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The Constitutional Requirements for Special Elections

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I. Introduction

United States Senator John Heinz from Pennsylvania was killed in an airplane accident on April 4, 1991.[1] The Governor of Pennsylvania, Robert Casey, in accordance with Pennsylvania law,[2] issued a writ for a special election[3] to be held November 5, 1991. On May 8, 1991, Governor Casey appointed Harris Wofford as an interim Sena-

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1. John H. Cushman, Jr., *Senator Heinz and 6 Others Killed in Midair Crash Near Philadelphia*, N.Y. TIMES, Apr. 5, 1991, at A1.

2. Pennsylvania law provides that:

> When a vacancy shall occur in the office of United States Senator, said vacancy shall be filled for the unexpired term by the vote of the electors of the State at a special election to be held at the time of the next general or municipal election, occurring at least ninety (90) days after the happening of the such vacancy, . . . Candidates to fill vacancies in the office of United States Senator shall be nominated by political parties, in accordance with the party rules relating to the filling of vacancies.

25 Pa. Cons. Stat. Ann. § 2776 (1991).

The Rules of the Democratic Party of the Commonwealth of Pennsylvania provide:

> Any vacancy happening or existing in the Democratic nomination for any office to be voted for by the electors of the State at-large by reason of the death or withdrawal of a candidate, failure to nominate at the Primary Election, the calling of a special election, or other cause, and which cannot be filled at a Primary Election under the law, shall be filled by the State Committee which shall have authority to make and certify a nomination.

RULES OF THE DEMOCRATIC PARTY OF THE COMMONWEALTH OF PENNSYLVANIA, Rule VIII, § 1 (Rev. 1990).

The Rules of the Republican Party of the Commonwealth of Pennsylvania provide that:

> If a vacancy for any cause shall occur in an elective public office which is voted for by the electors of the state at large, and the Pennsylvania Election Code provides that nominations by political parties are to be made in accordance with party rules, nomination to fill said vacancy shall be made in the same manner as provided for by rule 10.1 to fill vacancies on the Republican ticket.

RULES OF THE REPUBLICAN PARTY OF THE COMMONWEALTH OF PENNSYLVANIA, Rule 10.5 (1991).

Rule 10.1 provides that:

> In the event of a vacancy occurring . . . the vacancy shall be filled by the State Committee which shall have ful (sic) authority to make and certify said nomination, provided that in the event of a vacancy occurring less that three weeks before the last day to file a substitute nomination, the Leadership Committee shall have full authority to make and certify nomination.

RULES OF THE REPUBLICAN PARTY OF THE COMMONWEALTH OF PENNSYLVANIA, Rule 10.1 (1991) [hereinafter RULES OF THE DEMOCRATIC AND REPUBLICAN PARTIES OF PENNSYLVANIA].

3. Special election is defined as "[A]n election for a particular emergency conducted . . . to fill a vacancy arising by death of the incumbent of the office." BLACK'S LAW DICTIONARY 518 (6th ed. 1990). For purposes of this Comment, "special election" will also include a vacancy caused by the resignation of an incumbent.

tor to fill the vacant senatorial seat until the special election.[4] Senator Wofford, elected on November 5, 1991 by the people of Pennsylvania, will serve the remainder of Heinz's term which expires January 1, 1995.

The electoral process was brought to an abrupt halt when John S. Trinsey Jr. filed suit against the Pennsylvania Board of Elections in the United States District Court for the Eastern District of Pennsylvania.[5] Trinsey alleged that the Pennsylvania election statute violated the Seventeenth Amendment to the United States Constitution.[6] The District Court granted Trinsey's request for a declaratory judgment and held that the statute illegally permitted political parties to nominate candidates by means other than special election. As such, the court determined that the statute was inconsistent with the Seventeenth Amendment's requirement that a senatorial seat be filled by a popular election.[7] On appeal the United States Court of Appeals for the Third Circuit reversed and held that the Pennsylvania state legislature may exercise reasonable discretion in determining the method in which vacant Senate seats should be filled.[8]

This Comment examines the question of whether the Seventeenth Amendment requires that a state hold primary elections to fill a vacant seat in the United States Senate. First, the Comment examines the legislative history of the original sections of the Constitution pertaining to the election of Senators. Second, the Comment discusses the changes mandated by the Seventeenth Amendment. Third, the Comment analyzes five United States Supreme Court decisions relating to primary elections. Finally, the Comment proposes a suggested analysis of special elections.

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4. Michael deCourcy Hinds, *Governor Names Heinz Successor*, N.Y. TIMES, May 9, 1991, at A16.

5. Trinsey v. Commonwealth of Pennsylvania, 766 F. Supp. 1338 (E.D. Pa. 1991).

6. The Seventeenth Amendment provides that:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.
>
> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislatures of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. CONST. amend. XVII.

7. *Trinsey*, 766 F. Supp. at 1337. Popular election is defined as an "[e]lection by the people as a whole, rather than by a select group." BLACK'S LAW DICTIONARY 518 (6th ed. 1990).

8. Trinsey v. Commonwealth of Pennsylvania, 941 F.2d 224 (3d Cir. 1991).

II. Senate Elections 1787-1913

A. Debate on the Method of Regular Elections

Senators were elected by state legislatures until the Seventeenth Amendment was ratified in 1913. Two plans, one authored by Charles Pinckney and the other by Edmund Randolph, were presented for consideration by the delegates at the outset of the Constitutional Convention.[9] Surprisingly, neither of the plans provided that Senators be popularly elected. The delegates held widely differing views regarding the proper structure of a legislative body. Several members of the Convention expressed the opinion that the common people could not be trusted to vote for wise government policy.[10] Other delegates had more confidence in the people. They argued that the House of Representatives should be elected by the people and the Senate by the state legislatures.[11] Only one member of the Convention, James Wilson, anticipated passage of the Seventeenth Amendment. He argued that both branches of the national legislature should be elected by the people.[12]

Delegates supporting the proposition that the selection of Senators should be made by the state legislatures made four arguments to support their position.[13] Those delegates who did not fully trust the wisdom of the people put forth the first argument. They wanted a small Senate[14] made up of wise and deliberate men.[15] They thought

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9. Edmund Randolph's plan, also known as the Virginia Plan, in Resolution 5, provided that "[t]he members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures." 1 JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 61 (E.H. Scott ed., Scott, Foresman and Co. 1898) (1840) [hereinafter MADISON].

Charles Pinckney's plan, also known as the South Carolina Plan, in Article IV, provided that "[t]he Senate shall be elected and chosen by the House of Delegates; . . . and they shall fill all vacancies that arise from death or resignation, for the time of service remaining of the members so dying or resigning." *Id.* at 65-66.

10. Roger Sherman said that "[t]he people . . . should have as little to do as may be about the government. They want information, and are constantly liable to be misled." *Id.* at 78. Elbridge Gerry thought that "[t]he evils we experience flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots." *Id.*

11. James Madison and George Mason both thought that one branch should be elected by the people. *Id.* at 78, 79.

12. MADISON, *supra* note 9, at 82. Wilson anticipated ratification of the Seventeenth Amendment by 126 years, (1787-1913).

13. 1 GEORGE HAYNES, THE SENATE OF THE UNITED STATES 13 (1938) [hereinafter HAYNES].

14. Edmund Randolph favored a small Senate so that it would be free from "the passionate proceedings to which numerous assemblies are liable." MADISON *supra* note 9, at 81. Hugh Williamson thought that twenty five senators would be adequate. MADISON, *supra* note 9, at 125. James Madison also favored a small Senate. He thought that a larger legislative body would be less capable of fulfilling its mission. MADISON, *supra* note 9, at 126.

15. John Dickinson wanted distinguished and wealthy men to serve in the Senate. His

that this type of man would be best chosen by state legislatures.[16] The second argument was that the states, as states, should be represented in the Senate.[17] Next, some delegates thought that the different methods of election would produce an internal check in Congress.[18] Theoretically, the tempestuous debate in the House would be tempered by the reflective and wise men in the Senate. Conversely, the conservative Senate would be forced into action by a House that was eager to act on an issue. The last argument posited was that the state legislatures would be much more willing to ratify the Constitution if they had a voice in the national government.[19]

B. Debate of the Original Vacancy Provision

While the methods of electing Senators were hotly debated, the vacancy provision was barely mentioned. The only debate over the provision occurred in the Convention after the first draft of the Constitution was presented to the Committee of the Whole. The first draft provided that "[v]acancies may be supplied by the Executive [state governor] until the next meeting of the legislature."[20]

Debate regarding the vacancy provision took place on August 9, 1787.[21] James Wilson thought it was unnecessary to have the Executive appoint a Senator because the vacancy would be left open for less than a year.[22] He also thought that the Executive should not have the power to appoint a Senator since the Executive in most states was elected by the state legislature. Wilson felt an appointed Senator would be too far removed from the people.[23] Edmund Ran-

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model was the British House of Lords. Contrary to Edmund Randolph and Hugh Williamson, he wanted a large Senate so that it could serve as a check on the House of Representatives. MADISON, *supra* note 9, at 124-25.

16. Elbridge Gerry thought that the legislatures had more character than the people. MADISON, *supra* note 9, at 129. John Dickinson thought that the legislature was more likely to pick wise and distinguished men than the people. MADISON, *supra* note 9, at 125.

17. George Mason wished to make the states "a constituent part of the national establishment". MADISON, *supra* note 9, at 130.

18. Hugh Williamson opined that different methods of representation would serve as a mutual check on each branch of the national legislature. MADISON, *supra* note 9, at 125. James Madison predicted the Senate's debates would proceed with "more coolness, with more system, and with more wisdom, than the popular branch." MADISON, *supra* note 9, at 126.

19. Roger Sherman thought that the states would support a national government if the states had a voice in the national legislature. The states and the national government would have a mutual interest in each other's existence. MADISON, *supra* note 9, at 124.

20. MADISON, *supra* note 9, at 451.

21. MADISON, *supra* note 9, at 482.

22. At the time of the Constitutional Convention, the state legislatures met at least once a year. Thus the vacancy would not last for more than a year. Valenti v. Rockefeller, 292 F. Supp. 851, 863 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969).

23. MADISON, *supra* note 9, at 482. Wilson did not like the practice of the state legislatures appointing the governor either. MADISON, *supra* note 9, at 482.

dolph, on the other hand, thought that a vacancy was quite important and should be filled as soon as possible. The Senate was too small and too powerful to leave vacant seats unfilled.[24] James Madison proposed that the state legislature be permitted to fill the vacancy with the provision that if the legislature was in recess, the Executive could fill a vacancy until the next meeting of the legislature.[25] Madison's motion was adopted by the Convention.[26]

III. Support for Primary Elections and the Seventeenth Amendment

A. State Support for Primary Elections

By 1911, the number of problems resulting from state legislatures electing Senators reached a breaking point. The problems included corruption,[27] deadlocks,[28] delays in conducting state business by the legislatures,[29] and the existence of unfilled vacancies in the Senate.[30] The people, as well as the state legislators themselves, grew increasingly disenchanted with the electoral process and demanded reform.[31]

The people of Oregon blazed the trail of reform for other states

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24. MADISON, *supra* note 9, at 482.

25. MADISON, *supra* note 9, at 483.

26. MADISON, *supra* note 9.

27. Nine cases of allegedly tainted senatorial elections were brought before the Senate between 1866 and 1911. HAYNES, *supra* note 13, at 91.

28. A newspaper description of a deadlocked Missouri state legislature is worth quoting in full.

> Lest the hour of adjournment should come before an election was secured, an attempt was made to stop the clock upon the wall of the assembly chamber. Democrats tried to prevent its being tampered with; and when certain Republicans brought forward a ladder, it was seized and thrown out of the window. A fist-fight followed, in which many were involved. Desks were torn from the floor and a fusillade of books began. The glass of the clock front was broken, but the pendulum still persisted in swinging until, in the midst of a yelling mob, one member began throwing ink bottles at the clock, and finally succeeded in breaking the pendulum. On a motion to adjourn, arose the wildest disorder. The presiding officers of both houses mounted the speaker's desk, and, by shouting and waving their arms, tried to quiet the mob. Finally, they succeeded in securing some semblance of order.

HAYNES, *supra* note 13, at 90.

29. In 1895, the Delaware legislature tried for 114 days to elect a senator and still failed. 1 ROBERT BYRD, THE SENATE 1789-1989 393 (1988). Several states were forced to call special sessions of the legislatures for the sole purpose of electing a senator. S. REP. NO. 961, 61st Cong., 3d Sess. 13, 14 (1911).

30. From 1866 through 1911, six states let their representation in the Senate lapse rather than go to the trouble of electing a senator. HAYNES, *supra* note 13, at 95.

31. The Democratic, People's, and Populist parties all included planks in their platforms favoring popular election of senators. The movement in the state legislatures towards popular election was strongest in the South and the West. By 1905, a total of thirty-one states had petitioned Congress to amend the Constitution. HAYNES, *supra* note 13, at 97-98.

to follow by launching an initiative petition known as a "direct primary nominating elections law".[32] The voters approved the proposed law by a three to one majority in the general election held in June of 1904.[33] The law provided that candidates for the Oregon state legislature be permitted to include a signed statement printed on the ballot informing the voter whether the candidate supported popular elections of senators.[34] This pledge was an attempt to make state legislators vote for the senatorial candidate who received the most votes in the unofficial primaries. Five years later, the Oregon Republican legislators fulfilled their pledges by casting their ballots for the victor in the primary, a Democrat.[35] Public interest in the popular election of senators was so intense that every state legislature examined the Oregon model of primary elections.[36] The pace of change was so rapid that by 1910, only six years after passage of the Oregon law, fourteen of the thirty senators elected that year had been first chosen in primary elections.[37]

B. Senatorial Support for Primary Elections

Many senators supported the concept of primary elections. Nebraska Senator Norris Brown said that "the direct primary for elective officers is the first step in the establishment and the most necessary step in the preservation of real representative government."[38] Maryland Senator Isidor Rayner commented that "in a great many of the States now Senators are nominated at primary elections, and I believe the time will come when every State will adopt this system."[39] Mississippi Senator Le Roy Percy, referring to his home state, remarked that "we have now, under the primary election system which obtains there, the benefits which are sought to be conferred by the joint resolution, having there a primary election by a majority of the voters."[40] Idaho Senator William Borah, who led the

32. HAYNES, *supra* note 13, at 101. The Wisconsin legislature, at the urging of Robert M. La Follette, passed an open primary law in 1903. Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 127 (1980).

33. HAYNES, *supra* note 13, at 101.

34. Candidates had to choose whether to support Statement No. 1 or Statement No. 2. If the candidate signed the first statement, he pledged himself to vote for the senatorial candidate who received the most votes in the general election. Statement No. 2 enabled the candidate to take the people's choice for senator as "nothing more than a recommendation." HAYNES, *supra* note 13, at 101.

35. HAYNES, *supra* note 13, at 102-03.

36. HAYNES, *supra* note 13, at 103.

37. HAYNES, *supra* note 13, at 104.

38. 46 CONG. REC. 2493 (1911).

39. *Id.* at 1163.

40. *Id.* at 2128. Senator Le Roy Percy's statement makes one wonder if the Seventeenth

fight in the Senate for popular elections, predicted that "[e]ach State has it's [sic] primary or is coming to have."[41]

A number of Senators supported popular elections as a way to counteract the power of the party bosses. Kansas Senator Joseph Bristow cited the notorious corruption of state legislators as a compelling argument for primaries.[42] Indiana Senator Albert Beveridge thought that the party bosses were even more powerful than the people.[43] Senator Rayner believed that the American people were ready for representative government. He said, "I am opposed to both the convention and caucus. I want to . . . put the power where it belongs, . . . in the people of the United States."[44]

Some Senators felt that primary elections would not solve the problems about which the people were complaining or that primaries might create different problems. North Dakota Senator Porter McCumber listed four disadvantages of primaries: (1) corruption would spread due to the great amount of money needed to run for office, (2) distortion about a candidate's record and character might be believed by a gullible public, (3) many honest and capable men would refuse to run for office because of the viciousness of the press, and (4) intra-party rivalry would tear apart the party system.[45] New York Senator Chauncey Depew was concerned that the Senate would find it difficult to sit in judgment on the results of a popular election. He was wary of the bribery and corruption that would inevitably take place among the general populace.[46] New York Senator Elihu Root, like many of the founding fathers, was fearful that stability and the Senate's mature reflection would be irretrievably

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Amendment was necessary. Senator Porter McCumber was of the opinion that the nomination of Senators by popular vote would yield the same result as the election of Senators by popular vote. 47 CONG. REC. 1879 (1911). Of course an amendment would apply to the nation as a whole whereas each state would have to provide for popular nomination.

41. 47 CONG. REC. 1886 (1911).

42. *Id.* at 2179.

43. *Id.* at 2253.

44. *Id.* at 1164.

45. The first three of Senator Porter McCumber's disadvantages seem to have been realized, as evidenced by the effects of political action committees, thirty second political advertising on television, and the Gary Hart episode in the 1984 Democratic presidential primary. McCumber did not want to vote for the Seventeenth Amendment but ultimately did. He gave two reasons. First, after many years of reflection, the people decided they wanted to change the Constitution. Second, he was merely voting to send the proposed amendment to the States for ratification. 47 CONG. REC. 1881, 1882 (1911).

46. Senator Chauncey Depew thought it was likely that the same men who bribed state legislators would find it just as easy to corrupt ordinary citizens. 46 CONG. REC. 1337 (1911). Senator Porter McCumber did not believe that any corrupt practice act could effectively deter those who offered bribes. Instead of the state legislators taking large bribes, the common people would take smaller bribes. *Id.* at 1881.

lost.[47]

It is evident many Senators were favorably disposed towards the idea of holding primary election before the general election. Some even wished that every state would hold primaries. The question remains, however, whether they intended, when approving the Seventeenth Amendment, to mandate that primary elections be used as the exclusive method of selecting candidates to run in the general election.

C. *Debate in Congress on the Seventeenth Amendment*

The debate on the Seventeenth Amendment in the House of Representatives and the Senate sheds little light on the question of whether primary elections are required to be used as the exclusive method of selecting candidates to run in the general election. Even the most ardent proponents of primary elections seemed to believe it was the responsibility of each state to decide if primaries were the proper mode to be used in the selection of worthy candidates.[48] Most of the statements made by the Congressmen regarding the future of primary elections were, in essence, predictions of the outcome of the existing trend toward primary elections in the States.

Part of the problem in resolving the question stems from the fact that primary elections were not seen to be the most important issue. Instead, the Senate spent most of its time debating the issue of whether the Constitution should be amended to remove the power reserved in Congress to regulate the conduct of federal elections in the States.[49] The Southern Democrats, afraid of the federal power exercised during Reconstruction,[50] refused to vote for the Seventeenth Amendment unless the proposed Amendment contained a clause vesting the exclusive control over the time, place, and manner of holding elections in the States.[51] The debates between the two

47. Senator Elihu Root also thought that many of the problems were caused by the federal election statute of 1866. *Id.* at 2241-42. The statute required each house of the state legislature to meet separately and take one ballot. The next day the legislature would meet and canvass the result. If one man did not take a majority in each house, then the legislature had to meet daily and take at least one vote per day until a senator was elected. HAYNES, *supra* note 13, at 85.

48. Senator William Borah, the leading proponent of popular elections, hoped that the state legislatures would obtain full power to regulate the election of senators and representatives. 46 CONG. REC. 851 (1911).

49. A complete version of the struggle of the Southern states to gain control the election process is contained in HAYNES, *supra* note 13, at 108-15.

50. Senator Joseph Johnston from Alabama feared that armed United States troops and federal marshals would again be used "to intimidate the voters" as he alleged occurred during Reconstruction. 47 CONG. REC. 1884 (1911).

51. A representative example of the resolution debated is found at 47 CONG. REC. 1884

factions in the Senate show that the text of the Amendment, providing for direct election by the people, was intended to give the people a choice of candidates in a general election, not require a particular method for selecting candidates to run in a general election.[52]

D. Does the Seventeenth Amendment Require Primary Elections?

The first argument for interpreting the Seventeenth Amendment to mandate primary elections is that, in both general and special elections, Senators are to be elected by the people.[53] The argument's emphasis is on the people's ability to exercise a meaningful choice at the general election. The corruption of the state legislatures was one of the primary concerns of the Senate. Senate Report No. 961, authored by Senator William Borah for the Senate Judiciary Committee,[54] referred twice to the evil effects of corruption. Article VIII of the report mentioned the numerous allegations of bribery that had attached to senatorial elections.[55] The report, in Article IX, compared the different ways in which governors and senators were elected. It admired the relative purity of popular elections of state governors.[56] Representative Tucker, in Section I of House Report No. 368[57] on the election of federal officers, expressed concern that corruption was destroying the pure administration of the government.[58] The argument has some merit. The Senate was very con-

(1911). (The Southern states wanted "[t]he times, places, and manner of holding elections for Senators . . . [to] be . . . prescribed in each State by the legislature thereof.")

52. In Newberry v. United States, 256 U.S. 232 (1921), the issue was whether Congress, through its power to regulate the manner of election, could regulate state primary election practices. Four Justices answered in the affirmative and four answered in the negative. Justice MacReynolds, writing the plurality opinion, stated that the Seventeenth Amendment did not announce or require a new meaning of the word "election." Since primaries were unknown in 1787, the concept of elections in the Constitution did not encompass primary elections. Certainly if primary elections had been required under the Amendment, the Court would have found that Congress had the power to regulate them. It was not until United States v. Classic, 313 U.S. 299 (1941), *reh'g denied* 314 U.S. 707 (1941) that the Court held that, under certain narrowly defined circumstances, Congress had the power to regulate primary elections.

53. The Seventeenth Amendment provides, in pertinent part:

> The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof* . . . . That the legislatures of any State may empower the executive thereof to make temporary appointments *until the people fill the vacancies*." [emphasis supplied]. U.S. CONST. amend. XVII.

54. S. REP. No. 961, 61st Cong., 3d Sess. 13 (1911).

55. Charges of bribery arose from senatorial elections and tainted the entire state legislature. *Id.* at 13.

56. *Id.* at 14.

57. H.R. REP. No. 368, 52nd Cong., 1st Sess. 4 (1892).

58. "The corporation that can enter the halls of a legislature and lay its unholy hand upon the members, claiming them as its own . . . has already destroyed the hope of a pure administration of the local affairs of the people of that State." *Id.* at 4.

cerned about the corruption that seemed inherent in legislative elections. The Senate could have seen primary elections as an ideal method to deal with the problem.

However, reliance on the argument that the Senate intended to require primaries to banish corruption from general elections is ill-advised. Representative Tucker's report was submitted in 1892. Binding primary elections for the selection of Senators were unknown until Oregon devised the idea in 1904. In addition, Tucker thought that if popular general elections were held the nominating conventions would be free from corruption since the "corruptionist will not dare to face the scorn of an enlightened constituency."[59] Thus Tucker, in actuality, presupposed the existence of nominating conventions and failed to address the idea of primaries at all. Reliance on Senator Borah's report for support is equally unavailing. Nowhere in the report are primary elections even mentioned.

The second argument is that primaries were seen as a method to strike a blow at the power of the party bosses. The Wisconsin Supreme Court stated that the great reformer, Robert M. La Follette, Sr., supported the primary because he believed that "citizens should nominate the party candidates; that the citizens, not the party bosses, could control the party by controlling the candidate selection process."[60] Senator Rayner was opposed to the caucus and the nominating convention partly because both were dominated by party bosses.[61] The populace as a whole considered political parties to be unresponsive and not representative of the constituency of the parties.[62]

A counterargument is that the power of the party bosses has, to a certain extent, been broken by reforms of the election laws. It is no longer possible for one person to exercise complete dominion over the internal workings of a political party. Another difference between the early 1900's and the present is that, in most states, primary elec-

59. *Id.* at 5.

60. Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 127 (1980).

61. 46 CONG. REC. 1164 (1911).

62. ALAN GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 74, 75 (1978). A more current example of this problem was typified by the New York election laws prior to 1967. Before 1967, candidates for statewide offices were nominated at the party convention. The people's only participation in the selection process was in voting for delegates to the conventions. Much debate ensued over whether this practice resulted in party bosses exercising too much influence in the selection of nominees. In 1967, the practice was changed to enable candidates who found substantial support at the convention, but did not receive the nomination to run against the party's nominee. Valenti v. Rockefeller, 292 F. Supp. 851, 861 (S.D.N.Y 1968), *aff'd*, 393 U.S. 405 (1969).

tions are the norm rather than the exception.[63] In most cases, voters are able to cast a ballot in a primary election. Only in relatively rare cases, such as a special election, will a person be denied the chance to vote in a primary.

E. Conclusion

It is evident from the Congressional debates and reports that primary elections, while viewed favorably as a way to rid party politics of corruption and boss rule, were not mandated for either general or special elections. Although the framers of the Seventeenth Amendment did not intend to require primary elections before a general election could occur, it is still necessary to examine United States Supreme Court decisions to determine whether any other provision of the Constitution requires primary elections.

IV. Supreme Court Analysis of the Nature of Primary Elections

A. United States v. Classic

One of the most important Supreme Court cases used by the District Court in *Trinsey* to establish a right to vote in a primary election was *United States v. Classic*.[64] In *Classic*, the Louisiana legislature had required that political parties use primary elections to nominate candidates for the office of U.S. Representative.[65] The appellees in *Classic* were two Commissioners of Elections in Louisiana. They were indicted for the alleged alteration of ballots in the Democratic primary election for United States Representative. The situation in Louisiana was such that the Democratic nominee elected in the district primary would always win the general election.[66]

In *Classic*, the U.S. Supreme Court began its analysis by recognizing that Article I, Section 2, clause 1, and Article I, Section 4, clause 1 of the Constitution grants wide discretion to the state legislatures to regulate elections of United States officers.[67] The Court

63. *See, e.g.*, 25 PA. CONS. STAT. ANN. § 2862 (1991).

64. 313 U.S. 299 (1941), *reh'g denied* 314 U.S. 707 (1941).

65. *Id.* at 311.

66. The Commissioners argued that they were merely officers of a political party. They also argued the proposition that a primary election is only an internal party function. The corollary to this proposition is that even though the State may regulate primary elections, that, in and of itself, is not sufficient to make a primary election constitute state action. *Id.* at 304.

67. Article I, Section 2, Clause 1 of the U.S. Constitution provides that "[t]he Electors [of the House of Representatives] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Thus the state legislatures can deny the ballot to potential electors as it sees fit. The Seventeenth Amendment contains the same language as Article I, Section 2, Clause 1 thereby making senatorial elections subject to the

also recognized that the primary essentially determines the candidates who appear on the ballot in the general election.[68] The Court placed special emphasis on the fact that the Democratic nominee was the successful candidate in the general election for the past forty years. Thus, the Commissioners had interfered with the choice of the voters at the only stage of the election where the interference would be effective.[69] The Court then stated that "[t]he right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice. We come then to the question of whether that right is one secured by the Constitution."[70]

The Court opined that the framers of the Constitution regarded the right to a free choice of candidates as a fundamental right of the American people.[71] Breaking down the election process into two discrete steps, the primary and the popular elections, could not serve to denigrate the fundamental right of the people to have a meaningful vote.[72] The Court held that "[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2."[73]

In *Trinsey*, the District Court applied the first prong of the

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control of the legislatures. U.S. CONST. amend. XVII.

Article I, Section 4, Clause 1 of the U.S. Constitution provides that "[t]he Times, Places, and Manner of holding Election for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."

68. *Classic*, 313 U.S. at 311.

69. *Id.* at 314.

70. *Id.*

71. The right to choose or, in other words, the right to elect is not an enumerated right in the Constitution. The state legislatures may modify who "the people" are that may vote. However, the fact that Article I, Section 2, Clause 1 of the Constitution provides that Representatives shall be chosen by the people presupposes that at least some people will be authorized by appropriate state legislation to cast ballots. Thus those who are enabled by state law to vote have the right to vote. *Classic*, 313 U.S. at 318; Ex Parte Yarbrough, 110 U.S. 651, 664 (1884). Since the Constitutional command is unlimited, neither states nor individuals may deny an eligible voter the right to choose. *Classic*, 313 U.S. at 315.

Ex Parte Yarbrough, 110 U.S. 651 (1884) is the case that established the right to freely elect federal officers. Yarbrough and seven other men were sentenced to prison for attempting to prevent a black man from voting in a Congressional election. *Id.* at 656. The Court held that Congress had the power to criminalize conduct which prevented citizens from freely choosing whether to vote and for whom to vote. The Court reasoned that it is in the federal government's interest to have free elections since the government's power is derived from the people. *Id.* at 662.

72. The Court rejected the argument that because primary elections were unknown when the Constitution was adopted, the right to choose should be limited solely to the general election. *Classic*, 313 U.S. at 316.

73. *Id.* at 318.

Classic test and held that since Pennsylvania law requires a primary election to nominate candidates for a general election, Pennsylvania must also hold a primary election before a special election.[74]

Classic's holding, as applied to the *Trinsey* facts, however, is inapposite for two reasons. First, the facts of *Classic* limit the holding to one party states.[75] The Democrats had a forty year record of successful candidates. This fact transformed the Democratic primary into the equivalent of a general election. The general election was, in reality, a rubberstamp approval by the voters of the Democratic primary result. Second, the two types of elections are distinguishable. *Classic* was concerned with a general election. In *Trinsey*, the constitutional requirements for special elections are at issue. The circumstances under which special elections are declared differentiate them from general elections for purposes of constitutional analysis. Thus, *Classic* holds that if a state chooses to mandate primaries for the general election then the primary elections must comply with constitutional strictures. *Classic*'s holding does not apply to or even mention special elections.

B. Tashjian v. Republican Party of Connecticut

The other case relied upon by the District Court in *Trinsey* was *Tashjian v. Republican Party of Connecticut*.[76] *Tashjian*, a freedom of association case, was a 5-4 decision. Connecticut law required that voters participating in a party primary had to be members of that party.[77] The Republican Party adopted a party rule permitting inde-

74. The fundamental error of the District Court is contained in the statement that "Pennsylvania . . . has chosen to have the major parties make nomination prior to the general election. Because the choice of party nominees plays a central role in determining the eventual electoral outcome, the question of whether those nominees must be chosen democratically is a valid one." Trinsey v. Commonwealth of Pennsylvania, 766 F.Supp. 1338 (E.D. Pa. 1991).

75. Other cases providing protection for the right to vote at the primary stage of the electoral process are also distinguishable due to the one party nature of the election. Nader v. Schaffer, 417 F. Supp. 837, 843 (D.Conn. 1976) (*Classic* was not binding since Connecticut was not a one party state), *aff'd mem.* 429 U.S. 989 (1976). The "White Primary" cases are both Equal Protection Clause cases. In Nixon v. Herndon, 273 U.S. 536 (1927), the state itself limited participation in primaries to white citizens. *Id.* at 540. In Nixon v. Condon, 286 U.S. 73 (1932), the Texas legislature delegated authority to regulate the qualifications of voters necessary to participate in primary elections to the Democratic Party. In both cases, regulation of primary elections was held to be state action. *Herndon*, 273 U.S. at 541; *Condon*, 286 U.S. at 88-89. The Court then applied the suspect classification test and held that the rules excluding blacks from participation in party primaries were invalid. *See* Julia E. Guttman, Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 YALE L.J. 117, 118, n.9 (1984) (collecting and discussing the "White Primary" cases).

76. Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

77. Justice Scalia, in his dissent, points out that the burden on the Republican Party's freedom of association is quite minimal. Independents were allowed to join the Party up until the day before the primary. *Id.* at 235 (Scalia, J., dissenting).

pendent voters to vote in the Republican primary. Because approximately one-third of registered Connecticut voters were independents, the Republican Party hoped that enabling independents to take part in the primary selection process would produce a candidate that appealed to independent voters in the general election.[78] The Republican Party then asked for a declaratory judgment that the Connecticut statute violated the Party's First and Fourteenth Amendment rights to free association.[79]

The United States Supreme Court began its analysis with the proposition that "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."[80] The Republican Party argued that the Connecticut statute unconstitutionally interfered with the Party's ability to associate with independent voters. The State asserted that it had the power to regulate the "[t]imes, [p]laces and [m]anner of holding [e]lections for Senators and Representatives."[81] The Court rejected the State's attempt to argue, what in effect was, a rational basis test. Instead, the Court held that "[t]he power to regulate . . . elections does not justify . . . the abridgment of fundamental rights such as the right to vote."[82] After imposing a strict scrutiny test the Court found that the State's purported interests were insubstantial.[83]

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78. The record showed that there were 659,268 registered Democrats, 425,695 registered Republicans and 532,723 independent voters. *Id.* at 212, n.3. The Republican Party would have to attract a substantial number of independent voters to prevail in a general election. Thus the Party was very interested in selecting a candidate who appealed to both Republicans and independents.

79. *Id.* at 213. The District Court granted summary judgment for the Republican Party and the Court of Appeals affirmed. *Tashjian*, 479 U.S. at 213.

80. *Id.* at 215.

81. *Id.* at 217. The State attempted to encompass its regulation of primary elections within the U.S. Constitution, Article I, Section 4, Clause 1.

82. Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986). It is not clear where the boundary is drawn between a party's right to freedom of association and a State's right to regulate its elections. *Tashjian* was a 5-4 decision. The dissent did not believe that the Republican Party's freedom of association was infringed in any significant way. *Id.* at 234-37. *See generally* Martin G. Byrne, *Political Parties Win the Battle, Will They Win the War?:* Tashjian v. Republican Party of Connecticut, HOW. L.J. 83 (1989) (discussing whether political party activities constitute state action.); Julia E. Guttman, Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 YALE L.J. 117 (1984) (discussing ramifications that *Tashjian* will have upon the relationship between states and political parties).

83. Connecticut asserted several interests. The first interest was ensuring the administrability of the system. Additional workers and voting machines would be needed. The State did not want to bear the additional costs that the party rule would create. *Tashjian*, 479 U.S. at 217-18. Second, the State wanted to prevent raiding. Raiding occurs when Democrats vote in the Republican primary, or vice versa, hoping to influence the outcome of the primary. *Id.* at 219. The Court noted that the existence of raiding had never been conclusively proven. *Id.* at 219, n.9. Third, the State argued that the system avoided voter confusion over where candidates stood on issues. *Id.* at 220. The Court rejected that argument out of hand. It said that "our cases reflect a greater faith in the ability of individual voter to inform themselves about

One of the State's concerns was that administrative costs would be much greater if the Republican Party implemented its rule allowing independents to vote in its primary. The Court dismissed that concern saying that if a major third party emerged the State would have to pay for a third primary.[84] The Court, however, in dicta, recognized that "the State is . . . entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all."[85]

According to the Court, the State has the power to abolish the primary and institute a different method of candidate selection. Presumably, the State could enable the political parties to establish their own election procedures so long as the party rules did not violate any other constitutional provision.[86] This is exactly the course that Pennsylvania has chosen regarding nominations for special elections.[87] In the event of a special election, the political parties in Pennsylvania could properly choose to nominate by state committee, nominating convention or even primary. Due to the exigent circumstances of a special election both political parties have chosen to nominate by state committee.[88]

Paradoxically, the district court's decision in *Trinsey* violates the spirit of *Tashjian*. By requiring a primary election to be held, the court reduces a political party's freedom to select candidates in the manner that it chooses. A party's self interest dictates that a candidate likely to attract voters must be selected. Naturally, the party will choose a candidate acceptable to a majority of the party's members.

Neither *Classic* nor *Tashjian* support the *Trinsey* court's decision that the Pennsylvania election statute infringes on the right to vote.[89] *Classic* is easily distinguishable from *Trinsey* on the facts. The *Tashjian* decision with its recognition of both state and party power to regulate elections renders implication of a constitutional re-

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campaign issues." *Tashjian*, 479 U.S. at 220. Lastly, the State contended that the Party rule would lead to a fracturing of the two party system. *Id.* at 223. The Court dismissed this argument admitting that while the State has a legitimate interest in protecting the political parties from external threats, in the instant case it is the party itself allowing independents to vote in the party primary. *Id.* at 224.

84. Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 218 (1986).

85. *Id.*

86. There are several restrictions on the state's power to regulate elections. U.S. CONST. amend. XV (bans discrimination based on race). U.S. CONST. amend. XIX (bans discrimination based on sex). U.S. CONST. amend. XXVI (lowered voting age to eighteen).

87. 25 PA. CONS. STAT. ANN. § 2776 (Supp. 1992).

88. RULES OF THE DEMOCRATIC AND REPUBLICAN PARTIES OF PENNSYLVANIA, *supra* note 2.

89. *See supra* notes 64-88 and accompanying text.

quirement of primary elections quite difficult. To complete the analysis of the problem, however, decisions affecting special elections must be examined.

IV. Special Elections

The U.S. Supreme Court has infrequently addressed the Constitutional requirements of special elections. It has, though, on occasion, decided disputes arising out of unusual election occurrences. These decisions are useful because they define what types of arguments the Court finds persuasive in a case not involving a general election.

A. Fortson v. Morris

The Supreme Court in *Fortson v. Morris*[90] analyzed a provision of the Georgia State Constitution. The provision provided that where no candidate for governor received a majority of votes in the regular election, the Georgia legislature would elect a governor from the two candidates who received the highest number of votes.[91] In the November 6, 1966 general election, a third gubernatorial candidate prevented either of the top two candidates from receiving an absolute majority of the votes cast in the election.[92]

The Court held that the legislative election did not deny voters their rights under the Equal Protection Clause of the Fourteenth Amendment.[93] Furthermore, the Court stated "[t]here is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor."[94] The majority, applying a rational basis

90. 385 U.S. 231 (1966).

91. *Id.* at 232, n.1. While this electoral method does not fit squarely within the definition of a special election, it can be analogized to a situation where the governorship is vacant and must be filled by a special election. The state legislature then would have the prerogative to decide the best manner in which to fill the vacancy.

92. *Id.* at 236. Callaway received 47.07%, Maddox received 46.88% and Arnall received 6.05% of the votes cast in the election. *Id.* Thus, the Georgia legislature would choose between Callaway and Maddox.

93. *Fortson*, 385 U.S. at 233. Significantly, the Court rejected application of the one person, one vote standard found in Gray v. Sanders, 372 U.S. 368 (1963). The *Fortson* Court characterized *Gray* as "only a voting case." Nothing in *Gray* could be construed to prevent a legislative election. *Fortson*, 385 U.S. at 233. The dissent, however, thought that the legislative election would violate the *Gray* standard. Each legislator had only one vote for the district he or she represented. When the vote was cast for one candidate then all the votes from that district for the opposing candidates in the popular election would be ignored. Thus the legislative election had the same problems that the county-unit system did in *Gray*. *Id.* at 240 (Douglas, J., dissenting).

94. *Id.* at 234.

test, found that the Georgia legislature had numerous rational reasons for its decision that a legislative election, under the circumstances, would speed the selection of a governor.[95] The Court stated four reasons why the Georgia legislature could legitimately elect a Governor. First, Georgia had already held two primaries and one general election. The Court refused to require Georgia to hold another election that would probably not result in a majority vote for one candidate.[96] Second, the Court took into account the fact that a statewide election costs a great deal of money.[97] Third, legislative elections had precedent in Georgia history.[98] Fourth, two other states required legislatures to elect a candidate where no candidate received a majority.[99]

B. Valenti v. Rockefeller

In *Fortson*, the Court never decided what effect, if any, the Seventeenth Amendment had on the issue. One of the few opinions to construe the vacancy provision of the Seventeenth Amendment is *Valenti v. Rockefeller*.[100] *Valenti* arose out of the assassination of Senator Robert Kennedy. Since the assassination occurred less than 60 days prior to New York's spring primary, it was too late to schedule a senatorial race.[101] New York law provided that the vacancy would then be filled at the next general election held in an even numbered year.[102] The election procedure resulted in a Senator, appointed temporarily by the Governor, serving for 29 months before New York could hold a special election.[103]

The *Valenti* court characterized the issue as whether the importance of a prompt special election outweighed the State's interest in following its normal schedule of primary elections.[104] First, the court focused on the Seventeenth Amendment's grant of power to state

95. *Fortson*, 385 U.S. at 234. Presumably, if a state elects to require popular election of its governor, then the balloting would have to conform to the one person, one vote standard.

96. *Id.* at 234.

97. *Id.*

98. *Id.* at 233-34. (The provision had been in the Georgia Constitution since 1824.)

99. Fortson v. Morris, 385 U.S. 231, 234 n.2 (1966).

100. 292 F. Supp. 851 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969). The *Valenti* court could not find another case construing the Seventeenth Amendment's vacancy provision. *Id.* at 862.

101. *Id.* at 853. Senator Kennedy was killed June 6, 1968.

102. *Id.*

103. *Id.*

104. *Valenti*, 292 F. Supp. at 855. The plaintiffs in *Valenti* were willing to have the state committees of the parties select nominees in order to have a prompt election. *Compare* Trinsey v. Commonwealth of Pennsylvania, 766 F. Supp. 1338 (E.D. Pa. 1991) (where plaintiff considered the primary election to be of paramount importance).

legislatures to regulate special elections.[105] It next examined how the state legislatures interpreted the extent of that power. The result of the survey showed that legislators have interpreted their power to be quite broad. Among the 50 states, many different statutes were enacted after ratification of the Seventeenth Amendment. The court also found that many states had changed their vacancy statutes to suit their changing needs.[106]

The court then applied a rational basis test and found that the State had three substantial interests furthered by the election statute. First, elections in even-numbered years included an election for either President of the United States or Governor of New York.[107] Thus, the New York legislature acted reasonably in assuming voter turnout would be higher in those election years. Second, political parties did not conduct fundraising in off-years. Senatorial candidates would be hard-pressed to finance election campaigns with little monetary support from their party.[108] Third, the expense and inconvenience of holding a special election in an off-year offset any benefits derived by the State.[109]

C. *Rodriguez v. Popular Democratic Party*

The most authoritative case on the subject of the constitutional requirements of special elections is *Rodriguez v. Popular Democratic Party*.[110] In *Rodriguez*, a member of the Puerto Rican House of Representatives died.[111] Puerto Rico's Supreme Court held that the vacancy statute permitted the Representative's political party to select, by primary election, a representative to fill the vacant seat.[112] Only members of the political party could vote in the special primary or be a candidate.[113]

On appeal, the United State Supreme Court adopted much of

105. *Valenti*, 292, F. Supp. at 855. The court felt that the last phrase of the Amendment, "as the legislature may direct", was so clear and plain as to be dispositive of the issue.

106. The court surveyed the vacancy statutes of the 50 states and found that 20 states provided that the vacancy be filled at the next biennial election with no specified period for nomination. The second most popular option was the same as the first with an additional provision that there be a primary election. Over the 55 years following ratification a number of states had changed or revised their statutes. Thus there has been no uniformity of interpretation of the Seventeenth Amendment's vacancy provision by the state legislatures. *Id.* at 868-70.

107. *Id.* at 859.

108. *Id.*

109. *Id.* at 860.

110. 457 U.S. 1 (1982).

111. *Id.* at 3.

112. *Id.* at 4-5.

113. *Id.* at 4.

the same line of reasoning as used in *Valenti v. Rockefeller*. The Court noted that there is no "right to vote" contained in the Federal Constitution.[114] Citing *Fortson v. Morris*, the Court reaffirmed the principle that the Federal Constitution does not dictate the method a State must choose to select State officers.[115] The Court proceeded to distinguish *Classic*'s proposition that where a State chooses to elect officers, a citizen has the right to participate in the election.[116] The Court held that Puerto Rico does not restrict access to general elections and that the vacancy statute applied equally to all legislative vacancies.[117]

Applying a rational basis test, the Court found that the Puerto Rico legislature "could reasonably conclude that appointment by the previous incumbent's political party would more fairly reflect the will of the voters than appointment by the Governor."[118] Other legitimate advantages of appointment by a political party instead of election included time and expense. Finally, the Court opined that while appointment "may have some effect on the ability of . . . citizens to elect . . . the effect is minimal, and like that in *Valenti*, it [the effect] does not fall disproportionately on any discrete group."[119]

V. Suggested Framework for Analysis

An incident leading to a special election is an infrequent occurrence. Disputes arising out of a special election are quite rare. As a result, the courts have had few opportunities to analyze the constitutional requirements of special elections. In the few decisions available, the courts have treated special elections as a mere subset of general elections. A better theoretical approach would be for the courts to explicitly recognize that special elections are unique.

The current method of analyzing special elections requires the state to enumerate the rationales for the challenged statute. The state's arguments are generally focused on the need to hold a quick election. In doing so, the state, in the end, is forced to justify the

114. *Rodriguez*, 457 U.S. at 9 (quoting Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1875) for the proposition that the states control the qualifications necessary to vote.)

115. *Rodriguez*, 457 U.S. at 9. (*Rodriquez* and *Fortson* are concerned with special elections of state officials. *Valenti* involved a federal official. The U.S. Supreme Court has not specifically addressed special elections of *federal* officials.)

116. *Id.* at 10.

117. *Id.* at 12.

118. *Rodriguez*, 457 U.S. at 12. The Governor of Pennsylvania appointed Harris Wofford, a Democrat, to fill the seat that John Heinz, a Republican, had held. *See supra*, note 4 and accompanying text.

119. *Id.*

differences in procedure between general and special elections. There should be no reason for the state to make that differentiation since the two types of elections are fundamentally different.

Under the proposed analysis, the state would not need to justify the differences in procedure. Instead, the burden of proof would be on the plaintiff to show an infringement of an enumerated constitutional right.[120] If the plaintiff cannot show a violation, then the statute must be upheld.

The U.S. Supreme Court, in both *Fortson* and *Rodriguez*, has shown an inclination to adopt this analysis. Both cases involved election procedures that might not have been acceptable in a general election. The Supreme Court held that in neither of those cases were the plaintiff's rights violated. The Court used the unique characteristics of special elections to justify its conclusion.

Applying the proposed rule to the facts in *Trinsey* shows that the Court of Appeals came to the correct result for the wrong reason. Trinsey did not allege a violation of an explicit constitutional right. Instead, he alleged that his right to vote was denied because primary elections were not held. To plead a valid cause of action, he should have pleaded facts that showed the Pennsylvania statute violated the Seventeenth Amendment on its face.

VI. Conclusion

This Comment has examined the components of special elections required by the Federal Constitution. The Comment, while searching for requirements, has discovered that legislative history, from both the Constitutional Convention and the Congressional debates on ratification of the Seventeenth Amendment, provides almost no guidance whatsoever. It is also evident that court opinions discussing general elections are not very useful either. The only helpful materials are the few cases on special elections themselves.

These cases have held that the legislature has wide discretion in the regulation of special elections. The courts have permitted this broad exercise of legislative authority because of the unique circumstances under which special elections are held. This Comment proposes that the courts ought to establish a bright-line rule that limits voter's rights to the enumerated guarantees of suffrage found in the Constitution.

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120. *See supra* note 86 and accompanying text.