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STATUTE: A MODEL ACT FOR THE DEMOCRATIZATION OF BALLOT ACCESS

The Appleseed Center for Electoral Reform The Harvard Legislative Research Bureau*

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SUMMARY:

... If voter turnout in elections is any indication of a democracy's health, then the United States is facing a major problem. ... **(3) eliminate the unnecessary barriers for third party and Independent candidate ballot access. ... Nor will a filing fee guarantee ballot access to a party or candidate that has popular support, but lacks financial resources. ... (2) a valid signature shall be affixed by a person registered to vote in the state and eligible to vote for that District-level Office. ... A Political Party shall qualify to place candidates for any Office on the general election ballot by voter registration if, on August 15 of the election year, the number of voters registered in the state in the name of that Political Party shall be equal to or greater than 0.05% of the total number of voters registered in the state as of January 1 of the election year. ... (a) A Political Party shall qualify to place candidates for any Office on the general election ballot by past election results if its candidate for any Statewide Office in either of the two preceding general elections received at least 1% of the total votes cast for that Office. ...**

HIGHLIGHT: *Many states have restrictive and complex ballot access laws that make it difficult for non-major party candidates to appear on federal or state election ballots. The Appleseed Center for Electoral Reform and the Harvard Legislative Research Bureau propose a Model Act to democratize ballot access that would broaden participation in political discourse, increase voter choice, and eliminate unnecessary barriers for third-party and independent candidates for public office.*

TEXT:

[*451] If voter turnout in elections is any indication of a democracy's health, then the United States is facing a major problem. In 1998, only 36.1% of eligible population voted, n1 the lowest turnout since the wartime election of 1942.

In the 1998 election, the highest turnout by a nine percent margin was in Minnesota, where almost sixty percent of the electorate voted and Reform Party candidate Jesse Ventura was elected governor. n2 A connection between the presence of a viable third party candidate and high voter turnout is hardly coincidental. Third parties and independents have traditionally played an important role in energizing voters and offering alternative viewpoints to those of the major parties. n3

Yet today the restrictive and complex ballot access laws of most states make it extremely difficult for non-major party candidates to secure a spot on the general election ballot for state or federal office. In order to qualify for the ballot

in all fifty states for the 1996 Presidential election, a third party candidate had to [*452] spend \$ 1.6 million, while a major party candidate had to spend less than one-fifth as much. n4 Some states require more than 100,000 registered voters to sign a party's petition for ballot access. n5 Others impose an onerous filing fee, mandate an early petition deadline, or simply have no available method for a third party to qualify for the ballot. n6 Still other states limit the number of candidates on the ballot by the sheer complexity of their laws. n7

The goal of this Model Act is to initiate reform in the state regulation of ballot access by offering a model set of provisions that could be adopted with only minor modifications in any of the fifty states. Each section of the proposed legislation is followed by commentary, examining the rationale behind particular rules chosen.

Ballot access regulation must first be understood in historical context. The origin of the restrictions in many states is largely in the "Red Scare" of the first part of the twentieth century. n8 During that time, fearing that Socialists or Communists would become significant political rivals, the major parties enacted legislation intended to deny them this opportunity. n9 For example, in the early twentieth century, the Illinois legislature increased the petition signature requirement from 1000 to 25,000 signatures, and added a requirement that 200 signatures be collected from each of fifty counties. n10 This measure was successful in preventing the Communist Party, which had a significant base of support in [*453] Chicago, from obtaining a ballot position in any of the next four statewide elections. n11

Today, the nature and severity of the restrictions vary from state to state in a haphazard manner, but the justifications advanced in favor of limiting ballot access rights are fairly uniform. The state interest in access restrictions is primarily framed in terms of preventing voter confusion, deterring frivolous candidacies, and promoting political stability. n12

Whether voters are truly confused by having to choose from a large number of candidates on the ballot has yet to be established, however. Even assuming this is the case, a fairly low threshold would suffice to prevent ballot overcrowding, as well as to deter frivolous candidates. As Richard Winger, a leading expert on ballot access, points out, "In the 1912 general election, [before most ballot access restrictions were enacted,] the average election ballot had 4.1 candidates for Congress." n13 Today, when third parties are much weaker, it is unlikely that even the most permissive ballot access rules would result in an overcrowded ballot.

While the recent Supreme Court decision in *Buckley v. American Constitutional Law Foundation* n14 eliminates a minor hurdle to ballot access, the Court has generally given states wide latitude in shaping their ballot access provisions. Prime examples of the Court's laissez-faire approach to ballot access are its decisions in *Jenness v. Fortson*, n15 deciding that Georgia's petition signature requirement of five percent of registered voters did not act to freeze the political status quo and was therefore constitutional, *Storer v. Brown*, n16 upholding California's party disaffiliation requirement for independent candidates, and *Burdick v. Takushi*, n17 holding that Hawaii was not required to provide write-in space on their ballot. Analysis of these decisions has led one author to argue that "minor parties will not succeed in reducing state barriers to political participation through future court challenges." n18 [*454] He thus concludes that, "if the answer to increasing ballot access lies anywhere, it appears to be in the hands of state legislatures." n19

As the political bodies responsible for creating ballot access restrictions in the first place, state legislatures are the most logical vehicle to undertake reform. Legislators, however, are not likely to initiate change without public pressure. As one Texas Republican official commented, "The one thing Democrats and Republicans agree on [is] they don't want more parties . . . they would rather continue to fight with one another." n20

Fortunately there are several recent trends pointing toward voter support for greater ballot access. In 1998, a record number of voters -- more than thirteen percent -- registered as neither Democrat nor Republican. n21 This percentage has been increasing steadily in the latter half of this century, from about 1.54% in 1962. n22

Voter dissatisfaction with the two major parties has been increasing according to other indicators as well. A Roper Poll conducted on the eve of the 1992 election showed that 63% of those surveyed were in favor of the creation of a third party to challenge the Republicans and Democrats. n23 In 1944, only 14% shared that opinion. n24 Another sign of dissatisfaction with the political status quo comes from Florida, where voters in the last election passed Revision 11 with 64% of the vote, eliminating the state's onerous petition requirements for third parties. n25

The relaxation or even elimination of ballot access restrictions is not likely to cause the demise of the two-party system. n26 As long as U.S. elections are based on a winner-take-all model, rather than proportional representation, it is likely that there will be two parties that dominate the political landscape. n27 Furthermore, [*455] the tremendous advantages that the the Republican and Democratic parties possess in terms of organizational structure and financing

virtually guarantee that they will continue to be stronger than their opponents in the foreseeable future.

This reality does not mean, however, that third parties do not have a vital role to play in our political system. On the contrary, "history has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted." n28 Third parties "have been a major force behind policy innovations, including direct election of senators, women's suffrage, nomination through party primaries, the eight-hour work day, child labor laws, federal farm aid, and the graduated income tax." n29

The goal of this Model Act is to allow voters a greater choice of candidates on election day by eliminating needless complexity and restrictions faced by potential candidates in most states. It is hoped that by adopting these rules, state legislatures will increase voter participation in the democratic process. Before that happens, however, both proponents and opponents of greater ballot access must engage in the long-overdue national debate on the current state of ballot access restrictions.

MODEL ACT FOR THE DEMOCRATIZATION OF BALLOT ACCESS

SECTION 1. STATEMENT OF PURPOSE

(a) The purposes of this Act are to:

(1) broaden meaningful participation in the political discourse;

[*456] **(2) increase voter choice; and**

(3) eliminate the unnecessary barriers for third party and Independent candidate ballot access.

(b) This Act shall be liberally construed to effectuate its purpose.

SECTION 2.1. METHODS OF RECOGNITION FOR A POLITICAL PARTY

A Political Party shall qualify to place candidates for any Office on the general election ballot by:

(a) petition, pursuant to Section 2.1.1;

(b) voter registration, pursuant to Section 2.1.2; or

(c) past election results, pursuant to Section 2.1.3.

COMMENT: In some states, simply paying a filing fee is sufficient for a candidate or party to obtain a position on the ballot. n30 This Act rejects filing fees as a method of ballot access. n31 One of the goals of the methods of ballot access listed in Section 2.1 is to ensure that candidates and parties on the ballot have sufficient popular support. n32 A filing fee, however, simply measures a party's ability to pay, which is often not an accurate indicator of public support. A filing fee will not effectively deter frivolous candidacies, since wealthy candidates without popular support will be able to obtain a position on the ballot. n33 Nor will a filing fee guarantee [*457] ballot access to a party or candidate that has popular support, but lacks financial resources. Although the costs of campaigning and media access may effectively prevent such parties from gaining significant support, this does not mean that a party's ability to pay a filing fee will be a better indicator of popular support than petitions, success in previous elections, or percent of voters registered with the party.

States that continue to impose burdensome signature requirements on third parties should retain the filing fee as a method of ballot access. In states that do allow parties to secure a spot on the ballot by paying a filing fee, parties often use this method instead of a petition so as to avoid the expense of petition drives. n34 In Florida, for example, which had a three percent signature requirement for a congressional candidate to obtain access to the primary ballot, and a filing fee of five percent of the congressional salary as an alternative, 300 candidates qualified between 1978 and 1988 for the Democratic or Republican congressional primaries through the filing fee, and not a single candidate qualified by petition. n35 One of the purposes of Section 2.1.1, which substantially lowers signature requirements for most states, is to reduce the costs of completing a successful petition drive. Lowering these costs would eliminate the practical need for a filing fee as the least burdensome method of ballot access in some states.

SECTION 2.1.1. PETITION

(a) A Political Party shall qualify to place candidates for any Office on the general election ballot by filing a petition with the state.

(1) The petition shall:

[*458] (A) contain a number of valid signatures equal to or greater than 0.1% of the voters registered in the state on January 1 of the election year;

(B) include the name, address, date of birth, and social security number of each person circulating the petition;

(C) contain the Political Party name, list of officers, and contact information; and

(D) be filed before August 15 of the election year.

(2) Each page of the petition shall:

(A) contain the name of the Political Party;

(B) state that the signers thereof desire that the Political Party shall be qualified to place candidates for any Office on the general election ballot;

(C) be circulated by any person 18 years or older at the time the person circulates the petition;

(D) contain the name of the person circulating that page;

(E) be signed and dated by the person circulating that page, attesting that each signature on that page:

(i) was affixed in the person's presence;

(ii) is the signature of the person whose name it purports to be, to the best of the circulator's knowledge; and

(iii) is a valid signature pursuant to Subsection (3), to the best of the person's knowledge; and

(F) comply with any form prescribed by the state, except that no such form shall require information in addition to that required by this Act.

[*459] (3) A valid signature shall be:

(A) affixed by a person registered to vote in the state;

(B) affixed between January 1 and August 15 of the election year;

(C) accompanied by the signer's name;

(D) accompanied by the signer's address; and

(E) accompanied by the date signed.

(b) There shall be no requirements other than those of Subsection (a) for a Political Party to qualify to place candidates for any Office on the general election ballot by filing a petition.

(c) A Political Party that does not meet the requirements of subsection (a) shall qualify to place a candidate for any District-level Office on the general election ballot if the Political Party files a petition which meets the requirements of Subsection (a), except (a)(1)(A) and (a)(3)(A), and:

(1) The petition shall contain a number of valid signatures equal to or greater than 0.1% of the voters registered in the state and eligible to vote for that District-level Office on January 1 of the election year; and

(2) a valid signature shall be affixed by a person registered to vote in the state and eligible to vote for that District-level Office.

(d) If a petition fails to meet the requirements of Subsections (a)(1)(A) or (a)(1)(D) then the petition shall not qualify a Political Party to place candidates on the general election ballot.

(e) If a page of the petition fails to meet the requirements of Subsection (a)(2), then the signatures on that page will not [*460] be counted toward meeting the requirement of Subsection (a)(1)(A).

(f) If a signature fails to meet the requirement of Subsection (a)(3), then that signature will not be counted toward meeting the requirement of Subsection (a)(1)(A).

(g) If a petition or signature fails to meet the requirements of Subsections (a)(1)(B), (a)(1)(C), (a)(3)(C), or (a)(3)(D), then the Political Party shall be given seven days to cure said failure from the date the Political Party is notified.

COMMENT: This section requires that a party's petition be signed by at least 0.1% of the registered voters of a state. It would require approximately 550 signatures in Rhode Island, and approximately 14,700 signatures in California. n36 This requirement is intended to serve several purposes. First, it is intended to lower unduly burdensome restrictions which prevent serious candidates with popular support from gaining access to the ballot. Overly burdensome signature requirements impose tremendous costs on parties, n37 requiring that third parties with limited resources devote a large part of their resources toward simply obtaining a spot on the ballot. The commercial cost of soliciting signatures commonly ranges from \$ 0.85 per signature to \$ 2.00 per signature. n38 Second, the Act is intended to restrict ballot access so that only those parties with sufficient popular support qualify to nominate candidates. n39 This will prevent frivolous candidacies, and also lower the risk of voter confusion which may result from an over-crowded ballot.

The 0.1% requirement is twice as high as the required percentage if the party seeks to qualify through the registration method. The reason for this difference is the greater difficulty in [*461] convincing someone to register with a party. Unlike registering with a party, which may indicate a certain loyalty and commitment to the party platform, signing a petition is simply an expression of support for allowing a party to place candidates on the ballot. n40

The 0.1% requirement will raise the required number of signatures in eight states. n41 It will, however, substantially lower the requirement in most states. Nineteen states currently have signature requirements over one percent -- the highest is that of Oklahoma, which has a five percent requirement, amounting to approximately 43,680 signatures. n42

The August 15 filing deadline is intended to provide candidates with ample opportunity to solicit petition signatures. Based on the 1998 general election filing deadlines, the Model Act would postpone the deadline in thirty-seven states. n43 Four states had filing deadlines as early as March for the 1998 general election. n44 Providing parties with adequate time to gather signatures is a fair way to measure popular support, since the amount of support a party enjoys has little correlation with the party's ability to gather signatures in a small window of time. Allowing parties sufficient time to petition also reduces the cost of petitioning, n45 leaving parties with more resources to spend on substantive issues.

Because issues taken up by third parties will often not receive media attention until the general election nears, early filing deadlines can prevent a party from using its public support to gain ballot access. Furthermore, voters may not turn to third parties as alternatives until the major parties have already nominated their candidates. n46 Early filing deadlines make it difficult [*462] for candidates to obtain the requisite number of signatures, n47 both because they limit the window of time during which a party must complete its petition drive, and because the general election is often too far in the future. New parties, historically, have formed late in the election year, sometimes organizing as late as July or early August. n48

A deadline later than August 15 would be a better indicator of a party's support at election time, but may not leave adequate time for states to administer the election. n49 Another problem with a later deadline is that it would not give voters enough time to evaluate the viability of particular parties and their candidates. Advancing the filing deadline

beyond August 15, in states where it would be administratively feasible to do so, however, would not be inconsistent with the goals of this legislation, as long as voters still have a reasonable amount of time to evaluate the petitioner's candidacy. n50

Permitting parties to begin petitioning at any time after January 1 of the election year, as provided under Section 2.1.1(a)(3)(B), allows a party ample time to collect the requisite number of signatures. An earlier starting date would be unnecessary, and signatures gathered any earlier would not necessarily represent the popular support that a party enjoys closer to the election.

This Section requires the circulator to be at least eighteen years of age and to provide personal information, since the petition circulator also serves as a witness to the signatures. n51 This Act rejects any additional restrictions, such as requiring candidates of the same party to circulate separate petitions. n52 Illinois, for example, prohibits people who circulate petitions to place a candidate on a primary election ballot from circulating petitions [*463] in the general election. n53 The policies underlying signature requirements are not served by placing burdens on those who can circulate petitions, since the amount of support for a party has no relation to who circulates the petition. Furthermore, restrictions on who may circulate a petition may violate the First Amendment right to petition. n54

The only restriction on who may sign a petition is that the signer be registered to vote in the state. n55 This facilitates the administration of the petition process, making it easier to verify that the people who signed the petition are indeed eligible to vote in the state. Apart from this limitation, the Model Act imposes no other requirements on who may sign a petition. By signing a petition, people are simply making the statement that they support the party obtaining a spot on the ballot. The Act does not require petition signers to swear that they are members of the party whose petition they are signing, that they will vote for the party's candidate, or that they will become party organizers -- all requirements that states have imposed. n56 Because third parties often serve to enrich the political debate and bring to light issues which the major parties are slow to address, people should be able to support more than one party's efforts to gain ballot access. n57 Thus, there is no requirement that a person may only sign one petition. Furthermore, voters who sign the petition of a party may still vote in the primary of another party. n58

The only information that the Act requires about a person who signs a petition is that person's name, address, and the date he or [*464] she signed the petition. States have required that signers include information that they may not want to share, such as their social security number, date of birth, and occupation. n59 States have also required information that most signers are unlikely to know, such as their voting district or voter affidavit number. n60 New York, for example, has required signers to include their election district, assembly district, and ward. n61 This Act rejects these requirements because they constitute unnecessary obstacles to the successful completion of a petition drive. Such requirements often needlessly raise the costs of the petition process by forcing parties to look up and fill in missing information after the fact. n62 Furthermore, additional requirements would make the process of verifying signatures more difficult, because states will have unnecessary information that requires verification. A voter's name and address should be sufficient to verify that the voter is registered to vote in the election. Any additional requirements create an unnecessary risk that a party which demonstrates popular support will be unable to obtain access to the ballot.

Section 2.1.1(b) rejects the practice of some states that require filing fees for parties seeking to qualify for ballot access through a petition. n63 Filing fees may be justified as a way to defray the costs incurred by the state in processing petitions and administering the state's elections. Popular elections are a democratic institution, however, and the costs of democracy should be borne by the entire population, not just the parties that choose to participate. n64

Unlike the law in some states, this Act imposes no requirements on where the signatures must come from within a state. n65 Since the purpose of the petition method of ballot access is to [*465] allow parties with sufficient public support to obtain a ballot line, there is no reason for geographic distribution requirements. On election day, support is measured irrespective of the geographic distribution. In states whose population is concentrated in a large metropolitan area, a candidate could theoretically win an election without satisfying the distribution requirements.

By eliminating geographic distribution requirements, the Model Act also eliminates a major expense of completing a petition drive. Canvassing an entire state to meet distribution requirements is an inefficient use of party resources. A third party that exhausts its budget on a burdensome petition drive will lack the means to promote its agenda once it has obtained a spot on the ballot.

A party that meets the requirement of Section 2.1.1(a) may place candidates on the ballot for any office, as defined in Section 3(b). A party that does not wish to run a full slate of candidates, however, may choose instead to qualify to place candidates for particular district-level offices on the ballot by filing a separate petition for each district. Where a

party's petition meets the requirements of Section 2.1.1(c), that party may qualify to place candidates on the ballot for any district-level office.

If a party enjoys strong support in a particular election district, that party should be able to place candidates on the ballot for offices in that district without having to meet the signature requirements to qualify statewide. Having district-level qualification promotes local autonomy, which in turn allows parties to develop around local issues and shape the political debate in areas where the party's platform has significant support.

The Act provides no private right of action for one party to challenge another party's signatures, thus eliminating the risk of costly, frivolous, and politically motivated challenges. A party's resources are most efficiently allocated if they are used to draw the public's attention to the substantive issues which the party seeks to address. n66

In states such as Illinois and New York, where the job of verifying petition signatures is left to private challenges to the petition, the decision to scrutinize a petition is often politically motivated. n67 For example, a candidate in New York recently brought an action challenging the petition of a candidate seeking a spot [*466] on the 1998 Republican primary ballot on the grounds that the petition lacked page numbers. n68 During the 1986 primary alone, 200 candidates in New York were denied access to the primary ballot because of defects in their petitions. n69 Private challenges to petitions provide candidates with a way of defeating their opponents through litigation instead of an election. n70

Random sampling should suffice to verify the validity of a petition. If a high percentage of invalid signatures exists, the petition should be verified systematically until the number of validated signatures meets the requirement of Section 2.1.1(a)(1)(A), or the number remaining is insufficient to meet this requirement. Parties will be allowed to add signatures until August 15 to compensate for disqualified signatures.

Certain errors, such as failure to meet the signature requirement or failure to meet the filing deadline, should disqualify a petition. Subsections (e), (f), and (g), however, are intended to minimize the effects of errors, both by limiting the consequences of an error, and by giving parties time to cure nonmaterial defects in a petition. For example, parties should be able to correct minor typographical errors since such errors have no bearing on a party's popular support.

SECTION 2.1.2. VOTER REGISTRATION

A Political Party shall qualify to place candidates for any Office on the general election ballot by voter registration if, on August 15 of the election year, the number of voters registered in the state in the name of that Political Party shall be equal to or greater than 0.05% of the total number of voters registered in the state as of January 1 of the election year.

COMMENT: This Section is modeled on the election law of Delaware, which provides for recognition of a political party statewide if that party has a registration equal to "at least 5/100 of one percent" of the total voter registration of the state on a [*467] specified date. n71 This is an appropriate method for attaining statewide ballot access because it satisfies the state's valid interest in assuring that parties on the ballot have a certain degree of popular support. The District Court of Delaware recognized the legitimacy of voter registration as a method of ballot access when it stated that this method of party recognition "limits the parties on the ballot to those who have demonstrated some degree of popular support, thereby insuring that the ballot is not filled with an abundance of candidates serving only to divide and confuse rather than to consolidate the support of the populace." n72 In Delaware in 1996, for a party to have qualified by voter registration, it would have needed to register approximately 180 voters. In a larger state like California, a registration of .05% would be approximately equal to 7400 voters. n73 The requirement provided for in the Act is a reasonable one, especially when considered in light of the history of Delaware's statute. Since its institution in 1978, Delaware has never had more than four minor parties recognized statewide for a given election. n74

In contrast, Maryland imposes a particularly onerous registration requirement, mandating that a party register a number of voters equal to or greater than one percent of the total registered voters in the state. n75 This registration requirement imposes an unreasonable burden on third parties, evidenced by the fact that no third party has ever qualified under this provision to be included on Maryland's ballot. n76 In fact, as Joshua Rosenkranz reports, "no third party in history has ever gotten on the ballot through party registration where the registration requirement was more than 1% of the total state registration." n77

States have generally recognized that requiring parties or independent candidates to collect petition signatures in order to get on the ballot is an effective way to ensure that the party's place on the ballot is popularly supported.

Registering voters in a party is at least as effective as the petition signature method in [*468] demonstrating a "significant modicum of [popular] support" n78 for a party's place on the ballot. As Richard Winger points out:

Membership in a party is meaningful. When a voter chooses to register as a member of a new or small particular party, he generally gives up the right to vote in major party primaries. Furthermore in most states, registration records are open to the public, and it is likely that anyone who joins a new or small party, knowing that such membership can be known to the neighbors, sincerely supports that party. n79

Providing alternative methods of ballot access through voter registration and petition reflects the varied justifications for allowing greater ballot access. The main reason for the inclusion of the petitioner signature method is that the presence of non-major parties and independent candidates in an election provides for a more comprehensive and vibrant debate on the issues, regardless of which candidate actually wins the election. Historically, third parties and independent candidates have been successful in forcing major parties to address issues that might ordinarily be left out of campaign discourse. n80 Thus, an individual who supports broader political discussion may be willing to sign a party's petition even though they do not intend to vote for that party's candidate. When individuals place their signature on a party's petition, they are indicating that they support *the idea* that a candidate or party should be allowed on the ballot, not necessarily that they support that specific party for political office.

Whereas petition signatures may indicate only support for alternative viewpoints in general, voter registration indicates stronger commitment to a party's platform. A party that can convince voters to change their party affiliation is very likely to receive their support in the general election. Parties that can demonstrate this degree of popular loyalty should be included on the ballot along with parties that petition for ballot access.

Several states provide for ballot access through satisfaction of party registration requirements. In addition to Delaware, a party may also qualify statewide using this method in thirteen other states. n81 Colorado recently passed a provision to its election code [*469] which allows a party to appear on the ballot if at least 1000 voters register in the party. n82 Colorado's ballot access scheme is similar to the one proposed in this Article in that it provides for ballot access by third parties through a variety of methods. A party in Colorado may qualify through the collection of petition signatures, n83 the aforementioned party registration method, or through satisfaction of continuing recognition requirements. n84

A distinct advantage of the registration method over other available means is the simplicity of its administration. Because voter registration mechanisms are already in place in almost every state, this method for ballot access could be easily administered.

A potential barrier to implementing the party registration method is that twenty-two states do not allow voters to choose a party affiliation on the voter registration forms. n85 However, any state can easily institute a system such as the one proposed in this Section by providing space on the voter registration forms for the voter to write in the name of the party with which she wishes to register. There is no need for a state to modify its registration forms to accommodate each new party seeking to gain recognition; a blank line would suffice. n86

Ironically, in states where the voter registration method is easiest to implement, new parties may have difficulty persuading voters to change their party affiliation. It would be easiest to institute this mechanism in states that have closed primaries in which voters choose a party affiliation. In these states, however, there may be a strong disincentive for individuals to register with a third party because doing so would prevent the voter from participating in a major party primary.

It should be noted that the Model Act does not allow for district-level qualification by the voter registration method. Under this Section, a party must qualify to nominate for all offices statewide, or not at all. Permitting district-level qualification [*470] would place an administrative burden on the state by requiring a calculation of the number of voters registered in a party to be made in each district. In addition, the number of voters that would need to be registered in order to qualify a party in a single voting district may be too low to indicate a significant degree of support for a party, even within that district.

Apart from this limitation, the inclusion of the voter registration method in this Model Act is designed to allow those parties that have shown the requisite modicum of popular support to appear on the ballot by persuading a significant number of voters to affiliate with that party. As Justice Warren stated in *Reynolds v. Sims*, n87 "the right to vote freely for the candidate of one's choice is of the essence of a democratic society" n88 and this method is perhaps best representative of that fundamental right.

SECTION 2.1.3. PAST ELECTION RESULTS

(a) A Political Party shall qualify to place candidates for any Office on the general election ballot by past election results if its candidate for any Statewide Office in either of the two preceding general elections received at least 1% of the total votes cast for that Office.

(b) A Political Party that does not meet the requirements of Subsection (a) shall qualify to place a candidate for District-level Office on the general election ballot in any district in which any of its candidates for District-level Office in either of the two preceding general elections received at least 1% of the total votes cast for that Office.

COMMENT: This provision is designed to allow a party that has demonstrated a sufficient level of popular support to remain on the ballot for a subsequent election without requiring that party to follow any of the other qualification procedures provided for in this Model Act. Currently, forty-seven states provide for some form of continuing recognition based on past election results. n89 This Section permits a party to achieve continuing recognition for all offices statewide as well as recognition in subsequent [*471] elections only for those specific offices for which it received the requisite votes. Although continuing recognition at the district level is not the current law in most states, there is no reason, except the potential administrative burden, that should prevent a party from achieving continuing recognition for a specific office only. n90

Using the results of a party's candidate for any statewide office, rather than for a specific statewide office, such as governor, n91 will allow parties greater liberty to choose the offices for which they will nominate candidates. Because keeping frivolous candidates from crowding the ballot and confusing voters is the strongest state interest in limiting ballot access, states should not create incentives for parties to run candidates even if those candidates are not viable. In addition, counting the votes for any statewide office protects the integrity of a party where its credibility might be undermined if it were forced to nominate a candidate in whom it does not truly believe simply to satisfy the statutory requirements for continuing recognition.

The allowance of the results of any of the two previous elections, rather than just the preceding one, is similar to the laws in Wisconsin n92 and Colorado. n93 It is designed to take into account the differences in popular participation that occur throughout the election cycle. Levels of participation is often higher in years in which there is a presidential election. Furthermore, a party's support may crystallize for a specific election in cases where a party has a particularly popular candidate, and the party's continuing recognition should take this into account.

The requirement that a party poll one percent of the vote in a previous election represents an adequate number of votes to indicate substantial support for that party and its place on the ballot. After a party has qualified to be on the ballot by obtaining the requisite petition signatures, many states require a party to poll a much higher percentage of votes to remain on the ballot. n94 [*472] This system requires a party that did not receive the much higher percentage of votes in the general election to once again go through the costly process of obtaining petition signatures in order to get back on the ballot. Because the party has already satisfied the requirement once, it probably could do so again. Thus, this system imposes an unnecessary set of costs on the third party. "Once a party has demonstrated a modicum of support, the failure of a party to poll a much higher percentage on election day does not mean the party lacks the necessary electoral support required for ballot access in the next election." n95 Only when the party fails to achieve a very minimal level of popular support in a general election should it be forced to go through the qualification process again. A party that receives one percent of the popular vote for an office has demonstrated a modicum of popular support and should be entitled to remain on the ballot. Indeed, this one percent requirement is the law in several states n96 and was the proposed requirement for federal elections under the Voter Freedom Act sponsored by Representative Ron Paul (R-Texas) in 1997. n97

SECTION 2.2. INDEPENDENT CANDIDATES

(a) An Independent candidate for a particular Office shall qualify to appear on the general election ballot for that Office by filing a petition with the state.

(1) The petition shall:

(A) contain a number of valid signatures equal to or greater than 0.1% of the voters registered in the state on January 1st of the election year and eligible to vote for the Office sought by the Independent candidate;

[*473] (B) include the name, address, date of birth, and social security number of each person circulating the petition;

(C) be filed before August 15 of the election year.

(2) Each page of the petition shall:

(A) contain the name of the Independent candidate and the Office sought by that candidate;

(B) state that the signers thereof desire that the Independent candidate shall be qualified to appear on the general election ballot for that Office; and

(C) comply with the requirements of Subsection 2.1.1(a)(2)(C)-(F).

(3) A valid signature shall comply with the requirements of Subsection 2.1.1(a)(3).

(b) There shall be no requirements other than those of Subsection (a) for an Independent candidate to appear on the general election ballot.

(c) If a petition fails to meet the requirements of Subsections (a)(1)(A) and (a)(1)(C) then the petition shall not qualify an Independent candidate to appear on the general election ballot.

(d) If a page of the petition fails to meet the requirements of subsection (a)(2), then the signatures on that page will not be counted toward meeting the requirement of Subsection (a)(1)(A).

(e) If a signature fails to meet the requirement of Section 2.1.1(a)(3) then that signature will not be counted toward meeting the requirement of Subsection (a)(1)(A).

(f) If a petition or signature fails to meet the requirements of Subsection (a)(1)(B), Sections 2.1.1(a)(3)(C), or 2.1.1(a) [*474] (3)(D), then the Independent candidate shall be given seven days to cure said failure from the date the Independent candidate is notified.

(g) A candidate who qualifies pursuant to this Section shall appear on the general election ballot with the label "Independent."

COMMENT: Candidates who do not affiliate with a political party may qualify to appear on the ballot by the same petition procedure as political parties. Prescribing the same method of ballot access for partisan and independent candidates promotes simplicity and neutrality, and eliminates the incentives for candidates to choose a party label after qualifying through the independent procedure. Under this Model Act, a party may qualify to run candidates statewide under Section 2.1.1(a) or within a district under Section 2.1.1(c), while an independent candidate may qualify to run for a particular office using the same substantive requirements under Section 2.2. If signature requirements were higher for party qualification, such requirements might create incentives for candidates to run as independents. On the other hand, if signature requirements were higher for independent qualification, this might create incentives for candidates to affiliate with a political party. Prescribing equal petition requirements promotes neutrality with regard to party affiliation; in this way, the state neither promotes nor discourages political parties.

While facially equal petition requirements are intended to place equal burdens on parties and independent candidates, their effects may differ in practice. A party submitting a petition may run candidates for all state offices, whereas an independent candidate may qualify for only one such office. The costs of a party petition, then, might be spread among a number of different candidates, while an independent candidate must bear those costs alone. However, the effects of cost spreading may be offset to some extent by the costs related to the organization of a party. Overall, the relative burdens of a particular petition requirement would be difficult to predict, so facially equal requirements are recommended in the interests of simplicity.

"Piggybacking" is not allowed under Section 2.2(g). Piggybacking occurs when a candidate gains access to the ballot as an [*475] independent, but is listed on the ballot with a party label. n98 In states where party ballot access requirements are more difficult to meet than those prescribed for independent candidates or where no procedure exists

for a party to gain access to the ballot, n99 piggybacking represents an attractive option. n100 Unlike the laws of such states, Section 2.2 of this Model Act provides a procedure for a party to qualify to place candidates on the ballot, and this procedure is no more difficult than the procedure available to independent candidates. Furthermore, piggybacking could introduce complexities into the continuing recognition procedure. n101 In light of these considerations, piggybacking is not permitted.

SECTION 2.3. WRITE-IN CANDIDATES

(a) Every general election ballot shall provide a space for write-in candidates.

(b) Votes for a write-in candidate shall be counted only if the write-in candidate files, on a form submitted to the state no later than five days before the general election, a statement of intent to qualify as a write-in.

COMMENT: Although the ballot access requirements in the preceding sections of this Act are designed to provide fair access to the ballot, circumstances may arise in which a candidate must resort to a write-in campaign. For example, on October 19, 1998, Tennessee state senator Tommy Burks (D-Tenn.) was killed. n102 His opponent, Byron "Low Tax" Looper, was charged with his murder. n103 Since it was less than thirty days from the election, neither Burks nor Looper could be replaced on the ballot with another candidate. n104 Burks's wife, Charlotte, mounted a successful write-in campaign and won the election, receiving an overwhelming [*476] ninety-seven percent of the vote. n105 Without the possibility of a write-in candidacy, the Tennessee voters would have been forced to abstain or vote for an accused murderer. If only one voter had voted for the accused murderer he would have been elected. Write-in candidacies allow for meaningful voter choice when unforeseen circumstances essentially disqualify those who appear on the ballot. n106

Even in the absence of exigent circumstances, write-in voting can provide an important avenue of political expression. As Justice Kennedy observed, "The fact that write-in candidates are longshots more often than not makes no difference; the right to vote for one's preferred candidate exists regardless of the likelihood that the candidate will be successful." n107

Because write-in candidacies impose administrative burdens on the state in tallying votes, a registration requirement is included. New Mexico requires that write-in candidates file a declaration of intent with the state sixty-three days before the general election, n108 while Wyoming requires write-in candidates to file two days before the election. n109 Requiring that a write-in candidate file with the state five days before the general election gives the state enough time to prepare to count the write-in ballots for qualified candidates and allows for the possibility of exigent circumstances which might occur in the weeks preceding the election.

SECTION 2.4. CANDIDATE ELIGIBILITY

(a) Any candidate who appears on the primary ballot of a Political Party, but is not chosen as the candidate for that Political Party for the general election, shall be eligible to appear on the general election ballot as the candidate of any Political Party, as an Independent candidate pursuant to Section 2.2, or as a write-in candidate pursuant to Section 2.3.

[*477] **(b) A person's membership or non-membership in a Political Party shall not disqualify that person from appearing on the general election ballot as the candidate of any Political Party, as an Independent candidate pursuant to Section 2.2, or as a write-in candidate pursuant to Section 2.3.**

COMMENT: Section 2.2(a) is intended to prohibit so-called "sore loser bans." Sore loser bans typically prevent candidates from running as an independent or moving to a different party in the same election in which they lost the nomination of their party of choice. n110 States institute sore loser bans to promote the integrity of the party nomination process and prevent party factionalism. n111 Even in the absence of a sore loser ban, however, major party candidates may be deterred from compromising their relationship with the major party simply to appear on the ballot in one election. Candidates who are willing to break away from the party are likely to have significant popular support and therefore ought to appear on the ballot.

There may be a danger that eliminating sore loser bans will compromise the integrity of non-major parties. This could occur if a non-major party nominates a candidate based upon that candidate's popularity, gained by participating in another party's primary, rather than based upon their ideological compatibility. However, a party should be allowed to decide if the benefit of running a particular candidate outweighs the risk of compromising its credibility.

Most importantly, the Supreme Court has described the right of qualified voters to cast their votes effectively as one of "our most precious freedoms." n112 Sore loser bans not only prohibit candidates from appearing on the ballot, but they also deny voters the opportunity to vote for the candidate of their choice. Whatever benefits sore loser bans may provide, they are outweighed by the detrimental effects they have on a voter's right to cast an effective vote and a party's right to nominate its chosen candidate.

[*478] Section 2.4(b) is intended to repeal the disaffiliation requirement present in many states' laws. Disaffiliation requirements typically prohibit political parties from nominating candidates who are not members of that political party. For example, in Colorado, non-major parties may not nominate anyone who has been registered as a Democrat or Republican within the twelve months preceding the nomination. n113

Disaffiliation requirements impede a political party's right to nominate the candidate of its choice. Some political parties focus on one or two issues. These issue-oriented parties may wish to nominate better known candidates who are members of other political parties, but who may share the view of the issue-oriented party. Moreover, a requirement such as Colorado's limits potential candidates' ability to change their party affiliation by not permitting them to run under another party's banner for the twelve months following the change.

Legitimate interests supporting disaffiliation requirements are difficult to articulate. Preventing party factionalism may provide one justification. However, the right to cast an effective vote and the freedom to associate to advance political beliefs protected by the First and Fourteenth Amendments is more important than the state's interest in preventing party factionalism. The Supreme Court, in *Tashjian v. Republican Party of Connecticut*, n114 stated, in dicta, that it would be unconstitutional for a state to prohibit political parties from nominating non-members. n115 In 1992, the Court confirmed that there is a constitutional right to create and develop new political parties. n116 In light of the clear public interest in promoting the freedom to develop new political parties and supporting the right of citizens to cast an effective vote, disaffiliation requirements should not be included in ballot access laws.

FOOTNOTES:

n1 See Committee for the Study of the American Electorate, *Press Release* (Nov. 6, 1998) <<http://www.epn.org/csae/cgans4.html>>.

n2 See *id.*

n3 See Walter D. Burnham, *The Changing Shape of the American Political Universe*, 59 AM. POL. SCI. REV. 7, 22-23 (1965) (attributing the decline in voter turnout in the early twentieth century to the collapse of third parties).

n4 See E. JOSHUA ROSENKRANZ, VOTER CHOICE '96: A 50-STATE REPORT CARD ON THE PRESIDENTIAL ELECTIONS 4 (1996).

n5 For example, Minnesota requires a number of signatures equal to five percent of votes cast in the preceding election, which is 105,268 signatures. See Richard Winger, How a New, Fully Qualified Party May Be Recognized, 2000 Election (Dec. 2, 1998) (unpublished chart on file with authors).

n6 Connecticut, Illinois, Indiana, Iowa, Kentucky, New Jersey, New York, Pennsylvania, Virginia, Washington, and West Virginia have no procedure by which a group may become a qualified party prior to any particular election. See *id.* Instead, these states allow independent candidates to choose a party name when they gain a spot on the ballot. For a discussion of this practice, known as "piggybacking," see *infra* Comment to Section 2.2.

n7 New York's ballot access laws are infamous for their complexity. *See infra* note 61 and accompanying text.

n8 Ray Arsenault, a historian at the University of South Florida, cites the Bolshevik Revolution, the presidential candidacy of Robert LaFollette (Progressive Party) in 1924, and the popularity of Florida's anti-Catholic gubernatorial candidate as factors prompting the legislature to fashion one of the most restrictive ballot access laws in the nation. *See* William March, *Events Outside Florida's Control Prompted Restrictive Political Law*, TAMPA TRIB., Feb. 1, 1999, at 1.

n9 *See* ROSENKRANZ, *supra* note 4, at 14.

n10 *See id.*

n11 *See id.*

n12 *See Anderson v. Celebrezze*, 460 US 780, 788 (1983).

n13 *See* Richard Winger, *What Are Ballots For?* (1988) <<http://www.ballot-access.org/winger/wabf.html>>.

n14 119 S. Ct. 636 (1999) (striking down Colorado's requirement that petition signature gatherers be registered voters as a violation of the First Amendment).

n15 403 U.S. 431, 439 (1971).

n16 415 U.S. 724, 736 (1974).

n17 504 U.S. 428, 447 (1992).

n18 Benjamin Black, Note, *Developments in the State Regulation of Major and Minor Political Parties*, 82 CORNELL L. REV. 109, 112 (1996).

n19 *Id.* at 181.

n20 *See* ROSENKRANZ, *supra* note 4, at 12. "While legislators may tussle over rules that advantage one major party over another, they can readily agree on rules that award both major parties significant advantages over upstarts." *Id.* at 74.

n21 *See* Committee for the Study of the American Electorate, *supra* note 1.

n22 *See id.*

n23 See Black, *supra* note 18, at 180.

n24 See *id.*

n25 See Richard Winger, *Florida Voters Wipe out Mandatory Petitions*, BALLOT ACCESS NEWS, Nov. 8, 1998, at 1 (calling Florida's Revision 11 the biggest victory for ballot access reform since 1968).

n26 See Black, *supra* note 18, at 176.

n27 See *id.*

n28 *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957).

n29 Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*. 28 HARV. J. ON LEGIS. 167, 168 (1991); see also GEORGE MAGAZINE, ET AL., THE BOOK OF POLITICAL LISTS 235 (Blake Eskin, ed. 1998) (noting that the Prohibition and Socialist parties advocated women's suffrage, the Prohibition and Populist parties supported the direct election of senators, and the Socialist Party backed public works programs along the lines of the New Deal programs eventually created).

n30 See ROSENKRANZ, *supra* note 4, at 46.

n31 The Supreme Court has held that states that allow filing fees as methods of ballot access must provide candidates with alternative means of securing a spot on the ballot. See *Bullock v. Carter*, 405 U.S. 134 (1972).

n32 As the New York Bar Association's Special Committee on Election Law recognized, "The opportunity to run for . . . office should be restricted only by the requirement of a minimum showing of public support to insure that the ballot will not be cluttered with frivolous candidates." THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON ELECTION LAW, BALLOT ACCESS IN NEW YORK 2 (1990).

n33 The Supreme Court noted in *Bullock* that if a filing "fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal." *Bullock*, 405 U.S. at 146; see also Mark R. Brown, *Popularizing Ballot Access: The Front Door to Election Reform*, 58 OHIO ST. L.J., 1281, 1289 (1997) ("Merchants and other entrepreneurs have been known to run for public office simply to make their names known to the public.") (quoting *Lubin v. Panish*, 415 U.S. 709, 717-18 (1974)).

n34 See ROSENKRANZ, *supra* note 4, at 46.

n35 See Brown, *supra* note 33, at 1299-1300. Brown also notes that to qualify for a congressional primary in Georgia in 1996, a candidate was required to obtain, on average, more than 2500 signatures. See *id.* at 1300. No candidate qualified by petition, and all 32 qualifying candidates paid the \$ 4,008 fee. See *id.*

n36 These numbers are calculated based on the number of registered voters in the 1996 general election. *See* ROSENKRANZ, *supra* note 4, at 98, 168.

n37 *See* Black, *supra* note 18, at 169 ("The cost of signature drives is the central mechanism to thwarting minor-party ballot access.").

n38 *See* Brown, *supra* note 31, at 1304; *see also* ROSENKRANZ, *supra* note 4, at 84.

n39 In states requiring that more than one percent of the number of registered voters sign a petition, there have never been more than four new parties or statewide independent candidates in a single election qualifying by petition. *See* RICHARD WINGER, BALLOT ACCESS 96 (1998) (unpublished manuscript for Brennan Center for Justice on file with authors). Additionally, states requiring more than 25,000 petition signatures have never had more than four new parties or statewide independent candidates qualify in a single election through petitioning. *See id.*

n40 For further comparison of the petition and voter registration methods, *see infra* Comment to Section 2.1.2.

n41 *See* Winger, *supra* note 5.

n42 *See id.*

n43 *See* Eileen Canavan, 1998 U.S. Congressional Primary Dates and Candidate Filing Deadlines for Ballot Access (last modified Aug. 12, 1998) <<http://www.fec.gov/pubrec/alpha.htm>>.

n44 *See id.*

n45 "For a variety of reasons, the costs [per signature] escalate when the candidate or the party does not have the luxury of time. Urgency requires the deployment of more personnel, more expensive means of transportation, and more expensive modes of signature gathering." ROSENKRANZ, *supra* note 4, at 84.

n46 The fact that many third parties do not hold primaries allows for a later filing deadline. *See* ROSENKRANZ, *supra* note 4, at 23. ("most third parties cannot overcome the statutory thresholds for participating in state-run primary elections . . .").

n47 *See Anderson, 460 U.S. at 780* (striking down a March 15 filing deadline for a general election on First Amendment grounds).

n48 *See* Winger, *supra* note 39, at 97 ("Historically, new parties of significance have been formed as late as July or August of an election year . . .").

n49 *See id.* at 98, noting that "[a] deadline later than mid-August would make it difficult for some states to prepare absentee ballots in time to mail them to overseas voters, particularly military voters in difficult-to-reach spots (notably, in submarines around the world's oceans)."

n50 In 1998, for example, Nebraska, New Hampshire, and Vermont all had September filing deadlines for congressional elections. *See Canavan, supra* note 43.

n51 Requiring that the petition circulator serve as a witness is intended to eliminate the need for any other means of attesting to the authenticity of the signatures, such as notarization, which is "an expensive and burdensome task with no apparent usefulness." Winger, *supra* note 39, at 99.

n52 *See National Prohibition Party v. Colorado*, 752 P.2d 80, 84 (Colo. 1988) (upholding such a requirement).

n53 *See Winger, supra* note 39, at 98-99 (describing the Illinois and other requirements, such as West Virginia's requirement that circulators complete a "credential" process involving a picture ID card which the circulator must display while petitioning).

n54 For example, in *Buckley*, the Supreme Court struck down a Colorado law limiting petition circulators to registered voters. *See Buckley*, 119 S. Ct. at 636.

n55 This requirement would not apply in North Dakota, which does not have a voter registration system. *See* Federal Election Commission, *State Voter Registration Requirements* (visited Feb. 17, 1999) <<http://www.fec.gov/pages/Voteinst.htm>>. However, the requirement should help ease the administrative burden of verifying voter eligibility in other states.

n56 *See Smith, supra* note 29, at 176; Black, *supra* note 18, at 171.

n57 "Permitting an individual to sign more than one petition for the same office rests upon the philosophic notion that in signing a petition of a candidate an individual is merely declaring that he or she wants that candidate to run in the primary election. Signing the petition does [not] necessarily mean that the signatory intends to vote for the candidate" THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON ELECTION LAW, *supra* note 32, at 20.

n58 In *Socialist Workers Party v. Hechler*, 890 F.2d 1303 (4th Cir. 1989), the court upheld a statute prohibiting voters who signed the petition of one party from voting in another party's primary.

n59 *See* Brian L. Porto, *The Constitution and the Ballot Box: Supreme Court Jurisprudence and the Ballot Access for Independent Candidates*, 7 BYU J. PUB. L. 281, 286 (1993); Winger, *supra* note 39, at 100.

n60 *See* Porto, *supra* note 59, at 285-86; Winger, *supra* note 39, at 100.

n61 *See Schulz v. Williams*, 44 F.3d 48, 56-59 (2d Cir. 1994) (upholding this requirement).

n62 See Smith, *supra* note 29, at 176-77.

n63 See *supra* Comment to Section 2.1.

n64 In *Bullock*, the Supreme Court rejected the argument that filing fees imposed on candidates seeking access to a primary ballot are necessary to finance primary elections. See *Bullock*, 405 U.S. at 148-49 ("The financial burden for general elections is carried by all taxpayers It seems appropriate that a primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth.").

n65 For an example of a geographic distribution requirement for a party to qualify statewide see *N.Y. Election Law § 6-136(1)* (McKinney 1998).

n66 See ROSENKRANZ, *supra* note 4, at 84-85.

n67 See Winger, *supra* note 39, at 99.

n68 See *Collins v. Kelly*, 678 N.Y.S.2d 791 (3d Dep't 1998) (allowing the candidate to photocopy the petition and include page numbers).

n69 See Katherine E. Schuelke, *A Call for Reform of New York State's Ballot Access Laws*, 64 N.Y.U. L. REV. 182, 183 (1989).

n70 See *id.* at 182 ("In New York State, many election contests are decided by detached judges in courtrooms rather than by interested voters on election day.").

n71 DEL. CODE ANN. tit. 15, § 3001 (1993).

n72 *Commoner v. Du Pont*, 501 F. Supp. 778, 782 (D. Del. 1980).

n73 See ROSENKRANZ, *supra* note 4, at 98, 104.

n74 See Winger, *supra* note 39, at 95.

n75 See MD. CODE ANN., ELECTIONS, § SB 123 (West Supp. 1998).

n76 See Richard Winger, *How Many Votes Must a Party Poll to Remain on the Ballot?* (Nov. 11, 1998) (unpublished chart on file with authors).

n77 ROSENKRANZ, *supra* note 4, at 58.

n78 *Jenness*, 403 U.S. at 442.

n79 Winger, *supra* note 39, at 94.

n80 *See supra* note 29 and accompanying text.

n81 In 1996, this method was available in Arizona, California, Connecticut, Delaware, Florida, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Nevada, Oregon, Tennessee, and Texas. *See* ROSENKRANZ, *supra* note 4, at 54.

n82 *See COLO. REV. STAT. ANN. § 1-4-1303* (West Supp. 1998).

n83 *See id.* at § 1-4-1302.

n84 *See id.* at § 1-4-1303.

n85 These states are Alabama, Arkansas, Georgia, Hawaii, Idaho, Illinois, Indiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. *See* Winger, *supra* note 39, at 96. Most of these states hold open primaries, allowing voters to participate in the primary of their choice. *See id.*

n86 *See id.* at 95.

n87 377 U.S. 533 (1964)

n88 *Id.* at 555.

n89 *See* ROSENKRANZ, *supra* note 4, at 57.

n90 Connecticut permits the continuing recognition of a "minor" party for a single office. *See CONN. GEN. STAT. ANN. § 9-372(6)* (West Supp. 1998). Alabama permits a party to be recognized within a single county if it polls 20% of the votes cast in that county. *See ALA. CODE § 17-16-2* (1975).

n91 West Virginia, New York, Texas, South Dakota and Alaska use the Office of Governor. *See* Winger, *supra* note 76.

n92 *See WIS. STAT. ANN. § 5.62(1)(b)* (West 1996).

n93 See *COLO. REV. STAT. ANN. § 1-4-1303* (West Supp. 1998).

n94 For example, in Alabama a party can qualify to be on the ballot if it files a petition containing the signatures of three percent of "qualified electors." See *ALA. CODE § 17-8-2.1* (1975). However, in order to remain on the ballot under the state's continuing recognition method, the party must poll 20% of the votes cast in the last general election. See *id.* at § 17-16-2. If this scheme was in place in Maine for the 1998 election for Governor, neither the Republican Party (19%), nor the Democrats (12%) would be qualified for the next election. See Maine Division of Elections, *General Elections Tabulations, November 3, 1998 -- Governor, By County and Town* (last modified Nov. 3, 1998) <<http://www.state.me.us/sos/cec/elec/gen98gv.htm>>.

n95 Black, *supra* note 18, at 168.

n96 See Winger, *supra* note 76 (indicating that one percent is the threshold in Michigan, Wisconsin, Oregon, Connecticut, Kansas, Nevada, West Virginia, and Georgia).

n97 See Voter Freedom Act of 1997, H.R. 2477, 105th Cong., § 3.

n98 See ROSENKRANZ *supra* note 4, at 25.

n99 See *supra* note 6.

n100 See ROSENKRANZ *supra* note 4, at 25.

n101 For example, a candidate qualifying through the independent procedure may list a non-existent party which would be recognized to nominate candidates for any state office in subsequent elections.

n102 See *Slain Lawmaker's Widow is Elected*, WASH. POST, Nov. 4, 1998, at A28.

n103 See *id.*

n104 See *id.*

n105 See *id.*

n106 Justice Kennedy, in *Burdick*, recognized the value of write-in voting in exigent circumstances when he wrote in dissent, "write-in voting can serve as an important safety mechanism in those instances where a late-developing issue arises or where new information is disclosed about a candidate late in the race." *Burdick*, 504 U.S. at 444-445 (Kennedy, J., dissenting).

n107 *Id.* at 447.

n108 See *N.M. STAT. ANN. § 1-12-19.1* (Michie 1995).

n109 See *WYO. STAT. ANN. § 22-5-501* (Michie Supp. 1998).

n110 See Winger, *supra* note 39, at 101.

n111 See *Burdick*, 504 U.S. at 439 (upholding Hawaii's prohibition of write-in candidacies on the basis of the State's interest in "averting divisive sore-loser candidacies").

n112 *Anderson*, 460 U.S. at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).

n113 See *COLO. REV. STAT. ANN. § 1-4-1304* (West 1998).

n114 479 U.S. 208 (1986).

n115 See *id.* at 215 ("Were the State to restrict by statute financial support of the Party's candidates to Party members, or to provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals.").

n116 See *Norman v. Reed*, 502 U.S. 279, 280 (1992) ("The right of citizens to create and develop new political parties derives from the First and the Fourteenth Amendments and advances the constitutional interest of likeminded voters to gather in pursuit of common political ends, thus enlarging all voters' opportunities to express their own political preferences.").