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HOUSE RESEARCH

Legal Analysis

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Constitutional Issues in Regulating Independent Candidates

This legal analysis summarizes reasons why many states regulate independent candidates, explains potential constitutional issues raised by such regulation, describes a Minnesota Statute on independent candidates that was invalidated and the case in which it was struck down, and outlines other valid methods used to regulate independents.

Introduction

An independent candidate is one who runs without party affiliation. In 1980 the Minnesota Supreme Court struck down a statute that required certain statements in an independent candidate's affidavit of candidacy.[1] Since that case Minnesota has had in effect only one express statutory requirement governing an independent candidacy.[2]

Three common modes of valid regulation, if properly drafted, are: early filing deadlines, prohibitions on primary losers appearing as independents at the general election ("sore loser" statutes), and disaffiliation statutes. Minnesota has the first two kinds of statutes. The third, a disaffiliation statute, is deemed by commentators to be the most effective regulation. The

[1] *Minnesota Fifth Congressional District Independent Republican Party v. Spannaus*, 295 N.W.2d 650 (Minn. 1980).

[2] An individual who has participated in a primary may not be placed on the general election ballot by nominating petition, which is the mechanism used for independent candidates, except in the very unlikely situation that none of a party's candidates gets at least 10 percent of the vote at the primary. Minn. Stat. §§ 204B.04, subd. 2; 204D.10, subd. 2.

disaffiliation statute works best with a party registration system of voting. Although Minnesota does not require party registration, constitutional variations on the typical disaffiliation statute probably could be drafted to fit Minnesota law. References to Minnesota law are for Minnesota Statutes as amended through 1999.

Rationale for Regulating Independents

There are two major reasons why a state may want to regulate candidates who run without party affiliation. First, a state has an interest in protecting the integrity of the political party process. This interest includes the goals of (1) stopping intraparty fights after the primary in order to have a settled contest, and (2) preventing one party from "raiding" another's votes by running a party candidate disguised as an independent. Second, a state has an interest in protecting the integrity of the electoral process. This includes such concerns as verifying that a candidate is truly independent, keeping the ballot a manageable length, and ensuring that candidates on the ballot are serious and have a minimal level of support that would make it possible for them to govern if elected.

Federal Constitutional Issues

Candidates and Voters are Protected

United States Supreme Court cases reviewing statutes on independents have recognized that these statutes may affect constitutional rights of both candidates and voters. The voter's right to cast an effective vote is based in part on the First Amendment right to associate for the advancement of political beliefs.[3] The Court has ruled that "[t]he right to vote is heavily burdened if that vote may be cast only for major party candidates at a time when other parties or candidates are 'clamoring for a place on the ballot'."[4]

The Court has not been as clear in explaining the basis for recognizing a candidate's constitutional rights. The candidate's rights seem to flow from the First Amendment protection of association for political purposes.[5] The major court decisions seem to mean that a candidate's right to appear

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[3] *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 10 (1968).

[4] *Anderson v. Celebrezze*, 460 U.S. 780, 787, 103 S. Ct. 1564, 1569 (1983), citing *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

[5] *Williams*, 393 U.S. at 30; 89 S. Ct. 5, 10.

on the ballot derives from the voters' right to associate with or vote for candidate's of their choice.[6]

State and Local Elections are Affected

The Supreme Court has found a constitutional basis for reviewing state laws affecting elections at the federal, state, and local levels of government. The United States Constitution specifically authorizes state legislatures to provide the manner of selecting presidential electors and electing senators and representatives to Congress.[7] However, the Supreme Court has ruled that "these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."[8] State regulation of independent candidates for federal office has been reviewed by the Court when it infringes the First Amendment right to associate for political purposes[9] or the Fourteenth Amendment right to equal protection of the laws.[10] The Fourteenth Amendment applies expressly to the states. The First Amendment has been held to apply to the states by operation of the Fourteenth Amendment.[11]

Although the right to vote in state and local elections is not mentioned in the Constitution, the Supreme Court has reviewed statutes that appear to infringe the franchise in these elections. The Court has employed two different analyses in the cases. One approach is that if a state grants the right to vote, regulation of the process may not violate equal protection by treating various groups of voters unfairly.[12] In a later case, the Court went further and said that in a representative democracy, voting in local elections is a fundamental right which must be protected from distinctions that violate equal protection.[13]

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[6] *See, Anderson,* 460 U.S. at 786; 103 S. Ct. 1564, 1568.

[7] U.S. Const. art. II

[8] *Williams,* 393 U.S. at 29; 89 S. Ct. 5, 9.

[9] *Williams,* 393 U.S. 23; 59 S. Ct. 5; *Anderson,* 460 U.S. 780; 103 S. Ct. 1564.

[10] *Williams,* 393 U.S. at 30; 89 S. Ct. 5,10.

[11] *Id.* at 30-31, 10.

[12] *Harper v. Va. State Board of Elections,* 383 U.S. 663, 86 S. Ct. 1079 (1966).

[13] *Kramer v. Union Free School District,* 395 U.S. 621 (1969).

Constitutional Theories

In cases challenging independent candidate regulations, the Supreme Court does not draw a sharp distinction between First Amendment and equal protection analysis.[14] The Court's ultimate concern is to minimize the burden on First Amendment rights. Thus, the First Amendment issue may be addressed either directly or from the equal protection angle of asking whether one group's First Amendment rights have been more heavily burdened than another's.

First Amendment

The Supreme Court has found that the First Amendment, in guaranteeing the people's right "peaceably to assemble," protects the voters' right to associate for political purposes. The Court has found that this right includes associating either in political parties or with a preferred independent candidate.[15] It has used two tests to review the constitutionality of independent candidate regulations. Each test is described below.

(1) Compelling Interest Test. In *Storer v. Brown* the Supreme Court stated one test of the validity of legislation that puts substantial burdens on the right to vote or to associate for political purposes: whether the legislation is essential to serve a compelling state interest.[16] The Court noted that predicting the results of applying the compelling interest test in any specific election law case may be very difficult.[17] Probably the best that can be done to evaluate the validity of particular election proposals or statutes is to seek a case involving a statute as nearly similar as possible. While the test requires a "compelling state interest," *Storer* suggests that states have much greater latitude in regulating the election process than in such areas as statutes involving racial or religious issues.[18]

Storer involved, in part, a challenge to a California statute that prevented seeking office as an independent at a general election if an individual was a registered party member within one year before the primary for that general election. The plaintiffs, who wanted to run for Congress, claimed the one-year period violated their constitutional right of association. A three-judge district court rejected this argument. The Supreme Court affirmed.

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[14] *See, Anderson v. Celebrezze,* 460 U.S. 780, 103 S. Ct. 1564 (1983).

[15] *Id.* at 793, 1572.

[16] *Storer v. Brown,* 415 U.S. 724, 729, 94 S. Ct. 1274, 1278 (1974).

[17] *Id.* at 730, 1279.

[18] *Id.*

Although regulation of independent candidates may infringe on the First Amendment right of political association, the Supreme Court has recognized a compelling state interest in protecting the stability of the political process by such regulation.[19] The compelling state interest for purposes of this test includes factors like encouraging compromise, ensuring that the winner of the general election will represent a majority of the community, and providing the electorate with a reasonably short ballot.[20]

Applying the compelling state interest test, the Court found that the one-year period served a compelling state interest in promoting the integrity of the political process.[21] The interest was promoted in part by discouraging party members from carrying on an intraparty feud through an independent candidacy.[22] Alternatively, the statute also served party integrity by discouraging "raids" in which a party member ran as an independent in order to bleed off the other party's votes.[23]

(2) Balancing Test. In *Anderson v. Celebrezze*, its most recent case on a statute that regulated independents, the Court used the following balancing test to decide whether the statute was an invalid restriction on the First Amendment right to political association:

- **Consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments;**

- **Identify and evaluate the legitimacy and strength of interests put forth by the state to justify the burdens imposed, and the extent to which those interests make it necessary to burden the voters' and candidates' rights.[24]**

In *Anderson* the plaintiff challenged an Ohio requirement that an independent presidential candidate must file by March to appear on the November ballot. Applying the first part of the balancing test, the Court found that the early deadline caused serious injury to independent candidates and supporters. Injury occurred because the issues that might cause a split with the political parties' candidates often do not emerge until late in the campaign. That the statute affected the presidential primary added to the character and magnitude of the injury, since eliminating some candidates in Ohio could affect voter choice in other states.

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[19] *Id.* at 729, 1278.

[20] *Id.*

[21] *Id.* at 733, 1281.

[22] *Id.* at 735, 1281.

[23] *Id.*

[24] *Anderson v. Celebrezze*, 460 U.S. 780, 789; 103 S. Ct. 1564, 1570 (1983).

The Court next examined the interests put forth by the state to justify the burdens caused by the statute. The interests were voter education, equal treatment for partisan and independent candidates, and political stability. None of these was found to justify the burdens the statute caused, so the statute was found to violate the First Amendment.

Equal Protection

Although *Anderson* analyzed the statute exclusively in First Amendment terms, the Court stated that it would still rely on earlier ballot access cases, such as *Williams v. Rhodes*, where it followed an equal protection analysis.[25] Thus, when evaluating the constitutionality of a statute on independent candidates, it is worthwhile to be aware of the equal protection test. In particular, this legal analysis will summarize the test used in *Williams*.

Williams involved a challenge to a series of Ohio election statutes that "made it virtually impossible" for a new political party or very small old political party to be placed on the ballot in a presidential election.[26] *Williams* is relevant to the question of independent candidate regulation because the Court does not distinguish between minor parties and independents when examining the validity of ballot access laws.[27] The Court acknowledged that the federal Constitution authorizes states to regulate the presidential election process, but held that such regulation must not be implemented so as to violate equal protection.

The Court found that the statutes in *Williams* burdened the constitutional rights to vote and to associate for political purposes. The latter is clearly protected by the First Amendment, and the Court implied that the right to vote is closely connected with the right to associate.[28] The Court further concluded that the statutes placed substantially unequal burdens on the two affected rights. The burdens would only be valid if the state had a compelling interest in imposing them. The Court reviewed the state's reasons for having the statutes and found that since the reasons did not meet the requirements for a compelling interest, the statutes violated equal protection.

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[25] *Anderson*, 460 U.S. at 786 n. 7; 103 S. Ct. 1564, 1569, citing *Williams v. Rhodes*, 393 U.S. 23, 30; 89 S. Ct. 5, 10 (1968).

[26] *Williams*, 393 U.S. at 24; 89 S. Ct. 5, 7.

[27] *See, Id.* at 36, 113 (Douglas concurring); *Anderson*, 460 U.S. at 793, n. 16; 103 S. Ct. 1564, 1572.

[28] *See, Williams*, 393 U.S. at 30; 89 S. Ct. 5, 10.

The Minnesota Statute Litigation

A Minnesota Statute enacted in 1978 required a candidate filing for partisan office as an independent to indicate in the affidavit of candidacy that she or he does not seek, does not intend to seek, and will not accept any political party's support in the campaign.[29] A 1980 lawsuit found this statute unconstitutional. The essential flaws in the statute were:

- **it denied equal protection to independents by allowing party candidates, but not independents, to accept support from any source; and**

- **it restricted the First Amendment freedom of speech and association of party members who want to express support for independents.**

The law was repealed in 1981.

In *Minnesota Fifth Congressional District Independent-Republican Party v. Spannaus*, the statute on independents' affidavits of candidacy was challenged by a party unit that customarily supported certain independent city council candidates.[30] The plaintiffs alleged that the statute violated the First Amendment by interfering with those candidates' ability to accept support from the party unit.

The Minnesota Supreme Court began its analysis by citing the United States Supreme Court ruling in *Storer v. Brown* that the state has a compelling interest in regulating independent candidates.[31] It then noted that furthering the state's compelling interest in this situation burdened the exercise of First Amendment rights. Therefore, the state must act in the least drastic way, a First Amendment formulation used by the United States Supreme Court in various cases challenging regulations of the right to political association.[32] The state argued that the Minnesota Statute was needed to ensure that voters are not misled by an allegedly independent candidate who is actually connected with a party. The Minnesota Supreme Court responded that the disclosure requirements of chapter 10A, the Ethics in Government Act, would satisfy that purpose without the additional restrictions of the challenged statute.[33]

The court ruled in favor of the plaintiffs and against the statute. It did not expressly rely on the equal protection clause. However, the court noted, in reasoning analogous to that used in equal protection review, that the statute discriminated against independents as compared to party

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[29] Minn. Stat. 1978, § 202A.22, subd. 1(m).

[30] *Minn. Fifth Congressional Dist. I-R Party v. Spannaus*, 295 N.W.2d 650 (Minn. 1980).

[31] *Id.* at 653.

[32] *Id.* at 654.

[33] *Id.*

candidates. This occurred because party candidates "may seek and accept support from any quarter," including another party, while independents were denied the same freedom.[34] The statute also was found to unconstitutionally restrict political parties by limiting their ability to express support for any candidate. The court concluded that since the statute "seeks to control the speech, association, and conduct of independent candidates and prospective supporters during the campaign [i]t . . . unconstitutionally restricts First Amendment rights of expression and association."[35] The court enjoined enforcement of the statute.

Ways to Regulate Independents

This legal analysis concludes by describing and evaluating the constitutionality of three basic types of statutes used in various states to regulate independent candidates. Minnesota has a version of two of the statute types, the early filing deadline and the "sore loser" law. Although probably valid, the Minnesota filing deadline statute may be vulnerable to constitutional attack in one respect. The "sore loser" law appears clearly constitutional.

The third and most common type of independent regulation is a disaffiliation statute, which does not exist in Minnesota. Under such a law, a candidate must certify that she or he does not belong to any political party in order to run as an independent. The legal analysis concludes with options for preparing a disaffiliation statute that would fit the Minnesota election system and be likely to survive a constitutional attack.

Filing Deadline

It has been suggested that an early filing deadline can serve as the practical equivalent of a disaffiliation statute by forcing candidates to declare themselves as independents or members of a specific party at an early date. The apparent theory is that requiring early filing will prevent someone who is really a disappointed party member from seeking office later that year as an "independent."

Minnesota requires both independents and party candidates for partisan office to file for office no later than 56 days before the primary.[36] The purpose of the deadline seems to be to allow preparation of ballots, rather than to discourage independents. The constitutionality of this deadline has not been challenged. However, the United States Supreme Court noted in *Anderson v. Celebrezze* that there is no administrative reason to require independents to file as early as party

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[34] *Id.* at 655.

[35] *Id.*

[36] Minn. Stat. § 204B.09, subd. 1.

candidates.[37] Since independents do not appear in the primary, their names are not needed for preparation of that ballot.

Anderson struck down an Ohio requirement that an independent candidate for president must file by March in order to be on the November ballot. After applying the balancing test described on page 5 of this legal analysis, the Supreme Court ruled that the early filing date for presidential candidates was an unconstitutional restriction on the voters' First Amendment freedom of candidate choice and freedom of political association in supporting a particular candidate. The constitutionally significant weaknesses in the Ohio statute seem to be that filing for independents closed 75 days before the primary, that having a June primary caused the filings to close many months before the general election, and that applying the statutes to a presidential primary could affect the choices of voters in other states.

Various features of the Minnesota filing date and election system seem legally distinguishable from the statute invalidated in *Anderson*. Minnesota's filings remain open closer to the primary date than Ohio's, Minnesota's primary is much closer to the general election than Ohio's, and Minnesota has no presidential primary that affects voters in other states. Because of these factors, the Minnesota filing deadline for independents is probably valid. However, lower courts have been hostile to what they perceive as excessively early filing deadlines for independents if independent filings are keyed to a primary date that only involves party candidates.[38] Thus, it is possible that an independent might successfully challenge the requirement that independents in Minnesota file in time for preparation of primary ballots.

"Sore Loser" Statute

A "sore loser" statute prevents a defeated primary candidate from appearing on the general election ballot as an independent, although such a candidate remains eligible for election through write-in votes. All courts that have heard challenges to sore loser statutes have upheld them.[39]

Minnesota's sore loser statute is narrowly focused on the state interest in prohibiting a candidate who ran in the primary from getting on the ballot as an independent.[40] Based on current case law, the statute is a constitutional way to end party feuds after the primary and prevent at least those party members who ran in the primary from offering themselves to the voters as independents in the same election year.

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[37] *Anderson*, 460 U.S. 780, 801; 103 S. Ct. 1564, 1576.

[38] *Lendall v. Bryant*, 387 F. Supp. 397 IE.D. Ark. (1975) (deadline seven weeks before primary invalid); *McCarthy v. Noel*, 420 F. Supp. 799 (D.R.I. 1976) (deadline 30 days before primary invalid as applied to presidential candidates).

[39] *See, Backus v. Spears*, 677 F. 2d 397 (4th Cir. 1982).

[40] Minn. Stat. § 204B.04, subd. 2.

Some observers see a parallel between the sore loser statute and the early filing deadline because both can operate to prevent disgruntled party members from filing for office as independents. The question may be asked then, why sore loser laws have all survived litigation while early filing deadlines have been vulnerable to constitutional attack. Case law does not expressly compare the two kinds of statutes, but the reason for the legal distinction may be learned from the Supreme Court opinions in *Storer v. Brown* and *Anderson v. Celebrezze*.

Storer involved a challenge to a one-year party disaffiliation requirement for independents.[41] In its opinion, the Supreme Court indicated approval of sore loser statutes, which were not challenged in the case:

> The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim...[42]

The Court ruled in *Storer* that the state has a legitimate interest in preventing party factionalism. Denying general election ballot access to a defeated primary candidate affects only individuals who have engaged in a party primary, by forcing them to accept the primary result. It thus appears to further a state interest that will justify some infringement on First Amendment rights.

In *Anderson* the Court cited *Storer* for the legitimacy of the state's interest in preventing party factionalism.[43] However, the Court found that, unlike a sore loser statute, the early filing deadline at issue in *Anderson* could not be justified by this interest, because the filing deadline's coverage was both too broad and too narrow.[44] The early deadline was too broad in that it would shut out the genuinely independent candidate who did not file on time. It was too narrow because it allowed a partisan candidate to run as an independent, simply by filing on time. This kind of misfit between statutory intent and effect is not allowed in constitutionally sensitive areas. On the other hand, sore loser statutes are valid because they shut out only those who have already filed for nomination that year as a party candidate and, thus, clearly are not independents.

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[41] *Storer v. Brown*, 415 U.S. 724 (1974); 94 S. Ct. 1274.

[42] *Id.* at 735, 1281.

[43] *Anderson v. Celebrezze*, 460 U.S. 780, 805 (1983); 103 S. Ct. 1564, 1578.

[44] *Id.*

Disaffiliation Statute

The disaffiliation statute is the most common way to regulate independent candidates. This kind of law is usually part of a party registration primary system.[45] By a statutory deadline, a candidate who is an independent will so register or will register nonaffiliation with any party and refrain from voting in any party's primary. The party registration system provides some check on the candidate. An individual who has not registered the appropriate disaffiliation by the statutory deadline is considered not an independent.

Minnesota does not have a disaffiliation statute. If one were desired, the only constitutional issue it would raise is the length of the disaffiliation period.

A statute that requires too long a disaffiliation period for candidates might invalidly restrict both the candidates' and voters' First Amendment right of association for political purposes. In reviewing a statute on the related matter of regulating voters' party registration, the United States Supreme Court has ruled that a deadline of registering as a party member 23 months before a primary is such an invalid restriction.[46] The 23-month deadline deprived voters of the opportunity to participate in any primary during that time. The Court found this an unnecessary burden on the exercise of constitutionally protected activity. At the other end of the spectrum, a requirement that a candidate file as an independent one year before a primary was upheld in *Storer v. Brown*.[47] The deadline was considered an essential means of furthering the state's compelling interest in promoting political stability.

Thus, a one-year disaffiliation period is clearly valid, while 23 months is clearly unconstitutional. A disaffiliation period closer to one year would of course run the least danger of being struck down.

On a practical level, because Minnesota law does not provide for registering voters' party preference, a disaffiliation statute would need to be drafted differently here than it is in states with party registration. A candidate filing as an independent could be required to file an affidavit that she or he did not participate in any party caucus or convention or serve on any party's state central committee or executive committee during a specified time. For a candidate not to participate in any of these party activities would be analogous to refraining from party registration in states where that exists. Analogous to the one-year period upheld in *Storer*, the time should be

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[45] The Supreme Court has ruled that where a party does not require primary voters to be registered as members of the party, state law may not impose such a requirement. *Tashjian v. Republican Party of Connecticut,* 107 S. Ct. 544 (1986). However, a state may still have a party registration system for other, constitutionally permitted purposes. One example would be to aid in compliance with the rules of a party that does limit primary participation to voters who are registered with that party. *See Democratic Party of United States v. Wisconsin,* 450 U.S. 107, 101 S. Ct. 1010 (1981).

[46] *Kusper v. Pontikes,* 414 U.S. 51, 94 S. Ct. 303 (1973).

[47] *Storer v. Brown,* 415 U.S. 724, 94 S. Ct. 1274 (1974).

close to one year or even less, to minimize the possibility of a successful constitutional challenge. Extrapolating from cases like *Kusper* and *Storer*, there is a high risk that it would be unconstitutional to require a candidate to certify to disaffiliation for much longer than one year before the primary or to promise to continue disaffiliation for any time after the general election.

It also would be constitutional to enact a requirement that an independent simply indicate in the affidavit of candidacy that he or she is not presently affiliated with a political party. This approach has the practical disadvantage that, in the absence of party registration, there is no effective way to verify whether an individual is or is not in fact connected with a party.