UIC Law Review

Volume 13 | Issue 3 Article 1

Spring 1980

Federal Protection of Individual Rights in Local Elections, 13 J. Marshall L. Rev. 503 (1980)

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FEDERAL PROTECTIONS OF INDIVIDUAL RIGHTS IN LOCAL ELECTIONS

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INTRODUCTION

As a result of the constitutional grant of authority in 1791 to the states to conduct elections for both federal and local offices, the states have possessed almost unlimited power, subject only to amendments to the United States Constitution.[1] With the passage of the fourteenth amendment, a new federalism developed. The citizens of the United States, as citizens of their state of residency, would now be protected by the federal courts. As this doctrine expanded and the courts entered the "political thicket," those rights of citizenship dealing with elections became subject to the overview of the federal judiciary. Thus, in slightly over a quarter of a century, the entire legal posture of our electoral system was transformed.

Historically, in the first century of the Republic, federal courts made few determinations involving electoral laws. The post-Civil War constitutional amendments however, effectively permitted federal court review of state election laws. Of particular importance was the fourteenth amendment, section 1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

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1. U.S. CONST. art. 1, § 4.

equal protection of the laws.[2]

Despite the fourteenth amendment, the scope of federal jurisdiction remained undefined, until the Warren Court, in *Baker v. Carr*[3] entered the "political thicket." Prior to *Baker*, a controversy had existed as to the appropriateness of the federal government's involvement in local political activities. The traditional or conservative position, best illustrated in 1946 by Justice Frankfurter in *Colegrove v. Green*[4] and his dissent in *Baker*, was that federal courts should not act in those areas that were deemed to involve political questions. Political areas were best handled by the voters in their election of state legislators, and not by the judiciary.[5] The liberal interpretation, best illustrated by Chief Justice Warren in *Reynolds v. Sims*,[6] was based upon a philosophical belief in a judicial obligation to protect those rights guaranteed under the fourteenth amendment, even though they were political in nature.

In *Colegrove*, the Supreme Court declined to consider a challenge to an Illinois reapportionment plan. Despite Justice Frankfurter's ominous warnings, the Court in *Baker* moved the courts into this political arena. Addressing for the first time the subject of reapportionment, the Court held that a state's infringement of the citizen's right to fourteenth amendment protections became a reviewable issue. It rejected the argument that judicially manageable standards were lacking. Justice Brennan stated: "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to de-

2. U.S. CONST., amend. XIV.

3. 369 U.S. 186 (1962).

4. 328 U.S. 549 (1946). "It has refused to do so because due regard for the effective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." *Id.* at 552. "The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress." *Id.* at 556. This case was based on the Guaranty Clause of the United States Constitution. U.S. CONST. art. IV, § 4; *see* Luther v. Borden, 48 U.S. (1 How.) 1 (1849) (Rhode Island had elected two governors).

5. Baker v. Carr, 369 U.S. 186 (1962) (Frankfurter, J., dissenting). In *Baker*, Justice Frankfurter relied on Colegrove v. Green, 328 U.S. 549 (1946), which held that the equal protection clause should not be used to protect citizens' rights to a representative form of government. The dissenters considered the case to be a political question, based upon the Guaranty Clause, and hence not justiciable in the federal courts. They considered the equal protection clause violation allegation to be a mere sham. *Id.* at 297; *see* O'Neill v. Leames, 239 U.S. 244 (1915); Luther v. Borden, 48 U.S. (1 How.) 1 (1849).

6. 377 U.S. 533 (1964). The equal protection clause protects those rights that are individual and personal in nature. The right to vote, and the right to have it counted equally with others, is individual and personal in nature and thus protected under the clause.

termine, if on the particular facts they must, that a discrimination reflects *no* policy but simply arbitrary and capricious action."[7] In *Reynolds*, Chief Justice Warren, articulated an important distinction between political questions and those involving individual rights with a political aspect. Individual rights, such as voting, fall into the category of legal questions which are political in nature.[8] As important rights, they need to be protected regardless of their incidental political impact. The Court noted "we are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."[9]

In a fashion similar to that of apportionment law, the federal courts have entertained challenges to state laws regulating elections.[10] In Illinois, political conflict had historically existed between the dominant political faction in the Democratic party and its opponents, both within and outside the party. Since the political opposition manifested itself in electoral challenges, it was common for these challenges to develop into litigation concerning the validity of state law.[11] These challenges were fre-

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7. 369 U.S. at 226 (emphasis in original).

8. But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

377 U.S. at 565.

9. *Id.* at 566.

10. These challenges have involved all aspects of elections. *E.g.*, American Party of Tex. v. White, 415 U.S. 767 (1974) (New Parties—signature requirements); Communist Party of Ind. v. Whitcomb, 414 U.S. 441, *reh. den.* 415 U.S. 952 (1974) (Candidate—loyalty oaths); Kusper v. Pontikes, 414 U.S. 51 (1973) (Suffrage-party affiliation restrictions); Dunn v. Blumstein, 405 U.S. 330 (1972) (Suffrage-residency requirements); Bullock v. Carter, 405 U.S. 134 (1972) (Candidate-filing fee requirements); Moore v. Ogilvie, 394 U.S. 814 (1969) (Candidate-signature requirements); Williams v. Rhodes, 393 U.S. 23 (1968) (New Parties-ballot access); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (Suffrage-poll tax requirements); Terry v. Adams, 345 U.S. 461 (1953) (Participation in party nominations based on race); Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970) (Conduct of electoral board hearing); Weisberg v. Powell, 417 F.2d 388 (7th Cir, *reh. en banc den.* 1969) (Conduct of elections - ballot position); Carey v. Elrod, 49 Ill. 2d 464, 275 N.E.2d 367, *appeal dismissed* 408 U.S. 901 (1971) (Douglas, J., noting probable justification) (Post election procedures - recounts).

11. *See generally* ATTORNEY'S GUIDE TO ILLINOIS ELECTION LAW, ILL. INST. CLE, ch. 3, §§ 3.6-3.13 (Supp. 1979); *Developments in Law-Elections*, 88 HARV. L. REV. 1111 (1975) [hereinafter cited as *Election Law*].

quently filed in the federal courts. It is a well-known political maxim that the established power in a state legislature seeks to use its enactments in the area of elections to protect its base of power.[12] There is little difference between the actions in various states; it is only the actors that are different.

Federal intervention was necessitated by the continued refusal by state courts to become involved in state election disputes. Most illustrative of this situation was the 1964 Illinois case of *Telcser v. Holzman*.[13] That litigation involved the incumbent ward committeemen of both parties in the City of Chicago who were faced with challenges from the opposing minority faction in their respective parties. The Electoral Board hearing challenges to the rebel committeemen accepted a new interpretation of who could sign petitions, and it sustained these challenges. When an appeal of this interpretation of the Electoral Board reached the Illinois Supreme Court, the court maintained that "in the absence of such an unreasonable determination by the electoral board as to amount to fraud, its determination under § 10-10 was final and the courts have no jurisdiction to review."[14] Thus, prior to the changes that occurred by the intervention of the federal courts, a candidate had no inherent right of review of an unfavorable hearing before an electoral board absent a showing of fraud.[15]

This attitude by the state courts changed as a result of federal court intervention. In 1971, in *Briscoe v. Kusper*,[16] a federal court determined that candidates were entitled to procedural due process rights in electoral board hearings.[17] No single example is more illustrative of the change than that which took place in Illinois. States are now required to guarantee procedural due process rights to protect the right to vote.[18]

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12. Reynolds v. Sims, 377 U.S. 533 (1964) (geographical discrimination: rural v. urban); Baker v. Carr, 369 U.S. 186 (1962) (geographical discrimination: rural v. urban); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (political gerrymandering).

13. 31 Ill. 2d 332, 201 N.E.2d 370 (1964).

14. *Id.* at 339, 201 N.E.2d at 374; ILL. REV. STAT. ch. 46, § 10-10 (1963) (current version at ILL. REV. STAT. ch. 46, § 10-10 (1977), authorizes a hearing before the electoral board).

15. It is interesting to note that Telcser subsequently gained a seat in the Illinois legislature and was instrumental in passing a statutory right of review. ILL. REV. STAT. ch. 46, § 10-10.1 (1977).

16. 435 F.2d 1046 (7th Cir. 1971).

17. *See generally* notes 197-221 and accompanying text *infra*.

18. While the state has a legitimate interest in restricting access to the ballot in order to maintain the integrity of the ballot and preserve an orderly election process, the Supreme Court has required that the means chosen by the state to achieve its goals be carefully scrutinized, for they necessarily place burdens on the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters to cast

Although the federal courts have intervened, they have done so only to the extent of protecting individual rights. The difference between success and failure in election law litigation frequently rests upon a properly developed description of the invasion of individual rights. Federal courts are reticent to challenge the state control of elections. It is imperative therefore to examine the specific factual situation in order to determine when and where federal courts will intervene.[19] Where individual rights are involved, the federal courts have recognized an important state interest in protecting the integrity of the electoral process.[20] Thus, the courts have engaged in a case by case analysis, balancing the individual rights and the state interest.[21] The key to a successful attack of state law is the skillful approach of the litigating attorney to show the loss of the fundamental right to vote. The key to a successful defense of a state law is an equally skillful response that the law or practice is necessary to permit the state to fulfill its duty to conduct the election.

Balancing these competing interests necessitates examination of various aspects of the electoral process. These aspects include suffrage, candidates, participation in party nomination, new parties, conduct of electoral mechanism and post-election proceedings. An in-depth study of these aspects will indicate that suffrage and candidate questions usually involve fundamentally protected rights, and courts are more apt to intervene.[22] Participation in party nominations and new parties, although involving individual rights, have a more remote relationship to the right to vote. Therefore, federal courts have intervened less in these areas.[23] Finally, the conduct of the electoral mechanism and post-election proceedings are almost purely procedural; yet in reviewing due process violations, federal courts have intervened in these areas.[24] These aspects do not exist separate from each other. Rather, they must be examined together to protect the individual's fundamental right

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their votes effectively. Socialist Workers Party v. Chicago Bd. of Election, 433 F. Supp. 11, 16 (N.D. Ill. 1977), *aff'd*, 440 U.S. 173 (1979).

19. It is not enough to attack the state scheme without having a factual situation which is almost a blatant violation of federally protected rights. For example, factual situations involving racial discrimination are readily apparent. However, factual situations involving age discrimination are much less apparent. Any age requirement will necessarily be arbitrary. *See* Blassman v. Markworth, 359 F. Supp. 1 (N.D. Ill. 1973).

20. American Party of Tex. v. White, 415 U.S. 767 (1974).

21. Dunn v. Blumstein, 405 U.S. 330 (1972) (compelling state interest is necessary to grant the right to vote to some and not others).

22. *See generally* notes 32-148 and accompanying text *infra*.

23. *See generally* notes 149-77 and accompanying text *infra*.

24. *See generally* notes 178-221 and accompanying text *infra*.

while preserving the state's constitutional right to conduct elections. This article will examine these aspects and how courts address the various competing interests.

HISTORICAL OVERVIEW OF THE FUNDAMENTAL RIGHT TO VOTE

Before one can examine the effect of the fourteenth amendment upon election law, it is important to first note its historical background. From the very beginning, the founders of the Republic, in drafting the Constitution, determined that while there would be both federal and local elections, control of the time, place, and manner of conducting federal elections would be within the state's domain.[25] The federal courts never acknowledged that granting control of the electoral mechanism to the states could jeopardize the federally-protected right to vote in federal elections directly guaranteed by the Constitution.[26]

As early as 1884 in *Ex Parte Yarbrough*,[27] there were recognized protections of certain fundamental rights guaranteed to the federal citizen. In *Yarbrough*, the Supreme Court in affirming the right to vote guaranteed to federal citizens noted:

> [A] government whose essential character is Republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, or corruption and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.[28]

Two years later, in *Yick Wo v. Hopkins*[29] the Court, in reference to the fundamental right to vote, stated:

> [I]n all cases where the Constitution has conferred a political right or privilege, and where the Constitution has not particularly designated the manner in which the right is to be exercised, it is clearly within the just and constitutional limits of the legislative power, to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate such right in a prompt, orderly and convenient manner; nevertheless, such a construction would afford no warrant

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25. U.S. CONST. art. 1, § 4 provides:

> The Times, Places and Manner of holding Elections 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, except as to the Places of chusing Senators.
>
> [The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day].

26. United States v. Classic, 313 U.S. 299 (1941); Yick Wo v. Hopkins, 118 U.S. 356 (1886); *Ex Parte* Yarbrough, 110 U.S. 651 (1884).

27. 110 U.S. 651 (1884).

28. *Id.* at 657.

29. 118 U.S. 356 (1886).

> for such an exercise of legislative power as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself.[30]

Finally, in *United States v. Classic*,[31] the Supreme Court recognized that the right to vote includes the right to have that vote counted as cast. In particular, a primary election prior to the general election is one wherein the voters' constitutional rights are protected from fraud.

Through the fourteenth amendment's privilege and immunities clause, a citizen of a state has all the rights guaranteed to federal citizens under the federal constitution, including the right to vote. In protecting this right, federal courts have examined state restrictions on suffrage, candidates, participation in party nominations, new parties, conduct of electoral mechanism, and post-election proceedings.

SUFFRAGE

The right to vote is basic to all aspects of elections. It is a "fundamental political right preservative of all rights."[32] In any case challenging part of an electoral procedure, whether the challenge be from an individual voter, candidate, or party, the court will determine if the fundamental right of voters has been impaired. Historically, states have imposed restrictions on that right. These restrictions include classifications of citizens and property requirements.

Race, Sex, and Age

In the early years of the nation, prior to utilization of the fourteenth amendment in protecting voting rights, the state often imposed limitations on the vote involving entire classes of persons. Generally, those classifications were based on race, sex, age, property ownership, and residency. Although there is a substantial body of case law concerning the constitutionality of limitations on suffrage—race, sex, and age limitations have effectively been eliminated by passage and enforcement of constitutional amendments.[33] The fifteenth amendment[34] effectively eradicated racial restriction on voting. The nineteenth amendment[35] eliminated suffrage limitations based on sex. The Voting

30. *Id.* at 370-71.

31. 313 U.S. 299 (1941).

32. Yick Wo v. Hopkins, 118 U.S. at 370.

33. U.S. CONST. amends. XV, XIX, XXIV and XXVI.

34. U.S. CONST. amend. XV, § 1 provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

35. U.S. CONST. amend. XIX § 1 provides: "The rights of citizens of the

Rights Act of 1970[36] provided a relaxed age limitation from twenty-one years to eighteen in all elections. In 1970, in *Oregon v. Mitchell*,[37] the Supreme Court had held the reduction in age applied only to federal elections. After this decision, a state could have had separate ballots based upon age distinctions for federal and state elections. Although this was a theoretical possibility, it was not practical. As of 1971, this distinction has been eliminated due to passage of the twenty-sixth amendment,[38] which allows all persons of eighteen years of age the right to vote in both federal and state elections.

Poll Tax

Another historical limitation on the right to vote occurred through the use of poll taxes. The poll tax was probably the last vestige of a property or wealth requirement for voting. Although payment of a poll tax did not presume that the payee owned property or had considerable wealth, it was obvious that there would be a direct correlation between the people who were disenfranchised and their lack of wealth. In effect, a poll tax denied the fundamental right to vote to the poor and indigent. In 1937, however, *Breedlove v. Suttles*[39] made clear that even after passage of the fourteenth amendment, a poll tax was permissible in elections as a condition of voting. The court viewed the poll tax as permissible under the state's interest in recapturing a portion of the cost of conducting an election, by placing what was in effect a user charge upon the voter. The court ignored any fourteenth amendment claims which might have accrued by the denial of the right to vote to persons who could not pay the tax.

In 1964, the twenty-fourth amendment[40] was passed. This

United States to vote shall not be denied or abridged by the United States or by any State on account of sex." *See* Williams v. Rhodes, 393 U.S. 23 (1968); Gray v. Sanders, 372 U.S. 368 (1963); Minor v. Happersett, 88 U.S. (21 Wall) 162 (1875); Graves v. Eubank, 205 Ala. 174, 87 So. 587 (1921); State *ex rel.* Barnett v. Gray, 107 Fla. 73, 144 So. 349 (1932); *In re* Opinion of Justices, 240 Mass. 601, 135 N.E. 173 (1922); State *ex rel.* Polk County v. Marsh, 106 Neb. 760, 184 N.W. 901 (1921).

36. 42 U.S.C. § 1971 *et seq.* (1976).

37. 400 U.S. 112 (1970). Oregon and Texas apparently were contemplating a statute limiting the right to vote in state election to those over 21 years old.

38. U.S. CONST. amend. XXVI, § 1 provides "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or any other State on account of age." *See* Walgren v. Board of Selectmen, 519 F.2d 1364 (1st Cir. 1975); Jolicoeur v. Mihaly, 5 Cal. 3d 565, 488 P.2d 1, 96 Cal. Rptr. 697 (1971); Totton v. Murdock, 482 S.W.2d 65 (Mo. 1972); Worden v. Mercer County Bd. of Elections, 61 N.J. 325, 294 A.2d 233 (1972).

39. 302 U.S. 277 (1937).

40. U.S. CONST. amend. XXIV, § 1 provides:

amendment abolished poll taxes in elections for the presidency and congress. Thus, the effectiveness of *Breedlove* was limited to local elections. It was not until 1966 that the Warren Court, in *Harper v. Virginia State Board of Elections*,[41] completely abolished the poll tax as an unreasonable limitation which discriminated against the poor. The Court stated:

> [I]t is enough to say that once a franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. . . . Voter qualifications have no relation to wealth nor to paying this or any tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the state from fixing voter qualifications which invidiously discriminate. . . . Wealth, like race, creed or color, is not germane to one's ability to participate intelligently in the electoral process.[42]

The *Harper* Court's fourteenth amendment analysis was such that it would have struck down discrimination based on race or sex without regard to the existence of the voting amendments.[43] In *Harper*, the Court viewed limitations on suffrage as they related to federal citizenship and scrutinized the degree of discrimination that might have been consistent with the equal protection clause. The Court referred back to *Reynolds v. Sims*[44] when it stated:

> In a recent searching re-examination of the Equal Protection Clause, we held, as already noted, that the opportunity for equal protection by all voters in the election of state legislators is required. . . . We declined to qualify that principal by sustaining this poll tax. Our conclusion, like that in Reynolds v. Sims, is found not on what we think governmental policy should be but on what the Equal Protection Clause requires.[45]

In addition, aside from the constitutional guarantees provided in the several amendments, guarantees to voters under the equal protection clause of the fourteenth amendment were

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> The rights of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

See United States v. Texas, 252 F. Supp. 234 (W.D. Tex.), *aff'd*, 384 U.S. 155 (1966) (even though the state has an interest in financing or regulating elections, it cannot restrict election).

41. 383 U.S. 663 (1966).

42. *Id.* at 665-68. The Court recognized the fundamental right to vote and did not hold that the poor were a suspect class. *See* note 89 *infra*.

43. U.S. CONST. amends. XV, XIX. If the fifteenth and nineteenth amendments had not been passed, the Court in its balancing would have reached the same result.

44. 377 U.S. 533 (1964).

45. 383 U.S. at 670.

judicially established in three areas: residency, party affiliation, and freehold requirements.

Residency

Residency restrictions are often imposed because "old residents" are fearful that their representation will be diluted by "new residents" with different political objectives. Challenges have been made to state limitations which establish durational requirements on new residents to the total exclusion of more transient groups, such as military personnel and students.

The state's purported interest in requiring a citizen to be a resident has been upheld as necessary to (1) retain purity of the ballot box; (2) protect against fraud through colonization; (3) prepare voter lists; and (4) insure that only citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them.[46]

While the state's compelling interest justifies the residency requirement, the courts have also taken cognizance of the fact that our nation has become extremely mobile and that it would be improper to impose unduly long residency requirements upon citizens' exercise of their right of franchise. The requirement would infringe the fundamental right to travel.[47] Thus, the Supreme Court, in *Dunn v. Blumstein*,[48] struck down a Tennessee statute requiring one year of state residency as well as three months of county residency before the right of franchise could be exercised. The state's compelling interest justified only as reasonable a requirement as was *necessary* to achieve that interest. Where less restrictive alternatives are available to achieve the state's interest, they must be utilized.

Military Personnel and Students

State laws had provided for special treatment of military personnel and students. While these laws allowed those persons to become taxpayers and residents, they often denied these persons the right to choose to be residents for voting purposes. One in military service or school had a right to vote by absentee ballot at the place of their prior or permanent domicile

46. Dunn v. Blumstein, 405 U.S. 330 (1970) (required one-year state residency and three-months county residency); Evans v. Cornman, 398 U.S. 419 (1970) (residents of National Institutes of Health, a federal enclave, were residents of Maryland for voting purposes).

47. Oregon v. Mitchell, 400 U.S. 112 (1970); Shapiro v. Thompson, 394 U.S. 618, 629-31, 634 (1969); *cf.* United States v. Guest, 383 U.S. 745, 758 (1966) (fundamental right to travel).

48. 405 U.S. 330 (1972).

or residency.[49]

In *Carrington v. Rash*,[50] the Court held unconstitutional a Texas statute excluding all military personnel from voting. Texas asserted that it was too difficult administratively to deter-

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49. ILL. REV. STAT. ch. 46, § 19.1 *et seq.* (1977), applies to students and provides in relevant part:

> Any qualified elector of the State of Illinois (other than one to whom an absentee ballot has been delivered or mailed pursuant to Article 20 of this Act) having duly registered where such registration is required who expects to be absent from the county in which he is a qualified elector or who is temporarily absent from the country or who because of being appointed a judge of election in a precinct other than the precinct in which he resides or who because of physical incapacity or the tenents of his religion in the observance of a religious holiday or who because of election duties in the office of a state's attorney, a county clerk or Board of Election Commissioners will be unable to be present at the polls on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, State, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, may vote at such election as hereinafter in this Article provided.
>
> Each state's attorney, county clerk and Board of Election Commissioners shall compile and keep current a list of his or its officers or employees who are eligible to vote under this Article by reason of election duties. [Amended by Public Act 79-1364, effective August 6, 1976.]

ILL. REV. STAT. ch. 46, § 21-1 *et seq.* (1977) applies to military personnel and provides in relevant part:

> Any person in the United States Service, qualified as an elector under Article 3 of this Act, who expects in the course of his duties to be absent from the county in which he resides on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, or at which questions of public policy are submitted, may vote at such election as hereinafter in this Article provided.
>
> No restriction shall be required in order to vote pursuant to this Article.
>
> For the purposes of this Act the term members of the United States Service means:
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> 1. Members of the Armed Forces while in the active service, and their spouses and dependents.
>
> 2. Members of the merchant marine of the United States, and their spouses and dependents.
>
> 3. Civilian employees of the United States in all categories serving outside the territorial limits of the several States of the United States and the District of Columbia and their spouses and dependents when residing with or accompanying them, whether or not the employee is subject to the civil-service laws and the Classification Act of 1949, and whether or not paid from funds appropriated by the Congress.
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> 4. Members of religious groups or welfare agencies assisting members of the Armed Forces, who are officially attached to and serving with the Armed Forces, and their spouses and dependents.
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> For the purposes of this Act the term "dependent" shall mean a father, mother, brother, sister or child of voting age who is actually residing with or is accompanying the members of the United States Service and is financially dependent upon the member. [Amended by Act approved August 19, 1961.]

50. 380 U.S. 89 (1965).

mine if such persons were bona fide residents. The court, however, suggested that more precise tests were available to winnow successfully from the ranks those who were not bona fide residents.[51]

In *Hall v. Wake County Board of Elections*[52] and *Lloyd v. Babb*,[53] the courts established that a student may not be denied the right to vote at the place where he is attending school, if he sustains the burden of proof of residence by declaring that (1) he has abandoned his prior home, (2) he has the present intention of making the place where he is attending school his home, and (3) he intends to remain in the college town at least as long as he is a student there and until he acquires a new domicile.[54]

Prisoners

In addition to military personnel and students, pretrial detainees unable to post bond are considered restricted by their temporary "residence" in jail. The first challenge to a state's interest in restricting voting based on physical ability to go to the polls occurred in Illinois in 1969. In *McDonald v. Board of Election Commissioners*,[55] an Illinois statute authorized absentee ballots only for medical reasons or for those persons who were to be out of the county on election day. The plaintiffs, Cook County jail "residents," were unable to post bail while awaiting trial. They were denied absentee ballots in accordance with the Illinois statute. Although the plaintiffs asserted a denial of their fundamental right to vote, the Court determined the record to be too sparse to decide whether an absolute denial of the vote occurred. There may have been alternative methods of voting available to the prisoners. Since, the plaintiffs were asserting a right to an absentee ballot, and the classifications of people accorded such ballots were not based on race or wealth, the plaintiffs were not denied their fundamental right.

This distinction did not continue to exist. Five years later in

51. *Id.* at 95.

52. 280 N.C. 600, 187 S.E.2d 52 (1972).

53. 296 N.C. 416, 251 S.E.2d 843 (1979).

54. In *Hall*, the plaintiff, a student at Meredith College, was refused registration as a voter in the district where her school residence was located.

In *Lloyd*, a group of voters brought an action seeking a mandatory injunction. The plaintiffs requested deletion of student voters from the voting rolls and stricter requirements for registering students in the future. The court modified *Hall* to the extent that a student's intent to remain in the locality only until graduation is not dispositive of whether he may vote in that locality.

55. 394 U.S. 802 (1969). The Court held that the standard of review was the rational basis test.

1974, the Supreme Court, in *O'Brien v. Skinner*,[56] announced that a state cannot deny voters an alternative means of casting their vote.[57] It distinguished *McDonald* on the basis that there may have been alternatives available, where as in *O'Brien*, the state had placed an absolute ban on persons confined in a penal institution.

Party Affiliation

The ability of a voter to switch parties has also been subjected to equal protection review. A right to affiliate with the party of one's choice has been recognized by the Supreme Court, through the freedom of association clauses found in the first amendment[58] as incorporated into the fourteenth.

Initially, primary elections were not considered constitutionally protected.[59] As a result, the state's restrictions on party affiliation in primary elections were not subject to equal protection review. When in 1941, in *United States v. Classic*,[60] the Supreme Court recognized primaries as constitutionally protected elections, the question of freedom of association in regard to party affiliation emerged as a constitutional issue. Thus, the primary restrictions imposed by states became subjected to review.

The restriction usually imposed by the state either requires a voter to register in a party or be limited from switching parties within a statutory period of time. The state's compelling interest in this area is to prevent raiding.[61] In *Kusper v. Pontikes*,[62] the Supreme Court reviewed an Illinois twenty-three month rule.[63] The statute prohibited voters from voting in a primary if

56. 414 U.S. 524 (1974).

57. *Id.* at 708.

58. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

59. Newberry v. United States, 256 U.S. 232 (1921).

60. 313 U.S. 299 (1941).

61. Raiding occurs where voters in sympathy with one party vote in another party's primary to distort that primary's result. Taslitz, *Rosario v. Rockefeller and Kusper v. Pontikes—Voters and Other Strangers*, 23 DEPAUL L. REV. 838, 839 (1974).

62. 414 U.S. 51 (1973).

63. ILL. REV. STAT. ch. 46, § 7-43 provided in part: "No person shall be entitled to vote at a primary:

* * *

(d) If he has voted at a primary of another political within a period of 23 calendar months next preceding the calendar month in which such primary is held."

they had voted in a primary of another political party within the preceding twenty-three months. The Court struck down the statute, holding that it had the effect of locking in the voter and absolutely denying him the right to vote by changing his party. *Rosario v. Rockefeller*,[64] like *Pontikes*, involved crossover voting. The Supreme Court upheld a New York statute,[65] distinguishing it from *Pontikes*, in that the New York statute did not *absolutely* deny the voters their constitutional right. Rather, the New York voters were denied the right to vote because of *their* failure to take affirmative action and enroll at least thirty days prior to the general election preceding the primary they wished to vote in. In *Pontikes*, there was no affirmative action the voter could have taken to become a qualified primary voter. The distinction between these two cases delineates the areas where the legitimate state interest based upon the least restrictive limitation necessary to protect that interest is located.

Freehold or Property Interests

The freehold or property interest limitation on suffrage is based upon a historical practice which limited suffrage rights to "persons of property." This is not only irrelevent in a modern democratic society, but is also irrational where wealth is no longer measured by the ownership of land. This requirement might be justified by the state's interest in limiting the electorate to those who have a pecuniary interest in the form of property ownership.[66] Rarely has a statute restricting the right to vote in this fashion been upheld. Only in instances where a quasi-municipal corporation which makes determinations concerning a property use or service which is paid for by user

64. 410 U.S. 752 (1973).

65. N.Y. ELEC. LAW § 186 (McKinney 1964) provides in relevant part:
All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of the general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under the declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. . . . When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such register, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year.

66. Cipriani v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

charges has the freehold requirement been upheld.[67] Arguably, the property holder is allowed a voice in determinations to which the electoral process does not apply. An argument could be made that all voters should also have a voice in the determinations which affect their environment or community.

CANDIDATES

Although there is no explicit mention in the Constitution of the right to be a candidate, it has been recognized as one derived from the right to vote.[68] Limitations of candidacy parallel limitations on voters;[69] however, courts have permitted greater restrictions on candidates than on voters.[70] States may restrict candidacy as long as no constitutional guarantee, such as the right to vote, is infringed.

Courts have held that the states have the following legitimate interests regarding candidate eligibility: (1) reducing the size of the ballot and as a necessary corollary minimizing potential voter confusion[71] because the smaller ballot also keeps the election to manageable proportions;[72] (2) limiting the number of candidates helps insure that the candidate that eventually wins will receive a majority of the popular vote;[73] and (3) advancing the integrity of the electoral process by avoiding the potential for frivolous candidacies.[74] Legitimate restrictions placed on candidates may include reasonable limitations as to age, residency, filing fees, signature requisites and party affiliation. Restrictions based on race, property ownership, and loyalty oaths are unconstitutional.

Age

Age has probably been the least controversial of all limitations both as to voters[75] and candidates. The recognition of a

67. Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973); Sayler Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973). These cases involved the right to vote in the election of the governing board of a water storage district. For other examples, see Annot., 35 L. Ed. 2d 843 (1973).

68. Gordon, *The Constitutional Right to Candidacy*, 25 U. KAN. L. REV. 545 (1977) [hereinafter cited as Gordon].

69. *See* notes 32-67 and accompanying text *supra*.

70. "If the voter-candidate relationship is relied upon, voters' rights will be scrupulously protected while candidates' rights may not be." *See* Gordon, *supra* note 68, at 567-68.

71. Lubin v. Panish, 415 U.S. 702, 709 (1972).

72. Storer v. Brown, 415 U.S. 724, 743 (1974).

73. Briscoe v. Kusper, 435 F.2d 1046, 1054 (7th Cir. 1971).

74. Williams v. Rhodes, 393 U.S. 23 (1968).

75. *See* notes 33-38 and accompanying text *supra*.

legitimate right to set a minimum age for candidates has developed principally in school board elections where students who are potential candidates may be barred by their age.[76] In the absence of an age barrier erected with the purpose of excluding large segments of the population, an issue of invidious age discrimination does not arise.[77] Arguably, a problem could arise if a small community with either a military base or college established an age for city council candidates that would exclude most students or enlisted personnel.[78]

Durational Residency Requirements

As most candidacy restrictions, candidate durational residency restrictions are allowed wider latitude then would be permissible for voters.[79] The courts are more appreciative of the compelling state interest in this area.

In 1973 in *Chimento v. Stark*,[80] the district court upheld a seven-year residency requirement for potential candidates for the office of govenor. New Hampshire advanced two arguments in support of the seven-year requirement. The first was the necessity of allowing the candidate an opportunity to observe the state, its people, its conditions, needs, and problems. The second, was the prevention of frivolous candidacies by persons with little previous exposure to the problems and desires of the people of New Hampshire.[81] In balancing the state's interest with the plaintiff's rights, the court scrutinized the residency requirement's effect on the entire democratic process and determined

76. In Blassman v. Markworth, 359 F. Supp. 1 (N.D. Ill. 1973), a 19 year old registered voter wanted to become a member of the school board in the district where he lived. ILL. REV. STAT. ch. 122, § 10-10 (1977) requires candidates to be 21 years old. The court held the statute to be a valid exercise of legislative power.

77. Manson v. Edwards, 482 F.2d 1076 (6th Cir. 1973) (25 year old age requirement for Detroit city councilman upheld).

Another age requirement in Illinois is one for judges. ILL. REV. STAT. ch. 37, § 23.71 (1977) requires a judge to retire at age 70. In Trafelet v. Thompson, 594 F.2d 623 (7th Cir.), *cert. denied*, 100 S. Ct. 219 (1979), the Seventh Circuit upheld the right of the state to improve its judicial system. It held that the right of government employment is not fundamental. *See* Massachusetts Bd. of Retirement v. Murgid, 427 U.S. 307 (1976). Any denial of the right to vote for a specific candidate was deemed incidental. Thus, Bullock v. Carter, 440 U.S. 134 (1979), did not apply.

78. This is similar to exclusion of military personnel and students by restrictive residency requirements. *See* notes 49-53 and accompanying text *supra*.

79. *See, e.g.*, Sununu v. Stark, 383 F. Supp. 1287 (D.N.H. 1974), *aff'd mem.*, 420 U.S. 958 (1975); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973); *see* note 70 *supra*.

80. 353 F. Supp. 1211 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973).

81. *Id.* at 1215.

the impact it had on voters as well as the plaintiff. The court reasoned that the infringement was minimal in comparison with other restrictions on candidacy. It only delayed the opportunity to be a candidate and was not an absolute ban. The court distinguished this case from others which struck down residency requirements for candidates by noting that the seven-year requirement only applied to the offices of Governor and Senator, where the State's interest carried greater weight than if applied to candidacies for lesser public offices.[82]

In rejecting the plaintiff's claim that his right to travel was infringed, the court stated: "It cannot be seriously argued that the inability to run for Governor is a real impediment to interstate travel."[83] The office of Governor is sought by relatively few people, and therefore the relationship between the right to travel and the residency requirement for candidates for Governor is too tenuous to constitute infringement.[84]

One year later, this same court upheld the same principle when it refused to strike New Hampshire's seven-year residency requirement for the office of state Senator. In *Sununu v. Stark*,[85] the court was concerned with the fundamental nature of the state's limitation on its office holders. Since the requirements were constitutionally mandated it expressly left any changes to the state's constitutional amending process.[86]

These cases suggest that residency requirements for lesser offices such as school board or alderman must be reasonable. A

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82. *Id.* at 1216 n.10. These cases involved lesser state offices for which the residency requirement was found violative of the equal protection clause. Antonio v. Kirkpatrick, 579 F.2d 1147 (8th Cir. 1978) (strikes ten-year residency requirement for the office of state auditor); Alexander v. Kramer, 363 F. Supp. 324 (E.D. Mich. 1973) (strikes five-year city and two-year district residency restriction for the office of City Commissioner); Wellford v. Battaglia, 343 F. Supp. 143 (D. Del. 1972), *aff'd*, 485 F.2d 1151 (3rd Cir. 1973) (five-year residency requirement for mayor's office struck); McKinney v. Kaminsky, 340 F. Supp. 289 (M.D. Ala. 1972) (five-year residency requirement for the office of County Commissioner struck); Mogk v. City of Detroit, 335 F. Supp. 698 (E.D. Mich. 1971) (strikes three-year residency requirement for membership on a City revision charter commission); Bolanowski v. Raich, 330 F. Supp. 724 (E.D. Mich. 1971) (strikes three-year residency requirement for office of mayor). The court found further support for its decision in the fact that the residency requirements were mandated by the state constitution.

83. 353 F. Supp. at 1218.

84. *Id.* The court also distinguished this case from Dunn v. Blumstein, 405 U.S. 330 (1970), by noting that the potential numbers of voters affected by residency restrictions are much greater than those of potential candidates for governor.

85. 383 F. Supp. 1287 (D.N.H. 1974), *aff'd mem.*, 420 U.S. 958 (1975).

86. *Id.* at 1291.

seven-year requirement for these offices would most likely be unconstitutional.[87]

Filing Fees

In 1972, in *Bullock v. Carter*,[88] the issue of whether excessive filing fees are a denial of equal protection of the laws was raised before the United States Supreme Court. The Court determined that the filing fees eliminated poor candidates from the ballot.[89] Thus, a voter would not have a choice of voting for a poor candidate. The state's contentions in support of filing fees were that they (1) necessarily limited the size of the ballot, (2) frustrated frivolous candidates, and (3) helped finance the election.[90] The Court noted that while the fee excluded frivolous candidates, it also excluded serious candidates. As such, it was too restrictive and amounted to a a denial of equal protection.[91] In 1974 in *Lubin v. Panish*,[92] the Supreme Court decided that while the state has a legitimate interest in keeping the ballot size manageable, it must allow voters a reasonable choice of candidates. To impose a filing fee would only be constitutional if there were alternative means available for poor candidates to obtain ballot access. Filing fees are allowable with two limitations: (1) they may not be excessive; and (2) there should be alternatives. If there were no alternatives in lieu of the fee, it could be unconstitutional. For this reason and others, a signature requirement is often used in lieu of any filing fee.[93]

Signature Requirements

The courts have accepted a limitation on the right of any candidate to file in order to show that the candidacy is a serious one. They have upheld signature requirements imposed by states to insure that only candidates who demonstrate initiative

87. *See generally* note 82 *supra*.

88. 405 U.S. 134 (1972).

89. *Id.* at 146. In *Bullock*, the Court noted that poor candidates were kept from the ballot; thus denying a voter the option to vote for a candidate unable to pay the filing fee. The Court, however, applied the strict scrutiny test not because of poor candidates, but because of the limitations placed upon one's right to vote. *See* Rodriguez v. San Antonio Bd. of Educ., 411 U.S. 1 (1973) (wealth is not a suspect class).

90. 405 U.S. at 145; Jenness v. Fortson, 403 U.S. 431, 442 (1970); *see* Williams v. Rhodes, 393 U.S. 23, 32 (1968).

91. The Court did note that financing an election is a legitimate purpose for filing fees. However, the State had not demonstrated a need to finance the election in this manner, as the fee varied depending on what office the candidate was seeking. 405 U.S. at 146-47. As such, the distinction was unreasonable.

92. 415 U.S. 709 (1974).

93. *See* notes 94-115 and accompanying text *infra*.

and voter appeal reach the ballot.[94] Thus, frivolous candidacies are prevented. The requirement must be reasonable; the number of signatures required may not act to prevent serious candidates from ballot access.[95] Signature requirements on nominating petitions often vary for independent, new party, and established party candidates. Generally, since the purpose of the signature requirement is to prevent frivolous candidacies, the signature requirements for independent and new party candidates may be more stringent than those for established parties.[96]

In 1969, in *Moore v. Ogilvie*,[97] an Illinois statute required an aggregate of 25,000 signatures on nominating petitions of independent candidates. It further required at least 200 signatures from each of 50 Illinois counties. The court noted, "[t]he use of nominating petitions by independents to obtain a place on the Illinois ballot is an integral part of her elective system." Thus "[a]ll procedures used by a state as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote."[98] Illinois' purported interest was "to require statewide support for launching a new political party rather than support from a few localities."[99] The law violated the equal protection clause by discriminating against residents of urban areas in favor of rural areas.[100] The Court clearly established that geographic discrimination in obtaining signatures was not constitutionally permissible.[101]

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94. American Party of Tex. v. White, 415 U.S. 767 (1974).

95. Jenness v. Fortson, 403 U.S. 431 (1970); Moore v. Ogilvie, 394 U.S. 814 (1969).

96. *See* notes 159-77 and accompanying text *infra*. ILL. REV. STAT. ch. 46, § 7-10 (1977) provides signature requirements for state, congressional, county, political subdivision, state central committeemen, and other lesser offices of established parties. § 10-2 provides for signature requirements for offices sought by new parties, and § 10-3 provides for signature requirements for offices sought by independents.

97. 394 U.S. 814 (1969).

98. *Id.* at 818 (citing Smith v. Allwright, 321 U.S. 649, 664 (1944); United States v. Classic, 313 U.S. 299, 314-18 (1941)).

99. 394 U.S. at 818; *see Election Law*, *supra* note 11, at 1149-51.

100. The court expressly overruled MacDougall v. Green, 335 U.S. 281 (1948). The issue was the same, although the vote dilution was not as great. In *MacDougall*, it was alleged that 87% of the state's registered voters were residents of the 49 most populous counties and only 13% resided in the 53 least populous counties. In *Moore*, the percentages were 93.4% and 6.6% respectively. Moore v. Ogilvie, 394 U.S. 814, 816 (1969).

101. In Communist Party of Ill. v. Ogilvie, 357 F. Supp. 105 (N.D. Ill. 1972), the court struck down a statute requiring no more than 13,000 signatures of qualified voters from any one county to be counted toward the total required for new political parties. Socialist Labor Party v. Rhodes, 318 F. Supp. 1262 (S.D. Ohio 1970), relied on *Moore v. Ogilvie*. In *Rhodes*, the stat-

A signature requirement for independent candidates where party candidates are accorded automatic ballot access is valid. In 1971, the Supreme Court reviewed a Georgia statute requiring independent candidates to obtain signatures totaling 5% of the registered voters at the last election. Candidates who won party primaries were automatically awarded ballot positions. In *Jeness v. Fortson*,[102] the Court upheld Georgia's requirement, noting that "Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life."[103] Further, the "premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary"[104] was not supportable. Georgia properly allowed alternative routes to the ballot, by entering a party primary or by circulating nominating petitions, neither of which violate the fourteenth amendment. In *Storer v. Brown*,[105] the Supreme Court set forth the criteria used in examining signature requirements to determine whether or not they unduly restrict independent candidates. The Court stated:

> [I]n the context of . . . politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.[106]

In 1977, the Supreme Court's *Mandel v. Bradley*[107] opinion reversed a trial court decision because the *Storer* criteria had not been applied. The plaintiff asserted that Maryland's law which required both independent and party candidates to file 70 days prior to the party primaries was a violation of the right to vote and of freedom of association. In remanding the case, the Court noted the failure of the district court to "undertake an independent examination of the merits."[108]

In *Illinois State Board of Elections v. Socialist Workers*

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ute required signatures of at least 200 from each of the 30 counties, but no more than 1/4 of the total required could come from any one county, *id.* at 1271; *cf.* Baker v. Carr, 369 U.S. 186 (1962), where the court held that Tennessee must redistrict because the rural vote counted much more heavily than the urban vote.

102. 403 U.S. 431 (1970).
103. *Id.* at 439.
104. *Id.* at 440.
105. 415 U.S. 724 (1974).
106. *Id.* at 742.
107. 432 U.S. 173 (1977).
108. *Id.* at 177.

Party,[109] the Illinois signature requirements for both independent and new party[110] candidates were challenged. The Illinois provision in effect required substantially more signatures for Chicago mayoral candidates than for any potential statewide office holders. The Supreme Court declared the statute unconstitutional to the extent that it required more signatures than the state office candidates.[111]

Although minimum signature requisites are justified by a state interest, the Seventh Circuit decided in *Richards v. Lavelle*[112] that Illinois' maximum signature requirement upheld earlier in *Lizak v. Zadrony*[113] was an irrational classification amounting to unreasonable and arbitrary governmental action.[114] The court rejected two proposed state interests for the requirement. First, it was suggested that the limitation prevented one candidate from monopolizing signatures. The court noted there was no restriction on the number of petitions a voter could sign, nor was there any suggestion that this was other than a possibility. Second, it was proposed that the requirement promoted an orderly election procedure by reducing the number of objections, thus providing the Electoral Board with administrative convenience. The court noted that removal from the ballot was a "draconian sanction"[115] which did not serve the purpose of this state interest. Rather, less drastic means, such as concluding the objection hearing as soon as the minimum requirement was reached, would better achieve the administrative convenience.

Race

In *Gomillion v. Lightfoot*,[116] the Supreme Court resolved the problems of racial restrictions even prior to the application

109. 440 U.S. 173 (1979).

110. *See* notes 159-77 and accompanying text *infra*.

111. ILL. REV. STAT. ch. 46, § 10-23 (1977) was held unconstitutional to the extent that mayoral candidates in Chicago were required to obtain 10,000 more signatures than candidates for governor, who were required to obtain 25,000 signatures. The court subsequently entered a consent decree authorizing 20,000 signatures for the mayoral candidates. Armor & Marcus, *The Bloodless Revolution of 1976*, 63 A.B.A.J. 1109 (1977) [hereinafter cited as Armor].

112. No. 80C 154, slip op. at 8 (7th Cir. Feb. 13, 1980).

113. 4 Ill. App. 3d 1023, 283 N.E.2d 252 (1972). In *Lizak*, the court held that even though the statute lacked a rational basis, because the equal protection clause only protected against invidious discrimination, the statute was not infirm. *Id.* at 1027, 283 N.E.2d at 255. *See* ILL. REV. STAT. ch. 46, § 7-10 (1977).

114. Richards v. Lavelle, No. 80C 154, slip op. at 5.

115. *Id.* at 6.

116. 364 U.S. 339 (1960).

of the fourteenth amendment to the electoral process. Since passage of the fifteenth amendment, no otherwise qualified voter may be denied the right to effectively case his vote on the basis of race. The constitutional mandate has been supplemented by the Voting Rights Act of 1965.[117] Thus, those restrictions of candidates based on race have been eliminated as unconstitutional.[118] It is interesting to note that the initial application of the fourteenth amendment in *Baker v. Carr* grew out of *Gomillion v. Lightfoot*.[119] In guaranteeing the rights of black voters under the fifteenth amendment, it was logical for the Court to take the next step to guarantee the rights of all voters under the fourteenth amendment.

Freehold

Generally, property ownership requirements for candidates are prohibited.[120] In *Turner v. Fouche*,[121] the Taliaferro, Georgia County Board of Education required that candidates for the Board be freeholders. The State argued that decisions abolishing the freehold requirement for voters were not controlling for officeholders.[122] The Supreme Court recognized "a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees."[123] Georgia's objective of achieving responsible participation in educational decisions must be met by more "finely tailored" means.[124]

The Fifth Circuit's *Woodward v. City of Deerfield Beach*[125]

117. 42 U.S.C. § 1971 *et seq.* (1976).

118. Subtle forms of discrimination which have been eliminated include grandfather clauses; gerrymandering; white primaries (*see* note 153 and accompanying text *infra*); and literacy tests. *See* Oregon v. Mitchell, 400 U.S. 112 (1970); Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45 (1959). Another method of achieving racial discrimination is by "At-Large Elections." In Mobile v. Bolden, 48 U.S.L.W. 4389 (1980), the Supreme Court upheld an at-large election in Mobile, Alabama even though it was impossible for blacks to be elected. The Court held there must be an intent to discriminate under § 1971 before an election would be interfered with.

119. 364 U.S. 339 (1960). In *Gomillion*, the Court relied on the fifteenth amendment.

120. *See* notes 66-67 and accompanying text *supra* (property restrictions on the right to vote are unconstitutional).

121. 396 U.S. 346 (1970).

122. Those decisions abolishing freehold requirements for voters were: Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriani v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

123. Turner v. Fouche, 396 U.S. at 362-63.

124. *Id.* at 364.

125. 538 F.2d 1081 (5th Cir. 1976).

opinion followed the *Turner* reasoning. In *Woodward*, the candidates for the office of city commissioner were required to be freeholders as well as residents six months prior to elections.[126] Relying on *Turner*, the court rejected the argument that this was an "other circumstance" whereby a freeholder requirement could be upheld. The court stated:

> We believe that "other circumstances" provided for by the Supreme Court does not refer to other types of communities, but to other types of public office. *Offices of general governmental responsibility can never be limited to freeholders.* The exceptions, *if any*, must be limited to special purpose governments whose impact are limited to real property interests.[127]

It may be noted that the candidate and voter requirement in special purpose districts may be distinguished from other elections in that the special district is frequently a quasi-municipal corporation based upon user charges and thus may be likened to a private business. In such cases courts may uphold the requirements that candidates own realty.[128] Of course, conflicting arguments may deal with environmental and other community impacts.[129]

Loyalty Oaths

A loyalty oath affirms one's allegiance to the national, state, or local government, including the laws of such government. The most familiar loyalty oath is the one the President and Vice-President swear to on Inauguration Day.[130] Although not as familiar, loyalty oaths have been required of candidates as well as state employees. For example, Illinois required a candidate to affirm his loyalty and declare he was not a member of a communist organization.[131] In *Communist Party of Illinois v. Ogil-*

126. *See* notes 79-86 and accompanying text *supra*.

127. 538 F.2d at 1083 (emphasis added). *See also* Chappelle v. Greater Baton Rouge Airport Dist., 413 U.S. 159 (1977).

128. This would be so because the Court held that a business town was not required to adhere to the fourteenth amendment. *See* Hudgens v. NLRB, 424 U.S. 507 (1976) which overruled Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). Thus, a corporation town could restrict the right to distribute leaflets, Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), or to picket an employer. This theory could logically be extended to conduct of elections. *Cf.* Hudgens v. NLRB, 424 U.S. 507 (1976) (underpinning of this case is that a corporation town does not take on the function of the state, so there is no state action).

129. *See* notes 79-86 and accompanying text *supra*.

130. Loyalty oaths were especially prevalent in the post-World War II era when there was a fear of communist subversion.

131. Illinois' loyalty oath provision was declared vague and overbroad in Communist Party of Ill. v. Ogilvie, 357 F. Supp. 105 (N.D. Ill. 1972). Subsequently, the legislature enacted a provision which precludes believing in the overthrow of the government by any unlawful means. ILL. REV. STAT. ch. 46, § 7-10.1 (1977) is of questionable validty in light of the Supreme Court's

vie,[132] the statute was held unconstitutional on the basis that it was vague and overbroad. The Supreme Court avoided determining the constitutionality per se of loyalty oaths until 1974.

In *Communist Party of Indiana v. Whitcomb*,[133] the statute in question stated:

> No 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.[134]

The Court held the oath unconstitutional and stated: "The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or a law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action."[135]

Recognizing that although the states have great discretion in regulating elections but that they may not infringe basic constitutional rights, the Court declared the loyalty oath unconstitutional. The burden imposed on ballot access, freedom of association, and the right to cast a meaningful vote merely because of a belief, is a substantial infringement of those rights.[136] In the future under *Whitcomb*, loyalty oaths will most certainly be unconstitutional.

Party Affiliation

A state requirement precluding eligibility for candidacy in a political primary for persons who have requested a primary ballot of any other party at a primary election held within a certain period of time has been challenged upon the basis of the candidate's freedom of association. In *Bendinger v. Ogilvie*,[137] the plaintiffs asserted that an Illinois statute of this type unconstitutionally restricted their freedom of association and their right to vote. The district court characterized freedom of association as the freedom to associate freely in organizations which espouse a particular point of view. Noting that the state had shown a compelling state interest to justify restrictions on this right to associate and that there were no less restrictive alternatives, the

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decision in Communist Party of Ind. v. Whitcomb, 414 U.S. 441, *reh. den.* 415 U.S. 952 (1974); *see* Annot., 19 L. Ed. 1333 (1968).

132. 357 F. Supp. 105 (N.D. Ill. 1972).

133. 414 U.S. 441, *reh. den.* 415 U.S. 952 (1974).

134. *Id.* at 442-43.

135. *Id.* at 448.

136. *Id.* at 440-50.

137. 335 F. Supp. 572 (N.D. Ill. 1971).

court upheld the statute. The compelling state interests offered by Illinois and accepted by the court were to: (1) prevent subversion of the electoral process; (2) limit the elective process to manageable proportions; (3) eliminate potential confusion which could result in a mockery of the election process; and (4) protect the party system.[138] Most importantly, the court recognized that "the state's interest in limiting candidates from switching parties . . . is greater than its interest in limiting voters from switching parties. . . . Thus, it is not inconsistent to prevent candidates from switching parties from election to election and at the same time permit voters to do so."[139]

At the same time, in *Lippitt v. Cipollone*,[140] the Ohio district court upheld an Ohio statute which precluded individuals from candidacy in a party primary "if such individual voted as a member of a different political party at any primary election within the next preceding four calendar years."[141] This decision was summarily affirmed by the Supreme Court.[142]

Lippitt was reaffirmed in 1974 in *Storer v. Brown*.[143] An action was brought by persons who sought ballot positions as independent candidates for President and Vice-President and for the United States Congress. They challenged the constitutionality of California statutes forbidding ballot position in a general election to an independent candidate if he had had a registered affiliation with a qualified political party at any time within one year prior to the preceding primary election. In sustaining the statute, the court recognized the state's purpose was to "winnow out and finally reject all but the chosen candidates."[144] The end

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138. *Id.* at 575.

139. *Id.* at 576. The court stated:

> The state's interest in preserving a vigorous and competitive two-party system is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; [It] cannot be said of voters, however, who should be freer to demonstrate their changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election.

Id. The alternative of requiring a potential candidate to take an oath was rejected as susceptible to possible misinterpretation and abuse. A shorter period of time was rejected on the grounds that it is better left to the judgment of the legislature.

140. 337 F. Supp. 1405 (N.D. Ohio 1971), *aff'd mem.*, 404 U.S. 1032 (1972) (Douglas, J., dissenting).

141. *Id.* at 1407.

142. 404 U.S. 1032 (1972) (Douglas, J., dissenting).

143. 415 U.S. 724 (1974).

144. *Id.* at 735. "The general election ballot is reserved for major struggles; it is not a continuing forum for intraparty feuds." *Id.* The requirement achieves this goal by preventing losers from obtaining ballot access, as an independent candidate.

result "furthers the state's interest in the stability of the political system," and that interest outweighs the interest the candidate and his supporters may have in making a later rather than early decision to seek ballot access.[145]

Finally, in *Sperling v. County Officers Electoral Board*,[146] the Illinois Supreme Court recognized that *Bendinger* and *Lippitt* predated *Kusper v. Pontikes*[147] which struck the party affiliation requirements in Illinois with respect to voters. The court further recognized that *Pontikes* did not indicate that it was to be applied to candidates. The Illinois Supreme Court, addressing the statute partially invalidated by *Pontikes*, ruled that the partial invalidation as a matter of state law had made the entire statutory scheme covering changes of party by voters, petition signers, and candidates invalid.[148]

Since the federal courts have intervened in elections, they have limited the right of states to place requirements on candidates. Although states can restrict candidates more readily than voters they must conform to the standard of reasonableness. States, however, do retain enough power to protect their interests.

Participation in Nomination Procedures

Traditionally, nomination procedures of political parties have been left to the inner workings of the party. Where there is a compelling state interest, however, states have intervened in this process.[149] Federal courts have left the regulation of the nomination process to the political party except where individual rights are infringed.[150] As a result, nominating procedures differ among parties and even within parties.[151]

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145. *Id.* at 736. The Court also noted that California's scheme did not discriminate between independent and party candidates, for although the route to the ballot varied, the party candidate was required to be disaffiliated for a longer period of time. It is important to distinguish the cases involving the right of a candidate to run as an independent and the right of the voters to form a new political party. *See* notes 160-77 *infra*.

146. 57 Ill. 2d 81, 309 N.E.2d 589 (1974).

147. 414 U.S. 51 (1973).

148. This resulted in Illinois permitting crossover voting in the 1980 presidential primary election.

149. Cousins v. Wigoda, 432 U.S. 173 (1977). In *Cousins*, the Court held that the state's interest was not compelling in light of the national party's interest, therefore, states have less of a right to intervene in the national conventions.

150. *See* note 153 and accompanying text *infra*.

151. The various states offer a number of methods for choosing candidates. They are: (1) the plurality primary which is used by two-thirds of the states; (2) the majority primary, which nine states utilize, guarantees that the chosen candidate wins a majority by utilizing minority election

Federal intervention has been limited because the fourteenth amendment only applies to the states. The federal courts have intervened only where the nominating procedures have been deemed an integral part of the electoral process.[152] In Texas, a series of cases[153] gradually established that pre-primary activities of a political party, which excluded blacks, became such an integral part of the electoral process that they denied blacks the right to cast a meaningful vote, and thus were unconstitutional.

Participation in nominations procedures differs between established political parties and independent candidates or new parties. As a general rule, the latter nominates its representatives by petition while the former does so in a primary election.[154] In these procedures, federal courts have allowed political parties a quasi private posture permitting self regulation. They have also allowed the states greater leeway in regulation of parties and primaries than in regulation of voters and general elections.[155]

The nomination process of a party necessarily eliminates many political candidates. Thus within the nominating process, there must be an effective method whereby the individual's right to cast a meaningful vote for the candidate of his choice is not impaired. Often the ability to participate in the nominating process is curtailed by an affiliation requirement. Both voters and candidates may be subject to durational affiliation require-

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(Louisiana has adopted a majority primary system for all party and independent candidates); (3) the convention primary combination, which nine states have adopted (in two of the states, conventions are conducted after the primary and in the others, there are mandatory primaries after the convention); (4) the pure convention, which seventeen states use, allowing the party organizations to nominate (especially for the minor parties); and (5) petitioning for independents. BALLOT ACCESS, Vol. 1 ADMINISTRATIVE ISSUES, PROBLEMS, AND RECOMMENDATIONS, Department of Political Science Texas A & M University (1979).

152. *Cf.* Ripon Soc'y v. National Rep. Party, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 424 U.S. 933 (1976) (courts have upheld the right to vote in the nomination process even though they have not reached the state action issue).

153. Terry v. Adams 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Grovey v. Townsend, 295 U.S. 45 (1934); Nixon v. Condon, 286 U.S. 73 (1931); Nixon v. Herndon, 273 U.S. 536 (1926). The Court implicitly held that within primaries, even though not regulated by the State, the federal courts will intervene to guarantee the right to vote. These cases, however, may only be applicable to racial discrimination. *See* O'Brien v. Brown, 409 U.S. 1, 4 n.1 (1972) (these white primary cases were based on the fifteenth amendment).

154. *See* ILL. REV. STAT. ch. 46, §§ 7-10, 10-2, 10-3 (1977).

155. There is a recognized national interest in the integrity and autonomy of the political party. States may not intervene in this process. Cousins v. Wigoda, 419 U.S. 477 (1975).

ments.[156] The rationale supporting such a requirement is to preserve party ideology and cohesiveness. Allegedly, without a durational residency requirement, raiders and crossovers would be prevalent, thus distorting the party integrity.[157] Despite the federal courts lack of involvement in the state and party regulations of nominating procedures, they will intervene to protect individual rights.[158]

NEW PARTIES

Political parties are accorded different ballot access based upon their classification as "established" or "new." Typically in the two-party system, established parties suggest the Democrat and Republican parties, but this is a historical and not legal prospective.[159] A new party may become an established party, generally by obtaining a certain percentage of the votes in a general election.[160] Then the established party procedures must be followed.[161] Likewise, an established party may lose its status by failing to obtain the required percentage. In the ensuing election, this party must follow the new party procedures.[162]

Established parties are provided automatic ballot access in every state.[163] New political parties often must satisfy varied

156. *See* notes 46-54 and 79-86 and accompanying text *supra*. Voters in some states, however, may declare their affiliation on the day of the primary election. *See Election Law, supra* note 11, at 1164.

157. The validity of the state interest in preventing raiding is questionable with the decline of party loyalty within the two party system.

158. In Ripon Soc'y v. National Rep. Party, 525 F.2d 567 (D.C. Cir. 1975), the court held that the Republican Party formula for choosing delegates did not violate the equal protection clause. Before reaching their holding, however, the court intimated that in normal disputes arising out of party nominating processes, federal courts will not have jurisdiction because there is no state action. Although it reserved its ruling on this issue, it reasoned that because Cousins v. Wigoda, 419 U.S. 477 (1975) held that a state is without power to interfere with the delegate selection process of a national convention, that in such situations not only is there no state action, a state has no jurisdiction to act. 525 F.2d at 575. This reasoning should not dissuade courts from intervening in the nominating process of state officials because states still assist the parties in the nominating process. *See* 525 F.2d at 616 (Bazelon, J., dissenting).

159. Historically, other major parties have included the Whigs, the Federalists, the Populists, Bull Moose, and many others. *See generally* MORRISON AND COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC (6th ed. 1969).

160. To be an established state political party in Illinois, a political party must have polled at least 5% of the vote statewide in the previous gubernatorial election; for congressional districts, school districts or municipalities, the party must have polled at least 5% of the vote cast in that political subdivision's previous election. ILL. REV. STAT. ch. 46, § 10-2 (1977).

161. *See* ILL. REV. STAT. ch. 46, § 10-1 *et seq.* (1977).

162. *See id.*

163. *See Election Law, supra* note 11, at 1123.

electoral requirements before access to the ballot can be obtained. The purpose, similar to that of restrictions on independent candidates, is to insure a "modicum of support by the electorate and reduce voter confusion."[164] The litigation over restrictions placed on new parties demonstrates the conflict between the right of a voter to support the party of his choice and the state interest in preventing parties who have not shown voter appeal from appearing on the ballot.

The obstacles to ballot access confronting new parties are manifested through complex procedures. These entail filing nominating petitions containing signatures of qualified voters within a certain period of time before a deadline.[165] Viewed separately, each restriction may seem reasonable. In *Williams v. Rhodes*,[166] however, an Ohio statute was so demanding and complex, that it was "virtually impossible for any party other than the Democratic or Republican parties to obtain ballot access."[167] The Supreme Court held the statute unconstitutional, as it denied the Socialist Party an opportunity, even through the use of write-ins, to obtain ballot access.

In *American Party of Texas v. White*,[168] the Court upheld as reasonable Texas' detailed statutory scheme for ballot access. This statute provided four alternative methods for a party to gain ballot access. The American Party of Texas failed to qualify under any method.[169] The Court held that this scheme was reasonable because there was no less burdensome alternative to insure that candidates have a significant amount of community support.[170]

In *American Party*, the Court did not retreat from *Williams*. In *Williams*, the only candidates gaining access to the ballot were the Democratic and Republican candidates, while Texas effectively allowed serious candidates to gain access.

The Court has not only required that third parties be given ballot access, but it has also applied equal protection analysis to other forms of discrimination against third parties. Geographical discrimination in obtaining signatures is unconstitutional.[171]

164. American Party of Tex. v. White, 415 U.S. 767, 782 n.14 (1974).

165. *See generally* notes 88-93 and accompanying text *supra*.

166. 393 U.S. 23 (1968).

167. *Id.* at 25; *cf.* Mandel v. Bradley, 432 U.S. 173, 177 (1977) (court must consider on remand the difficulty of obtaining signatures).

168. 415 U.S. 767 (1974).

169. *Id.* at 777-79. The American Party, as a new party, had to acquire the signatures of at least 1% of the total vote for governor in the last election or acquire a list of participants in the party numbering 1% of the last election. The party secured only one-third of the needed signatures.

170. *Id.* at 781.

171. In Communist Party of Ill. v. Ogilvie, 357 F. Supp. 105 (N.D. Ill. 1972),

Illinois State Board of Elections v. Socialist Workers Party[172] involved a challenge to an Illinois statute[173] requiring 25,000 signatures for ballot access in statewide elections. For political subdivision elections, however, signatures of 5% of the number of voters who had voted in the previous political subdivision election were needed. This statute in effect required 10,000 more signatures for a special Chicago mayoral election than for a statewide election.[174] It was challenged as violative of the equal protection clause of the fourteenth amendment. The Supreme Court declared the statute unconstitutional insofar as it required more than 25,000 signatures for a municipal election and noted:

> The state's interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office.[175]

As the Supreme Court noted in *Socialist Workers Party*, third parties have played a particularly significant role in American history. The importance of the third party arises where neither of the two major parties has satisfied a significant portion of its members. For example, in 1948 the Henry Wallace Progressive Party grew from a split within the Democratic Party. Large numbers of liberal voters left the Democratic Party and voted for him on the third party ticket. Shortly thereafter, a more conservative constituency in the Democratic Party abandoned the party to support George Wallace in his third party bid. Most recently, the Republican Party has experienced a split with John Anderson leaving the party taking with him part of its moderate and liberal constituency.

Where the third party structure grows out of a dissatisfaction with the established party, courts have become quite concerned with availability of ballot access.[176] The dissatisfied

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ILL. REV. STAT. ch. 46, § 10-2 (1977) which required 25,000 signatures with no more than 13,000 from any one county for recognition as a new political party, was struck down. The court acknowledged that the statute "discriminate[d] against voters of the most populous county in favor of voters in less populous counties," and amounted to a denial of equal protection. 357 F. Supp. at 108.

172. 440 U.S. 173 (1979).

173. The statute in question was the same as that in Communist Party of Ill. v. Ogilvie, 357 F. Supp. 105 (N.D. Ill. 1972); *see* note 171 *supra*.

174. 440 U.S. at 198; *see* ILL. REV. STAT. ch. 46, § 10-2 (1977).

175. 440 U.S. at 185-86; *see* A. BICKEL, REFORM AND CONTINUITY 79-80 (1971).

176. *See* Armor, *supra* note 111, at 1109.

party members are often caught in a quandry because deadlines exist which new parties must meet to obtain ballot access.[177] A problem is presented as to whether or not a third party can first pursue its goals within the established party, and if that fails, build a new party structure.

A distinction has been made between independent candidates and new parties. The courts are more likely to allow formation of a new political party wherein a losing primary candidate is placed on the ballot than to allow a losing candidate the right to appear on the ballot as an independent candidate. The distinction lies in the difference between the right of the people to form a new political party and the right of a losing candidate to run a second time. The unique method of nominating a presidential candidate, by election of legally uncommitted delegates raises a question of whether the candidate is really running for nomination. In addition, in the general election the voters elect legally uncommitted electors and thus only indirectly elect the candidate themselves.

CONDUCT OF ELECTIONS

Only in the last decade have the federal courts examined the mechanism of conducting an election from the candidates' challenges through preparation of the ballot.[178] There was probably no area of election law that appeared to be as removed from the right to vote as the conduct of elections. Local election officials argued that the electoral mechanism was sacrosanct from federal intervention, as this was the vehicle by which local governments carried out their constitutionally imposed mandate of conducting elections.[179] The federal courts, however, utilized the fourteenth amendment as a basis for constitutional review of the entire electoral mechanism.

An essential aspect of the electoral process deals with challenges to candidates or parties before a quasi-judicial electoral board or in court. In Illinois, both case and statutory law predating 1971 provided no system of judicial review of electoral board decisions.[180] Thus, the unlimited authority of the electoral board would permit arbitrary conduct. Illinois, in 1964 under

177. For example, in 1980, since Representative Anderson (R. Ill.) decided to run for president as an independent candidate, he may not be allowed on the ballot in at least five states because he failed to timely file as an independent candidate. Chicago Sun-Times, April 25, 1980, at 36 col. 1.

178. In Illinois, candidate challenge procedures are governed by ILL. REV. STAT. ch. 46, §§ 7-13, 10-8 (1977).

179. U.S. CONST. art. 1, § 4.

180. ILL. REV. STAT. ch. 46, § 10-10 (1977) authorizes an electoral board hearing. ILL. REV. STAT. ch. 46 § 10-10.1 (1977) authorizes judicial review of

Telcser v. Holzman,[181] held that "in the absence of such unreasonable determination by the electoral board as to amount to *fraud*, its determination . . . was final and the courts have no jurisdiction to review it."[182] Thus, state court relief was not available to plaintiffs who felt the board acted in an arbitrary, discriminatory, or negligent fashion.

Although the United States Supreme Court decided to enter the "political thicket" in 1962,[183] it was not until 1971, in *Briscoe v. Kusper*,[184] that a federal court applied fourteenth amendment protections to the electoral mechanism. *Briscoe* implicitly overruled *Telcser*. Both cases dealt with the electoral board applying new criteria to determine the validity of candidate nominating petitions which were in effect directly contrary to previous board rulings.

The *Briscoe* court specifically held that the board must grant candidates procedural due process and allow them to rely upon the custom, practice, and formal regulations of the board in defending themselves from a challenge to their candidacy.[185] No longer could an electoral board change the rules on an unsuspecting candidate.

With the advent of federal court intervention to overview the electoral mechanism in *Briscoe*, state courts began to scrutinze the activities of the electoral board authority. These courts insisted that the board limit its regulation to what was necessary to protect state interests. They struck improper state regulations involving ballot access and ballot rotation.

Initially, the position of the electoral authorities was to remove candidates from the ballot for technical defects in nominating petitions such as failure to obtain a signator's middle initial[186] or omission of a page number in a sequence.[187] This position was gradually eroded by the doctrine of substantial compliance. In *Stevenson v. County Officers Electoral Board*,[188] a petition which lacked page numbers was accepted, and in *Anderson v. Schneider*,[189] the failure of one candidate on a slate to fulfill residency requirements was not a defect fatal to the entire

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the electoral board decisions. *See* notes 13-16 and accompanying text *supra*.

181. 31 Ill. 2d 332, 201 N.E.2d 370 (1964).
182. *Id.* at 339, 201 N.E.2d at 374 (emphasis added).
183. Baker v. Carr, 396 U.S. 186 (1962).
184. 435 F.2d 1046 (7th Cir. 1971).
185. *Id.* at 1058.
186. Madison v. Sims, 6 Ill. App. 3d 795, 286 N.E.2d 592 (1972).
187. Williams v. Butler, 35 Ill. App. 3d 532, 341 N.E.2d 592 (1976).
188. 58 Ill. App. 3d 24, 373 N.E.2d 1043 (1978).
189. 67 Ill. 2d 165, 365 N.E.2d 900 (1977).

slate. Thus, in Illinois, electoral authorities, who had at one time removed candidates for minute formal defects, were forced by the court to apply the doctrine of substantial compliance.

The cases concerning ballot position of candidates and parties also demonstrate the federal court's influence on the conduct of elections. A candidate's position on the primary ballot is generally determined via one of two ways. The first is the rotation method,[190] whereby candidates for the same office are listed alphabetically in the first district and stepped up one position in the second district with the first candidate dropping to the last position. The names are rotated one position in each district. The second method for determining ballot position is by the temporal order of filing of candidates' petitions.[191] This method has presented difficulties where ties occur among the candidates. In Illinois, ballot positions in tie situations were determined arbitrarily by the election official.[192] The Illinois Supreme Court determined that ballot positions must be determined in a fair manner such as a lottery. "[D]iscrimination and favoritism in determining sequential ballot placement would not be tolerated."[193] Although the courts had employed the fairness doctrine for candidates, it was not until *Sangemeister v. Woodard*[194] that the doctrine was applied to positions of parties in general elections. Prior to *Sangemeister*, officials had arbitrarily placed parties on the ballot based on political considerations.[195]

The courts have made a further refinement by distinguishing between established parties and new parties. *Board of Election Commissioners of Chicago v. Libertarian Party*[196] allows a lottery system between established parties to determine the first tier of ballot position. In a second tier, new parties were

190. This method is used in Illinois in primaries for state offices. ILL. REV. STAT. ch. 46, § 7-14 (1977).

191. This method is used in Illinois in primaries for county offices and the Illinois Legislature. ILL. REV. STAT., ch. 46, § 7-14 (1977).

192. Weisberg v. Powell, 417 F.2d 388 (7th Cir. 1969) (attacked the practice in Illinois of distinguishing between those petitions delivered by mail prior to the opening of the office and those personally presented at 8:00 A.M. when the office opened. Only those received by mail were considered in the tie for first ballot position); Mann v. Powell, 314 F. Supp. 677 (N.D. Ill. 1969), *aff'd*, 398 U.S. 955 (1970) and 333 F. Supp. 1261 (N.D. Ill. 1971) (court held the Secretary of State must determine ballot position of those tied for first position by lottery); Netsch v. Lewis, 344 F. Supp. 1280 (N.D. Ill. 1972) (court voided a change in the election code which provided automatic higher ballot position to incumbent candidates).

193. Huff v. State Bd. of Elections, 57 Ill. 2d 74, 79, 309 N.E.2d 585, 588 (1974).

194. 565 F.2d 460 (7th Cir. 1977).

195. Bohus v. Board of Election Comm'rs, 447 F.2d 821 (7th Cir. 1971).

196. 591 F.2d 22 (7th Cir.), *cert. denied*, 442 U.S. 918 (1979).

placed below the first in the order in which nominations were filed.

Since 1971 when *Briscoe* commenced review of the electoral process, courts have revised the conduct of elections by local officials, replacing a highly political system with one that has allowed candidates procedural due process.

POST-ELECTION PROCEDURES

Post-election procedures relate to those aspects of the electoral process that survive the election. Specifically excluded from this discussion are criminal violations of the election law and civil rights claims for damages.[197]

Historically, post-election problems included three hurdles in invoking jurisdiction, especially federal court jurisdiction. First, the courts had a continuing reluctance to enter into the areas where local governments were conducting elections pursuant to state statutes mandated by the Constitution. Second, the courts were reluctant to "tamper" with the results of the election once the "electorate had spoken." Finally, courts had frequently applied the mootness doctrine.

A leading case in Illinois illustrates the extent of state control over election contests. In *Carey v. Elrod*,[198] Bernard Carey, a defeated candidate for Sheriff of Cook County, lost by 10,479 votes out of 1,763,577 votes cast. After proceeding with discovery allowed under Illinois statutes, he alleged irregularities and sought a complete recount. Richard Elrod, the winner, moved to have Carey deposit $220,000.00 to cover the cost of the recount. The deposit was not refundable even if the election result was changed. Carey alleged the statutory scheme which required such a deposit was unconstitutional in that it denied him due process and equal protection.

The Illinois Supreme Court held that this was a proper cost to be borne by Carey. The United State Supreme Court denied certiorari for want of a substantial federal question.[199]

Perhaps the most difficult hurdle to overcome in a post-election proceeding is that the issue raised has been mooted by the

197. League of Women Voters of United States v. Fields, 352 F. Supp. 1053 (E.D. Ill. 1972). In *League of Women Voters*, the district court denied defendant's motion to dismiss a claim brought against election officials for capriciously allowing unqualified voters to vote, sometimes more than once. *See also* Carey v. Piphus, 435 U.S. 247 (1978), where attorneys' fees were awarded for civil rights violations.

198. 49 Ill. 2d 464, 275 N.E.2d 367, *appeal dismissed*, 408 U.S. 901 (1971).

199. 408 U.S. 901 (1971) (Douglas, J., noting probable jurisdiction). If Carey had commenced litigation attacking the statute in federal court, he may have had a greater probability of success.

holding of the election. The doctrine of mootness requires that "an actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed."[200] When there is no current injury present, there is nonetheless a possibility that the plaintiff will suffer a related injury in the future.[201] More importantly, the plaintiff may not be the only individual who is harmed by the problem under review. His status as representative of a class of individuals subjected to the same harm is essential to resolve a problem which is "capable of repetition yet evading review."[202]

In *Moore v. Ogilvie*,[203] the district court dismissed an action because the election had been held and there was no possibility of granting any relief to the appellants. On appeal, the Supreme Court rejected the mootness argument and stated that while the election was over, the burden placed on the nomination of candidates for statewide offices remains and controls future elections.[204] In *Dunn v. Blumstein*,[205] although the voter would be eligible to vote before the next election, the "problem to voters posed by the Tennessee residence requirements [was] 'capable of repetition, yet evading review.' "[206] The laws in question remained on the books; therefore Blumstein had standing to challenge them as a member of the class of people affected by the then presently existing statute.[207] Thus, if a claim is made which is "capable of repetition but evading review," a mootness defense will be overcome. If, on the other hand, the problem no longer exists and is not capable of repetition, the mootness defense will preclude further adjudication.

Procedural Problems

With the advent of federal court activity in the election arena, the litigator has additional procedural problems that re-

200. Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974).

201. Dunn v. Blumstein, 405 U.S. 330 (1972).

202. Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

203. 394 U.S. 814 (1969).

204. "The problem is, therefore, capable of repetition yet evading review. . . . The need for its resolution thus reflects a continuing controversy in the federal-state area where 'one man, one vote' decisions have thrust." *Id.* at 816.

205. 405 U.S. 330 (1972).

206. *Id.* at 333 n.2.

207. Similarly, in Storer v. Brown, 415 U.S. 724 (1974), an action was brought by persons who sought ballot positions as independent candidates for President and Vice President of the United States and for the United States Congress challenging the constitutionality of certain California statutes. The Supreme Court once again refused to rely on the defense of mootness. *Id.* at 727 n.8.

late to a series of attacks or defenses that were not available in state court litigation. The dual alternatives of state and federal courts have created a two-track system beginning in the trial courts and terminating in the United States Supreme Court.

It is not the purpose of this article to extensively examine the defenses frequently raised in federal court actions. But an awareness of these defenses will often affect strategic decisions to be made by the litigator. If a case is commenced after the election, the mootness defense must be overcome. If a case proceeds from a state statutory procedure, the litigant wishing to change forums must be prepared to deal with the problems of removal, exhaustion of state remedies, waiver, comity, and abstention.[208]

Abstention has been a particularly important doctrine in election cases. Abstention is a doctrine employed by the federal courts to deny hearing a claim. There are three grounds for the denial: (1) that it is possible to construe a state statute so as to render it unnecessary to decide constitutional or federal issues,[209] (2) abstention avoids interference with a complex state system,[210] and (3) there is a need for clarification of state law before the federal issue may be resolved.[211] Thus, in *Ament v. Kusper*,[212] it was determined that the federal court should abstain from considering an action for a temporary restraining order where there are pending state court actions involving the same parties and issues.[213] The court concluded that "Federal Court patience and reservation in such cases not only serves to minimize federal-state friction, but also avoid premature and perhaps unnecessary constitutional adjudication."[214] The abstention doctrine was overcome in *Smith v. Cherry*[215] and *Lawlor v. Chicago Board of Election Commissioners*[216] when federal courts in Illinois declined to abstain from considering election issues. In *Smith*, the court noted "abstention seems particularly inappropriate here where the case will become moot. . . . The delays inherent in abstention could therefore abrogate the rem-

208. *See generally* ATTORNEY'S GUIDE TO ILLINOIS ELECTION LAW, ILL. INST. CLE ch. 3 (Supp. 1979).

209. Smith v. Cherry, 489 F.2d 1098 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974); *see* Lewellyn v. Gerhardt, 513 F.2d 184, 186 (7th Cir. 1975).

210. Smith v. Cherry, 489 F.2d 1098 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974).

211. Lawlor v. Chicago Bd. of Election Comm'rs, 395 F. Supp. 692 (N.D. Ill. 1975).

212. 370 F. Supp. 65 (N.D. Ill. 1974).

213. *Id.* at 68.

214. *Id.*

215. 489 F.2d 1098 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974).

216. 395 F. Supp. 692 (N.D. Ill. 1975).

edy sought."[217]

Laches may be a defense in state or federal cases. Laches is one defense which has been applied in election litigation by the federal courts. In *Maddox v. Wrightson*,[218] the court denied relief to the plaintiffs for their failure to timely qualify for ballot access under Delaware's independent candidate laws.[219] Noting that "laches [reflects] the maxim 'equity aids the vigilant,' [and] arises when there has been an unwarranted delay which would work hardship or disadvantage to another,"[220] the court determined the relief requested would incur "a sizeable risk of substantial harm to the public by disruption of the electoral process."[221]

CONCLUSION

Since the entry of the federal courts into the political thicket, their election decisions have worn a well-traveled path. Prior to federal court intervention, the states exercised exclusive jurisdiction in questions involving "political questions." Except for enforcing the fifteenth amendment, the federal courts kept a limited overview on the electoral process carefully watching for racist election laws and for a few other situations that particularly affected federal elections.

After the reapportionment cases paved the way, every aspect of the electoral process received federal court review. While neither the fears of the opponents nor the delights of the proponents were fulfilled, the federal courts have had a substantive impact upon the process. No longer could the state continue its posture of States Rights in this area. State legislatures, officials, and courts no longer were able to ignore their critics. The threat of federal court intervention caused a new concern with the rights of the candidates and voters who were bucking the powers that predominated in the state.

On the other hand, not every challenge to the electoral system presented to the courts was successful. The federal courts acknowledged the constitutional mandate to the States to "run" elections. The plaintiff had a burden to show that his fourteenth amendment injury outweighed the compelling state interests involved.

The result for the politican, the political scientist, and espe-

217. 489 F.2d at 1101.
218. 421 F. Supp. 1349 (D. Del. 1976).
219. DEL. CODE ANN. tit. § 4502 (1976).
220. 421 F. Supp. at 1252.
221. *Id.*

cially the lawyer, was to achieve a new consciousness of a two-track system of overview of local elections. First, one who remains in state court does so with expanded authority under new case law. Second, in the federal court system the expanded concepts of the rights of voters and those rights derived therefrom provide aggrieved persons and parties an alternative forum. Both paths ultimately lead to the United States Supreme Court as the ultimate arbiter. But now the litigant faces a more complex set of strategic and logical choices. Today's election lawyer has come a long way and has a difficult assignment in ably protecting his client.