Ballot Access Laws in West Virginia--A Call for Change

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Notes

BALLOT ACCESS LAWS IN WEST VIRGINIA—A CALL FOR CHANGE

I. Introduction

The nominees of the Republican and Democratic parties automatically appear on the general election ballot in West Virginia. The ability of candidates outside of the two major parties to have their names printed on the general election ballot is determined by ballot access laws in the Election Code of West Virginia. Simply stated, a nonmajor party candidate must collect a certain number of petition signatures to demonstrate public support before his name can be placed on the ballot. The various rules which dictate how those signatures are obtained, however, have combined to make ballot access a very difficult task.

The initial sections of this Note review the historical and constitutional backgrounds of ballot access laws. Since 1968, there has been an increase in judicial activity nationwide challenging restrictive ballot access laws. Two recent cases, Libertarian Party v. Manchin and Anderson v. Celebrezze, have rendered certain portions of West Virginia’s ballot access laws unconstitutional. However, the West Virginia Legislature has not amended the statutory requirements for ballot access since 1941.

With the election of a new secretary of state in 1984, there has been talk of a major reform of West Virginia’s election laws as a whole. It is important that such a complete overhaul should also include revisions to our ballot access laws. The final portion of this Note proposes revisions to bring West Virginia’s statutory requirements within constitutional guarantees.

II. Historical Background

Political parties, as we know them today, did not exist at the time of the writing of the United States Constitution. The Constitution does not explicitly mention

1 The term “nonmajor party candidates” is used herein to include both minor party and independent candidates. The term “major party” is used to refer to officially recognized parties, normally the Democrats and Republicans. See infra note 152 and accompanying text.


5 Election Campaign Reform Proposed, Morgantown Dominion-Post, February 20, 1985, at B12, col. 1.

6 See generally E. Robinson, THE EVOLUTION OF AMERICAN POLITICAL PARTIES (1924); PRACTICAL POLITICS IN THE UNITED STATES (C. Cotter ed. 1969). In fact, the founding fathers sought to avoid political parties on the premise that they were a threat to the cohesiveness of the new union. Many authors addressed this issue, including James Madison, George Washington, and Thomas Jefferson. See THE MAKING OF THE AMERICAN PARTY SYSTEM 1789 to 1809. (N. Cunningham ed. 1965).
political parties, nor is the present two party system mandated as the official political framework in America. Political parties began as loose coalitions bound together by a common doctrine or specific program. Some of these groups consisted of personal followings, some were of regional origin, and others were based on economic interests. As national issues began to dominate American politics, these factions aligned themselves into two opposing groups which clashed on a national scale. Thus, even in the early days of our republic, political activity centered around two major parties.

This fundamental two party alignment has continued to the present day. The entrenchment of the two party system may be traced to several factors, including the winner take all electoral system, voting habits, and, more recently, barriers to third party ballot access. Yet, despite the prevalent two party pattern, third parties have persistently managed to have a positive impact on American politics. Because of their unique role in our political scheme, the existence of third parties should be encouraged. One way to accomplish this is to standardize the laws which inhibit their access to our political system.

Many third parties have received significant voting percentages in presidential elections. Strong third parties have appeared in nearly every election, with the exceptions of the period of Reconstruction after the Civil War and the Great

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7 But cf. A. Bickel, Reform and Continuity; The Electoral College, the Convention, and the Party System 85 (1971) ("The states are entitled to put some store by the two party system and they ought to have the power to give it a certain edge." Id. at 85).

8 The party of Alexander Hamilton supported a strong central government. It was opposed by the followers of Thomas Jefferson, who advocated the return of power to the states. E. Robinson, supra note 6, at 62-74.

9 Various views were held by representatives of cities on the East Coast, the western settlers, landholders, planters, and immigrants. Id. at 20-21.

10 Early debate focused on the adoption of the Constitution, see The Federalist No. 10 (J. Madison); the constitutionality of a national bank, see N. Cunningham, supra note 6, at 32-36; and foreign policy, see E. Robinson, supra note 6, at 65-66.

11 D. Mazmanian, Third Parties in Presidential Elections 2 (1974). Mazmanian contends that competition to gain the Presidency, as well as pressure to build nationwide coalitions, tends to reduce the number of parties to two. Id. See also A. Bickel, supra note 7.

12 E. Robinson, supra note 6, at 6-7.


14 Significant Third Parties in Presidential Elections, 1828-1972

<table>
<thead>
<tr>
<th>Year</th>
<th>Party</th>
<th>Percentage of total votes cast</th>
</tr>
</thead>
<tbody>
<tr>
<td>1832</td>
<td>Anti-Mason</td>
<td>8.0</td>
</tr>
<tr>
<td>1848</td>
<td>Free Soil</td>
<td>10.1</td>
</tr>
<tr>
<td>1856</td>
<td>American</td>
<td>21.4</td>
</tr>
</tbody>
</table>
Depression. This pattern may be attributed to several factors. Whenever an intensely controversial issue appears, the two major parties are likely to appeal to the majority of the electorate, leaving an angry and unrepresented minority. This situation creates the opportunity for the minority to unite into a third party. In this way, major issues are highlighted and dramatized and the major parties are forced into addressing them.

<table>
<thead>
<tr>
<th>Year</th>
<th>Party 1</th>
<th>Party 2</th>
<th>Party 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>1860</td>
<td>Breckinridge Democratic</td>
<td>18.2</td>
<td>12.6</td>
</tr>
<tr>
<td>1892</td>
<td>Populist</td>
<td>8.5</td>
<td></td>
</tr>
<tr>
<td>1912</td>
<td>Theodore Roosevelt Progressive</td>
<td>27.4</td>
<td></td>
</tr>
<tr>
<td>1912</td>
<td>Socialist</td>
<td>6.0</td>
<td></td>
</tr>
<tr>
<td>1924</td>
<td>La Follette Progressive</td>
<td>16.6</td>
<td></td>
</tr>
<tr>
<td>1968</td>
<td>American Independent</td>
<td>13.5</td>
<td></td>
</tr>
</tbody>
</table>

The vote for the Republican party was 23.2 percent, making the vote of the short-lived Progressive party the second highest of the election.


15 Id. at 66. The absence of third parties may be attributed to the intensity of the conflict, which tends to split voters into two evenly divided parties and excludes third parties from the necessary support they need.

16 Id.

17 Coincidence of Intense Conflict on Issues and Significant Third-Party Vote in Presidential Elections, 1818-1972

Issues in conflict Third party and election year

- Egalitarianism
  - Anti-Mason: 1832
  - Free Soil: 1848
  - American: 1856
  - Breckinridge Democratic: 1860
  - Constitutional Union: 1860

- New territories, nativism, and slavery
  - none

- Reconstruction
  - none

- Agrarian protest
  - Populist: 1892

- Corporate regulation and government responsiveness
  - Theodore Roosevelt Progressive: 1912
  - Socialist: 1912
  - La Follette Progressive: 1924

- Great Depression
  - none

- Civil rights and Vietnam war
  - American Independent: 1968


Year in which third party won at least 5.6 percent of presidential vote.


11 Id. at 67.
For example, the Free Soilers of 1848 compelled the country to address the question of slavery. Later in the same century, the Populist Party (1892) voiced the concerns of discontented farmers. Demand for political and economic reform was a key controversy that was publicized by the Bull Moose and Socialist parties in 1912. A more contemporary illustration of this function of third parties is provided by George Wallace and his American Independent Party, whose stands on segregation and military strength in Vietnam appealed to a substantial number of Americans in 1968. At various times throughout our nation’s history, issues such as railroad regulation, progressive income taxation, social insurance, and child labor laws were campaign causes of third parties which later became governmental policy.

Even with recognition of the historical contributions of third parties, some scholars still categorize them as contrary to the American political process. These scholars allege that third parties threaten the stability of the political system, by encouraging extremism which would potentially deadlock the nation into unresolvable conflict. The continuing dominance of the two party system demonstrates that this has not occurred. The criticism that third parties could prevent a majority in the electoral college also has not been justified. Although a third party can capture votes that might have gone to a major party, in all elections with significant third parties, the majority candidate won with over fifty percent of the electoral votes.

19 Id. at 36-39. The Free-Soiler Party later merged into the Republican Party. Id. at 39.
20 W. HESSELTINE, THE RISE AND FALL OF THIRD PARTIES: FROM ANTI-MASONRY TO WALLACE 16 (1957). See also D. MAZMANIAN, supra note 11, at 51.
21 W. HESSELTINE, supra note 20, at 19-27. The Bull Moose Party could be termed the most successful of all third parties. Running on a platform of issues like women’s suffrage, regulation of corporations, and direct primaries, the party captured 88 electoral votes, running second to Woodrow Wilson with 435. Id. at 26-27.
22 Id. at 34-41. The main thrust of the party platform was the struggle between wage earners and capitalists. The Socialist candidate, Eugene V. Debs, received 900,000 votes; also, many state and local offices were held by Socialists. Id. at 37.
23 D. MAZMANIAN, supra note 11, at 24.
24 W. HESSELTINE, supra note 20, at 37 (Populist Party).
25 Id. at 38 (Socialist Party).
26 D. MAZMANIAN, supra note 11, at 81 (Progressive Party).
27 W. HESSELTINE, supra note 20, at 21 (Bull Moose Party).
29 D. MAZMANIAN, supra note 11, at 68-69.
30 Id. at 69.
31 Id. at 69-74. "The final outcome of the three-party contests of 1848, 1856, 1860, 1892, 1912, and 1968 might have been changed by eliminating third parties, for the victors won by pluralities." Id. at 70.
32 Id. at 69.
The important role played by third parties in representing minority interests clearly outweighs the negative effects on the two party system. Moreover, a third party appeals to voting groups who would not ordinarily be involved in politics, thereby increasing overall voter participation. Third parties can also have an effect on public policymaking. At the outset, the issues addressed by third parties are generally minority views. However, many of these ideas may be adopted in response to public demand by the major parties and translated into public policy. Therefore, third parties help to refine and distill creative new ideas, thus filling an indispensable role in our political system.

The success of the third party, at least in the early days, may have been attributed to the absence of barriers to their formation. Up until 1888, any group that wished to compete in an election would simply print and distribute its own ballots. The only responsibility of the government was to count the ballots. The potential for abuse of this system prompted a call for government administered elections. By making the government responsible for printing, distributing, and counting the ballots, the potential for corruption of elections was diminished. However, the major parties soon recognized that restricting ballot access was a method to eliminate third party competition.

Early ballot access requirements were put in place at the beginning of the twentieth century. Ironically, the stated purpose of these laws was to limit the number of less significant offices and to ensure the integrity of the election process. At first, the requirements for third party candidates were minimal. As the years went on, however, the laws became more and more restrictive, thus ensuring the perpetuation of the Democratic and Republican parties. In many states the tightening of these laws followed the campaigns of Teddy Roosevelt’s Bull Moose Party in 1912 and Robert LaFollette’s Progressive Party in 1924.

The 1940s brought even tighter restrictions on third parties. With patriotic fervor generated by the war, the states attempted to restrict the access of leftist parties such as the Communists and the Socialists. By the election of 1948, Henry Wallace's

33 Id. at 77.
34 Id. at 81.
35 Id. at 90.
36 Id.
37 Elder, supra note 13, at 389.
38 D. MAZMANIAN, supra note 11, at 90.
39 W. HESSELTINE, supra note 20.
40 The Progressive Party was the last party to achieve ballot access in all states. However, due to legal technicalities, the party appeared on the ballot under a variety of names, thus cutting down on the effectiveness of its campaign. LaFollette captured 17% of the popular vote. D. MAZMANIAN, supra note 11, at 92.
41 Id.
Progressive Party was thwarted by filing deadlines and petition requirements.\textsuperscript{42} Although the Progressive Party received significant support in some areas, ballot access restrictions prevented them from running in many states.\textsuperscript{43} As a result of the 1948 election, some states passed legislation further restricting ballot access.\textsuperscript{44} Twenty years would pass before a third party candidate again gained sufficient support to mount a serious presidential challenge.

In 1968, Alabama Governor George Wallace emerged as a presidential contender. Backed by a coalition of conservative voters, Wallace was preferred by twenty percent of the electorate, according to preelection polls.\textsuperscript{45} Yet his efforts to be placed on the ballot were hindered by tough ballot access requirements in many states.\textsuperscript{46} Wallace’s legal challenge to Ohio’s ballot access provisions resulted in a favorable decision in Williams v. Rhodes, the landmark case on judicial review of ballot access questions.\textsuperscript{47}

III. CONSTITUTIONAL IMPLICATIONS IN BALLOT ACCESS CHALLENGES

A. Constitutionally Guaranteed Rights and the Standard of Judicial Scrutiny

The standard of judicial scrutiny applied by the United States Supreme Court in a ballot access challenge is based, in part, upon the Court’s recognition of two constitutionally guaranteed, fundamental rights: “the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.”\textsuperscript{48} The Court has repeatedly and emphatically held each of these freedoms to be protected against federal encroachment by the first amendment\textsuperscript{49} and against state infringement by the equal protection clause of the fourteenth amendment.\textsuperscript{50} Indeed, the right to a meaningful vote of equal weight in government elections has been placed among this country’s most precious and fundamental rights.\textsuperscript{51}

\textsuperscript{42} Id. at 93.
\textsuperscript{43} Id. at 93-95.
\textsuperscript{44} During this period 37 states had petition requirements, 60% of the states had provisions disqualifying communist or subversive parties and 16 states had early filing deadlines. Id. at 95-96.
\textsuperscript{45} Id. at 96.
\textsuperscript{46} Id.
\textsuperscript{47} Williams v. Rhodes, 393 U.S. 23 (1968).
\textsuperscript{48} Id. at 30.
\textsuperscript{49} The first amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the Freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.
\textsuperscript{50} Williams, 393 U.S. at 30-31 (citing UMWA v. Illinois State Bar Ass’n, 389 U.S. 217 (1967); NAACP v. Button, 381 U.S. 415 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)). The relevant portion of the equal protection clause of the fourteenth amendment reads: “No state shall . . . deny to any person within this jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
Although a right to candidacy has never been explicitly recognized as a fundamental right, the Court has implicitly elevated it to such a level by choosing to employ a strict scrutiny standard of review.\textsuperscript{12} Simply stated, if a challenger can persuade the court that the classification is "suspect" or that a "fundamental right" is impaired, the state-imposed restriction will be reviewed and struck down under the strict scrutiny/compelling state interest test. If not, the Court will utilize the rational relationship test which simply requires the state's classification to be related to a legitimate state purpose and, in practice, the law is easily constitutionally approved.\textsuperscript{13}

The right to form a party for the advancement of political ideas becomes, in effect, an empty right if a party can be kept off the election ballot and therefore denied an opportunity to win votes.\textsuperscript{14} Likewise, the right to vote is severely burdened if that vote may be cast for only one of two parties "at a time when other parties are clamoring for a place on the ballot."\textsuperscript{15} Although the right to vote is fundamental and the right to candidacy, for all practical purposes, is regarded by the courts as "fundamental," not all state-imposed restrictions on candidates' eligibility for the ballot will be considered constitutionally suspect. The Supreme Court has clearly noted a state's interest in holding fair and honest elections in an orderly, rather than a chaotic fashion.\textsuperscript{16} Reasonable, nondiscriminatory restrictions protecting the integrity of the electoral process have generally been upheld, including a state's right to require candidates to make a preliminary showing of substantial voter support in order to qualify for a place on the ballot.\textsuperscript{17}

In a dissenting opinion in the 1968 landmark case, \textit{Williams v. Rhodes},\textsuperscript{18} Chief Justice Warren framed the precise question the Court must answer in each challenge to a state's restrictions on the electoral process. He asked, "[t]o what extent may a State, consistent with equal protection and the First Amendment guarantee of freedom of association, impose restrictions upon a candidate's desire to be placed on the ballot?"\textsuperscript{19} Since \textit{Williams}, courts have relied on basically two avenues of protection: the first amendment\textsuperscript{20} and the equal protection clause of the fourteenth


\textsuperscript{14} Williams, 393 U.S. at 31.

\textsuperscript{15} Id.

\textsuperscript{16} Id. at 31-32.

\textsuperscript{17} In Jenness v. Fortson, 403 U.S. 431 (1971), the Court recognized the State's interest in requiring a candidate to make a "preliminary showing of a significant modicum of support." Id. at 442. As of 1977, 35 states, including West Virginia, required the collection of signatures approximating a total of one percent or less. See Note, supra note 13.

\textsuperscript{18} Williams, 393 U.S. 23.

\textsuperscript{19} Id. at 69 (Warren, C.J., dissenting).

\textsuperscript{20} See, e.g., Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973); Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964) (en banc).
amendment. The courts must balance two competing interests: a state's right not to encumber the ballot with the names of frivolous candidates and the constitutionally guaranteed rights of minor party and independent candidates.

B. Recent Analysis—Anderson v. Celebrezze

The Court's most recent and notable articulation of the standard of review applicable in ballot access cases came in 1983 with its five to four decision in Anderson v. Celebrezze. This case arose out of John Anderson's attempt to be placed on the Ohio ballot in the 1980 election as an independent candidate for President of the United States. Ohio statutes required that an independent candidate file a statement of candidacy on or before March 20, 1980, which was also the filing deadline for candidates in the primary election. Anderson did not announce his independent candidacy until April 24, 1980. When his supporters attempted to turn in the required nominating petitions and a statement of candidacy on May 16, Ohio Secretary of State Anthony Celebrezze refused to accept them because of the early filing deadline. Anderson and supporters filed suit in the United States District Court for the Southern District of Ohio and successfully challenged the constitutionality of the statute. The district court granted summary judgment and ordered Anderson's name placed on the November general election ballot. The district court held the statutory deadline unconstitutional on two grounds. First, it dictated an impermissible burden on the first amendment rights of Anderson and supporters. Second, the early filing deadline for independent candidates, without similar requirements for political party nominees, violated the equal protection clause of the fourteenth amendment.

Celebrezze appealed to the Sixth Circuit Court of Appeals. The election was held, however, while the appeal was pending. The Court of Appeals reversed, holding that the early deadline met the State's interest in furthering important state goals. The decision conflicted with rulings in favor of Anderson in similar cases by the

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61 See, e.g., Williams, 393 U.S. 23; Bullock v. Carter, 405 U.S. 134 (1972). Some courts, including the West Virginia Supreme Court of Appeals, have struck down restrictions on candidacy based on a third rationale: right to candidacy is itself a fundamental right. See State ex rel Piccirillo v. City of Follansbee, 160 W. Va. 329, 233 S.E.2d 419 (1977) (citing State ex rel. Maloney v. McCartney, 159 W. Va. 513, 223 S.E.2d 607 (1976) (right to become a candidate for office is a fundamental right); Mancuso, 476 F.2d 187 (candidacy is both a protected first amendment right and a fundamental interest)).

62 Anderson, 460 U.S. 780.
63 Id. at 782-86.
64 Id.
66 Id. at 125, 129.
68 Id. at 567.
First and Fourth Circuits, thereby leading to review by the United States Supreme Court.

In an opinion by Justice John Paul Stevens, the Court reversed the Sixth Circuit decision and ruled that Ohio’s early filing deadline placed an unconstitutional burden on the voting and associational rights of Anderson’s supporters.

The opinion began by reiterating the standard of review in ballot access cases:

[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.

In effect, the Court was reaffirming its decision to apply strict scrutiny analysis in ballot access cases. In applying this standard, the Supreme Court agreed with Anderson’s contentions that Ohio’s laws unduly restricted nonmajor party candidates. It recognized that the major parties’ nominees are placed on the ballot even though they are not chosen until the late summer conventions. Indeed, the nominee might not have even run in the Ohio primary and yet, if selected at the convention, may still be placed on the ballot, while the nonmajor party candidates must qualify by mid-March. To do so, they must have announced much earlier than the March deadline and mobilized sufficient interest and support to collect enough signatures by that time. Candidates and supporters within the major parties thus had the political advantage of continued flexibility; they did not adopt their nominees or platforms until five months after the deadline for nonmajor party candidates.

The Court acknowledged this unequal burden against nonmajor party candidates and the resulting discrimination against independent-minded voters’ associational rights protected by the first amendment. These constitutional rights are abridged by restrictive ballot access laws which tend to favor the two major parties. The

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70 Anderson, 460 U.S. at 806.
71 Id. at 789.
72 Id. at 790-92. This was precisely the case in 1952 when General Eisenhower did not participate in the primary elections and only later became the nominee of the Republican Party at the convention. Anderson, 499 F. Supp. at 129.
73 Flexibility has become even more important in today’s modern world. The media gives vast coverage to elections, and developments may change at any time. Recent elections have been altered by such occurrences as assassinations, foreign developments, and scandals.
74 Anderson, 460 U.S. at 791.
75 Id. at 790-94.
Court noted that the first amendment's firm commitment to "uninhibited, robust, and wide-open" debates is thwarted when election campaigns are monopolized by existing political parties.76

The State of Ohio offered three arguments to support its ballot access laws: voter education, equal treatment, and political stability.77 First, the Court recognized the State's "important and legitimate interest" in ensuring that voters will be educated and informed concerning the electoral process.78 In applying the judicial balancing test of strict scrutiny,79 the Court refused to accept Ohio's proposition that its interest in voter education justified the early filing deadline restriction. The Court rejected Ohio's suggestion that it took more than seven months to inform voters about the qualifications of a candidate merely because he lacks a partisan label, given the mass communication capabilities in the modern world.80

Second, the Court rejected Ohio's claim that the early filing deadline served the State's interest of treating all candidates equally.81 Ohio contended that since its deadline was the same as that for candidates in the major parties' primaries, the nonmajor parties were accorded equal treatment. However, since major parties' nominees appear on the ballot regardless of whether they had run in the primary,82 the Court found that the deadline could not be considered the same for both, and was, in practical effect, unequal treatment for nonmajor party candidates.

Finally, the Court disposed of the political stability argument by relying on the earlier Ohio ballot access case of Williams v. Rhodes.83 Williams held that "protecting the Republican and Democratic parties from external competition cannot justify the virtual exclusion" of nonmajor party candidates.84 The Court reiterated its holding in Williams that first amendment freedoms and the prevention of a "permanent monopoly" by two parties clearly outweigh the state's interest in ensuring political stability.85

The Court's disagreement as to the standard of review to be applied in ballot access challenges is reflected by the dissenting opinion.86 The dissent opposed the majority's application of strict scrutiny analysis, preferring instead to apply minimal scrutiny or a rational basis standard. A state's laws should be upheld if they

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76 Id. at 794 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
77 Anderson, 460 U.S. at 796.
78 Id.
79 See supra note 28 and accompanying text.
80 Anderson, 460 U.S. at 797.
81 Id. at 799.
82 See supra note 29 and accompanying text.
83 Anderson, 460 U.S. at 802.
84 Id.
85 Id. (quoting Williams, 393 U.S. at 31-32).
86 Id. at 806. The four dissenting Justices were Rehnquist, White, Powell, and O'Connor.
are "tied to a particularized legitimate purpose, and [are] in no sense invidious or arbitrary." Ohio's attempt to ensure political stability by imposing an early filing deadline would meet this test. However, since Williams, the Court has consistently applied the majority-supported strict scrutiny standard.

As a result of the Anderson v. Celebrezze decision, it is unconstitutional to require nonmajor party candidates to conform to deadlines earlier than those which major party candidates are required to meet unless a state sufficiently satisfies the compelling state interest test. In light of the Court's continued elevation of the right to candidacy to the level of a fundamental right, it is highly likely that many states' restrictions on ballot-access would not survive this stringent test of judicial scrutiny.

IV. BALLOT ACCESS IN WEST VIRGINIA

A. History

The history of West Virginia ballot access law shows a steady progression of tighter restrictions. The State's early ballot access legislation allowed a third party candidate's name to be placed on the ballot by the submission of signatures representing one percent of the votes cast for that office in the previous general election, up to a maximum of one thousand. Voters could not sign more than one nominating certificate, but did not forfeit their right to vote in the primary. In the election of 1912, Roosevelt's Bull Moose Party finished second in the presidential race in West Virginia, the Progressive and Socialist parties managed to make impressive showings in many races. In 1915, the West Virginia Legislature amended the law by raising the signature requirement to five percent and lifting the one thousand voter ceiling. Primary voters were precluded from signing nominating certificates. The signature solicitation period, however, came after the primary. The law also made those who both signed a petition and voted in the primary subject

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87 Anderson, 460 U.S. at 817 (quoting Rosario v. Rockefeller, 410 U.S. 752, 762 (1973)).
88 Id. at 818.
89 See, e.g., Lubin v. Panish, 415 U.S. 709, 722 (1974) (state must show a compelling interest to keep political minorities off the ballot); Dunn, 405 U.S. at 335 (state must show a substantial and compelling reason for imposing durational residence requirements).
92 Brief, supra note 90, at 26. F. Barkey, The Socialist Party in West Virginia from 1898 to 1920: A Study in Working Class Radicalism 253, app. B, table III (1971) (unpublished manuscript available from the West Virginia Collection of the West Virginia University Library), provides a complete listing of Socialist Party candidates elected to office from 1910 to 1915. Their most successful year was 1912 when four mayors, ten councilmen, four justices of the peace, four constables, and two members of boards of education were elected in various races around the State.
to criminal prosecution. In 1923, the signature filing deadline was moved to before the primary, forcing voters to choose between signing a petition or voting for their preferred party. This new deadline also forced nonmajor party candidates to announce and mobilize their campaigns much sooner. A final revision to the laws was made in 1941, following a concerted effort by the Communist Party to get on the ballot. These amendments established the credential requirements and magisterial district limitations for canvassers and certificate signers.

As a result of West Virginia’s tough ballot access restrictions, only seven nonmajor candidates qualified to be placed on the presidential ballot in the past fifty years, making it one of the most restrictive states in which to achieve ballot access. Consequently, West Virginians miss the benefits of a full political discussion and, more importantly, lose the right to a variety of choices on election day. At the present time, the West Virginia Legislature has not yet revised these statutes.

B. Analysis

The West Virginia Supreme Court of Appeals in the 1980 case of West Virginia Libertarian Party v. Manchin chose to employ a balancing test in assessing the constitutionality of ballot access restrictions. The court chose the balancing test despite prior rulings that the right to run for office is a fundamental right entitled to strict scrutiny analysis.

Libertarian Party was a direct challenge to the ballot access requirements of the West Virginia Code. The court noted that the appropriate analysis of an alleged equal protection violation is "whether the state has imposed a significantly higher burden on the independent or third-party candidate than it has imposed on major-party candidates." The court’s wording of the applicable standard of review in

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93 1915 W. Va. Acts 26, 23. In his manuscript, Dr. Barkey states "the turning point in the political fortunes of the Mountain State Socialists appeared to be the passage of a primary election law by the 1915 State Legislature. The Socialists felt that this bill, which passed easily as a reform measure, was aimed directly at them." F. Barkey, supra note 92, at 175.
95 Id.
96 Brief, supra note 90, at 26-27.
98 These candidates were Henry Wallace (1948), George Wallace (1968), Ed Clark and John Anderson (1980), Bob Richards, Mel Mason, and Dennis Serrette (1984).
100 Libertarian Party, 270 S.E.2d 634.
102 Libertarian Party, 270 S.E.2d at 644 (citing Williams, 393 U.S. at 30-31).
strict scrutiny terms\textsuperscript{103} stands as an apparent anomaly since it does not "strictly" apply the standard but instead uses a relaxed balancing test. The court looked at three balancing factors: 1) whether the state’s interest in ballot access limitations outweighs the candidates’ interest in securing a place on the ballot, 2) whether the state statutes totally deprive an independent candidate or third party of ballot access, and 3) whether less restrictive alternative means would adequately promote the state’s interest.\textsuperscript{104}

The West Virginia Supreme Court of Appeals closely followed the United States Supreme Court in its equal protection analysis. However, the West Virginia court is clearly more expansive in its recognition of a candidate’s right to run for office as a fundamental right. In \textit{State ex rel. Piccirillo v. City of Follansbee},\textsuperscript{105} the court reiterated its 1966 holding in \textit{Brewer v. Wilson}\textsuperscript{106} that the right to become a candidate for election to public office is a "valuable and fundamental right."\textsuperscript{107} Therefore, it is entitled to constitutional protection under the equal protection clause and the first amendment. These constitutionally guaranteed rights of freedom of association and speech are paralleled in Article III of the West Virginia Constitution.\textsuperscript{108}

In contrast, the United States Supreme Court has never explicitly held that the right to candidacy is a fundamental right although implicitly treating it as such. The West Virginia court’s approach appears to be a more relaxed constitutional balancing test than traditional strict scrutiny analysis. The balancing occurs when the state is required to justify any restriction under the three factors listed above before it will be constitutionally upheld.

\section*{V. Proposals for Reform}

The time has come for a major revision of the sections of the West Virginia Election Code pertaining to ballot access. The \textit{Libertarian Party} and \textit{Anderson} cases have revealed that several provisions of the Code are unconstitutional, while decisions in other jurisdictions suggest additional modifications of our laws. A piecemeal response by the secretary of state to developments in the case law would be insufficient; a complete reconsideration of the entire ballot access procedure by the West Virginia Legislature is warranted. The following subsections are proposed revisions to West Virginia’s ballot access laws.

\textsuperscript{103} See text accompanying \textit{supra} notes 52-53.

\textsuperscript{104} \textit{Libertarian Party}, 270 S.E.2d 634. \textit{See also} Comment, \textit{supra} note 99.

\textsuperscript{105} \textit{Piccirillo}, 160 W. Va. 329, 233 S.E.2d 419.

\textsuperscript{106} \textit{Brewer}, 151 W. Va. 113, 150 S.E.2d 592.

\textsuperscript{107} \textit{Piccirillo}, 160 W. Va. at 333, 233 S.E.2d at 423 (quoting \textit{Brewer}, 151 W. Va. 113, 150 S.E.2d 592). Although freedom of association and speech were not asserted in \textit{Piccirillo}, the court noted that the test would be similar to the enunciated equal protection test with only "moderating" distinctions as to the mechanical aspects of registration. \textit{Piccirillo}, 160 W. Va. at 334 n.6, 233 S.E.2d at 423 n.6.

A. Magisterial District Petitioning

A major party’s candidate normally has his name placed on the ballot in a general election through selection at a convention or a primary election.

The West Virginia Code provides another method for nonmajor party candidates.\(^{109}\) The candidate is required to submit a petition signed by a number of voters equal to at least one percent of the number of votes cast for the office in the last general election, but not less than twenty-five. However, prior to the Liberation Party decision in 1980, the statute had severely restricted the petitioning process for nonmajor party candidates by imposing geographical limitations on where signatures could be solicited by petitioners. (The term petitioner refers to a campaign worker who solicits signatures on behalf of a specific candidate.) Petitioners were only allowed to solicit signatures from those registered voters who resided within the petitioner’s own magisterial district.

Magisterial districts once served as the political subdivisions from which justices of the peace and constables were elected, but that system has since been replaced by countywide election of magistrates.\(^{110}\) Because the magisterial district is no longer a functioning political subdivision, it is unlikely that either the voter or the petitioner knows where a magisterial district begins or ends. Although each county contains several magisterial districts, there are wide variations in number and size.\(^{111}\) The law precluded a petitioner from soliciting in areas where many citizens from different magisterial districts would tend to congregate, such as downtown commercial districts. This restriction increased the number of petitioners, as well as the amount of time and money, required to successfully complete a petition drive. Even the candidate’s personal petitioning activities were restricted to gathering signatures within his own small magisterial district.

In Libertarian Party, the West Virginia Supreme Court of Appeals struck down the magisterial district provision as a violation of the equal protection clauses of both the state and federal constitutions. The court could find no compelling state interest to justify the substantial burdens placed on a third-party or independent candidate by the magisterial district restriction.\(^ {112}\) The West Virginia election laws should be rewritten to reflect the court’s decision which removed the magisterial


\(^{110}\) The changeover to a magisterial court system was initiated by the Judicial Reorganization Amendment of 1974. See Com. Sub. for Senate Joint Resolution No. 6, 1974 W. Va. Acts at p. 946. There is no relationship between the old political subdivision of magisterial district and the newer elective office of magistrate.

\(^{111}\) W. Va. Code § 7-2-2 (1984), requires that counties have three to ten magisterial districts and that, within the county, magisterial districts should be nearly equal in population and territory. However, the size of the districts varies widely from county to county. Kanawha County, with the largest population in the state, has only five magisterial districts, while Wirt County, with the smallest population, has seven districts. This Code provision had the effect of fragmenting state ballot access efforts and denied petitioners geographic mobility beyond the district limits.

\(^{112}\) Libertarian Party, 270 S.E.2d at 642.
district restriction. The statute should make it clear that petitioners are allowed to obtain signatures in any area involved in the election.

B. Credentials Requirement

An issue related to magisterial district petitioning that should be reconsidered is the credentials requirement found in West Virginia Code section 3-5-23(b). The statute requires petitioners to obtain from the county clerk, a credentials form which must be exhibited to a voter before soliciting his signature. The credentials form lists the petitioner’s name, address, and magisterial district plus the candidate’s name and the office sought. The form expressly authorizes the petitioner to solicit signatures only from voters residing within the magisterial district.

The plaintiffs in Libertarian Party challenged the credentials provision as a violation of the first amendment to the United States Constitution. The court first found that the provisions was not impermissibly vague. The court then upheld the statute, finding that it was justified by a substantial state interest in assuring the integrity of the signature solicitation process.

The court noted that the regulation “prevents or reduces the opportunity for the bogus solicitor, promoted by adversary candidates, to reduce the pool of potential petition signers in a fraudulent petition drive, or to misrepresent himself as the candidate’s supporter and then abuse the electorate by alienating them from the candidate’s legitimate solicitors.”113 The court cited All the President’s Men as a source for examples of “dirty tricks” that are used in political campaigns.114

The court’s reasoning in sustaining this provision is questionable for several reasons. In its analysis of the magisterial district restriction the court required the State to show a compelling state interest.115 However, the court applied the lower standard of a substantial state interest in determining that the credentials requirement was justified.116 It is unclear why the court chose to use this lower standard.

West Virginia’s credentials requirement is, in effect, a license to petition. For many years, licensing laws for first amendment activities have been viewed with disfavor in cases before the United States Supreme Court.117 Some of these cases involved limitations on leafleting and canvassing. In Lovell v. Griffin,118 a Georgia

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113 Id. at 643.
114 Id.
115 Id. at 642.
city ordinance which forbade any distribution of literature was declared void. A year later, four similar ordinances prohibiting the distribution of leaflets were challenged in the consolidated cases decided under *Schneider v. State.* Efforts were made to distinguish these ordinances from the one voided in *Lovell* because they had been passed to prevent either frauds, disorder, or littering. The court refused to uphold the challenged ordinances, noting that frauds, disorder, or littering could be denounced and punished as separate offenses without impinging upon first amendment rights.

This reasoning is appropriate to the credentials requirement as well. The West Virginia Supreme Court of Appeals upheld the statutory credentials requirement in order to protect nonmajor party campaigns from "dirty tricks" perpetrated by their competitions. If such illegal campaign tactics are a problem, the perpetrators themselves should be punished through existing laws. The solution is not to restrict the first amendment rights of the victims.

In 1959, the plaintiffs in *Talley v. California* challenged a city ordinance that required a handbill to have the name and address of the person who prepared, distributed, or sponsored it to be printed on its face. The United States Supreme Court overruled the ordinance and emphasized the historical importance of anonymity in political affairs. The Court said that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." This same concern should apply to petitioners working for nonmajor party candidates in West Virginia.

Recent developments in related areas could affect the validity of the credentials' requirement. The United States Supreme Court has several times expressed its concern about harassment and violence directed at minor parties. In the landmark election reform case of *Buckley v. Valeo,* the Federal Election Campaign Act was challenged on several fronts. There were numerous appellants in the case, representing a broad spectrum of political interests. The case raised a number of significant issues. One such issue, advanced by minor parties, concerned disclosure requirements. They maintained that, in order to protect the rights of their supporters, minor parties should not be required to conform to the same reporting and disclosure requirements as the Republican or Democratic parties.

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121 *Id.* at 65.
125 *Buckley*, 424 U.S. at 72.
While recognizing the existence of a potential for harm from the disclosure of identities of nonmajor parties' supporters, the Supreme Court stopped short of granting a blanket exception for such parties. However, the Court did establish a test for determining when the first amendment requires the exemption of minor parties from compelled disclosures: "The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."126

The Buckley test was extended by the Supreme Court in Brown v. Socialist Workers' '74 Campaign Committee.127 This case successfully challenged Ohio laws which required the disclosure not only of campaign contributors, but also the recipients of disbursements of campaign funds. The Court not only approved the extended application of the Buckley test, but also reaffirmed that minor parties would be safeguarded from compelled disclosures which jeopardized first amendment rights. Justice Marshall's majority opinion concluded by stating:

The First Amendment prohibits a State from compelling disclosures by a minor party that will subject those persons identified to the reasonable probability of threats, harrassments, or reprisals. Such disclosures would infringe the First Amendment rights of the party and its members and supporters. In light of the substantial evidence of past and present hostility from private persons and government officials against the SWP [Socialist Workers' Party], Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP.128

The first amendment rights that gave rise to the Buckley exception for minor parties should also apply to credentials requirements. In all likelihood, West Virginia's credentials requirement would now be considered an unconstitutional disclosure as a result of Brown at least as to any party that can show evidence of harassment.129

The record in Libertarian Party reveals that many potential petitioners in West Virginia have encountered employees in the county clerk's offices who ranged from uncooperative to abusive.130 Many of these employees have been hired by a major party incumbent and view those petitioning for nonmajor party candidates as a threat to the current political powers and, thus, their job security. Petitioners who were quite willing to solicit for a candidate may feel their enthusiasm wane when confronted by such harassment before the job has even begun. Compounding this reluctance is a realization that potential petitioners must place their names and other

126 Id. at 74.
128 Id. at 102.
129 This requirement would also now be considered an unconstitutional disclosure where evidence of expected harassment can be shown by new parties. See Buckley, 424 U.S. at 74.
130 See Comment, supra note 99, at 241.
identifying information on file at the courthouse before they may begin soliciting signatures. The violence that resulted from the Socialist Workers’ Party parade in Charleston, West Virginia in 1980 is evidence that any fears of harassment experienced by nonmajor party candidates and their supporters are more than speculative.

Because the credentials requirement was justified primarily as a means to implement the magisterial district requirement, it would have been logical to expect that the credentials requirement would have fallen in the wake of removal of the magisterial district requirement. Surprisingly, the West Virginia Supreme Court of Appeals chose to upheld the former, even though it had struck down the latter.

Although the court did not hold the credentials provision constitutionally infirm the provision should be deleted by the legislature because it meets the exemption test as articulated by the Supreme Court in Buckley. The burden it imposes on nonmajor party candidates now outweighs any usefulness it might have. Absent credentials requirements, the campaigns themselves can be responsible for screening who receives their official petitions, as is the practice in other states.

C. Filing Fees

Filing fees are designated for all elective offices according to West Virginia Code section 3-5-8. Most fees are based on one percent of the annual salary of the office sought. Nonmajor party candidates are required by West Virginia Code section 3-5-23 to file a letter of intent and pay a filing fee prior to commencing their petition drive.

In Libertarian Party, the West Virginia Supreme Court of Appeals said that the failure to provide a reasonable alternative to filing fees for impecunious candidates is unconstitutional as to such candidates. This holding should be codified in any election law reform. The secretary of state now allows impecunious candidates to run without the payment of a filing fee.

Those who do not quite qualify as impecunious may also be adversely affected, and thus additional changes are warranted. An acknowledged purpose of filing fees is to dissuade nonserious candidates from running. But overly high filing fees can dissuade qualified, serious candidates, who cannot reasonably afford the filing

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131 May Day Demonstrators Attacked by City Crowd, Charleston Gazette, May 2, 1980 at 1, col. 3.
132 Libertarian Party, 270 S.E.2d at 639. It is interesting to note that the court made no attempt to define "impecunious." There being no specific guidelines, the secretary of state is free to determine fee waiver eligibility on a case by case basis. A suitable definition of "impecunious" should be included as a part of election law reform.
133 Telephone interview with Charlotte Cox, Elections Division Director, Secretary of State's Office (September 27, 1984).
fees from running, while less highly motivated wealthy candidates enjoy relatively easy entrance to the race.\textsuperscript{134} For example, a candidate for governor must pay $600 in order to begin his petition drive, regardless of its eventual success. For many, this is quite a sizeable sum on which to gamble.

It is arguable that West Virginia's filing fees are too high and can adversely affect potential nonmajor party candidates as well as Republicans and Democrats. Nonmajor party candidates are further disadvantaged because they must pay the filing fee whether they eventually appear on the ballot or not. Regardless of whether the filing fees are lowered, a more equitable arrangement would be to have the minor party candidate file the required letter of intent and to begin petitioning but defer payment of filing fees until the candidate has collected the required number of signatures. Under this proposed change, the nonmajor party candidate would be paying, not for the privilege of collecting signatures, but for appearing on the ballot.

This is, in essence, the privilege for which major party candidates are currently paying, and no state interest would be compromised by such a modification. Accordingly, a gubernatorial candidate who makes just enough money to prevent him from qualifying as impecunious could still try to get on the ballot without wagering $600 on the outcome of the petition drive. If he succeeded in garnering enough citizen support through signatures, he could then pay his filing fee knowing that he will be on the ballot. This additional time period, in conjunction with the heightened exposure as a result of the petitioning process, would make it easier for such a candidate to raise the necessary funds.

In \textit{State ex rel. Piccirillo v. City of Follansbee}, the West Virginia Supreme Court of Appeals held that a $100 property requirement was an unconstitutional restriction on city council candidates.\textsuperscript{135} The court declared that the right to become a candidate was a fundamental right under the equal protection clause of the state constitution.\textsuperscript{136} Allowing nonmajor party candidates to pay at the time they present their petitions would be an alternative that is less burdensome on that fundamental right to run for office. West Virginia should adopt this reasonable change.

D. \textit{Filing Deadlines}

Before 1984 nonmajor party candidates were required to have filed their declaration of candidacy and paid their filing fee no later than thirty-one days prior to the primary election as provided by West Virginia Code Section 3-5-23. The deadline for turning in the requisite number of petition signatures was the day before the

\textsuperscript{134} See \textit{Bullock}, 405 U.S. 134; and \textit{Lubin}, 415 U.S. 709.

\textsuperscript{135} \textit{Piccirillo}, 160 W. Va. 329, 233 S.E.2d 419.

\textsuperscript{136} \textit{Id.} at 334, 233 S.E.2d at 423.
primary, according to West Virginia Code section 3-5-24. This early deadline, months before the deadline for major parties to announce their nominees for the general election, presented a serious obstacle for nonmajor party candidates.

The plaintiffs in Libertarian Party v. Manchin attempted to extend the deadline. The West Virginia Supreme Court of Appeals declined to do so stating that the difference in deadlines for regular party candidates and nonmajor party candidates did not violate equal protection principles. However, the recent United States Supreme Court decision in Anderson v. Celebrezze made it unconstitutional for states to impose deadlines for nonmajor party candidates that are substantially different from the deadlines for major party candidates to be placed on the general election ballot.

In response to that decision, Secretary of State A. James Manchin, by consent, adopted new and fairer deadlines. Nonmajor party candidates must file their letter of intent and fees before July 5. They then have until September 7 to turn in the required signatures. Since these new deadlines substantially conform to the Anderson v. Celebrezze decision, they should be incorporated into West Virginia's statutes. They afford equal treatment to both major and nonmajor party candidates in accord with constitutional guarantees.

E. Primary Vote Forfeiture Provision

One reason the day before the primary had been established as the deadline for turning in the requisite petition signatures in West Virginia was that, by judicial construction of West Virginia Code Section 3-5-23(c), a petition signature is deemed to be the equivalent of a primary vote. In other words, by the terms of West Virginia Code Section 3-5-23(c), signing a petition forced a voter to forfeit the right to vote in the primary.

The plaintiffs in Libertarian Party challenged this provision but were denied relief. The court noted that sometimes major party voters are faced with a primary ballot on which their party has been unable to field candidates for every office. This is definitely an inequitable exchange, since the voter who signs a petition for

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137 Libertarian Party, 270 S.E.2d at 646.
138 Anderson, 460 U.S. 780; W. Va. Code § 3-5-19 (1984), allows major parties to fill any vacant nominations as late as 60 days prior to the general election.
139 Telephone interview with Charlotte Cox, Elections Division Director, Secretary of State's Office (September 27, 1984).
141 Libertarian Party, 270 S.E.2d at 647.
a single candidate for a particular office thereby loses the right to vote for all other offices on the primary ballot, not just a few vacant ballot slots.

This is a difficult sacrifice, even for a candidate's most ardent supporters. It is unfair to force them to give up their right (indeed, their duty) to vote. That West Virginia has traditionally been considered a predominately one-party state \(^{142}\) exacerbates the unfairness because, in many races, the primary is where the real election occurs for state and local offices. Thus, a petitioner seeking signatures for a presidential candidate finds many state voters reluctant to give up their all-important primary vote for the lower offices. Likewise, it is difficult to persuade people to give up their right to vote for higher offices such as president or governor in order to sign a petition for a nonmajor party candidate seeking a local office.

As a result of *Anderson v. Celebrezze*, the deadline for filing a letter of intent, as well as the deadline for submitting the required signatures, has been moved so that it now falls after the primary.\(^ {143}\) It is now possible that a nonmajor party candidate would not even announce until after the primary, thus foreclosing support in the form of petition signatures from those people who have already cast votes in a party's primary. Ironically, an exceptional nonmajor party candidate who attracts bipartisan support may find it difficult to obtain ballot access due to this vote waiver provision because potential supporters who had voted in the primary would be ineligible to help place him on the ballot for the general election.

The judicial construction declaring a petition signature to be the equivalent of a primary vote appeared in *State ex rel. Daily Gazette Co. v. Bailey*.\(^ {144}\) The peculiar circumstances of the case and the exigency of the situation under which it was decided make it probable that the West Virginia Supreme Court of Appeals did not fully appreciate the impact of such a declaration.

The narrow three to two decision involved an attempt by a prominent newspaper editor and acknowledged opponent of George Wallace and the American Independent Party to publish the names of all of Wallace's petition signers. By equating these signatures with votes, the court prevented their publication and thereby preserved what the court perceived to be their secrecy. However, the secrecy of a petition signature is illusory. In collecting signatures, each person who signs is free to see the preceding names on the petition. In addition, campaign workers and government clerks have access to the names as the petitions are processed and cross checked. The court's rationale for equating the petition signature with a vote is thus flawed. The statutory language is bad enough. This decision represents continued movement in the wrong direction.

\(^{142}\) *M. Stedman, Jr.*, *supra* note 140, at 74-77. *See also Libertarian Party*, 270 S.E.2d at 647.

\(^{143}\) *See* text accompanying *supra* note 139.

\(^{144}\) *Daily Gazette*, 152 W. Va. 521, 164 S.E.2d 414.
Clearly, the primary vote forfeiture provision should be removed. A signature on a nonmajor party candidate's petition is not the same as a primary election vote. It is merely a statement that the voter wishes to have, in addition to the Republican and Democratic nominees, that candidate as an alternative choice available on the general election ballot. This support should not be equated with an ultimate vote for the candidate in question. Nor should registered voters who have cast ballots in the primary be foreclosed from expressing their desire for the added choice of nonmajor party candidates on the November ballot, now that a post-primary deadline has been established. Such a restriction might be deemed to impinge upon first amendment rights.

A proposed reform would therefore include the freedom for all registered voters to sign petitions without forfeiting their valuable right to vote in the primary. All language to the contrary should be excised from the applicable sections of West Virginia's election statutes. This would include West Virginia Code section 3-5-23(f), which provides penalties of up to $1000 as well as imprisonment for up to one year for violations of the primary vote forfeiture provision. This stiff penalty was the basis for fear and confusion among voters who were considering signing a nonmajor party petition prior to the 1980 primary.145

Abandoning the primary vote forfeiture provision would provide a further benefit by alleviating the need to cross-check petition signatures with the records of who voted in the primary election.

F. Possible Write-in Alternative

It is not unlikely that sentiment in the partisan West Virginia legislature will be opposed to opening the petition process to all voters. If so, there is a possible compromise. This proposal would be slightly more complex than opening the petition process to all voters but it would allow voters wishing to support a ballot access effort by a nonmajor party candidate to retain the right to vote in the primary.

Justice McGraw, in a separate opinion in Libertarian Party, suggested the possibility of utilizing write-in votes by registered independents during the primary to qualify nonmajor party candidates for a slot on the general election ballot.146 This method by itself is an unworkable and unacceptable solution. Registered independents cannot vote in primary elections, unless there is a nonpartisan contest or question for consideration that day, such as a school board election or a proposed constitutional amendment.147 Very few registered independents bother to vote even

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146 Libertarian Party, 270 S.E.2d at 648 (McGraw, J., concurring in part and dissenting in part).
147 W. Va. Code § 3-4-19 (1979), authorizes independents to vote in primary elections under these specific circumstances.
when such nonpartisan matters are on the primary ballot. Therefore, to limit a nonmajor party candidate to achieving ballot access by gaining write-in votes from only registered independents on primary election day would be even more burdensome to potential nonmajor party candidates than the existing system. Also, the method that Justice McGraw suggests would be based solely on West Virginia's June primary, thus preventing compliance with the Anderson v. Celebrezze holding regarding early deadlines. Finally, this proposal ignores the problem of major party voters who often desire to support particular nonmajor party candidates, but cannot do so without forfeiting their right to vote for other offices on the ballot.

The following proposal is an adaptation of Justice McGraw's position, which might prove more acceptable to the West Virginia legislature. This would entail allowing any nonmajor party candidate who filed at a given deadline prior to the primary, to campaign for write-in votes from voters of either party. Those voters would then be able to select the remainder of the ballot according to their personal preference. They would be afforded absolute secrecy and, most importantly, would not be forfeiting their vote for all other offices.

The existing primary ballot system allows for write-in candidates seeking their party's nomination. The voter must "write in" the candidate's name at the proper place on the ballot. For example, if a member of the Democratic Party decides to try a write-in candidacy for the Democratic nomination for governor, then all Democratic ballot votes for him would count. Write-in campaigns are rarely attempted, however, because of their inherent disadvantage when competing against printed names already on the ballot.

Under this compromise method, nonmajor party candidates would be seeking write-in votes merely to demonstrate their support and to thus achieve ballot access. Such a candidate could choose to announce before the pre-primary deadline and campaign for write-in votes from all primary voters, regardless of registration, which would then be credited towards his required signature total. If he received more votes than the required number of signatures, he would automatically qualify for the general election ballot without petitioning. If the total fell short of that mark, the candidate would then have until September 7 to solicit enough petition signatures for voters not participating in the primary and independents to put him over the minimum required figure. The nonmajor party candidate would have to file prior to the primary in order to use the write-in vote process enabling those counting the ballots to be officially notified of his write-in effort and, in effect, according such votes automatic validation. Indeed, this process would save government administration expenses involved in ballot access efforts because every vote counted would be one less petition signature to be separately validated under the normal procedure.

144 This is the new deadline date established by the secretary of state in 1984. See text accompanying supra note 139.
The write-in provision cannot be used as the only method for achieving ballot access. The U.S. Supreme Court in Lubin v. Panish,149 discounted the viability of write-in votes as the sole alternative to ballot access provisions and said, "[A candidate] relegated to the write-in provision would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot."150 Additionally, sole reliance on write-in votes during the primary would force an early deadline on nonmajor party candidates thereby encountering the difficulties addressed in Anderson v. Celebrezze. Thus, the petitioning process must be available, with the primary write-in option serving as a supplementary method of obtaining the requisite number of signatures.

G. "Desire to Vote for" Language

West Virginia Code section 3-5-23(d) directs that the ballot access petition form should state that the signers "desire to vote for said candidates." Such a declaration is tantamount to being forced to reveal publicly how a citizen will vote in the election and would undoubtedly inhibit some supporters from signing. Those who are not sure yet exactly which candidate they will support, but who would be interested in having that nonmajor party candidate as a choice available to them in November, may also be inhibited by such language on the petition. As explained earlier, a petition signature should not be the equivalent of a vote.

The Sixth Circuit struck down a similar "desire to vote for" provision in Kentucky's election laws. The court, in Anderson v. Mills,151 stated:

The declaration operates to discourage from participation in the electoral process simply because they do not wish people to know how they will vote. Such a revelation invokes the fears sought to be quelled by the secrecy of voting laws in this country, and subjects an elector to the pressure of his neighbors, employers, and social peers. Since the declaration abridges the right to a secret ballot in such a direct and unacceptable manner, it cannot stand.152

A recent federal district court likewise declared such a provision as an unlawful and unconstitutional invasion of privacy and of the secret ballot in Libertarian Party of Nebraska v. Beerman.153 It is doubtful that West Virginia's "desire to vote for" provision could withstand judicial challenge. In light of these decisions and in combination with the preceding arguments against equating a signature with a vote, it is obvious that this "desire to vote for" language can no longer validly be required on petitions.

149 Lubin, 415 U.S. 709.
150 Id. at 719.
152 Id. at 608-09.
H. Independent Candidacy Recognition

The ability of a candidate to run for office as a nonaffiliated independent candidate without a formalized party structure is new to American politics. Until the last decade, most states, including West Virginia, had no provisions for candidacies outside of political parties. Indeed, fifteen states and the District of Columbia flatly prohibited a person independent of any political party from running.154

In 1974, the Supreme Court in Storer v. Brown155 invalidated California statutory requirements that tended to force an independent candidate either to join a political party or form a new political party.156 The Court noted, in essence, that an aversion to political parties might be the very reason a candidate chooses to run as an independent.157

In 1976, independent presidential candidate Senator Eugene McCarthy relied on this ruling in his attempts to achieve ballot access. McCarthy received only one percent of the vote, but he was eventually successful in virtually all of his judicial battles.158 As a result, election laws of twenty-four states were altered or struck down by McCarthy's challenges.159 Due to the restrictiveness of this State's ballot access laws, McCarthy did not run in West Virginia in 1976.160

Although there is no express prohibition against independent candidacies in West Virginia's statutory language, there is an overall impression that such candidacies are disapproved. This impression is conveyed by continued reference to minor parties, party names, party emblems, and the requirement that a party name appear on the credentials application, petition form, and elsewhere.161

The Supreme Court of Appeals addressed this issue in Libertarian Party, in which Congressman John Anderson was allowed to intervene as a plaintiff during his presidential campaign as an independent candidate. The court held that nonaffiliated, independent candidates should be eligible to run in West Virginia.162 This holding should be reflected in any revision of the election laws.

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156 Id.
157 Id. at 745-46.
158 Armor & Marcus, supra note 154, at 1110.
159 Id at 1108.
160 McCarthy filed an amicus brief for the case of Harless v. McCartney, No. 76-0293-CH, (S.D. W. Va., Sept. 30, 1976) (mem.) which challenged West Virginia's ballot access laws. The court upheld West Virginia's laws, thus preventing McCarthy from obtaining ballot access. This was the only decision against McCarthy on the constitutional points and was considered "an anomaly in the trend of ballot access cases" at that time. Armor & Marcus, supra note 154, at 1110.
161 See generally W. Va. Code § 3-5-23.
162 Libertarian Party, 270 S.E.2d at 640.
I. Official Party Recognition Requirements

The Democrats and the Republicans are the only officially recognized political parties in West Virginia, enabling them to hold primary elections, register voters by party affiliation, supply poll workers, and so forth. The threshold requirement for official political party recognition in West Virginia is the attainment of at least ten percent of the vote in the preceding gubernatorial race.\(^{163}\) This makes West Virginia one of the four most restrictive states in the nation,\(^{164}\) not only because of the high percentage of actual voter support required, but also because that relatively high standard can be met only in one statewide race which occurs only once every four years.\(^{165}\) Colorado, one of three other restrictive states, has the same requirements as West Virginia. In a 1984 case, *Baer v. Meyer*,\(^{166}\) a federal district court noted that "[i]ronically, a third party whose candidate had just been elected President of the United States would not qualify as a protected 'political party' under Colorado law, and such a party would still be at a disadvantage in competing with the Republicans and Democrats in the next general election."\(^{167}\) The Tenth Circuit's review of the lower court's decision in *Baer v. Meyer* did not reach the constitutional questions relied on below.\(^{168}\)

The disadvantages to minor parties of not being able to benefit from official political party recognition are numerous. If such rules had been in place during the 1800s, it is doubtful that either the Republicans or Democrats would have ever risen to their current dominance. The Federal Election Commission uses five percent as its minimum threshold figure for providing funding for presidential candidates. Had John Anderson chosen to run again in 1984, his seven percent total from 1980 would have qualified him for Federal Election Commission funding.\(^{169}\)

Restrictive election rules which serve only to "maintain the political status quo" are unconstitutional.\(^{170}\) West Virginia's official recognition rule would appear to fall under this category. A five percent threshold like that used by the Federal Election Commission would be a fair requirement for any statewide race and would constitute a sufficient showing of support to justify granting the benefits of major party status.

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\(^{163}\) W. VA. CODE § 3-5-22.


\(^{165}\) COLO. REV. STAT. § 1-1-104(18) (1980).

\(^{166}\) Baer, 577 F. Supp. 838.

\(^{167}\) Id. at 844.

\(^{168}\) Baer v. Meyer, 728 F.2d 471, 474-75 (10th Cir. 1984).


J. Sore Loser Provisions

As a result of the petition deadline being moved to after the primary, some unsuccessful local candidates around the state have considered running as a third party or independent candidates for the offices they had sought.171 Reaction to this may spur interest by incumbents in a “sore loser” provision which would prohibit a major party candidate who is defeated in the primary from seeking ballot access as a candidate from another party or as an independent. Succinctly stated, under such a provision, if a candidate loses in the primary, he can’t run.

Such statutes have been upheld by the courts.172 However, a distinction has been made in the case of presidential candidates. In Anderson v. Mills,173 Kentucky’s sore loser provision was found inapplicable to presidential candidates. Since losing in that state’s primary does not preclude a major party presidential candidate from ultimately appearing on the Kentucky general election ballot if indeed he is later selected at his party’s convention, it is clear that the provision does not apply to the two major parties. The court questioned the constitutionality of applying the sore loser provision to presidential candidates.174

The impact of this reasoning on lower offices is unclear. However, it should be noted that the adoption of sore loser provisions in West Virginia would have an effect on the two major parties as well. There have been various instances in which Republicans or Democrats have switched parties in order to run for office. For example in 1984, Monongalia County Democrat magisterial candidate John Marko was defeated in the primary and was later named to fill a vacancy on the Republican ballot.175 A sore loser provision would not have permitted his Republican candidacy.

Closely related to sore loser provisions are disaffiliation requirements. These require a candidate to have been a registered member of his party for a specified time before being eligible to run for office as a member of that party. The practical effect of disaffiliation requirements is the same as a sore loser provision. The Supreme Court in Storer v. Brown, upheld a California statute which required candidates to have been a member of their party at least one year prior to running.176 Again in Monongalia County, such a provision would have excluded the candidacy of former Morgantown Republican Mayor Florence Merow, who won nomination to the House of Delegates in the 1984 Democratic primary.177

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172 See Storer, 415 U.S. 724.
173 Anderson, 664 F.2d 600.
174 Id. at 605.
175 Republicans Nominate Three, Morgantown Dominion Post, August 27, 1984, at A5, col.1.
176 Storer, 415 U.S. at 733-34.
177 Florence Merow Enters Democrat Race for House, Morgantown Dominion Post, April 1, 1984, at B2, col.5.
Since such party-switching has often happened in West Virginia electoral history without threatening the system, the imposition of sore loser provisions or disaffiliation requirements are unnecessary. Voters are capable of deciding if they want someone who has changed parties. It is therefore unnecessary to rely on inflexible, artificial election statutes.

VI. CONCLUSION

It is clear from the preceding arguments that a total revision of West Virginia's ballot access laws is warranted. Since the newly elected secretary of state has expressed interest in a major reform of West Virginia's election laws as a whole, it is imperative that ballot access laws be included in such an endeavor. The rights of minor party and independent candidates should be recognized and enlarged in light of recent judicial decisions.

Constitutional guarantees demand that the Democrats and Republicans refrain from continuing monopolistic election regulations enacted during this century. In a country that espouses political freedom, Americans must become accustomed again to more than two choices on the general election ballot. Tolerance of diverse political ideas is essential to our freedom and something for Americans to be proud of. American voters, however, must make intelligent decisions about which candidates they wish to see on the ballot. A balance must be struck between denying constitutional rights and guarding against a plethora of nonserious or frivolous candidates on the ballot. Nevertheless, the legislature should rely more on the judgment of the voters and less on restrictive, inflexible laws to accomplish that balance. Our political arena should be a free market of competing ideas so that we might better pursue our forefather's vision of democracy.

David Kurtz

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178 See supra note 5 and accompanying text.