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Ballot Access: Applying the Constitutional Balancing Test to the West Virginia Election Code

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STUDENT COMMENTS

BALLOT ACCESS: APPLYING THE CONSTITUTIONAL BALANCING TEST TO THE WEST VIRGINIA ELECTION CODE

I. INTRODUCTION

The right to vote and the right to form associations to further political ideas, deemed fundamental rights by the Supreme Court of the United States and guarded from state infringement by the equal protection clause of the fourteenth amendment, are afforded the most stringent constitutional protection.¹

These freedoms, however, are threatened by state ballot access requirements. The power of the states to regulate elections is beyond dispute,² but if a state makes ballot access requirements so restrictive that candidates of certain political organizations are denied access to the ballot, the state has exceeded its constitutional limits. An exclusionary ballot access requirement, in essence, removes the incentive for political organization and deprives potential members of their full associational rights.³

Consequently, first amendment and fourteenth amendment equal protection rights are implicated. First amendment rights

¹ The right to vote and the right to associate have both been afforded status as fundamental rights. The Supreme Court affirmed that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined" in *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The Court also expressly affirmed that the right to associate for the advancement of beliefs and ideas was an inseparable aspect of the first amendment. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The Court extended this notion to the formation of political organizations in *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 450 (1974). See also *Williams v. Rhodes*, 393 U.S. 23 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964).

U.S. CONST. amend. XIV, § 1 states that no state shall "deny to any person within its jurisdiction, the equal protection of the laws."

² U.S. CONST. art. I, § 4 confers upon the states, subject to congressional oversight, the power to regulate the "Times, Places and Manner" of holding elections.

³ *Williams v. Rhodes*, 393 U.S. 23, 41 (1968) (Harlan, J., concurring). See also *Developments in the Law-Elections*, 88 HARV. L. REV. 1111, 1145 (1975) [hereinafter cited as *Developments in the Law*].

may be violated because statute restrictions might deprive certain individuals of the freedom of association. The equal protection clause of the fourteenth amendment may be violated because excessive ballot restrictions might place a burden on the associational rights of a *certain class*, namely, third party and independent candidates, that is not placed on others similarly situated, namely, Republicans and Democrats.⁴

The West Virginia Election Code has placed severe restrictions for access to the ballot on independent candidates and third parties. For example, under the Code: 1) an independent candidate is denied access to the ballot;⁵ 2) a third party candidate must pay, as a prerequisite for a petition drive, a filing fee equal to one percent of the salary of the office for which he is campaigning;⁶ 3) a third party candidate must gather a number of signatures on petitions equal to one percent of the number of voters in the last election;⁷ 4) a canvasser can solicit petition signatures

⁴ For a more complete discussion of the equal protection clause and how legislation classifies certain groups and imposes unequal burdens on those groups, see Note, *Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

⁵ W. VA. CODE § 3-5-23(a) (1979 Replacement Vol.) provides in part: Groups of citizens having no party organization may nominate candidates for public office otherwise than by conventions or primary elections. In such case, the candidate or candidates, jointly or severally, shall file a declaration containing *the name of the political party* he or they propose to represent, its platform, principles or purposes with the secretary of state . . . (emphasis added).

⁶ *Id.* § 3-5-8(a) provides in part:

A candidate for president of the United States, for vice-president of the United States, for United States senator, for member of the United States house of representatives, for governor and for all other state elected officials shall pay a fee equivalent to one percent of the annual salary of the office for which the candidate announces;

Id. § 3-5-23(a) provides additionally that, "at the time of filing of such declaration [for candidacy] each candidate shall pay the filing fee required by law, and if such declaration is not so filed or the filing fee so paid the certificate [petition for nomination] shall not be received . . ."

The one percent fee requirement amounts to \$2,000 for a presidential candidate and \$500 for a West Virginia gubernatorial candidate. WEST VIRGINIA BLUE BOOK (1979).

⁷ W. VA. CODE § 3-5-23(c) (1979 Replacement Vol.) provides in part: "The number of . . . signatures shall be equal to not less than one percent of the entire vote cast at the last preceding general election for the office in the State, district, county or other political division for which the nomination is to be made, . . ."

only in the magisterial district in which he lives;⁸ 5) a voter can sign the petition only in the magisterial district in which he lives;⁹ 6) a voter who signs any petition for nomination forfeits his right to vote for partisan offices in the primary;¹⁰ 7) any petitions gathered must be filed with the secretary of state the day before the primary;¹¹ and 8) a canvasser must receive credentials before soliciting any votes and must identify himself and present his credentials when soliciting each signature.¹²

* *Id.* § 3-5-23(b) provides in part:

The person or persons soliciting or canvassing signatures of duly qualified voters on such certificate or certificates, shall be residents and qualified, registered voters, of the magisterial district of the county in which such solicitation or canvassing is made, and may solicit or canvass duly registered voters resident within their own respective magisterial district, . . .

* *Id.* § 3-5-23(c) provides in part: "The certificate shall be personally signed by duly registered voters, in their own proper handwriting or by their marks duly witnessed, who must be residents within the magisterial district of the county wherein such canvass or solicitation is made by the person or persons duly authorized."

¹⁰ *Id.* § 3-5-23(c) provides in part: "No person signing such certificate shall vote at any primary election to be held to nominate candidates for office to be voted for at the election to be held next after the date of signing such certificate;"

¹¹ *Id.* § 3-5-24 provides in part: "All certificates nominating candidates for office under the preceding section [§ 3-5-23] . . . shall be filed . . . not later than the day preceding the date on which the primary election is held. After such date no such certificate shall be received by such officers."

¹² *Id.* § 3-5-23(b) provides in part:

[A canvasser] may solicit or canvass duly registered voters resident within their own respective magisterial district, but first must obtain from the clerk of the county court of which such canvasser or solicitor is a resident, credentials which must be exhibited to each voter canvassed or solicited, which credentials may be in the following form or effect:

State of West Virginia, County of _____, ss:

This certifies that _____, a duly registered voter of Precinct No. _____ District, of this county and State; whose post-office address is _____, is hereby authorized to solicit and canvass duly registered voters residing in _____ District of this county to sign a certificate purporting to nominate _____ (here place name of candidate list on certificate) for the office of _____ and others, to represent the _____ Party at the general election to be held on _____, 19____.

Given under my hand and the seal of my office this _____ day of _____, 19____.

Clerk, County Court of _____ County.

Primarily because of these restrictions, between 1940 and 1980 only two third party candidates qualified for the office of president on the West Virginia general election ballot and none qualified for the position of United States senator.¹³ Consequently, West Virginia places last in the nation in qualifying third party candidates for the general election ballot.¹⁴

II. STATEMENT OF THE CASE

Faced with these restrictions, the West Virginia Socialist Workers Campaign Committee (W.V.S.W.C.C.) joined the West Virginia Libertarian Party to file a petition for mandamus in the West Virginia Supreme Court of Appeals. The petitioners' action, *West Virginia Libertarian Party v. Manchin*,¹⁵ charged that the West Virginia Code violated first amendment associational rights and fourteenth amendment equal protection rights. The restrictions involved were the filing fee requirement, the magisterial district restrictions, the credentials requirement, the preprimary filing deadline, and the primary vote forfeiture. The West Virginia court issued an order to show cause returnable by the Secretary of State for full argument on May 20, 1980. On that date petitioner, John Anderson, challenging the constitutionality of an additional provision which excluded independent parties from the ballot, was permitted to intervene.¹⁶

The court invalidated the filing fee requirement as applied to indigents, the provision excluding independent candidates from the ballot, and the magisterial district restrictions. The court,

¹³ SECRETARY OF STATE (W. Va.) OFFICIAL RETURNS OF THE GENERAL ELECTION.

¹⁴ CONGRESSIONAL QUARTERLY GUIDE TO UNITED STATES ELECTIONS (1975 & Supp. 1976).

¹⁵ 270 S.E.2d 634 (W. Va. 1980). Under the style of *Citizens Party v. Manchin*, 100 S. Ct. 3047 (1980), the Citizens Party, not allowed to intervene, appealed to the Supreme Court on substantially the same grounds. Certiorari was denied. 101 S. Ct. 46 (1980).

¹⁶ *Id.* at 637. The petitioners did not challenge the provision requiring a number of signatures on petitions equal to one percent of the total number of votes cast in the last general election.

The Citizens Party was not allowed to intervene in this case because the court held that "their claims were 'identical in law and in fact,' to those raised in the petitions already filed," and because the court deemed intervention unnecessary. *Id.* The court found Anderson's intervention justified because as an independent candidate he asserted different claims. *Id.*

however, sustained the credentials requirement, the preprimary deadline for petitions, and the primary vote forfeiture.¹⁷

III. CASE BACKGROUND

The United States Supreme Court first directly addressed the constitutional issues involved in third party and independent candidate access to the ballot in *Williams v. Rhodes*.¹⁸ There the Court was faced with an Ohio election statute which required a number of signatures on petitions equal to fifteen percent of the number of voters in the last election and the formation of an elaborate party organization in order for third party and independent candidates to gain access to the ballot. The Court declared the statute patently unconstitutional.¹⁹ Justice Brennan, fashioning the opinion, reasoned that the statute placed "substantially unequal burdens on both the right to vote and the right to associate" because minority parties were "denied an equal opportunity to win votes."²⁰

The significance of the *Williams* opinion, however, lies in the Court's finding that the right to vote and the right to associate were implicated by ballot restrictions and that these restrictions were subject to the strict scrutiny standard of equal protection review.²¹ Further, the Court reasoned that as a necessary conse-

¹⁷ A more complete procedural history is as follows: The court issued an order on May 22 invalidating the fee requirement as to indigents, the independent candidate exclusion, and the magisterial restrictions, and sustaining the vote forfeiture, the preprimary petition deadline, and the credentials requirement. Immediately afterwards, petitioners filed a motion to amend the order to allow for postprimary solicitation (there were only 11 days before the deadline). On May 27, the court denied the motion. A notice of appeal was filed with the West Virginia Supreme Court of Appeals on June 4. *Citizens Party v. Manchin*, 100 S. Ct. 3047 (1980), JURISDICTIONAL STATEMENT FOR THE SUPREME COURT OF THE UNITED STATES. The opinion here was filed September 16. The United States Supreme Court denied certiorari October 6. 101 S. Ct. 46 (1980).

¹⁸ 393 U.S. 23 (1968).

¹⁹ *Id.*

²⁰ *Id.* at 31.

²¹ *Id.* at 32.

The Supreme Court has implemented differing standards of review to determine whether state statutes pass constitutional muster. It has exercised a rational basis test in many substantive due process cases. Under this standard of review, the Court presumes the statute to be constitutional and requires only that the state have some rational basis for enacting the state law. *United States v.*

quence of "heightened scrutiny,"²² "only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms."²³

Finally, the Court dismissed the state interests in the stability of the two-party system, the elimination of voter confusion from an overcrowded ballot, and the channeling of political factionalism because none of these justified any compelling interest.²⁴

Three years later the Court took an entirely different approach to minor party and independent candidate access to the ballot. In *Jeness v. Fortson*²⁵ the Court affirmed the states' interest in regulating elections and found the state regulations at hand were not overly burdensome on the right to vote and the right to associate. The Court sustained a Georgia election statute with a five percent petition signature requirement for third parties and independent candidates.²⁶ Drawing a distinction between the restrictions found in the Georgia statute and the Ohio statute overturned by *Williams*, the Court said: "In a word, Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life."²⁷ In other words, the Court affirmed that the laws in Georgia were not geared to favor Republicans and Democrats while precluding third party and independent candidates from entering the political arena but that the laws allowed all groups to participate.

Carolene Products Co., 304 U.S. 144 (1938). On the other hand, in cases where the statute tends to implicate fundamental rights such as the right to vote and to associate, the Court has exercised an elevated standard of review, otherwise known as strict scrutiny. Under a strict scrutiny standard of review, the Court examines the statute more closely because it is primarily concerned with protecting fundamental liberties. Therefore, under this standard of review the Court requires the statute to further a *compelling* state interest, to be closely related to the state interest, and to be unable to achieve its objective in less burdensome ways. *Shapiro v. Thompson*, 394 U.S. 618 (1969). The former standard of review is, of course, easier for the state to meet than the latter.

²² 393 U.S. at 31.

²³ *NAACP v. Button*, 371 U.S. 415, 438 (1963), cited in *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

²⁴ 393 U.S. at 32.

²⁵ 403 U.S. 431 (1971).

²⁶ *Id.*

²⁷ *Id.* at 439.

Certainly, there were distinctions in the two statutes, but the lesson of *Jenness* was that the right of the state to regulate its elections was the primary concern of the Court. The Court first articulated that the state has a duty to protect the integrity of its political process from frivolous or fraudulent candidacies.²⁸ In order that this be achieved, the Court said the state should require "a preliminary showing of a modicum of support before printing the name of a political organization's candidate on the ballot."²⁹ The Court next voiced its concern with the states' interest in avoiding voter confusion. Requiring a modicum of support would also help in "avoiding confusion, deception, and even frustration of the democratic process at the general election."³⁰

Determining that the state's interests were legitimate and that the burden on minor parties was slight, *Jenness* steered away from the strict scrutiny standard of review advocated in *Williams* toward a rational relation standard of review.³¹ Even though the Court found the state's interests to be "compelling," it was actually willing to accept regulations that only had a rational connection to the state's purpose.³²

*Storer v. Brown*³³ and *American Party v. White*³⁴ signalled the advent of the next stage of development in constitutional analysis of ballot access restrictions. Since state ballot restrictions had appeared to infringe on constitutionally protected interests while furthering some compelling state interests, the Court in *Storer* and *American Party* took an approach which avoided the extremes of either *Williams* or *Jenness*.³⁵ Rather than exercising the strict scrutiny standard of review or upholding the rational basis test, the Court in *Storer* and *American Party* struck a balance between states' interests and constitutionally protected interests.³⁶

²⁸ *Id.* at 442.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Developments in the Law, supra* note 3, at 1134. See, e.g., Note, *Nominating Petition Requirements for Third Party and Independent Candidate Ballot Access*, 11 *SUFFOLK L. REV.* 974, 980-81 (1975).

³² *Id.*

³³ 415 U.S. 724 (1974).

³⁴ 415 U.S. 767 (1974).

³⁵ *Developments in the Law, supra* note 3, at 1139.

³⁶ To add to the uncertainty of which standard of review the Supreme Court

The Court in *Storer* upheld a restrictive California election statute which required a third party candidate to disaffiliate with a major party a year before he joined a minor party. The Court stated that the required layoff period furthers the state interest in the stability of its political system because it prevents losers prompted by "pique or personal quarrel" from continuing the struggle through a third party. It affirmed that the state's interest *outweighed* the interest of the candidate in making a late rather than an early decision.³⁷

Reviewing a Texas election statute, the Court in *American Party* also weighed the state's interest against the burden upon minor parties. The Court analyzed the restrictions such as the requirement of gathering a number of signatures on petitions equal to one percent of the votes cast in the last general election, the petition deadline before the primary, and the second chance provision allowing petitioning after the primary. The Court weighed the burden these placed on associational rights against the state's interests, such as preservation of the integrity of the electoral process and the avoidance of voter confusion.³⁸ Finally, it held that the statute legitimately served the state interest and was not overly burdensome on constitutionally protected rights.³⁹

Besides weighing the state's interest against the minor party candidates' interests, both *Storer* and *American Party* rely on other factors in determining whether a third party's or independent candidate's rights have been infringed by the states. One consideration voiced by the *Storer* Court was whether a potential candidate has been totally deprived of access to the ballot. The Court decided that the statute would not be overly burdensome if a reasonably diligent independent candidate can be expected to attain ballot access.⁴⁰ *American Party* formulated a similar test.⁴¹ The Court decided in both cases that if the law freezes the politi-

requires in ballot access restrictions cases, in its most recent case, *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), the Court seemed to rejuvenate the strict scrutiny standard of review exercised in *Williams*. Thus, it is not clear now whether the balancing test or strict scrutiny should be used.

³⁷ 415 U.S. at 736.

³⁸ 415 U.S. at 780-82.

³⁹ *Id.* at 782.

⁴⁰ 415 U.S. at 742.

⁴¹ 415 U.S. at 782.

cal status quo by barring candidates other than Democrats and Republicans, it would be unconstitutional.⁴² Closely connected with this concern was whether other candidates had successfully made the ballot in the past. *Storer* indicated that past experience will be helpful in determining if one has unlawfully been denied access to the ballot,⁴³ and *American Party* affirmed this view.⁴⁴

American Party raised another important concern in determining whether a state ballot restriction is unconstitutional. The Court, upholding the constitutionality of the statute, stated that those objectives which the statute seeks to further "cannot be served equally well in significantly less burdensome ways."⁴⁵ The obvious corollary is that a provision should be altered or voided if the state's objective could be achieved in another way less burdensome to minor parties. Justice Brennan, dissenting in *American Party*, cited this reason for overturning the Texas statute.⁴⁶

IV. THE BALANCING TEST

In *West Virginia Libertarian Party v. Manchin*, the West Virginia Supreme Court of Appeals took a path similar to that taken in *American Party* and *Storer* by balancing a number of factors to determine whether the state statutes unduly infringe upon the constitutionally protected interests of third parties and independent candidates. The court used this approach despite its previous holding in *State v. City of Follansbee*⁴⁷ that the right to run for office was a fundamental right subject to strict scrutiny and that state action implicating this right could be justified only if compelling and necessary.⁴⁸ One could argue that based on this case the West Virginia court should exercise a more stringent standard of review than it did in the instant case, and that by not doing so it manifests a willingness to "dilute" the strict scrutiny standard in order to uphold state legislation intruding on ballot access rights.⁴⁹ This retreat from the strict scrutiny requirement,

⁴² *Storer*, 415 U.S. at 746; *American Party*, 415 U.S. at 787-88.

⁴³ 415 U.S. at 742.

⁴⁴ 415 U.S. at 788.

⁴⁵ *Id.* at 781.

⁴⁶ 415 U.S. at 761 (Brennan, J., dissenting).

⁴⁷ 233 S.E.2d 419 (W. Va. 1977).

⁴⁸ *Id.* at 423.

⁴⁹ *The Supreme Ct., 1973 Term*, 88 HARV. L. REV. 13, 95 (1974). However, it

however, is understandable in light of the same trend that developed in the Supreme Court cases. Notwithstanding *Follansbee*, the West Virginia court, like the Supreme Court in *American Party* and *Storer*, is reluctant to go as far as *Williams* did in closely scrutinizing ballot access restrictions.

Analyzing the problems raised in *West Virginia Libertarian Party v. Manchin*, the court invokes three main balancing factors drawn from *American Party* and *Storer*: 1) whether the state interest in restricting ballot access outweighs the candidate's interest in securing a place on the ballot, 2) whether the state statutes totally deprive an independent candidate or third party of access to the ballot, and 3) whether other less burdensome means would adequately promote the state objective.

A. Filing Fee

Petitioners challenged the constitutionality of West Virginia Code section 3-5-8, which required a filing fee equal to one percent of the salary of the office for which one was campaigning.⁵⁰ The court analyzed the problem by balancing the right to associate against the state's interest in the requirement. The court recognized the state's interests, such as eliminating frivolous candidacies and reducing voter confusion from an overcrowded ballot but found these interests outweighed by the burden placed on the individual who could not afford to pay the filing fee, namely, denial of access to the ballot.⁵¹ The court cited *Follansbee*, declaring that the right to run for office could not be denied.⁵²

Relying on the Supreme Court cases of *Bullock v. Carter*⁵³ and *Lubin v. Panish*,^{53.1} both overturning filing fee statutes, the court further reasoned that the state objective could be achieved by "less burdensome means." The court noted the teaching of *Lubin* and *Bullock* "is that as to those candidates who cannot pay the filing fee, some alternative mode of gaining access to the bal-

should be noted that the West Virginia court decided *Follansbee* after *American Party* and, therefore, could have adopted the Supreme Court's balancing test rather than employing strict scrutiny.

⁵⁰ (1979 Replacement Vol.).

⁵¹ 270 S.E.2d at 638-39.

⁵² *Id.* at 639.

⁵³ 405 U.S. 134 (1972).

^{53.1} 415 U.S. 709 (1974).

lot must be provided, such as petitions gaining voter signatures."⁵⁴ The court thus asserts that the state objective can be achieved by the less burdensome petition drive.

B. Exclusion of Independent Candidates from the Ballot

The second challenge of unconstitutionality the court faced was that West Virginia Code section 3-5-23(a)⁵⁵ excluded independent candidates from the ballot.⁵⁶ In this instance the court was primarily concerned with the fact that the independent candidate, Anderson, would be totally denied access to the ballot because the statute does not recognize or qualify independent candidates. The weight of this factor alone was sufficient for the court to declare the provision unconstitutional because the burden on the independent candidate either to be excluded from the ballot or to forego his freedom of association and join one of the major parties was clearly violative of the equal protection clause of the fourteenth amendment.⁵⁷

C. Magisterial District Restriction

The court next turned to the challenge upon the constitutionality of West Virginia Code sections 3-5-23(c) and 3-5-23(d), which require a canvasser to solicit signatures only in the magisterial district in which he lives and permits a voter to sign a petition only in the district in which he lives.⁵⁸ Here the court balanced the state interest in this requirement against the interest of the third parties to be free from such a restriction and determined that the burden on the third parties' associational rights outweighed the state's interest. The restrictions on the canvassers' rights to solicit votes were severe, the court determined, because not only were canvassers prohibited from soliciting in populous areas such as shopping malls, but also the restrictions decreased mobility, caused uncertainty as to the boundaries of the magisterial districts, and increased cost of solicitation.⁵⁹ Furthermore, the restriction was equivalent to a geographical distri-

⁵⁴ 270 S.E.2d at 639.

⁵⁵ (1979 Replacement Vol.).

⁵⁶ 270 S.E.2d at 639.

⁵⁷ 270 S.E.2d at 640.

⁵⁸ (1979 Replacement Vol.).

⁵⁹ 270 S.E.2d at 642.

bution requirement ruled unconstitutional by the Supreme Court in *Moore v. Ogilvie*⁶⁰ because it violated the one-man-one-vote principle and gave, in essence, more voting power to those in sparsely populated magisterial districts.⁶¹ On the other hand, the court found the state interest of having someone familiar solicit signatures did not necessarily accomplish the objective of ensuring a fair solicitation, especially in large magisterial districts where familiarity would not be a factor and, therefore, the state interest was not legitimate.⁶²

D. *The Credentials Requirement*

The court sustained⁶³ West Virginia Code section 3-5-23(b) which requires all canvassers to obtain credentials before soliciting any signatures on petitions.⁶⁴ It determined that the state interest in requiring credentials was compelling because it assured the "integrity of the signature solicitation" and reduced the opportunity of "the bogus solicitor."⁶⁵ In assessing the burden on the solicitors, on the other hand, the court could find nothing substantial and thus held that the state interest outweighed the minor parties' interest to be free from the regulation.

E. *Filing Deadline*

The fifth provision challenged by petitioners, West Virginia Code section 3-5-24, requires that petition signatures be turned in to the secretary of state, or county clerk (depending on the office), one day before the primary.⁶⁶ Balancing the factors here, the court sustained the statute primarily because it could find no unreasonable burden on the interests of third party and independent candidates.⁶⁷ The court recognized that the minor party candidates might have to make an early decision whether to run for office and with which party to affiliate. The court noted, however, that this restriction was easily countered by the availability to

⁶⁰ 394 U.S. 814 (1969).

⁶¹ 270 S.E.2d at 641.

⁶² *Id.*

⁶³ *Id.* at 643.

⁶⁴ (1979 Replacement Vol.).

⁶⁵ 270 S.E.2d at 643.

⁶⁶ (1979 Replacement Vol.).

⁶⁷ 270 S.E.2d at 646.

minor parties of an unlimited time period before the deadline in which to gather petitions.⁶⁸ In this instance the court did not articulate a specific state interest in having the petition deadline at that date but, rather, invoked a general interest by citing an excerpt from *Storer*: "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process. . . ."⁶⁹

F. Primary Vote Forfeiture

The last provision challenged was West Virginia Code section 3-5-23(a), which prohibits a voter from voting in the primary election for partisan candidates if he has already signed a petition for a minor party candidate.⁷⁰ Sustaining the provision, the court found limiting one man to one vote was a compelling state interest which was not outweighed by any burden on third party and independent candidates. The court relied heavily on *American Party* which affirmed that the restriction preventing one who had already voted in the primary from signing a voter petition was nothing more than "a prohibition against any elector's casting more than one vote in the process of nominating candidates for a particular office."⁷¹ Also important in the court's reasoning was the theory that petition drives are the third party's and independent candidate's equivalent of a major party primary and that, therefore, their interests are not burdened because they are allowed to participate in the electoral process.⁷²

Finally, the court rejected the argument that one be prohibited from voting in the primary for only that office for which he signed the petition. The court concluded that enforcement of such a scheme would be virtually impossible and would substantially interfere with the state interest of regulating elections. This would be a problem, the court noted, because election officials would have to determine the identities of those who signed a petition and for what office the night before the primary (the filing

⁶⁸ *Id.*

⁶⁹ *Id.* at 644 (quoting *Storer v. Brown*, 415 U.S. 724, 729-30 (1974)).

⁷⁰ (1979 Replacement Vol.).

⁷¹ 415 U.S. at 785, *quoted in* *West Virginia Libertarian Party v. Manchin*, 270 S.E.2d 634, 646 (W. Va. 1980).

⁷² *Id.* at 644.

deadline) in order to separate those from the rest.⁷³ Furthermore, since the court could find no other means to carry out the state interest of one-man-one-vote except those more burdensome, it held the statute must be sustained.⁷⁴

V. ANALYSIS

The court carefully weighed the factors involved in the filing fee requirement, the magisterial district restriction, and the independent candidate exclusion in its determination of the unconstitutionality of those provisions. Its solution to the filing fee requirement, however, was insufficient because it failed to remove unequal burdens upon independent candidates and third parties. Furthermore, the court failed to recognize the severity of the burdens placed on independent candidates and minor parties by the credential requirement, the preprimary filing deadline, and the vote forfeiture restriction, and that the burdens created by those restrictions could violate the minor parties' equal protection rights.

The court's solution to the filing fee requirement is incomplete. It struck down the provision only for indigents and asserted that this group can gather petitions as an alternative. When one realizes that petition drives require an expenditure of time, energy, and money,⁷⁵ the solution for the indigents may be fruitless; in fact, the solution may be more burdensome than filing a fee. A more equitable resolution of the problem could be achieved by providing the third party or independent candidate with the option of paying the filing fee or gathering the needed petitions. Then it would be up to the candidate to decide which alternative would be less burdensome in his case.

Moreover, the court leaves the issue open as to those who are not indigents. It seems the court will still require nonindigents to *both* file a fee *and* gather the needed petitions. Since the state interest in discouraging frivolous candidacies can be adequately served by one of these requirements alone, the fact that the requirements may still stand together may be overly burdensome to third parties and independent candidates. This provision is even

⁷³ *Id.* at 647.

⁷⁴ *Id.*

⁷⁵ D. MAZMANIAN, *THIRD PARTIES IN PRESIDENTIAL ELECTIONS* 96 (1974).

more offensive because the candidate must pay his filing fee *before* he can begin soliciting signatures rather than at the time he submits his signatures. Therefore, the candidate must pay the filing fee even if he does not obtain the petitions needed to get his name on the ballot. The filing fee requirement should be abandoned altogether because it determines only that one is able to pay but does not ensure that one is a serious candidate or that he has a modicum of support and, therefore, does not serve the state interest.

The court did not adequately recognize the burdens placed upon canvassers under the credential requirement, which could amount to an unconstitutional infringement by the state. The problem exists because a vague statute can be abused by those enforcing it and also because canvassers required to identify themselves before each solicitation may be subject to a constitutional "chilling effect." The Supreme Court recognized these problems in *Hynes v. Mayor of Oradell*⁷⁶ where it noted that the vagueness of the statute gave the police the discretion to grant or deny permission to canvass. The Court also recognized that one petitioning for unpopular causes might be apprehensive of harassment if he were forced to identify himself.⁷⁷ The same might apply under the West Virginia Code because county clerks have the discretion to decide who is properly "qualified" to solicit votes.⁷⁸ In fact, one of petitioners' main contentions was that clerks in certain counties had made it very difficult for solicitors to obtain credentials.⁷⁹ Moreover, canvassers, such as the W.V.S.W.C.C., might be reluctant to identify themselves for fear of reprisal.

Most importantly, the court did not recognize the substantial burden placed upon the associational rights of third party and independent candidates by the combined effect of the vote forfei-

⁷⁶ 425 U.S. 610 (1976).

⁷⁷ *Id.* at 624-28 (Brennan, J., concurring in part).

⁷⁸ (1979 Replacement Vol.).

⁷⁹ *Citizens Party v. Manchin*, 100 S. Ct. 3047 (1980). JURISDICTIONAL STATEMENT FOR THE SUPREME COURT OF THE UNITED STATES. The affidavit of Mary Kernan indicates the difficulties encountered by the solicitors with county clerks. The clerk in Hancock County repeatedly refused to authorize Kernan, even after Harrington, the Assistant Secretary of State, had called to notify that Kernan and others should be authorized to solicit signatures. The clerk asked Kernan, "Does your father-in-law know what you're doing?" Affidavits of Brian Williams, Tom Moriarity, and Mary Kernan, No. 14863.

ture restriction and the preprimary deadline. Any analysis with an emphasis on the burden of state regulations upon candidates seeking to qualify for the ballot necessarily entails viewing the *overall* burden imposed by a comprehensive regulatory scheme. It is the overall burden that determines how well states' interests are served and how great is the infringement on constitutionally protected interests. The Supreme Court has affirmed this view because it required a comprehensive approach to evaluating state ballot access requirements in *Williams*, *Storer*, and *American Party*.⁸⁰

If the petition deadline and the vote forfeiture in West Virginia are taken together, the burden on associational rights may well be unconstitutional. Since the petition deadline is *before* the primary, the vote forfeiture discourages the signing of petitions because voters who sign petitions know they will lose their rights to vote in the primary. This argument is enhanced by a consideration of several factual situations. One would be reluctant to sign a petition for an independent candidate (such as Anderson) knowing he is forfeiting his right to vote for an entire political slate. This is especially true at the local level because few people would want to sign a petition for sheriff, for example, and lose the right to vote for president. Furthermore, in West Virginia, a predominantly Democratic state, the Democratic primary could be deemed more important than the general election. These considerations highlight the likelihood of a "chill" among potential petition signers which might stultify the political organizational efforts of third party and independent candidates and freeze the political status quo of a two-party system.

The West Virginia court relies on the position asserted in *American Party*, but there is a substantial difference between the Texas and West Virginia statutes. In Texas the primary is held before the period for petition drives begins, whereas in West Virginia the petition gathering period ends before the primary. In Texas since the primary has already been held, there is no apprehension on the part of those remaining to sign petitions. In West Virginia, however, all qualified voters are forced to make a decision before the primary whether they are willing to forfeit their rights to vote by signing a petition. Many voters will obviously be

⁸⁰ 393 U.S. at 36, 415 U.S. at 739, 415 U.S. at 780-81.

apprehensive of making this decision and will decide not to sign a petition.

The problem caused by this provision could be alleviated by less burdensome means. The petition deadline could be placed *after* the primary as it now stands in Texas. The state interest of having a reasonable period to validate signatures and to have ballots printed for the general election can be adequately served by having the petition gathering period after the primary and even up to two months before the general election. This would not only help canvassers in a practical way but would also help them attract more signatures because voter interest would be greater at that time.

VI. CONCLUSION

The West Virginia Supreme Court of Appeals in *West Virginia Libertarian Party v. Manchin* took a major step toward updating the West Virginia Election Code. In this period when several minor political organizations are "clamoring for a place on the ballot," the court has removed the most exclusionary provisions so that these groups might be successful. It officially recognized the right for independent candidates to run for office, struck down the stifling magisterial district requirements, and abolished the filing fee for indigents. The court also identified justifiable state interests for upholding the credentials requirement, the preprimary deadline, and the vote forfeiture. The court, however, should have gone further in recognizing the burden upon third party and independent candidates with respect to these three provisions because a more careful analysis reveals that they infringe on equal protection and associational rights and that a less burdensome solution might be achieved.

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