North Dakota Law Review

Volume 57 | Number 3 Article 8

1981

Elections - Denial of Reduced Postal Rates to Minor and New Political Parties Constitutes a Violation of the First and Fourteenth Amendments

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CASE COMMENTS

ELECTIONS — DENIAL OF REDUCED POSTAL RATES TO MINOR AND NEW POLITICAL PARTIES CONSTITUTES A VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS

Plaintiff political parties were denied special reduced rates for bulk third class mailings that were available to the Democratic and Republican Parties pursuant to the eligibility requirements of the Postal Service Appropriation Act.[1] Plaintiff parties sought an injunction invalidating as unconstitutional the relevant portion of the Postal Service Appropriation Act[2] or, alternatively, directing that they be afforded the special reduced rates.[3] As a consequence of the Postal Act's provisions, the two major parties paid only 3.1 cents per letter, while all other parties paid 8.4 cents.[4] The plaintiff

1. Greenberg v. Bolger, 497 F. Supp. 756, 766 (E.D.N.Y. 1980). The plaintiffs in this action were the Socialist Party of America, the Libertarian Party, the Peace and Freedom Party, the Conservative Party of the State of New York, the Citizens' Party and the National Unity Campaign for John Anderson and Uriel P. Bauer. *Id.* at 766-68. These parties historically have promulgated unpopular and minority views to society. For example, the Socialist Party of America, founded in 1901, believes it is essential to have some form of economic as well as political democracy. The democratic decision-making process, in the Socialists' view, should extend to other areas of society and not be limited to participation in the governing process. *Id.* at 766. The Libertarian Party, founded in 1971, professes that each individual has the absolute right to exercise sole dominion over his or her own life, liberty, and property, so long as the individual respects the equal right of every other individual to do the same. *Id.* Like the Libertarian Party, the other plaintiff political parties also represent unorthodox positions.

2. Postal Service Appropriation Act of 1980, Pub. L. No. 96-74, tit. II, 93 Stat. 562 (1979). The relevant portion of the Act provides that "no funds appropriated herein shall be available for implementing special bulk third-class rates for 'qualified political committees' authorized by Public Law 95-593, other than the National, State, or congressional committee of a major or minor party as defined in Public Law 92-178, as amended." *Id.* Pursuant to this Act, the Governors of the Postal Service adopted a resolution that effectively limited the preferred rate for bulk third class mailings to the major parties. Greenberg v. Bolger, 497 F. Supp. at 766. As a result, the plaintiff political parties were informed that they would no longer be entitled to the special rate of 3.1 cents per letter, and instead would be required to pay 8.4 cents for each mailing. *Id.*

3. Greenberg v. Bolger, 497 F. Supp. at 764.

4. *Id.* Prior to the 1980 Postal Service Appropriation Act, *supra* note 2, the plaintiff political parties enjoyed reduced third class bulk mail rates. Greenberg v. Bolger, 497 F. Supp. at 765. This

parties alleged that the eligibility requirements for the reduced rates violated their rights under the due process clause, the equal protection clause, and the first amendment.[5] The United States District Court for the Eastern District of New York recognized the state's interest in ensuring the manageability and integrity of elections, but found that the minority political parties must be afforded the right of equal access to the marketplace of political ideas.[6] Thus, the court *held* that minor and new political parties have a right to enjoy special reduced mailing rates equal to that enjoyed by the two major parties. Therefore, the Postal Service Appropriation Act was unconstitutional.[7] *Greenberg v. Bolger,* 497 F. Supp. 756 (E.D.N.Y. 1980).

Equal access to political ideas and the opportunity to influence governmental policy through elections are essential rights in a democratic society.[8] Third parties and independent candidates traditionally have been effective sources of novel and unorthodox political and social views and have played a vital role in changing the political environment.[9] Although courts have recognized the vital role played by minor parties, third parties, and independent candidates, historically these parties have not enjoyed the same level of constitutional protection that has been afforded the Democratic and Republican Parties.[10] State election committees traditionally have employed several practices which effectively work to exclude third parties and independent candidates from a position on election ballots.[11]

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preferred rate enabled plaintiffs to increase substantially the frequency and volume of their mailings. *Id.* For example, the Free Libertarian Party was able to increase its mailings from approximately 700 pieces per month to as many as 2000 per month. *Id.*

5. *Id.* at 773, 774, 778. The plaintiffs argued that they were deprived of due process of law because appropriation provisions were used to alter existing law, in violation of House of Representatives Rule XXI (2). The court rejected this argument, declaring that "[d]ue process rights to be heard do not attach to procedures resulting in the enactment of generally applicable legislation." *Id.* at 774.

6. 497 F. Supp. at 764.

7. *Id.* at 775, 781.

8. *Id.* at 764.

9. *Id.* at 771. Although third parties historically have not received broad support from the electorate, they do play an important role in American politics. Third parties formulate and develop policies before major parties are ready to act, they help modify major policies to reflect the view of an emerging third party, and they often test new programs that eventually prove unworkable or unpopular. *Id.*

10. *Id.*

11. *See* 6 COLUM. HUMAN RIGHTS L. REV. 155 (1975). Because these state committees charged with overseeing elections are generally comprised of members of the two major parties, election regulation practices that keep a candidate off the election ballot are rarely scrutinized until litigation is commenced. For example, in Pirincin v. Board of Elections, 368 F. Supp. 64 (N.D. Ohio 1973), *aff'd mem.*, 414 U.S. 990 (1973), Ohio's scheme for selection of members of the county boards of election, providing that the secretary of state appoint four qualified electors of the county to serve for a term of four years, consisted solely of Democratic and Republican Party members. The district court's decision, affirmed by the Supreme Court, held that the scheme did not impinge upon the right to vote and did not deprive independent or minority candidates of due process by effectively shutting them out of the decisionmaking process. 368 F. Supp. at 80.

For example, a number of states had enacted statutes that disqualified defeated primary candidates from being candidates in the general election, effectively excluding third party and independent candidates from the ballot.[12] North Dakota was one such state. Its statute provided that any person defeated in the primary election was prohibited from being a candidate for the same office in the ensuing general election.[13] The North Dakota Supreme Court held this statute unconstitutional in *Ex rel Graham v. Hall,* [14] because the statute had the effect of adding a qualification for holding public office to those already prescribed by the state constitution.[15] The court reasoned that the statute interfered not only with the person's right to become a candidate, but also with the electors' interest in choosing public officials, thereby interfering with the citizens' free exercise of their elective franchise.[16] The court concluded that because the legislature may not deter, hamper, or interfere with a person's right to become a candidate or with the citizens' choice of public officials, the statute was unconstitutional.[17]

Another state practice which effectively restricted ballot access was the requirement that nonmajor party and independent candidates pay excessive filing fees as a condition to having their names placed on the ballot.[18] Such mandatory filing fees were held

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Several problems arising in election law litigation that serve as barriers to potential litigants include: 1) Difficulties in satisfying standing requirements (A personal stake in the outcome is required, as well as an assertion of an individual's own legal rights.); 2) the political question doctrine (Political questions are not subject to judicial review as their resolution is delegated to another branch of government.); 3) problems with mootness (Theoretically, a controversy no longer exists and thus, good adjudication of the case would not result.); and 4) difficulties in determining appropriate remedies (A judicial order requiring that the government spend funds arguably amounts to making appropriations, a power reserved for Congress.) L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-34, 3-16, 3-22 (1st ed. 1978).

12. *See, e.g.,* N.D. CENT. CODE § 141 (1939). The statute provided as follows:

> Be it Enacted by the Legislative Assembly of the State of North Dakota:
> § 1. That any person who was a candidate for nomination for office at any primary election in any year and who was defeated for said office shall not be eligible as a candidate for the same office at the ensuing general election.

Id. See Ex rel Graham v. Hall, 73 N.D. 428, 15 N.W.2d 736 (1944) (holding statute unconstitutional).

13. N.D. CENT. CODE § 141 (1939) (repealed 1945) *held unconstitutional in Ex rel* Graham v. Hall, 73 N.D. 428, 15 N.W.2d 736 (1944).

14. *Ex rel* Graham v. Hall, 73 N.D. 428, 15 N.W.2d 736 (1944).

15. *Id.* at 437, 15 N.W.2d at 741. The North Dakota Constitution provided:

> No person shall be eligible to the office of governor or lieutenant governor unless he be a citizen of the United States, and a qualified elector of the state, who shall have attained the age of thirty years, and who shall have resided five years next preceding the election within the state or territory, nor shall he be eligible to any other office during the term for which he shall have been elected.

N.D. CONST. art. III § 73 (currently codified at N.D. CONST. art. V § 3).

16. 73 N.D. at 433, 15 N.W.2d at 739.

17. *Id.* at 437, 15 N.W.2d at 741.

18. *See, e.g.,* TEX. ELEC. CODE ANN. art. 13.08a (Vernon 1967).

Art. 13.08a provided the following for filing fees:

unconstitutional in *Bullock v. Carter,*[19] which involved a challenge to the Texas filing fee statute for candidates seeking ballot positions in primary elections. Fee payments as high as $8,900 were invalidated on the ground that they burdened voting rights and that the burden resulted from wealth distinctions.[20] The court found that the filing fee system favored affluent voters over poor voters in the ballot formation process, since candidates favored by affluent voters could pay the fee more easily than candidates supported by poor voters.[21] The court in *Bullock* held that this distinction was impermissibly based upon wealth and, therefore, violated the equal protection clause.[22] Thus, statutes that required payment of excessive filing fees were unconstitutional.[23]

Candidates were also sometimes required to take a loyalty oath as a condition to having their names placed on the ballot.[24] These oaths involved a vow that the candidate did not advocate the violent overthrow of local, state, or national government.[25] The oaths were held unconstitutional in *Communist Party v. Whitcomb,*[26] in which the court addressed the issue of loyalty oaths that effectively penalized candidates for expression of their beliefs by excluding them from the ballot.[27] The *Whitcomb* court found that the loyalty oath

Population of County	Filing Fee
Less than 650,000	$150.00
650,000 to 900,000	600.00
900,000 to 1,000,000	300.00
1,000,000 or more	500.00

Id.

19. 405 U.S. 134 (1972). In *Bullock* persons seeking to become candidates for local office in the Texas Democratic primary election challenged the constitutionality of the Texas filing fee scheme on the ground that the statutory scheme violated the equal protection clause. *Id.* at 141.

20. Bullock v. Carter, 405 U.S. 134, 143 (1972).

21. *Id.* at 144.

22. *Id.* at 145.

23. *Id.* at 149. The State's contention that the filing fees were necessary to regulate the primary ballot and to finance elections was rejected by the Court's holding that excessive filing fees violated the equal protection clause. *Id.* at 145.

24. Communist Party v. Whitcomb, 414 U.S. 441 (1974).

25. 414 U.S. at 443. The Indiana loyalty oath statute, which was found unconstitutional in *Whitcomb,* required that "[n]o existing or newly-organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state, or national government by force or violence. . . ." IND. ANN. STAT. § 29-3812 (Burns 1969). The current version of Indiana's loyalty oath statute is codified at IND. ANN. STAT. § 3-1-11-12 (Burns 1972).

26. 414 U.S. 441 (1974).

27. 414 U.S. at 441-43. The Communist Party had been barred from the 1972 Indiana general election ballot because it had not filed the proper affidavit disavowing its belief in the violent overthrow of local, state, or national government. *Id.* at 443-45. Instead, the Party filed an affidavit to which it attached its own definition of advocacy, which the Indiana Election Board rejected. *Id.* at 444. In striking down the loyalty oath requirement, the court ruled on the constitutional principle stated in Brandenburg v. Ohio, 395 U.S. 444 (1969), that the first amendment guarantees of free speech and free press do "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such an action." *Id.* at 447. The Indiana oath included advocacy of an abstract doctrine as well as advocacy of unlawful action and thus contravened this first amendment principle. Communist Party v. Whitcomb, 414 U.S. at 447. The *Brandenburg* Court

penalized candidates for protected expression, and the oath was struck down as an unconstitutional infringement on protected speech.[28]

Constitutional attacks on legislation that effectively discriminates against nonmajor parties have not been limited solely to state laws. The Federal Election Campaign Act's[29] (FECA) provisions regarding contribution limitations, disclosure requirements, and presidential campaign funding have been challenged as discriminatory against nonmajor parties.[30] In *Buckley v. Valeo*[31] the FECA was challenged on the grounds that contribution limitations unjustifiably burdened first amendment freedoms and discriminated against minor parties and independent candidates in violation of the fifth amendment.[32] The FECA limits individual contributions to candidates for federal office to $1,000 for any single candidate, with a maximum total for all such contributions of $25,000 per year.[33] The *Buckley* Court found that the limitations on individual contributions to political candidates were within the FECA's primary purpose of limiting the actuality or appearance of corruption resulting from large campaign contributions.[34] The *Buckley* Court concluded that the important interests served by restricting the amount of financial contributions were sufficient to justify the limited infringement upon first amendment rights resulting from the $1,000 and $25,000 contribution ceilings.[35] The *Buckley* Court also rejected the argument that contribution limitations invidiously discriminate

rejected the use of the clear and present danger test, which focused on the likelihood of possible harm arising from proscribed expression, for evaluation of the constitutionality of statutes. Brandenburg v. Ohio, 395 U.S. at 447. Thus, the test for determining when speech can be constitutionally restricted shifted from examination of the consequences of expression to the content of the speech. Communist Party v. Whitcomb, 414 U.S. at 448. If the speech does not direct advocacy of unlawful action, it cannot be constitutionally forbidden. *Id.* Because the Indiana statute included both advocacy and incitement, it was held unconstitutional. *Id.* at 446-47.

28. 414 U.S. at 449-50. The *Whitcomb* Court found that the constitutional guarantees of free speech and free press, which prohibit a state from criminalizing speech that is not directed to inciting or producing imminent lawless action or likely to produce such action, could not be applied to cases of state regulation of access to the ballot. The Court further rejected the notion that any group that advocates violent overthrow as an abstract doctrine must be regarded as necessarily advocating unlawful action. *Id.* at 450.

29. 2 U.S.C.A. §§ 431-435 (West 1977 & Supp. 1980) (originally enacted as Fed. Election Campaign Act of 1971, Pub. L. No. 92-225, § 301, 86 Stat. 11).

30. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

31. 424 U.S. 1 (1976). *Buckley v. Valeo,* a seminal case in election law, has received much attention in legal periodicals. *E.g.,* Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments,* 86 YALE L.J. 953 (1977); *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 56, 171-96 (1976); 25 EMORY L.J. 400 (1976).

32. Buckley v. Valeo, 424 U.S. 1, 11 (1976).

33. *Id.* at 13. The Court was referring to title 18 U.S.C., sections 608(b)(1) and (3) during its discussion of contribution limitations. 2 U.S.C.A. § 441a (West 1977 & Supp. 1981) (current codification of title 18 U.S.C., sections 608(b)(1) and (3)).

34. 424 U.S. at 38.

35. *Id.* at 29, 38.

against minor parties and independent candidates.[36] Although the Court addressed this "troubling" charge of discrimination, it concluded that the limitations actually benefit nonmajor parties.[37] The Court reasoned that, because major parties receive more money in large contributions, limitations on these contributions would facilitate fund raising by the nonmajor parties.[38] Thus, the Court found no invidious discrimination in violation of the fifth amendment.[39] Therefore, the contribution limitations of the FECA were constitutional.[40]

The *Buckley* Court also discussed the disclosure provisions of the FECA. These provisions require political committees to keep detailed records of their contributions and expenditures.[41] These particular FECA requirements were attacked in *Buckley* as being overbroad when applied to minor parties and independent candidates.[42] The nonmajor parties alleged that disclosure would deter individuals from contributing to minor parties and independent candidates because of the novel and unorthodox views presented by such candidates.[43] The *Buckley* Court acknowledged that some contributors may be exposed to "harassment or retaliation," but concluded that the governmental interests of providing information on candidates to voters and of deterring corruption or the appearance of corruption were sufficiently important to outweigh this burden.[44] The *Buckley* Court did recognize that the need for disclosure was diminished when contributions are made to minor parties with little chance of winning the election,[45] but refused to create an exception for minor parties and independent candidates.[46] Thus, the disclosure provisions were constitutional.[47]

The final challenge by the nonmajor parties in *Buckley* was

36. *Id.* at 33.

37. *Id.* The Supreme Court of the United States found that "[t]he charge of discrimination against minor-party and independent candidates is more troubling, but the record provides no basis for concluding that the Act [FECA] invidiously disadvantages such candidates." *Id.* The *Buckley* Court further noted that the FECA "on its face treats all candidates equally with regard to contribution limitations." *Id.*

38. *Id.* at 33-35.

39. *Id.* at 35.

40. *Id.*

41. *Id.* at 82-84. The FECA requires that the disclosure records include the name and address of each individual contributing in excess of $10, and his occupation and principal place of business if his contribution exceeds $100. *Id.* at 82. The FECA also requires the political committee to disclose the recipient and purpose of every expenditure over $100. *Id.*

42. *Id.* at 61.

43. *Id.* at 68.

44. *Id.* The *Buckley* Court noted that the disclosure requirements appeared to be the "least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.*

45. *Id.* at 66-67.

46. *Id.* at 70.

47. *Id.* at 74.

aimed at the FECA's establishment of a public financing scheme for presidential election campaigns.[48] The scheme provides that "major" parties receive full funding for presidential campaigns, while "minor" parties receive only a percentage of the funds to which the major parties are entitled.[49] "New" parties are limited to receipt of post-election funds or are not entitled to any funds if their candidate receives less than five percent of the vote.[50]

The nonmajor parties challenged this public financing plan as unconstitutionally discriminatory. The Court found that the plan violated the fifth amendment, especially when applied to "new" political parties.[51] The challengers asserted that requiring a "new" party to fund its own campaign in hopes of receiving post-election reimbursement was an unconstitutional burden on the new party.[52] The *Buckley* Court dismissed this argument, holding that the government interests of "not funding hopeless candidates with large sums of public money" and not "providing artificial incentives to 'splintered parties and unrestrained factionalism'"[53] were well served by the public funding scheme.[54] Thus, acceptance of public funds would narrow the economic gap that existed between the major and minor parties.[55]

The action brought in *Greenberg* to contest the constitutionality of the 1980 Postal Service Appropriation Act involved challenges similar to those in *Buckley*. The postal service is one of the most effective mediums of communication available for the dissemination of political information.[56] It operates as a monopoly because federal law prohibits the establishment of a private postal system.[57] As the sole provider, the United States Postal Service is

48. *Id.* at 85.

49. 26 U.S.C. § 9004(a)(1) (Supp. II 1970) (currently codified at 26 U.S.C.A. § 9004 (West Supp. 1981)). To defray expenses in the general election campaign, major-party candidates are entitled to $20,000,000. To be eligible for these funds, the candidate must pledge not to incur expenses in excess of this amount, and not to accept private contributions unless the funding is insufficient to provide the full $20,000,000. Minor-party candidates are entitled to funding based on the ratio of the vote received by the party's candidate in the preceding election to the average of the major-party candidates. New-party candidates receive no funding prior to the general election, but any candidate who receives five percent or more of the popular vote in the election is entitled to post-election payments according to the same ratio applicable to minor-party candidates. *Id.*

50. *Id.*

51. 424 U.S. at 102.

52. *Id.*

53. *Id.* at 96 (citations omitted).

54. *Id.* at 103-04.

55. *Id.*

56. *See generally* 1 DOLLAR POLITICS, THE ISSUES OF CAMPAIGN SPENDING (1971). Candidates commonly depend on various types of print media, including posters, billboards, brochures, newspaper and magazine advertisements, handbills, buttons, and bumper strips, as well as the electronic media, throughout the course of their campaigns. *Id.* The *Greenberg* court recognized the importance of access to the mails, quoting Mr. Justice Holmes: "[T]he use of the mails is almost as much a part of free speech as the right to use our tongues. . . ." Greenberg v. Bolger, 497 F. Supp. at 774 (E.D.N.Y. 1980) (quoting United States *ex rel* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting)).

57. 18 U.S.C. § 1696 (1970) (also codified at 18 U.S.C.A. § 1696 (West 1970 & Supp. 1981)).

required to deliver its services fairly and is forbidden to discriminate by serving some more favorably than others.[58] The Governors of the Postal Service are charged with the establishment of fair and equitable classes of mail, postage rates, and fees.[59] Notwithstanding that requirement, the Postal Reorganization Act of 1970 authorized Congress to provide for subsidization of postal rates, which allowed some recipients to enjoy lower postal rates.[60] These special reduced mailing rates were later extended to "qualified political committees" in the Overseas Citizens Voting Rights Act Amendments.[61] Qualified political committees were defined to include "a national or state committee of a political party," and as a result, *all* political parties were afforded reduced bulk mailing rates.[62] This special rate enabled third parties to substantially increase the frequency and volume of their mailings.[63] The 1980 Postal Service Appropriation Act, however, contained a more restrictive definition of the category of political organizations that would be eligible for the special mailing rate.[64] An eligible organization was defined as the national, state, or congressional committee of a major or minor party.[65] This effectively limited the special mailing rate to the two dominant political parties, the Democrats and the Republicans; they alone could meet the eligibility requirements.[66] The cost of mailing was thus sharply increased for all other parties, and the ability to disseminate political information was thereby restricted. The affected political parties challenged the constitutionality of the 1980 Act in *Greenberg v. Bolger,* alleging that the eligibility requirements for the reduced rates violated their rights under the first amendment and the equal

58. *Id.*

59. Postal Reorganization Act of 1970, 39 U.S.C. § 3621 (1970) (currently codified at 39 U.S.C.A. 3621 (West 1980)).

60. *Id.*

61. Pub. L. No. 95-593, § 11(c), 92 Stat. 2535 (1978).

62. *See* Greenberg v. Bolger, 497 F. Supp. at 765 (E.D.N.Y. 1980) (quoting 39 U.S.C. § 3626(e)(1) & (2)(1970)).

63. *Id.* For example, the Free Libertarian Party was able to increase its mailings from approximately 700 pieces per month to as many as 2000 per month. *Id.*

64. Postal Service Appropriation Act of 1980, Pub. L. No. 96-74, tit. II, 93 Stat. 562 (1979). The 1980 Act contained a more narrow definition of eligible political organizations. It provides, in pertinent part, that "no funds appropriated . . . shall be available for implementing special bulk third class rates for 'qualified political committees' authorized by Public Law 95-593 1978 Act, other than the National, State, or congressional committee of a major or minor party as defined in Public Law 92-178." *Id.*

Public Law 92-178, entitled the Presidential Election Campaign Fund Act, defines a "major" party as "a political party whose candidate for the office of President in the preceding presidential election received, as a candidate for such party, 25 percent or more of the total number of votes received by all candidates for such office." Presidential Election Campaign Act, 26 U.S.C. § 9002(6) (1970). A "minor" party is defined as one "whose last presidential candidate received more than 5 percent but less than 25 percent of the total popular vote." 26 U.S.C. § 9002 (7) (1970). A "new" party is one "whose candidate received less than 5 percent of the vote." 26 U.S.C. § 9002 (8) (1970).

65. Postal Service Appropriation Act of 1980, Pub. L. No. 96-74, tit. II, 93 Stat. 562 (1979).

66. 497 F. Supp. at 765-66.

protection clause.[67]

In *Greenberg* the court first addressed the issue of whether the postal subsidy scheme violated the plaintiff's first amendment rights of freedom of expression and association.[68] The court noted that government regulations that affect the first amendment guarantee to freedom of speech must be content neutral.[69] The political positions of the plaintiffs, the *Greenberg* court noted, were substantially different from those of the major parties.[70] Therefore, the court reasoned that by subsidizing the mailings of only the Republicans and Democrats, Congress had, in effect, conferred benefits upon those with popular views while burdening those with unpopular ones.[71] The court found that denying special mailing rates to political parties because they had not achieved a required level of acceptance had the same effect as overtly censoring speech because of its substance.[72] The court then concluded that the 1980 Act was an unconstitutional restriction on the first amendment rights of nonmajor parties.[73]

The *Greenberg* court also concluded that the 1980 Act violated the plaintiff political parties' equal protection rights.[74] To determine the level of judicial scrutiny to be applied, the court first searched for an infringment of a fundamental right.[75] The court found that the plaintiffs' first amendment freedoms had been infringed.[76] The court reasoned that the denial of preferred mailing

67. *Id.* at 773-74. The plaintiffs argued that they were deprived of due process of law because the 1980 Act violated House of Representatives Rule XXI (2) which prohibits the use of appropriations provisions to alter existing law. The *Greenberg* court rejected this claim, stating that "[d]ue process rights to be heard do not attach to procedures resulting in the enactment of generally-applicable legislation." *Id.* at 773.

68. *Id.* at 774. The rights of expression and association originate in the first amendment which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

69. 497 F. Supp. at 774. Content-neutral regulation of expression means that "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 774 (citing Police Dept. of Chicago v. Mosley, 408 U.S. 95 (1972)).

70. 497 F. Supp. at 776. The Socialist Party of America contends that the democratic decision-making process should regulate other aspects of life, rather than simply control the political democracy. *Id.* at 766. The Libertarian Party, however, believes that each individual has the absolute right to exercise sole dominion over his or her life, liberty, and property so long as he or she respects the equal right of every other individual to do the same. *Id.*

71. *Id.* at 776.

72. *Id.* The *Greenberg* court further reasoned that the denial of the postal discount unduly burdened first amendment liberties because such a denial generated costs which were directly proportionate to the number of persons the speaker sought to reach. *Id.*

73. *Id.* at 778.

74. *Id.* The fourteenth amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The due process clause of the fifth amendment subjects the federal government to the same restriction. U.S. CONST. amend V.

75. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-2 to -5 (1st ed. 1978). The court must first determine whether a suspect class or fundamental right is affected by the legislative scheme. If such a class or right is affected, the legislation will be reviewed with strict scrutiny. If such a class or right is not involved, the provision need be only rationally related to a legitimate governmental purpose to withstand constitutional attack. *Id.*

76. 497 F. Supp. at 778.

rates directly limits the plaintiffs' access to the mails.[77] The increased cost of mailing restricted the plaintiff parties' ability to use the mails, affording them fewer opportunities to spread their political message.[78] Therefore, the *Greenberg* court concluded that the plaintiffs' ability to express their political views was seriously impaired, thus jeopardizing their first amendment right of expression.[79] The court found that the plaintiff parties' ability to procure new members was also seriously impaired because the higher mailing costs restricted the parties' ability to reach prospective members.[80] The court reasoned that this restriction violated the plaintiffs' fundamental first amendment right to freedom of association.[81]

Legislation affecting a fundmental right must undergo "strict scrutiny," which requires a demonstration that the law is necessary to promote a compelling governmental interest and that there is no less burdensome method of accomplishing the intended purpose.[82] The defendants contended that the eligibility requirements for the postal rate discount operate to facilitate public expression, ensure a manageable election process, preserve scarce public resources, and protect against factionalism.[83] The court found that these interests, while legitimate goals, were not compelling governmental interests that would justify interference with the first amendment right of expression and association.[84]

In reaching its conclusion, the *Greenberg* court noted that the 1980 Act imposes a higher postal rate on third parties and independent candidates, those who are most in need of an economical means of access to the voting public.[85] Thus, the court

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77. *Id.*

78. *Id.* at 765. Congressional debate indicates that legislators were fully aware of the negative effect the 1980 Act would have on minor and third parties. One representative observed that the amendment would "sharply restrict minority parties' access to the mails." 125 CONG. REC. 5888 (1979) (remarks of Representative Glickman). Despite the negative observations of several representatives, the 1980 Act was adopted. 1980 Appropriation Act, Pub. L. No. 96-74, tit. II, 92 Stat. 562 (1979). *See* 497 F. Supp. at 765.

79. 497 F. Supp. at 778.

80. *Id.*

81. *Id.* at 779. The court stated that "[i]nterference with a political party's utilization of the mails is a direct infringement on the ability of that party to express its views which is, in turn, interference with the ability of members and potential members to enjoy political associations of their choosing." *Id.*

82. *Id. See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-2 to -5 (1st ed. 1978).

83. 497 F. Supp. at 779-81.

84. *Id.* at 781. The court found that the interests purportedly protected by the 1980 Act did not survive impartial scrutiny, adding that "[a]ny standard that causes funds to be allocated to some candidates or parties and not to others is inherently suspect because it serves the self-interests of those responsible for establishing the standard." *Id. See generally* 88 HARV. L. REV. 1111 (1975).

85. 497 F. Supp. at 778. The *Greenberg* court noted that "the integral role played by mailings, and the extremely tight budgetary constraints under which most third and independent parties operate all mitigate against the proposition that the government could facilitate access for one political party and not necessarily burden all other parties that are in competition with the benefited party." *Id.*

reasoned that the effect of the 1980 Act is not to facilitate political communication but to suppress it.[86] The court concluded that restricting access "to the minds of the public in and for itself" is not an acceptable goal of government regulation, rendering the 1980 Act unconstitutional.[87]

The putative governmental interest in preserving the integrity of elections was similarly rejected by the court as a compelling governmental interest. The court noted that the government may legitimately prescribe qualifications for access to the ballot in order to minimize confusion and to obtain a fair picture of the wishes of the electorate.[88] The court found, however, that restricting access to the mails to ensure manageability and integrity of elections does not preserve, but rather challenges, the integrity of the political process.[89] The court concluded that since the first amendment's purpose is to preserve the free exchange of ideas, any regulation that prevents access to the potential voter contravenes that amendment.[90]

The government's interest in protecting scarce fiscal resources was summarily rejected by the *Greenberg* court. All cases in which the government protects and fosters free expression by providing a public forum involve the expenditure of scarce financial resources.[91] Because of this, the *Greenberg* court found that if funds used to subsidize political mailing are limited, the amount of subsidy received by the two major parties can readily be reduced so that all political mailings are charged equally.[92] Thus, the court concluded that financial limitations may not be used to prevent full equality between the two major parties and the minor political parties.[93]

Protection against factionalism, the final interest advanced by the government, previously has received a qualified sanction by the Supreme Court.[94] The *Greenberg* court, however, found that there has been no indication that stifling the speech of competitors, which

86. *Id.* at 780.

87. *Id.*

88. *Id.* Regulations designed to ensure that an independent or third party candidate is a "serious contender, truly independent, and with a satisfactory level of community support" generally withstand constitutional attack. *Id.* (citing Storer v. Brown, 417 U.S. 724, 746 (1974) (footnote omitted)).

89. 497 F. Supp. at 780.

90. *Id.*

91. *Id. See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-21, at 689-90 (1st ed. 1978). The public fora "cannot be put off limits to leafletting, parading, or other first amendment activities merely to spare public expense or inconvenience. . . ." *Id.*

92. 497 F. Supp. at 781.

93. *Id.*

94. *Id.* The interest in minimizing the threat of factionalism has received support in recent United States Supreme Court decisions. *See, e.g.*, Storer v. Brown, 415 U.S. 724, 736 (1974) (campaign funding case); Buckley v. Valeo, 424 U.S. 1, 96 (1976) (campaign funding case).

results in the entrenchment of the two party system, is a legitimate governmental interest.[95] It concluded that, while Congress may choose not to offer assistance to new parties or independent candidates, it may not act to create disincentives for the purpose of protecting the two parties currently controlling the government.[96]

In arriving at its decision, the *Greenberg* court carefully distinguished its rationale for striking down the postal provision from that upholding the public financing provisions in *Buckley v. Valeo*.[97] In *Buckley* the specific challenge related to the contribution and expenditure limitations that the Federal Election Campaign Act placed upon individuals and candidates.[98] The *Buckley* court found that the limitations on individual contributions to political candidates and authorized campaign committees were within the Act's primary purpose of limiting the actuality and appearance of corruption resulting from large contributions.[99] Although the court upheld the limitation on individual campaign expenditures, it found that ceilings on expenditures by candidates imposed direct and substantial restraints on the quantity of political speech.[100] The Federal Election Campaign Act requires those accepting public financing to voluntarily accept expenditure ceilings, thereby eliminating any suggestion that the major party's ability to campaign is enhanced by the Act.[101]

In contrast, under the 1980 Postal Act, the receipt of the discounted postal rate by political parties was not conditioned upon a relinquishment of private funds.[102] Thus, the *Greenberg* court found that receiving the postal discount could not act to the advantage of those parties that did not qualify for the rates.[103] Receipt of the postal discount, however, greatly enhanced the ability of qualifying parties to campaign, while substantially reducing the ability of non-qualifying parties.[104] Thus, the court found that the 1980 Act exacerbated the very problem of party wealth impact on elections that the FECA sought to relieve.[105]

95. 497 F. Supp. at 781.
96. *Id.*
97. Buckley v. Valeo, 424 U.S. 1 (1976).
98. *Id.* at 38. The FECA limited individual contributions to candidates for federal office to $1,000 for any single candidate and limited expenditures of political candidates to $1,000 per candidate per election. *Id.*
99. *Id.*
100. *Id.* at 39.
101. 497 F. Supp. at 780. *See supra* note 49 and accompanying text.
102. 497 F. Supp. at 780.
103. *Id.* The *Buckley* Court suggested that expenditure limits for the two major parties might actually improve the chances of minor and third parties to receive funds and increase their spending. Buckley v. Valeo, 424 U.S. at 101.
104. 497 F. Supp. at 780.
105. *Id.*

Therefore, the court concluded that unlike the FECA, the 1980 Act could not withstand constitutional attack.[106]

The *Greenberg* court recognized the vital role played by minor parties and independent candidates in changing the political environment.[107] The court held that these parties must be afforded equal access to the marketplace of political ideas to bring about change effectively.[108] The postal scheme was held unconstitutional in *Greenberg* because it abridged this first amendment right.[109] The *Buckley* Court, however, refused to recognize the important first amendment role of nonmajor parties in enriching the marketplace of ideas.[110] Unlike *Greenberg,* the *Buckley* Court failed to focus upon the legislation's practical effect of inhibiting an important function of nonmajor parties — to subject new and unorthodox positions to public scrutiny.[111] Thus, the *Greenberg* decision indicates that perhaps courts are now willing to adopt a different focus towards nonmajor parties.

Because *Buckey* and *Greenberg* were similar cases yet reached different conclusions, the result in *Greenberg* may signify a trend towards focusing on the discriminatory treatment of nonmajor parties. Even though both *Buckley* and *Greenberg* involved funding with taxpayer money, nonmajor parties were treated differently from major parties. Contrary to *Buckley, Greenberg* found this different treatment to be unconstitutional.[112]

In *Buckley* the Presidential Campaign Fund was financed by individual taxpayers who "checked off" one dollar of their tax liability to the campaign fund.[113] In *Greenberg* the taxpayer funded the postage discount scheme through congressional appropriations to the Postal Service.[114] The *Buckley* Court, however, refused to concede that the treatment was unconstitutional. In *Buckley,* contribution limitiations, disclosure requirements, and public funding were challenged as discriminating against nonmajor

106. *Id.* at 779. The *Greenberg* court concluded that the "[h]arm caused by the 1980 Act [was] substantial and clear." *Id.*

107. *Id.* at 764.

108. *Id.* The *Greenberg* court viewed its duty as "protect[ing] a minority against a majority's attempt to reduce human rights." *Id.*

109. *Id.* at 778.

110. Buckley v. Valeo, 424 U.S. at 100-01 (1976).

111. *See* Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974,* 1977 WIS. L. REV. 323, 363 (1977).

112. 497 F. Supp. at 778.

113. Buckley v. Valeo, 424 U.S. at 86 (1976). Taxpayers filing a joint return may authorize a two dollar payment to the presidential campaign fund. The presidential campaign fund consists of three separate accounts to finance party nominating conventions, general election campaigns, and primary campaigns. *Id.*

114. 497 F. Supp. at 765.

parties,[115] but the Court upheld these provisions.[116] The postal scheme in *Greenberg* was similarly challenged, but in that case the provision was found to be unconstitutional.[117]

In both *Buckley* and *Greenberg,* minor parties and independent candidates sought treatment equal to that afforded the major parties. Nonmajor parties were seeking to share in pre-election financing with the major political parties in *Buckley.*[118] In *Greenberg* the plaintiff parties sought a decrease in postal rates for minor parties and independent candidates.[119] The plaintiff parties were granted the discounted postal rates, which placed them on the same level as the major parties.[120]

In both *Buckley* and *Greenberg,* the nonmajor parties' underlying argument was that in an election campaign, money is the equivalent of speech.[121] Without sufficient financial support, the ability of nonmajor parties to reach potential members is sharply reduced.[122] Thus, the nonmajor parties argued that because money is speech, and because the questioned legislation forced them to spend more than the major parties,[123] the nonmajor parties' right to free speech was abrogated.[124] Unlike the *Buckley* Court, the *Greenberg* court accepted the contention that money is speech.[125] Thus, although the cases were similar, the *Buckley* and *Greenberg* courts arrived at vastly different holdings. It is therefore arguable that the later *Greenberg* holding signifies a changing focus.

One explanation of the apparent change in focus, however, is the difference in fact situations. The major difference between the cases, though, is that *Buckley* found no first amendment violation in the public financing scheme.[126] The *Buckley* Court held that the public financing scheme actually facilitated, rather than inhibited, speech.[127] The reasoning in *Greenberg* indicates no question that

115. Buckley v. Valeo, 424 U.S. at 11, 61, 102.

116. *Id.* at 35, 84, 103-04.

117. 497 F. Supp. at 779.

118. Buckley v. Valeo, 424 U.S. at 102-03. The "new" political parties argued that forcing them to seek loans based upon the likelihood that five percent of the vote cast would be in their favor was an unconstitutional burden. *Id.*

119. 497 F. Supp. at 764, 784.

120. *Id.* at 784, 786.

121. *Id.* at 778. *See* Buckley v. Valeo, 424 U.S. at 92-93.

122. 497 F. Supp. at 779. The court stated that interference with a political party's use of the mails is a direct infringement on its ability to procure new members, and thus violates its first amendment right of freedom of association. *Id.*

123. Buckley v. Valeo, 424 U.S. at 102. In *Buckley* minority parties spent more money because they lacked sufficient support to qualify for pre-election campaign funds. Similarly, the plaintiff parties in *Greenberg* paid 8.4 cents per letter while the major parties paid only 3.1 cents. 497 F. Supp. at 764.

124. 497 F. Supp. at 778.

125. *Id.*

126. Buckley v. Valeo, 424 U.S. at 86.

127. *Id.* at 92-93. In *Buckley* the Court determined that public financing facilitated and enlarged public discussion and participation in the electoral process and, therefore, did not abridge or censor speech. *Id.*

funds appropriated would be spent on mailings.[128] In *Buckley,* however, courts were uncertain as to how political parties would ultimately spend public financing.[129] Although the amounts of money involved in the cases differed, the right to free expression was nevertheless involved. Thus, the basic constitutional question remained the same in both *Buckley* and *Greenberg.* The *Buckley* Court, however, evidenced a "relative lack of concern for the viability of nonmajor party candidates"[130] and an "insensitivity to the burdens placed [upon them] by the legislation."[131] In contrast, the *Greenberg* court carefully considered all ramifications of the legislation in question.[132] The *Greenberg* court's focus on the vital role of nonmajor parties in our democratic system indicates a willingness to closely examine challenged legislation. *Greenberg,* when combined with decisions such as *Buckley,* should strengthen the arguments of future litigants who contest the regulation of political campaigns.

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128. 497 F. Supp. at 775.
129. Buckley v. Valeo, 424 U.S. 1 (1976).
130. Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974,* 1977 WIS. L. REV. 323, 356 (1977).
131. *Id.* at 348.
132. 497 F. Supp. at 764.