id.* at 833-34.
107. *Id.* at 838.
108. *Cook*, 531 U.S. at 525 (emphasis added).
109. *Id.* at 526.
This expansion of the Thornton test for substantive regulations rests on the principle that states cannot influence election outcomes or exert pressure on voters by drawing issue distinctions between the candidates inside the ballot box.111

VI. HOW PROCEDURAL REGULATIONS BECOME SUBSTANTIVE UNDER THE COOK REASONING

At first glance, Cook may appear to be a logical application of Thornton's distinction between substantive and procedural election regulations. The Court in Cook reasoned that "pejorative" issue labels did not pass constitutional muster because of (1) the influence such labels will have on some voters and (2) the fact that such labels will ultimately and unfairly influence the electoral outcome.112 The problem with this reasoning is that influencing an electoral outcome is quite different than dictating an electoral outcome. Clearly the exclusion of certain candidates dictates an electoral outcome – it restricts voters' choices by removing certain candidates' (such as incumbents') names from the ballot. Such was the situation in Thornton. Once term limits were imposed, even if an incumbent candidate met all signature requirements mandated by a particular state and petitioned for ballot access well in advance of any state-imposed deadlines, that candidate would still not get a place on the ballot. The state's election regulation dictated an electoral outcome because it had created an absolute bar to the presence of a candidate's name on the ballot. By contrast, attaching a statement regarding an issue position next to a candidate's name falls short of dictating an electoral outcome. Such was the situation in Cook. Attaching a statement regarding an issue position next to a candidate's name may dictate the outcome by calling attention to an issue many, or even most, voters care about, but it does not necessarily do so. Thus, while Thornton's dictating-electoral-outcomes test addressed situations where a class of candidates was denied ballot access, Cook asked courts to examine whether a state law would "handicap" a

110. Id. (citing Anderson v. Martin, 375 U.S. 399, 402 (1964) (emphasis added)).
candidate or put a candidate at a "political disadvantage." Handicapping a candidate is less burdensome than excluding a candidate from the ballot altogether. After Cook, many so-called procedural (and constitutionally permissible) regulations under Thornton could now fall into the category of substantive regulations because they do what Cook prohibits. These regulations, while perhaps appearing "evenhanded," often influence election results by handicapping certain candidates, namely third party and independent candidates, and also place such candidates at a political disadvantage. They do so by forcing these candidates to overcome obstacles to gaining ballot access and getting elected which major parties and major party candidates simply do not face.

The following non-exhaustive list of examples demonstrates how some so-called procedural election regulations are arguably invalid under the Cook test because they handicap certain candidates and place them at a political disadvantage: (1) signature requirements for non-major party candidates to gain access to the ballot, (2) automatic ballot access for established parties and (3) the listing of party affiliations on ballots. Each of these regulations could be re-categorized as substantive under Cook.

A. Signature Requirements

Every state imposes some form of ballot-access signature requirements on all candidates for offices, regardless of their party affiliation. These signature requirements do not explicitly exclude a class of non-major party candidates from the ballot. However, they do create significant obstacles for non-major party candidates to get on the ballot. Across the nation, the number of signatures for major party candidates is almost always lower than the number required for minor party and independent candidates. In addition, the lack of major party resources presents further difficulties for aspiring non-major party candidates:

There are two ways that candidates can gather the

113. Id. at 525.
114. Daybell, supra note 1, at 294.
115. Id. at 294-95.
signatures necessary to fulfill the ballot access signature requirements. First, a candidate can hire a company to collect the necessary signatures. The other alternative requires a candidate to mobilize a large force of volunteer campaign workers to canvass the streets seeking petition signers. Unlike a major party candidate, a minor party candidate will not have the party-supplied support staff of volunteers to man the telephones, run the field offices, or conduct get-out-the-vote campaigns. In either case, the minor party candidate must expend substantial resources that the major party candidate can devote to other aspects of his or her campaign.116

Under *Cook*, these signature requirements could be categorized as substantive because they *handicap* non-major party candidates and place them at a *political disadvantage*. They also do not apply equally to the major parties vis-à-vis independent candidates. They force independent candidates to spend more time and resources than major party candidates to achieve the same goal: access to the ballot. In essence, "the[se] signature requirements have effectively created an uneven playing field" between major party candidates and non-major party candidates.117

B. Automatic Ballot Access for the Major Parties

Similarly, after *Cook*, automatic ballot access for "established" political parties may no longer fall into the procedural category. Many states reserve a place on the ballot for the Democratic and Republican parties and their candidates because of the strong support they have received in previous elections.118 Ralph Nader, aware of this obstacle in 2000, made it part of his platform to obtain five percent (5%) of the vote nationwide, a figure which would have guaranteed his party a position on every state ballot in 2004.119 He failed in that task, garnering just under three

116. Id. at 297.
117. Id. at 299.
percent (3%) of the vote nationwide.\textsuperscript{120} However, minor-party candidates for federal and state offices at all levels are confronted with this same obstacle every election year. If a party has not demonstrated that it has strong support, ballot access is denied and a minor party candidate is forced to collect signatures to gain a place on the ballot.\textsuperscript{121} Even if successful in that effort, the minor-party candidate still needs to obtain a certain percentage of the vote in the election to gain ballot access for his party in the next election cycle.\textsuperscript{122} This restriction clearly discriminates against minor party candidates, but it does not categorically exclude them from the ballot and thus would have represented a procedural regulation under Thornton and prior Elections Clause cases. However, while automatic ballot access for major parties does not dictate electoral outcomes, it certainly influences such outcomes. It meets the Cook definition of handicapping a certain class of candidates (minor parties and their members) and placing them at a political disadvantage. Therefore, under Cook's reasoning, automatic ballot access provisions for established parties are substantive and therefore unconstitutional.

While signature requirements and automatic ballot access for major parties should be categorized as substantive regulations under Cook's reasoning, defenders of such regulations may argue that they should remain in the procedural category because of the states' interest in preventing chaotic and confusing elections.\textsuperscript{123} The Court has recognized these interests, which include preventing the clogging of election machinery, avoiding voter confusion and assuring that the winner of an election is the choice of the majority, or at least a strong plurality, of the voters.\textsuperscript{124} Accordingly, the Court has ruled that the states can regulate the number of candidates that appear on the ballot in the interest of protecting the political process from frivolous and fraudulent candidacies.\textsuperscript{125} In upholding the constitutionality of election regulations in Storer, the Court pointed out that the state

\textsuperscript{120} PresidentElect.org, http://presidentelect.org/e2000.html.
\textsuperscript{121} See Daybell, \textit{supra} note 1, at 294-95.
\textsuperscript{122} See \textit{id.} at 296.
\textsuperscript{124} Id. (citing Jenness v. Forston, 403 U.S. 431, 442 (1971)).
\textsuperscript{126} Jenness, 403 U.S. at 442.
“apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government.”\textsuperscript{127}

These practical interests in maintaining order reflect the concerns raised by the Court in \textit{Anderson}.\textsuperscript{128} While maintaining order and preventing chaos are valid state concerns, they cannot be used to justify election regulations that purposely favor the two established major parties. Continuing to categorize signature requirements and ballot access for the two major parties as procedural regulations that the states can make under their Elections Clause powers would allow the two major parties to maintain their dominance in American politics. These regulations are not evenhanded because they erect larger obstacles in front of third parties and independent candidates seeking ballot access. Such unfair regulations should not survive in their current form.

\textbf{C. Party Labels}

Party labels present a different challenge then that presented by signature requirements and automatic ballot access provisions. States typically place the party affiliation of major party candidates next to their names on the ballot.\textsuperscript{129} The state’s interest in providing such information to the voters is even less related to its interests in preventing voter confusion or clogging election machinery. Rather, the Court’s reasoning in \textit{Cook} fails to distinguish the Missouri ballot labels regarding opponents of term limits from other information typically found on the ballot, such as the aforementioned party labels.\textsuperscript{130} The impact that a party label and an issue position label, such as on the one struck down in \textit{Cook}, could have on voters’ decisions is comparable:

A candidate’s party affiliation is a single piece of information to which the state draws voters’ attention by printing it on the ballot. Indeed, listing party affiliation is merely a shorthand way of listing a bundle of policy commitments held by the affiliated candidate. This

\textsuperscript{127} Storer, 415 U.S. at 736.
\textsuperscript{128} Anderson v. Celebrezze, 460 U.S. 780, 796, 800 (1983).
\textsuperscript{130} \textit{Id.}
makes it unlikely that the defect in the Arkansas ballot label law could have been the sin of providing information on the ballot about candidates' substantive positions. . . . There are many jurisdictions in which having the word "Democrat" or "Republican" printed next to one's name all but guarantees electoral defeat. Yet it seems clear that no candidate could successfully object to state law requiring disclosure on the ballot of party affiliation.131

After *Cook*, a challenge by an individual candidate to the placement of a partisan label on the ballot next to his name should not be discarded so lightly. A party label acts as a "clue" for voters with strong partisan attachments and provides a significant *political advantage* (or disadvantage) to one candidate over (or against) other candidates. For example, a Republican candidate running for Congress in a district with an overwhelming number of registered Republican voters will almost certainly want his party label on the ballot. His Democratic opponent, on the other hand, may not be so enthusiastic about having his party label next to his name on the ballot. For many voters in a Republican district, that "Democratic" label would probably be "pejorative" and at the very least "negative."132 Such voters may have never voted for a Democratic candidate in the past or they may perceive all Democrats as members of a national party they distrust. In such a strong Republican district, the "Democratic" party label may not truly differ from the "pejorative" issue position labels found unconstitutional in *Cook*. While the Democratic label does not guarantee electoral defeat in this district, it does *handicap* the Democratic candidate and place him at a *political disadvantage*. In addition, just as Missouri's forbidden issue label in *Cook* would have a substantive effect on voters' decisions at a crucial moment in the voting process - right before the vote is cast - the same is true of a party label. In fact, many less informed voters simply rely on this clue of party affiliation to make their decision and do not take the time to research the various candidates' positions on the issues.133

131. *Id.* at 52-53.
133. Many jurisdictions encourage this reliance by allowing voters to vote
This argument is not theoretical. Many of the nation's congressional districts are dominated by voters who historically vote for either Democratic or Republican candidates.\textsuperscript{134} Battles between the parties over redistricting indicate that both political parties know that it is in their best interest to create congressional districts dominated by voters most likely to vote for their candidates. These seemingly blind partisan preferences may explain why many localities have decided to remove party labels from the ballot.\textsuperscript{135} These localities are perhaps making an effort to break up one or both parties' dominance, forcing voters to learn more about candidates in local elections and discouraging voters from pulling the Democratic or Republican lever on Election Day.

D. Rethinking the Distinction between Procedural and Substantive Regulations

The broadening of the definition of substantive regulations in \textit{Cook} makes it difficult for future courts to continue to categorize many existing election regulations as procedural. Of course, one could ignore the \textit{Cook} court's rationale for why the Missouri ballot labels were substantive and interpret \textit{Cook} as a narrow decision which focused on the "pejorative" nature of the Missouri ballot label -- "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS." -- to strike it down.\textsuperscript{136} Chief Justice Rehnquist's concurrence in \textit{Cook} demonstrated this approach, relying on the First


\textsuperscript{134} See generally MICHAEL BARONE and GRANT UJIFUSA, \textit{THE ALMANAC OF AMERICAN POLITICS} 2000 (National Journal Group, Inc. 1999).

\textsuperscript{135} Perhaps the best example of removal of party labels comes from Nebraska, where a nonpartisan unicameral legislature is elected by Nebraskans. Candidates for election to Nebraska's unicameral legislature do not have their political party affiliations, or labels, next to their names on the election ballot. Instead, the two candidates who obtain the most votes in the primary election face each other in the general election. The History of Nebraska's Unicameral Legislature, http://www.unicam.state.ne.us/learning/history.htm.

Amendment rather than the Elections Clause to strike down the Missouri labels. Rehnquist's concern was "with the government speaking in a pejorative way about a...political candidate and the [fact that the] pejorative speech is a condition for appearing on the ballot." Had the court adopted Rehnquist's reasoning, the pejorative labels would represent a violation of free speech and therefore would be unlawful in both federal and state elections. However, the Cook majority, by relying on the Elections Clause, took a different path. Under the majority's reasoning, the use of issue labels – pejorative or otherwise – in state elections was not directly addressed, and therefore was left open.

Had the Cook Court analyzed the Missouri issue label as a violation of free speech, as suggested by Rehnquist, it would not have disrupted the procedural/substantive distinction articulated in Thornton. The "pejorative" label would have been forbidden in any state or federal election and the issues of federalism that underlie Elections Clause jurisprudence would not have come into play. By relying on the Elections Clause, the court clearly broadened its definition of substantive regulations to include a condition which was not excluding anyone from the ballot. The implication of this new definition is that it has opened the door for third parties and independent candidates to challenge election regulations, not for dictating the electoral outcome because they exclude a class of candidates from the ballot, but for handicapping those candidates and placing them at a political disadvantage. This lower threshold of what encompasses an unconstitutional regulation is easier to meet and makes it easier for courts post-Cook to strike down election regulations than it was under Thornton.

137. Jackson, supra note 136, at 327; see also Cook, 531 U.S. at 530-31 (Rehnquist, C.J., concurring).
138. Jackson, supra note 136, at 327.
139. See generally Cook, 531 U.S. 510 (Rehnquist, C.J., concurring).
140. Id. at 530-31 (Rehnquist, C.J., concurring).
141. A review of some subsequent decisions since Cook demonstrates that federal courts have not relied heavily on Cook or explored the dimensions of its broader definition of "substantive" regulations in analyzing the constitutionality of election regulations. Cartwright v. Barnes provides an example. 304 F.3d 1138, 1142 (2002). In that case, the United States Court of Appeals for the Eleventh Circuit relied mostly on Thornton to uphold Georgia election regulations similar to those upheld by the Court three decades ago in...
VI. Conclusion

The United States Supreme Court faced a choice when *Cook* came to it on appeal. The majority could have adopted the reasoning in Justice Rehnquist's concurrence[^142] and struck down the Missouri ballot labels on First Amendment grounds because of their pejorative nature. Instead, the Court chose a different route by strengthening and expanding its Elections Clause jurisprudence and redefining the scope of impermissible "substantive" election regulations. This redefinition not only includes regulations that dictate the outcomes of federal elections because they patently exclude candidates from the ballot, but also could include regulations more subtle in their application that influence, but do not necessarily dictate, the outcomes of federal elections.

By articulating a broader definition of a substantive regulation, the Court must now confront the realities of this new definition. If *Cook* is taken seriously, it will be difficult for courts to continue to uphold certain regulations, such as signature requirements, automatic ballot access for major parties and especially party labels, as neutral "procedural" regulations that do not seek to influence electoral outcomes. With *Cook*, the Court has opened the door for minor parties and independent candidates to challenge these regulations as substantive regulations that violate the Elections Clause.

Reforms aimed at opening up the federal electoral process, such as removal of party labels from states' ballots for federal elections, would not destroy the two parties overnight – and perhaps not ever. The essence, and thus the accompanying stability, of the two-party system would remain intact: the two major parties would not disband simply because ballots did not include the "Democrat" or "Republican" label next to candidates' names. Instead, the major parties would continue their operations because of their continued incentive to field candidates who agree on a set of unifying issues. The all-or-nothing aspects

[^Jenness]: 403 U.S. 431 (1970). The Court does not invoke *Cook*’s language regarding handicapping certain candidates or placing them at a "political disadvantage." In fact, it only mentions the *Cook* case once in a footnote. *Cartwright*, 304 F.3d at 1142, n.4.
of American elections – including the Electoral College\textsuperscript{143}, winner-take-all elections\textsuperscript{144} and single-member congressional districts\textsuperscript{145} – would still provide significant incentives for voters to vote for major party candidates.\textsuperscript{146}

However, removal of the party labels, as well as other reforms to break the two-party stranglehold, would represent a welcome breath of fresh air. Such reforms may not destroy the two-party system, but they could provide access for more dissident political voices. As a start, removal of party labels would prevent voters from pulling the Democratic or Republican lever. Without party labels as a guide, voters, no longer able to rely on party labels to decide for whom to vote, would be forced to learn at least a little bit more about the various candidates for political office. This shift would probably not take place overnight, but as incumbents retired, new candidates would have the opportunity to run on a fresher slate.

This change would also achieve a traditional goal of third parties and independent candidates – a broader and more vibrant political debate:

The minor party’s often unconventional opinions broaden political debate, expand the range of issues with which the electorate is concerned, and influence the positions of the majority, in some instances becoming majority positions. And its very existence provides an outlet for voters to express dissatisfaction with the candidates or platforms of the major parties.\textsuperscript{147}

In short, just as they have in the past, minor parties and their candidates could make the major parties more responsive to the emergence of new issues. Such reforms would help even the playing field between the two-party system and political outsiders by equalizing the rules that apply to both major and minor party candidates in their quests to gain access to the ballot. With easier

\begin{itemize}
  \item \textsuperscript{144} See id. at 474.
  \item \textsuperscript{145} Id. at 523-27.
  \item \textsuperscript{146} Sórauf, supra note 46, at 37.
\end{itemize}
access to the ballot, the major parties may be less likely to trivialize the influence of their dissident members and may make greater efforts to accommodate them. If the major parties ignored new issues, then perhaps dissenters within one or both parties could more easily form a new party to reflect and advocate for that issue. This persistent and real threat to the two parties could create a broader dialogue within the parties and perhaps across the entire political system. While the two major parties may well continue to control the electoral process through the domination of state legislatures across the country, they would no longer be able to take that dominance for granted. Cook has opened the door for political outsiders to challenge that dominance. Now the judiciary must keep that door open.

Matthew M. Mannix*

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* Juris Doctor Candidate, Roger Williams University School of Law; A.B., Princeton University (Politics). I dedicate this Comment to my late father, Michael T. Mannix.