

JUSTICES NEIL GORSUCH AND BRETT KAVANAUGH EXPRESS SYMPATHY FOR INDEPENDENT VOTERS

On October 5, the U.S. Supreme Court heard *Carney v Adams*, 19-309. This is the case over Delaware's Constitution, which says that no one is eligible to be a member of the three most important state courts unless that individual is a registered member of a party that has voter registration of at least 5%. This means that an independent, or a member of a minor party (qualified or not) can never qualify for a seat on the State Supreme Court, Superior Court, or Court of Chancery.

This is the first case to be heard in the U.S. Supreme Court involving the interests of independent voters, or members of minor parties, since 2005. Therefore, regardless of which side wins, the decision inevitably will say something about the attitude of members U.S. Supreme Court toward these voters.

The lawsuit was brought by James R. Adams, a Delaware attorney who is a registered independent and therefore ineligible to be appointed to any of the three most important courts. He won the case in the lower courts.

At the oral argument, both of the two newest justices, Neil Gorsuch and Brett Kavanaugh, made strong statements that show they do have sympathy for individuals who are registered independents.

Justice Gorsuch

Neil Gorsuch asked the attorney for the state government to respond to this lengthy question: "The major party provision prohibits independents from service, serving as judges. That's quite a sweeping rule. And I – as I understand you, you've indicated that you'd agree that that violates the Equal Protection Clause as applied to elected positions. But you indicate that it's somehow very different with respect to appointed positions.

"And I guess I'm not clear why, given the absence of any historically-rooted tradition along these lines with respect to the major party requirement. I understand your argument that it serves as a backstop for the bare majority rule, which does have historical antecedents, plenty of them, but, none of these has ever included this backstop before. This is a novel thing. And it does prohibit a great percentage of the population from participating in the process."

Gorsuch is correct when he says the exclusion applies to "a great percentage of the population." The Delaware rule excludes 24.5% of all the voters from being considered for the various judicial positions.

Gorsuch's reference to a "backstop" pertains to the fact that Delaware has two laws on the subject of the registration of its judges. The other law, which is not being challenged in this case, says no state court of any type can have more than a bare majority of its members from a single political party. Gorsuch, and several other justices, seem perplexed that if Delaware just wants political balance on its courts, the "bare majority" provision all by itself ought to serve that interest, without also excluding independent and minor party registrants.

Justice Kavanaugh

Brett Kavanaugh also seemed supportive of independent voters. He said, "Could a state exclude Republicans and Democrats from being judges and allow only independents to be judges?" After listening to a response from the attorney for the state, he said, "Why can't – to pick up on Justice Sotomayor's question, why can't independents even better serve the goal of a balanced judiciary nonpartisan/bipartisan judiciary?"

After hearing yet another response, Kavanaugh said, "Well, I guess there's a mismatch, arguably, between the State's interest and excluding independents altogether from being judges, because independents could certainly – wouldn't you agree that independents could serve the purpose of achieving a balanced non-partisan or bipartisan judiciary."

Other Justices

Justices Stephen Breyer and Sonia Sotomayor were also supportive. Sotomayor is herself a registered independent, although neither she nor anyone else mentioned that fact. Both justices stated that because Delaware has the other law preventing any party from holding more than a bare majority on any particular court, that alone should handle the state's asserted interest of having a balanced judiciary.

Breyer did not refer to independents, but he said, "How do you get around the fact that they way that it's written and applied is you have to be a Republican or a Democrat? And there are other parties. And so why is that constitutional? At another point he said, "The Green Party need not apply. It can't."

Justice Elena Kagan focused mostly on the standing issue. It is difficult to tell which way she is leaning on that.

No justice expressed support for the idea of excluding independents. The attorney for the state constantly implied that all minor party members and all independents are ideological soul-mates for one of the two major parties. Although no justice attacked that idea, it is clearly not true. The largest minor party in Delaware is the Independent Party, which is a centrist party. No one made any reference to the Independent Party, or to any minor party other than the Green Party.

Many would argue that the Libertarian Party is equally divergent from both major parties, and one could put up an argument about the Green Party also. Many Green Party activists were formerly Republicans before they were Greens.

The attorney for the state made a potential blunder when he said, “Political party in this country is – it’s universally used by political science and scientists as the proxy for a philosophy and ideology.”

If that is true, then the Delaware law clearly violates the First Amendment. One of the most famous quotations about the First Amendment was made by U.S. Supreme Court Justice Robert H. Jackson in 1943, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” If political party is just a proxy for ideology, then the Delaware law suppresses some ideologies and boosts others.

To the extent that the justices gave the plaintiff a hard time, it was over three points: (1) he had said “he would consider and apply” for any judicial position if he could, but of course he couldn’t obtain such an appointment because he is a registered independent. Some of the justices felt he may lack standing, because he should have said, “I would apply” instead of what he did say. Also he was attacked because even though he had said he was interested in joining any of the five types of court, he never actually applied for the two types of unimportant court for which independents are eligible (the Family Court and the Court of Common Pleas).

He was also attacked for having seemed to argue that he was also challenging the law that said no single party could have more than a bare majority of the membership of any court. However, at the oral argument, his attorney said Adams does not challenge that law in this lawsuit.

Finally, he was attacked for having seemed to argue in the courts below that the two types of law (the exclusion of minor party and independent members, as well as the law saying no party could have more than a bare majority) could not be severed from each other, and that if one law fell, the other one must also fall. The lower courts felt the two provisions could not be severed from each other, and had struck down both. But Adams disavowed the need to strike down the bare majority law.

It doesn’t seem likely that the Court will rule against Adams on standing, because the Justices must know that if they do that, inevitably another Delaware attorney who is registered as an independent, or as a member of a minor party, would file an entirely new lawsuit, and avoid making any mistakes to deprive himself or herself of standing.

And even if the Court does rule against Adams on standing, it seems likely that the decision will say something sympathetic to independent and minor party individuals.

Justices Clarence Thomas and Sam Alito hinted that they believe the Tenth Amendment forbids federal courts from interfering with state laws on the composition of its own judiciary, but this is not likely to be the position of any of the other justices. Chief Justice John Roberts seemed the most likely justice to rule that Adams lacks standing.

U.S. SUPREME COURT KEEPS RANKED CHOICE VOTING FOR PRESIDENT

On the evening of October 6, U.S. Supreme Court Justice Stephen Breyer rejected an appeal from Maine Republicans to stop ranked choice voting from being used for president this year. Thus Maine will be the first state in history to use ranked choice voting for president in a general election. *Jones v Dunlap*, 20A57. The actual issue in the case was whether the Republican-backed referendum should be on the ballot. If it had qualified, then RCV could not have been used in 2020.

ALASKA PARTY LABEL WIN AFTER ALL

The October 1 *B.A.N.* said that the Alaska Libertarian Party lawsuit to restore party labels for the nominees of unqualified parties had failed in court. But, even though the state court refused injunctive relief, on September 26 the Division of Elections reconsidered its position, and reprinted all the ballots from the legislative districts in which the state had stripped the party label. The new ballots have the label. The only affected parties were the Libertarian Party and the Veterans Party. Neither party happened to have any statewide candidates (except the Libertarians are ballot-qualified for president, so the problem didn’t affect Jo Jorgensen). But both parties had legislative candidates.

The law says that petitions for the nominees of unqualified parties may have partisan labels, and that the labels must be printed on the ballot. But the Elections Division had initially decided to ignore the law, and to simply print “petition candidate.”

JUDGE AMY BARRETT

Seventh Circuit Judge Amy Barrett has had one ballot access case, and she ruled badly. The issue was whether Illinois was violating the Constitution when it required more signatures for a candidate for county office to get on the primary ballot, than for a statewide candidate to get on the primary ballot. *Acevedo v Cook County Electoral Board* (2019). The law required a Democrat running for Sheriff to get 8,236 signatures, whereas all Democrats for statewide office needed 5,000.

The Democratic primary ballot for Sheriff of Cook County is never crowded. The number of candidates in that primary for Sheriff has been: 2002 one; 2006 three; 2010 two; 2014 four; 2018 one, for an average of 2.2 candidates. Twice the U.S. Supreme Court had ruled that Illinois can’t require more signatures for a county or city office than for a statewide office, but Barrett did not apply those precedents.

VOTER REGISTRATION TOTALS

	<u>Dem.</u>	<u>Rep.</u>	<u>Indp. misc</u>	<u>Lib't.</u>	<u>Green</u>	<u>Consti.</u>	<u>Wk Fam</u>	<u>Reform</u>	<u>other</u>
Alaska	80,017	144,802	340,796	6,950	1,539	615	?	?	19,755
Arizona	1,293,074	1,389,960	1,268,739	32,965	4,476	?	?	?	--
Arkansas	91,283	114,628	1,612,070	618	83	?	?	?	--
Calif.	9,109,939	4,842,603	5,255,294	184,838	81,305	218	?	?	726,928
Colorado	1,097,559	997,785	1,489,012	38,913	8,292	10,806	?	?	4,813
Conn.	838,292	471,157	917,277	3,270	1,453	11	332	10	32,156
Delaware	350,943	204,276	167,856	1,880	719	276	325	45	8,973
Dt. Col.	386,917	28,677	82,869	1,950	3,630	?	?	?	--
Florida	5,303,254	5,169,012	3,753,286	39,538	7,335	2,492	?	1,474	165,478
Idaho	137,730	515,310	308,307	9,714	?	3,480	?	?	--
Iowa	690,251	703,336	646,211	13,013	3,274	0	0	0	--
Kansas	509,048	865,387	524,195	20,353	0	0	0	0	0
Kentucky	1,672,380	1,568,690	307,577	13,511	1,931	899	?	138	300
Louis'na	1,248,613	1,004,537	708,366	23,406	4,545	267	0	3,143	15,048
Maine	386,786	295,122	339,782	?	41,693	?	?	?	--
Maryland	2,258,099	1,016,031	810,182	14,059	5,613	?	?	?	2,472
Mass.	1,499,898	459,913	2,660,796	18,803	3,666	307	64	127	22,725
Nebraska	366,099	599,087	269,709	17,194	?	?	?	?	--
Nevada	654,724	566,265	425,502	17,067	1,578	77,341	?	?	--
N. Hamp.	316,926	297,972	386,548	?	?	?	?	?	--
N. Jersey	2,498,976	1,425,319	2,362,169	18,199	11,496	17,138	?	2,009	30,880
N. M.	603,039	413,605	283,167	12,107	7,441	913	?	?	8,603
N. York	5,900,507	2,611,227	2,520,834	13,567	24,504	?	40,335	2,058	588,104
No. Car.	2,599,432	2,200,218	2,434,684	45,817	3,522	4,559	?	?	--
Okla.	739,466	1,100,032	353,269	13,441	?	?	?	?	--
Oregon	1,043,175	750,718	955,483	21,161	7,993	3,657	8,703	?	133,402
Penn.	4,168,900	3,451,514	1,227,454	40,324	9,547	?	?	?	--
Rhode Is.	351,296	111,230	332,686	?	?	?	?	?	--
So. Dak.	157,172	273,636	136,447	2,194	?	356	?	?	--
Utah	239,514	833,232	467,061	17,528	2,235	5,655	?	?	55,336
W. Va.	469,150	446,733	324,767	8,414	2,352	174	?	?	--
Wyo.	43,625	169,468	24,305	1,467	0	392	?	?	--
TOTAL	47,106,084	35,041,482	33,696,700	652,261	240,222	129,556	49,758	9,004	1,814,973
Percent	39.67%	29.51%	28.38%	.55%	.20%	.11%	.04%	.01%	1.53%

Totals October 2018 were: Democratic 44,780,772 (39.82%), Republican 32,854,496 (29.22%), independent & miscellaneous 32,322,402 (28.74%), Libertarian 548,399 (.49%), Green 249,260 (.22%), Constitution 105,668 (.09%), Working Families 52,613 (.05%), Reform 6,177 (.01%), other parties 1,534,330 (1.36%).

Totals October 2016 were: Democratic 45,690,825 (40.60%), Republican 33,052,332 (29.37%), independent & miscellaneous 31,200,104 (27.72%), Libertarian 497,535 (.44%), Green 256,560 (.23%), Constitution 92,483 (.08%), Reform 5,294 (.00+%), Working Families 61,517 (.05%), other parties 1,662,329 (1.50%).

Totals October 2012 were: Dem. 43,512,746 (41.85%), Rep. 31,298,863 (30.10%), indp. & misc. 26,808,810 (25.79%), Libertarian 330,811 (.32%), Green 250,682 (.24%), Constitution 77,918 (.07%), Reform 22,880 (.02%), Americans Elect 6,408 (.01%), other parties 1,659,537 (1.60%).

Totals October 2008 were: Dem. 43,933,901 (43.62%), Rep. 30,944,590 (30.72%), indp. & misc. 24,157,259 (23.98%), AIP/Constitution 438,222 (.44%), Green 255,019 (.25%), Libertarian 240,328 (.24%), Reform 32,961 (.03%), other parties 675,980 (.67%).

Totals October 2004 were: Dem. 37,301,951 (42.19%), Rep. 28,988,593 (32.79%), indp. & misc. 20,471,250 (23.15%), Constitution 320,019 (.36%), Green 298,701 (.34%), Libertarian 235,521 (.27%), Reform 63,729 (.07%), Natural Law 39,670 (.04%), other parties 695,639 (.79%). See page one and page six for more about this chart.

2020 PARTY REVENUE FROM STATE INCOME TAX “CHECK-OFF”

	Demo.	Rep.	Lib't.	Constitn	Green	Wk Fam	Indp. Party	other
Alabama	8,454	11,932	--	--	--	--	--	--
Arizona	22,316	11,961	660	--	1,610	--	--	--
Kentucky	61,802	95,828	--	--	--	--	--	--
Minn.	40,360	15,872	782	--	1,008	--	1,764	1,738
N. Mex.	6,584	3,844	366	94	278	--	--	148
Oregon	16,907	6,288	522	183	645	993	1,266	489
Rhode I.	9,965	3,530	--	--	--	--	--	512
Utah	46,240	53,024	5,166	2,030	1,694	--	--	6,328
Virginia	48,940	13,399	--	--	--	--	--	--
TOTAL	261,568	215,678	7,496	2,307	5,235	993	2,356	9,215

Entries in “Other” column are: Minn., Grassroots \$636 & Legalize Marijuana Now \$1,102; N.M., Better for America \$146 and Indp. American \$2; Ore., Prog; Rhode Island, Moderate; Utah, United Utah \$2,548 & Independent American \$3,780.

TOTALS FOR THE ENTIRE NATION THROUGH THE PERIOD 2000 - 2020

YEAR	Democrat	Republican	Green	Lib't.	Reform/AE	Constitution	Other
2000	941,463	822,671	31,864	13,024	5,054	19,209	71,824
2001	680,608	611,065	12,184	8,173	755	2,295	46,232
2002	928,716	892,438	84,120	7,289	749	2,886	97,559
2003	1,181,312	1,126,585	20,665	7,859	46	51	9,975
2004	828,136	786,190	16,309	8,446	324	1,409	8,822
2005	750,461	714,238	18,100	5,546	34	2,442	25,887
2006	915,945	806,193	50,434	7,282	--	5,847	45,355
2007	1,050,593	850,580	15,716	5,839	--	3,503	15,627
2008	1,520,746	1,127,478	8,324	5,034	--	5,938	5,219
2009	978,325	718,165	7,642	45,889	--	4,520	4,970
2010	830,562	616,027	5,257	11,115	--	3,617	5,630
2011	850,490	603,022	6,560	53,133	--	4,367	11,766
2012	1,883,507	1,245,403	7,862	101,253	--	2,458	8,733
2013	740,897	545,527	4,041	22,438	11,516	2,816	21,430
2014	369,153	324,042	1,836	7,418	817	3,041	3,175
2015	280,223	246,396	1,777	7,263	174	2,455	12,078
2016	275,908	231,102	3,517	6,636	561	2,428	6,229
2017	261,402	235,678	2,502	7,426	--	2,333	8,781
2018	251,366	201,949	4,783	8,316	--	2,255	13,152
2019	239,727	215,182	3,330	7,467	--	2,283	8,791
2020	261,568	215,678	5,235	7,496	--	2,307	12,564

LEGISLATIVE CANDIDATES ON THE BALLOT

	# seats	Rep.	Dem.	Lib't.	indp.	Green	Consti	other(1)	other(2)	oth(3)
Alas	51	41	37	2	19	0	4	3	1	0
Ariz	90	75	70	0	1	0	0	0	0	0
Ark	117	102	63	4	7	0	0	0	0	0
Cal	100	79	95	3	2	1	0	1	0	0
Colo	83	75	82	31	0	0	0	2	0	0
Ct	187	161	179	1	10	4	0	13	1	0
Del	52	34	43	3	0	0	0	0	0	0
Fla	140	114	139	2	14	0	0	0	0	0
Ga	236	167	183	0	1	0	0	0	0	0
Hi	65	35	65	2	0	2	0	13	1	0
Id	105	101	57	4	2	0	6	0	0	0
Ill	140	79	126	9	4	6	1	0	0	0
Ind	125	104	105	5	1	0	0	0	0	0
Iowa	125	125	125	5	4	0	0	0	0	0
Kan	165	153	120	5	1	0	0	0	0	0
Kv	119	98	89	11	4	0	0	0	0	0
Maine	186	159	170	0	13	4	0	0	0	0
Mass	200	59	183	0	14	1	0	0	0	0
Mich	110	108	109	9	1	10	2	5	1	0
Minn.	201	198	197	0	0	1	0	11	7	4
Mo	180	147	120	8	1	3	1	0	0	0
Mont	125	116	89	13	0	0	0	0	0	0
Nev	52	42	44	5	3	0	5	0	0	0
NH	424	369	418	2	1	0	0	0	0	0
NM	112	101	91	17	3	1	0	0	0	0
NY	213	153	198	14	6	8	0	14	4	3
NoC	170	161	168	23	1	1	0	0	0	0
NoD	70	70	57	0	1	0	0	0	0	0
Ohio	115	107	93	1	1	0	0	0	0	0
Okla	125	119	57	2	1	0	0	0	0	0
Ore	76	66	76	11	0	3	0	1	0	0
Pa	228	183	186	6	5	2	0	0	0	0
R I	113	42	107	1	19	0	0	0	0	0
So C	170	139	110	6	0	1	1	4	1	1
So D	105	101	62	7	4	0	0	0	0	0
Tenn	115	95	69	0	13	0	0	0	0	0
Tex	166	135	139	35	0	3	0	0	0	0
Utah	90	88	63	2	0	0	6	19	2	0
Vt	180	125	144	3	42	0	0	18	0	0
Wash	123	103	110	3	4	0	0	1	1	0
W Va	117	107	99	5	1	4	0	0	0	0
Wis	115	105	100	0	6	0	0	0	0	0
Wvo	75	70	26	6	3	0	0	0	0	0
TOTAL	5856	4811	4863	266	213	55	26	105	19	8

Parties in the “other(1)” column: Ak, Alaskan Independence; Cal, American Independent; Co, Unity; Ct, Independent Pty; Hi, Aloha Aina; Mi, Working Class; Mn, Legal Marijuana Now; NY, Conservative; Or, Working Families; SC, Alliance; Ut, United Utah; Vt, Progressive; Wa, Alliance.

Parties in the “other(2)” column are: Ak, Veterans; Ct, Socialist Resurgence; Hi, American Shopping; Mi, Natural Law; Mn, Grassroots-Legalize Cannabis; NY, Working Families; SC, Independence; Ut, Independent American; Wa, Seattle Peoples.

Parties in the “other(3)” column: Mn, 3 Veterans, and 1 Alliance; NY, SAM; SC, Labor; Wa, Progressive.

CHART ON PAGE FIVE

The chart shows how many legislative nominees each party has. Republicans have them in 82.2% of the seats, their highest since 2010, when they had 83.9%. Democrats have nominees in 83.0% of seats. Although they had a higher percentage in 2018 (87.8%), their 2020 showing is still the second-highest percentage since 2008.

The number of independent legislative candidates declined from 3.9% of the seats in 2018, to 3.6% in 2020. Libertarians declined from 5.9% of the seats in 2018 to 4.5% in 2020. Greens declined from 1.2% of the seats in 2018 to .9% in 2020. The health crisis injured minor party and independent candidates because they are more dependent on petitioning.

PRESIDENTIAL WRITE-IN STATUS

Here is a list of the presidential candidates who are on the ballot in at least two states, but who are not on the ballot in all states, and who have filed for write-in status in at least one state. It shows in which states they have filed for write-in status. However, this list is not complete, because the deadline has not passed in all states.

Howie Hawkins: Ak, Az, Ga, Id, In, Ky, Wi.

Gloria La Riva: Az, Ct, De, Ga, Id, Ky, Md, Mo, NY, Oh, Tx, WV, Ws.

Rocky De La Fuente: Md, NY, WV.

Don Blankenship: Il, NY, WV.

Brock Pierce: De, Md, WV.

Kanye West: Ak, De, Md, NY, Wi.

Brian Carroll: Ak, Ct, De, Fl, Ga, Id, In, Ky, Md, Ma, NY, Oh, Tx, Ut.

Phil Collins: NY.

Dario Hunter: Ak, NY, Oh.

Jade Simmons: Az, De, Fl, Ga, Id, Il, Md, Ma, Mt, NY, NC, Oh, Ut, WV, Wi.

GEORGIA SPECIAL U.S. HOUSE ELECTION

Georgia held a special election on September 29 to fill the vacant Fifth District seat. In Georgia special elections, there are no party nominees; any individual may run by paying a filing fee. Party labels are permitted. In this election, the candidates were five Democrats, one Libertarian, and one independent. No one got a majority so there will be a run-off between Democrats Kwanza Hall and Robert Franklin on December 1. The five Democrats together got 97.16% of the vote; the Libertarian received 2.04%; the independent received .81%.

ERRATA: PEOPLES PARTY

The last *B.A.N.* said that on August 30, the Movement for a Peoples Party held a founding convention on-line. Actually that meeting was a planning meeting for the upcoming founding convention. The convention itself will be early in 2021.

PRESIDENTIAL DEBATES

Free & Equal and Open the Debates sponsored an alternative presidential debate on Thursday, October 8, in Denver. The candidates were Howie Hawkins, Gloria La Riva, Don Blankenship, Brock Pierce, and Brian Carroll. The same five candidates will debate again on October 24 in Cheyenne, Wyoming.

The Commission on Presidential Debates had expected to hold three presidential debates between President Trump and Joe Biden, but the second debate, set for October 15, was never held.

FLORIDA ACLU OPPOSES TOP-TWO INITIATIVE

In late September, the American Civil Liberties Union of Florida League declared its opposition to the top-two initiative, which is on the ballot as Amendment Three. The ACLU statement did not mention the impact it would have on minor parties. Instead it cited evidence that it would be more difficult for racial and ethnic minorities to be elected.

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